



January 8, 2021

Via Electronic Mail

Southern District Office
Director for District Licensing
Office of the Comptroller of the Currency
500 North Akard Street, Suite 1600
Dallas, Texas 75201

Northeastern District Office
Director for District Licensing
Office of the Comptroller of the Currency
340 Madison Avenue, Fifth Floor
New York, NY 10173-0002

Re: Applications to Organize a National Trust Bank by BitPay National Trust Bank and Paxos National Trust

Dear Directors:

The undersigned associations (the “Associations”)¹ appreciate the opportunity to comment on the national bank charter applications submitted by BitPay National Trust Bank, Alpharetta, Georgia (“BitPay Trust”) and Paxos National Trust, New York, New York (“Paxos Trust”) and together

¹ The American Bankers Association, Consumer Bankers Association, Credit Union National Association, Independent Community Bankers of America, National Association of Federally-Insured Credit Unions, and The Clearing House represent banks and credit unions across the U.S. banking system. Please see Annex for a description of the Associations.

with BitPay Trust, the “Applicants”) to the Office of the Comptroller of the Currency (“OCC”) on December 7, 2020 and December 8, 2020, respectively (the “Applications”).

In sum, based on a review of the limited information included in the public portions of the Applications, the Associations believe that the Applicants’ proposed business models do not involve the types of fiduciary activities performed by national trust banks, and call into question the suitability of the trust charter for the Applicants. Granting these Applications would represent a fundamental departure from existing OCC precedent and such a shift demands public input. Moreover, the Applications do not provide sufficient information to allow interested stakeholders the opportunity to evaluate the novel business models and operations proposed by the Applicants. The lack of public information, and the OCC’s approval of the Applicants’ requests to keep their business plans confidential in their entirety, raise significant policy and process concerns.

Given the significant policy, legal and commercial implications that chartering the Applicants would have for the banking system, the Associations urge the OCC to postpone consideration of the Applications. The delay should continue until such time as the OCC has released enough information concerning the Applicants’ intended business models and other aspects of the Applications to inform the public’s review and interested stakeholder comment, consistent with the historical transparency of the OCC’s charter application review process. A postponement would allow time, and hopefully sufficient information, for the public to assess the Applications and the novel issues they present and to provide input regarding the broader policy shift that would be represented by granting a national trust bank charter to an entity that will not be engaged primarily in fiduciary activities.

I. The Applicants’ Proposed Activities do not Align with Established Fiduciary Activities

Based on the publicly available information included in the Applications, it appears that, while the Applicants are seeking a national trust bank charter, they do not intend to engage primarily in fiduciary activities. Such proposals, if granted, would represent a misappropriation of the OCC’s authority under 12 U.S.C. § 27(a). Based on the publicly available information, the OCC should not move forward with these precedent-breaking Applications.

The banking powers of national banks are set forth in 12 U.S.C. § 24(Seventh). These banking powers include deposit taking and lending, as well as other activities that are incidental to the business of banking. For example, under 12 U.S.C. § 24(Seventh) national banks are authorized to provide payment and certain escrow services, among other things.

The OCC may also charter national banks pursuant to 12 U.S.C. § 27(a).² That section of the National Bank Act authorizes the OCC to charter national banks if their activities are “limited to those of a trust company and activities related thereto.” Historically, this authority has been exercised to charter banks solely engaged in fiduciary and related activities, as provided in 12 U.S.C. § 92a.

² The BitPay Trust Application indicates that it will have a special Trust focus. The Paxos Trust Application indicates that Paxos Trust will be a “Limited Purpose Trust Company.”

Institutions chartered under 12 U.S.C. § 27(a) generally do not accept deposits or, by extension, obtain federal deposit insurance, or make commercial loans. This avoids the invocation of key provisions under the federal bank regulatory framework, including provisions of the Bank Holding Company Act and the Federal Deposit Insurance Act.³ Further, specific exemptions from applicable banking law that are available only to trust companies apply to entities chartered by the OCC under this authority.⁴ Accordingly, absent an agreement between the relevant parties and the OCC that invokes key provisions of the U.S. bank regulatory framework, national trust banks and their controlling entities are generally not subject to those provisions.

National trust banks are not subject to the full range of regulatory requirements that traditional national banks are subject to, because the powers in which a national trust bank may engage are limited and do not include those authorized for national banks under 12 U.S.C. § 24(Seventh). Consistent with 12 U.S.C. § 27(a), the Comptroller’s Licensing Manual states that the OCC may grant approval of a trust charter only for a “bank that will limit its operations to those of a fiduciary.”⁵ Fiduciary powers authorized for national banks are set forth in 12 U.S.C. § 92a. As a result, banking powers reserved for national banks under 12 U.S.C. § 24(Seventh) should not be exercised by trust companies chartered pursuant 12 U.S.C. § 27(a) unless such powers are also authorized under 12 U.S.C. § 92a, or relate to the exercise of powers authorized under that section. Otherwise, 12 U.S.C. § 27(a) would be a loophole available for companies seeking to take advantage of the benefits of a national bank charter without the attendant regulatory oversight generally applicable to national banks, including under the Bank Holding Company Act, absent a written agreement with the OCC.

Under 12 U.S.C. § 92a, the fiduciary powers granted to national trust banks include “the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity” authorized under the law of the state where the national trust bank is located.⁶ The authority under state law applies only with respect to powers deemed by the OCC to be “fiduciary” in nature; it is not enough that trust companies in the state are authorized to engage in the activity.

³ See 12 U.S.C. § 1841(c)(1) (defining “bank” for purposes of the Bank Holding Company Act to include insured banks and institutions that both accept deposits and engage in commercial lending).

⁴ See 12 U.S.C. § 1841(c)(2)(d) (limited Bank Holding Company Act exclusion for an institution that functions solely in a trust or fiduciary capacity).

⁵ Comptroller’s Licensing Manual, Charters, at p. 54.

⁶ OCC regulations implementing 12 U.S.C. § 92a define “fiduciary capacity” to mean “trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a.” 12 C.F.R. § 9.2(e).

Under OCC guidance, custody services are not fiduciary activities.⁷ Instead, powers to engage in custody services are derived from a national bank’s authority under 12 U.S.C. § 24(Seventh).⁸ Additionally, the OCC has determined that, even if custody services are authorized for trust companies under state law, such services are not fiduciary activities authorized for national trust banks pursuant to 12 U.S.C. § 92a.⁹ A national trust bank may provide custody services only if they are “related to” the fiduciary activities of the trust bank.¹⁰

Here, based on the limited public information concerning the Applicants’ proposed activities, it appears the Applicants will not primarily engage in fiduciary activities. Beyond using the terms “fiduciary” or “fiduciary capacity,” the closest the Applications come to explaining the fiduciary services that the Applicants would provide is by reference to the custody services they would provide. As discussed above, custody services are not fiduciary in nature. Further, the other services listed in the Applications do not appear to be fiduciary in nature, but rather, services that a national bank may be authorized to provide under 12 U.S.C. § 24(Seventh), such as payment and escrow services.¹¹ Moreover, the activities listed in the Applications do not constitute acting in a fiduciary capacity, as defined in OCC regulations.¹² Because limited, if any, fiduciary services appear to be contemplated in the Applications, the argument that the custody services would be “related to” the Applicants’ fiduciary business is unavailing.

As a result, based on the public information, it does not appear that the Applicants intend to engage predominantly in activities authorized under 12 U.S.C. § 92a. The OCC should

⁷ See OCC Interpretive Letter, 1985 WL 151292 (June 20, 1985) (“it is difficult to argue that safekeeping and safe deposit services are ‘fiduciary’ activities within the meaning of section 92a...Such activities do not involve the exercise of investment discretion or similar fiduciary responsibilities.” (citations omitted)).

⁸ See OCC Interpretive Letter No. 1078 (May 2007) (“For banking law purposes, the authority of national banks to engage in custody activities derives from the general business of banking, and incidental powers language in 12 U.S.C. § 24(Seventh).”).

⁹ See OCC Interpretive Letter, n.7 *supra* (determining that Florida law authorizing state trust banks to engage in custody activities did not authorize national trust banks located in Florida to engage in custody activities since custody activities are not fiduciary activities).

¹⁰ See *id.* The OCC has determined that national banks can offer cryptocurrency custody services in either a fiduciary or non-fiduciary capacity. OCC Interpretive Letter No. 1170 (July 22, 2020) (“A bank that provides custody for cryptocurrency in a non-fiduciary capacity would essentially provide safekeeping for the cryptographic key that allows for control and transfer of the customer’s cryptocurrency...A national bank holding cryptocurrencies in a fiduciary capacity—such as a trustee, an executor of a will, an administrator of an estate, a receiver, or as an investment advisor—would have the authority to manage them in the same way banks can manage other assets they hold as fiduciaries.”). The authority to offer cryptocurrency custody services in a non-fiduciary capacity is derived from a national bank’s powers under 12 U.S.C. § 24(Seventh). *Id.* at 8. The authority to offer cryptocurrency custody services in a fiduciary capacity is derived from 12 U.S.C. § 92a. See *id.* at 9 (describing the ability of a national bank to conduct cryptocurrency custody activities in a fiduciary capacity only to the extent the national bank has trust powers).

¹¹ As discussed further below, the BitPay Trust Application describes the proposed business activities as “acting in a fiduciary capacity for its merchant customers to ensure that they can provide crypto pricing quoted to their shoppers at the best available exchange rate, as well as cryptocurrency payouts to a business’s recipients,” without further explaining the fiduciary nature of its activities. The Paxos Trust Application describes the proposed business activities, including “fiduciary services such as acting as a fiduciary agent, payment agent or exchange agent” and “other cryptocurrency services,” but does the further explain the fiduciary nature of its activities.

¹² See 12 C.F.R. § 9.2(e).

supplement the publicly available information with an explanation of what makes the Applicants' proposed primary activities fiduciary in nature. Otherwise, based on the OCC's history in approving charters under 12 U.S.C. § 27(a), the Applications should be denied. The Associations are concerned that any other result would rip a gaping hole in the fabric of U.S. banking regulation for entities seeking to avoid regulation through the national trust bank charter.

II. The Public Portions of the Applications Permit the Public only a Limited Understanding of the Applicants' Proposed Activities.

The public portions of the Applications do not provide sufficient information for the public to assess or provide meaningful comment on the Applicants' proposed business models and operations.

For example, the BitPay Trust Application describes the anticipated activities simply as "acting in a fiduciary capacity for its merchant customers to ensure that they can provide crypto pricing quoted to their shoppers at the best available exchange rate, as well as cryptocurrency payouts to a business's recipients," otherwise referencing the confidential business plan.¹³ This description does not provide sufficient information to permit public understanding of BitPay Trust's proposed business activities. It is possible that further information is provided in BitPay Trust's fiduciary powers application; however, that entire application is accorded confidential treatment.

The Paxos Trust Application similarly does not provide sufficient information about Paxos Trust's intended business activities. Activities in which Paxos Trust proposes to engage include "custody services; fiduciary services such as acting as a fiduciary agent, payment agent or exchange agent; KYC as a Service; custody and management of USD stablecoin reserves; and *other cryptocurrency services*."¹⁴ Such a vague reference to other cryptocurrency services does not permit public understanding of the full scope of Paxos Trust's proposed business activities.

The Paxos Trust Application goes on to indicate, in vague terms, that additional activities may be migrated to Paxos National Trust from its affiliates over time.¹⁵ Again, little information can be gleaned from the public section of the Application about these affiliates, or their activities, except that there are eight of them, including a New York state-chartered trust company and an operating company in Singapore. These affiliates, like Paxos Trust, are presumably controlled by the same Cayman Islands domiciled holding company, Kabompo Holdings Ltd. With foreign ownership, these affiliates, if organized under foreign law, could evade U.S. regulatory oversight and introduce risk to Paxos Trust. Without greater information about Paxos Trust's affiliates, the business of which may be subsumed into Paxos Trust itself, the public cannot adequately assess the risks posed by this Application.

Further, the public section of the Paxos Trust Application indicates that Paxos Trust will perform many of the same functions as its New York state-chartered trust company affiliate. Public

¹³ BitPay Trust Application at p. 1.

¹⁴ Paxos Trust Application at p. 5 (emphasis added).

¹⁵ *Id.*

statements from the company indicate an intent to retain both charters.¹⁶ It is not clear, however, why the Paxos Trust Application seeks to establish a *de novo* national trust bank, rather than convert its affiliate from a state charter to a national charter. Nor is it clear why Paxos Trust's business model requires two trust company charters to perform essentially the same activities.

The Associations support the OCC's receptivity to innovative proposals; however, innovative proposals demand increased public scrutiny, not incomplete business descriptions and vague allusions. The Associations do not dispute the innovative nature of the Applicants' activities, both their current activities and, to the extent known, those activities in which they seek to engage with the OCC's imprimatur. But with innovation comes risk, and the public has the right and responsibility to evaluate the risk that innovation may pose to the U.S. financial system.

Unfortunately, with the incomplete information available in the public sections of the Applications, the public is not afforded an opportunity to exercise that right and responsibility. Accordingly, the Associations respectfully request that the OCC release to the public a more complete description of the Applicants' business plans, with appropriate redactions only with respect to truly confidential information.

III. Broader Change of OCC Policy Direction Without Sufficient Public Scrutiny

Public policy considerations argue strongly against approving the Applications. As described above, national trust banks have historically been permitted to engage solely in activities authorized under 12 U.S.C. § 92a.

If the Applicants are successfully able to establish themselves as national trust banks that do not primarily provide fiduciary services, but instead provide traditional banking services like payments, then the Associations fully expect that other companies will follow. And the next application for a trust bank charter may be submitted by a lending company or even a commercial enterprise that has no intention of providing fiduciary services at all.

This would call into question the OCC's authority under 12 U.S.C. § 27(a) to grant such national trust bank charters. Such approvals also would fly in the face of the recent order by the Southern District of New York, on appeal in the Second Circuit, preventing the OCC from issuing non-depository special purpose charters to entities with business models that may be similar to those of the Applicants.¹⁷ By granting non-depository entities like the Applicants national trust bank charters, the OCC would sidestep that pending litigation.

Further, even assuming the OCC has the legal authority to grant a national trust bank charter to the Applicants, doing so would represent a major policy shift, signaling a new interpretation of the OCC's authority under 12 U.S.C. § 27(a). Failure to give full consideration to these

¹⁶ Burstein, Dan, [Why Paxos is Seeking a National Trust Bank Charter – and Why We Remain Committed to New York](https://www.paxos.com/why-paxos-is-seeking-a-national-trust-bank-charter-and-why-we-remain-committed-to-new-york/), available at: <https://www.paxos.com/why-paxos-is-seeking-a-national-trust-bank-charter-and-why-we-remain-committed-to-new-york/> (“Today, Paxos is regulated by the New York State Department of Financial Services (“NYDFS”) as a Trust company, and Paxos is committed to maintaining its NYDFS Trust charter.”).

¹⁷ *Linda Lacewell v Office of the Comptroller of the Currency*, 2019 WL 6334895 (2019).

important legal and policy issues raised by the Applications could result in any approval being inconsistent with the legal requirements for agency actions.

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The Associations appreciate the opportunity to comment on the application. If you have any questions, please contact Stephen Kenneally by phone at 202-663-5147 or by email at skenneally@aba.com.

Respectfully submitted,



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cc: Brian Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency

Jonathan Gould
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Annex

The Associations

American Bankers Association. The American Bankers Association is the voice of the nation's \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$17 trillion in deposits and extend nearly \$11 trillion in loans.

The Consumer Bankers Association. The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

Credit Union National Association. The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,300 federal and state credit unions, which collectively serve more than 120 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

Independent Community Bankers of America. The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

National Association of Federally-Insured Credit Unions. The National Association of Federally-Insured Credit Unions advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 123 million consumers with personal and small business financial service products. NAFCU membership is direct and provides credit unions with the best in federal advocacy, education and compliance assistance.

The Clearing House. Since its founding in 1853, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar

payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching the RTP® system, an immediate payment system that modernizes core payments capabilities for all U.S. financial institutions. As the country's oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 23 of the country's largest commercial banks and supports hundreds of banks and credit unions through its core systems and related services.