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Via electronic submission

May 14, 2020

Ms. Beth Knickerbocker
Chief Innovation Officer
Office of the Comptroller of the Currency
Constitution Center
400 7th Street SW
Washington, DC 20219

RE: Recommendations, Requests and Suggestions for Continued Improvements to a Regulatory Environment that Facilitates Community Bank-Fintech Relationships

Dear Ms. Knickerbocker,

On behalf of the Independent Community Bankers of America (“ICBA”)¹, I am writing to thank you for your continued pursuit to encourage and facilitate community bank partnerships or relationships with third-party financial technology (“Fintech”) companies. As one of the regulators tasked with the responsibility of overseeing many of these relationships, ICBA is pleased to see that the Office of the Comptroller of the Currency (“OCC”), along with your fellow federal bank regulators (collectively, “agencies”), is working to improve the regulatory environment where these relationships reside.²

¹ *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, nearly \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America.*

ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

² See “Federal Reserve Board announces series of “fintech innovation office hours” across the country to meet with banks and companies engaged in emerging financial technologies,” Dec. 17, 2019, *available at* <https://www.federalreserve.gov/newsevents/pressreleases/other20191217a.htm>; FDITech, *available at* <https://www.fdic.gov/fditech/>; and OCC Office of Innovation, *available at* <https://www.occ.treas.gov/about/who-we-are/organizations/office-of-innovation/index-office-of-innovation.html>.

Community banks are well-positioned to blend the strengths of their operations with fintech innovations

ICBA supports and encourages community banks as they innovate, both organically and through partnerships with other innovators, such as fintech companies. Partnering with fintech companies can offer valuable relationships that help community banks enhance the customer experience. ICBA has long advocated that through partnerships with fintechs, community banks can forge deeper relationships with their customers, while also reducing costs and increasing access for all small businesses and consumers, especially for the 70 percent of Americans that are trying to improve their financial well-being.³

Despite the clear benefits of partnering with fintechs, community banks have often voiced frustration in navigating a regulatory framework that is designed to be more deliberative and process-oriented, rather than nimble and responsive to innovation. While properly designed and tailored regulations certainly help consumers, overly broad or outmoded regulations create uncertainty and do not protect consumers or other bank customers but serve as a barrier to innovation.

The agencies have already done much to improve the regulatory environment to allow these relationships to flourish, and ICBA believes the agencies are well positioned to pursue additional measures that would further the progress made to date.

Facilitating community bank and fintech relationships

ICBA supports a regulatory framework from which community banks and financial technology companies can cooperatively create products, cultivate solutions, and address barriers to delivering superior service. Regulators and policymakers can help promote technological development at community banks where research and development funding can be limited. Indeed, ICBA's own efforts in helping community banks partner with and use of fintech innovations have led us to believe that more involvement from regulators is necessary. This includes:

- (1) wider adoption of programs and policies for supervised experimentation;
- (2) collaboratively revising third-party guidance, in terms of both substance and procedure;
- (3) expanded access to supervisory findings of significant service providers; and
- (4) commitment to implementing "valid when made."

³ See Thea Garon, "U.S. Financial Health Pulse: 2018 Baseline Survey Results," Center for Financial Services Innovation, (Oct. 2018), (finding that nearly 20 percent of Americans are struggling with all or nearly all aspects of their financial lives, and over 50 percent with at least some aspects. Only 30 percent of the country is spending, saving, and borrowing as part of a plan to lead financially healthy lives), available at <https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2018/11/01021056/Pulse2018BenchmarkingStudy-Final-web.pdf>.

Wider adoption of programs and policies for supervised experimentation

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

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

Among other benefits, pursuits of nimble regulatory structures can yield practical innovations, enable collaboration among regulators and marketplace participants, advance regulatory compliance technology ("regtech") and regulatory supervisory technology ("suptech"), and address regulatory uncertainty, all while ensuring that regulatory compliance is prioritized in the product development process.

The OCC is currently considering comments regarding the establishment of an Innovation Pilot Program, which would build upon the OCC's existing financial services innovation infrastructure to provide national banks and other eligible entities with proactive supervision designed to facilitate fintech innovation. ICBA is optimistic that the OCC's proposed program is designed to address many regulatory uncertainties and usher in an era where regulators can quickly adapt to new technologies and changing marketplaces. As noted in response to the proposal, ICBA generally supports the concept put forth by OCC,⁴ and we urge the agency to incorporate our recommendations and to quickly implement the program.

Third-party relationship due diligence and monitoring

Regulators can contribute to an environment where banks are empowered to achieve supervisory goals by simplifying and clarifying the process of third-party service provider selection, due diligence, and monitoring.⁵

⁴ Letter from Michael Emancipator, Regulatory Counsel, Independent Community Bankers of America, to Beth Knickerbocker, Chief Innovation Officer, OCC, (Jun. 13, 2019), available at, https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/19-06-13_occl.pdf?sfvrsn=8a6f5917_0

⁵ See Governor Michelle W. Bowman, "Direction of Supervision: Impact of Payment System Innovation on Community Banks," (Feb. 27, 2020), remarks made at, "Age of Advancement: The Intricacies of a Digital World" 2020 Banking Outlook Conference sponsored by the Federal Reserve Bank of Atlanta, Atlanta, Georgia, available at <https://www.federalreserve.gov/newsevents/speech/bowman20200227a.htm>.

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

As your agency works with others to update third-party guidance, ICBA strongly encourages any rewrite or update to focus on principles- and performance-based requirements that are not rigid, but that allow for rapid changes and updates. In particular, ICBA asks that third-party guidance account for the following issues:

- *Lack of expertise or resources:*
Although many community banks are well-versed and experienced in partnering with fintechs, there are many that are uncertain of how, or where, to start. Unfortunately, the existing guidance is daunting and this, coupled with fears of increased examiner scrutiny over new relationships, creates a strong chilling effect that inhibits inexperienced community banks from entering into relationships with even the least controversial or novel fintechs. This uncertainty breeds paralysis from taking the first step toward partnering with or utilizing a fintech.
- *Inappropriate tailoring:*
To head-off any examiner criticism, community banks will sometimes subject fintechs to a full and thorough dose of due diligence, without regard to criticality, interconnectivity, or other factors that might dictate a less encompassing vetting. ICBA is concerned that some guidance may be too prescriptive for community banks without scalability. ICBA is pleased to hear that some agencies are directing staff to consider options to further tailor expectation for community banks with assets under \$1billion in this area.⁶

As Federal Reserve Board Governor Bowman recently stated, community banks are greatly inhibited from partnering with fintechs, due to limited staffs being able to conduct thorough due diligence, selection, ongoing monitoring, and all the other requirements laid out in existing third-party guidance.⁷ ICBA encourages OCC to consider similar threshold tailoring.

⁶ Id.

⁷ Id.

- Consistency:
Clear and transparent guidance is most helpful when it is consistent across banking agencies. ICBA appreciates that banking agencies are working together to establish consistent expectations for third-party relationships.

However, despite policies set by agency leadership, a community bank's real-world experience in fintech relationships is dictated by an examiner's interpretation of guidance on the matter. Guidance is not statute or regulation, yet field examiners' different interpretation of guidance can adversely assess a bank's compliance with law.

Non-compliance with guidance, or non-compliance with a field examiner's interpretation of guidance, is not binding and should not form the basis for an enforcement action. This principle aligns with one recently espoused and committed to by Federal Reserve Board Governor Quarles.⁸

- Shared due diligence and monitoring:
ICBA greatly appreciates that OCC published several resources to explain and provide advice on how community banks can collaborate with each other to ease fixed-cost burdens.⁹ Specifically, ICBA applauds the third-party guidance, Frequently Asked Questions, that explicitly contemplate and discuss shared due diligence and cooperation when managing third-party risk.¹⁰

ICBA reiterates the concerns of others that have noted the inefficiencies of each bank subjecting each third-party to the same or similar due diligence and monitoring requirements.¹¹ Banks are asking third parties a fairly common set of questions that have been asked and answered numerous times by third parties in response to multiple requests for proposals. It is frustrating for the fintechs, and certainly wasteful for the banks.

⁸ See Vice Chair for Supervision Randal K. Quarles, "Spontaneity and Order: Transparency, Accountability, and Fairness in Bank Supervision," (Jan. 17, 2020) remarks made at the American Bar Association Banking Law Committee Meeting 2020, Washington, D.C., stating, "[...]consistent with the September 2018 interagency statement on guidance, we would affirm the sensible principles that guidance is not binding and "non-compliance" with guidance may not form the basis for an enforcement action (such as a cease-and-desist order) or supervisory criticism (such as a Matter Requiring Attention (MRA)). This rule would be binding on the Board and on all staff of the Federal Reserve System, including bank examiners," available at <https://www.federalreserve.gov/newsevents/speech/quarles20200117a.htm>.

⁹ OCC Press release, "Collaboration Can Facilitate Community Bank Competitiveness, OCC Says," (Jan. 13, 2015), available at <https://www.occ.gov/news-issuances/news-releases/2015/nr-occ-2015-1.html>.

¹⁰ OCC Bulletin 2020-10, "Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29," (Mar. 5, 2020), available at <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html>.

¹¹ See Bowman, *supra* note 5.

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

- *More specific and timely guidance on novel issues:*

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

For example, laws such as the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and many other consumer protection laws, were enacted well before advancements in financial technology, and have not adequately been amended to reflect these advancements. As a result, many technologies or methods present novel questions that cannot neatly fit within existing statute, regulation or guidance. There is a litany of issues that could benefit from additional guidance, including, but not limited to:

- artificial intelligence and machine learning,
- use of alternative data,
- data aggregation and consumer access to data,
- fourth-party liability, and
- data security liability standards.

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

While ICBA commends the agencies' intention behind providing guidance on the use of novel technology, community banks need guidance that provides greater assurance that they are complying with fair lending laws when using these technologies. Supporting this assertion, a follow-up GAO report on priority open recommendations noted that while the interagency statement highlights some potential benefits and risks of using

alternative data, it “does not provide firms or banks with specific direction on the appropriate use of alternative data, including issues to consider when selecting types of alternative data to use.”¹² ICBA urges the OCC and other agencies to offer more substance on this matter.

Direct supervision of significant service providers

As a recent Congressional Research Service report noted, it is costly for community banks to conduct appropriate due diligence and to ensure compliance with relevant regulatory requirements when selecting and monitoring significant service providers.¹³ Fortunately, some industry leaders have started to explore options that would reduce these expenses.

Under the Bank Service Company Act, each agency conducts direct examinations of significant service providers, where the results of exams are made available to banks that are clients of the supervised service provider. ICBA is pleased to learn that some agencies are considering making the results of those examinations available to all banks, providing the benefit of the knowledge that supervisors have about their potential service providers. This would have the added benefit of banks knowing which fintechs are already supervised and evaluated by a federal banking agency.¹⁴ ICBA fully supports this endeavor and encourages the agencies to implement the idea.

Reiterate Madden fix

Already proposed by the FDIC and the OCC, ICBA fully supports a rulemaking that would clarify that permissible interest rates carry with a loan when it sold, assigned, or otherwise transferred by a bank. In other words, whether the interest on a loan is permissible under federal law would be determined when the loan is made and would not be affected by any subsequent events such as a sale, assignment, or other transfer of the loan or if there is a change in state law

ICBA agrees with the November 2019 proposed rule that a bank’s power to make loans implicitly carries with it the power to assign loans, and thus a national or state bank’s authority to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee the right to enforce a loan’s terms would effectively prohibit assignment and render the power to make the loan at the rate provided by the federal statute illusory.

¹² U.S. Government Accountability Office, Priority Open Recommendations: Board of Governors of the Federal Reserve System, (Apr. 20, 2020), available at <https://www.gao.gov/assets/710/706392.pdf>

¹³ Congressional Research Service, Fintech: Overview of Innovative Financial Technology and Selected Policy Issues, (Apr. 28, 2020), available at <https://crsreports.congress.gov/product/pdf/R/R46332>.

¹⁴ See Bowman, *supra* note 5.

The proposed rules by the OCC and the FDIC would address the uncertainty regarding the applicability of state law interest rate restrictions to national and state banks and would reaffirm the ability of national and state bank to sell and securitize loans they originate, including to fintech partners. Banks depend upon a stable and a consistent national legal framework to operate efficiently and in a safe and sound manner. But currently, there is a lack of consistency because of the Madden decision. Banks located in the Second Circuit are particularly concerned that the decision will eventually lead to significant pricing adjustments on the loans they sell and impair their ability to maintain proper levels of liquidity when partnering with fintechs.

In conclusion, ICBA thoroughly applauds the OCC and its fellow regulators for exploring ways to further innovative partnerships and relationships between community banks and fintechs. Community banks are encouraged by your recent efforts to this end, and ICBA looks forward to collaborating with your agency on leveraging these efforts into the future of community banking. Should you have any questions or would like to discuss this further, please do not hesitate to contact me at Michael.Emancipator@icba.org or at 1- 866-843-4222.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel

The Nation's Voice for Community Banks.[®]

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