



June 14, 2019

**VIA ELECTRONIC SUBMISSION**

Ms. Beth Knickerbocker  
Chief Innovation Officer, Office of Innovation  
Office of the Comptroller of the Currency  
400 7<sup>th</sup> Street, SW  
Washington, DC 20219  
Email: [pilotprogram@occ.treas.gov](mailto:pilotprogram@occ.treas.gov)

**Re: Innovation Pilot Program Proposal**

Dear Mrs. Knickerbocker:

The Consumer Bankers Association (CBA)<sup>1</sup> appreciates the opportunity to provide its comments in response to the Office of the Comptroller of the Currency's (OCC) proposed Innovation Pilot Program (the "Proposal" or the "Program"). We agree with the OCC's goal "to add value through constructive, proactive supervision."<sup>2</sup> As the OCC is aware, emerging technologies have shifted the way banks<sup>3</sup> engage and connect with customers. Banks of all sizes are continuing to embrace innovation and to explore ways to better serve their customers. CBA and its member banks believe appropriately tailored supervision has the ability to spark innovation, which will benefit both consumers and industry.

While we support the Proposal, we urge the OCC to further refine its policy and closely align it with the well-established and effective programs of other federal regulators, (e.g. the Securities and Exchange Commission (SEC), Commodities Futures Trading Commission). Here are some recommendations to strengthen the OCC's Innovation Pilot Program:

- Strengthen the value add to banks by increasing regulatory certainty;
- Provide greater detail about the mechanics of the Innovation Pilot Program; and
- Clarify the process for exiting the Program.

CBA believes this effort will help usher the change necessary to promote reasonable innovation. Banks need the ability to adopt the same innovative design practices followed by leading non-financial, technology firms. CBA is pleased with the mission and the work of the Office of Innovation, and we look forward to continuing to serve as a resource as the office continues to strengthen and grow. The OCC's

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<sup>1</sup> The Consumer Bankers Association is the trade association for today's leaders in retail banking —banking services geared towards consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

<sup>2</sup> Office of the Comptroller of the Currency, OCC Innovation Pilot Program Frequently Asked Questions (April 2019).

<sup>3</sup> For purposes of this letter, we refer to institutions covered by the Proposal as banks, though we recognize some non-bank financial institutions are chartered or licensed by the OCC as well.

Office of Innovation has the ability to introduce new business models to the banking systems, clarify regulatory expectations, and educate examiners about the evolving landscape of financial technologies.

With this in mind, the central regulator for financial services in the United Kingdom (UK), the Financial Conduct Authority (FCA), offers an excellent example of a program which promotes reasonable innovation. In 2014, the FCA launched its “Project Innovate,” an initiative to support innovation where it could improve the lives of consumers.<sup>4</sup> Through Project Innovate, the FCA sought to provide greater direct support of all financial services innovation by giving companies assistance with navigating regulatory requirements. The regulator’s assistance program also includes direct engagement regarding product and service development before a formal application to be authorized is submitted. The FCA often works directly with financial services firms to test innovative tools. Furthermore, the regulator uses the knowledge and experiences its gains through these interactions with financial services firms to better hone their rules and supervision. We believe the OCC Innovation Pilot Program can achieve the same level of proficiency as Project Innovate to support, regulate and supervise banks.

CBA recognizes the importance of a bank’s ability to innovate and to partner with non-bank entities to deliver customers the best financial services experience possible. The OCC Innovation Pilot Program has the ability to create another avenue for banks to test new innovations in the market with the support and engagement of the OCC. CBA believes a measured and responsible implementation of the Program will promote responsible innovation, which will benefit both industry and consumers.

#### **I. Strengthen Regulatory Certainty for Banks Engaged in Innovation**

Financial services innovation has historically benefitted consumers and continues to have tremendous potential to do so. As the history of banking amply demonstrates, innovation promotes financial inclusion, expands access to credit, and improves access to information, which in turn, supports informed decision-making and financial well-being. Today, many banks have already initiated relationships with their regulators to continue to innovate and offer customers enhanced products and services. The OCC needs to clarify the Innovation Pilot Program is **not required** for banks to test a new product or service in a pilot program. Similarly, CBA urges the OCC to clarify it is perfectly acceptable for a bank to pilot a product or service on its own, and the absence of participating in an OCC construct will not create any adverse inference on the pilot or the bank’s management. Absent an explicit statement from the OCC, banks may be discouraged to innovate or feel pressured to participate within the OCC’s Innovation Pilot Program.

The Program should encourage banks to innovate, while being certain they will not be penalized for trying to better provide services for their customers. Innovation is often an iterative process, which naturally involves several attempts to develop workable solutions. Regulations need flexibility in order to avoid situations where overly tempered approaches to risk can cause serious and lasting deficits in product and service innovation. Note, ideally, the Program would allow for the acceptance and controlled growth in innovation without stifling it. A successful innovation program needs to accommodate the disruptive process of innovation and harness the potential opportunities for positive change.

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<sup>4</sup> Letter from David Pommerehn, Senior Vice President & Associate General Counsel, Consumer Bankers Association, to OCC (May 31, 2016).

In the Spring 2019 Semiannual Risk Perspective Report, the OCC identified a financial firm’s inability to innovate as a source of significant strategic risk.<sup>5</sup> If financial regulators, including the OCC, fail to create a more certain environment, innovative companies will likely forego investments which would benefit U.S. consumers. As a consequence, talent and investment in financial services innovation will flow to countries where regulators support innovation through reducing regulatory uncertainty, exercising enforcement discretion, and ultimately, amending outdated and unduly burdensome rules. To combat these detrimental possible scenarios, it is imperative the United States encourage responsible innovation in the financial sector, whether by a new entrant, traditional financial institution, or by a joint initiative of the two.

a. *Amend Rules Which Demonstrate a Need for Reconsideration Based on Pilot Program Experience*

CBA also urges the OCC to account for experience with or evidence gathered through the Innovation Pilot Program experience to, when appropriate, amend certain regulations or provide guidance clarifying an interpretation of a rule or statute. By amending unnecessary, or outdated rules or clarifying ambiguities through guidance, the OCC will create a level playing field so all market participants know and benefit from the interpretation. CBA urges the OCC to commit to initiating a rulemaking to amend relevant regulation or to issuing guidance, after providing the opportunity for public comment, based on the information learned through the Innovation Pilot Program process.

With a measured approach to regulation and innovation, we believe the OCC’s Innovation Pilot Program will help to facilitate smarter and fairer financial services without sacrificing customer confidence and trust. The OCC can provide the most value for banks by making it clear the program is voluntary and focusing on areas where existing regulation is unclear.

b. *Lead Coordination with Other Regulators on Consumer Finance Matters*

CBA believes all relevant policymakers need to operate from the same game plan to encourage significant innovation. There are many players in financial services regulation which can lead to overlapping jurisdiction and policy inconsistencies. We believe open communication and consistency among the financial service regulators will provide the clarity needed to advance innovation in a highly complex regulatory and supervisory environment.

As recognized by the United States Department of Treasury in its Report on Nonbank Financials, Fintech and Innovation, “[I]t is critical **not** to allow fragmentation in the financial regulatory system, at both the federal and state level, to interfere with innovation, including permitting meaningful experimentation by financial services firms to create innovative products, services, and processes.”<sup>6</sup> From reviewing the OCC’s proposal, it does not seem like the Program would meet the Treasury’s aforementioned objective in its current form.

The Innovation Pilot Program proposal expresses the OCC’s intention to coordinate with other regulators on a “case-by-case” basis. However, CBA believes banks would better benefit from the OCC

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<sup>5</sup> OCC Semiannual Risk Perspective, 2019-49 (May 20, 2019).

<sup>6</sup> U.S. DEPT. OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 13-14 (2018).

having a more proactive role in coordination. CBA urges the OCC to revise the Proposal to include a firmer commitment on the part of the OCC to coordinate with other regulators.

*c. Defer to the Consumer Financial Protection Bureau (CFPB) Where It Has Exclusive Rulemaking Authority*

CBA suggests the OCC proactively communicate with and defer to the CFPB on legal interpretations of the statutes over which the Bureau exercises exclusive rulemaking authority. As the Office of Innovation is aware, section 1061 of the Dodd-Frank Act transferred all “consumer financial protection functions” from the federal banking agencies to the Bureau. The CFPB’s authority includes exclusive rulemaking and interpretive authority with respect to what constitutes an unlawful unfair, deceptive, or abusive act or practice.<sup>7</sup> With that being said, only the CFPB can provide a binding legal opinion to determine whether a proposed product or service would violate the consumer financial protection laws subject to its rulemaking authority. Naturally, only the CFPB can provide common interpretation to bind all firms subjects to the consumer financial protection laws. CBA believes coordination will be critical to avoid conflicting expectations for participating banks seeking to innovate.

**II. Provide More Clarity Concerning the Mechanics of the Innovation Pilot Program**

To begin, the Proposal describes several regulatory tools the OCC may use to reduce regulatory uncertainty for banks who choose to participate in the Program. According to the OCC’s proposal, the use of “tailored regulatory tools, such as “interpretive letters, supervisory feedback, and technical assistance from the OCC’s subject matter experts” would be sufficient to reduce regulatory uncertainty. However, these regulatory tools are already available to national banks. To provide noticeable value from an Innovation Pilot Program, the OCC must offer additional regulatory certainty.

*a. Achieve Internal Agreement Stating Punitive Actions Will Not be Pursued Against Innovation Pilot Program Participants*

CBA believes the OCC must also internally agree punitive actions will not be pursued to assure industry participants of the strength of the Program. For institutions to rely confidently on participation in the OCC Innovation Pilot Program, the OCC must have internal agreement the supervision and enforcement divisions will not pursue actions as a result of a bank’s efforts to innovate. Naturally, there may be occasions when an innovation promises to benefit consumers but presents legal and policy questions which are unclear or are not yet fully developed.

To further strengthen the value of the OCC’s Innovation Pilot Program, CBA suggests the OCC consider offering No Action Letters (NAL) similar to the CFPB or the SEC. The OCC may also want to consider creating a model similar to the SEC’s internal procedures to ensure the effectiveness of its NALs. To assure potential applicants the SEC stands behind a NAL, it has implemented procedural controls which require staff of the division which received the NAL application<sup>8</sup> to confer with the enforcement division and the Office of General Counsel. While the enforcement division may not have proposed the legal conclusions or interpretation in the proposed NAL, it is imperative enforcement agrees

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<sup>7</sup> 12 U.S.C. § 5531.

<sup>8</sup> SEC action letters may be issued by Divisions of Corporation Finance, Investment Management, and Trading and Markets, and the Office of the Chief Accountant.

it will not pursue an enforcement action if a NAL is granted. In addition, SEC procedures require staff to send SEC commissions and other divisions “advice memos” describing the proposed NAL. If after a defined period of time, neither the commissioners nor the other divisions object, staff will issue the NAL. These internal procedures guide the agency’s internal vetting of the NAL and, ultimately, produce the necessary assurances to industry participants the NALs will preclude supervisory or enforcement action for participants who comply with the terms. CBA recommends the adoption of similar requirements for consultation and agreement within the OCC.

Similarly, in an effort to assure industry participants, CBA urges the OCC to clarify a bank participating in the Program will not be assigned any Matters Requiring Attention (MRAs), if the bank acts in good faith as a part of the Program. The nature of technological innovation requires freedom to explore and safety from punitive action. Banks will need to experiment with new things, which naturally involves mistakes and shortcomings. The purpose of the Program is to be a short-term, limited-scale test to ensure these mistakes do not impact the safety and soundness of a bank. A statement clarifying banks will not be issued MRAs for mistakes made in good faith will add value to the Program and increase regulatory certainty to interested banks.

Furthermore, the OCC will need to commit to educating examiners about responding to technology-driven innovation. In the ordinary course of business, banks have conversations with its supervisors about the bank’s overall strategic direction, which includes its plans to develop and integrate new technology. The OCC should encourage examiners to be accepting of a bank’s strategic evolution as opposed to simply seeing the increased potential risk. Examiners must be able to balance any risks of innovation with the very real risk a bank faces if it does not innovate and adapt to changing technologies and consumer preferences.

*b. Disclose How the OCC Will Protect Private Information*

CBA commends the OCC for its commitment to maintain the confidentiality of proprietary information. Disclosure of information by the OCC about the product or service and any legal analysis provided could enable competitors to exploit the idea or otherwise add compliance or litigation risk. We suggest the OCC have extensive discussions with Program applicants concerning the legal limits of its ability to disclose confidential commercial or financial information, including confidential supervisory information (CSI) and trade secrets. We support the OCC’s intention to establish the practice of protecting private information, and we encourage the OCC to state in its final policy information shared during discussions which qualifies as confidential commercial, financial information, or CSI will be protected from disclosure under FOIA exceptions, as appropriate.

The OCC should also clearly outline how it intends to share findings, best practices, and lessons learned from pilot programs. Sharing information on the OCC’s experience and acquired knowledge would be helpful to other banks considering similar products. Moreover, as the OCC notes its experience with pilots, this enhanced knowledge may inform supervisory approaches or policies, and industry will benefit from information about these changes.

*c. Detail How Banks Can Collaborate on Pilots*

The Proposals states banks may “propose a pilot individually, in conjunction with a third party, or a collaborative effort among multiple banks.” While the OCC has provided guidance on how community banks may share resources, we ask for details on steps banks would need to take to coordinate a pilot.<sup>9</sup>

Additionally, CBA recommends the OCC consider allowing trade associations to apply on behalf of one or more of its members. CBA member banks have noted the ability of trade associations to participate in the CFPB’s Product Sandbox as a particularly attractive feature. Trade association participation has the potential to highlight areas in need of regulatory clarity when individual banks may find it too risky or burdensome to apply themselves.

d. *Commit to Reasonable Target Deadlines*

Innovation is a process, which values timely, direct feedback. Since the core purpose of the Program is to promote innovation, the OCC should ensure it is sufficiently responsive to allow banks to bring innovations to market in a timely manner. CBA urges the OCC to commit to reasonable target deadlines within which it could approve or deny Program applicants.

**III. Determine the Process of Exiting the Innovation Pilot Program**

CBA recommends the OCC provide more details concerning exiting the Innovation Pilot Program. There should be a clear process for transitioning into traditional supervision as the bank determines whether and how to expand availability of the product or service.

The OCC may also want to consider the process described in the CFPB’s Updated No-Action Letter Program.<sup>10</sup> The Bureau lists three grounds for revocation: 1) failure to substantially comply in good faith with the terms and conditions of the letter; 2) a determination by the Bureau stating the recipient’s offering or providing the described aspects of the product or service is causing material, tangible, harm to consumers; and 3) a determination by the Bureau which states the legal uncertainty, ambiguity, or barrier which was the basis for granting a NAL has changed as a result of a statutory change or a Supreme Court decision.

Furthermore, CBA recommends at least six months to wind down the activities involved, unless there is a compelling reason for more expedient action. Sudden terminations would be unfair to Innovation Pilot Program participants and may undermine the long-term success of the Program. The OCC should also confer with the companies to determine an appropriate wind down period after termination, unless there is a compelling reason for a more expedient process.

**IV. Conclusion**

Responsible supervision has the ability to spark innovation. Banks are facing an emerging threat from non-financial, technology firms who are able to innovate and to bring products and services to market without burdensome regulation. The OCC Office of Innovation has the opportunity to create a more certain regulatory environment where banks feel free to design, test and perfect new and better products

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<sup>9</sup> An Opportunity for Community Banks: Working Together Collaboratively (January 13, 2015).

<sup>10</sup> Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,040.

and services. An increase in innovation also has the ability to benefit customers through greater financial inclusion and more transparency into the financial products they use on a regular basis.

CBA appreciates the opportunity to comment on the Proposal and to continue to work with the OCC, especially the Office of Innovation, as it continues promote innovation within our nation's banks. Please feel free to contact André Cotten for further discussion regarding our comments at [Acotten@consumerbankers.com](mailto:Acotten@consumerbankers.com) or 202-552-6360.

Sincerely,

A handwritten signature in cursive script that reads "André B. Cotten".

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Regulatory Counsel  
Consumer Bankers Association