DEPARTMENT OF JUSTICE
Antitrust Division

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September 21, 2017

Mr. Richard Taffet
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178

Re: The Clearing House Payments Company LLC Business Review Request

Dear Mr. Taffet:

This letter responds to your request on behalf of The Clearing House Payments Company LLC ("TCH") for a business review letter from the Department of Justice pursuant to the Department's Business Review Procedure, 28 C.F.R. § 50.6. Specifically, you have asked for a statement of the Department's present enforcement intentions regarding TCH's proposal to create and operate a new real-time payment rail, the Real Time Payment system ("RTP" or "the RTP system").[1] Based on the information and representations you provided, and after a thorough review, the Department presently does not intend to challenge RTP for the reasons explained below. In accordance with the Department's usual practice, however, it reserves the right to challenge RTP in the future if RTP's operations are determined to be anticompetitive in purpose or effect.

I. Background[2]

TCH is a joint venture owned by 24 of the largest banks in the United States.[3] TCH's owner banks hold approximately 60% of all U.S. deposits. TCH is led by a Supervisory Board

[1] Letter from Richard Taffet, Esq., Morgan, Lewis & Bockius LLP, to Renata Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice (Oct. 11, 2016) [hereinafter Request Letter]; *see also* Letter from Richard Taffet to Stephanie Beckett, Att'y Advisor, U.S. Dep't of Justice (Jan. 10, 2017) [hereinafter Further Submission].

[2] All facts set out in this section regarding the proposed RTP system are based on TCH's representations to the Department.

[3] TCH's owner banks are: Bank of America, N.A.; Bank of the West; Barclays; The Bank of New York Mellon; Branch Banking and Trust Co.; Capital One, N.A.; Citibank, N.A.; Citizens Bank; Comerica Bank; Deutsche Bank Trust Co. Americas; Fifth Third Bank; HSBC Bank USA, N.A.; JP Morgan Chase Bank, N.A.; KeyBank N.A.;

and a Managing Board, which both consist of senior executives of the owner banks.[4] TCH's owner banks contribute funds to TCH, but they do not receive dividends.

TCH proposes to introduce a new "payment rail" that is faster than current payment rails. Payment rails (also called "payment systems") are the systems that depository institutions use to transfer money among themselves. Existing payment rails include wire, automated clearing house ("ACH"), and check clearing houses. TCH and the Federal Reserve System (the "Federal Reserve") are the only operators of the U.S. wire and ACH rails, with TCH processing roughly half of the volume of each rail.

Payment rails are used by banks, thrifts, and credit unions (hereinafter referred to as "banks"), as well as by "payment service providers," which are non-bank entities that provide end users with the ability to send or receive funds.[5] Banks and payment service providers offer services that allow end users to transfer usable funds between each other ("fund-transfer services"). Both banks and payment service providers generally need to use payment rails to facilitate their end user customers' fund transfers to or from accounts held at other banks.

In 2015, the Federal Reserve announced an interest in the industry developing a "ubiquitous, convenient and cost-effective way for U.S. consumers and businesses to make (near) real-time payments from any bank account to any other bank account."[6] TCH's proposal is, in part, a response to the encouragement of the Federal Reserve.

A. Description of RTP

RTP will allow banks to complete near-instantaneous fund transfers between each other, from authorization to clearing to settlement, at any time of the day, on any day of the week (including weekends and banking holidays). As such, RTP will facilitate real-time fund transfers between end users. In addition, RTP will provide banks (and, in turn, end users) with the ability to send remittance-advice messages through RTP. This will facilitate end users' linkage of payments to remittance information.

Manufacturers and Traders Trust Co.; MUFG Union Bank; PNC Bank, N.A.; Banco Santander; State Street Bank & Trust Co.; SunTrust; The Toronto-Dominion Bank; UBS AG; US Bank N.A.; and Wells Fargo, N.A.

[4] In addition, City National Bank and First Citizens Bank share a seat on TCH's Managing Board.

[5] According to TCH, "[e]xamples of [payment service providers] include PayPal, Apple (in its role as the provider of ApplePay), Venmo, Dwolla, and Square." Request Letter, *supra* note 1, at 4. As is the case with some of the other terms used in this letter, industry participants sometimes apply different meanings to the phrase "payment service provider."

[6] FED. RESERVE SYS., STRATEGIES FOR IMPROVING THE U.S. PAYMENT SYSTEM 8-9 (2016), https://fedpaymentsimprovement.org/wp-content/uploads/strategies-improving-us-payment-system.pdf. The Federal Reserve stated that it "would not consider an operational role in providing this faster payments capability unless it determines, not only that the new service would be expected to yield clear public benefits, but also that other providers alone could not be expected to provide this capability with reasonable effectiveness, scope and equity and following public comment." *Id.* at 18.

End users will not have a direct relationship with RTP. TCH will not be involved in the development or pricing of real-time fund-transfer services that banks offer to their end user customers that use RTP. According to TCH, its antitrust policies "will guard against the use of the RTP system to facilitate competitor collaborations" on "the real time products and services offered by a depository institution" and "the pricing for those products and services."[7]

TCH plans that any end user with a bank account will be able to make payments through RTP. RTP will be open to all federally-insured banks, including non-TCH banks. Any bank can choose to connect to RTP directly. Alternatively, TCH agreements with third party technology vendors will allow banks to connect indirectly to RTP. Banks will also be able to connect to RTP through corporate credit unions and bankers' banks. Many banks already use these third parties to connect to existing payment rails. Payment service providers will be able to connect to RTP by partnering with banks and complying with certain rules, such as a requirement to post a surety bond.[8]

B. Request for Payment Function

TCH will implement a request for payment ("RFP") function as part of its RTP rail, which will allow banks to develop enhanced electronic messaging services for their end users. Through the enhanced messaging services, the RFP function will enable end users to send in real time a request for payment along with information, such as an invoice, through the rail itself. Effectively, this will enable a biller to send a bill to a payer through their respective banks. The RFP function complements RTP's enhanced messaging capabilities by allowing a bank to build a service that lets a biller automatically link an RFP invoice to an RTP payment and any remittance advice message accompanying the payment, which may reduce businesses' costs of reconciling invoices with remittance information. TCH represents that its goal for RFP is for banks to establish easy-to-use mechanisms that allow payers to respond to RFPs using RTP, creating a seamless e-billing and e-payment experience for end users.

C. Fees

RTP will charge banks two kinds of usage fees. First, banks will pay "network fees" to TCH each time the bank uses RTP to send a payment, an RFP, or a remittance message. These network fees will be determined on a cost-plus basis and will not include any volume discounts. "'[N]etwork fees' will be incurred only based on actual usage of the RTP system, so no financial penalty will attach if a transaction is cleared and settled over another payment system."[9] TCH's owner banks will not be paid any portion of the network fees. According to TCH, the network

[7] Request Letter, *supra* note 1, at 13.

[8] TCH represents that the surety bond imposed will cover "claims only that (i) relate directly to the RTP system, and (ii) are for losses that exceed coverage under state bond obligations." Further Submission, *supra* note 1, at 3.

[9] Request Letter, *supra* note 1, at 14.

fees will be used "to reimburse TCH for its costs of operating the RTP system, and to support TCH's continuing innovation of new functions and features for the system."[10]

Second, TCH plans to implement an interbank fee for using RFP, called the "RFP Incentive Fee."[11] The RFP Incentive Fee will be paid by the biller's bank to the payer's bank, but only if the payment requested via the RFP message is completed using RTP. This RFP Incentive Fee will reward banks whose payers respond to RFPs by making RTP payments. TCH contends that payers currently do not have an adequate incentive to use e-billing, even though doing so would be economically efficient, and the RFP Incentive Fee could help correct this problem. Thus, for example, a bank may be incentivized by the incentive fee to build an interface that makes it easy for end-user payers to respond to RFPs by making payments through RTP. TCH asserts that the RFP Incentive Fee is necessary to achieve sufficient scale.

The RFP Incentive Fee will be a flat per-transaction fee that will be set by a panel of two or three outside economists. TCH's CEO will have the authority to reject the panel's recommendation and refer the matter back to the panel for further consideration, while stating specific grounds for doing so. After considering the CEO's position, the panel may, but will not be required to, change its recommendation. The panel members will be selected by members of TCH's senior management and counsel, not by TCH's Supervisory Board or Managing Board. The economists selected for the panel will be compensated at their standard rates, will be given renewable five-year contracts, can be terminated only for nonfeasance or malfeasance, and will meet at least annually to determine whether to change the fee. According to TCH, the panel's goal will be "ensuring that [the RFP Incentive Fee] properly balances biller and payer interests and remains in equilibrium."[12]

For both of these kinds of fees, TCH has represented that it will not impose anti-steering rules. That is, RTP's rules will preserve bank customers' ability to steer usage away from the RTP payment rail. For example, the rules will allow a biller to include surcharges in bills to cover the fees the biller must pay and allow a biller to provide its customers with incentives (either monetary or in-kind) to use another method of payment, including particular brands of payment. Also, TCH will not be involved in the pricing of RTP or RFP services that banks provide to their end user customers.

II. Analysis of the Proposed RTP System

The Department analyzes the operation of this joint venture under the rule of reason. Because RTP may create significant procompetitive benefits, and we do not believe that

[10] *Id.* at 22.

[11] TCH does not plan to implement an interbank fee for making an RTP payment without using the RFP function.

[12] Further Submission, *supra* note 1, at 10.

significant anticompetitive effects are likely, the Department has no present intention to challenge RTP.

The development of the RTP system may yield procompetitive benefits. Many other countries already have such a system, and the Federal Reserve has encouraged its development in the United States. The need for a faster payment rail is predicated on the value that end users get from real-time fund-transfer services, and the risks currently undertaken by banks and payment service providers that provide these services using existing payment rails. Currently, a bank that immediately releases funds to an end user payee assumes settlement risk because the payer's bank could fail to complete the promised fund transfer. This risk could be eliminated with the real-time settlement mechanism that RTP offers. The lack of a real-time payment rail may cause banks and payment service providers to impose limitations on the real-time fund-transfer services they provide to end users. For example, TCH claims that the existing real-time fund-transfer services that payment service providers offer to their end user customers "do not provide for real-time transfers between bank accounts, have other limitations (*e.g.*, only enrolled users of a service may send and receive funds), and generally utilize existing payment rails to settle transactions."[13] Thus, TCH's development of RTP could create a payment rail that facilitates real-time fund-transfer services for end users and reduces banks' and payment service providers' risks in providing those services.

By creating a new payment rail, RTP also may increase the variety of payment rails available to banks, payment service providers, and ultimately their end user customers. TCH represents that it will allow banks and payment service providers to use other payment rails in addition to RTP, and TCH will not steer banks toward using RTP. Also, TCH asserts that it will continue to offer ACH and wire services, and that RTP will "creat[e] no barriers to the continued use of existing payment systems."[14]

TCH also asserts that RTP will offer other advantages to its customers (the banks) and end users. For example, banks may be able to offer services that implement RTP's enhanced messaging capabilities such as its RFP function, which may reduce end users' payment reconciliation and billing costs.

Many collaborations of significant competitors, such as TCH, have some potential to harm competition.[15] None of TCH's currently-proposed rules seem to limit rivals' ability to access RTP in a way that appears to be anticompetitive, although we note that TCH retains the right to change its rules at any time, and it has complete discretion over enforcement and implementation decisions. The Department has no current reason to believe, however, that TCH will use RTP to harm the rivals of the TCH owner banks. In light of the lack of current evidence

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[13] Request Letter, *supra* note 1, at 6; *see also id.* at 6-7 (discussing limitations of banks' existing real-time fund-transfer services offered to end users).

[14] *Id.* at 2.

[15] The Department also considered whether TCH's RTP may be an over-inclusive joint venture – i.e., whether some subset of TCH owner banks could create an RTP-like product. Based on TCH's representations and the Department's investigation, that does not appear to be likely.

of likely anticompetitive effects and the likelihood of procompetitive benefits, the Department has no present intention to challenge RTP. To the extent any anticompetitive effects arise in the future, they would be balanced against RTP's procompetitive benefits under the rule of reason.

III. Conclusion

Based on TCH's representations regarding its proposed new RTP system, which has the potential to offer improved services to banks, businesses, and consumers, the Department has no present intention to take antitrust enforcement action against TCH's proposed conduct.

This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and assertions that you have presented to us, as well as the additional qualifications set forth in this letter. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you submitted will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

Andrew C. Finch