

August 3rd, 2020



Brian Brooks
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20036

Via electronic delivery

Re: Docket ID OCC-2019-0028 - Advance Notice of Proposed Rulemaking regarding National Bank and Federal Savings Association Digital Activities

Dear Acting Comptroller Brooks:

Financial Innovation Now (“FIN”) appreciates the opportunity to provide comments to the Office of the Comptroller of the Currency (“OCC”) in response to its Advance Notice of Proposed Rulemaking (“ANPR”) regarding national bank and federal savings association digital activities.

FIN is an alliance of technology leaders, including Amazon, Apple, Google, Intuit, PayPal, Square, and Stripe.¹ We are working together on policies that will help modernize the way consumers and businesses manage money and conduct commerce. We believe technology plays a central role in the democratization of finance and have brought to market some of the most innovative and secure financial technology products available to consumers and small businesses today. From real-time peer-to-peer payments to new lending services, we strive to meet customer demand for digital tools that solve many kinds of financial challenges. In many cases we do this in cooperative partnership with traditional financial services providers, some of whom recognize our mutual strengths.

FIN strongly commends your leadership in promoting innovation in financial services. We agree with you that the OCC “has long understood that the banking business is not frozen in time” and has the authority to construe national bank powers to evolve with technology and the changing economy.² As the nation grapples with the challenges of the Covid-19 pandemic, now more than ever it is important for federal regulators to consider expanding the ways that consumers and small businesses can digitally access the financial services and support they need. A financial system that reaches all Americans, including through new entrants, is a worthy and timely endeavor.

I. SUMMARY OF COMMENTS

Non-bank financial services providers are offering new and innovative products and services, which are of particular benefit to consumers and small businesses that do not have convenient, efficient, and

¹ For more information regarding FIN’s policy priorities and principles, please visit www.financialinnovationnow.org.

² ANPR, 7.

affordable access on a regular basis to services provided by traditional banking organizations. Nevertheless, the development of these novel products and services is impeded by the differing requirements under individual U.S. state money transmission laws. States have recognized the problem and have attempted to provide a more efficient system, but there are limits to the states achieving uniformity of laws and regulation.

FIN appreciates the leadership of the Conference of State Bank Supervisors (“CSBS”) and those states participating in modernization efforts. We remain committed to working with states towards more uniform supervision and a streamlined multi-state system that will better support innovation, promote access to new services, and protect consumers and the financial system.

FIN urges the OCC to continue its own effort to foster innovation and explore complementary federal mechanisms that will make regulation more uniform and consistent, including diversifying the licensing options available at the federal level. While any one FIN member may not necessarily seek to obtain an OCC charter, the coalition nonetheless supports the OCC’s leadership and vision in driving this regulatory discussion. FIN suggests the OCC examine payment infrastructure challenges. FIN also supports the OCC’s ongoing tech-neutral approach to security standards and urges the OCC to embrace and foster open banking as a means to enhance customer choice and access.

II. NON-BANK FINANCIAL SERVICES PROVIDERS DELIVER CRITICAL AND INNOVATIVE PAYMENT METHODS

A. Non-Bank Financial Services Innovators

The evolution of mobile Internet access is dramatically changing the way consumers and businesses can make payments. Whether it is payments via text message, digital wallets, or voice-enabled commerce, technology companies are extending their innovations in hardware and software to make payments more convenient, faster, and more secure. In addition, entirely new payment technologies and business models have grown to address the needs of consumers and small businesses that are underserved by traditional banking organizations.

With technology and the Internet changing the way financial services are provided and consumed, non-bank financial services innovators are poised to provide enormous benefits to consumers of financial services. Non-banks have always played a significant role in the financial services realm, both as service providers to banking organizations and as direct providers of financial services to all consumers, whether banked, unbanked or underbanked.³ In addition, the evolutionary trend toward the electronification of financial services and the emergence of electronic commerce in new forms, including mobile and voice-activated e-commerce, are creating new opportunities for payment services, facilitating access to such services and lowering costs at the same time. As innovators, non-bank providers of financial services are driving new financial products and services that empower individuals and businesses to reach financial goals and are creating jobs across the country.

FIN member companies offer a wide range of innovative payment services to consumers and small businesses. These services include card processing for online merchants, person-to-person/person-to-business/business-to-person payments, mobile wallets, voice payments, and other services. While it varies by

³ As characterized by the Federal Deposit Insurance Corporation (“FDIC”), unbanked households are those that do not have a checking or savings account. Underbanked households have an account but also obtain certain specific financial services, such as money orders, check cashing, or international remittances, from non-bank alternative financial services providers. The FDIC uses the term “underserved” to describe both the unbanked and underbanked. The FDIC estimated that in 2017 8.4 million U.S. households were unbanked and that another 24.2 million were underbanked. See FDIC, *2017 FDIC National Survey of Unbanked and Underbanked Households*, at 1 (Oct. 2018), <https://www.fdic.gov/householdsurvey/2017/2017report.pdf>.

company and service, FIN member companies provide these services directly through our authorities as licensed money transmitters and/or through partnerships under agreements with a number of U.S. financial institutions. FIN member companies are also end users of the current payment systems – ACH payments, card payments, wire transfers and checks – as payees receiving payments from customers and as payors making payments to individuals and businesses. FIN member companies are also facilitating the above services on behalf of a large ecosystem of innovative companies.

FIN recently conducted a consumer survey⁴ on payment apps, which demonstrated that:

- Two in three Americans use payment apps or have used them in the past.
- Usage is common across all ages, urban and rural populations, and across race and ethnicities – including higher adoption within minority communities such as African American / Blacks and Hispanic / Latino.
- Usage is particularly strong among Americans who are “financially at risk” and 79% agree that payment apps are a “vital tool” used to manage finances.
- Four in five agree that “payment apps created by technology companies help address consumer needs that are unfulfilled by traditional financial institutions.”

The importance of non-bank disintermediation in the provision of financial services cannot be underestimated. For example, the Federal Deposit Insurance Corporation (“FDIC”) found that in 2017 “underbanked” populations continued to have more access to smartphone mobile devices than the general population.⁵ The FDIC also found that these underbanked groups were more likely to manage and move their

⁴ See PSB Research, *Key Findings Consumer Attitudes and Behaviors Regarding Payment Apps*, February 4th, 2020, available at <http://financialinnovationnow.org/2020/02/11/fin-consumer-survey/>. Though younger Americans are more likely to use payment apps (for example, 83% of those 18-24 and 81% of those age 25-34), usage is pervasive among older Americans as well. 76% of Americans ages 35-49, and 57% of those ages 50-64 have used payment apps, and 42% of those age of 65 or older have used payment apps. As it relates to race and ethnicity, payment apps have been used by 62% of Whites / Caucasians and usage is even higher within minority communities such as Blacks / African Americans (75%) and Hispanics / Latinos (80%). Payment app usage is high regardless of where people live, evident by similar usage from those who live in the suburbs (64%) and in urban settings (70%), as well as those in rural communities (64%). Payment apps are not just for bill sharing; 73% of Americans say payment apps are “a vital tool that people use to manage their finances,” including 30% who “strongly agree”. Three in four users (74%) have used payment apps to send money to family members. One in three users – and half of users under age 35 – have used payment apps to pay their rent (33% and 49%, respectively); in addition, over half (52%) have used one to pay their utilities and/or other household bills. Payment apps are especially important to millions of Americans financially at risk. Usage is noticeably strong (68%) among Americans who are financially at risk, such as the one in eight Americans (12%) who say they are “not at all confident” in their households’ ability to pay an unexpected \$500 expense such as from an illness or accident. In fact, among these financially at-risk Americans, 79% agree payment apps are “a vital tool people use to manage their finances” and 77% say restricting payment apps would “disrupt people’s lives and make it more difficult [...] to perform basic financial activities”. Those who are financially at-risk are much more likely to have lower incomes (52% have an annual household income at less than \$25,000) and are 3x more likely to be unbanked or underbanked (15% have neither a debit nor credit card, compared to 6% of all adults). Americans agree that tech companies are fulfilling unmet needs not currently addressed by traditional financial institutions. Four in five Americans (83%) agree that “payment apps created by technology companies help address consumer needs that are unfulfilled by traditional financial institutions. Americans are 6x more likely to associate innovation with technology companies rather than financial institutions (“innovative”: 73% vs. 12%). Speed is also a major perceived strength of technology companies: 58% of Americans associate “fast” with technology companies over financial institutions (23%). Innovation and speed are key elements of security, and 83% of Americans agree “technology companies are dedicated to building and using the most advanced measures to protect their customers”. Overwhelming majorities of Americans support *more* integration of tech and finance. Nine in ten Americans (89%) agree that “consumers benefit when technology companies and financial institutions work together”, including 43% who “strongly agree”. See also, Javelin, *Growing P2P Adoption*, November 2019, available at <http://financialinnovationnow.org/wp-content/uploads/2020/02/19-2050j-p-growing-p2p-adoption-licensed-financial-innovation-now.pdf>

⁵ See *id.* at 28.

money using a mobile device. Responding to this need, non-bank financial services companies have created a wide range of mobile apps that allow users to manage and transfer funds through their mobile devices. By making financial services more available to underserved populations, these payments innovators have increased access to financial services by the unbanked and the underbanked. Those services can be delivered more conveniently, more economically, and marketed at lower cost than paper-based and electronic services delivered through brick and mortar facilities.

Moreover, the products and services offered by providers of non-bank financial services create jobs and promote economic growth. For example, non-bank financial services companies contribute enormously to the e-commerce sector by providing mobile payments technologies that appeal to both underbanked and traditionally served populations.⁶ According to U.S. Census data, e-commerce sales increased more than 14% in 2018 from 2017, and accounted for 11.2 percent of total retail sales in the fourth quarter of 2018.⁷

Nevertheless, despite the beneficial impact of non-bank financial services providers, these innovators are often significantly hampered by the current U.S. regulatory regime governing the provision of non-bank financial services. Of particular concern are state money transmission laws that, in the aggregate, have unnecessarily increased costs to consumers and small businesses, complicated regulatory compliance and enforcement efforts, and reduced consumer and small business access to critical financial services. While state money transmission laws are primarily safety and soundness measures that are intended to protect users of certain non-bank financial services, the current money transmission regulatory regime in the U.S. has struggled to keep pace with advances in technology and the evolving national market for such services. That is, the efficient and effective regulation of money transmission is of central importance in order to provide a safe and sound financial environment and to instill confidence in the users of money transmission services, but such effective and efficient regulation cannot be realized by the current fractured licensing and oversight landscape.

B. Money Transmission and the Regulation of Non-Bank Financial Services Innovators

While it is impossible to synthesize a uniform definition of money transmission across all state jurisdictions, such state laws generally define a money transmitter very broadly and typically include an entity that engages in “receiving money for transmission” or “transmitting money”, as well as issuing or selling stored value.⁸ As a result, the handling of funds or the facilitation of payments, either as a core component of a product or service or incidentally as a result of providing some other non-payments-related product or service can be subject to state-by-state regulation as money transmission. These activities could include “sharing economy” services, facilitating bill payments, providing peer-to-peer funds transfer

⁶ See, e.g., Consumer Financial Protection Bureau, *Mobile financial services: A summary of comments from the public on opportunities, challenges and risks for the underserved*, at 4–5 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

⁷ U.S. Dep’t of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales 4th Quarter 2018* (Mar. 13, 2019), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

⁸ See, e.g., Cal. Fin. Code § 2003(u) (defining “receiving money for transmission” as “receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means”), Cal. Fin. Code § 2003(q)(2) (defining regulated “money transmission” activity to include “selling or issuing stored value”); Colo. Rev. Stat. § 11-110-103(11) (defining “money transmission” to include “engaging in the business of receiving money for transmission or transmitting money within the United States or to locations abroad by any and all means including but not limited to payment instrument, wire, facsimile, or electronic transfer”); Tex. Fin. Code § 151.301(b)(4) (defining “money transmission” to mean “the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location”), Tex. Fin. Code § 151.301(b)(4)(A)(i) (defining regulated “money transmission” activity to include “selling or issuing stored value or payment instruments . . .”); Wash. Rev. Code § 19.230.010(18) (defining “money transmission” as “receiving money or its equivalent value (equivalent value includes virtual currency) to transmit, deliver, or instruct to be delivered the money or its equivalent value to another location, inside or outside the United States, by any means . . .”).

services, managing payroll, issuing stored value, and so on. A partial list of the types of products and services offered by non-bank financial services innovators includes:

- **“Traditional” Money Transmission.** The “traditional” funds transfer service is generally a “cash-in, cash-out” transaction provided to consumers directly at brick-and-mortar retail locations through “authorized agents.” In addition to person-to-person transmissions and international remittances, these “walk-up” services may also include the sale of money orders and other payment instruments, and person-to-business transmissions.
- **Online P2P Services.** Online P2P services enable people to pay each other digitally without the need to share bank account information or via digital wallets that contain credit card, debit card or prepaid card information for the parties to the transactions. These types of transactions are generally enabled through the Internet or a mobile application, and funds go “bank to bank,” rather than through the traditional authorized agent location model.
- **Stored Value.** Stored value devices are pre-funded and hold monetary value maintained through an electronic record. They can come in many forms, including physical or virtual cards or, as mentioned above, virtual account-based “wallets” that can be used to store funds either for future person-to-person funds transfers, purchase transactions, or transfers to a linked bank account.
- **Bill Payment.** Another common model involves facilitating bill payments (i.e., consumer-to-business transactions), such as for wireless carrier or cable bills, or other utilities. Such services can be provided in a variety of ways, including payment in cash at walk-up locations or debit card or credit card payments through the Internet or a mobile application. In addition, in many cases, the companies that offer these services may have a direct contractual relationship and technical integration with the biller, which can enable payments to be credited in real time or in near real time.
- **Business-to-Business Services.** Many companies also provide business-to-business payments services, including funds transfers and invoicing functionality.

Almost all U.S. states and territories require entities engaging in the business of money transmission (which may include any or all of the above depending on regulators’ interpretations of their laws) within their borders to be licensed as a money transmitter in that particular jurisdiction.⁹ As a result, unless covered by an explicit statutory exemption, an entity must obtain appropriate state money transmitter licensing in order to “engage in the business of ‘money transmission’ or [to] advertise, solicit, or hold itself out as a person that engages in the business of money transmission.”¹⁰ And, failure to do so could result in the imposition of both civil and criminal penalties at both the state and federal levels.¹¹

⁹ The only U.S. state that currently does not require a license to engage in money transmission is Montana, which does not have a money transmission licensing law. Massachusetts requires a license to engage in international but not domestic-only funds transfer services (Massachusetts does separately regulate domestic sellers of checks (e.g., money orders)). In addition to the states, the District of Columbia, as well as Puerto Rico, the U.S. Virgin Islands, Guam, and other U.S. territories require a license to engage in the business of money transmission.

¹⁰ See, e.g., Tex. Fin. Code § 151.302(a).

¹¹ Under state laws, engaging in money transmission without first obtaining a license is generally punishable by civil penalties that may range from \$1,000 to \$5,000 per violation per day, and some state money transmission statutes provide for criminal penalties for violations (which would include unlicensed activity). See, e.g., 7 Pa. Stat. Ann. § 6116. At the federal level, an entity that fails to register with the Financial Crimes Enforcement Network (“FinCEN”) when required to do so could be subject to civil fines and criminal prosecution. See 31 U.S.C. § 5330(e); 31 C.F.R. § 1022.380(e) in addition to criminal penalties. FinCEN also can seek injunctive relief for a failure to register. See 31 U.S.C. §§ 5320, 5330(a); 31 C.F.R. § 1022.380(e). Furthermore, federal criminal prosecution could occur for engaging in money transmission without any required state licenses, and penalties include fines or

However, this style of state-by-state regulation and licensing is inconsistent with the rise of the national money transmission industry. The state-by-state regulatory regime as a whole has resulted in the prioritization of varied and competing individual state interests at the cost of an efficient national set of regulations. And, in doing so, has made it more difficult for non-bank financial services providers to bring innovative financial services to consumers and small businesses, including those aimed at helping the financially underserved.

III. ISSUES FOR OCC CONSIDERATION

FIN continues to applaud the OCC for its commitment to fostering innovation. As the OCC considers a variety of approaches, FIN offers the following considerations.

A. Payment Infrastructure Improvement

The Covid-19 pandemic has demonstrated that U.S. payment infrastructures need significant improvements in speed and connectivity to reach all citizens. Mobile financial technologies, particularly mobile applications that integrate real-time payments, help improve financial health because they enable instant access to money when most needed. Consumers increasingly want their payment services to be readily accessible and capable of real-time transmission, an expectation set, in large part, by innovative services that FIN member companies have brought to market in recent years. These non-bank technologies enhance financial capability directly, and they also enable traditional financial products to be more manageable, and help users to avoid high-cost alternatives. The adoption and growth of these services is strong. FIN member companies collectively are facilitating payments for hundreds of millions of consumers and small businesses worldwide, and in some cases, volume is more than doubling year over year. We expect this growth to continue and accelerate as more consumers and businesses move their payments to digital and mobile interfaces, a trend that is accelerating very rapidly during the Covid-19 pandemic.

Despite strong growth in new payment services, the existing payment infrastructure constrains innovation and access. FIN member company payment services interconnect and operate in partnership with payment systems offered by financial institutions and card networks. Legacy payment systems have not kept pace with innovation and customer demand. Furthermore, non-bank payment companies do not currently have direct access to payment infrastructures available to deposit-taking banks, which forces a heavy reliance on single points of entry, governed by incumbent players. This bottleneck arrangement can increase systemic risk, decrease security, raise costs, increase intermediary friction, and put non-banks at a competitive disadvantage. Indeed, as the Bureau for International Settlements notes in a recent paper, many other jurisdictions have already opened payment infrastructures to non-bank payment providers: “Without direct participation in payment infrastructures, non-banks have only indirect access, potentially raising level playing field concerns. If given direct access to payment infrastructures, non-banks can compete on equal terms with banks.”¹² The OCC should look for opportunities to help democratize access to payment infrastructures, public or private.

B. Chartering and Licensing Diversity

While FIN continues working on state modernization efforts, we believe the regulatory ecosystem can benefit from further optionality at the federal level. The OCC’s earlier effort¹³ to clarify the existing

imprisonment for at least 5 years for any person who “knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business....” See 18 U.S.C. § 1960(a).

¹² *Ibid.* 49.

¹³ OCC “*White Paper: Exploring Special Purpose National Bank Charters for Fintech Companies*” December, 2016, available at <https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html>

availability of national charters to “fintech” companies was a recognition that the current federal regulatory environment must evolve to provide different options for meeting the financial needs of consumers and small businesses. To the extent the OCC considers a charter application from a payment company, as has been suggested publicly,¹⁴ FIN believes it would enhance the U.S. regulatory ecosystem with more diversity in licensing options and promote more competition and a wider array of choices for consumers and small businesses. FIN members already are regulated by the states and appreciate their relationship with state supervisors. The coalition nonetheless supports the OCC’s leadership and vision in driving this regulatory discussion. As FIN has previously argued, any such charter should be an option, not a requirement.

To the extent the OCC is willing to consider a payment charter applicant, potential recipients should be subject to high supervisory standards. At the same time, the charter needs to be a viable option and applicants should not face disproportionately higher requirements simply because they are new or because entrenched stakeholders seek regulatory barriers as protectionism. Tailoring supervisory requirements is an important way to help ensure the long-term viability of a charter because it would be based on actual risk and the business model of an applicant. A money transmitter, for example, may hold funds on behalf of its customers as outstanding payment obligations for a period of time but is required to hold at all times permissible investments on a 1:1 basis for those outstanding obligations. This profile contrasts heavily with the risks of a traditional deposit-taking bank, an altogether different model susceptible to runs and systemic contagion due to leveraging long-term assets (loans) funded by short-term liabilities (deposits). Payment companies typically provide a narrower range of financial products and services than traditional banks. The supervisory expectations for payment companies should reflect that narrow focus. For example, if a payment company does not accept insured deposits, that payment company would not expose taxpayers and consumers to the same level of risk as a deposit-taking institution. The supervisory standards should be adjusted accordingly to reflect that difference in risk, and can be accommodated by the OCC’s current practice of tailoring supervisory standards based on risk: “The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness.”¹⁵

As the OCC has recognized, supervisory standards “need to be commensurate with the risk and complexity of the proposed activities...”¹⁶ We support a risk-based approach to supervisory standards for charter applicants, which would be consistent with the OCC’s history of overseeing diverse businesses activities. Finally, diversifying OCC charter recipients would also be consistent with trends in other jurisdictions around the world, many of which have recognized the emergence of technology-enabled business models in payments and pursued a variety of flexible licensing frameworks to foster these developments.¹⁷

C. Technology-neutral security standards

As the OCC considers data security in its supervisory role over existing chartered institutions and third parties, we reiterate that the OCC should adopt technology-neutral standards, and *not* to adopt standards that require one specific technological solution for security. In recent years, security technology has advanced rapidly, at times changing dramatically in scope in short periods of time. Some of these changes might have been predicted, such as advancements in encryption algorithms and practices. But others would not have been, such as the use of two-factor authentication to add a human check on password theft, the rise

¹⁴ ABA BANKING JOURNAL PODCAST *The OCC Innovation Agenda with Acting Comptroller Brian Brooks*, (Jun. 25, 2020), available at <https://bankingjournal.aba.com/2020/06/podcast-occ-brooks-plans-to-unveil-payments-charter-1-0-this-fall/>.

¹⁵ OCC Comptroller’s Handbook, *Bank Supervision Process* (Sept. 2007), 1-2.

¹⁶ OCC White Paper, 9.

¹⁷ BANK FOR INTERNATIONAL SETTLEMENTS COMMITTEE ON PAYMENTS AND MARKET INFRASTRUCTURES AND WORLD BANK GROUP *Payment aspects of financial inclusion in the fintech era* (April, 2020), 43, available at <https://www.bis.org/cpmi/publ/d191.pdf>

of web-based APIs (secure interfaces for software to retrieve data from another source), or the advancement of smart email filters that minimize “social” or “phishing” attacks on data. And many changes have come as institutions migrate from traditional fortresses of data behind firewalls to more agile cloud-based systems. In all cases, technology-specific rules would minimize the benefit of these innovations. Moreover, single-technology security solutions are in fact antithetical to what today’s security experts view as best practice, because they lock data into a single system of protection that attackers are then at leisure to learn how to exploit. Simply put, specific technology requirements will not keep pace with innovation.

D. Open Banking

FIN believes that consumers and small businesses should be able to securely access their finances using the technology they wish. There are many applications that are helping consumers and small businesses better manage their finances, including improving financial literacy, meeting savings goals, and avoiding fees and penalties. Should incumbent institutions seek regulations or standards that restrict customers’ access to their financial information, the OCC should discuss those requests directly with financial innovators and FIN in addition to the traditional due diligence that it undertakes. While traditional financial institutions have often shown remarkable flexibility in cooperating with financial technology companies, some have at times cited concerns about security and privacy as a pretext for additional regulation of the technology sector. An open discussion about the realities of security and privacy practices will help ensure healthy competition and increase consumer choice.

* * *

In conclusion, FIN has a strong desire to see innovation and competition flourish in the U.S. financial services sector. Our companies work every day to help our customers wield technology to better manage and improve nearly every aspect of their daily lives. These same tools are growing in the financial services marketplace, where consumers and small businesses can use technology to increase access to financial services options that are safer, convenient, and affordable. Growth in these services can also help maintain U.S. competitiveness and job growth. The OCC’s efforts, along with those of other financial regulators, can help foster a balanced U.S. regulatory approach that embraces technology and encourages innovation while protecting consumers and ensuring economic safety.

Respectfully,



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