INDEPENDENT COMMUNITY
BANKERS of AMERICA®

Via electronic submission

August 3, 2020

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

RE: Comments in Response to ANPR Concerning National Bank and Federal Savings Association Digital Activities; Docket: OCC–2019–0028; RIN 1557–AE74

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to respond to the Office of the Comptroller of the Currency's ("OCC" or "Comptroller") Advance Notice of Proposed Rulemaking ("ANPR") to solicit comments to aid in the review of regulations on bank digital activities.[2] ICBA supports this review effort as a way for OCC to ensure consistency and adaptability of regulations in response to new technologies. Overall, ICBA believes that the current, principles-based regulations governing bank digital activities provide sufficient flexibility for community banks to innovate. However, these principles-based regulations should be revisited and revised to limit their availability and breadth if sought to be applied to and relied upon by special purpose national banks ("SPNB").

[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, more than $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.
[2] 85 Fed. Reg. 40827 (July 7, 2020).

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Background

The OCC is reviewing its regulations on bank digital activities in subpart E of part 7 and in part 155 of Title 12 of the Code of Federal Regulations (hereinafter, collectively referred to as "digital activities regulations") to ensure that its regulations continue to evolve with developments in the industry. The digital activities regulations govern the use of electronic activities to deliver products and services, consistent with safety and soundness, for national banks ("NB") and federal savings associations ("FSA"). This includes activities that are part of or incidental to the business of banking, electronic activity comprised of several component activities, the sale of excess electronic capacity, data processing, and other uses of electronic means, products and services.

Specifically, section 7.5001 is designed to assist banks that are contemplating electronic activities and products by identifying the factors that the OCC uses to determine whether such an activity or product is part of, or incidental to, the business of banking, pursuant to 12 U.S.C.§24. While this section details those criteria in the context of electronic activities, the OCC uses these same criteria to determine whether any activity is part of, or incidental to, the business of banking.

The ANPR states that the OCC seeks to regulate banking in ways that allow for the responsible creation or adoption of technological advances and to establish a regulatory and supervisory framework that allows banking to evolve, while ensuring that safety and soundness and the fair treatment of customers is preserved. Frequently, the OCC achieves this balance by responding on a case-by-case basis to industry requests for approval to engage in innovative, technology-driven banking activities. Such approvals in the 1990s covered internet applications (e.g., transactional websites, commercial website hosting services, a virtual mall, an electronic marketplace for non-financial products, and Internet access services), electronic payment systems activities (e.g., electronic bill payment and presentment services, stored value systems, electronic data interchange services, and prepaid alternate media such as stamps and prepaid phone cards), and other technology-based services.

The goals of this ANPR are to evaluate whether existing regulations and policies effectively take into account the ongoing evolution of the financial services industry; promote economic growth and opportunity to ensure that banks operate in a safe and sound manner; provide fair access to financial services; treat customers fairly; and comply with applicable laws and regulations.

ICBA Comments

Executive Summary

ICBA offers comments and recommendations noted below for the OCC's consideration as it conducts a review of digital activities regulations.

- **Current legal standards are sufficiently flexible and clear** – the combination of principles-based regulations and publication of illustrative guidance appropriately accounts and allows for future technological developments.
- **Lack of authority to issue special purpose national bank charter** – OCC does not have the necessary statutory authority to establish a special purpose national bank charter that engages exclusively in non-depository core banking functions.

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- **Existing language in section 7.5001 should not be used to determine eligible activities for SPNBs** – OCC must acknowledge that certain activities are permissible only so long as they contain a logical nexus to the type of activities in which the bank is engaged.
- **Use of cryptocurrency** – the major barrier for financial institutions in cryptocurrency is identifying, assessing, and mitigating risk. Appropriate regulation of cryptocurrencies should mitigate significant risks.
- **Privacy concerns associated with distributed ledger technology** – DLT has promise in many use cases, but the transparency that comes with it can present privacy concerns.
- **Artificial intelligence and machine learning have enormous potential** – almost every facet of banking can benefit from AI/ML technology, including both consumer-facing and back-office operations.
- **Yet challenges inherent to AI/ML technology exist** – certain legal liabilities, including safety and soundness and consumer protection concerns, need further exploration.
- **OCC should not impose unnecessary burdens or obstacles to the use of AI/ML** – regulatory focus should be on the use of guided questions on the outcomes of AI/ML technologies.
- **Harmonize the regulatory environment** – OCC should increase and harmonize guidance for third-party collaborations, and voluntarily agree to other agency sandboxes, pilot programs, or other policies that enable innovation such as AI/ML models and usage.
- **New payment technologies are vital to the economy** – increased use of real-time credit push transactions, prepaid cards, and p2p provides a framework for financial innovation and expands financial inclusion to the unbanked.
- **Regtech can significantly reduce compliance costs for community banks** – regtech holds the potential to reduce the need for regulated entities to transfer data to the OCC, provide more cost-effective oversight of banks, facilitate secure data exchange between banks and OCC regulated entities and the OCC, and reduce compliance burdens.
- **Support for regulatory framework where bank-fintech relationships can flourish** – OCC should adopt programs and policies for supervised experimentation, collaboratively revise third-party service provider guidance, in terms of both substance and procedure, and expand access to supervisory and examination findings of significant service providers.
- **Adoption of Application Programming Interface for sharing consumer information** – OCC should encourage the usage and adoption of APIs that allow greater customer control over the ability to initiate, manage and revoke consent to share data.
- **COVID-19 pandemic has changed how consumers bank and make payments –** the pandemic has fostered a digital shift in the behaviors and preferences of consumers and businesses, spurred industry initiatives, and strengthened legislative efforts to address the prevailing gaps in consumer access to financial services and affordable broadband internet.

<u>Response to ANPR Questions</u>

Considering the financial industry's evolution, are the OCC's legal standards in part 7, subpart E, and part 155 sufficiently flexible and clear? Should the standards be revised to better reflect developments in the broader financial services industry? If so, how? (Question 1)

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OCC's legal standards are sufficiently flexible and clear

ICBA believes that the current legal standards in digital activities regulations sufficiently facilitate NBs' and FSAs' use of technology, consistent with safety and soundness. Of most significance, section 7.5001 of subpart E sets the standard to determine whether an activity fits within the "business of banking," and as such, what activities are permissible for banks. This essentially consists of four factors:

1. Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
2. Whether the activity strengthens the bank by benefiting its customers or its business;
3. Whether the activity involves risks similar in nature to those already assumed by banks; and
4. Whether the activity is authorized for state-chartered banks.

Similarly, the standards to determine whether an activity is incidental to the business of banking are equally flexible and broad, hinging on whether the activity is "convenient or useful" to the business of banking. The OCC uses the following factors to determine whether this "convenient or useful" standard is met:

1. Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations; and
2. Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

Because these standards are principles-based and agnostic to the type of technology or activity, they are sufficiently flexible to account for future developments. Rather than erring on the side of being overly prescriptive, the standard is adaptable enough to be applied to new, yet-to-be developed technologies that NBs and FSAs may eventually want to adopt or provide.

Aside from the principles-based regulations in 7.5001, the enumerated activities listed in subpart E are also useful. They help illustrate specific and explicit activities that are permissible for banks to pursue. Taken in tandem with OCC's "Activities Permissible for National Banks and Federal Savings Associations,"[3] OCC's regulations, interpretive letters, and decisions all serve as valuable resources to inform NBs and FSAs of permissible activities. So long as the OCC maintains this approach of issuing principles-based regulations and publishing illustrative guidance, future technological developments can be appropriately addressed and regulated within the existing framework.

OCC should not use existing language in section 7.5001 to determine what activities are permissible for SPNB charters

Although the ANPR states that the OCC is not seeking comment on the creation of a SPNB charter, ICBA notes that the OCC currently uses section 7.5001 criteria to determine whether *any* activity is part of, or incidental to, the business of banking, regardless of whether it is "electronic" in nature. [4] As such,

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[3] OCC Publication, "Activities Permissible for National Banks and Federal Savings Associations, Cumulative," (Oct 17, 2017), *available at* https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-activities-permissible-for-nat-banks-fed-saving.pdf.

[4] In a separate notice of proposed rulemaking ("NPRM"), the OCC intends to remove the word "electronic" from this section and move § 7.5001 to subpart A of part 7 to clarify that this criteria may apply to *any* potential national

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section 7.5001 will likely be relied upon to determine what SPNB activities are within the "business of banking." Because a discussion of SPNB "activities" cannot feasibly be severed or isolated from a discussion regarding the "chartering" of SPNBs, ICBA is using this opportunity to provide feedback on policies concerning both the activities and chartering of SPNBs.

As ICBA has asserted numerous times, the OCC does not have the necessary statutory authority to establish a special purpose national bank charter that engages exclusively in non-depository core banking functions.[5] While the OCC does have explicit statutory authority to charter and supervise SPNBs with operations limited solely to providing fiduciary services or certain other types of specialized activities such as community development banking and bankers banks, there is no explicit authority under the National Bank Act ("NBA") to charter a non-depository fintech company as a SPNB.

ICBA reminds the OCC that national banks are still limited to certain restrictions and requirements found elsewhere in federal law, namely that national banks must also become members of the Federal Reserve System ("FRS").[6] Other federal laws, such as the Bank Holding Company Act, federal tax laws and federal bankruptcy laws, define the business of banking more broadly than the OCC does, and require banks to engage in deposit taking before they can be defined as a "bank." In fact, the Bank Holding Company Act has been held to limit the scope of the Comptroller's chartering authority. By defining "bank" as an institution which accepts deposits and makes loans, the Bank Holding Company Act has been held to bar the Comptroller from conditioning the approval of a charter application on an institution that agrees to voluntarily refrain from engaging in either of these core banking functions, particularly deposit-taking.[7]

Though the NBA provides certain explicit powers to NBs,[8] as well as implicit powers that are "necessary to carry on the business of banking,"[9] national banks still only "possess […] those powers conferred upon them by Congress."[10] OCC has defined the business of banking as taking deposits, making loans **or** paying checks, which is currently the subject of litigation.

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bank activity and not just those that are electronic in nature. To confirm the broader applicability of the criteria listed in § 7.5001, the OCC is proposing to remove the word ''electronic'' from this section and move § 7.5001 to subpart A of part 7 as new § 7.1000. As part of this move, the proposal would redesignate current § 7.1000 as § 7.1024. The OCC believes that new § 7.1000 belongs at the beginning of part 7 because it provides the framework for all national bank powers that follow in subpart A. *See* NPRM "Activities and Operations of National Banks and Federal Savings Associations," 85 Fed. Reg. 40794 (July 7, 2020).

[5] *See* Cole, Chris and Kendrick, James, "ICBA comment letter to OCC, 'Exploring Special Purpose National Bank Charters for Fintech Companies: Summary of Comments and Explanatory Statement,' Apr. 12, 2017, *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/2017/cl041217.pdf?sfvrsn=0.

[6] 12 U.S.C. § 282.

[7] *See* Independent Bankers Ass'n of America v. Conover, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (IBAA v. Conover) (holding that an institution which does not engage in both accepting deposits and making loans cannot be chartered as a national bank because it would not be engaged in the "business of banking" within the meaning of the NBA).

[8] These powers include: (1) "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," (2) "receiving deposits," (3) "buying and selling exchange, coin, and bullion," (4) "loaning money on personal security," and (5) "obtaining, issuing, and circulating notes."

[9] Section 24 of NBA.

[10] *See* Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000).

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If OCC's determination that the "business of banking" does not require deposit-taking is upheld by the courts, then the OCC must acknowledge that certain activities are permissible only so long as they contain a logical nexus to the type of activities in which the bank is engaged. ICBA advocates that not all explicit powers enumerated in NBA, nor implicit powers contemplated in Part 7, subpart E, nor any other section of OCC code, should be extended to SPNBs as a matter of right. That is, a SPNB that does not engage in the deposit-taking and lending functions of banking should not be permitted, on a de facto basis, to engage in any incidental activity that is "a logical outgrowth of," "strengthened by," or "involves similar risks to" deposit-taking or lending.

What types of activities related to cryptocurrencies or cryptoassets are financial services companies or bank customers engaged? To what extent does customer engagement in crypto-related activities impact banks and the banking industry? What are the barriers or obstacles, if any, to further adoption of crypto-related activities in the banking industry? Are there specific activities that should be addressed in regulatory guidance, including regulations? (Question 4)

Cryptocurrencies have a long history of being used for criminal and illicit activity, undermining law enforcement. An April 2019 article in the Review of Financial Studies found that roughly two-thirds of the 20 most popular cryptocurrency exchanges have weak frameworks for Anti-Money Laundering ("AML"), counter-terrorist financing ("CTF"), and Know Your Customer ("KYC") practices.

Most community banks are not directly engaged in cryptocurrency related activities. There are several fintech companies seeking to partner with banks to use cryptocurrencies for specific use cases, such as international payments and trade finance. While some community bank customers purchase cryptocurrency as investments, they purchase it independently of their bank, using a third-party wallet.

The major barrier for financial institutions in cryptocurrency is identifying, assessing, and mitigating risk. First, there is the potential for systemic risk. The widespread issuance of cryptocurrency would be a significant and irreversible development that would alter global digital commerce and the global financial system. ICBA has serious concerns regarding threats posed by cryptocurrency to privacy, money laundering, terrorist financing, fraud, consumer protection, and financial stability.

ICBA urges the OCC to ensure public trust and address the possibility of systemic risk related to widespread issuance of cryptocurrency, both domestically and globally. Any regulatory regime applied to cryptocurrency should be comparable to the multitude of regulations applicable to traditional, functionally similar payments products and services offered by the banking system.

A second barrier to cryptocurrency among banks is the risk to the individual customer. Many scams will use cryptocurrency as the method of payment. Limited regulation, customer protections and oversight of the cryptocurrency marketplace and transactions mean that consumers and investors that use or hold cryptocurrency are exposed to significant risks. The speed and finality of cryptocurrency transactions make it next to impossible for the customer to claw back the funds. Additionally, there are scams unique to cryptocurrency regarding initial coin offerings, currency exchange and fraudulent cryptocurrency wallets. Lastly, cryptocurrencies' market value is highly volatile and can subject the owner to dramatic losses.

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Appropriate regulation of cryptocurrencies should mitigate significant risks. The scope of regulation should address: capital adequacy and reserves; activity restrictions; due diligence; information security and privacy; business resiliency, ownership and control of data; anti-money laundering and anti-terrorist financing; reporting and maintenance of books and records; consumer protections; safeguarding customer information; vendor and third-party management; and ongoing examination. Without such a regime, there will be a lack of parity with the banking industry and a heightened level of risk to consumer privacy, digital commerce, and the global financial system. Another barrier to the adoption of cryptocurrency is its limited usage. Currently, there are not consistent, ubiquitous, legitimate use cases for cryptocurrency, aside from investments. Cryptocurrencies can dramatically fluctuate in value, often making everyday usage difficult. To address this, the concept of stablecoins has been developed. Stablecoins are a new class of cryptocurrencies that attempt to offer price stability and are backed by a reserve asset. However, ICBA is concerned that stablecoins pose threats to financial stability in the United States and globally if widely adopted. To operate safely, the size of the reserves held by these cryptocurrencies and the quality and liquidity of their investments need to be carefully regulated. Any number of events – for example, a devaluation of one of the currencies that make up a basket or loss of confidence in the cryptocurrencies' reserve investments – could precipitate a run on the cryptocurrency, with users demanding immediate redemptions on a mass scale.

Privacy and data sharing related to third-party wallets also serve as barriers to the adoption of cryptocurrencies. Many third-party cryptocurrency wallets require the customer to provide the online banking login, many times under the pretext of account authentication, to provide the third party with direct access into customer accounts to acquire or scrape the data and reuse it in their applications. Since this practice provides third-party cryptocurrency wallets with account credentials, the risk of account takeover is significantly higher, which puts the customer and bank at a higher risk for fraud and other malicious activity.

Finally, inconsistent funds availability practices among third party wallets is a barrier to widespread adoption. Often customers experience significant delays (1-2 days) in transferring money within their wallet from their cold wallet ("vault") to their active wallet. These delays impact the usage and can impact the actual value. Funds availability provisions, such as Regulation CC, should apply to cryptocurrencies.

How is distributed ledger technology used, or potentially used, in banking activities (e.g., identity verification, credit underwriting or monitoring, payments processing, trade finance, and records management)? Are there specific matters on this topic that should be clarified in regulatory guidance, including regulations? (Question 5)

Cryptocurrencies' use of distributed ledger technology ("DLT") is spurring significant investments in payments technology, both from banks and nonbanks. Distributed ledger technology can work, either as part of or decoupled from cryptocurrency. These technologies can be used for executable contracts and international payments and can be used for non-payment-related purposes, such as DLT to monitor supply chains, manage recording, and gain additional credit related information.

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While DLT has promise in all these use cases, the transparency that comes with DLT can present privacy concerns. If a customer's personal data is inserted into a public distributed ledger, the customer's privacy is jeopardized. Most distributed ledgers are unchangeable, and the customer's personal data remains in the ledger. Additionally, if the customer requests to change data or withdraws consent completely, data on the ledgers cannot be altered without compromising the ledger. Appropriate regulation of DLT should ensure the customer's privacy.

How are AI techniques, including machine learning, used or potentially used in activities related to banking (e.g., credit underwriting or monitoring, transaction monitoring, anti-money laundering or fraud detection, customer identification and due diligence processes, trading and hedging activities, forecasting, and marketing)? Are there ways the banking industry could be, but is not, using AI because of issues such as regulatory complexity, lack of transparency, audit and audit trail complexities, or other regulatory barriers? Are there specific ways these issues could be addressed by the OCC? Should the OCC provide regulatory guidance on this use, including by issuing regulations? (Question 6)

How AI techniques are used or potentially used in activities related to banking
The use cases for artificial intelligence ("AI") and machine learning ("ML")[11] are very wide and hold enormous potential to improve the efficiency and the efficacy of banking.[12] For example, according to U.S. Treasury's *Nonbank Financials, Fintech, and Innovation Report* (hereinafter, "Treasury Fintech Report"), a large percentages of U.S. banks report either current or planned AI deployment across the following use cases: more than 60% in biometrics, about 60% in fraud and security detection, about 55% in chatbots or robo-advisers; and about 35% in voice assistants.[13] Yet applications that successfully utilize AI and ML technologies are primarily still in their infancy. It is important that OCC and other federal agencies do not act prematurely to promulgate rules and regulations that inadvertently choke-off their development.

Though published several years ago, and not directly in response to AI/ML usage, OCC's guidance on model risk management continues to provide relevant use cases and salient governance of similar

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[11] Section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 1695 (Aug. 13, 2018) (codified at 10 U.S.C. § 2358, note), defined AI to include the following:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or another context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision-making, and acting.

[12] "A Financial System That Creates Economic Opportunities: Banks and Credit Unions," June 2017 ("Treasury Report"), at 51, *available at* https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf Treasury report, pg 51

[13] *Id.* at 54.

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technologies, including the use of models for "underwriting credit; valuing exposures, instruments, and positions; measuring risk; managing and safeguarding client assets; and determining capital and reserve adequacy." [14]

In addition to the use cases outlined in current guidance, ICBA notes several other AI/ML applications that hold promise.

Operational and back-office operations

Back-office banking operations, which have no direct interaction with consumers, are ripe for direct usage of AI/ML technology, especially when executed through robotic process automation ("RPA"). For example, when the Financial Stability Board ("FSB") has researched how several banks employ automated back-testing of models through RPAs as an important technique,[15] it found that automating certain routine and redundant tasks help the banks better evaluate how well risk models are performing. These tests are often run more frequently, including off-hours in the middle of the night. This technology and technique can also be used for other routine and highly repeatable functions, such as audit, data-quality assurance checks, and anomalous activity flags.

Alternative data collection and use for credit underwriting

According to the Consumer Financial Protection Bureau ("CFPB"), 26 million consumers—about one in 10 adults in America—could be considered credit invisible because they do not have any credit record at the nationwide credit bureaus. Another 19 million consumers have too little information to be evaluated by a widely used credit scoring model. Thankfully, AI has the potential to expand access to credit for these "credit invisible" and "thin-file" individuals by enabling lenders to evaluate the creditworthiness of some of the millions of consumers who are unscorable using traditional underwriting techniques.[16] For example, a 2017 study found some evidence that the use of "alternative" credit data has allowed consumers with more limited traditional credit profiles (i.e., based on FICO scores) to access credit.[17]

AI/ML techniques can help banks harvest this alternative data that would otherwise be cost-prohibitive. Current use cases include accessing cash flow, rent history, utility and cell phone bills, employment history, and property ownership. Eventually, AI/ML holds the potential to utilize and find patterns in even more unconventional data points, including social media, browsing history, behavioral data, shopping patterns, and data about consumers' friends and associates. However, as the degree of novelty and unconventionality increases, so does the risk of violating consumer financial protection laws (*discussed further, below*).

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[14] OCC Bulletin 2011-12, "Sound Practices for Model Risk Management: Supervisory Guidance on Model Risk Management," Apr. 4, 2011.

[15] Financial Stability Board, "Artificial intelligence and machine learning in financial services Market developments and financial stability implications," (Nov. 1, 2017), *available at* https://www.fsb.org/wp-content/uploads/P011117.pdf

[16] Ficklin, Patrice Alexander; Phal, Tom; and Watkins, Paul, "Innovation spotlight: Providing adverse action notices when using AI/ML models," July 7, 2020, *available at* https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/

[17] *Supra* note 12, at 130.

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Regulatory compliance

AI/ML is also being used to comply with various regulatory requirements. For example, usage of AI/ML technology helps banks comply with the BSA/KYC requirements, such as evaluating whether images in identifying documents match one another and whether certain applications or customer interactions warrant additional scrutiny.[18] There is also promising use cases for compliance with other data reporting regulations, such as management of data related to the Call Report, the Home Mortgage Disclosure Act, the Community Reinvestment Act, and other compliance management systems.

Customer assistance

The use of chatbots utilizes natural-language processing to autonomously assist customers with routine questions or problems. Many of these systems employ text messages or online direct message interfaces.[19] Through the use of chatbots, consumers have the opportunity to experience real-time, interactive information, resulting in a more informed consumer.

Challenges include regulatory complexity, lack of transparency, audit and audit trail complexities, or other regulatory barriers

While there are clearly many use cases and potential benefits of AI/ML technology, there are also several hurdles and challenges associated with its implementation. Perhaps the greatest challenge for the adoption of AI/ML usage will be direct interactions with consumers and the applicable consumer financial protection laws.

Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA") prohibits discrimination based on race, color, religion, national origin, sex or marital status, or age. While ECOA obviously prohibits facial and intentional discrimination, it has also been used to prohibit and punish unintentional and facially-neutral activities that result in a discriminatory impact on protected classes. Though the OCC and other agencies have recently issued an interagency statement on the treatment of alternative modeling (implicitly, through AI/ML models) under ECOA, the guidance was generic and broad enough to not be informative. The statement was short on substance and novel information.

Instead, the statement provides broad allusions to the potential benefits of alternative data, emphasizing that the use of alternative data may improve the speed and accuracy of credit decisions and may help firms evaluate the creditworthiness of consumers who currently may not obtain credit in the mainstream credit system. Further, the statement provides only glancing reference on how to mitigate the potential downsides, stressing that banks must still maintain a well-designed compliance management program that provides for a thorough analysis of

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[18] *Supra* note 15, at 20.

[19] *Supra* note 12, at 53.

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relevant consumer protection laws and regulations to ensure firms understand the opportunities, risks and compliance requirements before using alternative data. The OCC and other federal agencies should provide regulatory clarity for the use of alternative data models consistent with applicable law for use in credit decisions.

Although Official Interpretation to Regulation B, which implements ECOA, provides that a creditor need not describe how or why a disclosed factor adversely affected an application,[20] the banks themselves might not be aware of all the factors that go into how the credit models incorporate alternative data and methods into the underwriting process.

Another concern is that consumers will not be offered all the products that might be offered to others, again, unbeknownst to the bank. Critics of this technology have argued that implicit and unintentional bias could be automated and perpetuated to a higher magnitude than presently undertaken.[21]

Fair Credit Reporting Act

Another consumer financial protection law that presents challenges for the use of AI/ML technology is the Fair Credit Reporting Act ("FCRA"). FCRA requires credit reporting agencies ("CRA") and banks that furnish information to CRAs to maintain accurate data, provide consumers access to and the ability to correct their data, and that such data is used only for permissible activities.[22] Among other requirements, FCRA requires that consumers be provided adverse action notices if they are denied credit or charged more as the result of their consumer report information.

Additionally, online consumer scores, or e-scores, are sometimes used to further refine relationships with customers, yet the e-scores might be based on complex information upon which the bank is not familiar. The underling information is often calculated using complex algorithms and data mined from both online and offline sources.[23] Yet, use of these scores might inadvertently expose a bank to liability for unintentional discrimination. It has been noted that curation and tailoring like this might unintentionally lead to "digital redlining."[24]

Data privacy challenges

Consumers' financial and nonfinancial data may be increasingly shared without their understanding and informed consent. Moreover, the power of AI and machine learning tools may expand the universe of data that may be considered sensitive as such models can become highly proficient in identifying users individually.[25]

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[20] 12 CFR pt. 1002, comment 9(b)(2)-3

[21] Penny, Crossman, "A lot of people are going to get hurt': Petrou on fintech risk," AM. BANKER, (Feb. 4, 2019).

[22] *Supra* note 12, at 132.

[23] Carol A. Evans and Westra Miller, "From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing," Fed. Res. Board. Consumer Compliance Outlook, 3rd Issue (2019).

[24] *Id.*

[25] *Supra* note 12, at 56.

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AI/ML techniques may not be as reliable as traditional sources, and vendors of data used in AI/ML platforms may not always know the source of their own data, which could present material compliance risks.[26]

Model validation and "black box" challenges

In the lending context and many other financial services use cases, the underlying complexity of AI and ML-based models (often referred to as "black boxes") raises challenges in the transparency and auditing of these models. Many U.S. laws or regulations have been designed around a baseline expectation of auditability and transparency that may not be easily met by these models. For example, it can be challenging to defend or explain the analytics that provide "decisions."[27] Banks will likely struggle with conveying the reasons and the factors used in the model. Further, the consumers will likely have an even harder time understanding how the varied sources of data correlate with one another to yield certain, non-intuitive results.[28]

How these issues could be addressed by the OCC

As the OCC considers how AI techniques are used in activities related to banking, ICBA stresses our support of Executive Order 13859 and OMB's recent "Memorandum for the Heads of Executive Departments and Agencies," which stresses that "[f]ederal agencies must avoid regulatory or non-regulatory actions that needlessly hamper AI innovation and growth."[29]

Rather than regulate the underlying technology and techniques, ICBA recommends that the OCC and other federal banking agencies evaluate how existing guidance can sufficiently adapt to these new techniques and methods. Regulators, therefore, should not impose unnecessary burdens or obstacles to the use of AI and machine learning and should provide greater regulatory clarity that would enable further testing and responsible deployment of these technologies by regulated financial services companies as the technologies develop. Similarly, ICBA agrees with the recommendation made in in Treasury's Fintech Report to continue emphasizing use cases and applications in the financial services industry, including removing regulatory barriers to deployment of AI-powered technologies.[30]

One method of encouragement is for the OCC to provide financial institutions with avenues toward safe harbor from enforcement actions for general use of pre-approved models that incorporate AI/ML technology. A presumptive safe harbor could be conditioned on the bank's implementation of certain parameters and guardrails against consumer harm. This would provide a degree of certainty for financial institutions as they discover and utilize new ways of underwriting consumers with little or no credit history.

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[26] *Id* at 132.
[27] *Id.* at 56.
[28] *Supra* note 16.
[29] Vought, Russell T., "Memorandum for the Heads of Executive Departments and Agencies," Office of Management and Budget, *available at* https://www.whitehouse.gov/wp-content/uploads/2020/01/Draft-OMB-Memo-on-Regulation-of-AI-1-7-19.pdf
[30] *Supra* note 12, at 57.

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Additionally, the OCC could use its unfair or deceptive acts or practices ("UDAP") authority to set out clear, bright-line rules and expectations when employing AI/ML technology. Though prudential regulators often rely on historical interpretations made by FTC on many matters, OCC has the authority to more directly opine on certain matters that would provide more clarity.[31]

Harmonize the regulatory environment
ICBA recommends that the OCC increase and harmonize guidance for third-party collaborations, and voluntarily agree to other agency sandboxes, pilot programs, or other policies that enable innovation such as AI/ML models and usage. Individual sandbox initiatives should be aggregated into one, consolidated sandbox across all the agencies.[32]

Clear, consistent communication on alternative modeling techniques such as AI/ML can provide greater assurance that banks are complying with various federal laws.[33] Overlapping regulatory requirements have resulted in increased compliance costs and duplication of efforts for community banks. The prudential regulators, CFPB and Federal Trade Commission should implement a system in which it coordinates enforcement activity with other interested and relevant regulators.

What new payments technologies and processes should the OCC be aware of and what are the potential implications of these technologies and processes for the banking industry? How are new payments technologies and processes facilitated or hindered by existing regulatory frameworks? (Question 7)

Real-time payments and settlement
A payment system with well-regulated and insured financial institutions as participants is vital to community banks, their customers, the communities they serve, and the United States economy. Traditionally, direct access to the banking system is limited to regulated, examined, and insured financial institutions. Non-bank payment processors and fintech companies play an important role as catalysts for innovation; however, they are required to partner with financial institutions to access banking and payments systems.

ICBA regards the addition of a real-time settlement service by The Clearing House and the announcement of FedNow by the Federal Reserve as a major step forward for the U.S. payment system. These services complement present-day clearing and settlement systems by providing immediate funds settlement transaction-by-transaction on a 24x7x365 basis. Such a platform serves as a foundation for innovation, not just for payments today but as payments evolve in the future.

With settlement options in both the public and private sector, banks have: 1) an infrastructure option for clearing and settling faster payments; 2) ubiquitous access for all financial institutions; 3) a choice

[31] The OCC's standards for assessing whether a practice is unfair or deceptive are derived from the principles in the FTC's policy statements and communicated in OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices."
[32] U.S. Government Accountability Office, Financial Technology: Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight (Mar. 2018) at 40-50, *available at* https://www.gao.gov/assets/700/690803.pdf ("GAO Fintech Report").
[33] *Id* at 7.

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between the public and private sector; and 4) systemic resiliency in the event of disruption of either service.

ICBA continues to urge both the Federal Reserve and The Clearing House to make achieving interoperability in their real-time payments options a priority to ensure ubiquitous adoption. Both parties should aim for interoperability as soon as possible.

Increased use of real-time credit push transactions will provide a framework for financial innovation. Use cases such as on-demand access to earned wages, account-to-account transfers for investment purchases, and person-to-person payments will benefit from this essential step toward payments modernization in the U.S.

Prepaid cards

General purpose reloadable prepaid cards ("prepaid"), while not a new payment method, are a preferred means of banking for unbanked and underbanked consumers. However, prepaid cards leverage bank-based infrastructure to provide innovative account services to promote inclusion to the un-banked and under-banked.

Prepaid cards are linked to a cash balance that enable cardholders to load money on the card, to spend funds at the point of sale at locations that accept the card brand. Purchases at the point of sale are authorized using the available balance. The customer can reload funds as needed and are backed by bank funds. Prepaid cards have the same fraud protections. security features, and dispute resolution rights as traditional debit cards and the balances are FDIC insured. [34]

In April 2020, the U.S. Treasury sent Economic Impact Payments (EIP) and delivered stimulus money to prepaid card accounts of traditionally unbanked individuals. Like many banks, many prepaid card issuers allowed consumers to access EIP funds sent through the ACH Network prior to the settlement date.

Prepaid card issuers continue to innovate these services, adding digital access, and card-less payments to provide increased functionality and access to the customer. Some prepaid accounts utilize AI capabilities to educate and advise the customer on saving and spending patterns as well as account management.

[34] Testimony of Jodie Kelley, CEO of ETA Before the House Financial Services Committee Task Force on Financial Technology Hearing on Inclusive Banking During a Pandemic Using FedAccounts and Digital Tools to Improve Delivery of Stimulus, Jun. 11, 2020.

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P2P Services
The emergence of digital payments has resulted in tools that enable payments between individuals—peer-to-peer (P2P) payments—without using cash or checks. These applications leverage existing payments rails to allow users to send one another money from their mobile devices or personal computer from their bank account or debit card. These P2P systems help consumers send money to split dining bills, send money for expenses and to small businesses and services.

The emergence of P2P systems shows how payments innovation can leverage existing payments rails. Additionally, many of these networks are planning to migrate to faster settlement systems as settlement services are developed to improve their efficiency. The OCC should encourage innovation that leverages bank-based payment rails and combines them with digital technology.

What new or innovative tools do financial services companies use to comply with applicable regulations and supervisory expectations (i.e., "regtech")? How does the OCC's regulatory approach enable or hinder advancements in this area? (Question 8)

Compliance with regulations is a costly endeavor for community banks
The Federal Reserve Bank of St. Louis recently reported that compliance costs account for nearly 9 percent of non-interest expenses at banks with less than $100 million in assets, compared to almost 3 percent for banks with assets of $1 billion to $10 billion.[35] Policies that allow for new market products and services are the best opportunities to reduce these compliance costs. Thankfully, the OCC and other federal banking agencies have started to adopt and incorporate several policies that can integrate these novel products and services. For example, the OCC recently issued a NPRM regarding a possible pilot project policy.

These policies on innovation position the OCC to adequately respond to new products and services and the way consumers obtain them. The policies allow for technology to potentially reshape compliance, speed effective interaction between regulators and financial institutions, and decrease cost and administrative burden.

ICBA firmly believes that these policies will: (1) reduce or modify the need for regulated entities to transfer data to the OCC, (2) provide more cost-effective oversight of supervised entities, (3) facilitate secure data access or exchange between regulated entities and the OCC, and (4) reduce unwarranted regulatory compliance burdens.

In addition to policies that focus on regulating innovations made at banks and other market participants, ICBA strongly encourages the OCC to invest in programs that help its staff implement technologies that

[35] Drew Dahl , Andrew P. Meyer , Michelle Clark Neely, "Scale Matters: Community Banks and Compliance Costs," Fed. Res. Bank of St. Louis, (July 15, 2016), *available at* https://www.stlouisfed.org/publications/regional-economist/july-2016/scale-matters-community-banks-and-compliance-costs.

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improve their supervision, examination, and rulemaking responsibilities, typically classified as supervisory technology ("suptech") and regulatory technology ("regtech").

In particular, regtech and suptech would be beneficial for use with regulations that require data collection and reporting. This would include the development of technology that harnesses automated reporting, real-time monitoring, and data management and validation.

Machine-readable regulations
Drafting regulations in a machine-readable format, by using natural language processing, would save thousands of hours and costs associated with tracking and complying with consumer financial regulations. For example, a recent Tech Sprint event in the United Kingdom resulted in a proof of concept demonstrating how regulations can be drafted and converted into a machine-readable format, thus paving the way for artificial intelligence and machine learning applications to integrate more directly with regulations. The benefits of this development are still unfolding, but one promising development is the possibility for a bank's software to revise its loan origination documents, monitoring procedures, and other policies on an automated basis, whenever a regulation is revised or amended.

ICBA suggests that regulations be developed in tandem with industry standards and common use data. For example, regulation should be drafted explicitly enough to be directly incorporated into automated systems developed by industry workgroups, such as NACHA, Metro 2, Mortgage Industry Standards Maintenance Organization, Fannie/Freddie systems, and adverse action codes.

Are there issues unique to smaller institutions regarding the use and implementation of innovative products, services, or processes that the OCC should consider? (Question 9)

The OCC already has done much to improve the regulatory environment to allow smaller institutions such as community banks to develop relationships with third-party fintechs as a way to use and implement innovative products, services, or processes. ICBA noted many of these developments in recently submitted comments to OCC,[36] but for the purposes of this ANPR, ICBA will reiterate many of the recommendations here.

Despite the clear benefits of partnering with fintechs, community banks have often voiced frustration in navigating a regulatory framework that is designed to be more deliberative and process-oriented, rather than nimble and responsive to innovation. While properly designed and tailored regulations certainly

[36] Emancipator, Michael, "ICBA comment letter, Recommendations, Requests and Suggestions for Continued Improvements to a Regulatory Environment that Facilitates Community Bank-Fintech Relationships," May 14, 2020, *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-letter-to-occ-on-fintech-regulatory-enviornment24af48b051c36d55bb68ff00003634f2.pdf?sfvrsn=8a6c2517_2

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help consumers, overly broad or outmoded regulations create uncertainty and do not protect consumers or other bank customers but serve as a barrier to innovation.

ICBA supports a regulatory framework from which community banks and financial technology companies can cooperatively create products, cultivate solutions, and address barriers to delivering superior service. Regulators and policymakers can help promote technological development at community banks where research and development funding can be limited. Indeed, ICBA's own efforts in helping community banks partner with and use fintech innovations have led us to believe that more involvement from regulators is necessary. This includes: (1) wider adoption of programs and policies for supervised experimentation; (2) collaboratively revising third-party service provider guidance, in terms of both substance and procedure; and (3) expanded access to supervisory and examination findings of significant service providers.

Wider adoption of programs and policies for supervised experimentation
To a certain degree, each agency has pursued or initiated quasi-regulatory programs that are designed to mitigate the slow-moving realities of the traditional rulemaking process, which is anathema to fast-moving fintech. These programs attempt to allow for in-market testing in real world situations, which has the potential to offer valuable information for improving products and providing better value to consumers and other bank customers.

As expressed in response to several agencies' innovation initiatives, ICBA supports these regulatory frameworks that allow for the exploration of new technological developments that otherwise might be prohibited or curtailed by existing laws or regulations. These programs are nimbler alternatives to the formal rulemaking process, yet still have transparent components that are the hallmark of traditional rulemaking tools. This appropriately balances the need to rapidly adapt to advances in technology with the need to closely monitor these relationships.

The OCC is currently considering comments regarding the establishment of an Innovation Pilot Program,[37] which would build upon the OCC's existing financial services innovation infrastructure to provide national banks and other eligible entities with proactive supervision designed to facilitate fintech innovation. ICBA is optimistic that the OCC's proposed program is designed to address many regulatory uncertainties and usher in an era where regulators can quickly adapt to new technologies and changing marketplaces. As noted in response to the proposal, ICBA generally supports the concept put forth by OCC,[38] and we urge the agency to incorporate our recommendations and to quickly implement the program.

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[37] OCC Solicits Public Comment on Proposed Innovation Pilot Program, News Release 2019-42, (April 30, 2019), *available at* https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-42.html
[38] *Supra* note 36.

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Third-party relationship due diligence and monitoring
Regulators can contribute to an environment where banks are empowered to achieve supervisory goals by simplifying and clarifying the process of third-party service provider selection, due diligence, and monitoring.[39]

ICBA appreciates OCC's efforts to improve banks' relationships with their vendors and third-party service providers. Recent remarks made by agency heads have indicated that the agencies are looking to revise and improve third-party guidance. Ideally, this would increase clarity and transparency, while reducing confusion and burden that community banks face in this area. ICBA eagerly awaits a plan that contains more information on necessary elements of due diligence, and what a successful third-party relationship looks like.

As OCC works with other regulators to update third-party guidance, ICBA strongly encourages any update to focus on principles- and performance-based requirements that are not rigid, but that allow for rapid changes and updates.

In particular, ICBA asks that third-party guidance account for the following issues:

- *Lack of expertise or resources*: Although many community banks are well-versed and experienced in partnering with fintechs, there are many that are uncertain of how, or where, to start. Unfortunately, the existing guidance is daunting and this, coupled with fears of increased examiner scrutiny over new relationships, creates a strong chilling effect that inhibits inexperienced community banks from entering into relationships with even the least controversial or novel fintechs. This uncertainty breeds paralysis from taking the first step toward partnering with or utilizing a fintech.

- *Inappropriate tailoring*: To mitigate any examiner criticism, community banks will sometimes subject fintechs to a full and thorough dose of due diligence, without regard to criticality, interconnectivity, or other factors that might dictate a less encompassing vetting. ICBA is concerned that some guidance may be too prescriptive for community banks without scalability. ICBA is pleased to hear that some agencies are directing staff to consider options to further tailor expectation for community banks with assets under $1 billion in this area.[40]

  As Federal Reserve Board Governor Michelle Bowman recently stated, community banks are greatly inhibited from partnering with fintechs, due to limited staff being able to conduct thorough due diligence, selection, ongoing monitoring, and all the other requirements laid out in existing third-party guidance.[41] ICBA encourages OCC to consider similar threshold tailoring.

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[39] See Governor Michelle W. Bowman, "Direction of Supervision: Impact of Payment System Innovation on Community Banks," (Feb. 27, 2020), remarks made at, "Age of Advancement: The Intricacies of a Digital World" 2020 Banking Outlook Conference sponsored by the Federal Reserve Bank of Atlanta, Atlanta, Georgia, available at https://www.federalreserve.gov/newsevents/speech/bowman20200227a.htm
[40] *Id.*
[41] *Id*.

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- *Consistency*: Clear and transparent guidance is most helpful when it is consistent across banking agencies. ICBA appreciates that banking agencies are working together to establish consistent expectations for third-party relationships. However, despite policies set by agency leadership, a community bank's real-world experience in fintech relationships is dictated by an examiner's interpretation of guidance on the matter.

  Guidance is not statute or regulation, yet field examiners' different interpretation of guidance can adversely assess a bank's compliance with law. Non-compliance with guidance, or non-compliance with a field examiner's interpretation of guidance, is not binding and should not form the basis for an enforcement action. This principle aligns with one recently espoused and committed to by Federal Reserve Board Vice Chairman Randal Quarles.[42]

- *Shared due diligence and monitoring*: ICBA greatly appreciates that OCC published several resources to explain and provide advice on how community banks can collaborate with each other to ease fixed-cost burdens.[43] Specifically, ICBA applauds the third-party guidance, Frequently Asked Questions, that explicitly contemplate and discuss shared due diligence and cooperation when managing third-party risk.[44] ICBA reiterates the concerns of others that have noted the inefficiencies of each bank subjecting each third-party to the same or similar due diligence and monitoring requirements.[45] Banks are asking third parties a fairly common set of questions that have been asked and answered numerous times by third parties in response to multiple requests for proposals. It is frustrating for the fintechs, and certainly wasteful for the banks.

  Conducting shared due diligence on potential partners would gain economies of scale as banks pool their resources. Aside from continuing to support and issue guidance on how banks can collaborate, ICBA asks that OCC also work with its fellow regulators to encourage them to issue similar guidance and resources. Tremendous value would also be found if the OCC were to establish a mentor-mentee program, such as has been established in other endeavors and programs.

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[42] See Vice Chair for Supervision Randal K. Quarles, "Spontaneity and Order: Transparency, Accountability, and Fairness in Bank Supervision," (Jan. 17, 2020) remarks made at the American Bar Association Banking Law Committee Meeting 2020, Washington, D.C., stating, "[…]consistent with the September 2018 interagency statement on guidance, we would affirm the sensible principles that guidance is not binding and "non-compliance" with guidance may not form the basis for an enforcement action (such as a cease-and-desist order) or supervisory criticism (such as a Matter Requiring Attention (MRA)). This rule would be binding on the Board and on all staff of the Federal Reserve System, including bank examiners," available at https://www.federalreserve.gov/newsevents/speech/quarles20200117a.htm.
[43] OCC Press release, "Collaboration Can Facilitate Community Bank Competitiveness, OCC Says," (Jan. 13, 2015), available at https://www.occ.gov/news-issuances/news-releases/2015/nr-occ-2015-1.html.
[44] OCC Bulletin 2020-10, "Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29," (Mar. 5, 2020), available at https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html.
[45] *See* supra, note 39.

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- *More specific and timely guidance on novel issues*: In addition to providing general guidance on how to partner with fintechs and what is expected of the relationship, the agencies should provide more issue-specific compliance guidance for novel issues that might not be addressed by existing guidance. Rather than waiting until the guidance is reviewed en masse to address novel issues, ICBA recommends that the agencies weigh in on novel issues as they present themselves. This would more rapidly provide the industry with reliable guidance, relevant to more timely issues.

  As discussed above, laws such as ECOA and FCRA, as well as many other consumer protection laws, were enacted well before advancements in financial technology, and have not adequately been amended to reflect these advancements. As a result, many technologies or methods present novel questions that cannot neatly fit within existing statute, regulation, or guidance.

  For example, a recent GAO study found that the use of alternative data in credit decisions presents many potential benefits. But it also presents many unknown risks of compliance with ECOA, such as disparate impact and other fair lending issues. Though the agencies issued an interagency statement on the use of alternative data in December 2019, the guidance lacked substance and specific actionable items.

  While ICBA commends the agencies' intention behind providing guidance on the use of novel technology, community banks need guidance that provides greater assurance that they are complying with fair lending laws when using these technologies. Supporting this assertion, a follow-up GAO report on priority open recommendations noted that while the interagency statement highlights some potential benefits and risks of using alternative data, it "does not provide firms or banks with specific direction on the appropriate use of alternative data, including issues to consider when selecting types of alternative data to use."[46] ICBA urges the OCC and other agencies to offer more substance on this matter.

Direct supervision of significant service providers

As a recent Congressional Research Service report noted, it is costly for community banks to conduct appropriate due diligence and to ensure compliance with relevant regulatory requirements when selecting and monitoring significant service providers.[47] Fortunately, some industry leaders have started to explore options that would reduce these expenses. Under the Bank Service Company Act, each agency conducts direct examinations of significant service providers, where the results of exams are made available to banks that are clients of the supervised service provider. ICBA is pleased to learn that some agencies are considering making certain information about the outcomes of those examinations available to all banks, providing the benefit of the knowledge that supervisors have about their potential

[46] U.S. Government Accountability Office, Priority Open Recommendations: Board of Governors of the Federal Reserve System, (Apr. 20, 2020), available at https://www.gao.gov/assets/710/706392.pdf

[47] Congressional Research Service, Fintech: Overview of Innovative Financial Technology and Selected Policy Issues, (Apr. 28, 2020), available at https://crsreports.congress.gov/product/pdf/R/R46332.

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service providers.[48] This would have the added benefit of banks knowing which fintechs are already supervised and evaluated by a federal banking agency.[49] ICBA fully supports this endeavor and encourages the agencies to implement the idea.

What other changes to the development and delivery of banking products and services for consumers, businesses and communities should the OCC be aware of and consider? (Question 10)

While only in its initial phase of adoption, Application Programming Interface ("API") technology provides community banks a low-cost method for innovation. Community banks that desire the ability to efficiently and seamlessly integrate third-party product offerings and ancillary services expect their technology partners to support third-party integrations, open-source applications, APIs, and software development kits.

Adoption of APIs that manage customer consent and facilitate permissioned data sharing are an improvement on customer-shared credentials (also known as "screen scraping") that allow applications and data aggregators unfettered access to the customer's account.

Even with API access, there is uncertainty regarding clarity of disclosures. Many data aggregators' disclosures seek customer permission to share all their data, even non-financial data unrelated to the transaction while failing to clearly identify the role of the third-party aggregator. Some data aggregators use bank logos on their disclosures to give the impression that the customers are giving their log-in credentials directly to the bank, rather than to a third-party data aggregator. The OCC should encourage clarity and transparency in data sharing disclosures.

The OCC should encourage the usage and adoption of APIs that allow customers to initiate, manage and revoke consent to share data. Such APIs ensure customer privacy and control and limit the risks associated with shared login credentials.

Are there issues the OCC should consider in light of changes in the banking system that have occurred in response to the COVID-19 pandemic, such as social distancing? (Question 11)

The COVID-19 pandemic has changed how consumers bank and make payments. Stay-at-home orders and quarantine restrictions combined with mandated business closures accelerated the digital delivery strategy of both banks and their business customers. Many consumers have shifted their shopping to online shopping and home delivery or curbside pickup. Most industries have seen a 15 to 40 percent increase in online channel user growth.[50]

[48] *See supra* note 39, Governor Bowman stating, "I believe we can go a step further to increase transparency by also making information that may be useful about our supervision of key service providers available to banks. This could take a number of forms, such as being more transparent about who and what we evaluate.")

[49] *Id*.

[50] "Survey: US consumer sentiment during the coronavirus crisis," McKinsey & Company, July 24, 2020, *available at* https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis.

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However, many customers are unable to use digital payments because of the lack of access to the internet or lack of broadband technology. A June 24, 2020 study from the Federal Reserve Bank of Kansas City reported that 46 percent of unbanked consumers did not have home internet access. The study concluded "The COVID-19 pandemic may prove to be the needed catalyst for change. The pandemic has fostered a digital shift in the behaviors and preferences of consumers and businesses, spurred industry initiatives, and strengthened legislative efforts to address the prevailing gaps in consumer access to financial services and affordable broadband internet."[51]

Conclusion

ICBA hopes that the above comments provide a foundation of perspective should the Comptroller determine to propose changes to existing regulations. Community banks are encouraged by your recent efforts in this area, and ICBA looks forward to collaborating with your agency on leveraging these efforts into the future of community banking. Should you have any questions or would like to discuss this further, please do not hesitate to contact either Cary Whaley at Cary.Whaley@icba.org or Michael Emancipator at Michael.Emancipator@icba.org.

Sincerely,

/s/

Cary Whaley
First Vice President, Payments and Technology Policy

/s/

Michael Emancipator
Vice President & Regulatory Counsel

[51] Ying Lei Toh and Thao Tran, "How the COVID-19 Pandemic May Reshape the Digital Payments Landscape," KC Fed Payments Research Briefing, June 24, 2020, *available at* https://www.kansascityfed.org/publications/research/rwp/psrb/articles/2020/covid19-pandemic-may-reshape-digital-payments-landscape.