April 22, 2022

Via Electronic Mail

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Guidelines for Evaluating Account and Services Requests (Docket No. OP–1747)

To Whom It May Concern:

The undersigned trade associations[1] appreciate the opportunity to comment on the Board of Governors of the Federal Reserve System's updated guidelines[2] for evaluating accounts and services requests. The question of which institutions should be permitted to open master accounts with a Federal Reserve Bank and obtain related services remains a critical one, particularly in light of the recent increase in the availability of novel charters[3] at a federal and state level that may seek such accounts and services and the potential unique risks of their obtaining such accounts and services to the U.S. payments and financial systems.

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1 Please see Annex A for a description of the associations.

2 Board of Governors of the Federal Reserve System, Guidelines for Evaluating Account and Services Requests, 87 Fed. Reg. 12957 (Mar. 8, 2022).

3 Throughout this comment letter, we use the term "novel charters" to describe potential applicants for Reserve Bank accounts and services that are neither (i) insured depository institutions subject to federal prudential oversight under the Federal Deposit Insurance Act (or other applicable Federal law regarding deposit insurance, such as the Federal Credit Union Act) nor (ii) uninsured institutions that are part of a bank holding company (for example, an uninsured national trust bank that is a subsidiary of a bank holding company), and thus subject to consolidated federal prudential oversight by the Board. Under the reproposal's tiered framework, these novel charters would qualify as either Tier 2 or Tier 3 applicants.

We appreciate the Board's response to certain comments that we raised in our prior comment letters, including (i) the Board's proposal of a tier-based framework for the evaluation of applications for Federal Reserve accounts and services that would distinguish and differently treat novel charters, and (ii) the clarification that Reserve Banks would not have the authority to set interest rates on reserve balances.[4]

However, because the reproposal does not address a range of critical issues and questions that we raised in our prior comment letters, we continue to have significant concerns that the reproposal does not appropriately and transparently address how the Board and Reserve Banks will resolve many of the most fundamental issues that any application by a novel charter is likely to raise. Most notably, as we describe in more detail below, it remains important that the Board: (i) clarify which institutions are legally eligible to apply for Reserve Bank accounts and services; (ii) explain how applications will be reviewed and scrutinized, and what conditions and limitations may be imposed in connection with approval, at each tier; (iii) explain how Reserve Banks will oversee and monitor institutions at each tier on an ongoing basis after granting an application for an account and/or services; and (iv) clarify that any decision to grant Federal Reserve accounts or services to a Tier 2 or Tier 3 applicant shall be subject to review and approval (or, at a minimum, non-objection) by the Board. Further clarity on each of the foregoing areas is needed in the final guidelines to achieve the Board's objective of the consistent application of a set of guidelines and factors when reviewing such access requests to promote consistent outcomes across Reserve Banks and to facilitate equitable treatment across institutions.

Underlying each of our recommendations are two key principles that we strongly believe must be taken into consideration by the Board if it is to successfully meet its previously articulated policy goals. *First*, it is crucial that the Board itself play a central role in ensuring that the guidelines are applied consistently across Reserve Banks by exercising ultimate oversight of most decisions involving Tier 2 and Tier 3 applicants. This type of central role for the Board is necessary in order to avoid the appearance (and reality) of an uncoordinated approach and questions around incoherent precedent[5] that can arise from a system of diffuse control of the process, as well as to eliminate the potential for forum shopping by applicants and competition in laxity among Reserve Banks.

Second, given the privileges afforded by access to accounts and services and the risks that could be posed to the payment system, the U.S. financial system and the overall economy, the guidelines should ensure that all institutions with access are held to an equally high standard of supervision and oversight to ensure their safety and soundness and compliance with other relevant laws regardless of charter type or business model. Particularly because access to Reserve Bank accounts and services comes with the extraordinary benefit of being able to clear and settle private transactions in central

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4 *See* Letter to the Federal Reserve, from the Bank Policy Institute and Independent Community Bankers of America re: Proposed Guidelines for Evaluating Accounts and Services Requests (July 12, 2021), *available at* https://bpi.com/wp-content/uploads/2021/07/BPI-ICBA-Comment-to-Fed-Accounts-Proposal-July-12-2021.pdf; Letter to the Federal Reserve, from The Clearing House re: Proposed Guidelines for Evaluating Accounts and Services Requests (July 12, 2021), *available at* https://www.theclearinghouse.org/-/media/new/tch/documents/advocacy/comment_letter_frb_notice_requests_accounts_services_07-12-21.pdf; Letter to the Federal Reserve, from the American Bankers Association, the Consumer Bankers Association, and the National Association of Federally-Insured Credit Unions (July 12, 2022), *available at* https://www.aba.com/advocacy/policy-analysis/joint-trades-comments-to-frb-on-fed-access.

5 Julie Andersen Hill, *Bank Access to Federal Reserve Accounts and Payment Systems*, YALE J. REG. (forthcoming 2022).

banks without concern about liquidity and credit risk, such access serves as a linchpin to a safe and stable payments system. And as the reproposal makes clear, such access can serve as the source of considerable risk to individual Reserve Banks, to the U.S. payments system and its participants, to financial stability and to the effective execution of monetary policy. Given these high and unique stakes, it is critical that the standards governing access are clear, transparent and rigorous.

I. The final guidelines should clarify which institutions are legally eligible to apply for Reserve Bank accounts and services.

While the reproposal incorporates certain technical changes to the proposed assessment guidelines, the reproposal continues to decline to address the fundamental question of which institutions are *legally* eligible to apply for Reserve Bank accounts and services under applicable law. As we indicated in the prior comment letters, it is difficult to assess the appropriateness and effectiveness of the proposed assessment guidelines in the absence of a clear understanding of those charters to which those guidelines may apply. We continue to believe that this is a significant gap in the guidelines that must be addressed in order to achieve the Board's objectives, as we do not believe that this interpretative analysis can be separated from the final guidelines.

Clarifying which institutions are legally eligible for Reserve Bank accounts and services is particularly important because, as the Board continues to acknowledge in the reproposal, the key assessment in any application is the risk profile and business model of the applicant, which may vary widely depending on the types of institutions the Board considers legally eligible to apply. As we note throughout this comment letter, we believe it is crucial that the Board specify how it will apply the tier review framework at each of (i) the application review stage, (ii) the determination of any conditions to the provision of accounts or services, and (iii) ongoing monitoring of applicants. Clarity on which institutions are eligible to apply — and thus the likely composition of each tier — is necessary to providing real transparency to the public regarding the effective scrutiny that applicants would receive — especially for novel charters that would be Tier 2 or Tier 3 applicants under the reproposal. Thus, we believe that express clarity regarding which entities are legally eligible to apply for Reserve Bank accounts and services — and thus which entities will qualify as Tiers 2 and 3 applicants — is essential to achieve the Board's objective of consistent and timely implementation of the guidelines for eligible institutions with similar risk profiles.

We therefore reiterate our recommendation, as described in the prior comment letters, that the Board expressly assess which novel charters meet (or do not meet) the definition of "national bank" and/or "depository institution" for purposes of the Federal Reserve Act.[6] This is especially important because, on its face, the reproposal's definition of Tier 2 and Tier 3 institutions would appear to contemplate applicants that are not federally insured and, in some cases, not even subject to federal oversight. Such applicants not only pose serious risks that must be addressed in any evaluation process — as we describe in detail below — but also raise substantial and important threshold questions of whether Congress intended for such institutions to be legally eligible to apply for Reserve Bank accounts

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[6] *See* 12 U.S.C. § 461(b)(1)(A) (defining "depository institution" for purposes of the relevant provisions of the Federal Reserve Act). The Federal Reserve Act does not define "national bank," beyond the statement that it shall be interchangeable with "national banking association." *See* 12 U.S.C. § 221.

and services.[7] The public deserves to have such legal questions addressed directly and explicitly through notice and comment rulemaking.

This is doubly important because the Board alone has legal authority to interpret the Federal Reserve Act, yet the guidelines contemplate an application process in which all decisions will be made separately, by Reserve Banks, with no direct role for the Board, which undermines consistency in the application process by facilitating different interpretations of the Federal Reserve Act if it is interpreted differently by different Reserve Banks.

II. The final guidelines should explain how applications will be reviewed and scrutinized at each tier, including tier-specific review criteria, processes and procedures where appropriate, and identify what incremental requirements and commitments may be imposed on applicants at each tier as a condition of approval.

While it is helpful that the reproposal establishes a principle of relative scrutiny among tiers, this principle provides no information whatsoever about the *substance* of that relative scrutiny as it will be applied in practice. For that reason, the final guidelines should clearly explain the criteria, processes and procedures that will be used to evaluate applicants at each tier, including a clear delineation of the differences in those criteria, processes and procedures in applying the factors under each evaluative principle among streamlined (Tier 1), intermediate (Tier 2) and strictest (Tier 3) review.

Moreover, the reproposal appears to limit the use of its tiers solely to matters of diligence of scrutiny during the application phase. However, the differences in risk that these tiers intend to capture are likely to persist on a continuing basis even after an application is granted. Thus, it is important that the final guidelines acknowledge that these tiers should also be taken into account for purposes of determining what conditions or limitations of approval may be imposed when granting an application, and to explain what conditions or limitations may be imposed at each tier.[8] To those ends, we provide concrete recommendations on the treatment of applicants by tier, as follows.

A. Treatment of Tier 1 applicants.

Under the reproposal, Tier 1 applicants would be federally insured depository institutions subject to the full scope of prudential and other requirements and federal agency supervision and oversight that is applicable under the Federal Deposit Insurance Act.

Consistent with this risk profile, for Tier 1 applicants, (i) there should be a rebuttable presumption that Tier 1 applications will be approved unless the applicant is identified as potentially higher risk, and that the Reserve Banks will not undertake an independent supervisory assessment of

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[7] While we understand that in the past certain institutions that are not federally insured and/or not subject to federal oversight may have been granted access to Reserve Bank accounts or services on an ad hoc basis, we are unaware of any public pronouncement by the Board concerning whether and why such institutions are legally eligible to apply for such accounts or services.

[8] We note that, under the reproposal, section 1 of the guidelines contemplates that, in deciding to grant an access request, the relevant Reserve Bank "may impose . . . obligations relating to, or conditions or limitations on, use of the account or services" and/or "place additional risk management controls on the account and services, such as real-time monitoring of account balances," but does not *expressly* differentiate among applicants by tier for those purposes. *See* Guidelines for Evaluating Account and Services Requests, 87 Fed. Reg. at 12959.

such comprehensively regulated applicants as part of an account or services application;[9] and (ii) such applications should be reviewed and approved by the relevant Reserve Bank, with no public notice requirement.

B. Treatment of Tier 2 applicants.

Second, under the reproposal, Tier 2 applicants would be uninsured institutions that are nonetheless subject to oversight by a federal banking agency, and by implication could thus either be (i) an uninsured state member bank, or (ii) an uninsured institution chartered by the OCC. In addition, if the Tier 2 applicant has a holding company, that holding company would either be (i) a regulated bank holding company, or (ii) a company that has entered into commitments with the Board to be subject to the requirements that apply to BHCs.

Consistent with this risk profile, for Tier 2 applicants that are part of a regulated BHC, and thus already subject to Board oversight, the Board should make clear that (i) no independent supervisory assessment of such comprehensively regulated applicants shall be necessary as part of an account or services application, and (ii) such applications should be reviewed and approved by the relevant Reserve Bank, with no public notice requirement.

For other Tier 2 applicants — that is, those that are not part of a regulated BHC and thus not already subject to Board oversight at a consolidated level — the Board should clearly articulate the methodology, procedures and standards that will be used as part of the intermediate review of Tier 2 applications, which at a minimum should include:

(1) Public notice and an opportunity for other participants in the Board's payments systems and services to review and comment on such application, including any commitments into which the applicant or its affiliates propose to enter;

(2) An independent and comprehensive assessment of the risks posed by the applicant and its affiliates as part of an account or services application;

(3) The Board's review and approval of — or, at a minimum, non-objection to — any decision to grant Federal Reserve accounts or services to the applicant;

[9] On this point, the recommendation is consistent with, but would go further, than the reproposal.

(4) Consideration of, and compensating requirements for, any important gaps in the regulatory regime applicable to such institutions that are identified at the application stage;[10]

(5) Consideration of the potential impact to private sector operators, and their customers, that interoperate with Board services;

(6) Input from a cross-section of Reserve Banks and Board staff; and

(7) Application, where appropriate, of additional conditions and limitations on Tier 2 applicants, such as (i) caps on account balances and payment of different rates of interest on balances held by such applicants (as contemplated by the reproposal), (ii) grant of only certain services (but not others), and/or (iii) grant of account and/or services for a trial period (e.g., two years), during which time the relevant Reserve Bank could revoke the grant of access on an expedited basis if continued access poses undue risks to the financial system or otherwise violates the six principles.[11]

For the same reasons, it is also important that the final guidelines clarify the definition of a Tier 2 applicant to make clear that, for any holding company that is not a BHC, the relevant commitment that holding company must make to the Board in order for the applicant to qualify as a Tier 2 institution subjects the holding company to *all* prudential and supervisory requirements applicable to BHCs under Federal law, and not simply the enforcement jurisdiction of the Board. This would include, for example, (i) the activities restrictions of sections 3, 4 and 13 of the Bank Holding Company Act, (ii) all applicable capital, liquidity and resolution planning requirements (and other enhanced prudential standards, where application would be appropriate based on the factors the Board considers in applying those standards to BHCs), and (iii) the anti-tying restrictions of section 106 of the Bank Holding Company Act. To ensure predictability and transparency, the Board should publish the specific form of commitment to be required in this respect as part of the final guidelines. In so doing, the Board will also help fill the gaps between Tier 1 and Tier 2 applicants.

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[10] We note that both BPI and The Clearing House have written extensively about the significant regulatory gaps that exist with respect to novel charters, which may include (i) gaps in capital, liquidity and other prudential regulation, (ii) gaps in anti-money laundering requirements, (iii) gaps in risk management expectations and requirements, (iv) gaps in consumer protection and liability insurance, and (v) gaps in Community Reinvestment Act and similar obligations. *See, e.g.*, Letter to the Federal Reserve, from The Clearing House et al. re: Application of Kraken Financial for Access to Federal Reserve Account and Payments System Services (Oct. 5, 2020), *available at* https://bpi.com/wp-content/uploads/2021/01/Joint-Trades-Letter-to-Fed-re-Application-of-Kraken-Fiancial-for-Access-to-Fed-Accounts-and-Payments-2020.10.05.pdf; *see also FinTech and Big Tech Want Access to the Banking System*, BPI, https://www.keepbankingsafe.com*;* BPI Staff, *Why a Wyoming Charter Is No Hail Mary for the Anti-Fractional Banking Team*, BPI (Nov. 9, 2020), https://bpi.com/why-a-wyoming-charter-is-no-hail-mary-for-the-anti-fractional-banking-team/; Matthew Rosenthal & John Court, *Is It OK for FinTechs To Use Regulatory Arbitrage To Avoid Consolidated Supervision?*, BPI (Nov. 6, 2020), https://bpi.com/is-it-ok-for-fintechs-to-use-regulatory-arbitrage-to-avoid-consolidated-supervision/.

[11] This set of standards should apply not just under intermediate review for Tier 2 applicants but also under the strictest review for Tier 3 applicants, as discussed below.

C. Treatment of Tier 3 applicants.

Under the reproposal, Tier 3 applicants would pose the greatest risk, as such applicants would not be subject to the prudential and other requirements of the Federal Deposit Insurance Act that apply to insured banks and would not be subject to any federal oversight at the institution or holding company level.

Consistent with this risk profile, for Tier 3 applicants, the Board should clearly articulate the methodology, procedures and standards that will be used as part of the strictest review of such applications, including all seven of the elements that we recommend in connection with Tier 2 applicants that are not part of a regulated BHC, as described above.

In addition, given the significant and concerning gaps in prudential regulation and federal supervision and oversight that Tier 3 applicants would pose relative to Tier 1 or even Tier 2 applicants, there should be a rebuttable presumption that an application for accounts or services by a Tier 3 applicant will not be approved unless the applicant enters into commitments with the Board by which it is obligated to meet requirements that (i) at the applicant level, are at least as strenuous and effective at limiting the risks posed by the applicant as those that apply to federally insured depository institutions, and (ii) at the holding company level, are at least as strenuous and effective at limiting risks posed by the applicant and its affiliates as those that apply to regulated BHCs. For example:

- Consistent with the Board's stated policy goal of ensuring the safety and soundness of the banking system, the Board should require that (i) the applicant commit to comply with the requirements of sections 23A and 23B of the Federal Reserve Act, and (ii) both the applicant and its holding company commit to comply with the capital, liquidity and other prudential standards that apply to federally insured depository institutions and BHCs, respectively;

- Consistent with the Board's stated policy goal of promoting financial stability, the Board should require that any applicant and/or applicant holding company the size of which exceeds relevant asset thresholds established under § 165 of the Dodd-Frank Act (as amended and implemented by the Board) are subject to the same enhanced prudential standards (including resolution and recovery planning standards) established thereunder; and

- Consistent with the Board's stated policy goals of effectively implementing monetary policy, protecting consumers and promoting a safe, efficient, inclusive and innovative payment system, the Board should require that the applicant agree not to use the relevant accounts or services to engage in a financial activity in a manner that functions to avoid the consumer protection and other regulatory protections and costs that come with federal bank regulation.

III. The final guidelines should clearly explain how the Reserve Banks will oversee and monitor institutions at each tier on an ongoing basis after an application for an account and/or services is granted.

For similar reasons, the final guidelines should specify how the Reserve Banks will monitor compliance with the guidelines (including any commitments an applicant made to the Reserve Banks at

the application stage) on an ongoing basis following any grant of accounts or services access. Consistent with the overall tier-based review framework under the reproposal, the Board should clearly articulate how the ongoing monitoring will differ from Tier 1 applicants through Tier 3 applicants.

For Tier 1 applicants and Tier 2 applicants that are part of regulated BHCs, the Reserve Banks should continue to rely on the federal banking agencies' supervision and oversight of applicants, rather than conducting their own independent supervision, which is neither necessary nor appropriate. Accordingly, following the grant of an account or services application, the final guidelines should not result in additional and redundant *ex post* monitoring of such applicants.

For Tier 2 applicants that are not part of regulated BHCs and for Tier 3 applicants, the final guidelines should provide for a clear framework of periodic monitoring and evaluation regarding the satisfaction of the criteria for application in accordance with the six principles.[12] As we noted in the prior comment letters, the final guidelines should require periodic monitoring of such applicants to ensure they continue to meet the standards set forth in the final guidelines. The guidelines should also make explicit that such standards for ongoing periodic monitoring should be as rigorous as those applicable to federally insured depository institutions or BHCs under federal banking law, including those regarding capital, liquidity, operational and other risk management, cybersecurity, anti-money laundering, operational resilience, consumer protection, affiliations and affiliate transactions and other prudential requirements.

For Tier 3 applicants in particular, the final guidelines should provide for annual, on-site examination of the institution by the examination staff of the relevant Reserve Bank that covers both (i) the financial condition of the institution and its operational, liquidity and other risk management, and (ii) compliance by the institution and its affiliates with any commitments or conditions of its access to Reserve Bank accounts and services.

IV. The final guidelines should state that any decision to grant Federal Reserve accounts or services to a Tier 2 applicant that is not part of a regulated BHC or a Tier 3 applicant should be subject to review and approval — or, at a minimum, non-objection — by the Board.

We reiterate our comment in the BPI/ICBA prior comment letter that decisions about whether to grant Reserve Bank accounts or services to novel charters (i.e., Tier 2 and Tier 3 applicants) should be subject to review and approval — or, at a minimum, non-objection — by the Board in order to provide a transparent and consistent process for all applications throughout the Federal Reserve System as a whole. Novel charters are the most likely to pose new and distinct issues under the guidelines, and heightened risks to the financial and payments system, if granted Reserve Bank accounts and services. Further, novel charters are more likely to raise distinct legal questions regarding eligibility for such accounts and services that only the Board may resolve under the Federal Reserve Act.

Therefore, while we fully support the Board's objective for a transparent and consistent process, the guidelines should include a requirement that Tier 2 applicants that are not part of regulated BHCs and all Tier 3 applicants should be subject to review and approval (or, at a minimum, non-objection) by

[12] As noted in the BPI/ICBA prior comment letter, the ongoing monitoring of novel charters should include an assessment of affiliate transactions and relationships that could have a meaningful impact on an applicant's use of Reserve Bank accounts or services.

the Board. Exercise of this direct role by the Board is also consistent with the Board's enumerated authority to exercise general supervision over the Reserve Banks pursuant to 12 U.S.C. § 248(j).

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The associations appreciate the opportunity to comment on the proposal and would welcome the opportunity to discuss them further with you. If you have any questions, please contact Paige Paridon by phone at (703) 887-5229 or by email at *Paige.paridon@bpi.com*.

Respectfully submitted,

Bank Policy Institute
The Clearing House Association L.L.C.
American Bankers Association
Independent Community Bankers of America
Mid-Size Bank Coalition of America
Consumer Bankers Association

cc: Mark Van Der Weide
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Matthew Eichner
Director, Reserve Bank Operations & Payment Systems

Annex A

Bank Policy Institute: BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

The Clearing House Association L.L.C.: The Clearing House Association L.L.C., the country's oldest banking trade association, is a nonpartisan organization that provides informed advocacy and thought leadership on critical payments-related issues. Its sister company, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the U.S., clearing and settling more than $2 trillion each day. *See* The Clearing House's web page at www.theclearinghouse.org.

American Bankers Association: The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.7 trillion in deposits and extend $11.2 trillion in loans.

Independent Community Bankers of America: The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

Mid-Size Bank Coalition of America: Founded in 2010, the MBCA is a distinct and singularly focused "self-help" organization for America's mid-size banks that has the direct involvement of its members' CEOs and most of their management committee members. MBCA advocates for, champions, and serves as a resource to America's mid-size banks. The MBCA's-member banks average less than $20 billion in size and serve customers and communities through more than 10,000 branches in all 50 states, the District of Columbia, and three U.S. territories.

Consumer Bankers Association: The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.