October 30, 2024

Via Electronic Mail

Chief Counsel's Office,
Attention: Comment Processing, Office of the Comptroller of the Currency,
400 7th Street SW, Suite 3E-218,
Washington, DC 20219

Ann E. Misback, Secretary,
Board of Governors of the Federal Reserve System,
Mailstop M-4775, 2001 C St. NW,
Washington, DC 20551

James P. Sheesley, Assistant Executive Secretary,
Attention: Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses—RIN 3064-ZA43,
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses (Docket No. OCC-2024-0014, Docket No. OP-1836, RIN 3064-ZA43)

Ladies and Gentlemen:

The Bank Policy Institute[1] and The Clearing House Association[2] (the Associations) appreciate the opportunity to comment on the request for information on *Bank-Fintech Arrangements Involving*

---

1 BPI is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

2 The Clearing House Association L.L.C., the country's oldest banking trade association, is a nonpartisan organization that provides informed advocacy and thought leadership on critical payments-related issues. Its sister company, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States, clearing and settling more than $2 trillion each day. See The Clearing House's website at www.theclearinghouse.org.

Banking Products and Services Distributed to Consumers and Businesses (RFI) issued jointly by the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency (each an "Agency," and collectively, the "Agencies").[3]

As discussed in the RFI, bank-fintech partnerships where the fintech interacts directly with the customer in providing banking products and services (sometimes referred to as front-end partnerships or "Banking-as-a-Service") present both opportunities and enhanced risks to banks, fintechs, and customers. While the RFI was broad in describing various types of arrangements between banks and fintechs, we understand its focus to be on bank partnerships with non-bank technology companies that allow the non-banks to deliver financial products and services directly to customers by leveraging a bank's infrastructure.[4] That infrastructure includes the bank's ability to accept deposits, process payments and issue credit. This model gives rise to a range of so-called 'as-a-service' arrangements involving fintechs that directly engage with the end-customer and, in certain cases, a middleware platform provider that sits between the bank and fintech.[5] However, we note that not all bank relationships with fintechs are partnerships or constitute an 'as-a-service' arrangement, and some relationships with fintechs may be more appropriately characterized as customer relationships or vendor relationships, which represent a lower level of integration. For purposes of this comment letter, we focus mainly on partnerships.

Like the Agencies, we support relationships that are consistent with safe and sound practices and in compliance with applicable laws and regulations, including those designed to protect consumers, such as fair lending laws and prohibitions against unfair, deceptive, or abusive acts or practices and those addressing financial crimes (such as fraud and money laundering). Partnerships can foster innovation and opportunities in new markets that banks may not otherwise have access to – and, in doing so, fintechs can help banks extend their geographic reach and diversify their deposit and credit portfolios.

Our member banks have dedicated significant resources to building relationships with a variety of fintech partners and, in some cases, also materially strengthening fintech companies' risk management and compliance controls. In our experience, our banks employ appropriate levels of oversight and engagement with their partner fintechs, specifically tailored to the unique characteristics of each arrangement. When necessary, our member banks appropriately calibrate their oversight and engagement to provide greater levels of oversight and engagement for those relationships that pose heightened risks as contemplated by interagency guidance.

---

3 OCC, FDIC, Federal Reserve, "Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses, "89 Fed. Reg. 61577 (July 31, 2024).

4 While the RFI was issued broadly to cover 'Banking Products and Services Distributed to *Consumers and Businesses*,' it is critical that the particular type of end-customer be considered in risk assessments of bank-fintech partnerships and in how the Agencies ultimately issue further guidance and/or regulation. Business relationships are distinct given the sophisticated customer base; a crucial distinction that must be taken into account by the Agencies with respect to evolving business banking offerings in the digital age.

5 This letter does not specifically address any other types of bank-fintech relationships such as those where the fintech provides operational technology or facilitates traditional bank-customer relationships. *See, e.g.,* Federal Reserve, "Community Bank Access to Innovation through Partnerships" (Oct. 2023), available at: https://www.federalreserve.gov/publications/files/community-bank-access-to-innovation-through-partnerships-202109.pdf. For example, we do not intend to address situations where the bank and fintech work together to promote business development for the bank's products and services offerings.

The characteristics that give rise to risk in the 'as-a-service' relationships generally are not materially different from bank relationships with third parties more generally that are addressed under existing bank regulatory and supervisory frameworks. Accordingly, existing bank-oriented guidance and rules need not be significantly reinvented to specifically address these bank-fintech partnerships.[6] However, the current supervisory approach relies too heavily on partner banks to oversee their fintech and middleware platform partners especially where the activities of these third parties introduce new risks to the system.[7] Rather than leaning more on banks to serve as a quasi-regulator for partner fintechs – only without the enforcement tools and oversight authorities possessed by the Agencies – the Agencies should instead focus on clarifying applicable responsibilities for fintechs and directly oversee fintech compliance with applicable laws.

In member experience, a clear sense of accountability or ownership on the part of the fintech partner is a key component of a successful relationship. We believe the combination of direct Agency oversight of fintechs (including by the CFPB, where appropriate under the existing legal framework) and consumer education are imperative to achieve our shared goal of effective fintech risk management. The current approach, in which the Agencies place all responsibility for ensuring appropriate fintech risk management on the banks, suggests that compliance is primarily a "bank issue" and need not be a major concern for the fintech.

As Governor Bowman has stated, "[w]e should consider the appropriateness of shifting the regulatory burden from . . . banks to more efficiently focus directly on service providers . . . it seems to me that these providers should bear more responsibility to ensure the outsourced activities are performed in a safe and sound manner."[8] The Agencies should address fintech accountability by, *e.g.*, expanding Agency oversight to non-bank fintechs in these partnerships, considering risks in a

---

6 For example, the interagency third-party risk management (TPRM) guidance generally encompasses BaaS and similar arrangements with fintechs as 'business arrangements' within the scope of the guidance. As we have noted previously, however, the Agencies should be more explicit that merely providing consumer permissioned data to a fintech ("data recipients" under Section 1033 of the Dodd-Frank Act) is not a service to the bank that should be covered under TPRM guidance. *See* Letter to the Agencies from BPI re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management (Docket No. OP–1752; RIN 3064–ZA26; Docket ID OCC-2021-0011), (Oct. 18, 2021), available at: https://bpi.com/wp-content/uploads/2021/10/BPI-Issues-Comment-Letter-in-Response-to-Proposed-Interagency-Guidance-on-Third-Party-Relationships.pdf.

7 This response does not address issues specifically relating to the FDIC's proposal on custodial deposit accounts and maintenance of ledgers more generally. We anticipate that our views respecting those issues will be addressed in a separate submission to the FDIC. *See* 89 Fed. Reg. 80135, (Oct. 2, 2024). In addition, we note that FDIC Vice Chair Hill stated that the proposal on custodial deposit accounts should not have been issued until after the FDIC had considered responses to the RFI. We agree with his assertion. *See "*Statement by Vice Chairman Travis Hill on Notice of Proposed Rulemaking on Custodial Deposit Accounts with Transaction Features and Prompt Payment of Deposit Insurance to Depositors" (Sept. 17, 2024), available athttps://www.fdic.gov/news/speeches/2024/statement-vice-chairman-travis-hill-notice-proposed-rulemaking-custodial-deposit. .

8 "Statement on Third Party Risk Management Guidance by Governor Michelle W. Bowman" (June 6, 2023), available at: https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20230606.htm. *See also* Governor Michelle W. Bowman, "The Future of Banking" (Feb. 2, 2024) ("The BSCA [Banks Service Company Act] is a 'potentially underused tool' that could be used to address the 'flow of risk between the permeable boundary separating regulating banks and other companies.'") available at: https://www.federalreserve.gov/newsevents/speech/bowman20240202a.htm.

technologically neutral way, and continuing to foster awareness of the risks that may be presented by certain bank-fintech relationships and the hallmarks of responsible partnerships via education.[9]

Moreover, if the Agencies continue to rely on banks as quasi-regulators of fintech partners, these particular fintechs may be burdened with complying with the varying ways those banks provide oversight. As a result, fintech partners of banks may find it more difficult to innovate with the increasing costs associated with duplicative and differing monitoring requirements from multiple institutions.

Executive Summary

- **The Agencies should use their regulatory tools and authorities, including the Bank Service Company Act, to directly obtain information from, and exercise oversight of fintech partners to impose greater accountability on fintechs.**
  - Utilize relevant examination authorities, such as the Bank Service Company Act (BSCA), to (i) directly examine fintechs in order to stay abreast of key developments and trends especially in areas of minimal prudential oversight and that may be higher risk, and (ii) leverage knowledge gained in conducting examinations of fintechs to eliminate needless duplication when examining applicable bank partners to preserve agency resources, and (iii) issue a supervisory handbook for fintechs and other non-bank partners involved in 'as-a-service' arrangements.[10]
  - Coordinate as appropriate with the CFPB to supervise non-bank fintechs. The CFPB possesses broad authorities over non-bank providers of financial products and services, including the authority to examine them in various circumstances. For example, the CFPB can examine certain service providers to CFPB-supervised institutions, non-banks that pose heightened risk to consumers or that are larger participants of defined markets for consumer products or services.[11]
  - Provide greater clarification to the industry on CIP/KYC-related responsibilities in connection with bank-fintech partnerships where the bank does not have the CIP/CDD obligation (i.e., because the end-user is not a bank customer), including related to FBO account models.
  - Eliminate the ability of fintech companies to abuse the small issuer exemption under Regulation II.
- **The Agencies should provide clear information on the risks and benefits of bank-fintech partnerships to consumers, banks, and fintechs.**

---

[9] The recent interagency statement accompanying the RFI included useful references to resources that should helpfully promote education in this area. *See* OCC, FDIC, Federal Reserve, "Joint Statement on Banks' Arrangements with Third Parties to Deliver Bank Deposit Products and Services" (July 25, 2024), available at: https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20240725c1.pdf.

[10] "Remarks Before the Exchequer Club by Acting Comptroller, Michael Hsu on Size, Complexity, and Polarization in Banking" (July 17, 2024), https://occ.gov/news-issuances/speeches/2024/pub-speech-2024-79.pdf. According to the Acting Comptroller of the Currency, "[t]he continued evolution and proliferation of bank-nonbank arrangements . . . has highlighted the need for greater engagement between the Federal Banking Agencies and nonbank fintechs."

[11] *See* 12 U.S.C. 5514(e), 5515(d), 5516(e), 5563, 5564, and 5514(a)(1)(B)-(C).

- Educate consumers on the risks and benefits of fintechs, including through public education campaigns and requiring fintechs to disclose pertinent information to consumers.
- Engage directly with fintechs to provide guidance on their legal and regulatory responsibilities when partnering with banks to provide financial services to customers.
- Share more guidance like the Joint Statement published along with the RFI that summarizes compliance issues observed during supervision and enforcement of bank-fintech arrangements, so that banks and fintechs can learn and adjust their practices accordingly.

I. The Agencies should use their regulatory tools and authorities, including the Bank Service Company Act, to directly obtain information from, and exercise oversight of fintech partners to impose greater accountability on fintechs.

Banks are accountable for managing risks arising out of bank-fintech partnerships, and they manage these risks in numerous ways, including by careful selection of partners and inclusion of contract provisions that are consistent with applicable legal requirements. At the same time, in view of marketplace realities and existing practices, the ability of a banking organization to manage for risks presented by a fintech partner is dictated by and limited to the commercial terms of the specific relationship and arrangement.

Given the unique risk management challenges that these partnerships pose, we strongly suggest the Agencies consider using their existing regulatory tools and authorities to directly interact with and oversee fintechs that participate in this growing segment of the financial ecosystem to improve banking organizations' and Agencies' ability to manage these risks. Fintech partners are typically subject to only a very limited form of regulation and supervision, if any. For example, they may be subject to a patchwork of varying state-by-state standards and licenses, such as state money transmitter licenses.[12] Greater engagement between the Agencies and non-bank fintechs would promote accountability and

---

[12] Importantly, money transmission supervision and regulation are not intended to address risks arising from deposit-taking partnerships but only issues pertinent to the facilitation of payments (and an AML program obligation under federal law). Similarly, other state licenses that fintech partners may have such as lending licenses and debt collection licenses do not compare to prudential federal bank agency oversight. For example, non-bank financial services providers are not subject to consolidated supervision of the entirety of the organization or entitled to draw on the parent company as a source of strength, factors that are critical for ensuring the safety and soundness of the organization and of the financial system more broadly. Consolidated supervision allows regulators to intervene with troubled institutions before risks accumulate within the organization, thereby mitigating the impact on consumers and the financial system.

See Acting Comptroller Hsu's remarks before the Exchequer Club, *supra* note 10 ("[T]he gap between state money transmitter licensing and prudential federal bank agency oversight is likely to become starker over time. Customer-facing non-bank fintechs generally are regulated as state-licensed money services businesses (MSBs). None are supervised prudentially at the federal level. Proponents of the state MSB regime claim that this has enabled innovation. Perhaps. More clearly, however, it has enabled customer confusion.")

appropriate risk management on the part of fintechs and reduce reliance on banks to enforce fintechs' management of their risks.

To this end, the Agencies should develop a supervisory program for non-bank fintech partners and middleware platform providers, including: (i) creating a common lexicon for the different types of relationships (including, identifying those deemed by the Agencies to be higher risk), and (ii) providing for appropriate levels of supervision necessary to maintain a safe and sound banking system and financial stability, that vary based on the nature of the activity.

In general, new non-bank supervisory programs should be risk-based and reflect Agency priorities and review standards comparable to those that apply to banks. For example, potential risks to the Deposit Insurance Fund (DIF) may warrant more scrutiny than other types of product or service offerings. Likewise, fintechs that enter into FBO arrangements in which end-user funds are held in a single omnibus account belonging to the fintech may warrant greater scrutiny given the more limited transparency a bank has with respect to the ultimate end-user in those arrangements.

The Agencies may determine to establish separate programs for fintechs and middleware platform providers tailored to the specific risks posed.

A. Enhanced risk-based supervisory oversight with respect to the performance of bank-like activities

Fintech partners and middleware providers may be susceptible to a variety of, inter alia, cyber risks, threats to privacy of consumer data, money laundering, lack of capitalization, and sanctions risks. These types of risks should be addressed via direct supervisory oversight of these non-banks to the extent of Agency authority under applicable law.

It is reasonable for banks to continue fundamental third-party risk management activities to mitigate core safety and soundness and consumer protection risks associated with these partnerships. At the same time, the Agencies should not look to banks to perform regulatory oversight of fintechs because, as noted above, banks do not serve a regulatory function vis-à-vis third parties. Agencies should use their existing regulatory tools and authorities to directly obtain information from, and exercise oversight of, third parties that engage in higher risk practices.

In determining regulatory priorities and approaches as well as identifying fintechs and middleware platform providers to be subject to oversight, Agencies could consider fintechs (i) that engage in higher risk activities from safety and soundness, financial stability and/or consumer harm perspectives, (ii) serve a large number of banking organizations, or (iii) whose size is large enough to pose risk.

Banks and fintechs could benefit from a "Definition of Terms" or "Common Nomenclature" for these different types of relationships and insight into the Agencies' view on the relative risks of the different bank-fintech partnership models. Such a taxonomy would provide clarity in the marketplace and emphasize that fintechs are expected to take ownership for compliance with risk management expectations in the programs that they operate, especially where the fintech directly engages with the customer. In our view and experience, higher-risk partnerships that should warrant Agency (and CFPB, as appropriate) oversight of non-bank partners include the following:

- Fintech relationships that expose banks to material concentration risks based on the size, scope, and complexity of the banks' operations.

- Special considerations should apply where a bank has no effective leverage to exit a relationship or insist on diligence of the partner. For example, if a large percentage of the bank's business is attributable to the fintech's customers (*e.g.,* heightened liquidity risks as described in the RFI).
- Even if a bank has a direct customer relationship with the underlying consumer, if the arrangement permits the fintech to take customers upon exiting the relationship, special considerations should apply, especially where that relationship may inherently cause concentration risks.

➢ Bank engages in balance sheet management, such as sweep arrangements, such that without those practices the bank would breach supervisory thresholds (*e.g.,* $10B under the Durbin Amendment).[13]

➢ The fintech retains confidential data after exiting the partnership (i.e., at such time the fintech may no longer be subject to any bank-like privacy and data restrictions, even indirectly).

➢ Arrangements in which the fintech generally own the customer relationship for individual accounts held at the bank and the bank is unlikely to offer customers the relevant services without the fintech would require additional oversight of the fintech engaging in activities traditionally managed by the financial institution.

➢ KYC or recordkeeping performed by a middleware platform provider or fintech where the end-user is not a customer of the bank (and thus, the bank has no regulatory obligation to do KYC) and where a bank may not know the identities of customers of a fintech partner whose transactions are processed through the bank.

The Agencies should leverage knowledge gained in conducting examinations of fintechs to eliminate needless duplication when examining applicable bank partners and share with banks pertinent information about fintech partners earlier and with significantly greater detail than they do now.

Finally, the Agencies should coordinate with the CFPB and state regulatory entities, where appropriate, in conducting an examination or requiring any report from a fintech that facilitates the provision of consumer financial products and services.

B. Enhanced fintech obligations and oversight

To the extent fintechs engage in the same activities presenting the same risks in which banks engage, they should be subject to the same requirements and regulatory oversight, a technologically neutral approach that focuses on the risk posed, rather than by adding additional TPRM oversight requirements for banks. The Associations have a long history of calling for functionally similar regulation and supervision of non-banks when they engage in functionally similar activities as banks, including payments related activities.[14] For example, the Associations supported the CFPB's proposed rulemaking

---

[13] The focus would be on institutions that are seeking to maintain certain status exceptions under the law by, *e.g.,* placing deposits at alternate institutions. These include multi-embedded or "sweep of a sweep" models (in contrast to bank/dealer sweep programs or reciprocal deposit models).

[14] *See, e.g.,* The Clearing House, "Ensuring Consistent Consumer Protection for Data Security; Major Banks v. Alternative Payment Providers," (Aug. 18, 2015) at p. 2 (noting the explosive growth of non-bank payment providers and the need to enhance legal and regulatory frameworks to ensure consistent consumer

to exercise supervisory authority over large digital payments providers,[15] noting that in light of "the increased use and acceptance of non-bank general-use consumer payment applications, supervision of the larger participants in that market is [necessary.]":

Similarly, the Associations have consistently observed that tech and fintech companies providing banking services, including payment functions, are not subject to the prudential regulation applicable to banks, including stringent capital and liquidity requirements, nor are they subject to a host of other requirements intended to ensure banks' safety and soundness or the same level of direct, consistent oversight as banks, exposing consumers and the financial system to risks.[16]

Fintechs that engage in money movement services or act as digital wallet operators present substantial risks to consumers and banking organizations, including the following:

- Fraud and scam risk for consumers;
- Increased costs on banks to mitigate fraud risk, manage customer complaints, conduct investigations or resolve disputes; and
- Potential increase in liability on banks without any recourse against fintechs.

Certain risks presented by money movement services or digital wallet activities provided by fintechs could be addressed, at least in part, through clarifications to the existing regulatory framework applicable to electronic funds transfers. For example, pursuant to Regulation E, which governs unauthorized electronic transfers pursuant to the Electronic Funds Transfer Act, the CFPB should clarify that when a consumer initiates an electronic fund transfer using a third-party service, that third party, and any data aggregator used by that third party to enable it to process the payment (the use of data aggregators is discussed in greater detail below), is responsible for unauthorized transactions in these circumstances even if the consumer's bank account is used. The CFPB could accomplish this by indicating that a data provider agreement between a financial institution and an authorized third party or data aggregator, is not the type of agreement contemplated in 12 CFR 1005.14(a)(2) of Regulation E.

Finally, banks also are required to implement robust anti-money laundering and anti-terrorist

---

protection), available at: https://media.theclearinghouse.org/-/media/Files/Research/TCHConsumer-Protection-for-Data-Security-August-2015-FINAL.pdf?rev=38dd4fa85c504d6da097efa383a9f63c; The Clearing House, letter to Consumer Financial Protection Bureau regarding nondepository supervision, (Aug. 15, 2011) at p. 2 ("The Clearing House believes that effective consumer protection in the area of financial services – particularly in the areas of core banking functions such as deposit, payments and lending-type functions – starts with a supervisory regime that emphasizes Federal and state consumer financial protection law compliance issues…."), available at: https://media.theclearinghouse.org/-/media/Files/Association-Documents-2/20110815-TCH-Urges-Authority-over-Nondepositories.pdf?rev=9301ba071eab4bea97778626c38e43a3. *See also* BPI letter to Consumer Financial Protection Bureau regarding the CFPB's Inquiry Into Big Tech Payment Platforms, (Dec. 10, 2021) at p. 2 ("It is critical that consumers are afforded the same level of protection whether they obtain banking services from a traditional bank or a tech company."), available at: BPI-CommentCFPBBigTechInquiry-12-10-21final.forsubmission-CFPB-2021–0017.pdf.

15 CFPB, "Defining Larger Participants of a Market for General-Use Consumer Payment Applications," 88 Fed. Reg. 80197, (Nov. 17, 2023).

16 *See* letter to the CFPB from BPI re: Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms (Docket No. CFPB–2021–0017) (Dec. 10, 2021), available at: BPI-CommentCFPBBigTechInquiry-12-10-21final.forsubmission-CFPB-2021–0017.pdf.

financing programs. Federal law requires all money services businesses to register with the U.S. Secretary of the Treasury, bringing them within the purview of the Financial Crimes Enforcement Network. These requirements apply to some, but not all, fintechs engaged in partnerships. The Agencies could consider whether fintech companies engage in activities that present the same or similar BSA/AML or sanctions risks and identify appropriate expectations to combat financial crime. For example, where the bank does not have the CIP/CDD obligation regarding the end-user of the product or service, in our experience, it typically relies upon the fintech to collect KYC diligence to be satisfied that the fintech's customers do not pose undue risk to the sanctions, fraud, AML risks of the Bank. We suggest that the Agencies provide greater clarification to the industry on CIP/KYC responsibilities in such circumstances (i.e., collecting and access to information) including related to FBO account models.

C. The Federal Reserve should eliminate the Durbin Amendment loophole for bank-fintech partnerships

As noted throughout this letter, fintechs have continued to grow in recent years, partnering with banks to provide various banking products and services. In some cases, fintechs have partnered with small financial institutions to issue debit and prepaid cards in connection with the fintech companies' financial services programs.[17] In many cases, these banks are not subject to the Dodd-Frank Act interchange limits, creating price advantages for those companies that may, at the same time, disadvantage small merchants and consumers. Since the Board first issued Regulation II in 2011,[18] debit card transactions have continued to grow at a rapid pace.[19] The legal agreements may be complex between the fintech and the exempt partner bank and nominally provide the bank with certain authorities or responsibilities related to the card program, but ultimately, in practice, the fintech has effective control over all material aspects of the debit or prepaid card program.[20] As the U.S. Department of the Treasury has noted in detail,[21] certain fintech companies are engaging in regulatory

---

17 *See* S&P Global, "Banking as a service: The role of banks in powering the fintech industry," (Aug. 17, 2023), available at: https://www.spglobal.com/marketintelligence/en/news-insights/research/banking-as-a-service-the-role-of-banks-in-powering-the-fintech-industry (noting that "there are more than 50 financial institutions that support fintechs on an as-a-service basis . . . [which banks] often have less than $10 billion in assets.").

18 Federal Reserve, "Debit Cards Interchange Fees and Routing," 76 Fed. Reg. 43478, (July 20, 2011).

19 The value of core noncash payments in the United States (including debit card payments) grew faster between 2018 and 2021 than in any previous Federal Reserve Payment Study measurement period since 2000, with the number of non-prepaid debit card payments increasing the most of all card types (The Federal Reserve Payments Study: 2022 Triennial Initial Data Release, p. 1, https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm.

20 For example, these arrangements often give a significant share of all interchange to the fintech, require the fintech to incur losses for customer fraud, transaction errors, and chargebacks, and assign control of the customer relationship to the fintech, from customer acquisition to customer service. (*See, for example*, Marqeta, Inc. Form 10-K (2023), available at: https://investors.marqeta.com/static-files/4068a8e7-2689-4462-b802-9f6acb512e74. "Under this agreement we are entitled to receive 100% of the Interchange Fees for processing our customers' card transactions.").

21 U.S Department of the Treasury Report to the White House Competition Council, "Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets," (November 2022), p. 82, available at: https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf (noting that non-banks are able to commit regulatory arbitrage by taking advantage of

arbitrage by selecting small, exempt financial institutions as card issuers and structuring their card issuing programs to take advantage of the small issuer exemption to avoid the interchange fee limitations under EFTA and Regulation II.[22] Indeed, the Treasury concluded that "[s]uch use of the Durbin Amendment exemption warrants further examination."[23]

Under Regulation II, an issuer is exempt from the rule if the issuer (i) holds the account that is debited; and (ii) together with its affiliates, has assets of less than $10 billion as of the end of the preceding calendar year)).[24] Large fintech companies, including those with well over $10 billion in assets, are engaging issuers whose assets qualify them for the small issuer exemption to: (a) serve as BIN sponsors[25] for the fintech companies' debit and prepaid cards in reliance on the small issuer exemption to avoid applicability of the interchange fee limitation to the fintech companies' card services offerings, and (b) hold only a small portion of funds that are accessible through the debit and prepaid cards issued by the exempt issuers.

These arrangements unfairly and inappropriately evade the interchange fee limitations of EFTA and Regulation II and create an uneven regulatory playing field that both has implications for financial stability[26] and unfairly disadvantages large financial institution debit and prepaid card issuers that are ineligible for the small issuer exemption (both directly and through relationships with small financial institutions) relative to similarly-sized non-bank competitors.

Further, issuers that fall under Regulation II's small-issuer loophole and partner with fintechs to issue debit and prepaid cards on behalf of those fintechs can raise additional risks to consumers and the payments systems. Outside of this creating an uneven regulatory playing field, it creates a gap with respect to consumer protection that fails to consider the risk posed by the underlying activity, and the oversight and examination of the fintech and appropriate management of the funds being held by the bank on behalf of that fintech.

Regulation II's small issuer exemption to "scale up their operations to be larger than the $10 billion threshold.").

22 Section 920(a)(2) of EFTA requires the amount of any interchange fee that an issuer of debit cards receives or charges to be reasonable and proportional to the cost incurred by the issuer with respect to the transaction. As proposed by the Board in the proposed rule, Sections 235.3 and 235.4 of Regulation II would give effect to section 920(a)(2) of EFTA. *See* Debit Card Interchange Fees and Routing, *infra* note 27.

23 *Supra* note 21.

24 12 C.F.R. § 235.5(a)(1)(i).

25 A "BIN sponsor" in the card issuing context is a bank that provides card issuing services and related access to a payment network through licensure of its Bank Identification Number, or "BIN" to non-bank third parties.

26 *See*, *e.g.,* Acting Comptroller of the Currency Michael J. Hsu "Preventing the Next Great Blurring," Vanderbilt University, (Feb. 21, 2024), available at: https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-17.pdf ("From a financial stability perspective, the deposit-taking-like activity warrants the most scrutiny because of the vulnerability it creates to runs. Any entity managing money on behalf of customers can face a run if those customers have doubts about the safety of their money. […] Significant data gaps exist, however. The lack of standardized data makes it challenging to aggregate and compare the amount of money nonbank companies manage on behalf of their customers.").

The Associations have previously requested that the Board eliminate the ability of fintech companies to abuse the small issuer exemption, and we reiterate that request here.[27]

II. The Federal Banking Agencies Should Provide Clearer Information on Bank-Fintech Partnerships to Consumers, Banks, and Fintechs.

The Associations support a flexible approach to supervision and enforcement of bank-fintech arrangements. As the Agencies note in the RFI, there are myriad different arrangements between banks, fintechs, large technology companies, and middleware platform providers. Further, the products, services, and arrangements offered change rapidly as technology improves and consumer behavior and demand evolve. A prescriptive, one-size fits all approach to bank-fintech arrangements would inhibit innovation and progress towards financial inclusion.

At the same time, banks need more clarity in how to establish and maintain relationships with fintechs that meet the Agencies' risk management expectations. To that end, the Agencies should consider providing clear and actionable information on these relationships to consumers, fintechs, and banks.

A. The Agencies should educate consumers on risks of fintechs

First, the Agencies should consider consumer education around non-bank companies that provide bank-like products and teach consumers to identify when they are dealing with a non-bank fintech as opposed to a bank. For example, consumers could benefit from education around the fact that funds stored with non-banks may not be federally insured if that company fails. The CFPB's Director recently acknowledged that "disclosure requirements related to the intricacies of pass-through deposit insurance are woefully inadequate. Consumers should, at the very least, be told clearly and concisely that they could face delays or lose their money by banking with a non-bank."[28] Generally, consumers likely are not aware that the nature of the consumer protections provided often depends on the specific model of bank-fintech arrangement and the specific product provided.

In general, the Agencies have attempted to address these areas of consumer confusion simply by requiring depository institutions to make disclosures to consumers. For example, the FDIC's recent revisions to it signs and advertising rule aim to address misrepresentations by non-banks about the

---

[27] *See* letter to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, from BPI and TCH, re: Docket No. R-1818, RIN 7100-AG67; Debit Card Interchange Fees and Routing (May 10, 2024), available at: https://bpi.com/wp-content/uploads/2024/05/TCH-BPI-CBA-Reg-II-Anti-Circumvention-Letter.pdf*See also* letter to Matthew Eichner, Director, Division of Reserve Bank Operations and Payment Systems, Board of Governors of the Federal Reserve System, from The Clearing House re: Regulation II Circumvention & Recommended Actions (Oct. 23, 2020); *See also* letter to Matthew Eichner, Director, Division of Reserve Bank Operations and Payment Systems, Board of Governors of the Federal Reserve System, from The Clearing House re: Regulation II Small Issuer Exemption Recommended Frequently Asked Questions (Jan. 12, 2022), available at: https://www.federalreserve.gov/regreform/rr-commpublic/tch-letter-20220112.pdf.

[28] CFPB, "Statement of CFPB Director Rohit Chopra, Member, FDIC Board of Directors, on Stopping Fintech Deposit Meltdowns" (Sept. 17, 2024), available at: https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-member-fdic-board-of-directors-on-stopping-fintech-deposit-meltdowns/.

availability of deposit insurance.[29] However, the rule primarily focuses on obligations of depository institutions, rather than on fintechs. The Associations instead recommend that fintechs themselves, as well as the Agencies, bear some of the burden for educating consumers about the risks of obtaining financial products through non-banks.[30] The Agencies could consider launching a public education campaign or developing fintech-specific disclosures to inform consumers about these risks.[31]

B. The Agencies should engage directly with fintechs and middleware platform providers to clarify expectations

In our experience, some fintech partners and middleware platform providers do not fully appreciate that even if a fintech, rather than a bank, offers a product to its customer, the products are still subject to the full suite of relevant rules and regulations applicable to banks for the specific product or service. Moreover, the fintech may not appreciate that they have compliance responsibilities stemming from their roles in providing partnership package services traditionally offered by banks such as deposits and debit cards.

These misunderstandings may stem from the fact that whether a banking organization or fintech partner is providing or receiving goods or services can depend on the perspective of the relevant parties. In some 'as-a-service' relationships, the banking organization may be viewed as both a recipient and a provider of services. As the Agencies have made clear in the interagency TPRM guidance, in these "front-end" business arrangements between a banking organization and fintechs that have direct relationships with the end-user, the fintech should be viewed as a service provider to the banking organization for purposes of the TPRM, notwithstanding the fact that the fintech may view itself as a customer of the banking organization.

The Agencies could help resolve these misunderstandings through greater engagement between the Agencies and the non-bank fintech community. Outreach efforts to the fintechs should include explaining to fintechs the constraints that banks operate under and that those obligations are not altered by entering one of the arrangements contemplated by the RFI. Instead, fintechs are independently obligated to comply with applicable consumer protection and other laws and regulations. The Agencies should also advise fintech partners that the Agencies have supervisory and enforcement tools at their disposal to incentivize more robust risk management by those firms. Indeed, as they do for banks, the Agencies should make their expectations for fintechs clear and bring enforcement actions against fintechs when they fail to meet those expectations. The Agencies' outreach efforts in this regard could include issuing guidance, advisories and other publications (*e.g.,* on how to properly safeguard consumer funds) as well as holding Agency "office hours" where fintech partners have opportunities to ask questions.

---

29 FDIC, "Official Signs and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo," 89 Fed. Reg. 3504 (Jan. 18, 2024).

30 One example of helpful consumer education is the CFPB's "Issue Spotlight: Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps," (June 1, 2023),available at: https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/. .

31 With respect to disclosures, marketing materials and account opening disclosures from a fintech may look similar to those from a bank, making it even harder for consumers to tell the difference as to whether they are dealing with a bank or a non-bank.

C. The Agencies should publish anonymized supervisory findings and details of non-public enforcement actions

Lastly, the Agencies should consider sharing more detailed information about bank-fintech practices obtained through supervision and enforcement. The Associations appreciate the Joint Statement issued by the Agencies this summer related to third parties offering bank deposit products and services and believe banks and fintechs would benefit from more specific guidance of this sort. As one example, we encourage the FDIC to amend its Statement of Policy Regarding Minority Deposit Institutions to reflect the higher risk and control environment that arises when minority DIs partner with fintechs.[32] The FDIC could further consider offering targeted technical assistance and resources to support minority DIs in this effort.

In addition to more forward-looking guidance and support, the Associations would encourage regular publication by each Agency of anonymized compliance issues identified during supervisory exams of banks and their fintech partners.[33] As one example, the FDIC published a Financial Institution Letter in 2019 with the purpose of enhancing transparency regarding the FDIC's consumer compliance supervisory activities that provided an overview of consumer compliance issues identified during 2018 through the FDIC's supervision of state non-member banks and thrifts.[34] Each Agency could issue a similar letter summarizing findings in bank-fintech partnerships on an annual basis. As another example, each Agency might consider a summary publication similar to the CFPB's *Supervisory Highlights* which is regularly released and summarizes key findings from its examinations.[35] Publications of this type could offer meaningful, concrete examples of problematic or effective practices that banks could use to evaluate their own institutions for compliance, as well as a useful resource to point to when engaging with fintechs in trying to encourage practices that align with regulators' expectations. And because banks are generally prohibited from sharing Confidential Supervisory Information, real-world compliance examples are often available only through the Agencies. Further, publishing lessons-learned from exam findings on a regular basis would allow for banks and fintechs to receive timely and updated information about compliance expectations as technology and the market change.

Similarly, the Associations also recommend that each Agency consider incorporating into this type of summary bulletin descriptions and explanations of non-public enforcement actions related to bank-fintech partnerships while maintaining strict confidentiality around the identity of the target of the action. Banks and fintechs could benefit from a summary of the relevant facts and law and the Agency's rationales for bringing the actions because that would enable them to take action based on the information in the summary publication, as appropriate.

While the Associations recommend publication of key supervisory and enforcement findings on an anonymous basis, we note that findings specific to a particular financial institution or fintech should not be considered safety and soundness recommendations applicable to all institutions. In other words,

---

[32] FDIC, "Statement of Policy Regarding Minority Depository Institutions," 86 Fed. Reg. 32728 (June 23, 2021).

[33] To be clear, in order that supervisory findings be published quickly and efficiently, we recommend each Agency publish these individually, rather than the Agencies publishing joint findings.

[34] FDIC, "Consumer Compliance Supervisory Highlights," (June 2019), available at: https://www.fdic.gov/regulations/examinations/consumercomplsupervisoryhighlights.pdf.

[35] As one example, the Federal Reserve Board could consider including instructive supervisory findings in its existing publication, Consumer Compliance Outlook.

these fact-based publications should be illustrative in nature and should not establish new requirements or supervisory expectations.

* * *

The Associations appreciate the opportunity to comment on the RFI. If you have any questions, please contact the undersigned by email at Gregg.Rozansky@bpi.com and Nora.Rigby@theclearinghouse.org.

Respectfully submitted,

Gregg Rozansky
Senior Vice President, Senior Associate General Counsel
Bank Policy Institute

Nora Rigby
Associate Director, Regulatory & Legislative Affairs
The Clearing House Association