University of Miami Business Law Review

Volume 29 | Issue 2 | Article 3

The OCC FinTech Charter and the Bank Holding Company Act

Lauren Bomberger
American University Washington College of Law

Follow this and additional works at: https://repository.law.miami.edu/umblr

Part of the Banking and Finance Law Commons, and the Business Organizations Law Commons

Recommended Citation

Lauren Bomberger, *The OCC FinTech Charter and the Bank Holding Company Act*, 29 U. MIA Bus. L. Rev. 1 ()
Available at: https://repository.law.miami.edu/umblr/vol29/iss2/3

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Business Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The OCC FinTech Charter and the Bank Holding Company Act

Lauren Bomberger[*]

Abstract

The definition of a bank under the Bank Holding Company Act of 1956 ("BHCA") has changed several times since the statute was first enacted. Congress has identified a number of underlying rationales for applying the BHCA to certain entities thus necessitating a change in the definition. Recent innovations in technology, however, have made it challenging to adapt the U.S. financial regulatory regime to these advances, particularly for the financial technology ("FinTech") industry. The Office of the Comptroller of the Currency's ("OCC") FinTech charter is one example of an attempt by a U.S. financial regulator to grapple with emerging technologies in financial services in a meaningful way. Despite the OCC initially suggesting that the BHCA could apply to FinTech companies chartered as special purpose national banks ("SPNBs"), these entities do not and cannot meet the definition of a bank under the BHCA because FinTech SPNBs are not permitted to take deposits. This Comment sets out a framework by which to analyze whether the definition of a bank under the BHCA should include FinTech firms who make loans and do not take deposits, i.e., "marketplace lenders." This Comment finds that including FinTech firms, specifically

[*] J.D. Candidate, 2021, American University Washington College of Law; Executive Editor, *American University Business Law Review*, Volume 10. The author would like to thank Professor Hilary J. Allen of the American University Washington College of Law for her extensive feedback and comments. This Comment was developed as an academic exercise in fulfillment of the *American University Business Law Review*'s note and comment requirement and the American University Washington College of Law's upper-level writing requirement. This Comment does not reflect the author's personal views or any position that the author might or will take in the future.

marketplace lenders, in the statutory definition of a bank would serve a majority of the BHCA's underlying policy rationales.

I. INTRODUCTION 2
II. THE FINTECH CHARTER AND THE BHCA 5
A. Introducing the OCC FinTech Charter *5*
B. Marketplace Lending *7*
C. The Bank Holding Company Act: A History of a Statute Under Siege *10*
i. The Evolving Definition of a "Bank" Under the BCHA.........10
ii. The BHCA's Policy Rationales...12
III. ANALYZING THE FINTECH CHARTER AND THE APPLICABILITY OF THE BHCA...15
A. Proposing a BHCA Analysis Framework *16*
i. Framework Part I: Explicit Rationales for the BHCA 16
ii. Framework Part II: Proposed Rationales 19
B. Applying the Framework: Marketplace Lending.........................*23*
IV. RECOMMENDATIONS FOR APPLYING THE BHCA TO FINTECH SPNBS...28
V. CONCLUSION 30

I. INTRODUCTION

From mobile banking and artificial intelligence to Big Tech, technology is changing the way financial services are reaching consumers, and U.S. financial regulators are struggling to keep pace. In 2016, the U.S. Office of the Comptroller of the Currency ("OCC") attempted to bring financial innovations under the federal regulatory regime by announcing the agency's exploration into special purpose national bank ("SPNB") charters for financial technology ("FinTech") companies.[1] The agency proceeded with its proposal in 2018, announcing it would begin accepting applications for such charters, publishing an update to the Comptroller's Licensing Manual in July 2018.[2]

---

[1] *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 2 (2016), https://www.occ.gov/topics/supervision-and-examination/responsible-innovation/comments/pub-special-purpose-nat-bank-charters-fintech.pdf (introducing the idea of a FinTech charter).

[2] *See generally* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT, CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL

The July 2018 Licensing Manual Supplement made clear that the only FinTech companies who could apply for the charter were those who *did not take deposits*.[3] Yet the OCC's white paper from December 2016 suggested that the Bank Holding Company Act of 1956 ("BHCA") could apply to companies that own FinTech SPNBs if the SPNB meets the definition of a bank under the statute.[4] However, in order to meet the definition of a bank under the BHCA, the institution must either be (1) insured by the Federal Deposit Insurance Corporation (FDIC), or (2) take deposits *and* make commercial loans.[5] Because of the OCC's own requirement that depository institutions cannot apply for the FinTech charter, parent companies of FinTech SPNBs would be, by definition, excluded from application of the BHCA.[6]

To demonstrate this issue, imagine a hypothetical FinTech company: a marketplace lender, FastCash, Inc. FastCash is a large direct lender that relies on market funding to make loans to its customers via its online website. Customers need only fill out an application online before receiving a credit decision, which FastCash makes using its proprietary underwriting algorithm. FastCash only makes consumer loans; that is, extensions of credit to a person rather than a business. To avoid the costly and burdensome state-by-state licensing system, FastCash applies for and receives an SPNB charter, thus entitling it to all the rights and benefits of a federally-regulated national bank.

Imagine, also, a large technology and e-commerce company—Abracadabra, Inc.—which offers a variety of services in addition to its e-commerce platform, including big data analytics.[7] To facilitate its e-

---

TECHNOLOGY COMPANIES (2018), https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/pub-considering-charter-apps-from-fin-tech-co.pdf (establishing that FinTech companies may be eligible for a national bank charter and explaining how FinTech charter applications might be evaluated).

[3] *See id.* at 1 ("This document describes the key factors the OCC will consider in evaluating charter applications from fintech companies that . . . do not take deposits . . . .").

[4] *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 7 ("If a fintech company interested in operating as a special purpose national bank has or plans to have a holding company that would be the sole or controlling owner of the bank . . . the BHCA could apply.").

[5] *See* 12 U.S.C. § 1841(c)(1) (providing the seminal definition of a bank under the BHCA as an institution that is either FDIC-insured or both accepts deposits and makes commercial loans).

[6] *See* Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1393, 1426 (2018) (arguing the OCC should not be allowed to charter non-depository institutions because doing so would enable parent companies of such institutions to avoid the BHCA).

[7] The interest of Big Tech in expanding into financial services is well documented. *See generally* Dan Murphy, *Big Tech's Invasion of Banking*, MILKEN INST. (Apr. 26, 2019),

commerce business and make use of its data analytics arm, Abracadabra seeks to acquire FastCash to offer lending services to its customers. FastCash is not a bank for the purposes of the BHCA because it neither accepts deposits nor is FDIC-insured. Abracadabra can thus obtain the benefits of a nationally-chartered entity without being subject to the BHCA.

The history of the BHCA tracks a game of cat-and-mouse, in which industry players construct innovative business models to avoid triggering the statute, while Congress attempts to undercut opportunities for regulatory arbitrage by amending the statutory text.[8] If there is a loophole in the OCC FinTech charter that undermines the underlying policy objectives of the BHCA, then undoubtedly FinTech SPNBs should also be tethered to the BHCA's requirements like other national banks.[9] If, however, applying the BHCA to the parent companies of FinTech SPNBs would not serve any underlying policy objective, then there is no legal conundrum.[10] Ultimately, whether the BHCA should apply to the parent companies of FinTech SPNBs is a question of the extent to which it would serve the statute's underlying policy rationales.

The question that this Comment seeks to answer is: should the BHCA apply to the parent companies of FinTech SPNBs? Through the lens of the marketplace lending industry, this Comment argues that subjecting the parent companies of FinTech SPNBs to the BHCA would serve the BHCA's underlying policy rationales and, therefore, the BHCA should apply. This Comment also proposes a framework by which to analyze the applicability of the BHCA. Part II of this Comment provides an introduction to the OCC FinTech charter, the marketplace lending industry, and the BHCA. Part III proposes a framework to analyze the BHCA's applicability and applies that framework to our hypothetical marketplace lender, FastCash. Part IV recommends a solution in the form of a statutory amendment from Congress that would incorporate FinTech SPNBs into the definition of a bank under the BHCA.

---

https://www.milkenreview.org/articles/big-techs-invasion-of-banking (discussing the threat of Big Tech companies seeking to enter the financial services industry).

8 *See generally* Saule T. Omarova & Tahyar E. Margaret, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States*, 31 REV. BANKING & FIN. L. 113 (2012) (providing a detailed history of the development of the BHCA and the changing definition of a bank as a result of the industry exploiting loopholes).

9 *Cf. id.* at 159–68 (exemplifying how an exemption from the BHCA precipitated the rapid growth of the industrial loan company industry).

10 *See id.* at 172 (explaining that credit card banks were first implicitly, and then explicitly, exempted from the definition of a bank under the BHCA because there was no interstate banking risk or monopolization of commercial credit risk).

II. THE FINTECH CHARTER AND THE BHCA

FinTech is difficult to define as there is no universally-accepted definition.[11] Merriam-Webster's Dictionary defines FinTech as "products and companies that employ newly developed digital and online technologies in the banking and financial services industries."[12] The types of technologies are broad and include products such as marketplace lending, mobile banking, mobile payments, crowdfunding, cryptocurrency, automated investing, and other digitized assets and services.[13] The rise of FinTech, particularly marketplace lending, accelerated following the financial crisis of 2008, when access to lines of credit dried up and made it exceedingly difficult for consumers and small businesses to obtain short-term, small-dollar loans.[14] Consequently, the FinTech industry is generally seen as a product of the growing 21st-century digital economy, and a new challenge for financial regulators tasked with ensuring the safety and soundness of the markets and their participants.[15] In 2018, the OCC attempted to provide greater regulatory clarity for FinTech companies that pay checks or make loans, but do not take deposits, in the form of a proposed FinTech charter.[16]

A. Introducing the OCC FinTech Charter

The OCC FinTech charter was the result of a long-term multi-stakeholder effort beginning in August 2015 to study financial innovation and develop an appropriate regulatory framework.[17] In March 2016, the

---

11 *See, e.g.*, Christopher G. Bradley, *FinTech's Double Edges*, 93 CHI.-KENT L. REV. 61, 78–79 (2018) (advocating for a broad definition of financial technology).

12 *Fintech*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/fintech (last visited May 25, 2021).

13 *See, e.g.*, JACKSON MUELLER, MILKEN INSTITUTE, BIPARTISAN OPPORTUNITIES TO LEGISLATE U.S. FINTECH IN THE 21ST CENTURY 9 (2018), https://milkeninstitute.org/sites/default/files/reports-pdf/FINAL-FinTech-Bipartisan-Legislation2.pdf (tabulating the various sectors of the financial technology industry).

14 *See* DAVID W. PERKINS, CONG. RSCH. SERV., R44614, MARKETPLACE LENDING: FINTECH IN CONSUMER AND SMALL-BUSINESS LENDING 1 (2018) (discussing the rapid growth of the marketplace lending industry); *see also* Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 268 (analyzing how online lenders have filled the gaps in access to credit).

15 *See* PERKINS, *supra* note 14, at 2 (discussing FinTech as a new development in market trends); *id.* at 16 (noting FinTech presents regulatory challenges).

16 *See* Press Release, Off. of the Comptroller of the Currency, OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html (announcing the agency would begin accepting applications for national bank charters from FinTech companies).

17 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 3 (summarizing the progress of the OCC's innovation initiative).

agency capitalized on its work by publishing its first white paper on the principles of regulating financial innovation.[18] A few months later, the OCC established the Office of Innovation and, not long after, announced in December 2016 that it would begin exploring SPNB charters for FinTech companies.[19] In the Comptroller's Licensing Manual Supplement, the agency defines an SPNB as "a national bank that engages in a limited range of banking or fiduciary activities . . . ."[20] In the case of the FinTech charter, these activities are limited to paying checks or lending money.[21]

According to the OCC, an SPNB charter for FinTech would: (1) "provide[] a framework of uniform standards"; (2) "level the playing field with regulated institutions"; and (3) "help promote consistency in the application of laws and regulations across the country . . . ."[22] The FinTech charter provides a nationalized solution to the current state-by-state licensing system.[23] The present regulatory framework can be quite burdensome for FinTech companies, particularly marketplace lenders, who are required to comply with the varying, and sometimes conflicting, state licensing requirements.[24] The OCC aimed to provide greater certainty and clarity for the industry through the creation of FinTech SPNBs that have the same rights and requirements as national banks.[25] According to the OCC, a FinTech company chartered as an SPNB has the same rights as any other chartered national bank.[26] This special status affords SPNBs

---

18 *See id.* (highlighting the white paper released in March 2016 in which the OCC discussed the regulation of financial innovation).

19 *See id.* at 2–3 (summarizing the agency's findings and discussing the establishment of the OCC's Office of Innovation); Press Release, Off. of the Comptroller of the Currency, OCC To Consider Fintech Charter Applications, Seeks Comment (Dec. 2, 2016), https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html.

20 OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2, at 2.

21 *See id.* (defining the core banking functions of SPNBs); *see also* 12 C.F.R. § 5.20(e)(1) (2021) ("A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money.").

22 OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 2 (2018), https://www.ots.treas.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf.

23 *See* PERKINS, *supra* note 14, at 17 (explaining how FinTech companies are regulated at the state level).

24 *See id.* at 15 (discussing the various state licensing requirements and which companies or industries are required to obtain licenses).

25 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 5 ("In general, a special purpose national bank is subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks.").

26 *See id.* (describing further the benefits that a FinTech SPNB can obtain by virtue of becoming a chartered national bank).

certain benefits, notably federal preemption under the National Bank Act and the OCC's regulations.[27]

The OCC FinTech charter has been caught up in litigation since 2016, when the Conference of State Bank Supervisors ("CSBS") and New York State Department of Financial Services ("NYDFS") first filed lawsuits challenging the charter.[28] While the CSBS case was dismissed for lack of ripeness, the U.S. District Court for the Southern District of New York entered judgment in October 2019 in favor of NYDFS, effectively blocking the OCC from issuing any charters to FinTech companies.[29] The OCC appealed to the U.S. Court of Appeals for the Second Circuit and, as of May 2021, the parties are awaiting a decision.[30] Nonetheless, interest in the FinTech charter remains high, particularly among the industry that would stand to benefit the most from a national regulatory regime: marketplace lenders.[31]

B. Marketplace Lending

In simple terms, a marketplace lender is a non-banking entity that makes loans to consumers and businesses via an online platform.[32] Customers apply for a loan, typically via the marketplace lender's website, provide access to their bank and other accounts, and receive a credit

---

27 *See id*. (discussing the dual-banking preemption system).

28 *See* Complaint at 5, Conference of State Bank Supervisors v. OCC, 313 F. Supp. 3d 285 (D.D.C. 2018) (No. 17 Civ. 0763) (brining a suit against the OCC for declaratory and injunctive relief, preventing the OCC from chartering FinTech companies); *see also* Complaint at 1, Vullo v. OCC, No. 17 Civ. 3574, 2017 WL 6512245, at *1 (S.D.N.Y. Dec. 12, 2017) (seeking declaratory and injunctive relief and challenging the OCC SPNB charter for FinTech companies).

29 *See* Conference of State Bank Supervisors v. OCC, No. 18 Civ. 2449, 2019 WL 4194541, at *1 (D.D.C. Sept. 3, 2019) (dismissing the case for lack of ripeness); *see also* Lacewell v. OCC, No. 18 Civ. 8377, 2019 WL 6334895, at *1 (S.D.N.Y. Oct. 21, 2019) (vacating the OCC's regulation permitting it to charter non-depository institutions).

30 *See* Notice of Appeal, *Lacewell*, No. 18 Civ. 8377, 2019 WL 6334895, at *1 (appealing the decision by the U.S. District Court for the Southern District of New York); *see also* Lacewell v. OCC, No. 19-04271 (2d Cir. filed Dec. 19, 2019) (filing the appeal with the U.S. Court of Appeals for the Second Circuit).

31 *See* Kate Rooney, *Fintech's Fast Pass to Traditional Banking is Now Cut Off*, CNBC (Oct. 24, 2019, 5:00 AM), https://www.cnbc.com/2019/10/24/fintechs-fast-pass-to-traditional-banking-is-now-cut-off.html (pointing out that FinTech companies were very interested in the OCC charter). *But see* Zach A. Pette, *It's Harder for Fintechs to Become Banks. And That's Good*., PAYMENTSSOURCE (Mar. 26, 2020, 11:00 AM), https://www.paymentssource.com/opinion/its-harder-for-fintechs-to-become-banks-and-thats-good (arguing against a national bank charter for FinTech companies but noting many companies, including Varo and Square, are eager to obtain the benefits of a national bank charter).

32 *See* PERKINS, *supra* note 14, at 1–2 (describing the central features of marketplace lenders).

decision almost immediately.[33] The process is expedited through the use of machine learning and artificial intelligence to assess alternative, nontraditional data, enabling the program to generate a credit decision within minutes.[34] The platform's use of alternative data make marketplace lenders particularly accessible to unbanked and underbanked customers who are often unable to obtain credit from chartered institutions that use more traditional data.[35] The growth of the industry is further evidence of the popularity of marketplace lenders, who saw a global increase in credit originations from $11 billion in 2013 to $284 billion in 2016.[36] In 2019, two of the largest industry players in the United States, LendingClub and OnDeck, originated almost $15 billion in loans combined.[37]

There are two primary business models by which the marketplace lender can extend credit: (1) the direct lending model; and (2) the bank partnership model.[38] Under either model, the marketplace lender does not take deposits and instead relies on the market or its bank partner to fund the loan.[39] In the direct lending model, the marketplace lender holds the loans on its balance sheet and incurs all the credit risk if a borrower defaults.[40] Direct marketplace lenders generally have to obtain a license for every state in which they want to do business, which can discourage companies from pursuing the direct lending model.[41]

In the bank partnership model, the marketplace lender relies on a state- or nationally-chartered bank to originate the loan, which the marketplace

---

33 *See How Do I Get a Loan?*, LENDINGCLUB, https://help.lendingclub.com/hc/en-us/articles/214496857 (last visited May 25, 2021) (detailing the steps for securing credit); *see also* HOW IT WORKS, ONDECK, https://www.ondeck.com/how-it-works (last visited Apr. 12, 2020) (summarizing OnDeck's credit application process for potential customers).

34 *See* Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499, 500–05 (2019) (explaining how FinTech lenders use machine learning and artificial intelligence).

35 *See id.* at 528 (discussing the benefits of artificial intelligence).

36 Stijn Claessens et al., *Fintech Credit Markets Around the World: Size, Drivers and Policy Issues*, 2018 BIS Q. REV. 29, 33.

37 *See* LendingClub Corp., Annual Report (Form 10-K), at 58 (Feb. 19, 2020) (reporting $12.3 billion in loan originations in 2019); *see also* On Deck Cap., Inc., Annual Report (Form 10-K), at 4 (Feb. 28, 2020) (reporting $2.5 billion in loan originations in 2019).

38 *See* PERKINS, *supra* note 14, at 2–3 (describing the marketplace lending business models and noting that the direct lending model is also referred to as the balance-sheet lending model); *see also* U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES NONBANK FINANCIALS, FINTECH, AND INNOVATION 87–88 (2018) (discussing the lending models).

39 *See* PERKINS, *supra* note 14, at 11 (noting marketplace lenders do not rely on deposits).

40 *See id.* at 3 (describing the direct lending model, which is also referred to as the balance-sheet lending model).

41 *See* U.S. DEP'T OF THE TREASURY, *supra* note 38, at 87–88 (discussing the direct lending model).

lender then buys back and services for the borrower.[42] Another version of this model, referred to as "peer-to-peer" or "P2P" lending, connects prospective investors with loans that match their risk tolerance and desired rate of return.[43] Once a match is made and the investor has committed to funding the loan, the partner bank originates the loan and sells it to the marketplace lender, who in turn sells the loan to investors in the form of a note.[44]

The bank partnership model is often referred to as a "rent-a-charter" or "rent-a-bank" scheme because the marketplace lender pays the partner bank to originate the loan and, in exchange, obtains the same legal protections and preemption benefits afforded to that institution for that loan.[45] This model can be particularly beneficial for a marketplace lender seeking to avoid state usury caps because, under *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,[46] the loan originated by the partner bank is valid so long as it complies with the usury laws of the state in which the bank is located. However, a Second Circuit decision from 2015 eviscerated this arrangement by holding that third-party debt buyers cannot avail themselves of the partner bank's federal preemption of state usury caps.[47] Consequently, the benefits of the "rent-a-charter" structure are waning, making the OCC's FinTech charter all the more appealing.[48]

---

[42] *See id.* at 88 (discussing the bank partnership model); *see also* PERKINS, *supra* note 14, at 3 (explaining how the bank partnership model functions).

[43] *See* U.S. DEP'T OF THE TREASURY, *supra* note 38, at 88 (discussing the P2P lending model); *see also* PERKINS, *supra* note 14, at 4 (illustrating the P2P lending model).

[44] *See* U.S. DEP'T OF THE TREASURY, *supra* note 38, at 88 (detailing the funding strategy in the P2P funding model); *see also* PERKINS, *supra* note 14, at 3 (explaining the securitization process in the P2P lending model, also referred to as the indirect funding model).

[45] *See, e.g.*, PERKINS, *supra* note 14, at 18 (explaining the legal challenges that rent-a-charter schemes face, particularly when considering who the true lender is).

[46] 439 U.S. 299, 313 (1978) (holding that a bank may charge its out-of-state customers the interest rate that is permitted in the state where the bank is located).

[47] *See* Madden v. Midland Funding, LLC, 786 F.3d 246, 251 (2d Cir. 2015) (holding that third-party debt buyer partners of national banks cannot preempt state usury caps under the National Bank Act).

[48] *See* Joseph B. Sconyers et al., *OCC Fintech Charter Headed to the Second Circuit*, JONES DAY (Jan. 2020), https://www.jonesday.com/en/insights/2020/01/occ-fintech-charter-headed-to-the-second-circuit (contending that the Second Circuit's decision in *Madden v. Midland* "raised existential questions" for FinTech companies and made the prospect of a national bank charter more appealing).

C. The Bank Holding Company Act: A History of a Statute Under Siege

The BHCA regulates the parent companies of entities that meet the definition of a bank under the statute.[49] These bank holding companies ("BHCs") are subject to enhanced regulation and supervision by the Federal Reserve Board of Governors ("Board").[50] Specifically, there are a number of requirements that a company must meet before becoming a BHC, such as requesting pre-approval by the Board before acquiring any bank or any additional bank.[51] The Board also restricts the permissible activities of the non-banking subsidiaries of BHCs to those that are "so closely related to banking or managing or controlling banks as to be a proper incident thereto . . . ."[52]

The BHCA was initially enacted for two primary and interrelated purposes: (1) to prevent the monopolization of commercial credit; and (2) to restrict the interstate expansion of bank branches.[53] The enactment of the groundbreaking legislation was the result of an uptick in banks forming BHCs as a means to subvert state banking regulations restricting interstate branching.[54] The drafters of the BHCA feared this trend would lead to the rise of a "national banking empire."[55] Nonetheless, following the BHCA's passage in 1956, the policy focus shifted from the two above rationales to the separation of banking and commerce, reflecting concerns about banks becoming too immersed in non-banking activities.[56] The three policies for the BHCA that Congress put forth can be summarized as: (1) restricting interstate banking; (2) preventing the monopolization of commercial credit; and (3) separating banking and commerce.

i. The Evolving Definition of a "Bank" Under the BCHA

Whether an entity qualifies as a bank under the BHCA determines the statute's applicability. A company that acquires a nonbank entity will not

---

[49] 12 U.S.C. § 1841(a)(1).

[50] *Id.* § 1844 (requiring BHCs to register with the Board and authorizing the Board to regulate BHCs).

[51] *Id.* §§ 1842(a), 1843(j)(1), (4)–(5).

[52] 12 C.F.R. § 225.28(a) (2021).

[53] *See* H.R. REP. NO. 84-609, at 2–7 (1955) (outlining the reasons for the BHCA, including combatting the growing number of BHCs seeking to take advantage of out-of-state markets); *see also* Omarova & Margaret, *supra* note 8, at 119 (summarizing the two underlying rationales for the BHCA).

[54] *See* H.R. REP. NO. 84-609, at 4 (detailing the expansion of BHCs across state lines).

[55] *See* Omarova & Margaret, *supra* note 8, at 120 (citing Note, *The Bank Holding Company Act of 1956*, 75 BANKING L.J. 277, 293 (1958)).

[56] *See id.* at 124 (demonstrating the shift in focus to the separation of banking and commerce).

be subject to the requirements of the BHCA or heightened regulation by the Board.[57] The definition of a bank under the BHCA is the product of numerous amendments between 1956, when the statute was enacted, and 1987, when the definition of a bank was most recently amended.[58] Congress acknowledged that the BHCA as originally enacted was not intended to contemplate all the issues and risks posed by BHCs.[59] Yet, because the statute was not comprehensive, this gave rise to loopholes.[60] As the BHCA's legislative history demonstrates, for every amendment to the statute, there was a corresponding increase in institutions seeking to take advantage of newly-created loopholes.[61]

The 1966 Amendments to the BHCA redefined a bank as "any institution that accepts deposits that the depositor has a legal right to withdraw on demand . . . ."[62] Congress narrowed the original 1956 definition[63] realizing that restricting the application of the BHCA to depository institutions could still serve the underlying objective of restraining the concentration of commercial credit.[64] Congress viewed it as unnecessary to apply the BHCA to companies that owned savings banks and thus applied the statute only to institutions that accepted demand deposits.[65] However, the 1966 Amendments enabled holding companies to sidestep the requirements of the BHCA by ensuring that the institutions under their control did not accept what would legally be considered demand deposits.[66]

In 1970, Congress again amended the definition of a bank to "any institution . . . which (1) accepts deposits that the depositor has a legal

---

[57] *Cf.* 12 U.S.C. § 1841(a), (c)(1) (applying the statute's restrictions only to BHCs that own banks that meet the statutory definition).

[58] *See* Omarova & Margaret, *supra* note 8, at 138–39 (noting that Congress amended the definition of a bank under the BHCA three times).

[59] *See* H.R. REP. NO. 89-534, at 3 (1965) (stating the BHCA was not intended to anticipate all possible problems).

[60] *See id.* at 3–4 (closing the loophole for trust banks).

[61] *See*, *e.g.*, Omarova & Margaret, *supra* note 8, at 151–52 (discussing the growing number of acquisitions of nonbank banks in the 1980s, exploiting a loophole in an older version of the BHCA).

[62] Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 3, 80 Stat. 236, 236.

[63] *See* Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 2(c), 70 Stat. 133, 133 (defining 'bank' as "any national banking association or any State bank, savings bank, or trust company . . . ").

[64] S. REP. NO. 89-1179, at 7 (1966).

[65] *See id.* (providing that the "commonly accepted test" for whether an institution is a commercial bank is whether it accepts demand deposits).

[66] *See id.* (maintaining that the 1966 Amendments opened the door to holding companies that could control both commercial and *de facto* banking subsidiaries so long as these entities did not take demand deposits).

right to withdraw on demand, and (2) engages in the business of making commercial loans."[67] The 1970 definition of a bank restricted the BHCA's application only to those institutions engaged in commercial and not consumer lending.[68] This change, in effect, allowed any company to obtain control of an FDIC-insured institution that both accepted deposits and made *consumer* loans without implicating the BHCA.[69] This so-called "nonbank bank" loophole rapidly proliferated given that companies could own banks without being subject to the restrictions of the BHCA.[70]

Viewing this trend as a major threat to the separation of banking and commerce, Congress closed the nonbank bank loophole in the Competitive Equality Banking Act ("CEBA") of 1987 by amending the definition of a bank to its current version:

> (A) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act. (B) An institution . . . which both—(i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) is engaged in the business of making commercial loans.[71]

CEBA also included a number of exceptions from the definition of a bank, specifically excluding foreign banks, trust banks, credit unions, credit card banks, industrial loan companies (ILCs), and savings banks.[72] The exceptions to the definition of a bank under the BHCA shed light on the statute's underlying policy rationales, providing some guidance as to when Congress will apply the BHCA to a particular type of entity.

ii. The BHCA's Policy Rationales

Prior to the BHCA's enactment in 1956 and in order to protect small community banks, a number of states imposed restrictions on banks' abilities to expand across state borders.[73] In response, several entities began to form BHCs because it enabled them to own banks from different

---

[67] Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1760.

[68] *See* S. REP. NO. 91-1084, at 24 (1970) (discussing the Board's concerns that the 1966 Amendments made the definition of a bank too broad).

[69] *See* S. REP. NO. 100-19, at 2 (1987) (discussing the rise of the nonbank bank loophole).

[70] *See* Omarova & Margaret, *supra* note 8, at 150 (expanding upon the creation of the nonbank bank loophole).

[71] Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 554; *see also* 12 U.S.C. § 1841(c)(1).

[72] Competitive Equality Banking Act of 1987 § 101(a); *see also* 12 U.S.C. § 1841(c)(2).

[73] *See* Omarova & Margaret, *supra* note 8, at 120–21 (discussing the interstate banking rationale).

states while avoiding restrictions on interstate banking.[74] States and local bankers grew concerned that the growing number of BHCs threatened the ability of community banks to operate in the commercial credit market.[75] The BHCA was thus born from the two harmonious policy rationales of (1) restricting interstate banking and (2) preventing excessive concentration of commercial credit.[76] Nevertheless, market and economic realities made these two objectives less feasible.[77] Interstate banking restrictions simply fell out of favor while resistance to the monopolization of commercial credit faded as more banks consolidated and merged with each other "in search for . . . economies of scale . . . ."[78] Instead, policymakers grew more concerned with the intermingling of banking and commerce.[79]

Separating banking and commerce has been a long-standing principle of U.S. financial regulation, and it has evolved over time.[80] Beginning in the 1860s, the National Bank Act of 1864 provided for a limited set of core banking powers.[81] The separation of banking and commerce was then formally codified into law with the Glass-Steagall Act of 1933, which limited the activities that banks could engage in, specifically prohibiting banks from dealing in or underwriting securities.[82] However, banks were

---

74 *Id.* at 121.

75 *Id.* at 122 (noting that the BHCA was the result of lobbying efforts by smaller local banks).

76 *Id.* at 120.

77 *Id.* at 123 n.33 (analyzing the historical and economic developments that lessened the importance of restricting expansions into interstate banking).

78 *Id.* at 123–24 (detailing "the wave of bank mergers, acquisitions, and consolidations" that occurred throughout the latter half of the 20th century).

79 *Id.* at 124 (citing PATRICIA A. MCCOY, BANKING LAW MANUAL: FEDERAL REGULATION OF FINANCIAL HOLDING COMPANIES, BANKS AND THRIFTS § 4:03 (Matthew Bender ed., 2nd ed., 2011)) ("Soon after 1956, the main focus of BHC regulation gradually began shifting away from its original emphasis on prevention of undue concentration of commercial bank credit toward the issue of separation of banking and commerce.").

80 *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 794 (2017) (noting the historical significance of the separation of banking and commerce in banking law). *See generally* Stephen K. Halpert, *The Separation of Banking and Commerce Reconsidered*, 13 J. CORP. L. 481 (providing a history of the separation of banking and commerce in the United States).

81 *See* Halpert, *supra* note 80, at 492 (noting the powers granted to banks by the National Bank Act were limited in scope); *see also* 12 U.S.C § 24(Seventh) (containing a one-sentence description of the powers of banks that states: "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . ").

82 *See* WILLIAM D. JACKSON, CONG. RSCH. SERV., NO. 87-352 E, GLASS-STEAGALL ACT: COMMERCIAL V. INVESTMENT BANKING 2 (1987) (discussing the purpose and enactment of the Glass-Steagall Act, which was to counteract the risky intermingling of commercial

still permitted to affiliate with purely commercial firms.[83] The most meaningful change came in 1956 with the BHCA, which finally imposed restrictions on the activities of bank affiliates.[84]

There are three main arguments in favor of maintaining the separation between banking and commerce: "the needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive economic enterprise, and to prevent excessive concentration of financial and economic power in the financial sector."[85] The safety and soundness argument has to do with the bank's exposure to risky nonbanking activities as both banks and the deposit insurance fund (for depository banks) should not be used to prop-up failing commercial affiliates.[86] The second argument pertains to bias in credit underwriting, as banks affiliated with commercial firms may be strongly incentivized "to make important lending decisions on the basis of such decisions' potential impact on their commercial affiliates' financial condition or profitability."[87] Lastly, the third prong relates to the potential for banks and commercial firms to merge and form large financial conglomerates to the exclusion of small businesses and businesses not affiliated with a bank.[88]

In 1999, Congress enacted the Gramm-Leach-Bliley Act ("GLBA"), which both partially repealed Glass-Steagall and created a new financial entity: the financial holding company ("FHC").[89] FHCs are able to engage in a broader range of activities that are "financial in nature" or determined to be "complementary" to a financial activity.[90] While the GLBA did not outright repeal the separation of banking and commerce, it did make it

---

banking and securities dealing that was a contributing factor to the financial meltdown that precipitated the Great Depression).

83 Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 274 (2013).

84 *Id.*

85 *Id.* at 275.

86 *See id.* at 275–76 (discussing the problems with allowing commercial businesses to benefit from the deposit insurance fund through their bank affiliates).

87 *Id.* at 276; *see also* S. REP. NO. 100-19, at 8 (1987) (quoting Federal Reserve Chairman Paul Volcker) ("Suppose the local appliance dealer comes in to ask for loans from a bank run by a large retail chain. I suspect the branch manager isn't going to be very happy to provide the money . . . .If he does [make the loans], I suspect he is going to find himself selling shoes . . . before long.").

88 *See* Omarova, *supra* note 83, at 276–77.

89 Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338, 1341 (1999); *see also* Omarova, *supra* note 83, at 279 (discussing the GLBA).

90 12 U.S.C. § 1843(k)(1).

significantly easier for companies to own a bank while also owning other nonbank entities.[91]

III. ANALYZING THE FINTECH CHARTER AND THE APPLICABILITY OF THE BHCA

The OCC FinTech charter specifically requires that marketplace lenders not take deposits, yet allows them to avail themselves of all the rights and benefits of becoming a national bank.[92] Because of this, the FinTech charter is highly desirable for marketplace lenders seeking greater regulatory clarity and certainty, particularly because of the federal preemption benefits.[93] Throughout the history of the BHCA, numerous entities have sought to take advantage of the BHC structure without triggering the statute and thus being subject to enhanced regulation by the Board.[94] This demonstrates that the BHC structure itself is highly desirable as it enables companies to consolidate.[95] But, as the BHCA is currently written, it would not apply to the parent company of a marketplace lender because the marketplace lender would not meet the statutory definition of a bank.[96] An analysis of the BHCA's explicit and implicit underlying policy rationales demonstrates that the BHCA should apply to the parent companies of chartered FinTech SPNBs because doing so would serve those rationales.[97]

---

91 *See* Omarova & Margaret, *supra* note 8, at 126 (contending that the principle of the separation of banking and commerce was retained "by a last minute amendment" to the GLBA).

92 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2, at 2 (stating that depository institutions would not qualify for the FinTech charter); *see also* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 5 (stating that SPNBs are subject to the same laws and standards as chartered national banks and that a FinTech SPNB would have the same rights as any other nationally-chartered bank).

93 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 5 (noting that SPNBs would be able to avail themselves of the preemption benefits available to chartered national banks under the National Bank Act and the OCC's regulations).

94 *See generally* Omarova & Margaret, *supra* note 8 (providing a history of the definition of a bank under the BHCA, which evolved in response to companies seeking to become BHCs without being regulated as such under the statute).

95 *See id.* at 123–24 (discussing the trend among banks and their holding companies to merge, acquire, and consolidate in order to take advantage of the benefits that a large financial conglomerate has to offer).

96 *See* PERKINS, *supra* note 14, at 11 (noting marketplace lenders do not take deposits and instead rely on other sources of funding); *see also* 12 U.S.C. § 1841(c)(1) (2018) (defining a bank as an institution that takes demand deposits).

97 *See generally* Omarova & Margaret, *supra* note 8 (discussing the changing definition of a bank under the BHCA pursuant to the underlying policy rationales).

A. Proposing a BHCA Analysis Framework

Let us return to the case of FastCash, Inc., our hypothetical marketplace lender that is now a charted SPNB. Recall that Abracadabra, Inc., a technology and e-commerce company, is seeking to acquire FastCash in order to offer lending services to its customers and, in doing so, it would not be subject to the requirements under the BHCA. But, should it be?

The underlying rationales for the BHCA helped guide Congress when determining whether an entity should be considered a bank under the statute.[98] These policy rationales can be used as a framework to analyze whether companies like Abracadabra should be subject to the requirements of the BHCA by including marketplace lenders, such as FastCash, in the definition of a bank.[99] The first part of the analysis framework encompasses the three explicit underlying policy rationales that emerged throughout the history of the BHCA: (1) restricting interstate banking; (2) preventing the monopolization of commercial credit; and (3) separating banking and commerce.[100] The second part of the analysis framework proposes three new rationales that were implicit in the policy decisions underlying the BHCA' definition of a bank: (1) the availability of a parallel regulatory regime; (2) access to the federal safety net; and (3) mitigating too-big-to-fail institutions.[101]

i. Framework Part I: Explicit Rationales for the BHCA

Over time, restricting interstate banking and preventing the excessive concentration of commercial credit faded away as the primary policy objectives of the BHCA because the economic realities of the financial industry had changed.[102] Congress ultimately repealed the restrictions on interstate banking under the BHCA in 1994, finding the provision no

---

98 *See generally id.* (providing a history of the evolution of the BHCA due to underlying policy rationales).

99 *See generally id.* (demonstrating how Congress created the definition of a bank and the exemptions from the definition of a bank based on whether doing so served the underlying policy rationales).

100 *See id.* at 119 (prevention of excessive concentration of commercial credit and the separation of banking and commerce); *see also id.* at 120 (restricting geographic expansion of large banking groups and to prevent excessive concentration in the commercial banking industry).

101 *See id.* at 190 (parallel regulatory regime); *see also id.* at 151–52 (pointing out that commercial companies who acquire banks also acquire cheap funding from the bank's depositors because the deposits are insured by the federal government); *id.* at 127 (discussing how, under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, nonbank systemically important financial institutions ("SIFIs") are regulated similarly to BHCs)

102 *See id.* at 122–23 (examining how these two rationales became less relevant).

longer useful.[103] In 1987, CEBA further eroded the restrictions against interstate banking by codifying an explicit federal preemption of state interstate banking laws.[104] However, preventing the excessive concentration of commercial credit remains a viable, though not central, objective of the BHCA.[105] This is seen in the definition of a bank in the statute itself, which includes entities that take demand deposits and make *commercial* loans, demonstrating a focus on commercial credit as opposed to consumer credit.[106] In addition, CEBA created an exemption from the definition of a bank for trust companies, but specifically restricted them from making *commercial* loans.[107] Although restricting interstate banking is not as essential when balancing the various policy rationales supporting the applicability of the BHCA, preventing the excessive concentration of commercial credit remains relevant.[108]

The importance of these latter two policy rationales pales in comparison to the third policy rationale: separating banking and commerce.[109] Recall the three reasons Congress chose to separate banking and commerce: (1) ensuring banks' safety and soundness by restricting affiliations with risky, purely-commercial businesses; (2) preventing bias in credit decisions causing banks to prop-up their failing commercial affiliates to the detriment of other potential borrowers; and (3)

---

[103] *See id*. at 123 n.33 (discussing the development and eventual repeal of the Douglas Amendment and explaining why the restrictions on interstate banking fell out of favor).

[104] *See* H.R. REP. NO. 100-261, at 172 (1987) (Conf. Rep.) (explaining the rationale for preempting state laws restricting interstate banking as important for bank acquisitions).

[105] *See generally id.* (retaining provisions of the BHCA that protect against the monopolization of commercial credit).

[106] *See id.* at 119–20 (closing the nonbank bank loophole but maintaining commercial loans as a key feature of a bank); *see also* 12 U.S.C. § 1841(c)(1) (current statutory definition of a bank).

[107] Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 554; *see* H.R. REP. NO. 100-261, at 120.

[108] *See* Omarova & Margaret, *supra* note 8, at 172 (noting CEBA also exempted credit card banks from the statutory definition of a bank because these entities were not engaged in commercial lending); *see also id.* at 178 (discussing the credit union exemption, which was justified on the basis that credit unions did not impact the commercial credit market); *id.* at 190 (emphasizing Congress' concerns about the excessive concentration of commercial credit).

[109] *See generally* Omarova, *supra* note 83 (providing a thorough discussion of the history and importance of separating banking and commerce in U.S. financial regulation and providing recent examples that demonstrate the conflicts of interest that arise from allowing financial institutions to deal in commodities); Khan, *supra* note 80 (analogizing the separation of banking and commerce to antitrust law and explaining why Amazon poses similar risks to the economy as banks who affiliate with purely commercial businesses); Lina M. Khan, T*he Separation of Platforms and Commerce*, 119 COLUMBIA L. REV. 973 (2019) (emphasizing the importance of "separation regimes" in other industries, including banking).

discouraging the formation of large financial conglomerates.[110] While these reasons illuminate why the separation of banking and commerce is a priority, the history of the BHCA also demonstrates how that separation is continuously undermined by companies seeking to exploit loopholes and gain the benefits of owning a bank.[111]

An ILC, one of the entities excepted from the definition of a bank, is a good example of what happens when an entity is exempt from application of the BHCA.[112] In 2005, there was significant controversy when Wal-Mart attempted to form its own ILC in order to offer financial services to its customers.[113] Realizing the implications for the separation of banking and commerce, the FDIC subsequently imposed a moratorium on Wal-Mart's application for deposit insurance as well as all other applications by commercial firms seeking ILCs.[114] Despite this, ILCs continue to benefit from exemption status under the BHCA, and the popularity of an ILC charter has not abated.[115] Some have speculated that Big Tech companies, such as Google, Amazon, and Apple, will apply for an ILC charter sometime soon, posing a direct threat to the separation of banking and commerce.[116]

Congress appears to have legitimate reasons for wanting separate banking and commerce, despite disagreement among legal scholars, policymakers, and regulators as to whether doing so is still a worthwhile

---

110 *See* Omarova, *supra* note 83, at 275–76.

111 *Cf.* JACKSON, *supra* note 82, at 13–14 (discussing the benefits of allowing banks to diversify by affiliating with commercial businesses).

112 *See* Omarova & Margaret, *supra* note 8, at 160 (discussing the ILC exemption to the definition of a bank under the BHCA).

113 *See id.* at 168 (providing a history of Wal-Mart's attempt to obtain an ILC).

114 *See id.* (discussing the FDIC's moratorium on Wal-Mart's application for deposit insurance and the related fallout); *see also* Scott Coleman & James Kim, *FDIC Issues Proposed Rule for Approval of ILC Deposit Insurance Applications*, JD SUPRA (Mar. 25, 2020), https://www.jdsupra.com/legalnews/fdic-issues-proposed-rule-for-approval-86042/ (discussing the process by which ILCs apply for a charter under the relevant state authorities and subsequently apply for deposit insurance with the FDIC).

115 *See generally* DAVID W. PERKINS, CONG. RSCH. SERV., IF11374, INDUSTRIAL LOAN COMPANIES AND FINTECH IN BANKING (2019) (analyzing the increasing popularity of ILC charters among technology companies and the implications for the separation of banking and commerce).

116 *See id.* at 2 ("[O]bservers have speculated that technology giants such as Google, Amazon, and Apple might have reason to want a bank charter, possibly including an ILC, in the near future.").

goal.[117] In reality, these threats create significant conflicts of interest.[118] A recent example from the early 2010s in which Goldman Sachs utilized its commodities and derivatives businesses to profit from its own manipulation of aluminum prices underscores the importance of maintaining the separation between banking and commerce even in modern times.[119] Returning to our hypothetical marketplace lender, FastCash, and Abracadabra, such an acquisition mirrors the more recent trend of Big Tech entering financial services; thus, the separation of banking and commerce should factor heavily into the analysis framework.[120]

ii. Framework Part II: Proposed Rationales

As the BHCA evolved, new policy rationales determining the statute's applicability emerged as both the market and regulatory environment changed, particularly following the financial crisis of 2008.[121] The earliest exemptions to the definition of a bank under the BHCA were carved out for credit unions and savings and loan associations, or "thrifts."[122] Congress did not view these entities as banks for the purposes of the

---

[117] *Compare* Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 400–01 (2012) (arguing financial regulators should adjust to the current structure of the market rather than pushing for the separation of banking and commerce), *and* Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 322 (1987) (highlighting the benefits of allowing banks to diversify their assets), *and* Peter J. Wallison, *Why Are We Still Separating Banking and Commerce?* AM. BANKER (Jul. 27, 2017, 9:30 AM), https://www.americanbanker.com/opinion/why-are-we-still-separating-banking-and-commerce (explaining that enabling banks to affiliate with nonbank entities has certain benefits such as diversification, enhanced risk tolerance, increased efficiency, and opportunities for capital expansion), *with* Thomas E. Wilson, *Separation Between Banking and Commerce Under the Bank Holding Company Act -- A Statutory Objective Under Attack*, 33 CATH. U.L. REV. 163, 184 (1983) (contending that the separation of banking and commerce should be strengthened as "an essential ingredient of a sound banking system" and to suppress the rise of nonbank banks).

[118] *See* Omarova, *supra* note 83, at 276 (listing the potential conflicts of interest that would arise from an intermingling of banking and commerce); *see also* Khan, *supra* note 109, at 1053 (stating bias as the drive behind separating banking and commerce).

[119] *See generally* Omarova, *supra* note 83 (providing a detailed history and analysis of Goldman Sachs' commodities business and the consequences).

[120] *See* BIS, ANNUAL ECONOMIC REPORT 60 (2019) (noting the trend among Big Tech companies, including e-commerce platforms, to offer lending services to their customers).

[121] *See* Omarova & Margaret, *supra* note 8, at 190 (tracking the changing policy rationales for the BHCA since CEBA in response to the financial crisis and the enactment of Dodd-Frank).

[122] *See id.* at 174 (discussing the credit union exemption); *see also id.* at 179 (discussing the exemption for savings associations).

BHCA, so the companies that seek to acquire them need not abide by the statute's requirements or apply for approval by the Board.[123] Though not explicitly stated, the rationale for these exemptions was, in part, due to the existence of a parallel regulatory regime.[124] Credit unions are regulated and supervised by the National Credit Union Administration ("NCUA"), and thrift holding companies are regulated by the OCC (though, when the exemption was created, thrift holding companies were regulated by the Office of Thrift Supervision ("OTS")).[125] When considering whether our hypothetical marketplace lender, FastCash, should fall under the definition of a bank under the BHCA, we may also consider whether it is subject to a parallel federal regulatory regime.[126]

Another implicit rationale for the applicability of the BHCA has to do with access to the federal safety net, i.e., deposit insurance.[127] This rationale can be thought of as an offshoot of the separation of banking and commerce.[128] Policymakers supported separating banking and commerce out of concerns that access to deposit insurance by commercial businesses would give them an unfair competitive advantage over businesses that have not acquired a deposit-taking bank.[129] Part of the reason for closing the nonbank bank loophole in 1987 was to prevent "direct access to federally-insured retail deposits that served as a cheaper source of financing because of the public subsidy."[130] While access to such valuable funding is permissible for banks, who provide a public service, it is less necessary for commercial firms who are expected to rely on market forces

---

123 *See* 12 U.S.C. § 1841(c)(2) (codifying exemptions to the definition of a bank in the BHCA).

124 *See* Omarova & Margaret, *supra* note 8, at 190 (pointing out the parallel regulatory regime for credit unions and the parallel regulatory regime for thrifts).

125 *See id.* at 187 (explaining that Dodd-Frank altered the regulatory regime for thrifts by dissolving OTS and transferring authority to the OCC).

126 *See id.* at 190.

127 *See id.* at 152 (elaborating on the vulnerability of the federal safety net if purely commercial businesses were allowed to affiliate with banks).

128 *See* Omarova, *supra* note 83, at 275–76 (expanding upon the risks posed to the deposit insurance fund by purely commercial businesses in the context of discussing the underlying reasons for separating banking and commerce).

129 *See* S. REP. NO. 100-19, at 7 (1987) (reporting that failing to close the nonbank bank loophole would undermine the separation of banking and commerce and undermine market competition); *id.* at 8 ("The nonbank bank loophole allows commercial firms that own nonbanks to gain an unfair competitive advantage over bank holding companies and over commercial firms that do not have captive nonbank banks."); *cf.* JACKSON, *supra* note 82, at 14 (making the case against allowing the intermingling of banking and commerce because giving businesses access to cheap funding and "not funds obtained at higher competitive costs in less-regulated capital and credit markets" is generally anti-competitive).

130 Omarova & Margaret, *supra* note 8, at 152; *see also* S. REP. NO. 100-19 at 8 (discussing Congress' reasoning for closing the nonbank bank loophole).

for both funding and competition.[131] We may also ask, therefore, whether our marketplace lender FastCash has access to the federal safety net such that it would give Abracadabra an unfair competitive advantage over other commercial firms.[132]

Lastly, a more recent rationale has emerged following the financial crisis of 2008 and enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: safeguarding firms that are too big to fail.[133] Dodd-Frank revolutionized financial stability regulation with the creation of the Financial Stability Oversight Council (FSOC), whose ability to designate nonbank systemically important financial institutions ("SIFIs") gives the Board power that never existed under the BHCA; that is, oversight over nonbank institutions—institutions with *no* banking subsidiaries—such as insurance companies.[134] Under Dodd-Frank, firms designated as SIFIs by FSOC are subject to enhanced regulation by the Board and must maintain certain capital thresholds, among other requirements.[135] While the FSOC regime is separate and apart from the BHCA, it adopts a similar framework and applies it to firms designated as SIFIs.[136] It is notable that Congress viewed safeguarding too-big-to-fail financial conglomerates as a key policy objective underlying a BHCA-like regulatory regime.[137]

The concept behind the FSOC designation process was that financial firms could become so large that they pose a systemic risk to the entire financial system such that their failure is not an option (thus the moniker "too-big-to-fail").[138] FSOC initially showed promise, with some legal

---

131 *See* Omarova & Margaret, *supra* note 8, at 152 n.146 (stating that because of deposit insurance, U.S. banks receive "a significant public subsidy," but this is because "they perform important public utility functions"); PERKINS, *supra* note 14, at 4, 5–6 (illustrating and explaining the funding sources for marketplace lenders, who do not take deposits).

132 *See*, *e.g.*, *id.* (discussing the implications of access to deposit insurance for commercial businesses who partner with depository institutions).

133 *See id.* at 191 (noting how the Dodd-Frank financial stability regime functions as a backstop to the BHCA for firms not covered under the statute).

134 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 111, 113, 124 Stat. 1376, 1392, 1398 (establishing FSOC and vesting it with the authority to subject nonbank institutions to enhanced supervision and prudential regulation by the Board); *see* Omarova & Margaret, *supra* note 8, at 127 (explaining Dodd-Frank's applicability to firms designated as SIFIs, even ones that do not own a bank, and how they would become subject to supervision and regulation by the Board much like BHCs).

135 Dodd-Frank Wall Street Reform and Consumer Protection Act § 115.

136 *See* Omarova & Margaret, *supra* note 8, at 127 (contending that Dodd-Frank essentially adopted the BHCA regulatory regime and applied it to firms designated as SIFIs).

137 *See id.* (noting the financial crisis made the once "obsolete" BHCA relevant again).

138 *See* DAVID W. PERKINS ET AL., CONG. RSCH. SERV., R45518, BANKING POLICY ISSUES IN THE 116TH CONGRESS 20 (2019) (discussing the concept of too-big-to-fail, stemming from the financial crisis of 2007–2009).

scholars positing that the new financial stability regime would make a strong BHCA less necessary.[139] In other words, a BHC that is not subject to the BHCA due to the fact that it controls an exempt entity could still be subject to oversight by the Board if it is designated as a SIFI.[140] Others questioned the effectiveness of Dodd-Frank's solution for resolving too-big-to-fail institutions.[141] Nevertheless, Dodd-Frank's financial stability regime has since been rolled back. The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 raised the threshold for SIFI designation from $50 billion to $250 billion in assets.[142] Additionally, Treasury Secretary Steven Mnuchin announced changes to FSOC's designation guidelines that would make it harder to designate too-big-to-fail institutions as SIFIs.[143] Accepting the premise that FSOC would serve

---

[139] *See, e.g.*, Omarova & Margaret, *supra* note 8, at 191 (arguing that the debate over the BHCA's applicability will be much less vital following Dodd-Frank and pointing out that the FSOC regime can also serve the same policy rationales that underlie the BHCA). *But see* Hilary J. Allen, *Putting the 'Financial Stability' in Financial Stability Oversight Council*, 76 OHIO STATE L.J. 1087, 1091 (2015) (arguing that the effectiveness of FSOC has been questionable owing to the need for a restructuring, explaining that FSOC's member agencies "have only nebulous responsibility for financial stability concerns, and this responsibility is easily shirked when the economy is booming and regulatory intervention has become unpalatable").

[140] *See* Omarova & Margaret, *supra* note 8, at 191 (making the point that a company not covered by the BHCA could still be subject to supervision by the Board in a BHCA-like manner under Dodd-Frank).

[141] *See* Thomas W. Joo, *Lehman 10 Years Later: The Dodd-Frank Rollback*, 50 LOY. U. CHI. L.J. 561, 595–96 (2019) (stating that FSOC had "withered" under the Trump Administration owing to the administration's deregulatory agenda and that "[i]n 2013 and 2014, the FSOC identified four companies [as SIFIs]," but "[t]here are now no more non-bank financial companies with this designation"). *See generally* Allen, *supra* note 139 (discussing the risks and inadequacies of an *ex post* approach to financial stability and financial crises, criticizing Dodd-Frank and FSOC); Arthur E. Wilmarth, *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951 (2011) (discussing the shortcomings of Dodd-Frank's approach to too-big-to-fail and the SIFI designation process).

[142] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401, 132 Stat. 1296, 1356 (2018); *see also* Joo, *supra* note 141, at 568 (discussing the changes that the 2018 legislation made to Dodd-Frank and FSOC's SIFI designation process).

[143] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 71,740, 71,760 (Dec. 30, 2019) (to be codified at 12 C.F.R. pt. 1310); *see also* John W. Banes et al., *FSOC Shift to an Activities-Based Approach Signals an Emphasis on the Risks to Financial Stability from Digital Transformation*, DAVIS POLK (Jan. 15, 2020), https://www.davispolk.com/files/2020-01-15_fsoc_shift_to_activities-based_approach_signals_emphasis_on_risks_from_digital_transformation.pdf (summarizing the changes to the SIFI designation process under the 2019 guidance). It should be noted that the 2019 FSOC guidance is a potential target for rollback by the Biden Administration. *See* Gregg Gelzinis, *5 Priorities for the Financial Stability Oversight Council*, CTR. FOR AM. PROGRESS (Mar. 31, 2021, 12:01 AM),

to complement the BHCA—and recognizing that there are no presently designated SIFIs—it appears that the BHCA will have to assume the role of safeguarding too-big-to-fail institutions going forward.[144]

B. Applying the Framework: Marketplace Lending

Having established a framework by which to analyze whether marketplace lenders should qualify as banks under the BHCA, we can now apply that framework to our hypothetical marketplace lender, FastCash. The first rationale—restricting interstate banking—has faded away from the BHCA's focus.[145] Nonetheless, even if we were to consider whether defining FastCash as a bank under the BHCA would serve this rationale, FastCash offers lending services to its customers via an online platform only and does not have any branch locations.[146] Even if Congress retained restricting interstate banking as a key policy objective for the BHCA, applying the definition of a bank to FastCash would not serve this rationale.[147]

The second rationale, preventing the monopolization of commercial credit, stemmed from concerns by community bankers that they would be pushed out of the market by larger banking entities.[148] While it remains a valid policy goal for the BHCA, the reality of the financial industry is that most banks have consolidated to form large financial conglomerates, hoarding a significant percentage of the commercial credit market.[149] Our hypothetical marketplace lender FastCash makes consumer loans only, and the concentration of *consumer* credit was not an issue that Congress

---

https://www.americanprogress.org/issues/economy/reports/2021/03/31/497439/5-priorities-financial-stability-oversight-council/.

144 *See* Omarova & Margaret, *supra* note 8, at 191 (discussing the potential for FSOC to fill the shoes of the BHCA when it comes to too-big-to-fail institutions); *see also* John Heltman, *Prudential, the Last Nonbank SIFI, Sheds the Label*, AM. BANKER (Oct. 17, 2018, 9:08 AM), https://www.americanbanker.com/news/prudential-the-last-nonbank-sifi-sheds-the-label (reporting on FSOC's decision to remove Prudential's SIFI designation, which was the last remaining SIFI).

145 Omarova & Margaret, *supra* note 8, at 122–23 ("[S]afeguarding interstate banking restrictions faded away as the primary policy purpose behind the BHCA.").

146 *See*, *e.g.*, PERKINS, *supra* note 14, at 1 (describing marketplace lenders as online entities that do not provide services via a physical location).

147 *See* Omarova & Margaret, *supra* note 8, at 122 (explaining that the restrictions in the BHCA against interstate banking arose as a result of banks forming BHC to avoid state laws in interstate branching).

148 *See id.* (characterizing small independent and community bankers as the main thrust behind the BHCA due to fears of being overrun by large interstate banks).

149 *See id.* at 124 (describing the allocation of commercial credit among large financial institutions versus small and medium-sized banks).

was concerned about.[150] But, say for example that FastCash wanted to expand into small business lending.[151] FastCash's share of the small business lending market would likely be relatively minor compared to the total amount of commercial credit.[152] However, small business credit origination by marketplace lenders is growing rapidly, and there is reason to assume that FastCash will be competitive with other commercial lenders in the future.[153] Additionally, it is likely that Abracadabra's acquisition of FastCash could pose a risk to the concentration of commercial credit given that Abracadabra, a large e-commerce technology company, holds a substantial share of the market in the retail industry and thus has a large customer base.[154]

We now turn to the question of whether defining FastCash as a bank under the BHCA would serve the separation of banking and commerce.[155] The first prong of this rationale pertains to safety and soundness, specifically whether FastCash, as a national SPNB, is "too vital to be subject to the risks of other business activities."[156] It is unlikely that a small lender such as FastCash, even if acquired by a larger company like Abracadabra, would face systemic risks due to Abracadbra's nonbanking businesses.[157] However, Abracadabra's use of big data could pose problems that might affect both its retail customers and lending customers.[158] Therefore, it would seem defining FastCash as a bank under the BHCA would serve the safety and soundness prong. The second prong pertains to bias in credit underwriting, particularly whether FastCash would be more inclined to lend to Abracadabra to prop-up its failing

---

[150] H.R. REP. NO. 84-609, at 2 (1955) ("There has developed in this country . . . a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the community's industrial and commercial activities . . . .The bank holding company device threatens to destroy this democratic grassroots institution."); *see* Omarova & Margaret, *supra* note 8, at 148 (explaining Congress' focus on commercial loans as opposed to consumer loans).

[151] *See* PERKINS, *supra* note 14, at 5 (describing the commercial lending activities of marketplace lenders).

[152] *See id.* (providing statistics on marketplace lenders' consumer and small business lending portfolios, noting that marketplace lenders "accounted for less than 1% of the total consumer and small-business loan market").

[153] *See id.* (emphasizing that marketplace lending is growing at a fast pace and noting the industry saw an increase of 163% in credit originations between 2011 and 2015).

[154] *See*, *e.g.*, Khan, *supra* note 80, at 795 (analogizing the risks posed by Amazon in the antitrust sense to the intermingling of banking and commerce).

[155] *See* Omarova & Margaret, *supra* note 8, at 123–24 (discussing the separation of banking and commerce).

[156] Khan, *supra* note 80, at 795.

[157] *See id.* at 795–96 (suggesting that Amazon's expansion into financial services is unlikely to pose excessive financial risks).

[158] *See id.* at 796 (using the 2013 Target hack as an example of the threat that large retailers pose because of their access to scores of consumer data).

nonbanking businesses.[159] It would be very difficult to predict whether FastCash would be a good actor and conduct transactions with its affiliates at arms-length, but it is safe to assume that bias is a possibility.[160] Lastly, the third prong relates to the potential for Abracadabra to form a large financial conglomerate.[161] This is similarly difficult to predict but, nonetheless, a possibility.[162] It is important to note the growing trend among Big Tech companies to expand into financial services.[163] The "Big Four"—Google, Amazon, Facebook, and Apple—hold a large share of the market and thus have a large consumer base.[164] Even though it is unclear whether this prong is satisfied, there is a sufficient possibility that the acquisition of marketplace lenders will form large financial conglomerates that subjecting FastCash to the definition of bank would seem to serve all three prongs and, therefore, the separation of banking and commerce.[165]

Having discussed the explicit policy rationales, there appears to be a case for subjecting FastCash to the definition of a bank under the BHCA.[166] There remain, however, the proposed implicit rationales, which might shed further light on whether FastCash should be a "bank."[167] The first implicit rationale is the existence, or lack thereof, of a parallel

---

159 *See* Omarova, *supra* note 83, at 276 (discussing bias as an issue with failing to separate banking and commerce).

160 *See* Khan, *supra* note 80, at 795 ("Allowing a vertically integrated dominant platform [such as Amazon] to pick and choose to whom it makes its services available, and on what terms, has the potential to distort fair competition and the economy as a whole.").

161 *See* Omarova, *supra* note 83, at 276–77 (examining the risks of an excessive concentration of economic power).

162 *See* Khan, *supra* note 80, at 796–97 (using Amazon as an example to suggest that allowing such companies to combine various lines of business could create an excessive concentration of economic power).

163 *See*, *e.g.*, Dan Murphy, *Big Tech's Invasion of Banking*, MILKEN INST. (Apr. 26, 2019), https://www.milkenreview.org/articles/big-techs-invasion-of-banking (noting that commercial firms, such as "Amazon, Google, Alibaba and Tencent," are entering the financial services world, threatening antitrust principles and the separation of banking and commerce, particularly because these companies have a large cache of resources and data).

164 *See id.* ("[I]n light of its deep pockets and unprecedented access to data, big tech could prove the greater threat.").

165 *See* Khan, *supra* note 80, at 796–97 (discussing the risks of consolidating economic power).

166 *See* Omarova & Margaret, *supra* note 8, at 119 (emphasizing the relevance of the BHCA's underlying policy rationales); *id.* at 120 (stating that the BHCA's policy rationales have evolved over time as a result of changing conditions); *id.* (reiterating restricting interstate banking and the excessive concentration of commercial credit as underlying policy rationales for the BHCA).

167 *See id.* at 190 (parallel regulatory regime); *id.* at 151–52 (pointing out that commercial companies who acquire banks also acquire cheap funding backed by depositors); *id.* at 127 (discussing how, under the Dodd-Frank Act, nonbank SIFIs are regulated similarly to BHCs).

regulatory regime.[168] The credit union and thrift exemptions to the statutory definition of a bank are notable given that credit unions were already regulated by the NCUA, while thrifts were already regulated by OTS, and subsequently the OCC.[169] With marketplace lenders, there is no parallel regulatory regime at the national level.[170] Marketplace lenders are primarily regulated by the states and may be regulated by the Consumer Financial Protection Bureau (CFPB) to the extent that consumer protection statutes are implicated.[171] This tilts the balance in favor of including marketplace lenders in the statutory definition of a bank.[172]

However, recall that our hypothetical marketplace lender FastCash has received an SPNB charter from the OCC.[173] Therefore, a parallel regulatory regime *would* exist for FastCash at the federal level, but this is hardly dispositive.[174] If being subject to regulation by the OCC weighed *against* BHCA applicability, then there would be no BHCA to begin with. This is because the OCC has primary regulatory authority for all chartered national banks.[175] The fact that FastCash as a SPNB would be regulated by the primary federal banking regulator does not mean that the BHCA should not apply.[176] As a result, analyzing the parallel regulatory structure suggests that FastCash should be subject to the statutory definition of a bank.[177]

The next implicit policy rationale pertains to whether FastCash has access to the federal safety net; specifically, whether Abracadabra would have access to funding subsidized by the public, obtaining an unfair

---

168 *See id.* at 178, 190 (existence of a parallel regulatory regime for thrifts and credit unions).

169 *See id.* at 187 (explaining that Dodd-Frank altered the regulatory regime for thrifts by dissolving OTS and transferring authority to the OCC).

170 *See* PERKINS, *supra* note 14, at 12 (outlining the regulatory framework for the marketplace lending industry).

171 *See id.* at 14–15 (discussing the consumer protection statutes that apply to marketplace lending).

172 *See id.* at 16–17 (discussing the burdensome state regulatory system and lack of a national regulatory regime for marketplace lenders).

173 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 4 (discussing how FinTech SPNBs would be regulated by the OCC as national banks).

174 *See id.* at 6 ("The OCC is the primary prudential regulator and supervisor of national banks.").

175 *Id.*

176 *See id.* at 7 (acknowledging that national banks could be subject to regulation under the BHCA if the bank meets the statutory definition).

177 *See* Omarova & Margaret, *supra* note 8, at 186 n.327 (citing H.R. 10 - The Financial Services Modernization Act of 1999 Hearings before the Comm. on Banking and Financial Servs., 106th Cong. 42-43 (1999) (statement of R. Scott Jones, President, American Bankers Association)).

competitive advantage.[178] This rationale need not be discussed further because subjecting FastCash to the BHCA clearly would not serve to protect the federal safety net.[179] FastCash does not engage in any deposit-taking business nor would it be able to because FinTech SPNBs are not permitted to take deposits.[180] Without any insured deposits, FastCash and its acquisition by Abracadabra pose no threat to the federal safety net.[181]

There appears to be a case in favor of subjecting FastCash to the statutory definition of a bank as doing so would serve the following three rationales: (1) preventing the monopolization of commercial credit; (2) separation of banking and commerce; and (3) availability of a parallel regulatory regime. The last rationale to consider is whether applying the statutory definition of a bank to FastCash would safeguard FastCash and its parent company as too-big-too-fail.[182]

Because it is near impossible to predict with certainty whether Abracadabra will become too-big-to-fail, the primary argument weighing in favor of defining FastCash as a bank under the BHCA is the fact that the Dodd-Frank regime is no longer a fallback.[183] In the Dodd-Frank Act, Congress created FSOC with the intention of regulating large firms posing a systemic financial risk to the markets.[184] Initially, it was unclear how effective FSOC would be, but it was suggested that the exemptions from the BHCA definition of a bank would become less important in favor of the Dodd-Frank regulatory regime.[185] Because that has not happened, and

---

[178] *See id.* at 152 (explaining that the issue with nonbank banks was that there access to the federal safety net, giving them an unfair competitive advantage).

[179] *See id.* at 150 (noting that nonbank banks accepted insured deposits, which exposed the federal safety net to risk).

[180] *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2 (prohibiting depository institutions from applying for the FinTech charter).

[181] *Cf.* Omarova & Margaret, *supra* note 8, at 152 (pointing out that deposits serve as cheap source of funding because they are insured and backed by federal dollars).

[182] *See id.* at 191 (discussing the relevance of the FSOC regime to the BHCA).

[183] *See* Joo, *supra* note 141, at 568 (detailing how the Dodd-Frank regulatory regime and SIFI designation process have been rolled back under the Trump Administration); *see also* Banes, *supra* note 143, at 3 (describing how the FSOC designation process has changed pursuant to the 2019 guidance).

[184] S. REP. NO. 111-176, at 2 (2010) (providing that the purpose of FSOC would be "to prevent a recurrence or mitigate the impact of financial crises that could cripple financial markets and damage the economy" and to "require nonbank financial companies to be supervised by the Federal Reserve if their failure would pose a risk to U.S. financial stability"); *see* Omarova & Margaret, *supra* note 8, at 129 (discussing the BHCA-like regulatory regime that was enacted following the financial crisis).

[185] *See* Omarova & Margaret, *supra* note 8, at 129 (noting that the success of Dodd-Frank's changes on financial stability and the regulation of too-big-to-fail institutions had not yet come to fruition); *id.* at 191 (arguing that the distinctions in the definition of a bank under the BHCA matter less following the passage of Dodd-Frank because this new

the future of the Dodd-Frank regime remains uncertain, this weighs in favor of applying the statutory definition of a bank to FastCash and subjecting Abracadabra to the enhanced regulations of the BHCA.[186]

IV. RECOMMENDATIONS FOR APPLYING THE BHCA TO FINTECH SPNBS

Given that the BHCA does not currently apply to FinTech SPNBs and having concluded that it should, this Comment recommends that Congress amend Section 2(c) of the BHCA to include FinTech SPNBs in the definition of a bank.[187] Firstly, it must be noted that the OCC FinTech charter is still being litigated, and no FinTech company has yet applied for the charter.[188] There are two ways by which the FinTech charter can become a legal certainty. On the one hand, the Second Circuit could uphold the OCC's authority to charter FinTech SPNBs, in which case, the charter proposal would move forward.[189] On the other hand, Congress could amend the National Bank Act and give the OCC the specific authority to charter FinTech SPNBs, similar to what it has done in the past for trust banks and bankers' banks.[190] Alternatively, however, it is possible that the OCC neither wins its case nor receives authority from

---

systemic regulatory regime was serving the same rationales underlying the BHCA but with broader applicability).

186 *See id.* at 191 (suggesting that the Dodd-Frank regulatory regime might make it less likely that companies will try to avoid triggering the BHCA because of FSOC's designation authority). *But see* Complaint at 1, Lacewell v. OCC, No. 18 Civ. 8377, 2019 WL 6334895, at *1 (S.D.N.Y. Oct. 21, 2019) (cautioning against enabling companies to obtain the benefits of a national bank charter because it would make them more likely to be too-big-to-fail).

187 *See* 12 U.S.C. § 1841(c)(1) (setting out the seminal definition of a bank under the BHCA).

188 Notice of Appeal, *Lacewell*, 2019 WL 6334895; *see also* Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 1, *Lacewell*, 2019 WL 6334895, (noting that the OCC has not yet received any applications for a FinTech charter). As of March 2021, this appears to still be the case. *See* Oral Argument at 38:20, Lacewell v. OCC, No. 19-04271 (2nd Cir. Dec. 19, 2019), https://www.ca2.uscourts.gov/decisions/isysquery/c3e0d214-c94f-47df-a78e-5f18f43d4a12/201-210/list/ (stating that there is no evidence in the record that the OCC had received an application from a FinTech company to obtain an SPNB charter).

189 *See* Glenn G. Lammi, *State vs. Federal Clash Over National "Fintech Charter" Set For 2020 Appellate Showdown?*, FORBES (Nov. 14, 2019, 1:04 PM), https://www.forbes.com/sites/wlf/2019/11/14/state-vs-federal-clash-over-national-fintech-charter-set-for-2020-appellate-showdown/#34e43868757d (contending that the Second Circuit could uphold the OCC FinTech charter).

190 *See* 12 U.S.C. § 27 (giving the OCC the authority to charter trust banks and bankers' banks).

Congress to charter FinTech SPNBs, and the potential for a FinTech national bank disappears for the time being.[191]

Assuming the OCC's ability to charter FinTech companies as national banks is valid, Congress should amend the BHCA in accordance with previous iterations to include FinTech SPNBs in the statutory definition of a bank.[192] In 1982, Congress enacted the Garn-St Germain Depository Institutions Act, which provides a framework that Congress can replicate to apply the BHCA definition of a bank to FinTech SPNBs.[193] Title IV of the Garn-St Germain Act introduced the concept of "bankers' banks," that is, banks that are owned "exclusively . . . by other depository institutions" and are engaged in "providing services for other depository institutions and their officers, directors, and employees."[194] Under the 1970 version of the BHCA, bankers' banks did not meet the statutory definition of a bank.[195] Consequently, in the Garn-St Germain Act, Congress amended the BHCA to provide that:

> The term 'bank' also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees.[196]

While this provision has been effectively repealed because it is no longer necessary under the 1987 statutory definition of a bank, the Garn-St Germain Act provides a useful roadmap for how Congress can close the

---

[191] *See* Sarah Grotta, *Is This the End for the OCC Fintech Charter?*, PAYMENTSJOURNAL (Oct. 23, 2019), https://www.paymentsjournal.com/is-this-the-end-for-the-occ-fintech-charter/ (reporting on the OCC FinTech charter litigation). Alternatively, the Second Circuit could dismiss the case for lack of ripeness, after which the OCC could begin chartering FinTech companies. This would not resolve the underlying litigation on the merits. *See* Oral Argument at 18:21, Lacewell v. OCC, No. 19-04271 (2nd Cir. Dec. 19, 2019), https://www.ca2.uscourts.gov/decisions/isysquery/c3e0d214-c94f-47df-a78e-5f18f43d4a12/201-210/list/ (arguing that the case should be dismissed for lack of ripeness).

[192] *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, 96 Stat. 1469 (codified as amended in sections of 12 U.S.C.) (subjecting bankers' banks to the definition of a bank under the BHCA).

[193] *Id.*

[194] *Id.* (giving the OCC the authority to charter bankers' banks and amending the BHCA to include bankers' banks in the definition of a bank); *see* 12 U.S.C. § 27 (codifying the OCC's authority charter bankers' banks and defining a bankers' bank).

[195] Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1760 (1970).

[196] § 404(d), 96 Stat. 1469 at 1512.

BHCA loophole in the OCC FinTech charter.[197] This Comment recommends that Congress append a subsection to Section 2(c)(1) of the BHCA providing that the term "bank" also includes institutions chartered as SPNBs pursuant to the OCC FinTech charter.[198]

The Garn-St Germain Act also exempted bankers' banks from the requirement that every bank subsidiary of a holding company be an insured bank as defined in the Federal Deposit Insurance Act ("FDIA").[199] With FinTech SPNBs who, by definition, do not and cannot take deposits, the Garn-St Germain Act appears to be the optimal model for Congress to subject companies with control over FinTech SPNBs to the requirements of the BCHA without also implicating the requirements for deposit insurance.[200]

V. CONCLUSION

As Big Tech makes its way into financial services, U.S. regulators will need to grapple with the reality that the current legal framework is ill-equipped to deal with this entry. This Comment proposes an analysis framework that is flexible and will necessarily evolve over time in order to determine whether an entity should be subject to the requirements of the BHCA. An analysis of the BHCA's underlying policy rationales reveals that marketplace lenders should be included in the statutory definition of a bank. Congress can do this by amending the definition under Section 2(c) of the BHCA to include SPNBs chartered pursuant to the OCC FinTech charter. Doing so would ensure that Big Tech companies and others could not use the charter as a form of regulatory arbitrage by circumventing the enhanced requirements under the BHCA.

---

[197] *See* Competitive Equality Banking Act of 1987, Pub. L. No. 100–86, § 101, 101 Stat. 552, 554–564 (codified at 12 U.S.C. § 1841) (replacing the statutory definition of a bank); *see also* U.S.C. § 1841(c)(1).

[198] *See* 12 U.S.C. § 1841(c)(1) (containing the statutory definition of a bank under the BHCA).

[199] § 404(d)(2), 96 Stat. 1469 at 1512 (exempting bankers' banks from BHCA deposit insurance requirements).

[200] *See* § 404, 96 Stat. 1469 at 1512 (amending the BHCA with respect to bankers' banks).