May 31, 2016

By email to: innovation@occ.treas.gov

Thomas J. Curry, Comptroller
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Re: Comments on Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective

Dear Comptroller Curry:

The National Consumer Law Center®,[1] on behalf of its low income clients, Center for Responsible Lending,[2] Empire Justice Center[3] and U.S. Public Interest Research Group[4] appreciate the opportunity to submit these comments in response to the Office of the Comptroller of the Currency's request for comments on how to support responsible financial innovation.

Our comments begin with our reaction to the OCC's white paper. We appreciate the OCC's emphasis on supporting "responsible" innovation. Innovation in the financial sector can broaden financial inclusion, address unmet needs, and make financial products and services better, safer and more affordable. But innovation is not a uniformly positive thing. "Innovative" products and services need to be reviewed with a critical eye and carefully monitored.

Support for innovation should never be at the expense of consumer protection regulations. Even responsible innovations need to be covered by critical consumer protection laws – laws that may need to be updated to close gaps or address new issues.

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[1] The National Consumer Law Center® (NCLC®) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC is also the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises and annual supplements, including *Consumer Credit Regulation*, *Fair Credit Reporting*, and *Unfair and Deceptive Act s and Practices*.

[2] The Center for Responsible Lending (CRL) is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund.

[3] Empire Justice Center works to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through: systems change advocacy, training and support to other advocates and organizations, and high quality direct civil legal representation.

[4] U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending, student loans, credit report accuracy, privacy of customer information (including data breaches) and, generally, any unfair and deceptive practices.

Consumer protection must be at the forefront of innovation, not an afterthought. Problems are much easier to avoid and address when close attention is being paid as new products are designed and new markets are developing. After problems become an entrenched part of a business model, they are much more difficult to root out. Reacting quickly to address problems can also help industry by weeding out bad actors and promoting consumer confidence. Responsible innovation is also supported by the flexibility of laws against unfair, deceptive or abusive acts or practices, which give regulators the ability to address problems before they are widespread or concrete enough to write a rule applicable to an entire industry.

Bank-fintech partnerships can bring innovation to financial services and promote financial inclusion. But partnerships should not be used to evade state consumer protection laws, and we oppose a federal charter for fintech companies. Fintech companies also need to be supervised directly, in addition to the indirect supervision they may receive through bank regulators.

A centralized office within the OCC to monitor innovation could be helpful, but it must have a core consumer protection mission. It should not primarily be an advocate for companies that are looking to loosen consumer protection regulations.

In the remainder of our comments, we will summarize lengthier comments that some of our organizations have submitted earlier to the OCC or other agencies about specific areas of innovation:

- Marketplace lending and big data;
- Mobile financial products and services;
- Modernization of the Community Reinvestment Act and the role of bank branches;
- Payment fraud and faster payments;
- Virtual currencies; and
- Interchange fees on prepaid cards.

We have also attached a full set of these earlier comments as exhibits.[5]

1. *Supporting "Responsible" Innovation is Critical, and Regulation Plays a Key Role*

We appreciate the way the OCC has framed the question: How to support <u>responsible</u> innovation in the federal banking system. The ability to innovate and to come up with new, creative and better ways of doing things is a key strength of the American character. Innovation in the financial sector can broaden financial inclusion, address unmet needs, and make financial products and services better, safer and more affordable.

But innovation is not a uniformly positive thing. Just because something is new, flashy or different does not mean that it benefits consumers. Exploding adjustable rate mortgages were also at one time "innovations," but they were ones that wreaked havoc on families and brought down our entire

[5] The signatories to these comments do not necessarily join every aspect of earlier comments submitted by other organizations.

economy. Thus, the key is to be supportive of responsible innovation that improves lives while maintaining robust consumer protection.

Comptroller Curry succinctly stated the issue in a recent speech:

> But recalling the lessons of the financial crisis, when some "innovative" products such as subprime mortgages and financially engineered securitizations were used in ways that had disastrous consequences for individuals, communities, and our economy, we want to be sure that the banks and thrifts we supervise innovate in a way that is compatible with safety and soundness and consistent with consumer protection laws and regulations.[6]

Innovations can cause consumer protection problems in a number of ways. Some new products may not fit within the scope of critical consumer protection laws that were written decades ago. The products themselves may be important innovations but they still need to be covered by basic consumer protection principles. For example, most prepaid cards fall outside the protections of the Electronic Fund Transfer Act, a gap that the Consumer Financial Protection Bureau has, thankfully, proposed to fill.

New approaches may present new problems that are not adequately covered by existing rules. For example, the growth of the debt buyer industry has presented new problems of debt collectors who lack basic and accurate information about the debts they are collecting.

New business models may also be designed purposely to evade consumer protection laws. Nonbanks often seek to partner with financial institutions in order to avoid interest rate caps or other important state consumer protection laws. New payment systems like remotely created payment orders may be set up to avoid protections under Regulation E.

It is critical for consumer protection to be at the forefront of innovation, not an afterthought. Problems are much easier to avoid and address when close attention is being paid as new products are designed and new markets are developing. After problems become an entrenched part of a business model, they are much more difficult to root out.

Regulation plays a critical role in supporting responsible innovation and preventing irresponsible new products and services. The basic principles underlying many consumer protection laws must be heeded and enforced even as products evolve. For example, as discussed below, if companies are offering lenders big data analyses of a consumer's creditworthiness, then that is a "credit report" that needs the protections of accuracy, transparency and dispute resolution procedures required by the Fair Credit Reporting Act. Those values are critical even if the data technically falls outside the law. If there are gaps in the coverage of regulations – as in the case of mobile check deposits and funds availability rules (discussed below) – then regulations should be amended to encompass new products and services.

[6] Remarks By Thomas J. Curry, Comptroller of the Currency, Before the Harvard Kennedy School's New Directions in Regulation Seminar at 5 (March 31, 2016), http://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-39.pdf ("Curry Harvard Speech").

Responsible businesses and consumers alike benefit if regulations prevent bad actors from casting a pall on an industry. When new problems arise and are identified, regulators need to address those problems, whether through enforcement, supervisory actions, or new laws.

Responsible innovation is also supported by the flexibility of laws against unfair, deceptive or abusive acts or practices (UDAAP). We should not wait to address problems until they are widespread or concrete enough to write a rule applicable to an entire industry. UDAAP laws give innovators the freedom to innovate outside the strictures of prematurely specific rules while providing a check on bad practices.

We appreciate the OCC's observation that any pilot projects to test new products would include "appropriate limitations that would protect consumers and ***would not involve giving banks a safe harbor*** from consumer laws and regulations during the testing phase of a new product."[7]

Innovation must never come at the expense of effective consumer protection regulations. We must not let the lure of new products put stars in our eyes and let our guard down. Robust consumer protections are a critical component of responsible financial innovation that benefit business and consumers alike.

2. Bank-Fintech Partnerships

Many of the OCC's questions involve the relationship between national banks and thrifts and nonbank innovators. Similar issues arise when innovators partner with banks or credit unions regulated by other agencies.

Bank-fintech partnerships can be quite important to responsible innovation. Smaller, newer fintech companies can be more agile than financial institutions in coming up with new and better financial services. Incorporating fintech innovations into banking products and services can improve the latter and benefit banks and their customers. Banks also can provide important capital and legitimacy to help innovative products take off and reach critical mass.

However, partnerships with financial institutions can also be used to evade consumer protection laws or as an excuse for less oversight.

a. Bank partnerships should not be used to help fintech companies evade state law

Sometimes bank-fintech partnerships are created for the purpose of, or have the effect of, evading critical state consumer protections. In particular, fintech companies may seek out bank partners in order to avoid interest rate caps, licensing requirements and other state laws. Financial institutions are often exempt from these laws, but the laws do apply to nonbank entities.

[7] OCC, Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective at 6 (March 2016), http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf.

Bank partnerships should not have the impact of insulating nonbanks from state laws that would otherwise apply to them. This is especially important when a product or service is primarily designed or offered by a nonbank company and the bank plays a more peripheral role.

Banks can also be harmed by fintech partnerships that are used to evade state consumer protection laws. Abusive practices by nonbanks can stain the reputations of their bank partners and expose them to enforcement actions and other compliance risks. Partnerships involving payday lenders, payment processors, credit card add-on products and college prepaid cards have all come back to haunt financial institutions.

Years ago, regulators put a stop to rent-a-bank arrangements used by payday lenders.[8] Yet history repeats itself, and rent-a-bank payday lending is once again rearing its head in the guise of fintech and innovation.

For example, Elevate offers high-cost, longer-term online payday loans using what it claims is an innovative big data underwriting model.[9] Elevate has two brands in the United States, Rise Credit, which offers closed-end installment loans in 15 states,[10] and Elastic, which it describes as an open-end loan,[11] in 40 states.[12] Elevate claims to be staying within state usury caps on the Rise loans (at least for now) though the rates are quite high – up to 365% APR.[13]

Elevate uses Republic Bank & Trust Co. to originate the Elastic credit advances, circumventing state usury caps.[14] For example, Elastic is available in Arkansas, which caps interest at 17%.[15] A $380 Elevate loan with monthly minimum payments would cost $480 to repay over four months,[16] with an APR of about 120%.[17]

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[8] *See* NCLC, Consumer Credit Regulation § 9.6.1 (2012 & online supp.).

[9] *See* Jeff John Roberts, "Bad credit is a bonanza for online lender, but critics cry foul," Fortune (July 9, 2015), http://fortune.com/2015/07/09/elevate-online-loans/.

[10] *See* http://www.risecredit.com; Elevate Credit, Inc., Securities and Exchange Commission Form S-1, Registration Statement at 140 (Nov. 9, 2015) ("Elevate SEC Form S-1"), https://www.sec.gov/Archives/edgar/data/1651094/000119312515371673/d83122ds1.htm.

[11] While the loans purport to be open-end, they really function more like a series of closed-end loans. A $400 advance has minimum payments that pay the loan off in four months. The main difference between Elastic and Rise is that, with Elastic, the consumer has a line of credit so can take additional advances. With Rise, the consumer would technically need to apply for a new loan, although it seems likely that the process would be fairly automatic for a returning customer.

[12] *See* https://www.elastic.com/FAQs/ (answer to "What states are currently served by Elastic?").

[13] *See* Elevate SEC Form S-1 at 140 (describing the maximum state law APR and the Rise APR in 15 states).

[14] *See* Elevate SEC Form S-1 at 27.

[15] Arkansas Const'n, Amend. 89.

[16] *See* https://www.elastic.com/what-it-costs/.

[17] We have calculated the APR including all of the fees. The Truth in Lending Act rules for calculating APRs on open-end credit are full of loopholes and might even result in an APR of 0% for the Elastic loan if the fees are not considered to be periodic interest.

Elevate depends on Republic Bank to be able to make usurious loans.[18] Elevate targets subprime borrowers and has a very high charge-off rate, which it has no intention of lowering.[19]

Recent court decisions have rejected rent-a-bank arrangements and bolstered the role of state law in regulating nonbank entities.[20] The Dodd-Frank Act also reaffirmed the importance of state laws and cut back on the OCC's preemption powers. But nonbank entities continue to attempt to use financial institutions to shield themselves from state laws.

Smaller community banks may be especially susceptible to entreaties from companies whose primary interest is in evading consumer protection laws. Those banks may have less sophisticated compliance systems to monitor their nonbank partners. Some smaller banks, which may lack the economies of scale larger banks have, may be eager to enter into arrangements with third parties that promise lucrative new revenue sources. It is likely no coincidence that the banks that have been the subject of Operation Choke Point and found themselves caught up in payments scams have to date all been small banks.[21]

The OCC (and other bank regulators) can support <u>responsible</u> innovation by prohibiting financial institutions from entering into partnerships with entities that are offering products or services that would be otherwise unlawful. Banks should not be in the business of renting out their charters. State laws offer important protections that should not be evaded.

For a longer discussion of places where the OCC's preemption rules are outdated and need to be revised in order to restore critical state consumer protections, see also our preemption comments to the OCC under the Economic Growth and Regulatory Paperwork Reduction Act.[22]

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[18] *See* Elevate SEC Form S-1 at 27 ("The structure of the Elastic product exposes us to risks associated with being reliant on Republic Bank as the originating lender…. Because line of credit products are relatively more difficult to establish under state law, any inability to find another originating lender would adversely affect our ability to continue to offer Elastic, which in turn could have a material adverse effect on our business, prospects, results of operations, financial condition or cash flows.").

[19] Elevate's net charge-offs were 51% of revenues in 2014. Elevate SEC Form S-1 at 22. While Elevate noted that this charge-off ratio could go down with a more seasoned portfolio, the company stated that "we do not intend to drive down this ratio significantly below our historical ratios and would instead seek to offer our existing products to a broader new customer base to drive additional revenues." *Id.* at 78.

[20] Madden v. Midland Funding, LLC, No. 14-2131-cv, 2015 WL 2435657 (2d Cir. May 22, 2015) (debt buyers must comply with state usury caps when adding additional interest to charged off credit card debt); Final Order On Phase II Of Trial: The State's Usury And Lending Claims, State of West Virginia, ex rel. v. CashCall, Inc and J. Paul Reddam, Kanawha County Circuit Court, Civil Action No.: 08-C-1964, Sept. 10, 2012. http://bit.ly/16lOhAe (upholding the state's claim that CashCall was the de facto lender in violation of the state's usury limit, while finding that CashCall purchased all loans made under the arrangement from First Bank of Delaware three days later and clearly bore the economic risk of the loans).

[21] NCLC, Issue Brief: What is Operation Choke Point?: Stopping Banks from Helping Scammers Raid Your Bank Account (May 2015), http://www.nclc.org/images/pdf/banking_and_payment_systems/payment-fraud/ib_what_is_operation_choke_point52815.pdf.

[22] Comments of NCLC et al. to Office of the Comptroller of the Currency On Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Docket ID FFIEC-2014-001, Regarding 12 CFR parts 7, 34, 150 (preemption regulations) (Sept. 2, 2014), http://www.nclc.org/images/pdf/rulemaking/occ-10-year-review-comments-consumer-groups09022014.pdf.

b. Direct supervision of fintech companies is important, along with oversight of third-party service providers

Partnerships with nonbanks may bring an essential regulatory eye to an otherwise unregulated product. The OCC and other bank regulators play an important role in supervising bank-fintech partnerships and setting expectations about fair practices by the nonbanks with which banks interact. For example, there is little regulation of small business lending, but lenders that partner with banks at least have some indirect regulation through bank regulators.

Financial institutions also play an important role in their oversight of third-party relationships with fintech companies. The OCC and other regulators have rightly advised financial institutions to ensure that they have robust compliance systems and are fully aware of the risks when they engage with third party service provides.

However, indirect supervision through bank regulators and financial institutions is not sufficient oversight of fintech companies. Companies that interact directly with consumers or play a key role in consumer products or services should be examined directly to ensure consumer protection. Supervision that is primarily focused on ensuring the safety and soundness of the financial institution, or that does not have direct access to the fintech company, is insufficient.

c. Fintech companies should not be given a federal charter

For all of reasons discussed in the previous sections, we oppose any efforts to authorize or create a federal charter for fintech companies. The sole purpose of such a charter would be to preempt state consumer protection laws, which is a wholly inappropriate reason to provide a federal charter. In the absence of federal usury caps, state interest rate limits are critical to consumer protection. States have a variety of other laws that protect consumers when borrowing, transferring funds or engaging in other financial activities. The ability of states to license and examine fintech companies (in areas where licenses are required) is critical to ensuring that fintech products and services have sufficient oversight.

Comptroller Curry appropriately commented that he "would be very concerned, for example, if we were to authorize a federal license that offers the benefits of the national bank charter, including preemption, without any of the safeguards or responsibilities that apply to banks and thrifts. Among the safeguards is the benefit of prudential supervision."[23]

But the nature of supervision is different for a nondepository institution that does not benefit from deposit insurance and is unlikely to be as robust. For depository institutions, part of the critical role of supervision is to ensure the safety and soundness of the bank and to make sure that it does not fail. And deposit insurance protects consumers in the rare cases where a bank does fail.

[23] Curry Harvard Speech, *supra*, at 7.

But fintech companies will rise and fall, as they should in new markets. The government should not be in the business of propping them up. And yet, the fact that some of these companies will fail and potentially harm consumers in the process makes it all the more inappropriate to give them the benefits of federal preemption. As Comptroller Curry stated:

> Our job is to help ensure that banks of all sizes are capable of withstanding economic storms so that they can continue to support their communities and their customers. I would worry about the staying power of some of the new types of lenders. One of the great virtues of community banks is that they know their customers and they stand behind them in good times and bad. ***I'm not so sure that customers selected by an algorithm would fare as well in a downturn.***[24]

While we appreciate the complexity of applying for licenses in every state, there are ways to streamline the process without undercutting consumer protection and oversight. For example, the Conference of State Bank Supervisors runs a Multistate Licensing and Registration System, "a web based system that allows state-licensed, non-depository companies in a variety of industries to apply for, amend, update, or renew a license online for all participating state agencies using a single set of uniform applications in one system."[25] Originally adopted for mortgages, the system is beginning to be used for other types of services, including small dollar loans and money transmitter licenses. CSBS has also developed a model regulatory framework for adapting state money transmitter laws for virtual currencies. These types of approaches could be adapted to streamline compliance for fintech companies while maintaining the important role of state consumer protection laws and state regulators.

3. A Centralized OCC Office to Monitor Innovation Can Be Helpful if It Also Has a Core Consumer Protection Mission

The OCC has asked whether it should establish a centralized office of innovation within the OCC to facilitate more open, timely, and ongoing dialogue regarding opportunities for responsible innovation. We believe that more focused attention on financial innovations can be helpful, but that attention must play a dual role of supporting responsible innovations and preventing new problems from emerging from innovations.

An office focused on innovation must not become solely a booster for the fintech industry. Nor should it view its primary role as loosening the regulations that are the subject of industry complaints. Old and new industries alike complain about regulation, but consumer protection rules must be at the front and center of innovations, as discussed above. The OCC should be focused on how to make sure that regulations keep up and work for both industry and consumers – updated to address new problems and new products, and modernized if older approaches are no longer appropriate.

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[24] *Id.* (emphasis added).

[25] Conference of State Bank Supervisors & Money Transmitter Regulators Association, The State Of State Money Services Businesses Regulation & Supervision at 17-18 (May 2016), https://www.csbs.org/regulatory/Cooperative-Agreements/Documents/State%20of%20State%20MSB%20Regulation%20and%20Supervision%202.pdf.

An office of innovation must also help the OCC and the public keep a close eye on how innovative products and services are working in practice. It may be difficult to understand from a company's slick marketing materials the problems that a product creates. Regulators need to ask the hard questions, look "under the hood," and determine whether the structure of a product or service takes it outside of critical consumer protections or creates new issues.

Outreach to consumers and consumer advocates is an essential part of this vigilance. The OCC's white paper asks how a centralized office on innovation would facilitate "more open, timely and ongoing dialogue regarding opportunities for financial innovation." It is critical that the dialogue around innovation not be confined to conversations with fintech innovators but that the office be tasked with inviting such dialogue with consumer groups as well.

4. ***Marketplace Loans and Big Data Underwriting***

We previously submitted comments to the Department of the Treasury on the growing marketplace loan industry, including the role of big data underwriting. We will summarize those comments briefly here and attach them to these comments.[26]

The marketplace lending market is in many ways emblematic of fintech more generally: it holds the promise of significant benefits for consumers, but also poses risks that must be addressed. Marketplace lending is reaching consumers and small businesses who have not been well served by traditional institutions. Many marketplace loans on the market today have relatively low rates and can help consumers and business access credit or refinance it at lower rate.

Nonetheless, there is nothing unique about marketplace lenders that should lead to any weaker consumer protections or regulatory exemptions. To the contrary, we fear that the market today is developing with little oversight and some signs of problems.

Preemption of state laws. While the key players in marketplace loans are not financial institutions, they often partner with those institutions. Those partnerships are often designed to or have the impact of evading state laws including interest rate caps and licensing requirements. Marketplace entities may market, underwrite, and service the loan as well as market the securities and deal with investors. The financial institution may have little to do with the loan other than originating it and quickly selling it off. As in other rent-a-bank arrangements, the financial institution's role may be little more than a fig leaf to justify preemption of state laws. As discussed above, state laws play a critical role in protecting consumers and should not be evaded through bank partnerships.

Big data. A central aspect of the "innovative" aspect of marketplace lending is the use of big data in underwriting. But big data underwriting poses many risks, and those risks are especially great due to the completely opaque nature of big data.

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[26] Comments of NCLC to U.S. Dep't of the Treasury on Marketplace Lending RFI, TREAS-DO-2015-0007-0001 (Sept. 30, 2015), http://www.nclc.org/images/pdf/rulemaking/treasury-marketplace-loan-comments.pdf, attached as Exhibit 1.

The key consumer protection principles that underlie the ***Fair Credit Reporting Act*** are also critical in the use of big data: The data must be accurate and be used for fair and appropriate uses. Consumers must be informed when information about them leads to a denial of credit or a higher price -- in order to have an opportunity to determine if the information (or conclusions based on it) is mistaken, or to learn from the experience. Consumers must have the right to invoke clear dispute procedures that companies must follow when there is a potential error. These principles are essential whether or not a use of big data technically falls within the FCRA rules. Yet companies that use big data are unlikely to give consumers any opportunity to correct any errors or even to know how the data is being used.

Big data also poses the troubling potential to violate ***fair lending laws*** and to inadvertently lead to redlining in cyberspace. Many elements of big data may be correlated with race, neighborhood, or community. If a white consumer and a black consumer have identical incomes and credit histories, it may still be that the black consumer is a bigger credit risk because, due to historical discrimination, she is less likely to have parents, friends or family with the resources to help her out if she hits a bump in the road.[27] Discrimination on that basis is rightly illegal. But big data algorithms may tend to lead to credit denials or higher prices for borrowers of color, even though the decisions will not be flagged that way.

Many uses of big data also pose troubling ***privacy issues*** for consumers.[28] Here again, the opacity of big data presents significant new risks.

New underwriting methods may also incorporate ***alternative data*** sources that have other negative impacts on consumers.[29] For example, some are promoting full-file reporting of ***utility payment data*** to credit reporting agencies. But mass incorporation of this data could give millions of low-income consumers bad or worse credit scores and could undermine state consumer protections, such as prohibitions against wintertime shut offs for vulnerable consumers, such as the elderly.[30]

The new business models of some marketplace lenders could also result in the lenders having ***insufficient skin in the game***, skewing origination incentives and leading to **poor underwriting.**

The mandatory or default **use of preauthorized electronic payments** can also weaken consumers' control over their bank accounts, cause bank account closures, and create incentives for weaker underwriting.

[27] *See* NCLC, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination (May 2016), http://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

[28] For more information on privacy issues, see Comments by the U.S. Public Interest Research Group (USPIRG) and the Center for Digital Democracy (CDD) on "Expanding Access to Credit through Online Marketplace Lending." U.S. Department of the Treasury RFI. [FR Doc. 2015–17644 Billing code 4810–25–P4810-25-P Docket #RFI, TREAS-DO-2015-0007-0001.] (Sept. 30, 2015) http://www.uspirg.org/sites/pirg/files/reports/USPIRG_CDD_MarketplaceLendingRFI_Final30Sept2015.pdf.

[29] NCLC, Issue Brief: Credit Invisibility and Alternative Data: The Devil is in the Details (June 2015), http://www.nclc.org/images/pdf/credit_reports/ib-credit-invisible-june2015.pdf.

[30] NCLC, Issue Brief: Full Utility Credit Reporting: Risks to Low Income Consumers (August 2013), http://www.nclc.org/images/pdf/credit_reports/ib_utility_credit_2013.pdf.

Finally, the use of **lead generators** could lead to the sale of sensitive financial information, potential for fraud, and the other problems prevalent in the online payday loan and debt relief markets.

5. Mobile Financial Services

Much fintech innovation is happening in the area of mobile financial services. It is difficult to summarize the wide range of issues posed by the multitude of rapidly emerging and changing financial services that can be offered through mobile devices. If there is one common thread it is this: vigilance by regulators is essential, because it is impossible for consumers or even relatively sophisticated consumer advocates to monitor and understand all of the issues posed by mobile financial services.

As discussed earlier, fintech partnerships with financial institutions pose the potential for inadequate oversight if the bank has only a minor role and the fintech partner is not being directly supervised.

Regulators must watch the field closely, think closely about how services work, scour terms and conditions, and keep a close ear to the ground for complaints or potential problems. Regulators must take action in whatever form appropriate – including rules, enforcement actions, supervisory guidance, consumer alerts, and conversations with industry – whenever they see gaps in protections or new issues that are not adequately covered by existing rules.

We submitted comments to the CFPB in 2014 and attach them to these comments.[31] Those comments focused on core principles to protect consumers in mobile financial transactions. Regulators and industry alike must:

- Ensure safety, including the safety of funds and the safety of data.
- Promote consumer understanding of features, terms and costs.
- Establish clear, effective protections and procedures in case of disputes, errors, and unauthorized charges, including Regulation E protections, chargeback rights and protections for loading problems.
- Protect privacy.
- Use consumer data fairly.
- Keep credit and deposit accounts separate.
- Provide ample, free and convenient access to account information and customer service.
- Ensure access to funds.
- Prohibit unfair fees and tricks.
- Facilitate choice and competition.
- Protect children and parents.
- Allow consumers to exit easily.

[31] Comments of NCLC et al. to the CFPB on Request for Information Regarding Mobile Financial Services, Docket No. CFPB-2014-0012 (Sept. 10, 2014), http://www.nclc.org/images/pdf/banking_and_payment_systems/comments-cfpb-mobile-sept2014.pdf, attached as Exhibit 2.

Our comments also addressed opportunities and concerns about how mobile financial services provide access to underserved consumers.

Mobile financial services also provide another illustration of how innovations may lead to gaps in consumer protections. Remote deposit capture (RDC) is a tremendous innovation that holds the promise of enabling consumers to quickly deposit checks, including to prepaid accounts, and to avoid check cashing fees. However, the regulations that implement the Expedited Funds Availability Act have not been updated to address either RDC or deposits to prepaid accounts. As a result, consumers often face long delays in accessing deposited funds and are forced to pay fees either to traditional check cashers or through apps that promise immediate access to mobile deposits. We have attached our comments to the Federal Reserve Board on this topic.[32]

Finally, the promise of mobile services and innovations in the payment and deposits space has led some to call for eliminating paper, including paper statements for financial accounts. Some financial institutions are calling for relief from the laws that give consumers the choice of paper bank account and credit card statements or that protect consumers when they are asked to consent to electronic disclosures.

Some consumers do just fine with purely electronic information. But paper statements and disclosures can also serve an important consumer protection function.[33] Consumers must have the right to receive information in the manner that works for them. For many consumers, from those without regular broadband Internet access to the most computer savvy, paper is a more reliable way of ensuring that the consumer actually sees the information and can retain important records. Consumers should not be coerced into electronic statements or steered into them by default if paper is the consumer's first choice. We must also remember that there is still a digital divide, and a focus on innovation should not leave behind those on the other side of that divide.

6. Community Reinvestment and the Role of Bank Branches

Most fintech innovations involve online or mobile products or services. Financial institutions may partner with fintech companies as a way of expanding their customer base beyond people who use their bank branches. Fintech products and services may also be used as a replacement for services offered in branch, and even as an excuse for closing branches.

While fintech can be a tool of financial inclusion, it can also result in a weakening of services to, relationships with, and investment in communities that have been underserved. The OCC can encourage responsible innovation by (1) encouraging its financial institutions to meet community needs

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[32] *See* Comments of NCLC et al. to Federal Reserve Board On Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Docket ID OP-1491, Regarding Community Reinvestment Act Availability of Funds and Collection of Checks (Regulation CC) (May 14, 2015) ("NCLC EGRPRA CRA and Reg CC Comments"), http://www.nclc.org/images/pdf/banking_and_payment_systems/nclc_egrpra_fed_rule_review_comments_on_cra_reg_cc05142015.pdf, attached as Exhibit 3.

[33] For more information, see Chi Chi Wu, Lauren Saunders, NCLC, Paper Statements: An Important Consumer Protection (March 2016), http://www.nclc.org/media-center/report-paper-electronic-statements.html.

for their full customer base, including customers who are not within their Community Reinvestment Act (CRA) assessment areas; (2) ensuring that all communities continue to be served by brick and mortar bank branches; and (3) working with the Federal Reserve Board and the FDIC to develop regulations, guidance, Qs and As or other vehicles to modernize and strengthen the CRA to account for the changing nature of banking and to more effectively encourage and monitor investment in underserved communities.[34]

Reinvestment in struggling communities is more important today than ever. The impact of predatory lending practices, the foreclosure crisis, and the loss of wealth and assets have devastated lower and moderate income communities and communities of color. Financial innovations must be used to improve reinvestment and should not be an excuse for weakening the in-person ties to the consumers that continue to be important to underserved communities.

7. Payment Fraud and Faster Payment Systems

Scammers can find innovative ways to scam consumers. Criminals can also exploit weakness in older systems instead of using newer systems that have more robust fraud monitoring.

Purely electronic remotely created payment orders (RCPOs) are an "innovation" that scammers have been using to perpetrate widespread fraud more efficiently than they can with paper-based remotely created checks (RCCs). Scammers also continue to process payments through the check system using RCPOs and RCCs in order to avoid the fraud monitoring tools of the ACH system and the card networks. But even those systems have their weaknesses.

The OCC can support responsible innovation and prevent payment fraud by:

- encouraging the Federal Reserve Board to ban RCCs and RCPOs for consumer purposes, and in the meantime to complete the 2011 rulemaking to bring RCPOs within the rules governing RCCs;[35] and
- encouraging national banks and thrifts to be especially vigilant when their customers are depositing RCCs and RCPOs, as well as when they are serving as the originating depository financial institution for payment processors.

The OCC can also support responsible innovation by adding its voice to make sure that new, faster payment systems[36] under development have robust consumer protections, including rules or other measures to make sure that:

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[34] For more information, see NCLC EGRPRA CRA & Reg CC Comments, Exhibit 3.
[35] *See* NCLC EGRPRA CRA and Reg CC Comments, Exhibit 3.
[36] NCLC has been participating in the Federal Reserve Board's Faster Payments Task Force, including the development of Faster Payments Effectiveness Criteria, available at https://fedpaymentsimprovement.org/faster-payments/task-force/criteria/. Some of the criteria that reflect consumer protection principles include a recognition that fraud includes fraud in the inducement (see the definition of "fraudulent" as well as S.1.4),as well as principles designed to prevent and remedy payment fraud, such as receiver authentication and identification

- Funds are safe;
- Costs are low and transparent;
- Underserved populations are served and the system is accessible to individuals with disabilities, the elderly, and consumers with limited English proficiency;
- Antiquated overdraft fees do not migrate into modernized faster payment systems;
- Consumers have full information about their payments;
- Consumers have access to robust error resolution tools and protection from unauthorized charges; and
- Faster payments do not result in faster fraud with no remedies for consumers who are defrauded into sending funds to fraudsters.[37]

Like many innovations, faster payments have a tremendous potential to benefit consumers. But incorporating strong consumer protections and clear rules of the road <u>at the outset</u> is essential.

8. Virtual Currencies

One of the most cutting edge areas of financial innovation involves virtual currencies. Virtual currencies hold the promise of reducing the costs and delays of moving money, with potential benefits to consumers such as faster and cheaper remittances. But virtual currencies are also fraught with consumer protection risks. They can be used to perpetrate frauds and to evade the consumer protections that apply to traditional payment systems.

The OCC can encourage responsible innovation by making sure that financial institutions that become involved with virtual currencies continue to follow, or to make sure that their partners follow, the protections of Regulation E, deposit insurance and other protections from loss.

The OCC can also insist that its financial institutions partner only with businesses that are licensed and supervised. We support the Conference of State Bank Supervisors model regulatory framework for state virtual currency regulatory regimes. However, that framework can be improved by making explicit that covered virtual currency businesses must have:

(S.1.4, U.2.2, S.10.2, S. 10.5); retention of information and information sharing to detect patterns of fraud, including those not visible at the level of an individual participant (E.7.2, E.7.3, S.6.1, S.6.7); allocation of liability (S.5, S.5.5); authorization focused on the consumer's institution or account provider (S.2.1, S.2.2); easy methods to revoke preauthorizations (S.2.3, L.2.1.3, L.2.1.4); mechanisms to block funds availability for potentially unauthorized, fraudulent or erroneous payments (S.5.1); addressing the needs of the underserved and individuals with disabilities, the elderly, and consumers with limited English proficiency (U.1.4, U.2.4); clear, understandable communications (U.3.2, U.3.5, S.2, S.2.3); transparency of fees and other costs (U.5.3, E.1.3); competition that will lower costs, including the ability to easily switch providers (E.1.2); information associated with payments, i.e., to help consumers identify payees and payments (U.4); acknowledgement that "irrevocability" does not foreclose compensation to consumers for dispute payments (S.3.3); acknowledgement of the role of state law (L.1.4); and options for consumer protections above legal requirements (L.3.3).

[37] Lauren Saunders, American Banker, "Will Faster Electronic Payments Mean Faster Fraud?" (Sept. 17, 2015), http://www.americanbanker.com/bankthink/will-faster-electronic-payments-mean-faster-fraud-1076715-1.html.

- 100% liquidity in dollars to match consumer value, whether that consumer value is denominated in fiat or virtual currency;
- living wills, which should include procedures to ensure consumers are made whole in the event of non-performance, bankruptcy or catastrophe;
- robust error resolution policies, caps on consumer losses, and streamlined policies and procedures to re-credit consumers;
- regularly updated, comprehensive, uniform consumer disclosures prominently posted on websites and provided to consumers before they become customers;
- the highest data security standards; and
- ample cyber insurance.[38]

9. Prepaid Cards and Interchange Fees

Finally, the OCC could encourage innovations in prepaid accounts and financial inclusion by urging the Federal Reserve Board (FRB) to revisit the unnecessary limitations on the prepaid card accounts that are eligible for an exemption from the interchange fee caps of Regulation II.[39] As a result of Regulation II, many prepaid card accounts offered by larger financial institutions do not permit links to savings accounts or access to the bank's online bill payment page, features that are especially important for consumers who lack access to safe bank accounts. The rules also prevent other innovations on prepaid accounts that permit funds to be accessed or transferred without the card.

With the CFPB about to finalize rules to define prepaid accounts and cover those accounts under Regulation E, the FRB should adopt the CFPB's definition and eliminate the Regulation II limitations that restrict innovative features of prepaid cards and mobile financial accounts.

10. Conclusion

Financial innovation can help provide better, safer, more affordable and more widely available financial products and services. But innovation is not inherently good for consumers, and the quest for innovation should never be an excuse to weaken consumer protection regulations. Regulators should encourage innovation while being vigilant to ensure that it is responsible innovation that puts consumer protection first.

Thank you for the opportunity to submit these comments. If you have any questions, contact Lauren Saunders, Associate Director of the National Consumer Law Center, (202) 595-7845, lsaunders@nclc.org.

Respectfully submitted,

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[38] The comments of Consumers Union, NCLC and Prof. Mark Budnitz on the draft framework and ways to improve it are at http://www.nclc.org/images/pdf/rulemaking/comments-on-scbs-framework.pdf. The final framework incorporates some but not all of our comments.

[39] *See* Comments of NCLC et al. to Federal Reserve Board on Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Regulation II, FRB Docket No. R–1510 (March 22, 2016), http://www.nclc.org/images/pdf/rulemaking/EGRPRA-Reg-II-comments-consumer-groups.pdf, attached as Exhibit 4.

National Consumer Law Center (on behalf of its low income clients)
Center for Responsible Lending,
Empire Justice Center
U.S. Public Interest Research Group

Exhibits to Comments of
National Consumer Law Center
Center for Responsible Lending
Consumers Union
Empire Justice Center
U.S. Public Interest Research Group
To Office of the Comptroller of the Currency
On Supporting Responsible Innovation
(May 31, 2016)

Exhibit 1: Comments of NCLC to U.S. Dep't of the Treasury on Marketplace Lending RFI, TREAS-DO-2015-0007-0001 (Sept. 30, 2015), http://www.nclc.org/images/pdf/rulemaking/treasury-marketplace-loan-comments.pdf.

Exhibit 2: Comments of NCLC et al. to the CFPB on Request for Information Regarding Mobile Financial Services, Docket No. CFPB-2014-0012 (Sept. 10, 2014), http://www.nclc.org/images/pdf/banking_and_payment_systems/comments-cfpb-mobile-sept2014.pdf.

Exhibit 3: Comments of NCLC et al. to Federal Reserve Board On Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Docket ID OP-1491, Regarding Community Reinvestment Act Availability of Funds and Collection of Checks (Regulation CC) (May 14, 2015) (EGRPRA CRA and Reg CC Comments), http://www.nclc.org/images/pdf/banking_and_payment_systems/nclc_egrpra_fed_rule_review_comments_on_cra_reg_cc05142015.pdf.

Exhibit 4: Comments of NCLC et al. to Federal Reserve Board on Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, FRB Docket No. R–1510, Regulation II (March 22, 2016), http://www.nclc.org/images/pdf/rulemaking/EGRPRA-Reg-II-comments-consumer-groups.pdf.