

June 14, 2019

pilotprogram@occ.treas.gov
Beth Knickerbocker, Chief Innovation Officer
Office of Innovation
Office of the Comptroller of the Currency

Re: Comments on OCC Innovation Pilot Program

Dear Ms. Knickerbocker:

The undersigned consumer, civil rights and privacy groups submit these comments on the Office of the Comptroller of the Currency's (OCC) proposed Innovation Pilot Program.¹ We support the OCC's focus on fostering compliance with the law, promoting fair treatment for consumers, ensuring the safe and responsible use of technology, and enhancing the OCC's understanding of the use and risks of financial technology. We especially appreciate the fact that the OCC seeks to achieve these goals without waiving consumer protection regulations or risking the appearance that the agency is approving or promoting the products of particular companies.

To further protect consumers and the public, we urge the OCC to:

- Refrain from issuing interpretive letters except in rare circumstances to avoid creating a new complicated body of caselaw or doing rulemaking outside a public notice and comment process;
- Consult with other agencies prior to admitting a company or product;
- Increase transparency by making participation in the pilot program public and sharing information about outcomes;
- Limit live testing and keep pilot programs small and limited, and
- Prohibit the use of forced arbitration clauses in pilot programs.

These changes are needed in order to ensure that consumers are protected, that the OCC is fully informed, and that the program does not become a one-sided back-channel method for select participants to effectively re-write or re-interpret rules.

Appropriate Goals of an Innovation Pilot Program

We support the goal of early engagement with the OCC to help companies understand how novel products can comply with existing rules and supervisory expectations. Ensuring *compliance* with the law – rather than an avenue to avoid consumer protection regulations – is an appropriate use of the pilot program. Thus, as the OCC has proposed, the pilot program tools should only be available “when their use would not violate existing laws, involve an unsafe or unsound practice, or cause an unsafe or unsound condition.”² We also appreciate the plan to determine legal permissibility before any live test.³

¹ <https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-42.html>.

² OCC, OCC Innovation Pilot Program at 5 (April 2019), <https://www.occ.gov/topics/responsible-innovation/occ-innovation-pilot-program.pdf> (“OCC Innovation Pilot Program”).

We note that many “innovations” are merely modest changes in financial products and services that at their core remain the same. Financial products and services are continuously evolving, and iterations on forms of credit, payments, or deposits do not justify exempting them from consumer protection laws. Moreover, innovations are not invariably positive. They may be designed to increase profits at consumer expense, may amplify previous problems, or may pose new types of risks to consumers. Thus, the goal of a pilot program should be to understand innovations, not necessarily support or endorse them.

We appreciate several elements of the OCC’s proposal that stand in marked contrast to the Consumer Financial Protection Bureau’s reckless product sandbox proposal⁴:

- “The program provides no statutory or regulatory waivers and does not absolve entities participating in the program from complying with applicable laws and regulations, including legal standards that protect consumers.”⁵
- The OCC will not, and is striving to avoid any appearance that it will, approve or endorse particular products or companies;⁶
- The OCC has not imposed any time limits on its review of applications for the suitability of participation and is not committing to a high volume that could undermine oversight and strain agency resources;⁷
- The OCC retains full authority to suspend a pilot or trigger an exit strategy “as deemed necessary,” with no required process or limits on the OCC’s ability to act to protect the public in the agency’s full discretion.⁸

A responsible innovation pilot program should not be a deregulatory initiative or a way to change rules outside of the public rulemaking process. Evolving financial technology may require that regulations and guidances be updated periodically. But that process must take place in public, with all stakeholders involved, to ensure that all risks to consumers, competition and the general public are taken into consideration and that regulations are crafted carefully with attention to all potential implications.

The purposes of a responsible pilot program should be to help the agency understand new uses of financial technology, to help innovators understand their obligations under existing law, to promote compliance with the law, to spot new risks, and to identify regulations that need to be updated in a public process, either by allowing beneficial technologies or by addressing new risks.

A pilot program should involve *more oversight*, not less. That is precisely because, as the OCC recognizes, “appropriate safe and sound banking or risk management practices [may be] unknown.”

³ *Id.*

⁴ See Comments of 80 consumer and other organizations to CFPB on no-action letters and product sandbox, Docket No. CFPB-2018-0042-001 (Feb. 11, 2019), <https://www.nclc.org/images/pdf/rulemaking/coalition-comments-nal-product-sandbox.pdf>.

⁵ OCC Innovation Pilot Program at 5.

⁶ See *id.* at 2 & n.5

⁷ See *id.* at 7.

⁸ *Id.* at 4.

Moreover, any agency conducting a pilot program must be attentive to the risk that participation could be used inappropriately by a company to imply agency endorsement of products that are being studied precisely because they are not well understood. The goal of a government pilot program is to understand new uses of financial technology and to promote safety and consumer protection, not to promote particular companies or products.

Concerns About and Improvements to the Proposal

Refrain from issuing interpretive letters or statements endorsing the company's compliance with the law.

We disagree with the OCC's plan to "encourage[] banks to seek interpretive letters."⁹ Interpretive letters bear the risk of changing the interpretation of a law or regulation – in effect, changing the law or regulation – without public notice or input from all stakeholders, including consumers and competitors. Even if applied to only one company, interpretive letters invariably become extended to similar or somewhat similar models in a way that can expand over time. Changing interpretations in this manner can result in unforeseen risks to consumers or to interpretations that favor one business model over that of competitors.

Moreover, if interpretive letters are used regularly, they effectively become a private body of caselaw that adds complexity to both legal compliance and consumer protection. The experience of the Federal Reserve Board prior to the 1981 adoption of the Official Staff Commentary (OSC) (now called the Official Interpretations) to the Truth in Lending Act is instructive. As the FRB explained:

Under the prior regulation, staff opinions were issued in response to individual inquiries regarding specific fact situations, and were normally limited to those facts. Subsequent variations in those facts were similarly addressed in individual responses tailored to the variations. More than 1500 letters interpreting and applying the prior regulation were issued on this basis.

... Although originally designed to aid creditors in complying, the longstanding practice of trying to respond in writing to each and every special circumstance has instead created an enormous amount of regulatory material. *The cumulative effect of the interpretations has been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate has served to generate further questions.*¹⁰

The OSC, which is adopted in a more thoughtful manner after public notice and comment, is a more appropriate way of addressing interpretive questions than letters based on one company's information and without public input. While the OCC may not have rulemaking authority over many of the statutes involved, that is a further reason not to embark on issuing interpretive letters, not a justification for doing so. These should be used rarely if at all.

⁹ OCC Innovation Pilot Program at 2.

¹⁰ 46 Fed. Reg. 28560 (May 27, 1981).

Interpretive letters and other pre-clearance reviews may also be problematic because, despite the best efforts to review a proposed activity ahead of time, it may only become apparent later on if a company is violating existing laws (including laws against unfair, deceptive or abusive practices or discrimination against members of protected classes under fair lending laws), engaging in an unsafe or unsound practice, or causing an unsafe or unsound condition. We support the OCC's ability to terminate a pilot program at any time for any reason. We urge the OCC not to provide a definitive endorsement of the entity's compliance or to limit the agency's ability to take action if warranted.

Improve consultation with other agencies.

We urge the OCC to consult with the CFPB and, if a nonbank is involved, the Federal Trade Commission prior to admitting a company or product into a pilot program. The OCC may also wish to consult with the other bank regulators. This is important for several reasons. Consultation can avoid conflicts between an OCC pilot and activities by other agencies. The CFPB or FTC may perceive risk to consumers that the OCC does not identify. Specifically, as part of the vetting to ensure that a proposal does not violate existing laws, if a consumer product or service is involved, the OCC should make sure that the CFPB has not identified violations through supervisory or enforcement actions that implicate practices similar to those used within the pilot project. This is also important because the OCC may not have the primary enforcement authority if issues arise.

Improve transparency.

The OCC has noted that it may periodically develop publicly available materials "regarding the results of the program," including "best practices or lessons learned when conducting a pilot, general topics explored within the program, and any supervisory approaches or policies stemming from pilot experiences."¹¹

We urge the OCC to commit to greater transparency. The public should know what pilot programs the OCC is conducting and should have the opportunity to learn from them. Specifically, we urge the OCC to publish reports – drawn from the information it will be requesting from participants – identifying issues discovered and remedial action taken, along with publications that describe the outcome of approved pilots when an entity leaves the program for any reason.

Limit live testing and keep pilot programs small and limited.

We encourage the OCC to avoid live testing when possible to avoid consumer risks. The OCC appropriately notes that additional tailored controls and safeguards are important in the case of live testing. While we support consumer notification or consent, that is not sufficient; consumers may not understand the risks involved.

¹¹ OCC Innovation Pilot Program at 7 to 8.

We support the OCC’s statement that pilots are “small-scale, short-term tests,” not broad, long-term blessings or endorsements.¹² The CFPB, in contrast, has proposed to allow trade associations to apply on behalf of their entire membership.

The OCC has proposed a time frame of three to 24 months, and we encourage time limits on the shorter end of that spectrum. To the extent that a pilot involves live testing, we urge the OCC to limit the number of consumers exposed to the test.

The OCC also appropriately notes that agency resources may – and should – limit the number of pilots that the OCC can conduct in light of the need to provide “resources, guidance, and oversight.”¹³ Close oversight is essential to a responsible pilot program – not only to prevent consumer harm, but also to enable the agency to achieve the goal of learning from a pilot program.

Ban forced arbitration clauses and be vigilant about complaints.

We urge the OCC to prohibit forced arbitration clauses in any consumer agreements used in connection with a live trial. Companies that are testing a novel approach on consumers should not be allowed to deprive consumers of their right to access the courts or to band together if consumers are harmed. If a company is unwilling to take the risk of being held accountable for something going wrong, it should not impose that risk on consumers.

Forced arbitration clauses are also contrary to the purposes of the pilot program because they channel disputes into a secretive forum. They deprive the public – including the OCC – of information about problems that may impact other consumers as well.

While the OCC is requiring companies to have “mechanisms for remediation, including timely and fair compensation for any harm to consumers caused by the pilot,”¹⁴ these mechanisms cannot be left in the hands of the company. Consumers must have direct remedies and the ability to take action to protect themselves if they are harmed. Consumers will not know to complain to the OCC and cannot count on the OCC to adjudicate individual disputes.

The OCC should also actively review any complaints submitted during the pilot, whether they are submitted to the company, to the OCC or to the CFPB or other agencies, and should make the number and types of complaints publicly available.

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¹² OCC Innovation Pilot Program at 2.

¹³ OCC Innovation Pilot Program at 7.

¹⁴ OCC Innovation Pilot Program at 5.

Thank you for the opportunity to submit these comments.

Yours very truly,

Allied Progress

Americans for Financial Reform Education Fund

Atlanta Legal Aid Society, Inc.

California Reinvestment Coalition

Center for Digital Democracy

Center for Economic Integrity

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Consumer Reports

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

National Fair Housing Alliance

Public Citizen

Public Justice Center

Reinvestment Partners

U.S. PIRG