April 2, 2018

The Honorable Steven T. Mnuchin
Secretary of the Treasury
US Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Mnuchin:

In February 2017, President Trump signed an executive order requiring an extensive review of all financial industry regulations to spur economic growth. As the Treasury Department continues these efforts, the Online Lenders Alliance (OLA) would like to offer some perspectives from the fintech community to help create financial markets that support consumer and small business lending.

About OLA

OLA is the center for lending, technology and innovation, representing the growing industry of companies offering loans online. OLA is comprised of lenders, advertisers, specialty credit bureaus and software developers – the entire fintech community. Our members abide by a rigorous set of Best Practices and a Code of Conduct to ensure their customers are fully informed and treated fairly. OLA also serves as a resource to federal and state policymakers on issues related to access to credit. Beyond our role in serving and leading our members, OLA provides resources including a consumer hotline, that is a portal to report fraud, and consumer tips.

Overview of Online Lending

The online lending industry relies on innovative financial technology. The industry is rapidly evolving as companies are continually developing new variants of existing business models. In addition, existing lenders -- including banks and nonbanks -- are increasingly adopting this new technology. Online lending is a rapidly growing portion of the market providing approximately $23 billion in loans for 2015[1]. This is a 163% growth rate from 2011 when loan levels sat at just $473 million[2]. Some market analysts predict that by 2020 the market could grow to a $90 billion market.[3] Industry observers attribute this growth to several variables including lower cost structure and greater accuracy in underwriting. These advantages should allow for continued

[1] Neil Tomlinson "Marketplace Lending: A Temporary Phenomenon? Deloitte Insights, May 2016
[2] Neil Tomlinson "Marketplace Lending: A Temporary Phenomenon? Deloitte Insights, May 2016
[3] U.S. Department of Treasury *Opportunities and Challenges in Online Marketplace Lending*, May 2016

growth that will transform the way individuals and small business acquire credit. These changes will provide for future improvements that will benefit every aspect of our financial markets.

Bank Fintech Partnerships

Banks routinely rely on relationships with third parties to deliver financial services more broadly, more efficiently, and with less risk to consumers and the banks themselves. Today those banks that lack the technical know-how to market, underwrite, originate, service and collect loans over the internet can bridge these challenges by partnering with a fintech company. Many of these firms have spent years developing innovative technology and analytics for these specific tasks. Their investment of time and resources allows the banks to benefit from fintech firms' expertise, and it also can provide additional sources of funding to share the risk of loans with banks. These partnerships allow banks to deploy their own capital to make new loans, thereby providing broader access to credit for consumers and small businesses.

The ability to leverage these relationships, to reach new customers and obtain greater portfolio risk diversification is especially beneficial to smaller or community banks. Nonbank fintech providers can bring expertise in electronic and internet marketing of loans, innovative underwriting and credit risk assessment techniques, or online banking and servicing of loans that these banks may not possess. These partnerships can enable a smaller bank to make greater use of the internet to originate loans. They can also open marketing opportunities beyond consumer loans to small businesses and borrowers outside of the bank's traditional footprint. Borrowers of lesser credit quality, whether thin-file or no-file consumers, can benefit from the algorithms and greater use of non-traditional credit information employed by fintech firms. These new technologies can allow a bank to better target and more accurately customize product offerings, increasing overall efficiencies. All of this translates into greater competition among providers and lower costs of credit, resulting in more options and access to credit for consumers.

The Center for Financial Services Innovation, in a recent comment letter to the Federal Deposit Insurance Corp. (FDIC), characterized this as a "win-win-win" for all involved, including consumers. Banks win because they can serve a broader and deeper segment of the consumer market than they otherwise could. Third-party fintech providers win by creating an opportunity to offer products and services to consumers that they would not otherwise reach. Consumers win because they "get access to high-quality credit that they otherwise would not." These partnerships also allow "smaller and more rural banks to broaden the set of products and services they can offer to consumers and small businesses in their communities."[4]

The FDIC, in proposed examination guidance for third-party lending programs, echoed these sentiments: "Third-party lending arrangements may provide institutions with the ability to

[4] CFSI Comment Letter on Proposed Guidance for Third-Party Lending (Oct. 27, 2016), https://cfsinnovation.org/research/cfsi-comment-letter-on-proposed-guidance-for-third-party-lending/.

supplement, enhance, or expedite lending services for their customers. Engaging in third-party lending arrangements may also enable institutions to lower costs of delivering credit products and to achieve strategic or profitability goals."[5]

With banks of all sizes routinely relying on third parties to provide critical services, a robust regime of third-party supervision has been established by the federal banking agencies. This ensures that activities that occur outside of the bank are examined and supervised to the same extent as if they were being conducted by the bank itself. This protects the consumers and the financial system. Bank-sponsored lending programs with fintech firms are no exception, and both the Office of the Comptroller of the Currency (OCC) and FDIC have published detailed guidance as to how these relationships should be managed and supervised. These clearly state that any loans issued by a bank – including those that benefit from the technology of a fintech partner – are subject to the same high level of scrutiny and regulation that any other loan issued by the bank would be. This ensures borrowers are protected and supervision is appropriate and enables consumers to choose to work with a federally-licensed lender, giving them greater confidence and security.

The ultimate promise of fintech – delivering safer, more transparent, lower cost and more convenient financial products and services to consumers over the internet and mobile devices – depends on the ability of banks, particularly community banks, to cooperate with third-party fintech providers to offer financial products and services to consumers. OLA would encourage Treasury to develop policies to support these partnerships including OCC, Federal Reserve Board and FDIC adopting policy statements and guidance encouraging banks to partner with nonbanks in the offering of financial services over the internet.

Need for Formal Clarity from the Federal Banking Agencies

There is a strong and immediate need for formal direction from the FDIC and/or the OCC clarifying the ability of federally-regulated banks to engage in lending arrangements with nonbank fintech providers. In footnote 3 of its June 2016 Proposed Guidance for Third-Party Lending, which remains in pending status almost two years later, the FDIC noted that courts are divided on whether third-parties may avail themselves of an insured state bank's ability to export its home state's interest rate under the Federal Deposit Insurance Act ("FDIA"). Recent litigation has highlighted the division among the courts, escalating the continued uncertainty in marketplace.

Because most of the banks that are engaged in bank partnership lending are FDIC-regulated state banks, the FDIC is in the most logical position to provide the necessary clarity. For example, the FDIC could amend existing General Counsel's Opinion No. 10 (Interest Charges Under Section

[5] FDIC, Proposed Guidance: Examination Guidance for Third-Party Lending (July 29, 2016), https://www.fdic.gov/news/news/financial/2016/fil16050a.pdf.

27 of the FDIA) or issue a formal regulation clarifying by interpretation that an insured bank which originated a loan remains the true lender, and the valid- when made doctrine continues to apply, following the sale or assignment of that loan. Alternatively, the OCC could issue a similar interpretation of Section 85 of the National Bank Act; e.g., in the form of an amendment to existing subpart 7.0041 of the OCC Interpretative Rules (Charging interest at rates permitted competing institutions; charging interest to corporate borrowers).

In the continuing absence of clear direction from the federal bank agencies, we are concerned that the current chilling effect caused by ill-conceived lawsuits and enforcement actions could evolve into a torrent of actions that would essentially shut down the opportunity for sustainable lending arrangements between nonbank fintech providers and federally-regulated banks.

New and Inconsistent Court Decisions Threaten Bank Fintech Partnerships

A relatively recent litigation trend threatens the ability of banks and community banks to expand access to credit through partnerships with third-party fintech providers. Some courts have taken it upon themselves to look beyond the actual, legal rights and responsibilities with respect to a particular loan transaction and have instead examined the facts and circumstances of each individual loan. These decisions upend the reasonable commercial expectations of all the participants in the loan transaction process and threaten to discourage banks and fintech providers from entering into partnerships with one another.

"True Lender" Court Decisions

Despite the demonstrated benefits and consumer protections associated with bank/fintech lending partnerships, a handful of courts have called these arrangements into question. At issue is that even though the bank signed the loan agreement, funded the loan, and the borrower agreement is to repay the bank, these courts have raised the possibility that the bank may not be the "true lender." They have instead focused on the service provider as potentially the "true lender." These courts have looked past the explicit terms of the loan agreements, preferring to rely upon other facts and circumstances.

These cases are significant because, if the bank is the true lender, then it is subject to the federal bank regulatory framework. If the fintech firm is the true lender, however, then it may be subject to different state licensing requirements and the loan itself may be subject to state rate and term regulation, including limits on the interest rate that can be charged. In some states, this might even void the loan or make it uncollectible, meaning that the lender may not be able to recover its principal, much less its costs and profit.[6]

[6] We note that the "true lender" argument is different than the "valid when made" issue raised by the *Madden v. Midland* case. *See* Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015). In *Madden*, a loan originated by a bank was charged off and sold by the bank to a debt buyer. The debt buyer argued that because the loan was

Most “true lender” cases revolve around loans originated by a federally-supervised bank, consistently with well-settled principles of federal law. Because of these principles, many courts have rightfully focused on the loan agreement to hold that the bank is the true lender.[7] Unfortunately not all courts have followed suit, with a handful looking beyond the loan agreement to entertain claims that the nonbank has the “predominant economic interest” in the transaction and is the true lender.[8]

Many court challenges have occurred months or even years after the fact. By looking beyond, the actual terms of the loan these court decisions can greatly alters the expectations of the bank, the fintech firm, the loan purchasers, the investors, and all other participants in the loan transaction. The resulting outcome is to invalidate not only that single transaction, but potentially entire portfolios of loans. These after-the-fact actions introduce significant uncertainty and unpredictability into the lending market. This in turn can diminish market liquidity. It is critical to a stable and robust lending market to have liquidity standards that are clear, predictable, and provide banks with a uniform set of rules to follow for the origination and sale of loans.

Legislation has been introduced which would address this issue by clarifying that when a loan is made by a bank to a borrower, which the borrower agrees to repay, the bank, and not the fintech partner or service provider is the lender. H.R. 4439, “Modernizing Credit Opportunities Act,” introduced by Rep. Hollingsworth would resolve any uncertainty about a bank’s ability to use third-party services. OLA would encourage the Administration to support this legislation. In addition, the Administration is encouraged make full use of its resources through policy statements to stress that these relationships fall under the scrutiny of federal banking regulators as well as other regulatory avenues to support bank/fintech relationships. Reinforcement by the Administration that these relationships fall under the extensive federal supervisory regime could provide these courts with much-needed guidance on the matter. This will help to preserve the benefits of bank-fintech partnerships for consumers and the economy in general.

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valid when it was made by the bank, any fees that could be charged by the bank also can be charged by the debt buyer. In a true lender challenge, however, it is the validity of the underlying loan that is under attack, the allegation being that the loan was originated by a nonbank in violation of State law. In other words, a defendant never gets to a “valid when made” challenge, unless it first survives the “true lender” challenge.

[7] *See* Beechum v. Navient Solutions, Inc., 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016); Sawyer v. Bill Me Later, Inc., 23 F. Supp. 3d 1359 (D. Utah 2014); Discover Bank v. Vaden, 489 F.3d 594 (4th Cir. 2007) *rev'd and remanded (on other grounds)*, 556 U.S. 49 (2009); Hudson v. ACE Cash Express, Inc., 2002 WL 1205060 (S.D. Ind. May 30, 2002); Krispin v. May Dept. Stores Co., 218 F.3d 919 (8th Cir. 2000); *cf.* SPGGC, LLC v. Ayotte, 488 F.3d 525, 534 (1st Cir. 2007).

[8] *See* Consumer Fin. Protection Bureau v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016); CashCall, Inc. v. Morrisey, No. 12-1274, 2014 WL 2404300 (W. Va. May 30, 2014) *cert. denied sub nom.* CashCall, Inc. v. Morrissey, 135 S. Ct. 2050 (2015); Bankwest, Inc. v. Baker, 324 F. Supp. 2d 1333 (N.D. Ga. 2004), *aff’d*, 411 F.3d 1289 (11th Cir. 2005), *en banc review granted*, 433 F.3d 1344 (11th Cir. 2005), *vacated for mootness*, 446 F.3d 1358 (11th Cir. 2008); People ex rel. Spitzer v. County Bank of Rehoboth Beach, 846 N.Y.S.2d 436 (2007); *cf.* Commonwealth of Pa. v. Think Finance, Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016); Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190 (N.D. Cal. 2012).

To date there has been no clear-cut explanation for these varying outcomes. This creates challenges for banks, fintech firms and investors. Without certainty, these market participants may no longer be willing to enter into these types of transactions, thereby depriving banks, the economy and most importantly consumers the many benefits that bank/fintech partnerships provide.

"Valid When-Made" Court Decision

In May 2015 a panel of the Second Circuit Court of Appeals issued a ruling in the *Madden v. Midland Funding LLC*, case that valid loans made by a bank could be deemed illegally usurious loans if sold to a nonbank after the fact. This ruling contradicted the doctrine of valid-when-made as applied to lending agreements which provides that a loan that is valid at inception cannot become invalid or unenforceable according to its original terms upon its subsequent transfer to another person. This bedrock common law principle has been a cornerstone of U.S. banking law for over 100 years, providing critical legal certainty. It is central to our financial markets' ability to supply credit to individuals and small businesses.

This decision is having real-life impact on the borrowers in the Second Circuit. A Columbia-Stanford study shows that Second Circuit borrowers with credit scores under 625 have seen a 52% reduction in credit availability post-*Madden*. This potentially could affect all types of securitized debt or whole loan sales, in turn impacting access to credit and risk mitigation. As it stands, even though the FDIC and OCC have issued guidance recognizing third party lending arrangements (FIL-50), there is a lack of uniform interpretation of banking law across the country. And, while this decision only directly impacts the three states in the Second Circuit (NY, VT, CT), the lack of legal certainty has brought forward similar cases in at least one other jurisdiction.

The Obama Administration's Solicitor General and the OCC called the decision "incorrect" with "analysis reflect[ing] a misunderstanding" of section 85 of the National Bank Act and relevant Supreme Court precedent. The Solicitor General's brief further noted the Second Circuit's failure to properly consider the valid-when-made doctrine and stated that "a loan that was valid when made will not be rendered usurious by the transfer."

However, even though there has been broad agreement from the executive branch that the Second Circuit Court of Appeals got it wrong, both the Department of Justice (DOJ) and OCC have maintained that the Supreme Court should not hear *Madden*. The DOJ and the OCC's basis for this decision was that the case was not yet final and could still be reversed. However, this delay is causing actual harm to bank/fintech partnerships by impacting the availability of loans. Given the current landscape, DOJ and OCC should develop a more proactive strategy. Failing to do so will allow this unsettled area to continue to affect the health and liquidity of credit markets.

The Second Circuit's decision, if left unchallenged, will have an unsettling impact on credit markets, increasing costs and decreasing competition. This will have chilling effect on the availability of capital, impacting products and lending models built on long-settled interpretations of banking and contract law. It could also significantly disrupt the secondary markets for consumer and commercial credit, impacting a broad range of financial services providers and businesses that rely on post-sale loans originated by national- or state-chartered depository institutions.

The Madden decision is choking off access to capital, creating uncertainty for fintech companies, financial institutions and credit markets. It is important for Treasury and the appropriate bank regulators to have policies that are consistent in reaffirming that loans made by a bank are valid regardless of what entity they are transferred to. Failure to act will pose new compliance challenges to market participants and ultimately impact the liquidity of the secondary market, which is a key source of funding for many of today's consumer and small business loans.

OCC Fintech Charter

In December 2016 the OCC published a white paper discussing the issues and conditions that the agency will consider in granting special-purpose national bank charters. OLA was pleased to provide comments to the OCC on this issue and strongly supports making national bank charters available to fintech companies. Doing so would benefit both consumers and the fintech industry.

For consumers, the primary advantages would be access to a broader range of products and services. A national charter would signal to consumers that the products and services offered by fintech companies meet the same high standards as those from a traditional bank. In addition, with the ability to operate on a nationwide basis, the goals of promoting fair access and financial inclusion would be furthered because fintech-issued products and services would be offered more broadly. This would also address the unsettled legal environment created by many state court decisions mentioned previously that have called into question bank/fintech partnerships. These court actions have slowed the collaboration between traditional lenders and fintech companies, resulting in limiting competition and the development of new products.

For fintech firms, an appropriately structured national bank charter would provide a stable, predictable framework for delivering innovative and affordable products and services on a nationwide basis. In addition, the increased structure and operational discipline that results from ongoing federal oversight and examination would help encourage future growth and expansion. For those fintech firms that are subject to oversight by multiple regulators, a charter could additionally serve to alleviate existing regulatory burdens. A key component to any charter proposal is to take care that it not be structured in a manner that applies a one-size-fits-all structure. Such an approach could stifle innovation. In this regard, we strongly recommend that a national fintech charter proposal should designate an agency to serve as a facilitator to help coordinate and communicate with other federal banking regulators. A national fintech charter would promote consistently high standards for products and services offered by all national banks, regardless of whether the subject bank is engaged in full service or limited purpose activities, serving to foster a more level competitive playing field among different issuers, in addition to providing benefits to consumers.

Fintech can play a key role in fostering greater financial inclusion. Fintech firms have a strong commitment to financial inclusion and many have developed innovative technologies and products to reach consumers. Through their use of innovative algorithms and proven willingness to consider additional sources of credit information above and beyond a credit score obtained from one of the "big three" credit reporting agencies, fintech lenders promote financial inclusion. This can help provide credit access to the tens of millions of consumers who have no traditional credit history, a thin file, or a stale file with the nationwide credit houses. As Treasury looks to develop policies to support greater availability of capital it is important that these policies encourage, not compel, the development of products and services that may provide further access to underserved consumers or small businesses.

A vital component of a financial regulator's work is the enforcement of federal lending laws. Many in the fintech industry are new to the compliance policies that apply to national banks, which have a long history of being subject to a body of federal regulations and laws and have built extensive departments to support compliance efforts. Adherence to current federal lending law is a crucial component that the fintech community believes any entity that is looking to operate under a federal charter must adhere to, but it's important that care is taken not to create a regulatory regime that negatively impacts innovation.

The national banking system has flourished because of its ability to adapt to the ever-changing needs of customers and markets. If appropriately structured, the special purpose charter will benefit consumers and further the public interest by contributing to a robust, unified, and nationwide system of banks offering new and innovation products and services for the benefit of consumer and small businesses across America.

Industrial Loan Banks

Industrial Loans Banks, also called Industrial Loan Corporations (collectively, "ILCs"), are a form of insured state bank that is similar to the proposed OCC Fintech Charter in that the ownership of entities is exempt from the Bank Holding Company Act. Unlike the proposed OCC charter, an ILC is a well-settled form of regulated bank that has a lengthy history of supervision and oversight by state banking regulators, notably he Utah Department of Financial Institutions, and the FDIC. As state-chartered insured institutions, ILCs must meet the same standards as any other form of FDIC-insured bank. We note that a number of the state banks that are currently participating in lending relationships with nonbank fintech providers are ILCs.

De novo ILC formations have additionally been affected at various times by moratoria, the most recent of which was imposed by the Dodd-Frank Act and expired in 2013. As a result, no new ILCs have been approved since September 2008. In his July 13, 2016 testimony before the House Committee on Oversight and Government Reform, FDIC Chairman Martin Gruenberg recounted the many steps that the FDIC has implemented over the years to strengthen the financial viability of the ILC charter, noting that only two ILCs failed during the recent financial crisis, neither of which resulted from financial weakness at the institution's corporate parent. Moreover, incoming FDIC Chairperson Jelena McWilliams, whose nomination is awaiting confirmation by the Senate, spoke favorably of ILCs when she appeared before the Senate on January 22, 2017, noting that ILCs pose no greater risk to financial stability than traditional banks.

The creation of new ILCs has been controversial due to concerns about a potential improper mixing of banking and commerce, most notably in connection with the ILC applications respectively filed by WalMart and Home Depot in the mid-2000s. We note that no such concerns would be raised by the prospective ownership of an ILC by a nonbank fintech whose business was focused on the core banking activity of lending.

In sum, the ILC charter offers an established, safe and sound vehicle for supporting fintech lending activities. As noted above, many ILCs presently maintain relationships with nonbank fintech providers. As the latter grow in lending capacity and acquire knowledge of bank regulation as the result of such partnerships, the ability to become an ILC in their own right represents a natural progression that the Treasury Department should fully support. We recommend that the Treasury Department endorse the concept of the ILC charter and urge the FDIC to actively promote fintech companies to consider the ILC charter as a way to effectively and efficiently expand on a national basis.

Operation Choke Point

In 2011, the DOJ and FDIC set up a joint initiative called Operation Choke Point to eliminate fraud and illegal transactions from our nation's payment system. While this initiative may have had been well-intended at the outset, it ended up harming legitimately licensed businesses and had a devastating impact on entire industries that some senior agencies' personnel viewed as undesirable.

Regulatory enforcement is a key component to ensure that only lawful businesses operate in our financial markets, but when regulatory overreach results in the loss of longstanding banking relationships, that cannot be allowed. In January 2015, and again in November 2015, FDIC Chair Gruenberg issued Financial Institution Letters clarifying that regulators in his Agency were prohibited from this practice.

While some may view Operation Choke Point as a thing of the past, many bank executives still believe that the DOJ and federal bank examiners negatively view providing financial services to members of certain industries. Given these perceptions it is important to have policies in place that prohibit federal banking regulators from suggesting, requesting or ordering the termination of a banking relationship unless they have a material reason beyond reputational risk. This will ensure that in the future, legally operating businesses will have access to banking services.

Communicating that Operation Choke Point is no longer in effect and no agency or bank examiner has the authority to pursue this policy any further will assure banks that they can provide services without discriminating against certain industries. Without such action, banks' perception of "regulatory risk" will continue to negatively impact their ability to work with legitimate and profitable businesses.

Fintech Bill of Rights

The Fintech industry believes that consumers and small businesses must have financial markets that work for them. However, today many fintech firms are struggling with a mismatched regulatory structure that hampers the industry's ability to support economic growth, while leaving consumers with a loss of services, higher credit card interest rates and skyrocketing fees. This is often due to regulators who have missed the mark by creating a complex web of rules and regulation that fail to reflect the true dynamics of today's financial markets. Rather than employing proper market monitoring, this approach attempts to micromanage the financial service sector. To refocus our financial markets back on helping consumers and small businesses, OLA is advocating for a Fintech Regulatory Bill of Rights (attached). This proposal will:

- End the practice employed by some regulators of undefined inquires that bury companies in paperwork, saddling them with legal bills and hampering their ability to provide consumers and businesses with much-needed capital.
- Create an equitable process that communicates clear information on actual infractions under investigation
- Engages the entire economic ecosystem during the policy development process to allow for greater transparency that will ensure final rules and regulations do not have unintended consequences.

Adopting these principles will create a regulatory system that will provide an understandable, fair framework for the whole industry to follow, while holding entities accountable that fail to play by the rules. Most importantly the Fintech Bill of Rights will support job growth; while protecting consumers and entrepreneurs. We hope that as the Treasury Department looks to develop future policy proposals you will give strong consideration to the concepts contained in the Fintech bill of rights.

As you work to chart the agency's direction, OLA's members would like to work with you on adopting these principles that will provide an understandable system to create a regulatory framework to support job and economic growth.

If you have questions or would like additional information, I can be reached at lmcgreevy@oladc.org.

Very Truly Yours,

Lisa S. McGreevy

President and CEO

Online Lenders Alliance