



August 3, 2020

Via Electronic Mail

The Honorable Brian Brooks
Acting Comptroller of the Currency

Chief Counsel's Office
Attention: Comment Processing

Office of the Comptroller of the Currency
400 Seventh Street NW, Suite 3E-218
Washington, DC 20219

Re: National Bank and Federal Savings Association Digital Activities
(Docket ID OCC-2019-0028, RIN 1557-AE74)

To Acting Comptroller Brooks and the Staff of the OCC:

The Bank Policy Institute¹ appreciates the opportunity to comment on the advance notice of proposed rulemaking by the Office of the Comptroller of the Currency relating to the digital activities of national banks and federal savings associations (the "ANPR").²

As the ANPR notes, the past two decades have witnessed significant technological developments that have dramatically changed the financial services landscape. In order to remain competitive and responsive to customer needs, banks have increasingly embraced new technologies – including innovative software, cryptocurrency and cryptoassets, distributed ledger technology, artificial intelligence and machine learning, and new payments technologies – that have reshaped both banks' product and service offerings to customers and internal bank systems and processes. The pace of this change has only accelerated, and banks are expected to remain at the forefront of technological innovation as the business of banking continues to evolve.

Although the pace of technological progress has been rapid, innovation in banking is nothing new. Banks have long been innovators, and the OCC has historically supported innovation in banking through an expansive and forward-thinking approach to bank powers issues. For this reason, BPI supports the OCC's efforts to reexamine its regulations governing banks' digital activities in order to stay

¹ The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

² 85 Fed. Reg. 40,827 (Jul. 7, 2020). In this letter, we refer to national banks and federal savings associations collectively as "banks."

abreast of recent technological changes, and to ensure that banks remain well-positioned to adapt to technological developments in the future. To that end, BPI would support the promulgation of regulations that describe banks' broad authorities to engage in digital activities. We emphasize however, that any new regulations should be as clear and straightforward as possible. The OCC's goals should be to provide certainty as to banks' authority permissibly to engage in digital activities, and to promote consistent application of such regulations in the day-to-day supervision of the institutions the OCC supervises. Ensuring the legal standards and requirements that govern the permissibility of digital activities are set forth in the OCC's regulations also will serve to mitigate any existing uncertainty about what forms of guidance banks may rely on.

In Part I of this letter, BPI proposes some high-level principles, in addition to those the OCC has articulated, that should guide the OCC's decisions about what revisions to make to its existing part 7, subpart E regulations, which address digital activities. Part II of this letter responds to the specific questions raised in the ANPR, with an emphasis on identifying specific areas where clarification would be useful to promote innovation in the banking industry, consistent with safety and soundness standards and principles of fairness. BPI looks forward to working with the OCC to shape a proposed regulation and other initiatives that will further these goals.

I. Guiding Principles for the OCC's Regulatory Review

BPI agrees with the principles articulated in the ANPR that will inform the OCC's approach to its review of its digital activities regulations. In particular, BPI strongly agrees that future rulemakings must be both technology neutral³ and principles-based in order to remain adaptable and avoid becoming quickly outdated as available technologies change and improve. Further, BPI agrees that future rulemakings must facilitate appropriate levels of consumer protection and privacy, which are areas of heightened concern due to certain technologies' potential for abuse.⁴

In addition to those guiding principles articulated in the ANPR, BPI offers the following principles to guide the OCC's regulatory review.

A. The OCC should retain a flexible framework that encourages banks to be agile innovators within the guardrails necessary to maintain safety and soundness and protect bank customers.

BPI believes that certain features of the OCC's current regulatory framework in part 7, subpart E have worked well to support innovation and should be retained. For example, section 7.5002(a) of the current rules provides that a national bank may conduct electronically any activity that it is "otherwise authorized" to conduct. (A similar provision applies to Federal savings associations.) This flexible

³ In this letter, BPI uses the phrase "technology neutral" to mean both that (i) there should be no regulatory or supervisory preference for one technology over another technology, and (ii) to the extent possible, regulations should be generally applicable and not specific to a particular technology. At the same time, BPI recognizes that there may be circumstances where technology-specific regulations may be warranted due to the particular features of the technology.

⁴ With respect to consumer privacy, the ANPR specifically mentions transparency and informed consent. BPI notes that the implementation of these concepts is highly contextual, and as a result, these concepts should undergo thoughtful consideration and consultation as to when they are both appropriate and meaningful for consumers. BPI further suggests that these issues are best handled in the context of broader discussions around a national privacy framework designed to ensure an appropriate balance between consumer protection and consumer convenience.

authorization is consistent with the scope of the OCC's authority to determine what the "business of banking" comprises, subject to a rule of reasonableness.⁵ It gives banks the "headroom" they need to innovate. Prescriptive regulations quickly will become outdated as new technologies are adopted, and a "one size fits all" regulatory approach would fail to account for relevant differences between banks, such as the scale of the digital activity being conducted, the materiality of the digital activity to the bank's business, or the level of risk that the digital activity represents to the bank. For these reasons, any new regulatory framework should be flexible, graduated, and principles-based. This means that the regulatory compliance burden and the degree of the OCC's oversight should be tailored to the extent and nature of the digital activity so that oversight is commensurate with the digital activity's level of risk.

At the same time, BPI recognizes that certain digital activities warrant careful attention by regulators due to the potential impact of the activity on consumers and the broader financial system. For example, payments technology, lending activities, data storage, and wholesale infrastructure development are areas that can present special concerns regarding a variety of topics, including money laundering and terrorist financing, disparate impact, fraud, identity theft, unauthorized transfers, and operational resiliency. Especially in these areas, the OCC should continue to make clear that its broad approach to bank powers is coupled with a commitment to apply the standards necessary to maintain safety and soundness and to ensure fairness for bank customers.

B. The OCC should strive to foster a level playing field by applying the same standards to all institutions within its jurisdiction and promoting the application of comparable standards for banks and non-banks.

The OCC's regulations include an authorization at section 5 to issue certain "special purpose" bank charters. The ANPR expressly indicates that the agency is not seeking comment on this authority,⁶ and we do not do so here. BPI strongly recommends, however, that the OCC take concerted efforts in its approach to innovation (regardless of the avenue) to minimize regulatory arbitrage as between different classes of charters within the federal banking system by adopting the principle of "same activity, same risk, same treatment." BPI believes that all national banks, regardless of charter type, should be subject to the same prudential requirements, including those related to capital and liquidity, BSA/AML and fraud prevention, third-party service provider risk management, and other compliance requirements and supervisory expectations. This is no less true with respect to digital activities.

C. The OCC should provide thought leadership in the broader regulatory community by enhancing its own regulatory framework and encouraging comparable and consistent approaches by other regulators.

While banks play an indispensable role in the broader financial services industry, other types of participants – under the oversight of other regulators such as the SEC, CFTC, CFPB, and state banking

⁵ *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

⁶ 85 Fed. Reg. at 40,830. See 12 C.F.R. § 5.20(e)(1)(i). The OCC has indicated its intention to consider applications for a national bank charter from financial technology, or "fintech," companies. See OCC, *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters* (Jul. 31, 2018), <https://www.occ.treas.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf>. More recently, we understand that the OCC is considering granting a payments charter. See Jason Brett, *Acting Comptroller of the 'Cryptocurrency' Brian Brooks to Unveil New Payments Charter*, FORBES (Jun. 26, 2020), <https://www.forbes.com/sites/jasonbrett/2020/06/26/us-banking-regulator-to-unveil-new-payments-charter-in-late-2020/amp>.

and financial regulators – are also using new technologies to deliver financial products and services customers. The OCC should ensure that its digital activities regulations are forward-thinking and ensure the safe and sound operation of the banking system, without placing banks at a disadvantage as compared to these other industry players. More generally, the OCC should work with other regulators to strive for consistent regulation in areas such as fair lending, digital currency activities, and blockchain technology where there is shared or overlapping jurisdiction.

In addition to taking a leadership role in ensuring consistent regulation of digital activities across regulatory jurisdictions, the OCC should coordinate with other agencies' efforts to promote innovation. For example, the OCC might seek cooperative arrangements with other regulators that would result in joint no-action letters or in no-action letters issued by one agency, such as the CFPB,⁷ but explicitly recognized and honored by the other prudential or consumer protection regulations.⁸

D. The OCC's regulatory framework should retain the approach that banks need not ask for permission on a case-by-case basis for the new digital products or services they offer.

There is currently no requirement for a bank to obtain advance permission in order to conduct a new activity.⁹ The ANPR correctly recognizes that the OCC's digital activities regulations should be principles based. This means that banks should not be required to ask the OCC on a case-by-case basis whether a digital activity is permissible; banks should continue to be able to determine whether a digital activity is permissible based on the principles articulated in the OCC's regulations. However, for the avoidance of doubt, it is helpful for the OCC to provide examples of activities that are permissible, provided the example are clearly identified as illustrative and non-exclusive.

II. Comments on Specific Questions in the ANPR

Question 1: *Considering the financial industry's evolution, are the OCC's legal standards in part 7, subpart E, and part 155 sufficiently flexible and clear? Should the standards be revised to better reflect developments in the broader financial services industry? If so, how?*

In general, the OCC's current regulations at part 7, subpart E authorize banks to engage in digital activities through three main grants of authority. First, the regulations articulate the standards used to determine whether a digital activity is part of the business of banking or incidental to the business of banking.¹⁰ Second, the regulations provide that a bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, subject to certain restrictions.¹¹ Third, banks have so-called "composite authority" to engage in a digital activity that is comprised of component activities, each of which is itself

⁷ See CFPB, Policy on No Action Letters, 84 Fed. Reg. 48,229 (Sept. 13, 2019).

⁸ See CFPB, Policy on the Compliance Assistance Sandbox, 84 Fed. Reg. 48,246 (Sept. 13, 2019); CFPB, Policy to Encourage Trial Disclosure Programs, 84 Fed. Reg. 48,260 (Sept. 13, 2019). While BPI is generally supportive of sandbox-type programs, these programs should be permissive, rather than mandatory.

⁹ New activities are, of course, subject to OCC oversight to ensure that a bank is conducting appropriate risk management. See, e.g., OCC Bulletin 2017-43, "New, Modified, or Expanded Bank Products and Services: Risk Management Principles" (Oct. 20, 2017), <https://www.occ.gov/news-issuances/bulletins/2017/bulletin-2017-43.html>.

¹⁰ 12 C.F.R. § 7.5001(c)-(d).

¹¹ 12 C.F.R. § 7.5002(a).

part of or incidental to the business of banking or is otherwise authorized.¹² In addition to these three grants of authority, the regulations discuss and provide illustrative examples of other specific digital activities in which banks may engage.¹³

BPI understands that the standards governing what activities are part of or incidental to the business of banking are based not only on statutes but also on longstanding case law. In addition, as we have noted above, the OCC has demonstrated its willingness to apply these legal standards in a forward-thinking manner, including by adopting the current regulations at part 7, subpart E. For these reasons, BPI recommends these standards be retained substantially in their current form, with appropriate updates to the terminology used through part 7, subpart E.

Question 2: *Do any of the legal standards in part 7, subpart E, or part 155 create unnecessary hurdles or burdens to the use of technological advances or innovation in banking?*

Because banks are authorized to perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that they are otherwise authorized to perform, provide, or deliver, there is an opportunity to streamline the OCC's regulations by eliminating rules that focus on the use of technology to perform and activity that is part of or incidental to the business of banking. For example, one of the digital activities regulations confirms banks' authority to act as an electronic finder.¹⁴ However, banks' general authority to act as finder is described in a separate regulation;¹⁵ the OCC could eliminate unnecessary regulations by inserting into this general finder authority regulation illustrative examples of banks acting as electronic finder. There are similar opportunities to consolidate regulations throughout part 7, subpart E.¹⁶

Separately, the OCC should clarify and expand national banks' authority to engage in data processing and data transmission services. Under current regulations at part 7, subpart E, banks may provide certain data processing and data transmission services as part of the business of banking, provided that the data is banking, financial, or economic data, or if the derivative or resulting product is banking, financial, or economic data; for these purposes "economic data" is defined as anything of value in banking and financial decisions.¹⁷ Additionally, banks may engage in data processing and data transmission services with respect to other types of data (other than banking, financial, or economic data), subject to a revenue limitation, as an incidental power.¹⁸ Finally, banks may sell excess data processing capacity to avoid economic loss or waste,¹⁹ and sell software that performs data processing functions that are part of the business of banking.²⁰

¹² 12 C.F.R. § 7.5003.

¹³ See generally 12 C.F.R. § 7.5004–.5007.

¹⁴ 12 C.F.R. § 7.5002(a)(1).

¹⁵ See 12 C.F.R. § 7.1002.

¹⁶ For example, 12 C.F.R. § 7.5004 authorizes banks to market and sell to third parties electronic capacities legitimately acquired or developed by the bank for its banking business in order to avoid economic loss or waste. This authority is analogous to the more general authority for banks to lease unused physical space to avoid waste and economic loss.

¹⁷ 12 C.F.R. § 7.5006(a).

¹⁸ 12 C.F.R. § 7.5006(b).

¹⁹ 12 C.F.R. § 7.5004(c)(1).

²⁰ 12 C.F.R. § 7.5006(c).

The statement of banks' authority to process and transmit data in section 7.5006 should be revised to be simpler and more straightforward to focus on banks' *use* of data rather than formalistic distinctions between *types* of data.²¹ First, it is unclear that the distinction between data processing activities that are "part of" the business of banking and those that are "incidental" to it remains meaningful is given the breadth of the definition of "economic data" used in the "part of" portion of the authorization. Moreover, the very nature of "data" has changed and expanded since the adoption of the current rule in 2002, such that distinctions among types of data are both less relevant and harder to draw. Finally, and more practically, the limitations on banks' authority to process and transmit data puts banks at a competitive disadvantage vis-à-vis fintech companies, which are not subject to similar limitations.²² The OCC could consider simplifying its regulations and promote competitive parity by confirming that banks may engage in the processing and transmission of data of any type, provided that such services are incidental to an otherwise bank-permissible activity.²³

Question 3: *Are there digital banking activities or issues related to digital banking activities that the OCC does not address in part 7, subpart E, or part 155 that the OCC should address? If so, what are these activities or issues, and why and how should the OCC address them?*

As described above, BPI supports principles-based regulation that does not require banks to ask the OCC on a case-by-case basis whether a digital activity is permissible, but rather, allows banks to determine for themselves whether a digital activity is permissible based on the standards articulated in the OCC's regulations. However, for the avoidance of doubt, the regulations could contain a non-exclusive list of illustrative examples of permissible digital activities. The OCC's current part 7, subpart E regulations already take this approach. BPI suggests that the illustrative list of digital activities that are permissible for banks to conduct as incidental to the business of banking could be expanded to include:²⁴

1. Offering online safe deposit box-like products, which may hold and share financial and non-financial information;
2. Selling advertising space on the bank's digital footprint;

²¹ In addition, the OCC could take this opportunity to harmonize the regulation of national banks and Federal savings associations, which was one policy goal of the Dodd-Frank Act. Indeed, the OCC already views national bank and Federal savings association data processing powers as similar. See 82 Fed. Reg. 8,082, 8,098 (Jan. 23, 2017) (stating that Federal savings associations' abilities to engage in electronic operations are "similar to what is provided for national banks in 12 C.F.R. part 7, subpart E"). Moreover, there is no statutory impediment to having the same data processing powers for both types of charters because the data processing powers of national banks and Federal savings associations are each derived from their respective authorizing statutes, not express language regarding data processing. In other words, the OCC has interpreted the business of banking in section 24(Seventh) of the National Bank Act as a source of authority for national bank data processing activities, and the Home Owners' Loan Act as a source of authority for data processing as an incidental power of Federal savings associations.

²² BPI notes that banks' incidental power to process and transmit non-economic data is intended to allow banks to remain competitive. The regulation states that banks may conduct this activity "where reasonably necessary to conduct those activities on a competitive basis." 12 C.F.R. § 7.006(b).

²³ Section 7.5006 also currently requires that a bank's total revenue from its incidental data processing activities be predominantly derived from activities involving banking, financial, or economic data. As it reviews section 7.5006, the OCC also could consider whether the revenue test continues to be appropriate.

²⁴ See 12 C.F.R. § 7.5001(d)(3),

3. Using biometric data for the purpose of authenticating a customer's identity;
4. Offering digital ID products and services; and
5. Building a bank-owned cloud for the storage of data.

Question 3(a): *Are there digital finders' activities (i.e., activities that bring together buyers and sellers of financial and nonfinancial products and services) in which financial services companies engage or banks wish to engage that are not included or sufficiently addressed 12 CFR part 7, subpart E, or part 155? If so, what are they?*

As described above, the OCC should consider streamlining its regulations by consolidating its finder authority regulations into a single rule that is technology neutral. The consolidated rule could include examples of banks acting as a digital finder in a non-exhaustive list of illustrative examples.

Question 3(b): *Is there software that a bank produces, markets, or sells (or wishes to produce, market, or sell) that is not within the current scope of, or sufficiently addressed in, 12 CFR part 7, subpart E, or part 155? If so, what type of software?*

Question 3(c): *Does the term "software," as used in 12 CFR 7.5006, exclude a similar product or service that should be included in this section? If so, what is the similar product or service, and why should it be included?*

The OCC should clarify and expand banks' authority to engage in software-related activities. Under current regulations at part 7, subpart E, banks may sell excess electronic capacity for the production and distribution of non-financial software to third parties to avoid economic loss or waste,²⁵ and may sell to third parties the electronic by-products of software acquired or developed by the bank for banking purposes.²⁶ In addition, banks have a more general authority to produce, market, or sell software that performs services or functions that the bank could perform directly as part of the banking business.²⁷ Finally, banks may engage in certain software activities on a correspondent basis.²⁸

First, for the avoidance of doubt, the OCC should expressly confirm that banks' authority to sell software does not depend on the distribution model of such software. In particular, banks should be able to license or sell software through a software as a service ("SaaS") model in which the software is hosted and made available to customers over the internet, including through subscription pricing. Second, consistent with BPI's comments regarding banks' data processing and transmission activities, and in order to restore competitive parity between banks and fintech companies, the OCC should reexamine whether banks' software authorities should be limited to economic and financial software, or whether these authorities should cover software used, for example, to provide management consulting on any issue. Finally, pursuant to the guiding principle that the OCC's digital activities regulation should be technology neutral, the regulation should be amended so that banks' authorities are not limited to software as such, but should include *any technology solution* used by the bank that is part of or

²⁵ 12 C.F.R. § 7.5004(c)(2).

²⁶ 12 C.F.R. § 7.5004(d)(1).

²⁷ 12 C.F.R. § 7.5006(c).

²⁸ 12 C.F.R. § 7.5007(c), (e).

incidental to the business of banking, including, for example, application programming interfaces (“APIs”).

Question 3(d): *Are there digital activities that banks offer, or wish to offer, as correspondent services to its affiliates or other financial institutions that are not included or sufficiently addressed in 12 CFR part 7, subpart E, or in part 155? If so, what are they?*

The OCC should expand banks’ authority to offer correspondent services in the digital space. Under current regulations at part 7, subpart E, a bank may offer as a correspondent service to any of its affiliates or any other financial institution any service it may perform for itself, including any digital activity.²⁹ However, fintech companies that compete with banks are not subject to any limitations on the types of customers they may serve. Therefore, to restore competitive parity between banks and fintech companies, the regulation should be amended to permit banks to offer correspondent services to *any third party*, not just affiliates and financial institutions.

Question 4: *What types of activities related to cryptocurrencies or cryptoassets are financial services companies or bank customers engaged? To what extent does customer engagement in crypto-related activities impact banks and the banking industry? What are the barriers or obstacles, if any, to further adoption of crypto-related activities in the banking industry? Are there specific activities that should be addressed in regulatory guidance, including regulations?*

BPI welcomes the OCC’s recent interpretive letter confirming that banks may provide custody services for cryptoassets as part of the business of banking.³⁰ The interpretive letter is further evidence that the OCC is forward thinking and supportive of technological innovation in the banking industry.

Cryptoassets remain at the forefront of banking innovation, and BPI expects that both market practices and the regulatory landscape relating to cryptoassets³¹ will evolve significantly over the next few years. As a general matter, and consistent with the guiding principle that the OCC should provide thought leadership to the broader regulatory community and ensure that its own regulations are consistent with other regulators’ approaches, the OCC should work to ensure that any regulation of banks’ crypto activities is as consistent as possible with the approach of other federal agencies with potentially overlapping jurisdiction, including the SEC, FINRA, and similar regulators regarding trading activities). In addition, the OCC can take a leadership role in developing a globally consistent taxonomy that delineates different types of cryptoassets (e.g. stablecoins vs. value stable digital assets), and clearly describes whether and how each cryptoasset fits into existing regulatory regimes. There is a strong need for clear and consistent definitions in this area, without which banks face a choice between taking unknown risks or foregoing new activities. Similarly, the OCC should work with other regulators to clarify the application of KYC/AML laws to cryptoassets, which pose special challenges given that they may be anonymous in nature.

²⁹ 12 C.F.R. § 7.5007.

³⁰ See OCC Interpretive Letter No. 1170 (July 22, 2020).

³¹ BPI defines “cryptoassets” to include any digital asset whose provenance is tracked via a blockchain or distributed ledger technology infrastructure, with ownership or control determined by a cryptographic key.

Question 5: *How is distributed ledger technology used, or potentially used, in banking activities (e.g., identity verification, credit underwriting or monitoring, payments processing, trade finance, and records management)? Are there specific matters on this topic that should be clarified in regulatory guidance, including regulations?*

BPI's comments concerning the opportunities for the OCC to take a leadership role on the global regulation of cryptoassets apply with equal force to the regulation of distributed ledger technology more generally. For example, the OCC should participate in domestic and cross-border deliberations aimed at clarifying the application of state-level and foreign "right to be forgotten" laws, which pose a particular challenge due to the permanence of the distributed ledger. The OCC also should clarify its position on public viewing, and consider providing standards for ensuring that public viewing is secure and visible.

As banks increase activity in this space, these services conducted on a blockchain would need to continue meet existing risk management standards, including appropriate governance, due diligence, and cybersecurity standards. There are certain areas within the OCC's regulatory purview relating to distributed ledger technology that, if clarified, could promote further innovation and allow for more streamlined risk management practices and processes. In particular, the OCC should, for example, confirm that providing transaction counterparties with access to their transaction information on a blockchain satisfies the OCC's recordkeeping and confirmation requirements for securities transactions (including the auditability and readily available standards).³²

Question 6: *How are AI techniques, including machine learning, used or potentially used in activities related to banking (e.g., credit underwriting or monitoring, transaction monitoring, anti-money laundering or fraud detection, customer identification and due diligence processes, trading and hedging activities, forecasting, and marketing)? Are there ways the banking industry could be, but is not, using AI because of issues such as regulatory complexity, lack of transparency, audit and audit trail complexities, or other regulatory barriers? Are there specific ways these issues could be addressed by the OCC? Should the OCC provide regulatory guidance on this use, including by issuing regulations?*

BPI supports the OCC's efforts to modernize its regulatory framework to account for the growing use of AI and machine learning in the financial services industry. There are use cases for AI and machine learning in a wide variety of bank operations, including marketing, customer services, fraud detection and prevention, AML, credit underwriting, back-office processing, pricing, and more. BPI previously has expressed this support to Congress,³³ and has articulated both guiding principles for the modernization of the AI regulatory framework, as well as specific suggestions for regulatory changes in connection with AI-based credit underwriting models.³⁴

In general, BPI believes that, consistent with the guiding principle that any regulation of banks' digital activities should be technology neutral, there should be no supervisory preference for traditional technologies over AI-based technologies. In addition, there should be no preference for banks to

³² See 12 C.F.R. § 12.3–12.5.

³³ See, e.g., BPI, Letter to the House Financial Services Committee, Artificial Intelligence Task Force (Feb. 12, 2020), <https://bpi.com/wp-content/uploads/2020/02/BPI-Supports-Efforts-to-Review-and-Modernize-AI-Regulatory-Framework.pdf>.

³⁴ See BPI and Covington & Burling LLP, *Artificial Intelligence Discussion Draft* (Sept. 9, 2019), <https://bpi.com/wp-content/uploads/2019/09/BPI-Artificial-Intelligence-Discussion-Draft-The-Future-of-Credit-Underwriting.pdf>.

develop AI technologies “in house” over acquiring such technologies from AI vendors. To that end, the OCC should clarify the application of its third-party risk management guidance to vendors that provide AI-based products to banks.³⁵ In particular, the OCC should make clear its expectations for banks and their vendors, and how those expectations may change depending on the bank’s capabilities, the materiality of the AI product to the banks’ business, and other factors. Specifically, we are aware of situations where banks have encountered issues where AI vendors do not have a deep understanding of the bank regulatory framework, and may insist that obligations do not apply to them, or may be unable to meet strict standards or bank-preferred liability allocations due to their newness or small size. In addition, there are constant challenges to ensuring transparency and controls around how vendors build their AI products or introduce AI technology into existing products due to vendors’ reluctance to share their algorithms because of IP and competitive concerns. The OCC can help address these issues by hosting education sessions with third parties that provide substantial services to banks.

In addition to these general principles, the OCC should work to address some particular issues related to models that use AI technology. First, the OCC should work with the Federal Reserve Board and the FDIC to clarify the application of the agencies’ model risk management guidance to AI-based models.³⁶ The current model risk management guidance does not mention AI-based models at all. However, AI-based models pose a particular challenge to model validation because the mechanics of an AI-based model are likely to be substantially more complex than traditional models.

Second, the OCC should work with the CFPB and other financial regulators to ensure a consistent approach to evaluating AI-based credit underwriting models with respect to fair lending and fair access to credit. For example, with respect to fair lending and fair access, Acting Comptroller Brooks has spoken about the potential for AI-based credit underwriting models to increase credit availability to poor and minority borrowers, but also stated that the use of AI-based credit underwriting models is likely to increase the statistical disparities between minorities and non-minorities.³⁷ The OCC should work collaboratively with other regulators to resolve this tension. As another example, it is critical to ensure a level playing field among banks and non-banks by subjecting non-banks to model risk management expectations that are similar to those that apply to banks. The OCC should work with the CFPB to ensure that both banks and non-banks apply consistent and robust risk management and controls to their AI tools to mitigate various risks, including data quality issues and privacy issues.

Question 7: *What new payments technologies and processes should the OCC be aware of and what are the potential implications of these technologies and processes for the banking industry? How are new payments technologies and processes facilitated or hindered by existing regulatory frameworks?*

In recent years, banks have begun to use new technologies, including distributed ledger and artificial intelligence, to create better and more efficient payment processes. BPI urges the OCC to take a technology-neutral approach to its oversight of these activities, to continue to evaluate risks inherent

³⁵ Any clarification of the third-party risk management guidance should address not only the provision of new AI-based products to banks by vendors, but also the updating of existing products by vendors.

³⁶ See OCC Bulletin No. 2011-12 (April 4, 2011). Any clarification of the model risk management guidance should also address situations where vendors introduce secondary functionalities that utilize AI within deterministic technology solutions, such as chat-bot interfaces on a website.

³⁷ See Brendan Pedersen, *Where FDIC, OCC Chiefs Differ on Post-Pandemic Banking*, AMERICAN BANKER (Jun. 26, 2020), <https://www.americanbanker.com/news/where-fdic-occ-chiefs-differ-on-post-pandemic-banking>.

in specific applications (rather than with the technology in general), and work hand-in-hand with banks to build up an understanding of how these technologies might be, utilized by banks.

Further, BPI acknowledges that fintech companies and other non-banks play an increasingly large role in the payments system. However, banks play a special role in the payments system, and invest significantly in operating and protecting the payments system infrastructure, including through compliance with KYC/AML requirements. As more fintechs and other non-bank participants gain access to the payments system, the OCC should ensure that banks continue to serve as the critical end-points of the payments system, thereby ensuring the system's security and increasing confidence in its safety and soundness.

At the same time, the OCC's regulations should make it easier to implement new payments technologies within the existing regulatory framework. This process may involve coordination with other agencies to ensure that rules and guidance are consistent.

Question 8: *What new or innovative tools do financial services companies use to comply with applicable regulations and supervisory expectations (i.e., "regtech")? How does the OCC's regulatory approach enable or hinder advancements in this area?*

BPI is supportive of and encouraged by the exemptive relief provided by the OCC for the automatic filing of suspicious activity reports reporting potential structuring activity.³⁸ This relief is another example of how the OCC has encouraged responsible innovation, and paved the way toward further adoption of regtech. Along these same lines, there are further opportunities for the OCC to promote more streamlined approaches to regulatory compliance.

Today, banks spend significant funds to comply with regulatory reporting requirements. These reporting requirements often diverge from the way banks define and aggregate data for internal purposes. As a result, regulatory reporting will likely continue to require incremental effort and expenses. However, the OCC could help create efficiency and reduce the cost of regulatory compliance by working to standardize the data collected in regulatory reporting, including by using global standards like the Legal Entity Identifier, ISO 20022, or CPMI-IOSCO critical data elements. This type of standardization would be particularly effective if done on an interagency basis, and would greatly improve the quality of report data regardless of whether regtech is used. Additionally, the OCC should ensure that reporting requirements are consistently applied to all institutions under its jurisdiction.

In addition, banks' adoption of innovative technologies to comply with regulatory requirements may be impeded by the expectation to simultaneously conduct business-as-usual regulatory processes while piloting a new, innovative approach to a regulatory process. The requirement to run full parallel processes (i.e., business-as-usual and a pilot) may create headwinds to innovating around regulatory compliance processes using new technologies. Flexibility from the OCC in how new approaches and technologies can be tested and implemented could help create incentives for banks to innovate.

Finally, the OCC should clarify that its supervisory expectations around model risk management guidance only apply where the model directly and critically impacts a business decision. This risk-based approach would ensure that there is appropriate rigor and governance around models that are riskier or critical to business decisions without imposing unnecessary requirements upon models that have little

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See OCC Interpretive Letter No. 1166 (Sept. 27, 2019).

impact on stakeholders or financial condition. Moreover, the OCC should ensure that its model risk management guidance does not stand as an obstacle to the use of models for regulatory compliance purposes, including with respect to AML. BPI has previously argued that models used in AML/CFT transaction monitoring should be exempt from the model risk management guidance.³⁹

Question 10: *What other changes to the development and delivery of banking products and services for consumers, businesses and communities should the OCC be aware of and consider?*

BPI wishes to highlight two developments in the delivery of banking products and services for the OCC to consider. First, the rise of fintech companies has resulted in the proliferation of bank partnerships with fintech companies and other non-banks. While many of these partnerships can be beneficial to banks and consumers alike, some partnerships can be viewed as taking advantage of the benefits of the national bank charter. For example, “rent a charter” arrangements allow non-banks to take advantage of the federal preemption of state usury limitations and other state lending laws. Increasingly, these “rent a charter” arrangements are formed with the same small handful of banks, resulting in a concentration of risk as well as customer confusion. Additionally, some fintech companies active in payments intermediation occasionally need to partner with banks for services, including cross-border wires, foreign exchange, etc. While banks require these fintech companies to have AML/sanctions programs, there are concerns that banks do not have sufficient visibility into the portion of payments flows that the fintech companies intermediate, especially with riskier activity, such as international remittances. The OCC, in consultation with other financial regulators, should carefully consider how to ensure that these developments do not adversely affect the safety and soundness of the banking system.

Second, new technologies present a unique opportunity for banks to collaborate with one another in detecting and counteracting fraud, such as by sharing information about bad actors, or coordinating on strategies to fight synthetic ID fraud or other types of fraud. The OCC’s current regulations at part 7, subpart E do not address such collaboration between banks for the purpose of fraud prevention. The OCC should provide thought leadership in the broader regulatory community on these possibilities.⁴⁰

Question 11: *Are there issues the OCC should consider in light of changes in the banking system that have occurred in response to the COVID-19 pandemic, such as social distancing?*

The COVID-19 pandemic has brought to the fore both opportunities and challenges in the provision of banking products and services to customers. On the opportunity side, the popularity of video conferencing has enabled new forms of “branch visits” that should be reflected in the OCC’s regulations.⁴¹ More generally, the OCC should review and update its regulatory framework to ensure that it contemplates and addresses banks providing financial services, including funds transfer services,

³⁹ See BPI, Comment Letter *re* Request for Comments Regarding Suspicious Transaction Reporting Requirements (Docket No. FINCEN-2020-0004) (Jul. 27, 2020).

⁴⁰ BPI is sensitive to the legal constraints on banks’ ability to share customer information. However, BPI believes that some collaboration between banks for the purpose of fighting fraud could be consistent with legal requirements and industry standards, such as the Financial Data Exchange standards for consumer-permissioned data sharing.

⁴¹ Any regulations on this issue should address the location of such meetings for regulatory purposes. *Cf.* 12 C.F.R. § 7.5008 (location of a national bank conducting electronic activities); *id.* § 7.5009 (location of national banks operating exclusively through the internet).

from remote or alternate work locations. The ability to deliver financial services, including funds transfer services, from remote or alternate work locations is critical to business continuity, ensure that such services remain available during emergency conditions, and helping to protect the personal safety of employees performing such services. In addition, customers increasingly demand such an “omni-channel” approach to banking that incorporates both physical branch visits and digital banking options.

On the challenges side, the lack of in-person interactions between bank personnel and bank customers has created significant complexity in obtaining customer consent and signatures. The OCC should consider simplifying electronic consent requirements to allow banks to easily obtain consent to transact and deliver banking documents and disclosures electronically without having to resort to a convoluted and outdated process. Additionally, such changes would restore competitive parity between banks and non-bank companies because banks are subject to higher supervisory standards above and beyond the federal E-Sign Act. Such modernization of the E-Sign Act should be an interagency priority.

Finally, there is conflicting state and federal guidance on social distancing and masking requirements applicable to essential businesses. The OCC should make it clear what types of guidance banks can rely upon to promote employee safety during the pandemic.

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If you have any questions, please contact the undersigned by phone at 202-589-2429 or by email at Naeha.Prakash@BPI.com.

Respectfully submitted,



Naeha Prakash
Associate General Counsel and Senior Vice President for
Consumer and Regulatory Affairs
Bank Policy Institute

cc: Acting Comptroller Brian P. Brooks
Beth Knickerbocker, OCC Chief Innovation Officer