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VIA Electronic Mail (regs.comments@occ.treas.gov)

Chief Counsel's Office

Office of the Comptroller of the Currency

400 7th Street, S.W.

Suite 3E-218

Washington, D.C. 20219

Attention: Comment Processing

Re: OCC Docket # 2019-0028
National Bank and Federal Savings Association Digital Activities

Ladies and Gentlemen:

The Clearing House Association L.L.C. ("The Clearing House")¹ appreciates the opportunity to comment on the Office of the Comptroller of the Currency's ("OCC") June 4, 2020 Advance Notice of Proposed Rulemaking ("ANPR") on the digital activities of banks, titled "National Bank and Federal Savings Association Digital Activities."² The Clearing House commends the OCC for taking the evolution of the financial services industry into account, and for promoting regulatory and supervisory frameworks that enable banks to adapt to changing trends and technology developments in ways that better serve their customers. The Clearing House recognizes the important role that banks, as depository institutions with access to readily available sources of liquidity and critical lending infrastructure, have historically played in facilitating reliable and safe payments, as well as the OCC's long-established processes for carefully considering the risks posed by specific payments-related activities of banks as it evaluates whether certain activities should be permitted. The Clearing House also appreciates the OCC's focus on ensuring that new banking technologies are developed and implemented in ways that promote economic growth and opportunity while ensuring that banks operate in a safe and sound manner, that access to

¹ The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound, and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operated core payments system infrastructure on the United States.

² "National Bank and Federal Savings Association Digital Activities," 85 Fed. Reg. 40,827 (July 7, 2020).

financial services is fair, and that customers are treated fairly. The Clearing House and its member banks share these important goals.

National banks and federal savings associations have achieved innovative and meaningful technological advancements in banking and payments, and kept pace with rapidly-changing technological innovation outside of banking, under the current regulatory and supervisory frameworks (12 C.F.R. part 7, subpart E and part 155, as well as related interpretive guidance and processes). Indeed, bank-driven development of new payment technologies, processes, and systems that meet business and consumer needs, and respond to the digitization of commerce, demonstrate that innovation is possible under the existing regulatory and supervisory frameworks. Chief among these advances is the development and launch of the RTP® network, a real-time payment system that modernizes core payments capabilities for all U.S. financial institutions. Significant revision to 12 C.F.R. part 7, subpart E, or 12 C.F.R. part 155 is therefore unnecessary in order for national banks and federal savings associations to innovate in the payments space or to engage in new, payments-related activities that are driven by advances in technology. Notwithstanding the flexibility available to national banks and federal savings associations to innovate under parts 7 and 155, there are other actions the OCC could take to further facilitate bank development and adoption of technology, and the development of banking and payments technology in general.

In this letter, The Clearing House seeks to provide general feedback on the ANPR and to identify actions the OCC can take to facilitate bank development and adoption of technology. Our response also provides feedback on some of the specific questions posed by the ANPR, including the adoption and use by banks of distributed ledger technology, bank activities involving cryptoassets, and whether 12 C.F.R. part 7, subpart E, and part 155 are sufficient for banks to be able to innovate and adopt new technologies, as well as feedback on the OCC's guidance on third party risk management.

As described in further detail below:

- Bank use of distributed ledger technology is in its nascent stages, and bank activities involving cryptoassets are still developing. The Clearing House recommends that the OCC continue to focus its analysis on the underlying activities of banks and not the technology used in support of those activities. A technology-neutral approach will allow the OCC to continue to evaluate risks inherent in specific applications, rather than with technology in general, and work hand-in-hand with banks to build up an understanding of how distributed ledger technology and cryptoassets are, and might be, utilized by banks.

- Bank participation in newly-developed payment systems and adoption of enhancements to existing payment systems are supported by the current regulatory framework and related processes, and do not require revision to current regulations. The OCC should evaluate the need for revision to 12 C.F.R. part 7, subpart E, or 12 C.F.R. part 155, in light of all of the tools the agency has available to it, such as the process for banks to request interpretive advice or non-objection, and the agency's record in successfully utilizing these tools in the past. The Clearing House does not view the requirements in 12 C.F.R. part 7 as inhibiting bank development and adoption of technology.
- OCC guidance on third-party risk management and resulting oversight responsibilities of banks can make collaboration between banks and technology companies challenging.
- In light of the COVID-19 pandemic, the OCC should review its existing regulatory framework, including regulatory guidance, to ensure that the regulations and guidance contemplate and address the safe and secure provision of payments-related services by banks from remote or alternate work locations. In addition, the OCC should evaluate requirements for acceptable forms of customer identification and authentication, and should consider simplifying electronic consent requirements.

I. Utilization of Distributed Ledger Technology, and Bank Activities Involving Cryptoassets, Including Cryptocurrencies, are Still Developing and the OCC Should Apply a Technology-Neutral Approach in Evaluating Applications of these Technologies

Bank utilization of distributed ledger technology (“DLT”) is in its nascent stages, and bank activities involving cryptoassets, including cryptocurrencies, are still developing. According to an Accenture report on bank adoption of DLT and blockchain technology, “three-quarters [of banks surveyed on behalf of Accenture are] either involved in a proof-of-concept, formulating their blockchain strategy, or just beginning to look into [distributed ledger technology].”³ In general, the fitness of DLT for a particular payments-related purpose, the ways in which cryptoassets are used, and the risks posed thereby, will naturally vary, depending on the particular application and characteristics of the use case. Examples of DLT applications in different stages of development include recordation of debtor/creditor relationships, book keeping, custodial treatment of/bailment of cryptoassets, including cryptocurrency, and delivery-versus-payment systems utilizing smart contracting; and examples of crypto-asset-based applications include use

³ Accenture Mobility, *Blockchain Technology: How Banks Are Building a Real-Time Global Payment Network* (2016) (available at: <https://www.accenture.com/acnmedia/PDF-35/Accenture-Blockchain-How-Banks-Building-Real-Time-Global-Payment-Network.pdf#zoom=50> (accessed June 24, 2020)).

of the technology to reflect the indebtedness of parties, the holding of cryptoassets as a custodian (e.g., providing custody services as a non-fiduciary or fiduciary for cryptocurrency, including by holding unique cryptographic keys associated with cryptocurrency),⁴ and maintenance of securities accounts relating to crypto-asset-based securities. These applications vary, significantly, but all represent long-performed activities of banks that are largely traditional in nature. Recognizing that DLT and cryptoassets are different and that utilization of these technologies by banks are in early stages still, The Clearing House recommends that the OCC apply a technology-neutral approach toward evaluating applications of these technologies, and that the OCC evaluate risks inherent in specific applications rather than the risks of DLT or cryptoassets in general. Additionally, the OCC should coordinate with other banking agencies to provide frequent, clear and consistent guidance, and to avoid the development of conflicting expectations and confusion surrounding the regulatory and supervisory frameworks applied to distributed ledger technology and cryptoassets. The development of a uniform set of terms and definitions by the OCC and other U.S. regulatory agencies would, for example, provide clarity to financial services providers evaluating and adopting DLT and cryptoassets. Moreover, The Clearing House suggests that the OCC work hand-in-hand with banks to build up an understanding of how distributed ledger technology and cryptoassets are, and might be, utilized by banks. The Clearing House notes that flexibility is key to successful innovation, and the capacity for banks to change and adapt the ways in which technology is used is crucial.

II. Bank Participation in New Payment Systems and Adoption of Enhancements to Existing Payment Systems Have Been Supported Under the Existing Regulatory and Supervisory Frameworks, and the OCC Should Consider Whether to Revise Existing Regulations in Light of the Agency's Other Tools and Past Successes

Under the current regulatory and supervisory frameworks, the OCC was made aware of, and specified its expectations for, bank participation in the first new payment system to be developed in the United States in over 40 years, the RTP[®] network.⁵ The issuance of effective

⁴ See Office of the Comptroller of the Currency, *Interpretive Letter No. 1170* (July 22, 2020) (available at: <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2020/int1170.pdf> (accessed July 24, 2020)), at pp. 7-8 (concluding that it is permissible for national banks to provide custody for cryptocurrency in both fiduciary and non-fiduciary capacities).

⁵ See Office of the Comptroller of the Currency, *Interpretive Letter No. 1157* (Nov. 12, 2017) (Dec. 2017) (available at: <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2017/int1157.pdf> (accessed June 23, 2020)), at p. 2 (evaluating PNC Bank, N.A.'s request for guidance on the permissibility of PNC joining the RTP[®] network as an RTP Funding Participant (a joint owner of the RTP Joint Account that provides a prefunded contribution directly to the RTP Joint Account) and concluding that a national bank may join a payment system such as RTP so long as it notifies its examiner in charge of the proposed membership, it evaluates the risk(s) posed by payment system membership/participation prior to joining, and it "monitor[s] the risks of membership on an ongoing basis").

guidance addressing bank participation in the RTP® network, and the ensuing clarity that was provided to supervised entities and market participants, illustrate the flexibility and sufficiency of the current regulatory and supervisory frameworks for addressing bank involvement in new payment systems. Indeed, bank involvement in the development of the RTP® network has been integral to the establishment of an immediate, informationally rich payment network that reaches over 50% of U.S. demand deposit accounts. The availability of the RTP® network for real-time payments, including U.S. government payments, such as pandemic relief payments, reflects precisely the modernization that can occur under existing frameworks.

The flexibility and sufficiency of the current regulatory and supervisory frameworks for payments-related innovation by banks is further illustrated by the stand up and success of Zelle®. Zelle, which is owned by bank-owned Early Warning Services, LLC, is a fast, safe, easy method of sending and receiving money. With Zelle, funds are generally available directly in users' bank accounts in minutes.

Banks are also able to adopt enhancements to existing payment systems under the current regulatory and supervisory frameworks. For example, the frameworks have not impaired efforts thus far undertaken by banks to adopt the ISO 20022 payments-messaging format. ISO 20022, which defines how certain financial messages are structured, establishes a data-rich, common language that supports uniformity, interoperability, and efficiency in payments.

As the ANPR notes, “the Federal banking system is well acquainted with and well positioned for change ... a hallmark of [the] system since its inception.”⁶ The Clearing House encourages the OCC to evaluate the need for revision to 12 C.F.R. part 7, subpart E, or 12 C.F.R. part 155, in light of the innovations that have occurred under the current frameworks, such as RTP® and Zelle®, as well as the tools the agency has available to it, including the process for banks to request interpretive advice or non-objection, and the agency's record in successfully utilizing these tools in the past. The Clearing House and its member banks do not view the requirements in 12 C.F.R. part 7 as inhibitive of bank development and adoption of technology. Furthermore, The Clearing House emphasizes the importance of payment system participants being banks, as their depository status, ready access to liquidity, and rigorous supervision regime ensure the safety and soundness of institutions participating in critical systems.

⁶ 85 Fed. Reg. at 40,829.

III. OCC Guidance on Third-Party Risk Management and Resulting Oversight Responsibilities of Banks Can Make Collaboration Between Banks and Technology Companies Challenging

A core focus of the ANPR is the relationship between banks and technology companies, and the ways in which these relationships “enable banks ... to establish new delivery channels and business practices and develop new products to meet the needs of consumers, businesses, and communities.”⁷ The ANPR notes that these relationships help banks “to reach new customers, better serve existing customers, and take advantage of cost efficiencies, which helps [banks] to remain competitive in a changing industry.”⁸ The Clearing House and its members agree with this observation and would simply note that in some instances the oversight responsibilities of banks resulting from the OCC’s guidance on third party risk management make collaboration between banks and technology companies challenging and advancements in banking and payments technology more difficult to achieve.

IV. The OCC Should Review its Existing Regulatory Framework, Including Regulatory Guidance, to Ensure that Banks are Able to Safely and Securely Provide Payments-Related Services from Remote or Alternate Work Locations and are Generally Able to Maintain Important Payments-Related Services During the COVID-19 Pandemic

The COVID-19 pandemic is altering the ways in which consumers and businesses think about and use payments, as well as how banks respond to their customers’ demands. The OCC should review its existing regulatory framework, including current regulatory guidance,⁹ to ensure that the regulations and guidance contemplate and address the safe and secure provision of payments-related services by banks during the COVID-19 pandemic, including the provision of services by bank staff working remotely or from alternate work locations. The ability to perform important payments-related services from remote or alternate work locations is critical to

⁷ *Id.*

⁸ *Id.*

⁹ *See, for example*, Federal Financial Institution Examination Council, “Wholesale Payment Systems Booklet” (July 2004), at Appendix A, Tier II, Objective 9 (pp. A-14-15) (available at: https://ithandbook.ffiec.gov/media/274899/ffiec_itbooklet_wholesalepaymentsystems.pdf (accessed July 21, 2020)) (setting forth requirements for determining whether banks have established sufficient physical and logical security to protect data security associated with funds transfers); *and* Federal Financial Institutions Examination Council, *Authentication in an Internet Banking Environment* (available at: <https://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-35a.pdf> (accessed July 13, 2020)) (2005), at pp. 1-3 (requiring the use of an effective means of authenticating customers in order to safeguard customer information, and highlighting technologies that financial institutions can use to authenticate customers).

business continuity, ensures that important services remain available during emergency conditions, and helps to protect the personal safety of employees performing such services. The Clearing House encourages the OCC to evaluate electronic consent requirements, as well as acceptable forms of customer identification and authentication, so that banks are able to easily obtain consent to transact and can deliver banking documents and disclosures electronically without having to resort to complicated and outdated processes.

V. Conclusion

The Clearing House agrees that the “business of banking” is not frozen in time. Indeed, “the business of banking” has evolved significantly over time; and while deposit taking is at the core of this business, national banks and federal savings associations have achieved meaningful technological advancements related to banking and payments under the regulatory and supervisory frameworks in place over this time. The Clearing House submits that it is unnecessary for the OCC to revise its current regulations in order to provide national banks and federal savings associations with the flexibility to adopt new payments-related technologies and keep pace with technological developments outside of banking. The current regulatory framework and supervisory processes work well and have proven successful. The OCC should continue its approach of activity driven regulation. To this end, The Clearing House urges the OCC to avoid the temptation to treat such things as blockchain and cryptoassets/cryptocurrency as new activities and to instead recognize them for what they are – technologies that support traditional banking activities.

The Clearing House appreciates the opportunity to comment on the OCC’s ANPR on bank digital activities and hopes the points made in this letter will be taken into consideration by the OCC as it reviews its regulations defining the scope of permissible banking activities of national banks and federal savings associations, and in any subsequent, related rulemakings. If you have any questions, please contact the undersigned by phone at 646-709-3026 or by email at philip.keitel@theclearinghouse.org.

Respectfully submitted,

/s/

Philip Keitel

Associate General Counsel & Vice President
The Clearing House Association L.L.C.