

May 31, 2016

The Honorable Thomas J. Curry
Office of the Comptroller of Currency
400 7th Street, SW
Washington, DC 20219

RE: Supporting Responsible Innovation in the Federal Banking System

Comptroller Curry,

The Small Business Finance Association (SBFA) is a non-profit advocacy organization dedicated to ensuring Main Street small businesses have access to the capital they need to grow and strengthen the economy. SBFA's mission is to educate policymakers and regulators about the technology-driven platforms emerging in the small business lending market and how our member companies bridge the small business capital gap using innovative financing solutions. The SBFA is supported by companies committed to promoting small business owners access to fair and responsible capital.

The single biggest concern in the small business community is access to reliable and efficient capital. It's no secret that traditional financing options for small businesses are disappearing. Since the 2008 financial crisis, the high cost of loan originations and servicing loans at traditional lending institutions has exacerbated a capital access problem for small businesses. Since the crisis, small business loans on the balance sheets of banks are down approximately 20%, and only 36% of small businesses indicated that they were able to get the financing they sought when they applied for credit. For traditional banks it quite simply isn't profitable to serve small-dollar small business customers. The cost to underwrite a \$100,000 loan is in most cases is the same as a \$1,000,000 or more loan, but with much more risk and far less profit. SBFA companies are supporting a gap that is critical to the American economy.

We would like to thank the OCC for reaching out to learn more about our industry, and the many differences between commercial and consumer lending. We also appreciate the OCC's request to learn more about how government can assist the growth of financing small businesses. We applaud the OCC's mission to ensure that any potential regulatory framework is receptive to responsible innovation. The SBFA represents a number of companies that offer small business lending products and interact with traditional banking systems in different ways. Rather than respond directly to the white paper, we will provide the OCC some brief comments about our industry and our approach to working with policymakers to ensure small business owners continue to have access to innovative and responsible products.

In terms of federal policymaking, we believe in a clear and defined separation between consumer and small business lending. Underwriting small businesses is significantly different

than underwriting consumers, largely due to the data that can be used to make underwriting decisions. Small business borrowers have a wealth of data they can bring into consideration, data that gives lenders a much better picture of business performance over time. Unlike consumer loans, most alternative small business finance products do not require collateral or personal recourse. In many cases, the lender won't use traditional underwriting data from the business owner personally because it doesn't paint a complete or even rational picture of their business' creditworthiness. SBFA members also don't require personal collateral and in many cases have no recourse against the owners of a business borrower. Most credit decisions are educated by the *business'* performance and loans are an investment in the eventual success of the business. Emerging technology and the development of new platforms are allowing alternative lenders to reach underserved businesses and those that traditional finance will not or cannot serve.

Consumer and commercial finance products should be treated differently because they serve fundamentally different customers. Consumer lending is more regulated than business lending out of concern for the relatively unequal bargaining power of the creditor over a consumer borrower. Consumer lending laws exist to prevent certain types of financial products from being offered to unsophisticated consumers who may be unable to fully evaluate the costs and benefits of a particular product. Following the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (“CFPB”) was vested with primary regulatory authority over consumer finance products. As such, the CFPB's regulatory oversight currently extends to marketplace lenders that offer consumer finance products.

Commercial or business lending has historically required fewer statutory protections as both parties to the transaction are engaged in commercial activities. The bargaining power of the parties in this setting is much more balanced than that of a consumer and a financial transaction. Business borrowers are also more sophisticated than consumers and more likely to evaluate a variety of options before settling on one product over another. Additionally, the vast majority of states have expressly decided to not regulate commercial finance products or rates so as not to restrict capital options for business and to promote a growing economy. This is consistent with decades of federal legislative history dating back to the 1960s when Congress intentionally excluded small business loans from the Truth in Lending Act as small business owners negotiate financial terms every day. This conclusion has been supported various times by regulators and has received no material question until Treasury's white paper was released.

There is a false narrative being spread that online small business lenders are for the most part “unregulated.” The industry is governed by several state and federal laws and most of our membership have in-house staff to ensure compliance. In particular, the industry is governed by the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Federal Trade Commission Act, and the Telephone Consumer Protection Act, among other and various state and local laws (some states require a license to make small business loans, some states have usury laws that apply, other states have call recording laws that apply, etc.)

Lastly, the SBFA released best practices (attached below) on behalf of the alternative small business finance industry. Our best practices are centered on four principles—transparency, responsibility, fairness, and security - that outline the steps the industry should take to best serve its small business customers. We believe every alternative finance company should fully disclose all terms and costs, and ensure that the product we offer is in the best interest of the small business. These best practices are our message to the millions of entrepreneurs we serve that no matter how fast the industry changes, transparency, responsibility, fairness, and security are central to everything we do.

Policymakers and regulators must recognize that alternative finance innovation is still in the early stages of development. While we support the OCC's desire to monitor ongoing market developments, the government should avoid preemptive regulatory efforts that may stifle innovation as it is evolving and restrict small businesses' ability to access our products. We look forward to working with the OCC and other regulators to ensure that alternative small business lenders are acting in a fair and responsible way.

Respectfully,

Stephen Denis
Executive Director, Small Business Finance Association

Small Business Finance Association Best Practices

A vibrant small business community depends on access to capital. But that access is also the greatest challenge small businesses face, threatening the very fabric of the American economy.

Members of the Small Business Finance Association, Inc. ("SBFA Companies") provide critical financial products to small businesses that want to grow, hire, and strengthen the economy.

Small businesses face numerous challenges and take on significant risks to succeed. SBFA Companies want to help them overcome these challenges and achieve that success by offering online alternative financing solutions that are clear, secure, and fair.

The SBFA encourages small businesses to obtain financing solutions from companies that follow the principles outlined below. Verifying finance companies follow these principles will assist the small business in obtaining fair and transparent terms for the capital they need.

Transparent

Provide transparent information that allows small businesses to make educated financial decisions.

- Disclose all fees, the amount of funds provided, and the total amount owed to the financing provider. For loan transactions, disclose the dollar cost of the loan and for receivables purchase transactions, disclose the discount cost associated with the purchase transaction. These terms should be disclosed in a clear and transparent way in documentation that is signed by the small business.
- Clearly disclose how the funding and repayment process works, the frequency of payments, and the amount of each payment.
- Clearly disclose prepayment policies and if prepayment penalties apply.
- Explain the reasons for rejecting an application for funding so the small business can understand what changes it might need to make in order to position itself for financing in the future.
- Provide direct access to customer service representatives that make it easy for small businesses to get detailed and accurate information about their account, the process, and the products offered by the financing provider.

Responsible

Only provide financing to companies that can reasonably afford the financial product without putting undue strain on the business.

- Fully analyze the business cash flow during the underwriting process to determine whether the small business will likely be able to service all of its outstanding financing obligations without putting undue strain on its finances or operations.
- Require small businesses only use the funds for business purposes.
- Work with small businesses to offer financing options that help put them in the best position to succeed
- When an account defaults, treat the small business fairly and make a good faith effort to resolve the issue in a manner that is professional and respectful.
- Adhere to the terms of the agreement with the small business just as the business must adhere to the terms. Do not unilaterally change payment amounts or dates.
- Cease electronic payments after repeated failures to clear.
- Recognize that loss rates may reflect the value being provided to the small business and track loss rates to verify underwriting practices are not resulting in unacceptably high rates of default.
- Follow policies to verify the funding provides value to the business and does not cause the business to be stuck in a cycle of debt that they are unable to escape.
- Follow policies to verify that, if the small business has other outstanding financing obligations with similar funding sources, either that other financing obligation is paid off at the time of funding from the new financing provider or the other financing obligation is not required to be paid off under the terms of the other funder's agreement.
- Follow policies and procedures to comply with applicable local, state, and federal laws.

Fair

Be truthful and fair in dealings with small businesses.

- Provide marketing materials and promote sales practices that are clear and understandable.
- Monitor marketing and sales practices to ensure a transparent, truthful, and fair process.
- Comply with applicable marketing laws including the federal TCPA.
- Treat every small business equally, determining creditworthiness based on the business case. Never make a credit decision based on race, religion, ethnicity, or sexual orientation and adhere to the applicable requirements of ECOA.
- Ensure that brokers who refer business are aligned with these principles and act accordingly.
- Provide a process for small businesses to file complaints that will be promptly addressed.
- Give each small business the ability to cancel the transaction and return all funds with no penalties for a limited period of time after funding (*e.g.*, 3 to 5 days).

Secure

Take seriously the responsibility to protect sensitive information.

- Adhere to rigorous privacy standards that satisfy applicable law.
- Always obtain the proper authorization before sharing data.
- Have robust underwriting procedures in place to verify the identity of the business that is receiving financing (*e.g.*, review bank statements and online presence; discuss business with the operator; confirm physical location; etc.); confirm the individual obligating the small business has the authority to do so (*e.g.*, review appropriate corporate records); and confirm ownership and that the owners are not on the OFAC SDN list.