

June 14, 2019

Beth Knickerbocker
Chief Innovation Officer
Office of the Comptroller of the Currency
400 7th St SW
Washington, DC 20219

Dear Mrs. Knickerbocker

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the proposal of the Office of the Comptroller of the Currency (OCC) to establish a Pilot Program for banks to test innovative products and programs (the Proposal).

ABA believes that innovations in financial services have tremendous potential to benefit customers as they have throughout the history of banking. Innovation can promote financial inclusion, make it possible to extend credit to many more borrowers, and give customers improved transparency into the financial products they use every day. In many ways, fintech was born in America's banks.

Today, innovations are emerging from both the traditional banking sector and from non-bank startups. ABA believes that when banks and startups partner they can deliver customers the best of both worlds: innovative services that customers demand from a partner that they can trust with their financial future.

To bring innovations to market, banks should be able to adopt the same innovative design practices followed by leading non-financial technology firms. Innovation requires constantly testing products, refining and adjusting them in response to customer preferences, and identifying and resolving other challenges, including attention to unforeseen risk management concerns. Working in a complex regulatory environment makes these iterative processes difficult.

This is why we believe it is critical to maintain an effective and empowered Office of Innovation within the OCC to support innovation in the banking industry and policies that promote partnerships with non-bank financial technology firms. We appreciate the important work that the Office of Innovation has done to date to encourage and prioritize innovation and believe the Office of Innovation should serve as an example to the entire agency of how to prioritize responsible innovation. Efforts to bring new business models into the banking system, clarify expectations about banks' third-party relationships, and educate examiners about new technologies are all important steps to further this goal.

ABA has long advocated for the establishment of Pilot Programs that allow banks to test new innovations in the market with the support and engagement of supervisors that can offer feedback

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

regarding safety and soundness expectations, risk management principles and compliance requirements.²³ ABA believes that proper implementation of Pilot Programs will promote responsible innovation that will benefit consumers and promote economic growth.

In this comment, we offer the following observations and recommendations:

- The OCC’s Pilot Program, and pilot programs in general, have the potential to foster responsible innovation in banking,
- The OCC should consider clarifications to ensure the Pilot Program is effective, and
- Innovation Must be an Agency-Wide Priority and Cannot be Limited to a Pilot Program.

Pilot Programs Have the Potential to Foster Responsible Innovation in Banking

Developing and deploying new technology has always been at the core of the business of banking, and banks should not be *required* to participate in special regulatory processes to continue to innovate. Today, many banks are working proactively with their regulators to introduce new or innovative products. Adding additional, mandatory steps to this process – including an express or implicit requirement that a bank test a new product or service in a pilot program – could discourage innovation inside the banking system.

However, as technology changes the way banking services are delivered, certain innovations will challenge existing regulatory assumptions and raise questions that will require collaboration between banks, regulators, and technologists. If implemented properly, voluntary Pilot Programs can encourage banks to test new innovations and give regulators insight into new technologies while ensuring that customers remain protected in the event of unforeseen adverse consequences.

The OCC’s Pilot Program is responsive to this need, and if properly implemented could be an important tool to encourage responsible innovation. The OCC appropriately focuses on establishing a collaborative process that facilitates banks and regulators working together to test a new product or technology to better understand how it works and should be regulated. Consistent with our prior recommendations, the OCC has proposed to work with banks to identify any risks, put processes in place to manage those risks, and facilitate the in-market testing of new technologies.

When implemented properly, pilot programs have the potential to afford banks the regulatory clarity that spurs innovation. By focusing on areas where existing regulation is unclear and ensuring that this program is optional, the OCC reduces this risk and focuses the program on areas where it can provide the most value.

The OCC Should Consider Clarifications to Ensure the Pilot Program is Effective

Pilot programs have great potential to help drive consumer-focused and responsible innovation in banking; however, if not implemented properly, they risk becoming a barrier to innovation. Although the Proposal addresses many of the essential requirements of an effective Pilot Program, there are a number of adjustments and clarifications that we recommend to ensure the Pilot Program meets its goal of facilitating responsible innovation in the banking industry, including:

² <https://www.aba.com/Advocacy/commentletters/Documents/Response-OCC-Innovation-Paper-53116.pdf>

³ <https://www.aba.com/Advocacy/Documents/fintech-treasury-report.pdf>

Program Mechanics: The Proposal describes several tools that may be used to reduce regulatory uncertainty associated with developing a new technology. The OCC envisions the use of “tailored regulatory tools, such as interpretive letters, supervisory feedback, and technical assistance from the OCC’s subject matter experts.” We agree that each of these tools can reduce regulatory uncertainty, but note that they are available currently to national banks. To encourage use of the Pilot Program, we recommend the OCC to provide more detail about how these tools could be applied in a pilot, how they might work together, and any other information that would demonstrate the additive value of engaging in the OCC Pilot Program.

For example, the OCC should consider adding an “agile supervision” approach. In this model, an OCC expert could work with a bank as it develops a pilot, acting as a sort of ombudsman to the rest of the agency. This expert could help the bank request appropriate tools, experts, and other resources at the agency.

Emphasize Voluntary Nature of the Program: While ABA believes the Pilot Program can help foster innovation in areas where there is significant regulatory uncertainty, the Pilot Program is not right for every innovation. Banks already work proactively with their regulators to introduce new or innovative products. Innovation has always been part of the business of banking and implementing most innovations should never require this special regulatory process.

If banks feel compelled to use this process for every innovative product they introduce, this program has the potential to slow the process and stifle the very innovation it is seeking to promote. We would urge the OCC to continue to emphasize the voluntary nature of the program to banks and examiners.

Binding Decisions: The OCC should reflect the Consumer Financial Protection Bureau’s (Bureau) experience by ensuring that banks can rely on the decisions made as part of the Pilot Program.

Providing this certainty is critical to ensuring a program is valuable for participants. The Bureau’s 2016 No-Action Letter Policy was limited to a single form of relief, a non-binding recommendation that “staff has no present intention to recommend initiation of an enforcement or supervisory action against the requester in respect to the particular aspects of its product under the specific identified provisions and applications of statutes or regulations that are the subject of the No-Action Letter.” As a result, only one company has applied for that program. The Bureau has taken steps to strengthen this language in updates proposed to the program in December 2018.⁴

For institutions to participate confidently in a pilot, there must be internal agreement that OCC supervision and enforcement will not pursue punitive actions. In other words, the program should produce decisions that have the full support of the OCC and bind the agency to those conclusions going forward. The CFPB addressed this issue in its updated proposal by ensuring that No-Action Letters be signed by the Assistant Director of the Office of Innovation or other members of the Office of Innovation, duly authorized by the Bureau, with the explicit intent to assure the recipient that “the Bureau itself stands behind the no-action relief provided by the letters.”

One way for the OCC to accomplish this is to clarify that a participating bank will not be assigned Matters Requiring Attention (MRAs) if it acts in good faith as part of a Pilot Program. The nature of technological innovation means that banks must try new things, experiment, and sometimes make

⁴ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64,036 (Dec. 13, 2018).

mistakes. The Pilot Program has been designed as a short-term limited-scale test to ensure that any mistakes made are unlikely to have an impact on the safety and soundness of an institution. Clarifying that MRAs will not be issued for mistakes made in good faith may help give banks the certainty they need to participate in a Pilot Program.

To strengthen further the protection provided by the Pilot Program, we encourage the OCC to include requirements for internal consultation modeled on the process adopted by the SEC for issuance of a no-action letter (NAL). To assure potential applicants that the SEC stands behind a NAL, it has implemented procedural controls that require staff of the division that received the NAL application to confer with the enforcement division and the Office of General Counsel⁵. While the enforcement division may not have proposed the legal conclusions or interpretation in the proposed NAL, it is imperative that enforcement agrees that it will not pursue an enforcement action if a NAL is granted. In addition, SEC procedures require staff to send SEC commissioners 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 that NALs will preclude supervisory or enforcement action for participants that comply with their terms. Adoption by the OCC of similar internal procedures would provide assurances to industry participants that would encourage use of the Pilot Program.

Program Exit: The OCC should clarify steps and expectations for the bank and agency at the conclusion of a Pilot Program. There should be a clear process for transitioning out of the pilot and into traditional supervision as the bank decides whether and how to expand availability of the product or service in the retail market.

In addition, the OCC should provide clarity on how tests will be wound down. In the Proposal, the OCC notes that it “may suspend OCC engagement in the pilot or trigger an exit strategy as deemed necessary.” The OCC should clearly articulate the conditions under which it would consider terminating a pilot in the Pilot Program.

The Bureau’s Updated No-Action Letter Program is instructive in this regard. The Bureau articulates 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 that 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 that the legal uncertainty, ambiguity, or barrier that was the basis for grant of a NAL has changed as a result of a statutory change or a Supreme Court decision.⁶

Further, we believe the Pilot Program, should give participants at least six months to wind down the activities involved, unless there is a compelling reason that require more expedient action. In addition, the Pilot Program should include a commitment to confer with the Pilot Program participant to determine an appropriate wind down period after termination, again unless there is evidence that

⁵ SEC action letters may be issued by Divisions of Corporation Finance, Investment Management, and Trading and Markets, and the Office of the Chief Accountant.

⁶ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,040

expediency is necessary. Sudden terminations would be unfair to participants and will undermine the success of the program in the long-run.

Responsiveness: Innovation is a process that benefits from timely direct feedback. Any program designed to promote innovation should ensure it is sufficiently responsive to allow companies to bring innovations to market in a timely manner. ABA would recommend the OCC commit to reasonable target deadlines within which it would approve or deny Pilot Program applications.

Regulatory Coordination: Regulatory coordination is also critical for the success of Pilot Programs. Since banks often have more than one regulator, a Pilot Program would be of little use without coordination among those regulators. We are pleased the OCC has emphasized regulatory coordination in the Proposal and would encourage the OCC to provide additional detail on how it would coordinate with other regulators within the Pilot Program. We would encourage the OCC to consider how it could help participating entities seek exemptive relief from other agencies.⁷ A clear path for coordination can help ensure that these programs work in concert, but will not be needed in every pilot and should therefore be voluntary.

Share Findings While Maintaining Confidentiality: The OCC should clearly outline how it intends to share findings, best practices, and lessons learned from activities conducted under the Pilot Programs. Sharing general information on the Agency's learnings can be helpful for other banks. Moreover, as the OCC notes, experience with pilots may inform supervisory approaches or policies, and industry will benefit from information about these changes

However, we urge the OCC to strike the right balance between sharing useful information and safeguarding confidential, proprietary information. We appreciate the OCC's assurance that it "will maintain the confidentiality of proprietary information, including identification of participating entities, to the extent permitted by law or regulation."⁸ In a footnote to that statement, the OCC expressly cites the Freedom of Information Act (FOIA) exemptions for personally identifiable information, trade secrets and confidential supervisory information.⁹ In addition, we urge the OCC to state that it would deem much of the information submitted by applicants and during their participation in the pilot to be confidential supervisory information that is protected by FOIA exemption 8.¹⁰

Clarify How Banks Can Collaborate on Pilots: The Proposal indicates that banks may "propose a pilot individually, in conjunction with a third party, or as a collaborative effort among multiple banks." While the OCC has provided guidance on how community banks might share resources¹¹ we ask that it outline the particular steps that these entities would need to undertake to coordinate on a pilot.

Additionally, the OCC should consider allowing trade associations to apply on behalf of one or more of its members. 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.

⁷ As outlined in footnote 15 of the Proposal.

⁸ See p. 7-8 of the Proposal

⁹ See foot note 12 page 8 of the Proposal

¹⁰ 5 U.S.C. §552(b)(8).

¹¹ [An Opportunity for Community Banks: Working Together Collaboratively](#) (January 13, 2015)

Innovation Must be an Agency-Wide Priority and Cannot be Limited to a Pilot Program

While ABA believes the Pilot Program can help facilitate responsible innovation, the OCC must look to support innovation throughout its interactions with the banking industry. The proposal notes that the “program builds on the OCC’s innovation initiatives to date and complements the agency’s vision.” The Pilot Program is just one of a set of tools needed to ensure banks remain competitive in today’s market. Innovation is critical to banks’ ability to serve the ever-evolving needs of their customers and the OCC should look to foster responsible innovation throughout all interactions with the banks it supervises.

Educate and Empower Examiners: In most instances, bank innovation should not require special regulatory processes. Developing and bringing to market new or improved financial products, services, and processes is an integral part of a typical bank’s business model. Accordingly, each bank’s dialogue with its supervisors includes regular and ongoing communication about the bank’s overall strategic direction as well as it plans for developing and integrating new technology and managing any risks presented.

Examiners should be accepting of a bank’s strategic evolution, rather than simply viewing innovation as a source of increased potential risk, and facilitating responsible innovation must be deemed an integral part of each examiner’s role. Examiners should balance any risks of innovation with the very real risk a bank faces if it does not innovate and adapt to changing technologies and corresponding market and consumer preferences.

- The OCC’s Spring 2019 Semiannual Risk Perspective identified that failure to innovate is in itself a key strategic risk, noting that “[B]anks that do not assess business relevancy and impacts from technological advancement or innovation, or are slow adopters to industry changes, may be exposed to increasing strategic risk.”
- While an innovative product might present risks relating to that specific product, a general decision not to innovate can risk the long-term safety and soundness of the bank.

Developing expertise about innovative new products, services or strategies is only useful to the extent that it is shared throughout each agency and changes to supervisory approaches or policies are applied consistently to all supervised entities. Regulators should focus on ensuring that examiners in the field are sharing the insights they learn from their interaction with the banks they supervise. The better field examiners understand the opportunities that technology presents for banks, the better they can support innovation in those institutions.

This highlights the importance of maintaining an effective Office of Innovation within the OCC. The OCC should look for opportunities to empower the Office of Innovation to lead this important discussion at all levels. Fostering responsible innovation should be a strategic imperative across the OCC and the Office of Innovation can play a critical role in facilitating agency-wide discussions to drive understanding of both the benefits and risks associated with bank innovation.

We appreciate the work the Office of Innovation has already done to educate examiners and believe that it has a critical role to play in ensuring examiners understand the latest innovations. When addressing potential risks and benefits new bank products and services (in or outside a Pilot Program), it should be on equal footing with onsite supervisory teams.

- For example, the Office of Innovation could help onsite supervisors as they consider how to balance the risks associated with failing to innovate with the risk presented by a potential new product or service.
- It might also work with supervisors and OCC policymakers to ensure that staff have access to the requisite technological expertise to understand a new product and service and ensure the bank has identified the risks of pursuing—or not pursuing—that innovation.

Examiner education should be one part of a broader OCC effort to ensure staff are best equipped to respond to technology-driven innovation.

- Existing and new OCC employees should have a broad understanding of innovative developments in bank-related services, by both banks and their non-bank competitors.
- The OCC should consider looking outside the traditional banking sector for the engineers, data scientists, and designers who best understand technological innovation and its associated risks.

Exemptive Relief: Clarity about legality under existing laws can help give banks the confidence to introduce new products. However, there are circumstances when existing laws and regulations (often written before today’s technologies were conceived) prevent the adoption of new technologies.

In these cases, it can be useful to provide an avenue for testing these technologies in a way that allows regulators and banks to work together to understand the risks and benefits of a technology and design an appropriate set of guardrails to ensure consumers benefit, and are not harmed. In addition, this will allow for a better-informed process for identifying the laws and regulations that need amendment.

For this to be effective, participants need assurances that they will not be penalized for participating in a pilot program. This often means that regulators must be flexible in applying regulations that would restrict the testing of new technologies and apply relief where appropriate.

Done properly, exemptive relief will not put consumers at risk, but will offer flexibility within applicable laws that may otherwise stifle innovation, while looking to the ultimate goal of the law and identifying appropriate guard rails to ensure that the spirit and intent of that law are not thwarted.

We recognize that the OCC has limited authority to provide exemptions from existing laws and regulations. We encourage the OCC to coordinate closely with those agencies that have interpretative authority and have supported legislation that would allow for this kind of testing.

Conclusion

Responsible innovation in financial services has tremendous potential to benefit customers, promoting financial inclusion, making it possible to extend credit to many more borrowers, and giving customers improved transparency into the financial products they use every day. The OCC's proposed Pilot Program has the potential to serve as an important tool that can give banks the certainty they need to introduce innovative products. The pro-innovation efforts behind the Pilot Program should apply throughout the OCC, and we urge the OCC look to seek opportunities to foster responsible innovation in all facets of its operations.

ABA appreciates the opportunity to comment on the Proposal and look forward to working with the OCC as it implements this, and other programs designed to promote innovation in our nation's banks. Please do not hesitate to reach out with questions or to discuss our comments.

Sincerely,

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American Bankers Association