



November 14, 2016

Mr. Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
Washington, DC
regs.comments@occ.treas.gov

Re: Receiverships for Uninsured National Banks
OCC-2016-0017

Dear Mr. Curry:

Americans for Financial Reform (“AFR”) appreciates the opportunity to comment on the Office of the Comptroller of the Currency (“OCC”) notice of proposed rulemaking on Receiverships for Uninsured Banks (“NPRM”).¹ AFR is a coalition of over 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.

We recognize that this rulemaking is concurrent with the OCC’s consideration of issuing special purpose charters to “fintech” firms,² despite the OCC’s doubtful legal authority to charter nondepository entities without specific statutory authorization.³ We along with 43 other organizations are separately submitting a letter urging the OCC to refrain from issuing charters to nondepository fintech lenders, which would enable the chartered entities to avoid state interest rate caps, other state consumer protection laws, and state oversight, thereby putting consumers and small businesses at risk.

In this letter AFR comments on four aspects of the rulemaking relating directly to receiverships: (i) the difficulty of proceeding with receiverships under the National Bank Act authorities; (ii) the need to protect the priority of customers’ claims; (iii) the mechanism for funding administrative expenses; and (iv) the requirements for buyers of the assets of failed institutions. Each issue is addressed in turn. Beyond these specific issues, we have a general concern that a specialized receivership system that grants benefits to certain creditors that invest in non-depository lenders that would not be obtained in bankruptcy could unduly shield bondholders from risk, with resulting moral hazard, possible decline in underwriting standards, and possible expansion of the sector beyond what would be economically appropriate.

¹ 81 Fed. Reg. 62835 (Sept. 13, 2016) (to be codified at 12 C.F.R. pt. 51).

² 81 Fed. Reg. at 62837.

³ See *National State Bank of Elizabeth, NJ v. Smith*, No. 76-1479 (D.N.J. Sept. 16, 1977), *rev’d as superseded by statute* 591 F.2d 223 (3d Cir. 1979); cf. *Independent Bankers Ass’n of Am. v. Conover*, Fed. Banking L. Rep. (CCH) ¶ 86,178 (M.D. Fla. 1985).

Statutory Receivership Authorities and Agency Expertise

Assuming that the OCC has authority to issue charters to nondepository lenders, the administrative challenges of efficiently resolving a failed institution under the National Bank Act of 1864 (“NBA”) is an additional reason the OCC should decline to in the absence of specific, modern statutory framework to facilitate the resolution of these entities.

The NPRM states that the resolution of a nondepository means that the OCC would not be able to make use of authorities created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) to facilitate the efficient resolution of failed entities.⁴ However, Congress rightly determined that the statutory authorities under the NBA were inadequate to facilitate the efficient resolution of modern financial institutions. As the courts have explained:

Congress passed FIRREA in 1989 in response to the crisis in the nation’s banking and savings and loan industries. . . . Congress granted the FDIC broad powers in conserving and disposing of the assets of the failed institution.⁵

In addition, the FDIC would be the federal agency best suited to resolve such a failed financial institution. From 2008 to 2013, the FDIC acted as receiver for 489 failed banks.⁶ The FDIC has 405 permanent employees assigned to its Division of Resolutions and Receiverships,⁷ plus temporary employees, in addition to other FDIC employees with receivership expertise who are assigned to other components of the FDIC. To the extent that further statutory authority is necessary for the FDIC to accept appointment as receiver, the OCC should decline to charter nondepository lenders in the absence of specific and comprehensive statutory authorization to issue such charters.

Claims Priority Should Protect Consumers Over Bondholders and Other Fixed Income Financiers

Section 51.5 of the proposed rule sets forth the order of priorities for payments from the assets of the receivership estate.⁸ The NPRM rightly acknowledges that customer assets held by a chartered institution as custodian would not be part of the receivership estate and therefore not

⁴ 81 Fed. Reg. at 62836.

⁵ *Sharpe v. FDIC*, 126 F.3d 1147, 1154 (9th Cir. 1997).

⁶ FDIC, *Failed Bank List* (last updated Nov. 10, 2016), <https://www.fdic.gov/bank/individual/failed/banklist.html>

⁷ FDIC, *Proposed 2016 FDIC Operating Budget: Exhibit 1* (Dec. 7, 2015), https://www.fdic.gov/news/board/2015/2015-12-15_notice_dis_a_exhibits.pdf

⁸ 81 Fed. Reg. at 62844.

subject to the claims priority.⁹ However, the NPRM posits that “a fiduciary customer’s claim for a refund of prepaid investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer, generally would be an unsecured claim.”¹⁰ A non-trust institution could similarly come into possession of unearned customer funds, for example, through overpayments or stored customer value.

In some instances, such customer funds may constitute a constructive trust under state law, in which case the funds would not be part of the receivership estate.¹¹ Where this is not the case, however, such customer funds would have less protection in an insolvent OCC chartered nondepository than is typical in insolvency proceedings. Modern statutes setting forth claim priorities typically give priority to customer claims over general unsecured creditor claims. For example, under the Bankruptcy Code, a limited amount of consumer deposits for goods are entitled to priority over general unsecured creditors.¹² Similarly, the Securities Investor Protection Act¹³ and commodity broker customer funds provide similar priorities to customers.¹⁴ To the extent that the NBA does not permit the OCC discretion to adopt a similar priority by regulation, charters should not be issued to non-depositories without a statute tailored to these address these issues.

In general, granting a higher prioritization to financiers of non-depository lenders in special OCC receiverships than would be obtained in an ordinary bankruptcy proceeding¹⁵ will tend to undermine the incentives of those who finance such entities to perform due diligence and ensure proper underwriting practices. We are skeptical that OCC oversight under a special charter could fully replace market incentives for funders to exercise due diligence.

Funding of Administrative Expenses (Question 2)

Under the NPRM, administrative expenses are entitled to the first payment priority from the assets of the receivership estate.¹⁶ The NPRM nevertheless contemplates that “there may be circumstances where the receiver’s administrative expenses exceed those resources.”¹⁷ Such a scenario would represent an extraordinary failure of safety and soundness supervision and should be exceedingly rare. However, to the extent that the OCC believes it is possible, AFR agrees that

⁹ 81 Fed. Reg. at 62840-41, 62844-45 (Section 51.8(b)).

¹⁰ 81 Fed. Reg. at 62841.

¹¹ *See generally In re Howard’s Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989).

¹² 11 U.S.C. § 507(a)(7) (2010).

¹³ 15 U.S.C. §§ 78lll(4), 78fff-2 (2010).

¹⁴ 11 U.S.C. § 766(h) (2005).

¹⁵ E.g., avoiding the priorities of 11 U.S.C. § 507(a) (2010).

¹⁶ 81 Fed. Reg. at 62838.

¹⁷ *Id.*

the OCC should “build resources to defray these costs into [the OCC’s] structure for collection of assessments from the uninsured institutions.”¹⁸ In no case should the fees paid by insured depositories cross-subsidize the risks for uninsured institutions, including the administrative expenses of insolvent receiverships.

Assets of Failed Institutions Should Be Sold Only to Qualified Buyers

The NPRM does not directly address the disposition of assets of the receivership estate. In advance of issuing any nondepository lending charter, the OCC should address the requirements for buyers of loans from a failed institution, as is commonplace for other agencies that sell loans. For example, the Federal Deposit Insurance Corporation,¹⁹ Federal Housing Administration,²⁰ and the Federal Housing Finance Agency²¹ each require buyers to meet qualification criteria and to incur contractual obligations to adhere to servicing and debt collection laws. To the extent a chartered institution fails while holding or servicing loans that it originated, the receiver of that entity should protect customer expectations of transacting with a federally-supervised entity by selling the loan assets, servicing rights, or both to other federally-supervised buyers.

* * *

Your consideration of these comments is appreciated. For questions, please contact Brian Simmonds Marshall, Policy Counsel at Americans for Financial Reform, at brian@ourfinancialsecurity.org or (202) 684-2974.

Sincerely,

Americans for Financial Reform

¹⁸ *Id.*

¹⁹ FDIC, LOAN SALES, <https://www.fdic.gov/buying/loan/index.html>.

²⁰ Press Release, HUD, *FHA Announces Most Significant Improvements to Date for Distressed Notes Sales Program* (June 30, 2016), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-105.

²¹ FHFA, *Enhanced Non-Performing Loan Sales Guidelines* (Apr. 13, 2016), <http://www.fhfa.gov/Media/PublicAffairs/Pages/Enhanced-Non-Performing-Loan-Sale-Guidelines.aspx>.

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- AARP
- A New Way Forward
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Income Life Insurance
- American Sustainable Business Council
- Americans for Democratic Action, Inc
- Americans United for Change
- Campaign for America’s Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Center for Effective Government
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos
- Economic Policy Institute

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- Essential Action
- Green America
- Greenlining Institute
- Good Business International
- Government Accountability Project
- HNMA Funding Company
- Home Actions
- Housing Counseling Services
- Home Defenders League
- Information Press
- Institute for Agriculture and Trade Policy
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women’s Policy Research
- Krull & Company
- Laborers’ International Union of North America
- Lawyers’ Committee for Civil Rights Under Law
- Main Street Alliance
- Move On
- NAACP
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Council of Women’s Organizations
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Resource Center
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People’s Action
- National Urban League
- Next Step
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good

- PICO National Network
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen
- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer’s for Common Sense
- The Association for Housing and Neighborhood Development
- The Fuel Savers Club
- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- UNITE HERE
- United Food and Commercial Workers
- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now
- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

State and Local Partners

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)

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- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O’odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA
- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)
- Cooperative Fund of New England, Wilmington NC
- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR
- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Empowering and Strengthening Ohio’s People (ESOP), Cleveland OH
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY

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- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- New Economy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ
- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network
- New Yorkers for Responsible Lending
- NOAH Community Development Fund, Inc., Boston MA
- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO
- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development

- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG

Small Businesses

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Phoenix AZ
- UNET