# Fintech

## Promoting Responsible Innovation

American
Bankers
Association®

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ABA believes that innovation in financial services continues to have tremendous potential to benefit customers as it has throughout the history of banking. Innovation can promote financial inclusion, make it possible to extend credit to many more borrowers, and give customers improved transparency into the financial products they use every day. In many ways, fintech was born in America's banks.

Today, innovations are emerging from both the traditional banking sector and from non-bank startups. ABA believes that when banks and startups partner they are able to deliver customers the best of both worlds: innovative services that customers crave from a partner that they can trust with their financial future. **This is why ABA supports innovation both inside and outside the banking system and policies that promote partnerships.**

Startups and banks both bring a lot to the table and each have a unique set of strengths that are often complementary. Startups' freedom from legacy systems and lighter oversight makes them nimble and gives them the ability to bring new products to market and test them quickly. This has allowed them to build innovative and intuitive user experiences. Banks are key drivers of innovation as well, delivering new products to market through both internal development and partnerships. Banks bring customer relationships and trust that are built on years of doing right by customers and are supported by regulatory oversight. This trust is foundational to banking.

The benefits of fintech innovations are only realized when they are delivered responsibly, in a way that does right by customers. This means getting regulation right is critical. Regulation must be flexible enough to allow innovations to be driven from within traditional banks. We must also ensure that customers receive the protection they deserve wherever they get their financial services through consistent regulation and oversight.

Ultimately, fintech investment and talent will flow to countries where regulation facilitates innovation. While regulators in the United States have made progress, our international peers are moving quickly to modernize regulations in response to fintech. This is too important to be left behind. Regulators can make changes that facilitate innovation and partnering without jeopardizing financial stability or consumer protection. To this end, ABA recommends the following framework to facilitate responsible innovation in financial services:

### I. Regulators should continue working to understand how innovation is impacting banking

Just as banks cannot implement new innovations without fully understanding them, regulators must build expertise in emerging technologies to facilitate bank adoption. Regulators' understanding of new technologies is critical to banks' ability to implement innovations. A

regulator's lack of familiarity with an innovation will often present a significant barrier to bank adoption. ABA recognizes the work done by a number of banking regulators to date, including the Office of the Comptroller of the Currency's (OCC) Office of Innovation, the Bureau of Consumer Financial Protection's (Bureau) Project Catalyst, the Commodity Futures Trading Commission's (CFTC) LabCFTC, the Federal Reserve's national fintech team, and efforts of other regulatory agencies. These efforts are important first steps, but more must be done to encourage innovation.

There is also an opportunity for regulators to do more than just remove barriers to innovation. Regulators should engage with expert staff focused on innovation at banks and non-banks alike. The regulatory goal to ensure safety and soundness should embody the notion that banks need to innovate to stay current with evolving customer needs and remain competitive in a digital world. By understanding new technologies and sharing their findings, regulators can send a clear message to the financial institutions they oversee that the regulators understand the relevant opportunities and risks. Innovation in banking is not simply a risk to be managed, it is a customer demand, an imperative for banks to remain competitive in an increasingly digital economy, and should be encouraged by regulators.

To do this effectively, regulators need to better track and understand how innovations are impacting banking. Building internal expertise on innovation is only useful to the extent that it is messaged throughout each agency and applied consistently to all supervised entities. Regulators should focus on ensuring that examiners in the field are sharing these insights. The better field examiners understand the opportunities that technology presents for banks, the better they can support innovation in those institutions.

Regulators also need to be sure to share their findings and coordinate with other regulators. Coordination is a critical component of bringing innovation into the banking system. Since banks often have more than one regulator, they are only as innovative as their least innovative regulator. A coordinated approach will give banks clarity about how to implement new technologies and confidence to move forward. Moreover, as non-banks begin offering banking products and services through digital channels, bank regulators and other agencies must coordinate to ensure that these activities are appropriately being monitored, the emerging risks adequately captured, and all applicable legal requirements met.

## II. Regulators should allow banks to move quickly and implement new innovations

In order to bring innovations to market, banks should be able to adopt the same innovative design practices followed by leading technology firms. Innovation requires constantly testing products, tweaking the design, and rolling out updates. Working in a complex regulatory environment makes this kind of iteration difficult. Today, product cycles at banks can be up to one year or longer. A clear set of rules and regulatory support can help shorten this timeframe, empowering banks to quickly bring new products to market and drive innovation in banking.

In most cases, bank innovation should not require special supervisory processes. Developing and bringing to market new or improved financial products, services, and processes is an integral part of a typical bank's business model and is an appropriate part of each bank's dialogue with its supervisors. The ongoing communication that must occur between bank management and examiners concerning the bank's overall strategic direction and general risk management is an appropriate way for supervisors to gain insight into each bank's innovative business strategies, activities, and products. As such, most successful innovations will not call for a specialized supervisory function or process.

Supervisors' support for bank innovation requires a reasonably stable and predictable regulatory landscape for banks. Supervisors should not seek to implement policy through enforcement actions that turn regulator preferences into requirements or that leave regulatory expectations exposed to conjecture. Banks should not have to worry about a surprise from a regulator who has determined that a best practice at another bank should become a requirement for theirs.

Regulators should also encourage banks to partner with innovative companies. Supervisors evaluate most bank-fintech partnerships under the traditional third-party vendor management framework. Often this process can restrict banks' ability to partner. While regulatory guidance emphasizes the review of third party internal controls, regulators have indicated that they will evaluate activities conducted through third-party relationships as though they were performed by the bank itself. This requires the bank to act as a quasi-regulator, raising the prospect of risk and complexity for any partnership, which can discourage collaboration.

While banks should be able to implement most innovations through the course of their normal business, there are times where new technologies challenge regulatory assumptions and raise questions that must be explored by banks, regulators, and technologists together. In these cases, it can be helpful for regulators to participate in pilot programs that allow innovators to test new technologies with regulatory confidence.

## III. Security must always be a top priority in innovation

As banks innovate, security is always a top priority. Innovation in banking can deliver real benefits to customers, but these benefits are only realized if innovations are delivered responsibly and securely. Banks are trusted custodians of customers' financial lives, and they do not take this responsibility lightly. This is supported by a strong regulatory framework and proactive supervision. Trust is critical to the proper functioning of our financial system, and regulators should ensure that regulations are applied uniformly and that customers receive consistent treatment wherever they go for their financial services.

Technology has fundamentally changed the ability of technology driven companies to quickly reach customers and directly offer financial services. Today, a company does not need a branch network to reach a mass market. In many cases, this has allowed non-banks to develop direct customer relationships. While innovation at banks is closely watched by regulators, non-banks offering similar services do not have the same level of oversight.

Regulation that focuses on activities can help ensure that all companies offering financial services are subject to consistent regulation. Similar activities should be subject to similar regulation, regardless of what type of company offers them. Oversight is also a critical component of any regulatory structure, ensuring that regulations are consistently applied. Simply put, customers should expect the same reliable experience and protections whether they borrow from a bank or non-bank.

Trust is also critical to the protection of customers' financial data. Increasing adoption of new technologies has driven an explosion in the amount of financial data being created. Consumer financial data are extremely sensitive and must be protected appropriately. Banks take very seriously their responsibilities to their customers to maintain the highest level of privacy, security, and control over their financial assets and transactions.

Banks are working with technology firms to help give customers the ability to share their financial data with third parties, but are careful to ensure that this is done in a secure, transparent manner that gives customers control over their data. Regulators should ensure that customers' data receive bank-level protection when customers share it with third parties. At the same time, customers must understand the risks and liabilities when they entrust access to their financial data to third party aggregators.

Innovation in banking stands to provide customers tremendous benefits. There is an opportunity today to remove regulatory impediments and empower banks to drive innovation. If innovation is to fully benefit customers, it must be delivered in a responsible way that maintains the trust that is critical to the banking system. To this end, ABA offers the following specific recommendations for Treasury to consider as it looks at the market:

## SPECIFIC RECOMMENDATIONS:

### 1. **Data Access** – Regulators should clarify existing regulations to ensure that customers can securely share their financial data.

Technology has facilitated the creation of an unprecedented amount of consumer financial data. As the amount of data has grown, so has the number of companies interested in leveraging it. New financial tools require access to consumer's financial account data to offer their services and banks are working to facilitate this access. **ABA fully supports the customer's ability to access and share their financial data in a secure, transparent manner that gives them control.**

Consumer financial data are extremely sensitive and must be protected appropriately. Accordingly, Congress has recognized the sensitivity of financial information and has provided protections for it in the Gramm-Leach Bliley Act of 1999 (GLBA)–obligations that apply to all parties that hold it throughout its lifecycle.

Banks take very seriously their responsibilities to their customers to maintain the highest level of privacy, security, and control over their financial assets and transactions, which is why this issue of data sharing – and getting it right – is so important to our industry. Today, consumers trust that their financial data are being protected and handled appropriately. This trust is critical to the functioning of the financial system and is the reason banks dedicate tremendous resources to safeguarding financial data.

Current practices in the data aggregation market, however, may leave consumers exposed and create risks that undermine this trust. As we have seen with Facebook, customers often authorize access to sensitive data without fully realizing how these data are used. Today, third parties often ask customers for their account and login information so that they may acquire account data in a process known as "screen scraping." In this process third parties log into a customer's bank account as the customer and uses algorithms to "read" whatever account data they can find. In return they offer the customer little transparency about how they are monetizing these data and limit their own liability should things go wrong.

Moreover, consumers may be unaware of the differences in the legal and supervisory standards applicable to bank and non-bank participants in the financial services marketplace. Once the customer information is shared, it leaves a secure bank environment, where it is accorded longstanding legal protections, and it is released into the data services market where it is accorded no more special status than data created through a consumer's use of a social media platform.

There is a better way forward. We can empower consumers to share their financial data without the risks that consumers take on unknowingly today. We believe three core principles should set the framework for how data are shared and how consumer data are treated:

- **Security:** Consumers deserve bank-level security and protection regardless of where they choose to share their data. This means that consumer data are treated the same – and subject to GLBA protections – whether at a bank or a third party.
- **Transparency:** Consumers must have transparency about how companies use their financial data. It should be clear to consumers what data a fintech company is accessing, how long the company is holding these data, and how it is using the data.
- **Control:** Consumers should have control over the access and use of their data. This would allow consumers to see easily who is authorized to receive their data, modify what access they have, and revoke that access when a service is no longer used. If consumers can easily control the data being accessed, they can better understand what is being used and protect themselves accordingly.

More specifically, ABA offers the following recommendations to ensure that consumers can continue to benefit from innovative products and services within a resilient financial services market that protects and advances privacy and data security. Larger institutions have greater resources to develop secure portals and improve the ability to obtain privacy and data security commitments through contractual provisions negotiated with aggregators. This is an important

tool for them to manage the risk to their customers. However, community banks typically lack the resources to negotiate directly with aggregators. We believe regulatory clarifications and actions are necessary to ensure that customers of all banks – regardless of their asset size – can benefit from financial innovation.

The Bureau has a key role to play in making this happen. In October 2017, the Bureau published a set of principles for consumer data access. While were we were pleased that these principles rightly focused on consumer security, more can be done. ABA recommends that the Bureau use existing regulatory authorities to close regulatory gaps and ensure that consumer financial data are accorded baseline privacy and security protections regardless of where the data reside.

We recommend that the Bureau:

- Clarify that data aggregators are "financial institutions" subject to the requirements of the Gramm-Leach-Bliley Act (GLBA) that apply to financial institutions under the Federal Trade Commission's Safeguards Rule and the Bureau's Regulation P.
- Take steps to ensure data aggregators are subject to the same standards as depository institutions for safeguarding financial data and notifying customers about security breaches.
- Clarify that data aggregators are "service providers" under the Electronic Funds Transfer Act and are subject to its provisions assigning liability for unauthorized electronic fund transfers.
- Identify "larger participants" in the market for consumer financial data that are subject to supervision by the Bureau and begin to supervise those entities.

We discuss this concept further and offer additional recommendations in our February 21, 2017, letter to the Bureau on Consumer Access to Financial Records[1].

## 2. **Third-Party Risk Management** – Regulators should think innovatively with respect to third-party relationships.

In the past decade, technological advances have impacted how banks develop and deploy new financial products and services. Increasingly, banks are leveraging the efficiency and expertise of specialized technology providers to offer products and services to consumers. Banks also rely on fintechs to provide important back-office support. When banks partner with fintech firms, customers benefit by receiving innovative products delivered through a trusted channel.

These relationships are subject to by third-party risk management guidance issued by the federal banking agencies.[2] The guidance applies broadly to a bank's third-party relationships – from

[1] https://www.aba.com/Advocacy/commentletters/Documents/ABA-Comment-CFPB-Data-Aggregators.pdf.
[2] OCC Bulletin 2013-29 (October 13, 2013), Federal Reserve SR Letter 13-19 (December 5, 2013), FDIC FIL-44-2008 (June 6, 2008).

armored car services and outside consultants to cloud providers and partnerships with online lenders. As banks evaluated potential partnerships with fintechs, questions emerged regarding how the agencies' third-party risk management guidance applies to these relationships, particularly with respect to a bank's risk assessment and due diligence processes.

The OCC's release of its June 2017 Frequently Asked Questions is an important step in clarifying the agency's expectations for how banks manage fintech relationships.[3] However, regulators could do more to encourage bank-fintech partnerships and to communicate regulatory expectations to banks and fintechs alike. ABA offers the following recommendations, which take into account the unique view that regulators have into the risks and benefits presented by fintech firms.

- **Evaluate service provider innovation:** Some vendors are not investing in research and development that would allow bank core processing systems to incorporate new technologies developed by fintech firms. Core processors must keep up with technological changes that enable community banks to partner with fintechs to offer modern products and services and compete in the marketplace. Regulators could incorporate into service provider examinations a review of how the provider plans for and responds to innovation and changes in technology.

- **Collaborate on third-party risk management guidance with special emphasis on fintechs:** The detail and scope of existing third-party risk management guidance vary by agency. Bank regulators should work through the Federal Financial Institutions Examination Council (FFIEC) to reduce the potential for inconsistent supervisory treatment and mixed policy signals regarding bank engagement with fintechs.

  Issuing joint guidance with a special emphasis on fintechs is one way to ensure regulatory consistency. Such guidance could incorporate examples of approaches for managing the risk of partnering with start-up companies as well as examples of acceptable compliance due diligence practices or "alternative due diligence" in which a bank could engage prior to contracting with a third-party that provides limited due diligence information.

  Regulators also expect that banks assess the compliance management systems of third parties. Current regulatory guidance emphasizes a bank's review of a third-party's internal controls (e.g., policies, procedures, processes, governance). Yet, regulators have also said that they will evaluate activities conducted through third-party relationships as though the activities are performed by the institution itself. Regulators should clarify the tension between these standards.

- **Share regulatory trends:** The banking agencies should identify and publish information about "regulatory hot spots," examination trends, and lessons learned from fintech

[3] https://www.occ.gov/news-issuances/bulletins/2017/bulletin-2017-21.html.

relationships. This could be a joint, FFIEC project that is similar to the Bureau's quarterly *Supervisory Highlights* publication. Such a publication would be informative for banks and fintechs alike and could be particularly useful for educating non-bank firms.

- **Expand the firms subject to examination under the Bank Service Company Act:** The BSCA authorizes banking regulators to examine bank service companies to the same extent as if covered services are performed by the bank itself. As a result, covered service providers are subject to regulatory scrutiny and are held accountable for compliance with consumer protection laws. However, the entities and activities covered by the Act are outdated and do not reflect the wide range of relationships that banks have with fintech firms and technology companies today. For example, activities covered by the BSCA currently include services such as payment and statement processing and certain clerical and bookkeeping functions.

  BSCA authorities should reflect the evolution of the banking system and banks' increased reliance on a wide array of service providers, particularly those that are technology-focused. Thus, regulators should exercise fully their existing authority to examine fintechs. Similarly, policymakers should identify legislative changes that are necessary to expand the types of covered service providers that regulators may examine under the BSCA.

- **Share exam information:** Banks are limited in their ability to evaluate a service provider's compliance with applicable laws and regulations prior to entering a contractual relationship. Additionally, banks need a better method of determining which service providers have been examined so that they may access information pertaining to service providers with whom they contract. To help address these challenges, regulators could share a topical list of Matters Requiring Attention (MRAs) that have been issued to a particular service provider so long as a bank has formally extended a Request for Proposal (RFP) to that service provider and is subject to a confidentiality agreement.

- **Have reasonable and clear expectations regarding model validation:** Regulatory expectations regarding bank validation of models developed by fintechs may discourage some institutions from engaging in innovative partnerships with such firms. Regulators should provide guidance on how banks can test and demonstrate that models comply with fair lending requirements and meet supervisory safety and soundness expectations about model validation.

## 3. **Fintech Charters** – Regulators should provide fintech companies a path to become banks.

Historically, in order to offer banking services, companies needed a brick and mortar presence and a banking license. Technology is quickly challenging this assumption, empowering startups

to connect directly with customers and enabling new methods of accessing capital. While this dynamic has allowed for the creation of innovative products, it presents a challenge for regulators whose remit only extends to licensed banking entities. In addition, the application of myriad Federal and state licensing requirements to many of these new products and activities is unclear and complicated. Startups are often unsure how some rules apply or how they will be regulated. As these startups seek legitimacy and customer trust, a banking charter becomes attractive. This is why we have seen numerous fintech firms call for a banking charter tailored to their activities.

The OCC has considered offering a special purpose national bank charter tailored to the activities in the fintech space. **ABA supports the OCC's intent to consider special purpose charter applications from fintech companies as long as existing rules and oversight are applied consistent with those for any national bank.** Any such charter option must be implemented thoughtfully to ensure that the policy determinations underlying our bank regulatory framework are maintained, including the separation of banking and commerce. As national banks currently expect, this means applicable rules are applied evenly and fairly, and the OCC performs effective oversight to assure safe and sound operation and consumer protection.

A bank charter is a clear signal to customers that they are dealing with a trusted partner. Any fintech company that is granted a national bank charter will receive the instant credibility that comes with being a bank. Likewise, any missteps by a fintech operating through a national bank charter will inevitably reflect on all banks. The title of "bank" carries significant weight in the minds of customers and should not be taken lightly.

Effective implementation is of utmost importance and is critical to ABA's support of any new charter. The OCC must ensure that the appropriate regulations apply consistently to all national bank charters and that no regulatory gaps emerge. We agree with statements by the OCC that robust regulatory compliance and an affirmative responsibility to the communities these new charters would serve—backed by vigorous examination and enforcement—can facilitate innovation in the banking system in a way customers can trust.

We firmly believe that any newly chartered member of our national banking system should be subject to the following requirements:

- Strong and consistent regulation;
- Effective oversight; and
- Equivalent charter responsibilities.

ABA views the OCC's intent to issue charters as an opportunity to further bring financial technology startups into the banking system, ensuring that innovative products are offered in a safe and responsible manner that customers can trust. We discuss this further in our January 17, 2017 letter to the OCC regarding Exploring Special Purpose National Bank Charters for Fintech Companies[4].

[4] https://www.aba.com/Advocacy/commentletters/Documents/ABA-Comment-On-OCC-Charter.pdf.

## 4. **Pilot Programs** – Regulators should provide a process for testing new technologies.

ABA believes that proper implementation of pilot programs can help drive innovation that stands to benefit customers without putting those customers at any additional risk. Technology has always been core to the business of banking and implementing most innovations should not require special regulatory processes. However, as technology changes how banking services are delivered certain innovations will inevitably challenge existing regulatory assumptions and raise questions that will require collaboration between banks, regulators and technologists. If implemented properly, pilot programs can encourage banks to test new innovations and give regulators insight into new technologies while ensuring that customers remain protected in the event of unforeseen adverse consequences.

These programs should be a collaborative process that allow banks and regulators to design a test of a new product or technology to better understand how it works and should be regulated in the future. Regulators should work with banks to identify any risks, put processes in place to manage those risks, and have a plan to ensure that customers are not harmed.

Recently, regulators have made steps to facilitate these kind of tests. In 2016, the Bureau finalized its No-Action Letter (NAL) policy. While we support the intent of the NAL policy, considerable revisions are needed before it can be used as a tool to reduce uncertainty and promote innovation. ABA intends to offer recommendations to the Bureau to accomplish this. Additionally, the OCC has signaled its willingness to participate in bank-run pilot programs. While these programs are an important step forward, more work is needed to provide certainty and ensure collaboration.

For these pilot programs to be effective, participants need certainty that they will not be punished for participating. This often means that regulators must be flexible in applying regulations that would restrict the testing of new technologies. We believe that there is significant flexibility within existing laws for regulators to allow tests. However, there remains uncertainty about the extent of the authority of regulators to enable sufficient flexibility and clarity which may require legislation to facilitate this important change. ABA has supported the Financial Services Innovation Act of 2016 (H.R. 6118), which would do just this.

Coordination is also critical for the success of pilot programs. Since banks often have more than one regulator, a pilot program would be of little use without coordination among those regulators.

New innovations are intended to expand financial opportunities and improve the banking experience for customers. Any new program must protect customers from harm, and pilot programs can help regulators assess impacts, both immediate and long-term. A successful pilot program will offer flexibility within applicable law (often written before today’s technologies were conceived) that inhibit innovation, while looking to the ultimate goal of the law and using guard rails to ensure that the spirit and intent of the law are not lost.

We discuss this further in our May 31, 2016, letter to the OCC on Supporting Responsible Innovation in the Federal Banking System[5].

## 5. **Valid When Made** – Congress should codify the "valid-when-made" doctrine.

ABA Supports Congressional efforts to codify the "valid-when-made" doctrine to give certainty in credit markets that will support increased access to credit for both consumers and small businesses. The "valid-when-made" doctrine is a longstanding legal principle, stating that if a loan is valid when it is made with respect to its interest rate, then it does not become invalid or unenforceable when assigned to another party. It provides critical legal certainty necessary for the effective and efficient functioning of the credit markets, thereby benefiting both individuals and small businesses.

This doctrine was recently indirectly undermined by the Second Circuit Court of Appeals' decision in *Madden v. Midland Funding, LLC*. By calling into question the "valid-when-made" doctrine, the decision has injected uncertainty into the secondary markets for consumer and commercial credit, resulting in increased costs and decreased competition.

After the *Midland* decision, potential purchasers of loans and interests in loan securitizations could face the risk that a loan that was valid at origination might be ruled invalid after a transfer. This increased risk is likely to make purchasers less willing, if not entirely unwilling, to buy loans or interests in certain securitizations of loans that may turn out to be subject to additional state usury limits. If certain loans cannot be resold by lenders, or if the ability to do so is substantially curtailed, credit availability decreases and borrower cost rise.

Affirmation of the "valid-when-made" principle will encourage innovative partnerships between banks and financial technology companies that purchase bank loans or interests in securitizations of such loans, further expanding access to credit for U.S. small businesses and consumers.

ABA supports[6] the Protecting Consumers' Access to Credit Act of 2017 (S. 1642 and H.R. 3299), which would reaffirm this longstanding principle.

## 6. **CRA Modernization** – ABA appreciates Treasury's review of the Community Reinvestment Act.

ABA is committed to the objectives of the Community Reinvestment Act (CRA). Banks, savings associations, and other financial firms should serve the financial services needs of all income demographics within their communities, consistent with safe and sound banking. We support

[5] https://www.aba.com/Advocacy/commentletters/Documents/Response-OCC-Innovation-Paper-53116.pdf.
[6] https://www.aba.com/Advocacy/LetterstoCongress/Documents/Industry-Protecting-Consumers-Access-Credit-Act-100517.pdf#_ga=2.176811749.1169732475.1523545345-1857775274.1504817383.

efforts by Treasury and the banking agencies to comprehensively review CRA regulations and FAQs with the goal of promoting economic growth, simplifying compliance requirements, and improving the transparency of the supervisory process.

On April 3, 2018, Treasury provided a memorandum to the federal banking agencies containing recommendations for modernizing CRA's regulatory and supervisory framework in a manner that is consistent with the original intent of CRA. In particular, the memo acknowledges the ever-changing technology environment and the continued trend toward digital delivery of banking products and services. ABA strongly believes that banks should receive positive CRA consideration for utilizing such "alternative delivery systems." As described in our December 2017 white paper,[7] public policy should recognize not only brick-and-mortar locations but also how banks today are reaching their customers - including low-and moderate-income individuals— in the age of digital banking. Regulators should provide additional examiner training to address existing inconsistencies on this point.

In addition, revisions to the CRA regulatory framework should be forward-looking. Not only should regulatory reforms provide CRA credit for utilizing digital delivery channels that exist today, but they should also provide for product and service innovations that will be developed in the years to come.

We support Treasury's recommendation that the banking agencies monitor the impact of the emergence of nonbanks on the effectiveness of CRA and that they conduct more research on the extent to which nonbanks are meeting the credit needs of low and moderate income communities. We also suggest that as the financial services industry evolves and regulators explore the provision of special purpose charters to financial technology firms, any such charter should ensure that these entities meet the convenience and credit needs of their particular communities, just as all banks are expected to do under the CRA.

## 7. **Digital Account Opening** – ABA supports congressional efforts to allow banks to use images of a driver's license.

ABA supports[8] efforts to remove legal hurdles for banks to use technology to deliver banking services such as H.R. 1457, the Making Online Banking Initiation Legal and Easy Act or MOBILE Act. This bipartisan legislation would allow financial institutions – with the consent of an individual – to record personal information from a driver's license or personal identification card and retain it for the purposes of opening an account with a financial institution or obtaining a related banking product or service.

ABA believes that this legislation is mutually beneficial to banks and their customers, as it will help expand access to crucial banking services for more people by offering similar retail services

[7] https://www.aba.com/Advocacy/Documents/CRA-WhitePaper2017.pdf.
[8] https://tipton.house.gov/sites/tipton.house.gov/files/ABA%20Support%20letter%20HR%201457%20MOBILE%20Act.pdf.

through mobile technology. At the same time, the MOBILE Act safeguards consumer identity through the storage of personal identification information in an electronic format, which can be an important and accessible barrier to prevent fraud or other criminal activity.

### 8. **Brokered Deposits** – Regulators should reevaluate the overly broad definition of a "brokered deposit."

Banks use a wide variety of channels to communicate to customers information about deposit products and also to serve customers who have placed deposits with them. In doing so, banks employ a variety of intermediaries in accordance with customer choices. In the process of serving customers in these ways, banks can face regulatory issues from the outdated and overly broad definition of "brokered deposit," applied in ways that could capture and complicate arrangements and customer access channels far removed from the risks that brokered-deposit restrictions were originally designed to control. In many, if not most cases, these issues arise when banks use customer communications technology that did not exist when the regulations were written and valuable customer choices were similarly unavailable. The need is to update standards that have clearly been rendered obsolete by innovation and retail customer preferences and permit innovative activities that do not raise the risks of unstable deposits that endanger bank safety and soundness. We believe that with appropriate regulatory adjustment the prudential supervision purposes can be achieved without inhibiting customer service.

We discuss this further in our May 31, 2016, letter to the OCC on Supporting Responsible Innovation in the Federal Banking System[9].

### 9. **TCPA** – Treasury should urge the FCC to revisit and modify its interpretations of the Telephone Consumer Protection Act to promote efficient and effective communications between financial institutions and their customers.

Efficient, effective communications are essential if financial institutions are to serve their customers and comply with their regulatory obligations. Banks regularly seek to send time-critical, non-telemarketing communications to large numbers of customers promptly, including suspicious activity alerts, notices of address discrepancies, data security breach notifications, delinquency notifications, and loan modification outreach. Only automated calling – not manual dialing by live agents – can reach bank customers in a timely and efficient manner.

However, the Federal Communications Commission has imposed significant impediments to banks' communications with their customers, effectively preventing banks from using the most efficient means available to advise these customers of important information affecting the customer's account. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA)

[9] https://www.aba.com/Advocacy/commentletters/Documents/Response-OCC-Innovation-Paper-53116.pdf.

to prohibit, with limited exceptions, telephone calls and text messages to mobile phones using a specific type of equipment—an "automatic telephone dialing system" (autodialer)—unless the caller has the prior express consent of the called party.[10] Congress did not intend for the TCPA to be a "barrier to the normal, expected or desired communications between businesses and their customers."[11] But the Commission has construed the statute's terms so broadly that it has swept in technologies used by banks and other callers that were never contemplated to fall within the statutory restrictions. With statutory damages of up to $1,500 per call placed,[12] any company that seeks to use an advanced technology may be subjected to a class action lawsuit with a damage claim in the millions, if not billions, of dollars, with a high settlement value unrelated to actual culpability.

The risk of draconian liability has led financial institutions to limit—and, in certain instances, to eliminate—many communications that we believe would be welcomed by customers.

On March 16, 2018, the U.S. Court of Appeals for the D.C. Circuit struck down key aspects of the FCC's interpretations of the TCPA, including the FCC's definition of an autodialer, and returned these issues to the FCC for new consideration. Although ABA applauds the court's decision, in the immediate term the decision has created a lack of clarity over which dialing equipment constitutes an autodialer, further stifling innovation. We respectfully ask that the Treasury Department urge the Commission to revisit and modify its TCPA interpretations to facilitate banks' use of modern technologies to send consumer-benefitting communications.

## 10. E-Signatures

Various governmental entities play an important role in mortgage finance and related processes, yet they do not offer fully automated solutions or platforms that support basic technological advances. For instance, the U.S. Department of Housing and Urban Development (HUD) has only recently issued guidance to accept e-signatures for mortgage originations, but not all documents may qualify. HUD desk reviews and examinations still mandate submissions of paper files and documents. As a result, investors and aggregators often require that originators submit paper documents, and banks and consumers are often unable to make use of the E-Sign Act and associated technologies that are widely available.

## 11. **Regulation D** – Treasury should urge the Federal Reserve to revisit Regulation D.

For purposes of implementing monetary policy, Regulation D imposes reserve requirements on certain deposits. Currently, "transaction accounts" are the only category of deposit subject to a reserve requirement, with the reserve rate depending on the total of transaction account deposits

[10] 47 U.S.C. § 227(b)(1).
[11] H.R. REP. NO. 102-317, at 17 (1991).
[12] 47 U.S.C. § 227(b)(3).

held. For institutions having net transaction accounts between $16.0 million and $122.3 million, the reserve requirement is 3%. For net transaction accounts of more than $122.3 million, the reserve requirement is 10%. Effectively, these reserve requirements operate as a graduated tax on banks holding transaction account deposits.

Excluded from reserve requirement treatment as a "transaction account" are savings deposit accounts, but only if certain regulatory requirements are met. Best known, and most burdensome, is the requirement that not more than six transfers or withdrawals may be made from a savings deposit account per statement cycle.

When customers violate the six transactions restriction more than 3 times over a 12 month period, banks are expected by the Federal Reserve to take action. Banks are expected either to suspend the transfer and draft capabilities of the savings deposit account or unilaterally convert the customer to a different type of account. Account suspension may subject bank customers to the unwelcome fees they sought to avoid when they initially transferred funds out of the savings deposit account. Forced conversion to a different type of account often places customer funds in accounts earning less interest, with unwanted features. Both account suspension and conversion are imperfect responses to a regulation that needlessly strains the relationship between a bank and its customer.

The limit of six transfers or withdrawals is an arbitrary threshold that could be updated to meet customer needs and preferences without compromising the Federal Reserve's ability to monitor the money supply and effectuate monetary policy. Regulation D restrictions should reflect the significant changes brought about by technology's impact on banking operations and customer interaction. Customers increasingly manage their accounts online, and through mobile platforms, or cash withdrawals from Point of Sale (POS) terminals, while banks continue to become less reliant on branches and have fewer face-to-face customer interactions. The ease of access these technologies provide coupled with decreased customer reliance on traditional banking portals, such as bank tellers, the mails, and ATMs, highlight the need to revisit the regulatory language and develop a definition of savings deposit that is responsive to bank innovation and evolving customer expectations.

For these reasons, ABA recommends that the Federal Reserve revise the six transactions restriction to include a broader category of unlimited transfers to include computer, online, and mobile platforms, permit bank-initiated transfers to facilitate overnight sweeps, and recognize preauthorized transfers to cure low balances and unforeseen overdrafts to assist customers.

ABA stands ready to assist as Treasury looks for ways help enable America's banks to deliver innovative financial services.