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### The OCC FinTech Charter and the Bank Holding Company Act: Exposing a Loophole

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The OCC FinTech Charter and the Bank Holding Company Act:  
Exposing a Loophole

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## **Abstract**

The Office of the Comptroller of the Currency's ("OCC") FinTech charter is an attempt by a U.S. financial regulator to grapple with emerging technologies in financial services in a meaningful way, and while this comment does not come to any conclusions as to whether the OCC's framework is correct, this comment does argue that the FinTech charter would enable companies to circumvent the requirements of the Bank Holding Company Act ("BHCA"). Despite the OCC initially suggesting that the BHCA could apply to FinTech companies chartered as special purpose national banks ("SPNBs"), it is clear that these entities do not and cannot meet the definition of a bank under the BHCA because FinTech SPNBs are not permitted to take deposits. Furthermore, the industry that the charter is actually targeting, marketplace lending, does not take deposits and instead relies on other sources of funding. Therefore, the parent companies of FinTech SPNBs can offer financial services and avail themselves of the rights and benefits of a national bank without complying with the BHCA. This comment argues that FinTech SPNBs should be subject to the BHCA because an analysis of marketplace lending reveals that including the industry in the statutory definition of a bank would serve the BHCA's underlying policy rationales.

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## **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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> See OFFICE 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).

<sup>2</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT, CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES 1 (2018) (establishing that FinTech companies may be eligible for a national bank charter and explaining how FinTech charter applications might be evaluated).

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*.<sup>3</sup> 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.<sup>4</sup> However, in order to meet the definition of a bank under the BHCA, the institution must either be FDIC-insured or take deposits *and* make commercial loans.<sup>5</sup> Because of the OCC's own requirement that depository institutions cannot apply for the

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<sup>3</sup> See *id.* at 2 (stating that the FinTech charter is intended only for institutions that do not take deposits).

<sup>4</sup> See OFFICE 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.").

<sup>5</sup> See 12 U.S.C. § 1841(c)(1) (2018) (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).

FinTech charter, parent companies of FinTech SPNBs would be, by definition, excluded from application of the BHCA.<sup>6</sup>

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.—that offers a variety of services in addition

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<sup>6</sup> 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).

to its e-commerce platform, including big data analytics.<sup>7</sup> To facilitate its e-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 insured by the Federal Deposit Insurance Corporation ("FDIC"). 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.<sup>8</sup> If there is a loophole in the FinTech charter

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<sup>7</sup> See generally Dan Murphy, *Big Tech's Invasion of Banking*, MILKEN INST. (Apr. 26, 2019), <https://www.milkenreview.org/articles/big-techs-invasion-of-banking> (discussing the threat of Big Tech companies seeking to enter the financial services industry),bh

<sup>8</sup> 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 industry exploiting loopholes).



that undermines the underlying policy objectives of the BHCA, then undoubtedly FinTech SPNBs should also be tethered to the BHCA's requirements like other FDIC-insured national banks.<sup>9</sup> 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.<sup>10</sup> 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 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.

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<sup>9</sup> See *id.* at 159-68 (exemplifying how an exemption from the BHCA precipitated the rapid growth of the industrial loan company industry).

<sup>10</sup> 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).

Section II of this comment provides an introduction to the OCC FinTech charter, the marketplace lending industry, and the BHCA. Section III proposes a framework to analyze the BHCA's applicability and applies that framework to our hypothetical marketplace lender, FastCash. Section IV recommends a solution in the form of a statutory amendment from Congress that would incorporate FinTech SPNBs in the definition of a bank.

## **II. The FinTech Charter and the BHCA**

FinTech is difficult to define and there is no universally-accepted definition.<sup>11</sup> 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."<sup>12</sup> The types of technologies are broad and include products such as marketplace lending, mobile banking, mobile payments, crowdfunding, cryptocurrency, automated

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<sup>11</sup> See, e.g., Christopher G. Bradley, *FinTech's Double Edges*, 93 CHI.-KENT L. REV. 61, 78-9 (2018) (advocating for a broad definition of financial technology).

<sup>12</sup> *Fintech*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/fintech> (last visited Feb. 15, 2020).

investing, and other digitized assets and services.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> In 2018, the OCC attempted to provide greater regulatory clarity

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<sup>13</sup> See, e.g., Jackson Mueller, *Bipartisan Opportunities to Legislate U.S. FinTech in the 21st Century*, MILKEN INSTITUTE 9 (2018) (tabulating the various sectors of the financial technology industry).

<sup>14</sup> See DAVID W. PERKINS, CONG. RESEARCH 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).

<sup>15</sup> See Perkins, *supra* note 14, at 2 (discussing FinTech as a new development in market trends); see *id.* at 26 (noting FinTech presents regulatory challenges).

for FinTech companies that pay checks or make loans, but do not take deposits, in the form of a proposed FinTech charter.<sup>16</sup>

#### **A. Introducing the OCC FinTech Charter**

The 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.<sup>17</sup> In March 2016, the agency capitalized on its work by publishing its first white paper on the principles of regulating financial innovation.<sup>18</sup> 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

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<sup>16</sup> See OFFICE 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).

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

<sup>18</sup> See *id.* (highlighting the white paper released in March 2016 in which the OCC discussed regulation of financial innovation, including FinTech).

companies.<sup>19</sup> 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 . . . ." <sup>20</sup> In the case of the FinTech charter, these activities are limited paying checks or lending money.<sup>21</sup>

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 . . . ." <sup>22</sup> The FinTech charter provides a nationalized solution to the current state-by-state licensing

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<sup>19</sup> See *id.* at 2-3 (summarizing the agency's findings and discussing the creation and establishment of the OCC's Office of Innovation).

<sup>20</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2, at 2.

<sup>21</sup> See 12 C.F.R. § 5.20(e)(1)(i) (2015) ("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.").

<sup>22</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 2 (2018).

system.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> According to the OCC, a FinTech company chartered as an SPNB has the same rights as any other chartered national bank.<sup>26</sup> This special status affords SPNBs certain benefits, notably federal preemption under the National Bank Act and the OCC's regulations.<sup>27</sup>

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<sup>23</sup> See Perkins, *supra* note 14, at 17 (explaining how fintech companies are regulated at the state level).

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

<sup>25</sup> See OFFICE 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.").

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

<sup>27</sup> See *id.* (discussing the dual-banking preemption system).

The 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.<sup>28</sup> 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.<sup>29</sup> The OCC appealed the decision to the U.S. Court of Appeals for the Second Circuit

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<sup>28</sup> 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 challenging the OCC SPNB charter for FinTech companies).

<sup>29</sup> 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).

and, as of April 2020, the case is pending.<sup>30</sup> 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.<sup>31</sup>

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<sup>30</sup> 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); see also UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (Mar. 26, 2020), <http://www.ca2.uscourts.gov/> (extending all filing deadlines by 21 days beginning April 6, 2020 due to the COVID-19 pandemic).

<sup>31</sup> 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.paymentsource.com/opinion/its-harder-for-fintechs-to-become-banks-and-thats-good> (arguing against a national bank



## **B. Marketplace Lending**

In simple terms, a marketplace lender is non-banking entity that makes loans to consumers and businesses via an online platform.<sup>32</sup> Customers apply for a loan, typically via the marketplace lender's website, provide access to their bank and other accounts, and receive a credit decision almost immediately.<sup>33</sup> The process is expedited through the use of machine learning and artificial intelligence ("AI") to assess alternative, nontraditional data, enabling the program to

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charter for FinTech companies but noting many companies, including Varo and Square, are eager to obtain the benefits of a national bank charter).

<sup>32</sup> See Perkins, *supra* note 14, at 1-2 (describing the central features of marketplace lenders).

<sup>33</sup> See HOW DOES AN ONLINE CREDIT MARKETPLACE WORK?, LENDINGCLUB, <https://www.lendingclub.com/public/how-peer-lending-works.action> (last visited Apr. 12, 2020) (describing LendingClub's online credit application and securitization); 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).

generate a credit decision within minutes.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> In 2019, two of the largest industry players in the United States, LendingClub and OnDeck, originated almost \$15 billion of loans combined.<sup>37</sup>

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<sup>34</sup> See Kristin Johnson et al., *Symposium: Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law: Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 *FORDHAM L. REV.* 499, 500 (2019) (explaining how FinTech lenders use machine learning and AI).

<sup>35</sup> See *id.* at 528 (discussing the benefits of AI).

<sup>36</sup> Stijn Claessens et al., *Fintech Credit Markets Around the World: Size, Drivers and Policy Issues*, *BIS Q. REV.* 33 (2018).

<sup>37</sup> See LendingClub, Form 10-K Annual Report 58 (Feb. 19, 2020) (reporting \$12.3 billion in loan originations in 2019); see also OnDeck, Form 10-K Annual Report 4 (Feb. 28, 2020) (reporting \$2.5 billion in loan originations in 2019).

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.<sup>38</sup> Under either model, the marketplace lender does not take deposits and instead relies on the market or its bank partner to fund the loan.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

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<sup>38</sup> 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. DEPARTMENT OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES NONBANK FINANCIALS, FINTECH, AND INNOVATION 87-88 (2018) (discussing the lending models).

<sup>39</sup> See Perkins, *supra* note 14, at 11 (noting marketplace lenders do not rely on deposits).

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

<sup>41</sup> See U.S. DEPARTMENT OF THE TREASURY, *supra* note 38, at 87-88 (discussing the direct lending model).

In the bank partnership model, the marketplace lender relies on a state- or nationally-chartered bank to originate the loan, which the marketplace lender then buys back and services for the borrower.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

The bank partnership model is often referred to as a “rent-a-charter” or “rent-a-bank” scheme because the marketplace

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<sup>42</sup> See *id.* at 88 (discussing the bank partnership model); see also Perkins, *supra* note 14, at 3 (explaining how the bank partnership model functions).

<sup>43</sup> See U.S. DEPARTMENT 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).

<sup>44</sup> See U.S. DEPARTMENT OF THE TREASURY, *supra* note 38, at 88 (detailing the funding strategy in the peer-to-peer funding model); see also Perkins, *supra* note 14, at 3 (explaining the securitization process in the peer-to-peer lending model, also known as the indirect funding model).

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.<sup>45</sup> 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.*,<sup>46</sup> 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.<sup>47</sup> Consequently, the benefits of

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<sup>45</sup> 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).

<sup>46</sup> 439 U.S. 299, 313 (1978) (holding that a bank may charge its out-of-state customers the interest that is permissible in the state where the bank is located).

<sup>47</sup> See *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2015) (holding that third-party debt buyer partners of national banks cannot preempt state usury caps under the National bank Act).

the “rent-a-charter” structure are waning, making the OCC’s FinTech charter all the more appealing.<sup>48</sup>

### **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.<sup>49</sup> These bank holding companies (“BHCs”) are subject to enhanced regulation and supervision by the Federal Reserve Board of Governors (“Board”).<sup>50</sup> 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.<sup>51</sup> The Board also restricts the

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<sup>48</sup> 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).

<sup>49</sup> 12 U.S.C. § 1841(a)(1) (2018).

<sup>50</sup> See *id.* § 1844 (requiring BHCs to register with the Board and authorizing the Board to regulate BHCs).

<sup>51</sup> *Id.* §§ 1842(a), 1843(j)(1), (4), (5).

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 . . . ." <sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> The drafters of the BHCA feared this trend would lead to the rise of a "national banking empire."<sup>55</sup> Nonetheless, following the BHCA's passage in 1956, the policy focus shifted from the two above rationales to the separation of

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<sup>52</sup> 12 C.F.R. § 225.28 (2019).

<sup>53</sup> 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, *supra* note 8, at 119 (summarizing the two underlying rationales for the BHCA).

<sup>54</sup> See H.R. REP. NO. 84-609, at 4 (detailing the expansion of BHCs across state lines).

<sup>55</sup> See Omarova, *supra* note 8, at 120 (citing Note, *The Bank Holding Company Act of 1956*, 75 BANKING L.J. 277, 293 (1958)).

banking and commerce, reflecting concerns about banks becoming too immersed in non-banking activities.<sup>56</sup> 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  
BHCA**

Whether an entity qualifies as a bank under the BHCA determines the statute's applicability. A company that acquires a nonbank entity will not be subject to the requirements of the BHCA or heightened regulation by the Board.<sup>57</sup> 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.<sup>58</sup> Congress acknowledged that the BHCA as originally enacted was not

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<sup>56</sup> See *id.* at 124 (demonstrating the shift in focus to the separation of banking and commerce).

<sup>57</sup> 12 U.S.C. § 1841(c)(1) (2018).

<sup>58</sup> See Omarova, *supra* note 8, at 138-39 (noting that Congress amended the definition of a bank under the BHCA three times).



intended to contemplate all the issues and risks posed by BHCs.<sup>59</sup> Yet, because the statute was not comprehensive, this gave rise to loopholes.<sup>60</sup> 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.<sup>61</sup>

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 . . . ."<sup>62</sup> Congress narrowed the original 1956 definition realizing that restricting the application of the BHCA to depository institutions could still serve the underlying objective of restraining the concentration of commercial credit.<sup>63</sup> Congress viewed it as unnecessary to apply the BHCA to companies that owned savings banks and thus

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<sup>59</sup> See H.R. REP. No. 89-534, at 3 (1965) (stating the BHCA was not intended to anticipate all possible problems).

<sup>60</sup> See *id.* at 3-4 (closing the loophole for trusts).

<sup>61</sup> See, e.g., Omarova, *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).

<sup>62</sup> Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 3, 80 Stat. 236, 236 (1966).

<sup>63</sup> S. REP. No. 89-1179, at 7 (1966).

applied the statute only to institutions that accepted demand deposits.<sup>64</sup> 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.<sup>65</sup>

In 1970, Congress again amended the definition of a bank to "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."<sup>66</sup> The 1970 definition of a bank restricted the BHCA's application to only those institutions engaged in commercial and not consumer

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<sup>64</sup> See *id.* (providing that the "commonly accepted test" for whether an institution is a commercial bank is whether it accepts demand deposits).

<sup>65</sup> 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).

<sup>66</sup> Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1760 (1970).

lending.<sup>67</sup> 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.<sup>68</sup> This so-called “nonbank bank” loophole rapidly proliferated given that companies could own banks without being subject to the restrictions of the BHCA.<sup>69</sup>

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)

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<sup>67</sup> See S. REP. NO. 89-1179, at 24 (discussing the Board’s concerns that the 1966 Amendments made the definition of a bank too broad).

<sup>68</sup> See S. REP. NO. 100-19, at 2 (1987) (discussing the rise of the nonbank bank loophole).

<sup>69</sup> See Omarova, *supra* note 8, at 150 (expanding upon the creation of the nonbank bank loophole).

is engaged in the business of making commercial loans.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup> In response, several entities began to form BHCs because it enabled them to own banks from different states while

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<sup>70</sup> Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 101(a), 101 Stat. 552, 554 (1987); 12 U.S.C. § 1841(c) (1) (2018).

<sup>71</sup> Competitive Equality Banking Act of 1987 § 101(a); 12 U.S.C. § 1841(c) (2).

<sup>72</sup> See Omarova, *supra* note 7, at 120-21 (discussing the interstate banking rationale).

avoiding restrictions on interstate banking.<sup>73</sup> 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.<sup>74</sup> The BHCA was thus born from the two harmonious policy rationales of (1) restricting interstate banking and (2) preventing excessive concentration of commercial credit.<sup>75</sup> Nevertheless, market and economic realities made these two objectives less feasible.<sup>76</sup> 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 . . . ."<sup>77</sup> Instead, policymakers grew more concerned with the intermingling of banking and commerce.<sup>78</sup>

Separating banking and commerce has been a long-standing principle of U.S. financial regulation, and it has evolved over

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<sup>73</sup> *Id.* at 121.

<sup>74</sup> *Id.* at 122.

<sup>75</sup> *Id.* at 120.

<sup>76</sup> *Id.* at 123 n.33.

<sup>77</sup> *Id.* at 123-24.

<sup>78</sup> *Id.* at 124.

time.<sup>79</sup> Beginning in the 1860s, the National Bank Act of 1864 provided for a limited set of core banking powers.<sup>80</sup> 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.<sup>81</sup> However, banks were still permitted to affiliate with purely commercial firms.<sup>82</sup> The most meaningful change came in 1956 with the BHCA,

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<sup>79</sup> See 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).

<sup>80</sup> See Halpert, *supra* note 79, at 492 (noting the powers granted to banks by the National Bank Act were limited in scope).

<sup>81</sup> See WILLIAM JACKSON, CONG. RESEARCH SERV., NO. 87-352 E, *THE SEPARATION OF BANKING AND COMMERCE* 4 (1987) (discussing the purpose and enactment of the Glass-Steagall Act).

<sup>82</sup> Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 274 (2013).

which finally imposed restrictions on the activities of bank affiliates.<sup>83</sup>

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."<sup>84</sup> 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.<sup>85</sup> 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

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 275.

<sup>85</sup> See *id.* at 275-76 (discussing the problems with allowing commercial businesses to benefit from the deposit insurance fund through their bank affiliates).

condition or profitability.”<sup>86</sup> 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.<sup>87</sup>

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”).<sup>88</sup> 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.<sup>89</sup> While the GLBA did not outright repeal the separation of banking and commerce, it did make it significantly easier for companies to own a bank while also owning other nonbank entities.<sup>90</sup>

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<sup>86</sup> *Id.* at 276. See also S. REP. NO. 100-19, at 8 (1987) (quoting Federal Reserve Chairman Paul Volcker).

<sup>87</sup> See Omarova, *supra* note 82, at 276-77.

<sup>88</sup> Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338, 1341 (1999); see also Omarova, *supra* note 82, at 279 (discussing the GLBA).

<sup>89</sup> 12 U.S.C. § 1843(k)(1) (2018).

<sup>90</sup> See Omarova, *supra* note 8, at 126 (contending that the principle of the separation of banking and commerce was retained before the GLBA was enacted).



### **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.<sup>91</sup> 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.<sup>92</sup> 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

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<sup>91</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2, at 2 (stating that depository institutions would not qualify for the FinTech charter); see also OFFICE 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); see also *id.* (establishing that a FinTech SPNB would have the same rights as any other nationally-chartered bank).

<sup>92</sup> See OFFICE 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).

enhanced regulation by the Board.<sup>93</sup> This demonstrates that the BHC structure itself is highly desirable as it enables companies to consolidate.<sup>94</sup> 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.<sup>95</sup> An analysis of the BHCA's explicit and implicit underlying policy rationales demonstrates that the BHCA

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<sup>93</sup> See generally Omarova, *supra* note 7 (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).

<sup>94</sup> 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).

<sup>95</sup> See Perkins, *supra* note 14, at 38 (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, including FDIC-insured institutions).

should apply to the parent companies of chartered FinTech SPNBs because doing so would serve those rationales.<sup>96</sup>

**A. Proposing a BHCA Analysis Framework**

Let us return to the case of FastCash, Inc., our hypothetical marketplace lender that is now a chartered 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.<sup>97</sup> 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

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<sup>96</sup> See generally Omarova, *supra* note 8 (discussing the changing definition of a bank under the BHCA pursuant to the underlying policy rationales).

<sup>97</sup> See generally *id.* (providing a history of the evolution of the BHCA due to the underlying policy rationales).

bank.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

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<sup>98</sup> 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).

<sup>99</sup> See *id.* at 119 (commercial credit and the separation of banking and commerce); see also *id.* (expansion of interstate banking).

<sup>100</sup> 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); see also *id.* at 127 (discussing how, under the Dodd-Frank Wall Street

**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.<sup>101</sup> Congress ultimately repealed the restrictions on interstate banking under the BHCA in 1994, finding the provision no longer useful.<sup>102</sup> In 1987, CEBA further eroded the restrictions against interstate banking by codifying an explicit federal preemption of state interstate banking laws.<sup>103</sup> However, preventing the excessive concentration of commercial credit remains a viable, though not

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Reform and Consumer Protection Act of 2010, nonbank systemically important financial institutions ("SIFIs") are regulated similarly to BHCs).

<sup>101</sup> See *id.* at 122-23 (examining how these two rationales became less relevant).

<sup>102</sup> 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).

<sup>103</sup> 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).

central, objective of the BHCA.<sup>104</sup> 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.<sup>105</sup> In addition, CEBA created an exemption from the definition of a bank for trust companies, but specifically restricted them from making *commercial* loans.<sup>106</sup> 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.<sup>107</sup>

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<sup>104</sup> See *generally id.* (retaining provisions of the BHCA that protect against the monopolization of commercial credit).

<sup>105</sup> 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) (2018) (current statutory definition of a bank).

<sup>106</sup> H.R. REP. NO. 100-261, at 120 (1987) (Conf. Rep.).

<sup>107</sup> See Omarova, *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,

The importance of these latter two policy rationales pales in comparison to the third policy rationale: separating banking and commerce.<sup>108</sup> 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

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which was also justified on the basis that credit unions did not impact the commercial credit market); see also *id.* at 190 (emphasizing Congress' concerns about the excessive concentration of commercial credit).

<sup>108</sup> See generally Omarova, *supra* note 82 (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); see generally Khan, *supra* note 79 (analogizing the separation of banking and commerce as a kind of antitrust principle and explaining why Amazon poses similar risks to the economy as banks who affiliate with purely commercial businesses); see generally Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUMBIA L. REV. 973 (2019) (emphasizing the importance of "separation regimes" in other industries, including banking).

causing banks to prop-up their failing commercial affiliates to the detriment of other potential borrowers; and (3) discouraging the formation of large financial conglomerates.<sup>109</sup> 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 firms seeking to exploit loopholes and gain the benefits of owning a bank.<sup>110</sup>

ILCs, one of the entities excepted from the definition of a bank, are a good example of what happens when an entity is exempt from application of the BHCA.<sup>111</sup> In 2005, there was significant controversy when Wal-Mart attempted to form its own ILC in order to offer financial services to its customers.<sup>112</sup> 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

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<sup>109</sup> Omarova, *supra* note 82, at 275-76.

<sup>110</sup> See Jackson, *supra* note 81, at 13-14 (discussing the benefits of allowing banks to diversify by affiliating with commercial businesses).

<sup>111</sup> See Omarova, *supra* note 82, at 160 (discussing the ILC exception to the definition of a bank under the BHCA).

<sup>112</sup> See *id.* at 167-69 (providing a history of Wal-Mart's attempt to obtain an ILC).



applications by commercial firms seeking ILCs.<sup>113</sup> Despite this, ILCs continue to benefit from exemption status under the BHCA, and the popularity of an ILC charter has not abated.<sup>114</sup> 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.<sup>115</sup>

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<sup>113</sup> See *id.* at 168 (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 from the FDIC).

<sup>114</sup> See generally DAVID W. PERKINS, CONG. RESEARCH 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).

<sup>115</sup> See *id.* at 2 ("[O]bservers have speculated that technology giants such as Google, Amazon, and Apple might have reason to

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 goal.<sup>116</sup> In reality, these threats create

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want a bank charter, possibly including an ILC, in the near future.”).

<sup>116</sup> Compare Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 400-401 (2012) (arguing financial regulators should adjust to the current structure of the market rather than pushing for the separation of banking and commerce), and 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 can have 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*

significant conflicts of interest.<sup>117</sup> 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.<sup>118</sup> 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

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*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).

<sup>117</sup> See Omarova, *supra* note 82, at 276 (listing the potential conflicts of interest that would arise from an intermingling of banking and commerce); see also Khan, *supra* note 108, at 1053 (stating bias as the drive behind separating banking and commerce).

<sup>118</sup> See generally Omarova, *supra* note 82 (providing a detailed history analysis of Goldman Sachs’ commodities business and the consequences).

banking and commerce should factor heavily into the analysis framework.<sup>119</sup>

## **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.<sup>120</sup> 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."<sup>121</sup> Congress did not view these entities as banks for the purposes of the BHCA, so the companies that own them need not abide by the statute's requirements or apply for approval by the Board.<sup>122</sup>

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<sup>119</sup> See BIS, ANNUAL ECONOMIC REPORT 2019 31 (2019) (noting the trend among Big Tech companies, including e-commerce platforms, to offer lending services to their customers).

<sup>120</sup> See Omarova, *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).

<sup>121</sup> See *id.* at 174 (discussing the credit union exemption); see also *id.* at 179 (discussing the exemption for savings associations).

<sup>122</sup> See 12 U.S.C. § 1841(c)(2) (codifying the exemptions to the definition of bank in the BHCA).

Though not explicitly stated, the rationale for these exemptions was, in part, due to the existence of a parallel regulatory regime.<sup>123</sup> 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")).<sup>124</sup> 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.<sup>125</sup>

Another implicit rationale for the applicability of the BHCA has to do with access to the federal safety net, i.e.,

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<sup>123</sup> See Omarova, *supra* note 8, at 178 (parallel regulatory regime for credit unions); see also *id.* at 190 (parallel regulatory regime for thrifts).

<sup>124</sup> See *id.* at 187 (explaining that Dodd-Frank altered the regulatory regime for thrifts by dissolving OTS and transferring authority to the OCC).

<sup>125</sup> See *id.* at 190 (discussing the importance of the policy rationales, including the existence of a parallel regulatory regime, to determining whether an entity should be subject to the requirements of the BHCA).

deposit insurance.<sup>126</sup> This rationale can be thought of as an offshoot of the separation of banking and commerce.<sup>127</sup>

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.<sup>128</sup> Part

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<sup>126</sup> See *id.* at 152 n.146 (elaborating on the vulnerability of the federal safety net if purely commercial businesses were allowed to affiliate with banks).

<sup>127</sup> See Omarova, *supra* note 82, at 275-76 (expanding upon the risks posed to the deposit insurance fund by purely commercial businesses in the context of discussing underlying reasons for separating banking and commerce).

<sup>128</sup> See Jackson, *supra* note 81, 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); see also 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); see also *id.* at 8 (“The nonbank bank loophole allows commercial firms that own

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."<sup>129</sup> 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 for both funding and competition.<sup>130</sup> 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.<sup>131</sup>

Lastly, a more recent rationale has emerged following the financial crisis of 2008 and enactment of the Dodd-Frank Wall

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nonbanks to gain an unfair competitive advantage over bank holding companies and over commercial firms that do not have captive nonbank banks.").

<sup>129</sup> Omarova, *supra* note 8, at 152; see also S. REP. NO. 100-19 at 8 (discussing Congress' reasoning for closing the nonbank bank loophole).

<sup>130</sup> *Contra* Omarova, *supra* note 8, at 152 n.146.

<sup>131</sup> See, e.g., *id.* (discussing the implications of access to deposit insurance for commercial businesses who partner with depository institutions).

Street Reform and Consumer Protection Act of 2010: safeguarding firms that are too big to fail.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> While the FSOC regime is separate and apart from the BHCA, it adopts a similar

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<sup>132</sup> 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).

<sup>133</sup> See *id.* 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).

<sup>134</sup> *Id.*



framework and applies it to firms designated as SIFIs.<sup>135</sup> It is notable that Congress viewed safeguarding too-big-to-fail financial conglomerates as a key policy objective underlying a BHCA-like regulatory regime.<sup>136</sup>

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”).<sup>137</sup> FSOC initially showed promise, with some legal scholars positing that the new financial stability regime would make a strong BHCA less necessary.<sup>138</sup> In other words, a BHC that is not subject to the

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<sup>135</sup> See *id.* (contending that Dodd-Frank essentially adopted the BHCA regulatory regime and applied it to firms designated as SIFIs).

<sup>136</sup> See *id.* (noting the financial crisis made the once “obsolete” BHCA relevant again).

<sup>137</sup> See DAVID W. PERKINS ET AL., CONG. RESEARCH SERV., R45518, BANKING POLICY ISSUES IN THE 116<sup>TH</sup> CONGRESS 20 (2019) (discussing the concept of too-big-to-fail, stemming from the financial crisis of 2007-2009).

<sup>138</sup> See Omarova, *supra* note 8, at 191 (arguing that the debate over the BHCA’s applicability will be much less vital following

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.<sup>139</sup> Others questioned the effectiveness of Dodd-Frank's solution for resolving too-big-to-fail institutions.<sup>140</sup> At any rate, 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

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Dodd-Frank and pointing out that the FSOC regime can also serve the same policy rationales that underlie the BHCA).

<sup>139</sup> See *id.* (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).

<sup>140</sup> See generally Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO STATE L.J. 1087 (2015) (discussing the risks and inadequacies of an *ex post* approach to financial stability and financial crises, criticizing Dodd-Frank and FSOC); see generally 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).

designation to from \$50 billion to \$250 billion in assets.<sup>141</sup> 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.<sup>142</sup> Accepting the premise that FSOC would serve 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.<sup>143</sup>

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<sup>141</sup> See Thomas W. Joo, *Lehman 10 Years Later: The Dodd-Frank Rollback*, 50 LOY. U. CHI. L.J. 561, 568 (2019) (discussing the changes that the 2018 legislation made to Dodd-Frank and FSOC's SIFI designation process).

<sup>142</sup> See 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](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).

<sup>143</sup> See Omarova, *supra* note 8, at 191 (discussing the potential for FSOC to fill the shoes of the BHCA when it comes to too-big-

## **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.<sup>144</sup> 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.<sup>145</sup> Even if Congress retained restricting interstate banking as a key policy

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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 designation to remove Prudential’s SIFI designation, which was the last remaining SIFI).

<sup>144</sup> See Omarova, *supra* note 8, at 122–23 (“[S]afeguarding interstate banking restrictions faded away as the primary policy purpose behind the BHCA.”).

<sup>145</sup> See, e.g., Perkins, *supra* note 14, at 1 (describing marketplace lenders as online entities that do not provide services via a physical location).

objective for the BHCA, applying the definition of a bank to FastCash would not serve this rationale.<sup>146</sup>

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.<sup>147</sup> 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.<sup>148</sup> At any rate, our hypothetical marketplace lender FastCash makes consumer loans only, and the concentration of *consumer* credit

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<sup>146</sup> See Omarova, *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).

<sup>147</sup> 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).

<sup>148</sup> See *id.* at 124 (describing the allocation of commercial credit among large financial institutions versus small and medium-sized banks).

was not an issue that Congress was concerned about.<sup>149</sup> But, say for example that FastCash wanted to expand into small business lending.<sup>150</sup> FastCash's share of the small business lending market would likely be relatively minor compared to the total amount of commercial credit.<sup>151</sup> 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.<sup>152</sup> 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

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<sup>149</sup> See *id.* at 148 (explaining Congress' focus on commercial loans as opposed to consumer loans).

<sup>150</sup> See Perkins, *supra* note 14, at 5 (describing the commercial lending activities of marketplace lenders).

<sup>151</sup> See *id.* (providing statistics on marketplace lenders' consumer and small business credit, noting that marketplace lenders "accounted for less than 1% of the total consumer and small-business loan market").

<sup>152</sup> 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).

of the market in the retail industry and thus has a large customer base.<sup>153</sup>

We now turn to the question of whether defining FastCash as a bank under the BHCA would serve the separation of banking and commerce.<sup>154</sup> 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.”<sup>155</sup> 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 Abracadabra’s nonbanking businesses.<sup>156</sup> However, Abracadabra’s use of big data could pose problems that might affect both its retail customers

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<sup>153</sup> See, e.g. Khan, *supra* note 79, at 795 (analogizing the risks posed by Amazon in the antitrust sense to the intermingling of banking and commerce).

<sup>154</sup> See Omarova, *supra* note 7, at 123-24 (discussing the separation of banking and commerce).

<sup>155</sup> Khan, *supra* note 79, at 795.

<sup>156</sup> See *id.* at 795-96 (suggesting that Amazon’s expansion into financial services is unlikely to pose excessive financial risks).

and lending customers.<sup>157</sup> 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 nonbanking businesses.<sup>158</sup> 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.<sup>159</sup> Lastly, the third prong relates to the potential for Abracadabra to form a large financial conglomerate.<sup>160</sup> This is similarly difficult to predict but,

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<sup>157</sup> 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).

<sup>158</sup> See Omarova, *supra* note 82, at 276 (discussing bias as an issue with failing to separate banking and commerce).

<sup>159</sup> See Khan, *supra* note 79, 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.”).

<sup>160</sup> See Omarova, *supra* note 82, at 276–77 (examining the risks of an excessive concentration of economic power).



nonetheless, a possibility.<sup>161</sup> Along the same line, however, it is important to note the growing trend among Big Tech companies to expand into financial services.<sup>162</sup> The “Big Four”—Google, Amazon, Facebook, and Apple—hold a large share of the market and thus have a large consumer base.<sup>163</sup> 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

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<sup>161</sup> See Khan, *supra* note 79, 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).

<sup>162</sup> 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).

<sup>163</sup> See *id.* (“[I]n light of its deep pockets and unprecedented access to data, big tech could prove the greater threat.”).

the definition of bank would seem to serve all three prongs and, therefore, the separation of banking and commerce.<sup>164</sup>

Having discussed the explicit policy rationales, there appears to be a case for subjecting FastCash to the definition of a bank under the BHCA.<sup>165</sup> There remain, however, the proposed implicit rationales, which might shed further light on whether FastCash should be a "bank."<sup>166</sup> The first implicit rationale is

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<sup>164</sup> See Khan, *supra* note 79, at 796-97 (discussing the risks of consolidating economic power).

<sup>165</sup> See Omarova, *supra* note 8, at 119 (emphasizing the relevance of the BHCA's underlying policy rationales); see also *id.* at 120 (stating that the BHCA's policy rationales have evolved over time as a result of changing conditions); see also *id.*

(reiterating restricting interstate banking and the excessive concentration of commercial credit as underlying policy rationales for the BHCA).

<sup>166</sup> 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 backed by depositors); see also *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).

the existence, or lack thereof, of a parallel regulatory regime.<sup>167</sup> The credit union and thrift exemptions to the statutory definition of a bank were justified on the basis that credit unions were already regulated by the NCUA, while thrifts were already regulated by OTS, and subsequently the OCC.<sup>168</sup> With marketplace lenders, there is no parallel regulatory regime at the national level.<sup>169</sup> 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.<sup>170</sup> This tilts the balance in

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<sup>167</sup> See *id.* at 178 (existence of a parallel regulatory regime for thrifts); see also *id.* at 190 (existence of a parallel regulatory regime for credit unions).

<sup>168</sup> See *id.* at 187 (explaining that Dodd-Frank altered the regulatory regime for thrifts by dissolving OTS and transferring authority to the OCC).

<sup>169</sup> See Perkins, *supra* note 14, at 12 (outlining the regulatory framework for the marketplace lending industry).

<sup>170</sup> See *id.* at 14-15 (discussing the consumer protection statutes that apply to marketplace lending).

favor of including marketplace lenders in the statutory definition of a bank.<sup>171</sup>

However, recall that our hypothetical marketplace lender FastCash has received an SPNB charter from the OCC.<sup>172</sup> Therefore, a parallel regulatory regime *would* exist for FastCash at the federal level, but this is hardly dispositive.<sup>173</sup> 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.<sup>174</sup> The fact that FastCash as a SPNB would be regulated by the primary federal banking regulator does

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<sup>171</sup> See *id.* at 16-17 (discussing the burdensome state regulatory system and lack of a national regulatory regime for marketplace lenders).

<sup>172</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 4 (discussing how FinTech SPNBs would be regulated by the OCC as national banks).

<sup>173</sup> See *id.* at 6 ("The OCC is the primary prudential regulator and supervisor of national banks.").

<sup>174</sup> *Id.*

not mean that the BHCA should not apply.<sup>175</sup> As a result, analyzing the parallel regulatory structure suggests that FastCash should be subject to the statutory definition of a bank.<sup>176</sup>

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 competitive advantage.<sup>177</sup> This

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<sup>175</sup> See *id.* at 7 (acknowledging that national banks could be subject to regulation under the BHCA if the bank meets the statutory definition).

<sup>176</sup> See Omarova, *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)) (noting thrift and bank holding companies are regulated differently, which is why the fact that a parallel regulatory system exists for thrifts was relevant to Congress' decision to exempt thrifts from the definition of a bank under the BHCA).

<sup>177</sup> See *id.* at 152 (explaining that the issue with nonbank banks was there access to the federal safety net, giving them an unfair competitive advantage).

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

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

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<sup>178</sup> See *id.* at 150 (noting that nonbank banks accepted insured deposits, which served as the exposure of risk to the federal safety net).

<sup>179</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 2 (prohibiting depository institutions from applying for the FinTech charter).

<sup>180</sup> See Omarova, *supra* note 8, at 152 (pointing out that deposits serve as cheap source of funding because they are insured and backed by federal dollars).

statutory definition of a bank to FastCash would safeguard FastCash and its parent company as too-big-too-fail.<sup>181</sup>

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.<sup>182</sup> In Dodd-Frank, Congress created FSOC with the intention of regulating large firms posing a systemic financial risk to the markets.<sup>183</sup> Initially, it was unclear how effective FSOC would be, but it was expected that the exemptions from the BHCA definition of a bank would become less important in favor

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<sup>181</sup> See *id.* at 191 (discussing the relevance of the FSOC regime to the BHCA).

<sup>182</sup> 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 142 (describing how the FSOC designation process has changed pursuant to the 2019 guidance).

<sup>183</sup> See Omarova, *supra* note 8, at 129 (discussing the BHCA-like regulatory regime that was enacted following the financial crisis).

of the Dodd-Frank regulatory regime.<sup>184</sup> Because that has not happened, and 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.<sup>185</sup>

#### **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

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<sup>184</sup> See *id.* (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); see also *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 systemic regulatory regime was serving the same rationales underlying the BHCA but with broader applicability).

<sup>185</sup> 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).



recommends that Congress amend Section 2(c) of the BHCA to include FinTech SPNBs in the definition of a bank.<sup>186</sup> Firstly, it must be noted that the OCC FinTech charter is still being litigated, and no FinTech company has yet applied for the charter.<sup>187</sup> 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.<sup>188</sup> On the

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<sup>186</sup> See 12 U.S.C. § 1841(c)(1) (2018) (setting out the seminal definition of a bank under the BHCA).

<sup>187</sup> Notice of Appeal, *Lacewell*, No. 18 Civ. 8377, 2019 WL 6334895, at \*1; see also *Lacewell v. OCC*, No. 19-04271 (2d Cir. filed Dec. 19, 2019); see also Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, *Lacewell*, No. 18 Civ. 8377, 2019 WL 6334895, at \*1 (noting that the OCC has not yet received any applications for a FinTech charter).

<sup>188</sup> 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).

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.<sup>189</sup> Alternatively, however, it is possible that the OCC neither wins the Second Circuit case nor receives authority from Congress to charter FinTech SPNBs, and the potential for a FinTech national bank disappears for the time being.<sup>190</sup>

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.<sup>191</sup> In 1982, Congress enacted the Garn-St Germain Depository Institutions Act, which provides

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<sup>189</sup> See 12 U.S.C. § 27 (2018) (giving the OCC the authority to charter trust banks and bankers' banks).

<sup>190</sup> 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).

<sup>191</sup> See Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404, 96 Stat. 1496, 1511-12 (codified as amended in sections of 12 U.S.C.) (subjecting bankers' banks to the definition of a bank under the BHCA).

a framework that Congress can replicate to apply the BHCA definition of a bank to FinTech SPNBs.<sup>192</sup> 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.”<sup>193</sup> Under the 1970 version of the BHCA, bankers’ banks did not meet the statutory definition of a bank.<sup>194</sup> 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

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<sup>192</sup> *Id.*

<sup>193</sup> *See id.* (giving the OCC the authority to charter bankers’ banks and amended the BHCA to include bankers’ banks in the definition of a bank); 12 U.S.C. § 27 (2018) (codifying the OCC’s authority charter bankers’ banks and defining a bankers’ bank) .

<sup>194</sup> Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1760 (1970) .

providing services for other depository institutions and their officers, directors, and employees.<sup>195</sup>

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 BHCA loophole in the OCC FinTech charter.<sup>196</sup> 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.<sup>197</sup>

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”).<sup>198</sup> With FinTech SPNBs who, by definition, do not and cannot take deposits, the Garn-St Germain Act appears to be

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<sup>195</sup> § 404(d), 96 Stat. 1512.

<sup>196</sup> Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 101, 101 Stat. 552, 554-564 (codified at 12 U.S.C. § 1841); U.S.C. § 1841(c)(1) (2018).

<sup>197</sup> See 12 U.S.C. § 1841(c)(1) (containing the statutory definition of a bank under the BHCA).

<sup>198</sup> § 404(d)(2), 96 Stat. 1512 (exempting bankers’ banks from BHCA deposit insurance requirements).

the optimal model for Congress to subject companies with control over FinTech SPNBs to the requirements of the BHCA without also implicating the requirements for deposit insurance.<sup>199</sup>

## **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.

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<sup>199</sup> See § 404, 96 Stat. 1512 (amending the BHCA with respect to bankers' banks).