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Via electronic submission

June 25, 2020

Kathy Moe
Regional Director
FDIC San Francisco Regional Office
25 Jessie Street at Ecker Square
San Francisco, California 94105

Re: FDIC Deposit Insurance Application of Rakuten Bank America

Dear Ms. Moe:

The Independent Community Bankers of America (“ICBA”)¹ appreciates this opportunity to comment on the re-submission by Rakuten Card Co., Ltd. (Rakuten Card Japan) a subsidiary of Rakuten, Inc., of an application for federal deposit insurance (the “Application”) with the Federal Deposit Insurance Corporation (FDIC) to insure the deposits of Rakuten Bank America (Rakuten Bank), an industrial bank or “ILC” to be chartered under Utah law.

According to the Application, Rakuten Bank will provide a wide variety of banking products including consumer credit cards, consumer loans, consumer deposits (NOW, savings, and time), merchant lines of credit and merchant savings accounts. These offerings, according to the Application, “will greatly enhance the Rakuten U.S. ecosystem, whereby consumers and merchants are served in a common online marketplace that creates loyalty and provides real value to both sets of customers.” Rakuten Card Japan has already contributed \$50 million cash for organizing and startup costs and will contribute \$350 million in cash as the initial capital for the Bank.

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, nearly \$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. 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.

Rakuten Bank will operate as an online only bank from its home office in Midvale, Utah and will not have any traditional branches. Rakuten Bank will market its products primarily in the existing Rakuten community to consumers who are already existing customers of the Bank's affiliates, including but not limited to Rakuten Rewards (previously known as Ebates) and Rakuten.com.

ICBA's Comments

Banking and Commerce Should Be Separated

As we stated in our comment letter dated August 21, 2019 concerning Rakuten Bank's original deposit insurance application, we object to Rakuten Bank's use of the ILC charter to avoid the legal prohibitions and restrictions under the Bank Holding Company Act (BHCA) that apply to other parent companies of full-service banks. Regulation under the BHCA entails consolidated supervision of the holding company by the Federal Reserve and restricts the activities of the holding company and its affiliates to those that are closely related to banking, or financial in nature. Because of a loophole, companies that own ILCs are not subject to BHCA supervision. As a result, a company that owns an FDIC-insured ILC can engage in non-banking commercial activities and not be subject to consolidated supervision.

Both Rakuten Card Japan, the parent company of Rakuten Bank, and Rakuten, Inc., the parent company of Rakuten Card Japan, are heavily involved in global commercial activities. Rakuten, Inc. owns an online marketing business, Rakuten Marketing, and has investments in companies as diverse as Pinterest (a social media web and mobile application company), Ozon.ru (a Russian online retailer) Lyft (a ride-hailing service), Cabify (a Latin American ride-hailing service), Careem (a middle-Eastern transportation startup company), and Carousell (a Singapore-based consumer-to-consumer marketplace app). Rakuten has made several large investments in e-book distribution, electronic publishing, and digital content particularly after purchasing Overdrive, Inc. in the United States and has also made large investments in video-on-demand service companies. In 2004, Rakuten Baseball was created and the baseball team Tohoku Rakuten Golden Eagles was formed and joined the Nippon Professional Baseball League.

To preserve the character and safety of our economy and to uphold consumer and business confidence in our banks, commercial companies must not be allowed to own banks. As independent and neutral arbiters of commercial and consumer credit, banks assess risk and create fair access to credit based on the power of an idea, the track record of management, the current marketplace, and economic potential. That critical role would be jeopardized if commercial firms were allowed to own or control banks or their functional equivalents.

In the case of Rakuten Bank, the deep commercial interests of its affiliates would jeopardize the ILC's ability to act independently and without bias towards its customers. Rakuten Bank would always be concerned with how its credit is influencing or affecting the commercial interests of its affiliates. Rakuten, Inc. would be tempted to direct Rakuten Bank to engage in transactions that benefitted the holding company's affiliates but were detrimental to the ILC's safety and soundness. For instance, Rakuten, Inc. could encourage its ILC to deny credit to customers of its affiliates' competitors or alternatively, could encourage its ILC to offer loans to affiliates' customers based on terms not offered to its competitor's customers.

Rakuten Bank America is applying as an ILC and not as a commercial bank because its parent company and the company that owns the parent company do not want to divest their commercial activities and be subject to the legal restrictions of the BHCA. **For safety and soundness reasons and to maintain the separation of banking and commerce, the FDIC should deny Rakuten Bank's application.** Rakuten, Inc. and/or Rakuten Card Japan should be subject to the same restrictions and supervision as any other bank holding company of a full-service bank. **Furthermore, Congress should close the ILC loophole because it not only threatens the financial system but creates an uneven playing field for community banks.**

The Application Does Not Meet the Statutory Requirements

In considering applications for deposit insurance for a proposed depository institution, the FDIC must evaluate each application in relation to the factors prescribed in Section 6 of the Federal Deposit Insurance Act (FDIA).² Those factors include—

1. The financial history and condition of the depository institution;
2. The adequacy of the depository institution's capital structure;
3. The future earnings prospects of the depository institution;
4. The general character and fitness of the management of the depository institution;
5. The risk presented by such depository institution to the Deposit Insurance Fund (DIF);
6. The convenience and needs of the community to be served by such depository institution; and
7. Whether the depository institution's corporate powers are consistent with the purposes of the FDIA.

The Application raises significant concerns with respect to (5) the risk to the DIF, and (6) the convenience and needs of the community to be served by Rakuten Bank. The Application states Rakuten Bank will enter into six different Master Services Agreements with Rakuten affiliates for services including Rakuten Card, Rakuten Card USA, Rakuten Commerce LLC, Rakuten Inc, Rakuten Marketing, and Rakuten USA. The Bank will also enter into a Marketing Services Agreement with Rakuten Rewards and may enter into marketing agreements

² 12 U.S.C. § 1816.

with Kobo, Viber and Viki. The marketing agreements will allow the Bank to market its products to existing Rakuten customer bases. Rakuten Bank also will “leverage the existing resources of certain affiliates to provide the Bank select administrative, operational, and other services including accounting, human resources (including but not limited to HR support, benefits administration, and 401(k) administration), facilities management, legal, and technology support.”

From the Application, it is clear that Rakuten Bank will have a very close relationship with its commercial affiliates as it markets its various financial products. The “synergistic ecosystem” between the ILC and its affiliates create undue risks to the DIF. Rakuten’s business of providing an online marketplace for electronic commerce would not be subject to direct regulatory supervision since Rakuten, Inc., Rakuten Card Japan and other affiliates would be exempt from consolidated supervision under the BHCA. Rakuten Bank’s non-financial affiliates would be vulnerable to unexpected movements in the market and changing consumer preferences and tastes, with the potential for directly negative consequences for the ILC. These close relationships between Rakuten Bank and its affiliates present significant risks to Rakuten Bank, and, therefore, to the DIF.

Rakuten Bank will be so intertwined with its commercial affiliates that instead of serving impartially the convenience and needs of its community, the ILC would be encouraged to subordinate those needs to the interests of its affiliates and its own commercial interests. At a minimum, the Application does not show how Rakuten Bank will prioritize the needs of its community in a way that will serve the public interest. In addition to the privacy concerns below, we believe the Application fails to demonstrate how it will comply with the statutory requirements of Section 6 of the FDIA.

The Application Raises Serious Concerns about Big Tech and Banking

The Application presents a myriad of privacy and conflict of interest concerns since Rakuten Bank will be working so closely with its large tech affiliates to market its products. What will happen, for instance, to Rakuten Bank if there is a serious data breach at one of its affiliates? Would the affiliates be able to contain the problem so that the ILC would not be seriously impacted? Furthermore, if there were a data breach or other misuse of personal information, would Rakuten’s reputation be so adversely affected that the ILC would be seriously impacted? These are questions that we believe the FDIC must seriously assess before approving the Application. While this contagion effect is possible in traditional bank holding companies, the concentrated business plan of Rakuten Bank, tied inextricably to the success of the non-bank tech affiliates, makes its business prospects very fragile and susceptible to major safety and soundness problems. Moreover, banks and their affiliates are subject to regulatory oversight and strict standards regarding the safeguarding of customer information.

Like Rakuten, Inc., there are thousands of U.S. fintech firms deeply involved in non-financial commercial activities. Many of these would no doubt welcome the opportunity to obtain an ILC charter with deposit insurance in order to obtain low-cost deposit funding while retaining and expanding their commercial ventures. **The integration of these technology and banking firms would not only result in an enormous concentration of financial and technological assets but also would pose significant privacy concerns to our banking system.**

With Square, Nelnet and now potentially Rakuten becoming operating ILCs, we believe it is only a matter of time before other large technology firms like Google, Amazon, Facebook, Apple, or Microsoft apply for an ILC charter, particularly with the legality of the OCC’s fintech charter in question. What will happen when social media giants like Google or Facebook extend their reach into our financial lives? Big data already tracks our movements, our friends, families, and associates, our religious and political affiliations and views, our internet browsing and shopping history. This data is being used for marketing products and services and for targeted political messages—sometimes by foreign or other nefarious actors. Adding personal, financial data—monthly paycheck direct deposits, account balances, expense patterns, political contributions, history of late fees, transaction records, etc.—would take targeted marketing to a whole new level. Moreover, this financial data could be sold to third-party data aggregators and could also be used to discriminate in lending and other financial services. As Karen Shaw Petrou has observed:

“One specific danger of a company like Amazon getting into finance is the possibility of analytics-based price manipulation. A consumer might try to buy a pair of sneakers and be offered a more expensive pair of sneakers because Amazon knows how much money he or she has... It’s watching your payment speed, estimating your pain threshold, and, all of a sudden, prioritizing products based on what it thinks it knows about what you can afford.”³

Furthermore, examining the affiliate relations of big global tech company like Rakuten, Inc. will be a tremendous challenge to the FDIC. According to the Application, affiliate services will be provided to Rakuten Bank “at or below market rates in compliance with Section 23B of the Federal Reserve Act and Regulation W.” **However, since many of these relationships will be with foreign companies, the work will be overwhelming for the FDIC and will require a large examination team working extensively to determine whether these relationships violate Regulation W. We question whether the FDIC has the resources or**

³ Shaw Petrou, Karen. “Making ‘Responsible Innovation’ a Reality: Big Tech, Small Money, and U.S. Economic Equality.” Federal Financial Analytics. February 4, 2019.

even the skills to examine and supervise this many different e-commerce affiliate relationships, particularly when so many of them operate overseas.

Conclusion

As we stated in our comment letter concerning the original deposit insurance application by Rakuten, the implications to our financial system and economy of a Rakuten Bank are enormous and illustrate exactly why the U.S. policy has been to separate banking and commerce for the good of the economy, consumers and businesses alike. In 1999, the Congress debated the issue of mixing banking and commerce as it considered the Gramm Leach Bliley Act and Congress decided to maintain the separation of banking and commerce and not to extend the safety net to commercial firms. It recognized the lessons of the 1980s and the banking collapse of the early 1930s--that our deposit insurance system was created for the protection of depositors of regulated banks and not for the protection of commercial firms. For safety and soundness reasons and to maintain the separation of banking and commerce, the FDIC should deny Rakuten Bank's application.

In addition, the Application does not meet the statutory requirements of the FDIA because Rakuten Bank's relationship to its e-commerce affiliates pose serious risks to the DIF and would not serve the convenience and needs of its community. Furthermore, the Application presents many privacy and conflict of interest concerns since Rakuten Bank will be primarily marketing its products to customers of its affiliates that are part of its "synergistic ecosystem."

ICBA appreciates the opportunity to comment on Rakuten Bank's application to the FDIC for deposit insurance. If you have any questions or would like additional information, please do not hesitate to contact me at Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole
Christopher Cole
Executive Vice President and Senior Regulatory Counsel

cc: Jelena McWilliams, Chairman, FDIC
Martin J. Gruenberg, Board Member, FDIC
Kathleen L. Kraninger, Director, CFPB
Brian Brooks, Acting Comptroller of the Currency