Comments of

National Consumer Law Center
(on behalf of its low income clients)

to

Department of the Treasury
Office of the Comptroller of the Currency

12 CFR Parts 7 and 155
[Docket ID OCC–2019–0028]
RIN 1557–AE74

on

Advance notice of proposed rulemaking on
National Bank and Federal Savings Association Digital Activities

Submitted August 3, 2020

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Introduction and Summary

The National Consumer Law Center, on behalf of its low income clients, submits these comments in response to the Office of the Comptroller of the Currency's ("OCC") Advance Notice of Proposed Rulemaking on National Bank and Federal Savings Association Digital Activities ("Digital Activities ANPR" or "ANPR").

As an initial matter, we note that we found it difficult to respond to this ANPR, both because of the broad and vague nature of the request and because of the timing, in the midst of the coronavirus crisis, which is taking the attention of our organization. We have attempted to summarize our thoughts on a number of financial technology topics, but we have not gone into detail, we have missed issues, and we expect that other organizations that have been too distracted by the coronavirus crisis to file comments would do so given more time and a more specific request. We therefore urge the OCC not to rush any fintech initiatives and to seek more public comment on discrete topics before it takes any significant actions.

The ANPR describes many benefits of digital activities and innovation (also called financial technology or "fintech"), along with some risks to the banking industry. Yet the ANPR is woefully short of curiosity about consumer protection risks. We urge the OCC to have a critical mind and look carefully for potential harms or downsides to consumers of new approaches, and to consider not only the benefits but also the consumer protection risks of fintech.

This ANPR follows several recent activities by the OCC, some justified in the name of financial technology, that involve expansion of national bank charters to nonbank entities as well as partnerships between national banks and federal savings associations (collectively, "banks") and nonbanks. The OCC must not allow banks and bank charters to be used to evade state consumer protection laws. The OCC should not grant national bank charters to nonbank entities. A lending charter poses a severe risk of predatory lending, and the complex policy issues posed by a payments charter should be considered by Congress, not usurped by the OCC. The OCC should stop allowing rent-a-bank partnerships with companies that use the fintech label to mask predatory lending and evasion of state usury laws.

The OCC notes that artificial intelligence, machine learning, alternative data, and big data are transforming financial services. The OCC must be vigilant to prevent misuse or harmful impacts from these developments, which can lead to disparate impacts on disadvantaged communities. Cashflow underwriting and other uses of transaction data show promise but must be monitored for misuse. But banks should be especially careful before using other types of alternative data. It is important to note that some data uses are subject to the Fair Credit Reporting Act or need similar protections. Banks also must respect consumers' privacy in the use of data.

One potentially beneficial use of technology that deserves more attention is to serve those with limited English proficiency. Banks can identify customers' language preferences and use technology to serve them in their own language before, during, and after a financial transaction.

New technologies in payments and deposits offer benefits but also pose risks of consumer protections being left behind. In particular, fraud protection and error resolution is an afterthought in faster payments and P2P services. Technology can be used to address weaknesses in know-your-customer compliance in remote account opening and monitoring. New technologies should also eliminate, not accommodate, overdraft fees. Banks that eliminate branches or focus on mobile banking must not forget real customer service and engagement with the community. Moreover, protections for check deposits to prepaid cards and remote deposit capture must catch up with the technology.

Cryptocurrencies lack protection that must be in place before widespread use or testing on vulnerable consumers. The OCC should also proceed with caution in its approach to blockchain technology, including in so-called "smart contracts."

The OCC should keep an eye on finance products that evade credit laws, which can pose risks to consumers and, at times, to banks. While most of these practices are confined to nonbanks right now, evasions could spread to banks. New loan servicing and debt collection technologies, as well, are not always improvements, and can create their own problems.

The OCC has asked about the impacts of the coronavirus crisis. We need more attention to the disparate impacts in who gets what COVID relief. The crisis also calls attention to the persistent lack of attention in servicing to helping people survive bumps in the road. The stay-at-home orders will likely accelerate growth in and comfort with electronic communications, but the OCC and its banks must remember that not everyone is fully comfortable with fully electronic transactions and communications or has consistent, reliable access to the internet. The crisis will also likely result in negative credit report impacts to people through no fault of their own, and the OCC should encourage banks to use technology to underwrite and serve customers without blacklisting those temporarily impacted by the COVID-19 crisis.

1. The OCC should not rush fintech initiatives and should seek more public comment on more discrete topics.

The OCC has issued a broad and vague advance notice of proposed rulemaking that covers a wide array of banking issues related to "digital activities, use of technology, or innovation." Though the ANPR mentions a number of recent uses of technology, the comment request does not propose or discuss any specific rule changes with respect to any of them, beyond a desire to generally update the activities addressed in 12 CFR part 7. This lack of specificity has made it difficult to determine what the OCC is contemplating and what information would be useful to provide. As a result, we have attempted to summarize our thoughts on a wide range of financial technology topics, but we have not gone into detail on any of them, and may have missed some issues that pose consumer protection issues altogether.

This comment request also comes in a middle of a health and economic crisis to which consumer organizations and many other stakeholders have been scrambling to respond. The coronavirus crisis

has posed a severe strain on our resources and those of our colleagues in the consumer advocacy, civil rights, legal services, and community organization world. We have not been able to engage with others as we normally would attempt to do. We expect that the OCC will get very few comments from other public interest orders due to the abstract nature of the request and the attention that the coronavirus crisis has been taking. But that does not mean that issues involving the impact of technology of financial services are not of interest.

Thus, we urge the OCC not to rush, and to seek further public input before undertaking or even proposing any significant initiatives involving use of technology in banking. A more specific comment request, such as a new ANPR, or request for information prior to any proposed rule or guidance will enable us to provide better input that the OCC should consider about the potential impacts on consumers of technology or a regulatory response.

2. The OCC should carefully consider not only the benefits but also the consumer protection risks of fintech.

The OCC's comment request heavily emphasizes the benefits of technology and "innovation." While the ANPR mentions some risks, those risks seem to focus almost entirely on the banks,[1] with only passing references to consumer protection. The specific questions posed are entirely focused on the banking industry and not a single one asks about consumer protection issues or risks to consumers.[2] Rather, the questions focus entirely on the impact of technology on the banking industry, including how to provide flexibility and relieve regulatory burdens.

It is essential that the OCC pay close attention to the consumer protection risks of new technologies as well as the benefits.[3] New technology offers the potential to provide important benefits to consumers. New approaches may lower costs, promote financial inclusion, help people avoid fees and comparison shop, improve personal financial management, and build assets and wealth. But innovation and technology are not invariably positive.

New products may have hidden or unintended negative consequences, or risks that are not obvious at first. The dangerous pick-a-payment and exploding adjustable rate mortgages that fueled the foreclosure crisis leading to the Great Recession of 2008 were innovations. New technology enabled banks to encourage overdraft fees on debit cards that can turn a $5 cup of coffee into a $40 one.

The "fintech label" also does not necessarily mean that much is different. Products and services are constantly evolving, but sometimes the more things change the more they stay the same. Old problems can arise in a new package, and promised benefits of fintech products may not actually materialize.

The fact that something is automated does not mean that it is always accurate. For example, automated home appraisal valuation models vary in their accuracy and lack the regulatory oversight of

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[1] *See* ANPR at 6.

[2] At best, one narrow and vague question asks: 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? *Id.* at 13.

[3] *See* Lauren Saunders, NCLC, Fintech and Consumer Protection: A Snapshot (March. 2019), http://bit.ly/2Tx9BmG.

traditional appraisals. An inaccurate valuation could leave homeowners with negative equity, leading them to overpay for a house or loan and making it hard to sell or refinance. In the abuses leading up to the last financial crisis, inflated appraisals were a central tool of scams such as property flipping and abusive refinancings.

The speed of technology is not always a good thing. Faster credit can be faster debt. Faster payments can mean faster fraud. Faster can be more dangerous to consumers who are lured into services with hidden risks and who do not have the time to consider ramifications.

Some fintech products also lack of transparency about the costs and business model. Fintech products often appear free or very low cost but may not be. Sometimes the costs are hidden or are not revealed until after a consumer begins the sign-up process, and sometimes the cost is not in dollars but in the use, sharing or selling of the consumer's personal information.

The allure of shiny fintech products must not lead us into waiving consumer protection rules or oversight of untested products. Just because a product uses new technology does not mean that older protections do not or should not apply or that regulators do not know how to approach a product. It is crucial to look at fintech products carefully and critically, to understand the risks, and not to accept unproven hype about benefits to consumers.

As the OCC considers appropriate consumer protections, it cannot solely rely on disclosures. The OCC states that "any regulation should facilitate appropriate levels of consumer protection and privacy, including features that ensure transparency and informed consent."[4] Transparency and consent are important, but are far from enough. Financial products and services must be safe, fair and sustainable. Clicking "I agree" to a disclosure is an extremely weak form of consumer protection.

The problems with some fintech products are compounded by the lack of accountability caused by forced arbitration clauses. Forced arbitration clauses, buried in the fine print of contracts, take away consumers' day in court and their ability to band together with other injured consumers when companies violate the law. Forced arbitration clauses are a problem in products old and new, but they are especially widespread in fintech products.[5]

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[4] *Id.* at 10.

[5] Christine Hines, National Association of Consumer Advocates, "Fintech Brings New Options and a Lingering Old Problem for Consumers" (Aug. 29, 2018), https://www.consumeradvocates.org/blog/2018/fintech-brings-new-options-and-lingering-old-problem-for-consumers.

3. The OCC should not allow banks and bank charters to be used to evade consumer protections.

3.1. The OCC should not grant national bank charters to nonbank entities.

The ANPR notes that the OCC is not seeking comments on its authority to issue a special purpose national bank charter ("nonbank charter"). Thus, we will not address that issue, though our views on the OCC's lack of authority to do so are set forth in earlier comments[6] and in our amicus brief filed last week[7] in support of the decision by the New York district court finding that the OCC has no such authority. In these comments, we will simply note briefly that, beyond the authority issues, it is a bad policy decision for the OCC to issue national bank charters to entities that do not take deposits and are not banks in any traditional sense of the word.

3.1.1. A lending charter poses a severe risk of predatory lending.

The dangers of a lending charter are especially stark. Predatory lenders are eager to obtain national bank charters so that they can ignore state usury laws and charge rates well over 100% APR that are illegal under most state laws. Granting national bank charters to nonbank lenders would eviscerate the fundamental power that states have had since the time of the American Revolution to cap interest rates to protect their residents from predatory lending.

We do not have confidence that a nonbank charter would not be available to predatory lenders. High-cost lenders, often under the "fintech" label, are already evading state rate caps by using rent-a-bank schemes. The OCC is not reining in – and in fact has been defending – predatory lenders that launder their loans through banks. A nonbank charter will make usurious lending even more widespread.

The OCC's safety and soundness supervision and enforcement of federal law would not compensate for the elimination of state interest rate caps. Federal law does not generally limit interest rates, and interest rate caps are the simplest and most effective protection against predatory lending. Safety and soundness regulation does not adequately protect consumers. Congress created the CFPB in 2010 precisely because the OCC and other bank regulators had failed to adequately protect consumers.

Moreover, monoline lending companies would have fewer obligations to serve communities with responsible products, as compared to true national banks with a broader range of products and services. Nonbanks will not be subject to the Community Reinvestment Act, which only applies to depository institutions, creating a higher risk they will offer products that harm the communities where they do business rather than serving these communities with responsible products.

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[6] Comments of NCLC et al. to OCC on Exploring Special Purpose National Bank Charters for Fintech Companies (Jan. 17, 2017), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/comments-fintech-jan2017.pdf.

[7] Amicus Curiae Brief of the Center for Responsible Lending, National Consumer Law Center And National Community Reinvestment Coalition in Support of Appellee, Lacewell v. OCC, No. 19-4271 (2d Cir. Filed July 30, 2020), https://bit.ly/AC-Lacewell-v-OCC-7-30-2020.

3.1.2. The complex policy issues posed by a payments charter should be considered by Congress, not usurped by the OCC.

We also have serious concerns about the OCC's recent announcement that it intends to go forward with a payments charter. As with a lending charter, we do not believe that the OCC has the authority to issue such a charter. Moreover, as a policy matter, the decision of whether and how to grant a national payments charter should be left to Congress. A payments charter raises important issues of how to provide strong and enforceable consumer protections, preemption of state consumer protection laws and state oversight, what financial inclusion and community reinvestment obligations apply and how they would be enforced, what protections must be in place to preserve existing laws regarding the separation of banking and commerce, and oversight and supervision of holding companies.

We are especially concerned about companies that handle payments and hold funds but do not obtain deposit insurance for those funds. Blurring the line between an insured depository institution and one that holds funds but with fewer safeguards will only harm consumers.

Granting a payments charter to nonbank companies would be a significant departure with implications for our broad infrastructure for regulating banks and nonbank companies. Our elected officials, after full public input, should be the ones to consider these issues and make any decisions on a payments charter. It is inappropriate for the OCC to do so.

3.2. The OCC should stop allowing bank partnerships with companies that use the fintech label to mask predatory lending and evasion of usury laws.

Banks are increasingly partnering with a wide range of nonbank companies that call themselves "fintechs," a label so broad as to be meaningless. Many of the partnerships between banks and nonbank companies provide important benefits to the partners as well as the consumers and other customers they serve.

But some partnerships exist primarily as a means for the nonbank company to rent out the bank charter in order to evade state consumer protection laws. High-cost rent-a-bank schemes in particular hide under fintech label that is a mere fig leaf for predatory lending. As OCC Comptroller, John D. Hawke, in 2002-2003, stated: rent-a-bank arrangements are "an abuse of the national charter," and the preemption privileges of national banks "are not a commodity that can be transferred for a fee to nonbank lenders," particularly "where an underlying purpose of the relationship is to afford the vendor an escape from state and local laws."[8]

Yet today the OCC is defending abusive bank partnerships with predatory lenders, not stopping them. Last year, the OCC filed an *amicus* brief supporting the right of a predatory nonbank lender, World Business Lenders (WBL), to charge 120% APR on a $550,000 loan despite Colorado's 45% usury law.[9] WBL is now laundering its loans through Axos Bank (f/k/a BOFI Bank), an OCC-supervised federal savings bank. Yet the OCC's supervision of Axos Bank has not stopped a predatory business model

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[8] OCC, News Release 2002-10, *Comptroller Calls Preemption a Major Advantage of National Bank Charter* ("OCC 2002 Preemption Release") (Feb. 12, 2002), https://bit.ly/3hBXz2L.

[9] See Amicus Brief of the [FDIC] and the [OCC] in Support of Affirmance and Appellee, In Re: Rent-Rite Super Kegs West Ltd. (Sept. 10, 2019), https://bit.ly/3fQDwx6.

where WBL approaches struggling businesses, does little responsible underwriting or due diligence, launders exorbitantly priced loans through the bank to evade state rate caps, and threatens to foreclose on business owners' homes when they cannot afford to repay.[10]

Another OCC-supervised bank, Stride Bank, is helping the payday lender CURO make triple-digit installment loans in states that do not allow those rates. For example, CURO is piloting an installment loan under the Avío Credit brand, funneled through Stride Bank, with rates up to 130% APR.[11] Avío is currently in two states but CURO boasts that it is "a product that will help us expand geographically, online and in some states where we -- where we don't operate right now."[12] The other emerging rent-a-bank scheme between CURO and Stride Bank is with Verge Credit, which makes loans up to 179% APR.

CURO makes payday loans and high-cost installment loans directly where legal, but uses a bank where necessary to evade state usury laws. As CURO told investors when explaining the plan to change to a rent-a-bank model through OCC-regulated MetaBank in order to evade California's newly tightened usury law, CURO needs to "sacrifice a little bit of the economics" to a bank "that's going to need a good rev[enue] share."[13]

CURO's website touts "Powering Innovation for Underbanked Consumers."[14] But that innovation masks predatory lending, plain and simple. The company's Verge Credit website goes so far as to claim the OCC's mantle for itself, describing itself as "100% transparent" because its relationship with a national bank "means you are under the protection of federal regulators (who make sure consumer laws are followed). 100% legit."[15]

If the OCC is serious about "responsible innovation," then it must stop its banks abusing the national bank charter to help predatory lenders.

4. The OCC must be vigilant to prevent misuse or harmful impacts from the use of artificial intelligence, machine learning, alternative data, and big data.

4.1. The use of data can lead to disparate impacts on disadvantaged communities.

Consumer financial products and services are impacted by the use of more and new sources of data about consumers, massive increases in computing power, and new methods to analyze huge amounts of data, such as machine learning and artificial intelligence. The use of data impacts the marketing, pricing, delivery, and implementation of almost every product.

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[10] Testimony of Lauren Saunders before the U.S. House Financial Services Committee on Rent-a-Bank Schemes and New Debt Traps at 10-13 (Feb. 5, 2020), http://bit.ly/debt-trap-schemes ("Saunders Rent-a-Bank Testimony").
[11] *See* Avío Credit website, *Installment Loan Fee Schedule*, https://bit.ly/3gao1jF (last visited 7/28/20).
[12] CURO Group Holdings Corp., Q4 2019 Earnings Call Transcript (Feb 6, 2020), (Don Gayhardt, Chief Executive Officer), https://bit.ly/39CrzJi.
[13] The Motley Fool website, CURO Group Holdings Corp. Q2 Earnings Call Transcript (Aug. 2, 2019), bit.ly/2Eg619v.
[14] *See* CURO, https://www.curo.com/ (last visited 7/29/20).
[15] *See* Verge Credit website, https://www.vergecredit.com (last visited 7/28/20).

Banks and the fintechs with which they partner claim that new uses of data and technology can streamline applications, improve underwriting, and offer better, faster, more personalized service. These uses of data do indeed have benefits, but they also come with significant risks.

In particular, banks must always be careful to examine the outcomes that their uses of data generate in order to ensure that they do not result in disparate impacts on disadvantaged communities. It is increasingly difficult for even the designers of artificial intelligence or machine learning systems to know what is in the "black box" of data and computer algorithms that shape how decisions about people on issues ranging from credit applications to pricing on a range of products are being made.[16] Yet many data elements, alone or in combination with each other, correlate with race, ethnicity, and other protected class characteristics, potentially leading to discrimination and disparate impacts.[17] Multiple data sources, even if individually permissible, "could be combined, once inside an algorithm, into a multivariable stand-in for a protected class. This can result in discriminatory outcomes in lending.[18]" Use of such data in lending decisions will implicate the Equal Credit Opportunity Act (ECOA) and potentially the Fair Housing Act.

Disparate impacts can occur even if the use of data is facially neutral and lacks the discretionary element of human interactions that can lead to discrimination. A recent study found that digital mortgages resulted in higher prices to equally qualified borrowers of color in the same manner as human underwriting does.[19] Disparate impact is often the result of structural racism, which drives significant racial disparities in key factors in our society – education, income, employment, housing, and criminal justice. Algorithms often end up reflecting and reinforcing the inequalities already present in a society.[20]

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[16] Siobhan Roberts, "The Yoda of Silicon Valley," *New York Times* (Dec. 17, 2018), ("However, as Kevin Slavin, a research affiliate at M.I.T.'s Media Lab said, 'We are now writing algorithms we cannot read. That makes this a unique moment in history, in that we are subject to ideas and actions and efforts by a set of physics that have human origins without human comprehension.'"), https://www.nytimes.com/2018/12/17/science/donald-knuth-computers-algorithms-programming.html.

[17] Carol Evans, Board of Governors of the Federal Reserve System, "Keeping Fintech Fair: Thinking about Fair Lending and UDAP Risks," Consumer Compliance Outlook (2d Issue 2017), https://www.consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/.

[18] Nathaniel Hoopes, Marketplace Lending Association, Don't ditch disparate impact (Mar. 4, 2020), https://www.americanbanker.com/opinion/dont-ditch-disparate-impact.

[19] Robert Bartlett et al., Consumer-Lending Discrimination in the Era of FinTech (Oct. 2018), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf; Penny Crosman, American Banker, "Weren't algorithms supposed to make digital mortgages colorblind?" (Nov. 26, 2018), https://www.americanbanker.com/news/werent-algorithms-supposed-to-make-digital-mortgages-colorblind;

[20] *See, e.g.*, Carolyn Y. Johnson, Racial bias in a medical algorithm favors white patients over sicker black patients, Washington Post (Oct 24, 2019) ("A widely used algorithm that predicts which patients will benefit from extra medical care dramatically underestimates the health needs of the sickest black patients"); Will Knight, Wired, The Apple Card Didn't 'See' Gender—and That's the Problem: The way its algorithm determines credit lines makes the risk of bias more acute (Nov. 19, 2019), https://www.wired.com/story/the-apple-card-didnt-see-genderand-thats-the-problem/; Ethan Chiel, The Injustice of Algorithms., New Republic (Jan. 23, 2018) (summary of examples in Virginia Eubanks's *Automating Inequality* of how three different automated systems developed biases against low-income Americans), https://newrepublic.com/article/146710/injustice-algorithms.

Data can also be used inappropriately to charge higher prices to those least able to afford them, harming all low-income consumers but especially communities of color that have long suffered the consequences of discrimination. Analysis of price sensitivity and propensity to comparison shop may lead to higher prices for less sophisticated consumers, those with more limited internet access, those with fewer banks in their community, and those with fewer options.

Major institutions have joined consumer organizations in defending the use of disparate impact analysis.[21] Disparate impact is an important tool to prevent discrimination that "doesn't just protect borrowers; it protects innovation."[22] As Lending Club put it, disparate impact, "while flexibly accommodating innovation in data, machine learning, and artificial intelligence (AI), … has not been onerous to comply with in our experience, and … provides the regulatory stability that supports innovation and investment.[23]

The promise of technology and innovation must reach all communities. Integrating rigorous disparate impact analysis is a critical component of the responsible use of innovation and regulatory oversight of new technologies.

For more on the civil rights implications of the use of data and technology, please see the separate comments on this topic submitted by several civil rights and consumer organizations that we have joined.

4.2. Cashflow underwriting and other uses of transaction data show promise but must be monitored for misuse.

Banks and other lenders that partner with banks are increasingly using transaction data from deposit and credit card accounts to evaluate credit applications. Banks may access data in their own customers' accounts, or they may use services such as Experian Boost (using utility and telecommunications payments as identified in bank account records) and UltraFICO (using bank account transactions). Banks also partner with lenders that access transaction data through data aggregators.

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[21] *See, e.g.,* Emily Flitter, New York Times, Big Banks' 'Revolutionary' Request: Please Don't Weaken This Rule (July 16, 2020), https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html (describing letter by Bank of America, Citigroup, JPMorgan Chase and Wells Fargo urging the Department of Housing and Urban Development not to adopt a proposed rule on disparate impact analysis as "We have all heard the legitimate concerns that have been raised that the proposed rule could make it more difficult to ensure that the Fair Housing Act's protections and avenues of redress against unlawful discrimination are available to all Americans"); Mary Ann Azevedo, Housing Wire, Quicken and NAR ask HUD to withdraw proposed amendments to Fair Housing Act (July 14, 2020), https://www.housingwire.com/articles/quicken-and-nar-ask-hud-to-withdraw-proposed-amendments-to-fair-housing-act/; Hoopes, *supra*, Don't ditch disparate impact.

[22] Hoopes, *supra*, Don't ditch disparate impact.

[23] *See* Comments of Lending Club to Consumer Financial Protection Bureau re: Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities; Maintain Disparate Impact Policy (June 23, 2018), https://www.regulations.gov/document?D=CFPB-2018-0012-0075; Comments of the National Consumer Law Center, et al. to the U.S. Department of Housing and Urban Development on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P (August 19, 2019), https://www.nclc.org/images/pdf/special_projects/racial_justice/comments-to-hud-disparate-impact-standardoct2019.pdf.

Analysis of a consumer's actual inflows and outflows, income, and expenses can streamline residual income underwriting through a simple process without intensive documentation. Cashflow analysis may provide a realistic picture of whether the consumer regularly has sufficient funds at the end of the month to handle a loan payment or, conversely, whether the consumer has difficulty meeting expenses.

Analysis of transaction data may provide a way to underwrite consumers who do not have significant credit histories or who are recovering from a temporary setback. It may also help those whose income comes from informal or irregular sources that is otherwise difficult to document. Consumers who want creditors to consider their utility payments can also grant access to their transaction data without the problems of encouraging utility companies to report all payments for all consumers to credit reporting agencies.[24] Sometimes, transaction data is only used to enhance a consumer's credit score in order to see if a consumer who was denied can be approved or if the consumer can be given a lower rate.

While transaction data can be used in many positive ways, there are also potential concerns. Will underwriting algorithms analyze not merely residual income but also where people shop? Using details of where people transact (either geographically or types of stores) could potentially lead to privacy violations and disparate impacts on protected classes. For example, people who shop at expensive stores may get better rates than those who live in lower-income neighborhoods and shop at discount stores.

Analysis of the patterns of deposits into an account could also lead to lending based on ability to collect, not ability to repay. Underwriting models may be focused on the timing of preauthorized debits and the likelihood that a lender will be able to recover payments, not the borrowers' ability to repay while meeting other expenses.

Account data will almost certain exhibit disparities by race because one of the factors used by scoring models is likely to be overdrafts. African Americans are disproportionately affected by bank overdraft practices,[25] which often encourage people to overdraft rather than helping them avoid fees (as discussed below).

4.3. Banks should be careful before using alternative data.

Beyond transaction information, banks and other companies are increasingly going beyond traditional data to incorporate a wide range of alternative data sources into their decisions. Alternative data has the potential to benefit millions of consumers, whether they are "credit invisible" or they have impaired records with the traditional Big Three nationwide consumer reporting agencies or "credit

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[24] *See* NCLC, Full File Utility Credit Reporting: Harms to Low-Income Consumers (June 2013), https://www.nclc.org/images/pdf/credit_reports/ib_utility_credit_2013.pdf; Consumer Groups' Comments in Response to the CFPB's Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, Docket No. CFPB-2017-0005, at 4 (May 19, 2017), https://www.nclc.org/images/pdf/credit_reports/comments-alt-data-may2017.pdf.

[25] See Pew Charitable Trusts, Heavy Overdrafters (April 2016), http://www.pewtrusts.org/~/media/assets/2016/04/heavyoverdrafters.pdf?la=en (African-Americans are 12 percent of the US population, but account for 19 percent of the heavy overdrafters).

bureaus," Equifax, Experian, and TransUnion. However, alternative data is not without its risks. Much of the analysis of whether alternative data will benefit or hurt consumers depends on several key factors:

- What kind of alternative data is being used?
- How is the alternative data being used?
- What is the accuracy and predictiveness of the data?
- What level of disparate impact does the data have on protected groups, especially communities of color?

If alternative data is used for credit decisionmaking, its use must be regulated by the Equal Credit Opportunity Act (ECOA) and subject to disparate impact analysis. Some types of data, such as social media data, are highly problematic and should be avoided. Similarly, outside of medical insurance underwriting, financial service providers have no reason to collect or share consumer medical information. And as discussed above, third-party financial data (and many other types of data) used for credit, employment, or other covered purposes will be regulated by the Fair Credit Reporting Act (FCRA). Compliance with both these laws will be critical for the purposes of accuracy, predictiveness, transparency and minimizing disparate impact.

One of the most important questions about the use of alternative data is whether consumer choice will be respected. If the use of alternative data is truly voluntary – that is, consumers make knowing and voluntary decisions to allow the use of the data and the data is used only for the limited purpose and in ways that consumers would expect – then it is much more likely to be helpful. A "second chance" score that incorporates utility payments, rental data, or other sources with consumer consent can give credit invisible consumers another shot to be seen, without potentially hurting other consumers.

More information about the use of alternative data is on NCLC's website.[26]

4.4. Some data uses are subject to the Fair Credit Reporting Act or need similar protections.

Banks must be cognizant of the need to comply with the Fair Credit Reporting Act in the use of data. The FCRA limits the uses to which information bearing on a consumer may be used; gives consumers important rights to know what information is being used and when it impacts them adversely; and provides rights, duties and procedures to correct errors.

In some circumstances, the protections of the FCRA apply to uses of big data. The definitions in the FCRA are very broad, and cover many types of data if used for decisions about credit, employment, insurance, and many other uses. While banks that use information in a consumer's account at that same bank are not covered by the FCRA because it is firsthand experience data exempted by the Act, a

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[26] *See, e.g.,* Testimony of Chi Chi Wu before the U.S. House of Representatives Committee on Financial Services, Task Force on Financial Technology, regarding Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit (July 25, 2019), https://bit.ly/alt-credit-scoring; NCLC, Credit Invisibility and Alternative Data: Promises and Perils (July 2019), https://www.nclc.org/issues/issue-brief-credit-invisibility-and-alternative-data.html.

broad range of third-party data[27] used for credit or other covered purposes is regulated by the FCRA. Whether or not the FCRA itself applies, the rights and duties it confers are important for many uses of data.

Among the requirements of the FCRA are adverse action and risk-based pricing notices when information has been used to deny credit or charge a higher price. These rules ensure that consumers are aware of the sources and types of information that are used against them in credit (and other) decisions, so that they are not left in the dark as to the reasons for decisions that may have critical consequences for their lives. Machine learning and artificial intelligence should not be widely used for credit decisions until banks and other lenders can provide transparent, understandable, and accurate explanations for these decisions.[28]

An explanation is especially important when a decision is made based on analysis of large amounts or unusual types of data. Data that goes into lending or other decisions could be attributed to the wrong consumer or be otherwise erroneous.[29] The conclusions of computer algorithms could be off base.

The FCRA is aimed at ensuring accuracy, predictiveness, transparency, and appropriate use of information that is used to make decisions about people. Those purposes apply equally to decisions made through analysis of big data by complicated computer analysis.

4.5. Banks must respect consumers' privacy in the use of data.

Consumers often have no control over use of their data. Even when consumers provide permission, the data may be collected for one purpose but then used or sold for other purposes or in ways that the consumer never understood or would have consented to.

Banks tend to be more respectful of the privacy of consumers' data than technology companies. They are clearly subject to the Graham-Leach-Bliley Act, and are not in the business of data brokering. Nonetheless, issues can arise as banks partner with other companies or use consumers' data obtained outside the relationship with the bank. Key privacy principles should apply to banks and nonbanks.

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[27] The seven types of data referred to in the FCRA's definition of "consumer report" are credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living. 15 U.S.C. § 1681a(d).

[28] The financial industry claims that it is developing tools to accurately explain complex AI decisions. *See* Patrice A. Ficklin, Tom Pahl, Paul Watkin, CFPB, Innovation spotlight: Providing adverse action notices when using AI/ML models (July 7, 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/. However, we remain skeptical of such claims, and would want the ability to independently verify for ourselves that such explanations are indeed correct and not illusory.

[29] *See, e.g.,* CFPB, Bureau Symposium: Consumer Access to Financial Records at 6 (July 2020), https://files.consumerfinance.gov/f/documents/cfpb_bureau-symposium-consumer-access-financial-records_report.pdf ("Bank participants generally asserted that screen scraping is susceptible to inaccurate capture of data ….").

First and foremost, consumers should not be asked to provide blanket consent:

- **Consent should not be used to permit uses that consumers do not expect or understand.**
- **Use must be limited by purpose.** For example, consent to use bank account data for credit underwriting should extend to that use alone and should not permit the use of the data for other purposes such as marketing or debt collection.

Consent should be a product of real choice:

- **Consumers should always have true choice in whether to share their data.** A consumer who already has a "fat" credit report file and a good credit score should be able to rely on that alone without being required to give permission to access other data. Use of alternative data may benefit those consumers who have insufficient credit history information or lower credit scores, but banks and lenders should not demand it from consumers who already qualify for mainstream credit.
- **Banks should not use bank or credit account transaction data for non-credit purposes**, such as employment, unless specifically required to by law or directly relevant to the position.
- **Consent must be real, knowing and meaningful**. It should never be buried in fine print. It must always be in a separate stand-alone document.

Consumers also need more control over how and when they provide consent or revoke consent:

- **Consent should be sought for the minimum amount of data needed,[30] and consent must be limited by data element.** A consumer should be able to choose sharing just cashflow information (credits, debits, balances) versus sharing cashflow plus the identities of merchants from debit card transactions or the identity of payors who make electronic deposits.
- **Consent should be time-limited and self-expiring.** Consent for credit underwriting should be a single-use permission. Consent for account review for an open-end account should expire after one year and require renewal.
- **Consumers should have multiple, simple options for ending data sharing.** Some banks and data aggregators are developing consumer dashboards where they can see who is accessing their data and easily turn it off. Both access points – at the bank and the data aggregator – are necessary. Most consumers do not know who a data aggregator is, and their bank will be the most logical place for them to look. But only the data aggregator may know the multiple other accounts – investment, credit, savings – that may be accessed by an app.

We appreciate that there are industry efforts to achieve more consumer control over data sharing. While voluntary efforts are helpful in the short run, that will not achieve uniform protections or consumer confidence. Ultimately only clear rules of the road with which all actors must comply will fully protect consumers.

The OCC should consider ways in which it can encourage financial institutions to ensure true consumer consent in the use of consumer data, prevent inappropriate uses, and practice data minimization and

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[30] *See, e.g.*, JT Sison, Dataguise, Data minimization in the DGPR: A Primer (Feb. 15, 2017), https://www.dataguise.com/gdpr-compliance-data-minimization-use-purpose/.

deletion of consumer data. These guardrails are essential to ensure that data is used in ways that are helpful to consumers without violating their privacy or leading to other harms.

5. Technology should be used to serve those with limited English proficiency.

New technology provides the opportunity to promote financial inclusion for all communities by better addressing the needs of limited English proficient (LEP) consumers. The number of U.S. residents for whom English is not a first language and who speak English with limited proficiency has increased dramatically. Appropriately serving these consumers should be a priority in the use and development of new technologies and systems.

Expecting people to muddle through with limited comprehension, or placing the burden of interpreting technical, legal, or financial information on family members, friends or others who lack financial expertise, compromises the consumer's ability to make a well-informed decision. It also means that sensitive financial information will be revealed to the third party who is helping with the translation. Language access is especially important when services are provided primarily online or through mobile devices.

The OCC should ensure that as banks develop greater reliance on technology and internet-based applications, they expand access for LEP consumers. Technology can help to identify and maintain confidential records regarding language preferences and to provide language access both orally and in writing. LEP individuals need to access services in their own language before, during, and after a financial transaction. The expanded use of technology should make these goals even more attainable for banks, and therefore, should be made a priority. Separate comments that we have joined regarding access for LEP clients have specific recommendations for transferring language preference information, providing written and electronic information and disclosures in-language, and offering oral interpretation.

We also urge the OCC to encourage the credit reporting agencies themselves to provide credit reports in Spanish and other prevalent languages. The Federal Housing Finance Agency and the CFPB have translated many loan disclosures into Spanish and some other languages. It is time for credit reports to be more widely accessible to LEP consumers.

At the same time, technology should not be used to improperly profile LEP consumers for differential treatment. Attention to disparate impacts and ECOA and FHA obligations is essential for customers of differing language capacities.

For more on LEP issues, see the separate comments that we joined on that topic.

6. New technologies in payments and deposits offer benefits but pose risks of consumer protections being left behind.

6.1. Fraud protection and error resolution should be more than an afterthought in faster payments and P2P services.

Bank services such as Zelle and nonbank apps such as Venmo and Square Cash are making person-to-person and person-to-business electronic payments faster in easier. In some cases, as when The Clearing House's RRP network is used, the payments in fact are nearly instant. The Federal Reserve

Board is also developing FedNow, another real time payment service. In other cases, funds availability is immediate but the funds actually move more slowly on older payment rails.

The rapidly growing use of these services shows the need for easier ways to make payments more quickly than by a paper check to people, landlords or merchants that do not accept credit or debit cards. Faster payments can also help people pay bills at the last minute and receive wages, loans, and help from family members faster, potentially avoiding late and overdraft fees and other late payment consequences.

When payments come out of the consumer's account immediately, it is also easier for the consumer to manage the account and know what the balance is. Avoiding the need to anticipate pending payments could reduce inadvertent overdraft or NSF fees.

But these faster payment options are also causing widespread problems with fraud and errors. Banks and other payment app providers have prioritized speed and ease over fraud and error protection and over responsibility for the problems that their payment systems create.

Scammers are already exploiting faster payment systems through "push payment scams" that defraud consumers and small businesses into sending money. These scams will only grow as faster payment systems become more ubiquitous and accepted. Today, telemarketing scammers typically rely on consumers' willingness to pay by unusual and inconvenient methods, such as going to a store to perform a wire transfer or buy gift cards. But it will be faster and easier to convince a consumer to use their smartphone while the scammer is still on the phone to set up that payment to the "IRS."[31] Faster payments do not give seniors or other vulnerable consumers the same time to reflect about why the IRS is taking gift cards or to talk to family members about a grandparent scam.

The OCC must insist that its banks must take responsibility for the fraudsters they let into the system. Every faster payment involves a financial institution on the receiving end. That institution already has the legal obligation to know its customer and should be monitoring the account for signs of illegal activity. When the bank's due diligence has broken down, the bank, not the consumer, should bear the loss caused by letting the scammer into the system. The consumer should be able to request reimbursement from their bank, but the sending bank should then be compensated by the receiving institution.

Both the sending and receiving institutions also have a far more sophisticated array of processes and systems they could employ to spot and prevent fraud than old-fashioned warnings to individual consumers. And financial institutions can bear the cost of occasional fraud – and will have the incentive to improve their systems if they do – whereas even a single instance of fraud can be devastating to a consumer. Consumers should not bear increased liability for not detecting fraudulent transactions simply because they happen in real-time. Banks and faster payment systems themselves can also do a better job helping consumers avoid making payments to scammers, such as by requiring better verification beyond simply cell phone numbers or user names that can be wrong, and by having user directories that help people identify the recipient before the payment is sent.

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[31] Lauren Saunders, *American Banker* "Will Faster Electronic Payments Mean Faster Fraud?", *American Banker* (Sept. 17, 2015), https://www.americanbanker.com/opinion/will-faster-electronic-payments-mean-faster-fraud; Will Hernandez, *American Banker*, "How fraudsters surprised British Banks," (Nov. 27, 2018), https://www.americanbanker.com/news/how-fraudsters-surprised-british-banks.

Speed cannot come at the expense of safety. In those rare instances when there are red flags of fraud, institutions should have the ability and duty to place a hold on transmitted funds even if the normal expectation is real time availability. A hold on funds in these rare instances will give banks time to investigate to prevent funds from being irretrievably lost.

We urge the OCC to review banks' fraud prevention mechanisms to make improvements today, and also to better understand how consumers will be impacted by the implementation of FedNow.

The OCC must also insist that banks comply with the Electronic Fund Transfer Act (EFTA) and Regulation E and take more responsibility for helping consumers resolve errors in faster payment systems. Banks and other companies offering faster payments today claim that consumers have no protection if money is accidentally sent to the wrong person or in the wrong amount, or if consumers were scammed.[32]

But Regulation E requires banks to investigate and help to resolve errors. The definition of "error" includes an "incorrect electronic fund transfer to or from the consumer's account,"[33] and there is nothing in the definition that requires the error to be one made by the bank.[34] Once notified of an error, the financial institution "shall investigate promptly and, except as otherwise provided in this paragraph (c), shall determine whether an error occurred within 10 business days of receiving a notice of error. The institution shall report the results to the consumer within three business days after completing its investigation. The institution shall correct the error within one business day after determining that an error occurred."[35]

Even if this duty is not interpreted to require the institution to compensate consumers for their own errors if they cannot be easily corrected, financial institutions do have a duty to at least attempt to resolve these errors. For example, a colleague had a situation where $1,000 unexpectedly appeared in his account, followed quickly by a phone call to his cell phone from a person who said they made a mistake and sent it to the wrong person. Our colleague was willing to return the money, but wanted assurance that he was not being scammed if he sent the money back. Both consumers contacted their banks – both were large national banks – and neither bank was willing to do anything to help them resolve the situation. It took a month or longer of repeated calls, and finally our colleague felt comfortable returning the money. Banks should have systems to help resolve this type of error.

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[32] Bob Sullivan, "P2P bank app Zelle soars in popularity — with criminals, and without fraud protections" (Feb. 23, 2018), https://bobsullivan.net/cybercrime/p2p-bank-app-zelle-soars-in-popularity-with-criminals-and-without-fraud-protections/; Telis Demos, *Wall Street Journal*, "You Accidentally Sent $149 to a Stranger on Venmo? Good Luck Getting It Back" (July 12, 2018), https://www.wsj.com/articles/you-accidentally-venmoed-149-to-a-stranger-good-luck-getting-it-back-1531411133?mod=hp_featst_pos3.

[33] Reg. E, 12 C.F.R. § 1005.11(a)(1)(ii).

[34] *See* 12 C.F.R. § 1005.11(a).

[35] 12 C.F.R. § 1005.11(c)(1).

6.2. Technology should be used to address weaknesses in know-your-customer compliance in remote account opening and monitoring.

With the spread of mobile and online banking, remote account opening is becoming more common. Yet the know-your-customer due diligence for remote account opening has not caught up with the safety of verifying a customer face to face. It is much easier for a scammer or criminal to open an account online under a stolen or synthetic identity than it is to do so in person at a bank. Fraudsters can even quickly open multiple accounts by using stolen identity data combined with bots.[36] Those accounts (both prepaid and traditional accounts) can then be used as vehicles for receiving and laundering funds acquired through hacking, scams, and other unlawful means.

In remote account opening, some financial institutions have prioritized ease and convenience over safety. The receiving institution's lack of responsibility for push payment scams, as discussed above, has led to a lack of incentives to keep fraudsters out of the system or to identify and block payment scams. This problem extends to account opening. By telling consumers who are subject to payment scams "too bad, you're out of luck" instead of requiring the institution to take a dispute and forward it to the payment network and the receiving institution, we are depriving institutions of information that can be used to spot fraudulent accounts.

Despite the almost daily breaches in this country, a consumer whose identity has been stolen has no place to turn to prevent that identify from being used to open a deposit account. One of the writers of these comments discovered that when trying to assist a relative. Even after finding out that several prepaid card accounts and online bank accounts had been opened, and after contacting each institution and filing an identity theft report with the local police and Federal Trade Commission, there was no place equivalent to a credit bureau where we could freeze his identify or alert other institutions. There is not even a way to know if an account has been opened in your name unless a physical card or information about the account is sent by mail, as it was in this case. With purely mobile accounts, that might not happen.

If banks had more responsibility for the accounts they create, they would also have an incentive to more closely monitor newly opened accounts to identify unusual transaction patterns so they could freeze and eventually shut them down. Better use of data and technology can help prevent fraud in remote account openings.

6.3. New technologies should eliminate, not accommodate, overdraft fees.

Overdraft fees are a product of a bygone era. Their reason for being was to pay for the occasional courtesy of a bank covering a check that would otherwise bounce. With a lag in time between when the consumer wrote the check and check clearing, and no easy way to communicate with the account holder, banks took on the risk of paying the check, and avoided the cost of returning it, in order to protect the customer from the problems and hassles caused by a missed rent check or an angry merchant who would charge returned check fees.

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[36] Michael Lynch, *Payments Source*, "Fast account openings and bots increase fraud risk" (Jan. 25, 2019), https://www.paymentssource.com/opinion/fast-account-openings-and-bots-heighten-the-fraud-risk.

Outside of the check context (and perhaps even there), new payment methods and new technologies have completely changed the need or rationale for overdraft fees. Debit card, ATM transactions, and faster payments like Zelle are authorized in real time. Mobile alerts, texts and chats give banks a way to communicate with customers quickly and easily. Mobile banking can provide access to balances, alerts, bill payments and upcoming debits or bills. Faster payments can help people pay bills at the last minute and receive wages, loans, and help from family members faster. Faster payments may also avoid the problem of inaccurate available balances caused by the lag in time between paying a bill and debiting of the account.

Banks should work with their customers and embrace change, working toward a world without overdraft fees. Instead, most banks have worked against their customers' best interests and have pushed overdrafts as an exorbitantly priced form of credit. They continue to use deception in pushing people to opt in to overdraft fees on debit card and ATM transactions. And most banks have eliminated or downplay their reasonably priced solutions for covering overdrafts, such as overdraft lines of credit or linked credit cards or savings accounts. Some banks are even arguing against the "good funds" requirement for faster payments and are pushing for the right to charge overdraft fees on faster payments.

Whether banks like it or not, change is coming. Consumers fed up with overdraft fees at traditional banks are turning to "neobanks" that promise no such fees. When banks fail to help consumers manage their money, personal financial management apps will intervene and do it. Banks can resist the tide, bear the risk of dwindling fee income that they counted on, and lose customers who get fed up. Or they can embrace technology and work towards a world with no overdraft fees. The OCC must push banks to work with their customers, not against them.

6.4. Banks that eliminate branches or focus on mobile banking must not forget real customer service and engagement with the community.

Both traditional banks and "neobanks" such as Varo and Chime are pushing to use technology to automate communications with consumers. Banks that operate primarily over the internet without branches offer accounts that are designed to avoid the need to interact with a human being. Mobile and internet financial management tools, chat boxes often answered by bots, and automated telephone prompts can cut down on costly human customer service, whether in person at a branch or on the phone.

These technologies can work well to get customers what they need while saving banks money. Until they don't.

Problems happen, and they often can't be answered by a chatbot. Banks that make it too difficult to talk to a real person end up with angry and frustrated customers. These problems are all the more acute for customers with limited English proficiency, as discussed in another section.

The move to eliminate bank branches can also leave communities underserved. There is really no substitute for walking in and talking to a real person, either about a problem or about the services the bank can offer. Lack of access to human beings weakens the connection to communities and makes it difficult to obtain help understanding a product or addressing problems. In communities that have

long been underserved by mainstream financial institutions, the lack of bank branches can be particularly devastating. As Federal Reserve Board Vice Chairman Randal Quarles said:

> Banks do not just cash checks and make loans — they also place ads in small-town newspapers, donate to local nonprofits and sponsor local Little League teams.... As towns lose banks and bankers, they also lose important local leaders.[37]

This does not mean that we always need the same number of full bank branches we have always had, particularly in communities that are well served. Slimmed down branches can provide some presence in the community and access to real people while acknowledging that most people rarely visit a bank branch. Robust telephone customer service can help too. But banks must not go too far in eliminating bank branches from communities altogether or by making it difficult to reach a real human being.[38]

6.5. Protections for check deposits to prepaid cards and remote deposit capture must catch up with the technology.

Remote deposit capture (RDC) has been around for more than a decade. Prepaid cards have passed two decades. Yet the regulations that implement the Expedited Funds Availability Act (EFAA) still have not been updated to address check hold times and funds availability for deposits to prepaid accounts or to prepaid or traditional accounts through mobile devices. Some banks give consumers access to checks deposited by RDC on the same time frame as other check deposits. But some, and prepaid card companies in particular, impose long, unwarranted hold times up to 10 days.

While the OCC does not write the rules, we urge it to push the Federal Reserve Board and the CFPB to update Regulation CC so that consumers who use prepaid accounts or mobile deposits – often the people who need access to their money the most – have the same protections as for other check deposits. We have been asking them to update the regulations repeatedly for seven years.[39] As regulators embrace fintech, consumer protection must not be an afterthought.

6.6. Cryptocurrencies lack protection that must be in place before widespread use or testing on vulnerable consumers.

Cryptocurrency scams and fraud are rampant, and hacking of wallets and exchanges, where virtual currencies are stored, is common. To date, the Consumer Financial Protection Bureau has declined to opine on whether Regulation E applies to cryptocurrency wallets. Similarly, there is no federal deposit insurance for cryptocurrency. Without these protections, holding assets in cryptocurrencies or using

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[37] Kevin Wack, American Banker, When a small town loses its only bank (Feb. 2, 2020), https://www.americanbanker.com/news/when-a-small-town-loses-its-only-bank.

[38] We will not address the OCC's revised Community Reinvestment Act obligations here, but for a critique of how they will leave communities underserved, see National Community Reinvestment Coalition, Analysis of the OCC's Final CRA Rule (June 15, 2020), https://ncrc.org/analysis-of-the-occs-final-cra-rule/.

[39] *See, e.g.,* Comments of NCLC, et al. to Federal Reserve Board On Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 12 C.F.R. Chapter II Docket ID OP-1491 Regarding Regulation CC at 2-3 (Sept. 2, 2014), https://www.nclc.org/images/pdf/rulemaking/fed-10-year-review-comments-consumer-groups09022014.pdf (referencing prior 2013 comments).

them to transact is unsafe, plain and simple. The OCC should work with other federal financial regulators to develop appropriate consumer protections for cryptocurrency to ensure that funds are safe and that these currencies are not used to propagate frauds or deny people the ability to address errors and unauthorized charges.

Cryptocurrency companies have made many claims about their ability to increase financial inclusion. The entire Libra project, for example, is justified by Facebook with the dubious claim that it will empower billions of people. The reality is that the reasons consumers are outside the financial mainstream in the United States are largely structural. Nothing about cryptocurrency fixes this, nor will any app or digital wallet.

Right now and in the absence of action from either Congress or the CFPB, the few consumer protections that cryptocurrency users have are mostly found in state money transmitter laws. These state laws lack the types of payments protection found in federal law.

Basic protections for consumers must be in place before cryptocurrencies become widely used. Claims about financial inclusion especially should not be used to justify testing these products on underserved consumers with the least cushion in their financial lives.

7. The OCC should proceed with caution in its approach to blockchain technology.

The technology behind virtual currencies, known as blockchain or distributed ledger technology, has many financial services industry applications, and can be used in tandem with or separate from digital assets. Blockchain is being used, tested or considered for a variety of uses, including international fund transfers, verification of identification,[40] land titles registries and other public records,[41] and so-called "smart contracts" (self-executing lines of code that implement aspects of the parties' agreement) used in connection with auto title loans.[42] States have passed or are considering legislation to recognize the validity of smart contracts and of electronic signatures secured through distributed ledger technology such as blockchain.[43]

There are open questions about how many aspects of federal and state law apply to blockchain. Among other issues, the FCRA covers entities that aggregate third-party financial information used in credit decisions. Some uses of blockchain could fall in that category.

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[40] Will Hernandez, *American Banker*, "Is customer information safer with a blockchain database?" (Jan. 24, 2019), https://www.americanbanker.com/news/is-customer-information-safer-with-a-blockchain-database.
[41] Press Release, Propy, "New Blockchain Law Passed in Vermont Following Propy's Successful Title Registry Project" (Aug. 28, 2018), https://www.businesswire.com/news/home/20180828005249/en/New-Blockchain-Law-Passed-Vermont-Propy%E2%80%99s-Successful.
[42] *See* Comments of NCLC et al. to the CFPB Policy on No-Action Letters and the BCFP Product Sandbox, Docket No. [CFPB-2018-0042] at 52-53 (Feb. 11, 2019), https://www.nclc.org/images/pdf/rulemaking/nclc-comments-nal-product-sandbox.pdf (describing Sweetbridge, which makes asset-based auto-title loans using virtual currencies and has been admitted to the Arizona "sandbox").
[43] Blockchain State Legislation, National Conference of State Legislatures, http://www.ncsl.org/research/financial-services-and-commerce/the-fundamentals-of-risk-management-and-insurance-viewed-through-the-lens-of-emerging-technology-webinar.aspx.

Core claims about the technology, for example that blockchain ledgers are immutable and that governance is decentralized, are very much in doubt. Blockchain technology offers no guarantee of reliability if bad data is inputted, and the "immutability" and decentralized nature of the blockchain could make errors harder to correct. The lack of a shared vocabulary to describe the technology and its capabilities also raises questions about the appropriateness of its use in critical systems.

Blockchain-enabled "smart contracts" are especially subject to hype that obscures the complicated legal and policy issues they present.[44] Dumb, one-sided "smart contracts" that are not contracts could enforce fraud and deception. The use of blockchain code to execute contracts is poorly understood, including by legislators rushing to legitimize smart contracts and blockchain signatures.[45] The technology cannot embody the parties' entire agreement and is not so smart.[46] Blockchains execute simple, clear-cut conditions and consequences – as defined by the designer.[47] Smart contract code, which is not negotiated, does not deal well with ambiguity, complexity, fairness, or due process when there are disputes.[48] Smart contract code could be especially problematic if it is used to deprive consumers of options or remedies in cases of fraud or deception, to permit self-help without legally required processes, if it operates like confession of judgment and other practices outlawed by the Federal Trade Commission,[49] or if it otherwise permits one side to block legitimate defenses and operate above the law.

The OCC should proceed with caution in its approach to blockchain and its use in financial services. The OCC should obtain further public input about specific uses in specific contexts. It should also ensure the accuracy of claims made about the potential of blockchain based on actual evidence, not merely the assertions of proponents.

8. Finance products that evade credit laws can pose risks to consumers and, at times, to banks.

One especially disturbing trend in the fintech world is the growth of products that offer credit but evade credit laws. Sometimes carefully using the term "finance" instead of "credit," these products can take a number of forms, including:

- Payday advance products disguised as early payment of earned wages;

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[44] *See* Heather Hughes, Blockchain and the Future of Secured Transactions Law, Stanford Journal of Blockchain Law & Policy (Jan. 5, 2020), https://stanford-jblp.pubpub.org/pub/blockchain-secured-transactions.

[45] Adrianne Jeffries, *The Verge*, "Blockchain laws tend to be hasty, unnecessary, and extremely thirsty" (Mar. 29, 2018), https://www.theverge.com/2018/3/29/17176596/blockchain-bitcoin-cryptocurrency-state-law-legislation.

[46] Adam J. Kolber, "Not-So-Smart Blockchain Contracts and Artificial Responsibility," 21 *Stan. Tech. L. Rev.* 129 (2018), https://law.stanford.edu/wp-content/uploads/2018/09/Kolber_LL_20180910.pdf.

[47] Angela Walch, "Deconstructing 'Decentralization': Exploring the Core Claim of Crypto Systems," Crypto Assets: Legal and Monetary Perspectives (forthcoming, last updated Feb. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326244 (questioning the claim that blockchains are decentralized or lack concentrated power centers).

[48] Jimmy Song, Medium, "The Truth about Smart Contracts" (Jun. 11, 2018), https://medium.com/@jimmysong/the-truth-about-smart-contracts-ae825271811f.

[49] *See* Margot Saunders, NCLC, Time to Update the Credit Practices Rule (Dec. 2010), https://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf.

- Overdraft loans with fees hidden in monthly charges for other services;
- Income share agreements offered to students in lieu of traditional student loans, or sometimes to ordinary consumers for financing large expenses like weddings;
- Shared appreciation home finance products as an alternative to home equity loans;
- Property Assessed Clean Energy (PACE) financing used to finance home improvements;
- Sale/leaseback alternatives to home mortgages; and
- Retail installment plans that may claim to be neither retail installment sales agreements nor loans.[50]

Whether these products are or should be covered by federal or state credit laws, and whether laws should be adapted to accommodate them, are complicated issues. But in many cases, these products pose risks to consumers that our consumer credit laws are designed to address. Products that claim not to be credit may also claim to fall outside fair lending laws.

Most of these products are not offered by banks. But sometimes banks play a role in a partnership with the fintech (or could be asked to in order to extend the bank's preemption rights). In others – such as with PACE loans – banks may be impacted if the product jeopardizes the security for, or the consumer's ability to repay, a bank loan.

Some of these products also use tricks that could migrate to the banking world if the evasions catch on and banks feel they need to compete. Finance charges that are hidden in "tips," late fees, or charges for other services; loans that claim not to be loans because they are instead sales or assignments; or simply slick marketing that obscures the risks and costs of products, are all strategies that banks should avoid. The OCC should be aware of the risks of these noncredit credit products, and should make sure that its banks stay away from products that are designed to evade important consumer protection laws.

9. New loan servicing and debt collection technologies are not always improvements, and can create their own problems.

Loan servicers are using electronic platforms, automated communications channels, and data analytics to cut costs and attempt to improve servicing. Debt collectors and debt collection software vendors use similar techniques to reach consumers. New technologies may also be used for banks' own servicing or collections operations or by their third-party servicers and debt collectors.

In theory, improvements in the borrower experience may help people stay on track with tools and options when they experience financial trouble. Some consumers who are struggling may prefer electronic communications that make it easier to ask questions and get answers and less stressful to communicate with a servicer or debt collector. Companies claim that they can use personal data, analytics, and automated but personalized communications to offer due date flexibility, improve loan modifications, and design better repayment plans.

But appropriate loan servicing in individual cases has proven very difficult even with human beings and even with predictable situations, such as successors in interest when a mortgage holder passes away.

[50] *See* NCLC, Fintech Snapshot, *supra*.

Standardized computer algorithms are unlikely to do any better with the myriad of real life complexities.

Debt collectors can harass or make deceptive claims about repayment plans through texts, mobile apps, and other electronic communications just as they do over the phone. And using electronic communications without the consent required by the E-Sign Act can result in consumers not getting information they need or can violate their privacy when communications are sent to the wrong person or a non-private channel. [51]

Data analytics may result in communities of color being offered worse loss mitigation options or targeted for more aggressive collection tactics.[52] This risk is compounded by the already higher risks of delinquency and default often faced by borrowers of color, especially Black and Latinx, and their lower likelihood of accessing assistance at all from a servicer.[53] Will streamlined approaches result in outcomes that disproportionately hurt homeowners of color?

Robocalls can also result in robo-harassment. The Telephone Consumer Protection Act protects people from robocalls and robotexts to cell phones without consent,[54] but banks and others have been pushing to weaken the Act. And many companies bury consent in fine print and make it difficult to revoke consent.

Technology is also making it easier for car lenders to track a car's movements or disable a car at the touch of button. This gives creditors a tremendous ability to threaten consumers with no real cost or consideration. It also raises safety issues if the car can't be restarted when it stalls on the interstate or is in a dangerous neighborhood and privacy issues if the vehicle is being tracked.

10. Lessons and impacts of the coronavirus crisis

The OCC has asked whether there are banking issues related to digital technology and innovation that the OCC should consider in light of the COVID-19 pandemic. Overall, our experience is that the pandemic has exacerbated many of the longstanding problems in the financial system, and that there has been insufficient attention to how to address them.

We need more attention to using data and new technologies to address systemic problems, not just to come up with new products and services. The subsections that follow briefly discuss some of these issues.

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[51] Comments of NCLC et al. to the CFPB on Proposed Debt Collection Rule, Docket No. CFPB-2019-0022, RIN 3170-AA41 at 197-220 (Sept. 18, 2019), http://bit.ly/com-debt-col.

[52] Nitasha Tiku, *Wired,* "Silicon Valley Wants To Use Algorithms For Debt Collection" (Sept. 4, 2018), https://www.wired.com/story/silicon-valley-algorithms-for-debt-collection/.

[53] Testimony of Alys Cohen before U.S. House of Representatives Financial Services Committee, Oversight Subcommittee (July 16, 2020), https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-oversight-servicers-cares-act.pdf ("Cohen Testimony").

[54] 47 U.S.C. §§ 227(b)(1)(A)(iii).

10.1. We need more attention to the disparate impacts in who gets what COVID relief.

As discussed in an earlier section, our financial system is built on a bedrock of severe, chronic and ingrained differences in how communities of color are treated compared to white communities. Those systemic problems are now showing up in differences in how COVID relief is being granted to Black and brown consumers. Black and Latinx homeownership took a severe hit during the Great Recession and have not recovered. Yet these communities, who are harder hit by COVID-19 and its economic fallout and need extra help to avoid falling further behind, are getting less.[55]

The OCC and other federal regulators themselves can use data and technology to spot and correct these inequities. We need increased transparency around who benefits, for example, from housing relief programs, and who needs such benefits. The mortgage servicing industry must meet the needs of homeowners facing COVID-19 hardships, especially those in Black and Latinx communities who are at greatest risk of foreclosure.

To start, the federal regulators, including the OCC, must require the collection of loan-level borrower loan performance and loss mitigation data on at least a quarterly basis, with public reporting. The evaluation of current and future relief efforts as well as identification of disparate impacts require loan-level data to be available to regulators, with free public access to aggregated data and certain disaggregated data available to researchers.

We also need more dedicated data and policy analysis. The OCC, other federal regulators, including the CFPB, FHFA and FHA, and the Government Sponsored Enterprises should analyze demographic and locality data to understand the impact of housing policies on the lives of Black and Latinx homeowners and communities, and low-income homeowners nationwide, and develop policies accordingly.

The OCC should ensure that its banks use technology to identify and make efforts to communicate with all borrowers about temporary and long-term payment relief available during the pandemic, and to provide tailored services to LEP borrowers.

10.2. The crisis emphasizes the servicing industry's lack of attention to helping people survive bumps in the road.

The Great Recession of 2007-2009 spotlighted the severe weaknesses in the mortgage servicing market. Yet even with ten years to digest lessons learned, the mortgage servicing industry is again failing to meet the needs of homeowners facing financial hardships.[56] The same can be said of other servicing markets, including student loans and credit cards.

For all the talk of technology and innovation, people who are having trouble with their mortgages or other loans are still facing old-fashioned problems of trying to get through to customer service, getting accurate and consistent answers to their questions, and obtaining real help to get back on track.

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[55] *See* Cohen Testimony.
[56] *See* Cohen Testimony.

That is because servicing tends to be an afterthought – a department starved of resources that is set up to detract from the bottom line for any services beyond routine servicing for "on time" clients. Until the system is transformed to support active default servicing, borrowers, investors and the market will face unnecessary defaults and foreclosures.

The OCC should encourage its banks to prioritize devoting resources and technology to anticipating, rather than reacting to, the messy problems that real families face in real life. They should work on innovative solutions to identify early people who need help, proactively reach out to them, and offer them real solutions that are sustainable in the long run.

10.3. The growth in electronic communications must not blind us to the weaknesses.

Stay-at-home orders and fears of interacting in person have led more and more people to embrace electronic communications, to shop and engage in financial transactions online, and to learn how to use mobile technologies. The coronavirus crisis will likely accelerate the trend of more and more financial services taking place through mobile devices in particular.

It is important to honor both the letter and spirit of the E-Sign Act. People must have a choice in how they want to communicate and to receive information, and banks should always comply with the requirement to confirm that an email or other electronic communication has reached the right place. While mobile, email or other internet communications work well for many people, that is not always the case, or may not consistently be so.

Many fintech products require consumers to opt in to electronic communications and to forgo paper statements and other paper communications. But an email notice that a statement is available on a website is not always a sufficient substitute, and consumers may not see fees or unauthorized charges.[57] Consumers may also miss important communications that come only by email, where they can be overlooked or inadvertently sent to a spam or junk folder.

People should continue to have a choice of paper disclosures, statements and other records. Studies show that even for those who have internet access, many prefer paper bills and statements as a record-keeping tool and a reminder to pay. For those who have mobile phones but no computer with internet access, paper may be their only real way of keep records. Access to electronic records can also be lost if a computer crashes or if an account is closed.

Digital connectivity also may not be reliable or consistent. Although smartphone penetration is high even in low-income communities, some consumers may have prepaid or limited data plans that are no substitute for full internet access. People who hit a financial shortfall may face disconnection of their

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[57] *See* Chi Chi Wu, Lauren Saunders, National Consumer Law Center, *"Paper or Electronic Statements? Why It Should Be the Consumer's Choice"* (March 2016), https://www.nclc.org/media-center/report-paper-electronic-statements.html; Consumer Action, "Consumers prefer a paper trail (Jan. 15, 2019), https://www.consumer-action.org/press/articles/consumers-prefer-paper-trail (finding that 78% of those who receive bill statements by mail review the transactions but only 43% of those who do not go online to review their transaction details).

mobile service. This could be problematic if the mobile device is the primary way of accessing an account.

Even for in-person transactions, consumers are increasingly being pushed into agreeing to finalize the transaction electronically, sometimes in ways that make deception easier. Some auto dealers have used computers and tablets to induce consumers to sign documents they have not seen at prices they did not agree to.[58] Home contractors going door to door have pushed PACE loans using tablets to commit people to thousands of dollars a year in tax increases for what they thought were free government programs.[59]

A desire by financial institutions to eliminate paper and move people entirely to electronic communications should not override consumer choice. The E-Sign Act gives people a choice, and we must respect it.

10.4. The OCC should encourage banks to use technology to underwrite and serve customers without putting those temporarily impacted by the COVID-19 crisis at a long-term disadvantage.

One of the pernicious aftermaths of the coronavirus crisis may be damage to the credit scores of tens of millions of people through no fault of their own. Lower credit scores will not only impede consumers' ability to get affordable credit, but also their ability to recover when this crisis is over.

A single late payment from any one of a consumer's creditors, whether for a mortgage, car loan, student loan, or credit card, can lower a credit score by up to 100 points. Thus, a consumer who cannot pay their bills due to COVID-19 economic hardship risks longstanding damage.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act of March 2020 addresses the credit reporting consequences of the COVID-19 crisis, but does little to nothing to actually protect impacted consumers.[60] The Act only protects consumers who are approved by their creditor for a forbearance, workout, or similar accommodation while they are still current, before any delinquency, unless they are able to catch up during the accommodation period, which will be difficult for many consumers. But most consumers will only seek relief after they are already in trouble, and flooded customer service centers make relief hard to obtain quickly.

We urge the OCC to join our call for a temporary moratorium on negative credit reporting for the COVID-19 emergency period plus four months, with the option for consumers to obtain an additional nine months of relief if they continue to experience COVID-19 related economic hardship.[61] This

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[58] *See* Ryan Relton, Jalopnik, Car Dealers are Using Elecronic Loan Contracts to Scam Buyers Into Horrible Situations (Dec. 15, 2017), https://jalopnik.com/car-dealers-are-using-electronic-loan-contracts-to-scam-1821021493.

[59] *See* NCLC, Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements at 3 (Sept. 2017), http://bit.ly/2xJm22L ("Technology Meets the Hard Sell").

[60] *See* NCLC, Protecting Credit Reports During the COVID-19 Crisis (April 2020), https://bit.ly/protect-covid-credit-rpt.

[61] *See* Letter from 73 consumer, civil rights, faith, labor, nonprofit, community, human rights and advocacy organizations to Sen. Mitch McConnell et al. (June 24, 2020), https://www.nclc.org/images/pdf/credit_reports/letter-cr-provisions-heroes.pdf (expressing support for

moratorium will greatly help consumers whose finances have been devastated by the economic crisis caused by COVID-19.

Absent such a moratorium, the OCC should encourage banks to use technology to identify consumers whose credit report blemishes are only the result of the temporary COVID impacts. For example, cash-flow data may help banks identify consumers who are recovering. Research prior to the COVID crisis suggests that many consumers with impaired credit were the victims of unfortunate events such as illness or job loss that do not reflect their long-term creditworthiness.[62] The coronavirus crisis should not cause consumers who were impacted to be blacklisted or charged higher rates for seven years until those delinquencies fall off their credit reports.

11. Conclusion

Many uses of technology have tremendous promise to improve financial products and services and benefit consumers. But a desire to promote innovation must not blind us to the potential risks and the need for consumer protection rules and oversight that are especially needed for untested new products and services.

Thank you for the opportunity to submit these comments. If you have any questions, please contact Lauren Saunders at lsaunders@nclc.org, 202-595-7845.

Section 110401 of the HEROES Act and S. 3508/H.R. 6370, the Disaster Protection for Workers' Credit Act).

[62] About 70 to 80% of consumers with impaired credit or a low score, such as a 600, will actually not default. These may be victims of extraordinary life circumstances who do not default again once they have recovered economically. See Chi Chi Wu, NCLC, Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession at 9-11 (Dec. 2013), www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf (summarizing research).