



## **Comments to the Office of the Comptroller of the Currency on Receiverships for Uninsured National Banks**

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### **Introduction**

Coin Center is a non-profit research and advocacy center focused on the public policy issues facing open and decentralized blockchain technologies. Specifically, our focus encompasses cryptocurrencies (e.g. Bitcoin), decentralized computing platforms (e.g. Ethereum) and inter-ledger systems and protocols (e.g. sidechains). Our mission is to build a better understanding of these technologies and to promote a regulatory climate that preserves the freedom to innovate using them. We do this by producing and publishing policy research from respected academics and experts, educating policymakers and the media about decentralized blockchain technology, and by engaging in advocacy for sound public policy. In that spirit, please find below our comments on the recent OCC notice of proposed rulemaking regarding receiverships for uninsured national banks.

We commend the OCC in taking tangible steps to encourage responsible innovation and address the emerging innovation gap between the United States and the international fintech sector.

The first question in the OCC's NPRM asks is whether the National Bank Act's legal framework for receiverships of uninsured banks raises any unique considerations when applied to a broadly described category of "innovative special purpose banks."<sup>1</sup> This is the only question we will address in this brief comment.

As a preliminary matter, it is critical to determine what types of firms may fit into this category; what types of activities do we imagine such "innovative special purposes banks" engaging in? Coin Center believes that digital currency exchanges (those who create platforms for buying and selling digital currencies, or serve a customer-facing brokerage role in digital currency markets) (1) may be suitable candidates for a national charter, (2) would likely benefit significantly from becoming federally chartered institutions, and (3) do not raise any unique considerations with respect to receivership as compared to traditional nationally chartered trusts. We will briefly address each of these points.

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<sup>1</sup> Department of the Treasury, Office of the Comptroller of the Currency, 12 CFR Part 51 [Docket ID OCC-2016-0017] RIN 1557-AE07, *Receiverships for Uninsured National Banks* (Sep. 16, 2016). Available at <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf> p. 62837.

## **Digital currency exchanges are suitable candidates for a national charter.**

The OCC has suggested that firms focused on “advances in financial technology”<sup>2</sup> may be among those who could benefit from a special purpose national charter. Existing rules require that any entity seeking such a charter will need to perform “*at least one* of the three core banking functions, namely receiving deposits, paying checks, or lending money.”<sup>3</sup> Digital currency exchanges do not engage in lending money and do not generally receive deposits as that activity is traditionally characterized. These companies may, however, pay checks.

When the user of an exchange wishes to obtain digital currency, she will generally need to fund an account using dollars or the currency of foreign nations. This will typically be accomplished via a bank transfer from the customer’s bank to a banking partner of the exchange. Nonetheless, the exchange does not then hold these funds on its own operational balance sheet; instead it holds them for the benefit of the customer. If the customer then chooses, she can trade her dollars for one of a number of digital currencies. Similarly, a customer can send digital currency to an exchange, and trade for dollars which, again, the exchange will hold for the benefit of that customer until she decides to move those funds to her bank via a wire transfer.

Though no longer accomplished with paper checks, the result is the same: *a customer delivers a payment instrument to the institution, and the institution grants that person the value of the instrument in a digital form and holds it for her benefit.* The digital currency exchange is paying checks in the same manner that a traditional state or nationally chartered trust can accept payment instruments and secure the value of those instruments on behalf of the beneficiary.

Digital currency exchanges perform one of the core banking functions and may, therefore, be eligible to become special purpose banks under the OCC’s rules.

## **Digital currency exchanges would benefit significantly from becoming federally chartered institutions.**

The U.S. does not currently offer a particularly welcoming home for digital currency exchanges because of two troublesome structural features of U.S. financial regulation that are not present in many foreign jurisdictions: *federalism*, and a *rules-based rather than principles-based* approach.<sup>4</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See generally, Peter Van Valkenburgh & Jerry Brito, “Comments to the Office of the Comptroller of the Currency on Supporting Responsible Innovation” *Coin Center* (May 27, 2016). Available at <http://coincenter.org/entry/comments-to-the-office-of-the-comptroller-of-the-currency-on-supporting-responsible-innovation>.

Without a federal charter, a digital currency exchange will likely be treated as a money services business and, more narrowly, a money transmitter. As a money transmitter, a firm must be prepared to interface with multiple federal regulators<sup>5</sup> as well as regulators in every one of the several states wherein they have or expect to have customers.<sup>6</sup> Little coordination exists between these several regulatory bodies and conflicting approaches and non-uniformity abound.<sup>7</sup> The resulting complexity and uncertainty massively increases the costs of operating these businesses in the U.S.<sup>8</sup>

Additionally, the U.S. approach to regulation of financial intermediaries—particularly state money transmission licensing law—is, more often than not, rules-based. There are, generally, no flexible standards for consumer protection. Firms are not left to calibrate their own policies using their own internal expertise and understanding of risk in the shadow of a principles-based standard. Instead, a business is prescriptively told to mitigate risks through a set of rigidly defined compliance requirements (e.g. hold surety bonds of specific amounts for customers in each of the several states,<sup>9</sup> and submit extensive and specific licensing applications dealing with many factors inapplicable to their particular, novel business model<sup>10</sup>).

The U.K. already offers fintech innovators a substantially safer harbor than the U.S. In the U.K. there is a one-stop-shop for financial regulation: Her Majesty's Treasury. Moreover, HM Treasury has seen fit to create greater flexibility for such firms via a principles-based approach to regulation engendered by the FCA's recently developed Innovation Hub.<sup>11</sup> The Innovation Hub forgoes rigid, often obsolete, check-the-box requirements in favor of a cooperative dialog between innovators and regulators, a dialog aimed at achieving a set of

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<sup>5</sup> MSBs are subject to regulation by FinCEN under the Bank Secrecy Act as well as being potentially regulated by the CFPB under the Dodd Frank Act, the FTC under Unfair and Deceptive Acts and Practices standards. Additionally, if the firm engages in margin trading or derivatives exchange it will be regulated by the CFTC and potentially the SEC.

<sup>6</sup> Specifically, 53 states and territories have individual licensing requirements for money transmission. See Thomas Brown, *50-STATE SURVEY: Money Transmitter Licensing Requirements* (last accessed May 2016) [http://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/50%20State%20Survey%20-%20MTL%20Licensing%20Requirements\(72986803\\_4\).pdf](http://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/50%20State%20Survey%20-%20MTL%20Licensing%20Requirements(72986803_4).pdf).

<sup>7</sup> For example, as of 2016, the Uniform Law Commission's *Uniform Money Services Act* has only been adopted by legislatures in nine states and territories. The UMSA was finalized in 2000. After 16 years it has only modestly remedied the issue of disparate standards for money transmission regulation across the several states. See Uniform Law Commission, *Uniform Money Services Act* (last accessed May 2016) <http://www.uniformlaws.org/Act.aspx?title=Money%20Services%20Act>.

<sup>8</sup> See Marco Santori, "What is Money Transmission and Why Does it Matter?" *Coin Center* (Apr. 7, 2015) <http://coincenter.org/entry/what-is-money-transmission-and-why-does-it-matter>.

<sup>9</sup> See Thomas Brown, *50-STATE SURVEY: Money Transmitter Licensing Requirements* (last accessed May 2016) [http://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/50%20State%20Survey%20-%20MTL%20Licensing%20Requirements\(72986803\\_4\).pdf](http://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/50%20State%20Survey%20-%20MTL%20Licensing%20Requirements(72986803_4).pdf).

<sup>10</sup> See *Id.*

<sup>11</sup> See Financial Conduct Authority, *Innovator businesses: Project Innovate* (last accessed May 2016), <https://innovate.fca.org.uk/>.

principles—adequate protection of consumer funds, prevention of systemic risks to the economy, and effective transparency for law enforcement—in light of the fresh opportunities and limitations of some new technology or business model.

The lack of a single, centralized, and flexible regulator for fintech products—as the U.K. has in HM Treasury—is the primary barrier to innovation in the U.S.. The OCC is in a prime position to play that singular and flexible regulatory role by chartering new special purpose entities; it can, therefore, remove the barriers to American competitiveness far more rapidly than any other regulatory or political means.

**Digital currency exchanges do not raise any unique considerations with respect to receivership as compared to traditional nationally-chartered trusts.**

As described earlier, a digital currency exchange is paying checks in the same manner that a traditional state or nationally chartered trust can accept payment instruments and secure the value of those instruments on behalf of the beneficiary. Like a chartered trust company, virtual currency exchanges do not have FDIC insurance, and do not engage in the lending out or hypothecation of the assets that they hold for the benefit of their customers. These firms present a similar risk profile as chartered trust companies. Accordingly, we believe there are no unique considerations with respect to receivership presented by virtual currency exchanges, and that rules suitable for traditional trust companies should be a good fit for newly chartered virtual currency firms, should the OCC see fit to grant such a charter.