The Evolving Regulatory Response to Innovation: Special Purpose National Bank Charters, Regulatory Sandboxes, and No-Action Letters

*By Robert Savoie and Philip (PJ) Hoffman**

Introduction

The application of innovative technologies to existing problems or gaps in the offering of financial services introduces the possibility of significant increases in access to credit, particularly among the underserved.[1] As financial services companies continue to innovate and strive to offer the best in financial products and services, the regulatory agencies that supervise these companies have responded in a variety of ways.

The report of the U.S. Department of the Treasury on financial technology ("fintech") and innovation ("Treasury Report")[2] makes a number of recommendations regarding how federal and state regulators can or should promote innovation. The most prominent regulatory responses to innovation to date are the special purpose national bank ("SPNB") charter introduced by the Office of the Comptroller of the Currency ("OCC"), regulatory sandboxes, and the no-action letter program of the Bureau of Consumer Financial Protection ("CFPB").

U.S. Treasury Report

The Treasury Report was prepared in response to the President's instruction to regulate the United States financial system in a manner designed to align with seven core principles that, among other things, reflect an emphasis on empowering Americans to make informed financial decisions and choices, and on mak-

* Robert Savoie is a partner at McGlinchey Stafford PLLC's Cleveland, Ohio, office. Philip (PJ) Hoffman is Director of Regulatory Affairs at the Electronic Transactions Association (www.electran.org) in Washington, D.C. One of the authors represents Upstart Network, Inc., but this survey is based solely on publicly available information.

1. *See* Press Release, Elec. Transactions Ass'n, How FinTech Is Addressing the Financial Needs of the Underserved (Sept. 2017), http://www.electran.org/new-research-finds-fintech-industry-expanding-access-to-underserved-communities/.

2. U.S. Department of Treasury, A Financial System that Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation (Aug. 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities-Nonbank-Financials-Fintech-and-Innovation_0.pdf.special-purpose-national-bank-charters-for-fintech.pdf [hereinafter Treasury Report].

ing regulation efficient and appropriately tailored.[3] Within this framework, the Treasury Report identified two major trends. First, the report observed that the financial crisis altered the environment in which banks and nonbanks provide financial services, particularly in how the increase in regulation drove banks out of certain segments of the market, thus creating opportunities for non-depository entities to offer such services.[4] Second, the report noted that a longer-term trend in the rapid development of technology enabled financial services firms to improve their operational efficiency and lower regulatory compliance costs.[5] Perhaps no statistic reflects this change more dramatically than the Treasury Report's observation that the percentage of U.S. personal loans made by technology-based firms increased from less than 1 percent of the market in 2010 to more than 36 percent in 2018.[6]

The Treasury Report includes several recommendations regarding how Congress and the regulatory agencies can promote innovation in lending. The report observed that marketplace lenders[7] are expanding access to credit for consumers and businesses in the United States, and recommended eliminating constraints brought about by court decisions that unnecessarily limit the functioning of U.S. credit markets.[8] Accordingly, the Treasury Report recommends that Congress codify the "valid when made" doctrine that was called into question by the Second Circuit's decision in *Madden v. Midland Funding, LLC*[9] and the role of banks as the alleged "true lender" in loans originated by other entities.[10] The report incorporates a series of recommendations focused on mortgage lending and servicing, as well as on student lending and servicing, designed to encourage the federal financial regulatory agencies and the U.S. Department of Education to modify the regulatory environment to remove regulatory challenges that stifle innovation and streamline the loan origination, loss-mitigation, and servicing processes.[11] The Treasury Report recommends that the CFPB repeal its payday loan rule in deference to existing state regulation and that federal and state banking regulators take steps to encourage prudent and sustainable short-term, small-dollar lending by banks.[12] These steps would remove the reg-

3. *Id.* at 3.
4. *Id.* at 4–5.
5. *Id.* at 5.
6. *Id.*
7. For a definition of "marketplace lenders," see Robert Savoie & Philip (PJ) Hoffman, *Marketplace Lending Developments: A Survey of Federal and State Issues Confronting the Industry*, 72 Bus. Law. 529, 530–31 (2017) (in the 2017 *Annual Survey*).
8. Treasury Report, *supra* note 2, at 11.
9. 786 F.3d 256 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).
10. Treasury Report, *supra* note 2, at 11; *see* Catherine M. Brennan & Latif Zeman, *True Lender Developments: Litigation and State Regulatory Actions*, 74 Bus. Law. 545 (2019) (in this *Annual Survey*).
11. Treasury Report, *supra* note 2, at 11–12.
12. *Id.* at 12; *see* Justin B. Hosie, K. Dailey Wilson, Erica A.N. Kramer & Andrea S. Cottrell, *The Walking Dead: 2018 Small-Dollar Lending Updates—Is the Small-Dollar Loan Industry Mostly Dead or Slightly Alive?*, 74 Bus. Law. 553 (2019) (in this *Annual Survey*); Justin B. Hosie, K. Dailey Wilson & Erica A.N. Kramer, *Stranger Things: Small-Dollar Lending Updates and the Arrival of a Final Rule*, 73 Bus. Law. 525, 525–27 (2018) (in the 2018 *Annual Survey*).

ulatory hurdles that currently prohibit lenders from meeting the high demand for such loans.[13]

The Treasury Report also includes several recommendations that impact on specific aspects of lending operations. It recommends that the CFPB establish minimum effective federal standards for third-party debt collectors to harmonize the requirements associated with what information must be transferred with the sale of debt.[14] It also recommends that regulators provide clarity to enable the use and testing of new credit models and the use of innovative data sets in credit underwriting, including machine-learning based algorithms.[15] It further recommends that credit bureaus be routinely supervised for compliance with federal data security requirements, but that they also be exempted from compliance with the Credit Repair Organizations Act so that they can provide credit education and counseling services to consumers to improve their credit scores prospectively.[16]

The Treasury Report made several recommendations for amendments to existing federal laws and the enactment of new ones to support the increased use of technology in financial services innovation. The report recommends that the Telephone Consumer Protection Act be amended to establish a reassigned telephone number database and to incorporate a safe harbor to grant market participants a reasonable opportunity to discover that a number has been reassigned in order to minimize the instances of inadvertent technical violations.[17] It recommended that the CFPB promulgate regulations under the Fair Debt Collection Practices Act to codify the use of reasonable digital communications without inadvertently invoking liability for communicating the existence of a debt to third parties.[18] The report recommended that the CFPB work with the consumer financial services industry to develop best practices relating to disclosures, terms, and conditions regarding data aggregation and financial account data, including the potential issuance of disclosure rules.[19] The Treasury Report also recommended that Congress enact a federal data security and breach notification law to protect consumer financial data and to notify consumers of a breach in a timely manner.[20] Such a law would employ uniform, national standards that preempt state laws and ensure that technology-neutral and scalable standards exist.[21]

13. Treasury Report, *supra* note 2, at 12.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 21; *see* Zachary D. Miller & Rachel D. Friedman, *TCPA Update: The D.C. Circuit Rules and Chaos Ensues*, 74 Bus. Law. 581 (2019) (in this *Annual Survey*); John R. Chiles, Zachary D. Miller & Rachel M. Friedman, *TCPA Regulatory and Litigation Developments: The FCC Opens the Floodgates*, 71 Bus. Law. 649, 655–53 (2016) (in the 2016 *Annual Survey*); Ralph Wutscher, Charles Ochab & Eric Tsai, *Regulation of Calls Under the TCPA: A Fog of Uncertainty Remains*, 70 Bus. Law. 563, 571–72 (2015) (in the 2015 *Annual Survey*).

18. Treasury Report, *supra* note 2, at 21.

19. *Id.* at 33.

20. *Id.* at 41.

21. *Id.*

The Treasury Report focused on one of the issues addressed in the CFPB's no-action letter program described below, the use of artificial intelligence and machine learning using new data sets and modeling, the potential benefits of which include the promise of enhanced access to credit and new products and services benefitting consumers.[22] The potential downsides include possible fair lending concerns relating to inadvertent discrimination and difficulty in complying with the adverse action notice requirements built into the federal consumer protection laws.[23]

With respect to other regulatory developments discussed below, the Treasury Report commended the OCC's SPNB charter initiative.[24] It recommended the functional creation of a unified regulatory sandbox at the federal and state level,[25] and it highlighted the importance of the CFPB's no-action letter program as a way to safely facilitate consumer-friendly innovations through the use of artificial intelligence and machine learning.[26]

OCC Special Purpose National Bank Charter

In July 2018, the OCC announced that it would begin to accept SPNB charter applications from fintech companies engaged in at least one of the three core banking functions: paying checks, lending money, or taking deposits.[27] In the OCC's view, the agency's statutory authority, regulations, and policies permit it to charter an SPNB that does not take insured deposits.[28] The OCC noted that its decision to accept applications for SPNB charters came after "extensive outreach with many stakeholders over a two-year period, and after reviewing public comments" submitted in response to OCC publications contemplating the possibility of fintech charters in December 2016 and March 2017.[29]

As discussed in the previous *Annual Survey*,[30] the Conference of State Bank Supervisors ("CSBS") and the New York Department of Financial Services ("DFS") filed suit to challenge the OCC's proposal to issue SPNB charters before the proposal became final. In its initial filing, the CSBS argued that the OCC's 2017 proposal to

22. *Id.* at 53–55.

23. *Id.* at 55–59.

24. *Id.* at 70.

25. *Id.* at 167–68.

26. *Id.* at 136.

27. Office of Comptroller of Currency, Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters 2 (July 31, 2018), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf [hereinafter OCC Fintech Policy Statement]; Office of Comptroller of Currency, Comptroller's Licensing Manual Supplement: Considering Charter Applications from Financial Technology Companies 2 (July 2018), https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf.

28. OCC Fintech Policy Statement, *supra* note 27, at 2.

29. *See* Press Release, Office of Comptroller of Currency, OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html.

30. *See* Robert Savoie & Philip (PJ) Hoffman, *Marketplace Lending and Fintech: The States Object*, 73 Bus. Law. 509, 511–13 (2018) (in the 2018 *Annual Survey*).

issue SPNB charters exceeded the authority granted to it by Congress under the National Bank Act ("NBA") and other federal banking laws to charter institutions that engage in the "business of banking."[31] The CSBS argued that to engage in the "business of banking," the NBA requires an institution, at a minimum, to receive deposits.[32] However, the CSBS suit was dismissed in April 2018 because the CSBS failed to establish any injury in fact necessary for Article III standing and the case was not ripe for judicial review.[33] In September 2018, the CSBS announced that it would again pursue litigation in opposition to the OCC's final decision to accept applications from non-depository fintech firms for SPNB charters, although it did not state when the lawsuit would be filed.[34]

The DFS lawsuit was dismissed in December 2017 on similar grounds.[35] The DFS filed a new lawsuit against the OCC in September 2018 asserting that the agency's decision to allow fintech companies to apply for SPNB charters was a "lawless" and "ill-conceived" move that would destabilize financial markets and that such companies are more effectively regulated by the state.[36] The DFS suit requested the court to declare that the OCC's decision to grant SPNB charters exceeded its statutory authority under the NBA by improperly defining the "'business of banking" to include non-depository institutions, and to enjoin the OCC "from taking further actions to implement its provisions."[37]

Regulatory Sandboxes

As traditional financial institutions and fintech companies push innovation, regulators and legislators are struggling to keep up. One key policy initiative, called a regulatory sandbox, is designed to promote innovative products that may not otherwise fit into the existing regulatory framework. A regulatory sandbox allows regulators either to waive requirements or to provide safe harbors for innovative financial products that may not fully comply with rules or guidance that are viewed as outdated or unclear. Such a policy allows innovators to test their products, subject to safeguards designed to limit the scope of risk that is introduced into the market.

The first regulatory sandbox was implemented in the United Kingdom in 2015,[38] followed quickly by other jurisdictions, including Australia,[39] Can-

31. Complaint at 8–10, Conference of State Bank Supervisors v. OCC, C.A. No. 17-0763 (D.D.C. Apr. 26, 2017).

32. *Id.*

33. Conference of State Bank Supervisors v. OCC, No. 17-cv-0763, slip op. at 16–20 (D.D.C. Apr. 30, 2018) (mem. opinion).

34. *See* Press Release, Conference of State Bank Supervisors, CSBS to Pursue Litigation Against OCC (Sept. 12, 2018), https://www.csbs.org/csbs-pursue-litigation-against-occ.

35. Vullo v. OCC, No. 17-cv-03574, slip op. at 26 (S.D.N.Y. Dec. 12, 2017).

36. Complaint at 1–2, Vullo v. OCC, No. 18-cv-08377 (S.D.N.Y. Sept. 14, 2018).

37. *Id.* at 21.

38. *See* Fin. Conduct Auth., Regulatory Sandbox (Nov. 2015), https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf.

39. *See* Australian Sec. & Inv. Comm'n, Regulatory Guide 257, Testing Fintech Products and Services Without Holding an AFS or Credit License (Aug. 2017), https://download.asic.gov.au/media/4420907/rg257-published-23-august-2017.pdf.

ada,[40] Russia,[41] Switzerland,[42] and Singapore.[43] In the United States, state and federal regulators have begun to implement and explore regulatory sandboxes.

State Legislation

While the international activity regarding regulatory sandboxes may be increasing, the complex regulatory structure in the United States has made movement on this issue significantly more fractured. According to a recent Aspen Institute paper, for domestic based sandboxes, "the most promising near-term opportunities may lie with the states."[44] Arizona was the first state to establish a regulatory sandbox program through a law enacted in March 2018.[45]

The Arizona law requires the state attorney general to "establish a regulatory sandbox program," which would require filing an application to be in the sandbox but would relieve a person who offers "innovative financial products or services" from the state's licensing requirements.[46] The program is open to companies with products that would normally require licensing from the Arizona Department of Financial Institutions, such as money transmitters, consumer lenders, debt management companies, mortgage brokers, and deferred presentment companies, and will run until July 2028.[47] Applicants must include information on the benefits and risks to consumers of using their products and how the innovation is different from other products or services available in the state.[48]

Under the sandbox program, consumer loan transactions are limited to a maximum value of $15,000 for individual loans and a total of $50,000 in aggregate loans per consumer.[49] Money transmission products and services are limited to a maximum value of $2,500 per transaction and no more than $25,000 in aggregate transactions per consumer.[50] These amounts can be increased to $15,000 per transaction and up to $50,000 in total if the company demonstrates adequate capitalization and risk management.[51]

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40. *See* Canadian Sec. Adm'rs, CSA Regulatory Sandbox (2016), https://www.securities-administrators.ca/industry_resources.aspx?id=1588.

41. *See* Cent. Bank of Russia, Launch of the Regulatory Platform of the Bank of Russia (Apr. 19, 2018), http://cbr.ru/Press/event/?id=1765.

42. *See* Swiss Fin. Mkt. Supervisory Auth. FINMA, Sandbox and Settlement Accounts (Sept. 1, 2017), https://www.finma.ch/en/news/2017/09/20170901-mm-rs-publikumseinlagen-bei-nichtbanken/.

43. *See* Monetary Auth. of Singapore, FinTech Regulatory Sandbox Guidelines (Nov. 2016), http://www.mas.gov.sg/~/media/Smart%20Financial%20Centre/Sandbox/FinTech%20Regulatory%20Sandbox%20Guidelines%2019Feb2018.pdf.

44. Schan Duff, Modernizing Digital Financial Regulation, The Evolving Role of Reglabs in the Regulatory Stack 7 (July 2017), https://assets.aspeninstitute.org/content/uploads/2017/07/Modernizing-Reglabs.pdf.

45. *See* Ariz. Rev. Stat. §§ 41-5601 to 41-5612 (2018).

46. *Id.* § 41-5602.

47. *Id.* §§ 41-5603, 41-5612.

48. *Id.* § 41-5603(F).

49. *Id.* § 41-5605.

50. *Id.*

51. *Id.*

Participants in the sandbox program must comply with all other Arizona laws, including consumer fraud and any other state laws applicable to financial products or services as determined by the attorney general.[52] Participants must provide specific disclosures to consumers before providing their products, and they are not exempt from compliance with federal consumer financial services laws but are "deemed to possess an appropriate license under the laws of this state for purposes of any provision of federal law requiring state licensure or authorization."[53]

One important feature of this law is that it authorizes the Arizona Attorney General to enter into agreements with state, federal, or foreign regulators to allow entities authorized to operate in sandboxes in other jurisdictions to be recognized as sandbox participants in Arizona.[54] This may help alleviate the financial challenge faced by companies seeking to deploy innovative products in just one state.

CFPB Actions[55]

The key to whether regulatory sandboxes will succeed in the United States is whether federal regulators, such as the CFPB, are willing to cooperate with the states to provide a workable solution for market participants. The CFPB has the authority to decide whether to coordinate with state regulators in their attempts to institute and operate regulatory sandbox programs or, on the other hand, to initiate enforcement actions against companies that are participating in such programs for failure to comply with federal regulations. As one observer stated, the CFPB has the statutory authority to "create an apparatus to give companies who want to test innovative products and services real certainty that they would not face regulatory sanction . . . create something that, while not perfect, is at least useful."[56]

Acting Director Mulvaney announced in May 2018 that the CFPB was actively working on launching a regulatory sandbox for the financial services industry in consultation with the Commodity Futures Trading Commission and some states.[57] As part of this effort, the CFPB proposed significant revisions in September 2018 to its 2013 Trial Disclosure Programs Policy, which sets forth agency standards and procedures for exempting individual companies on a case-by-case

52. *Id.* § 41-5611(C), (E).

53. *Id.* § 41-5605(E). For example, it is a federal crime to operate without a required state money transmitter license. *See* 12 U.S.C. § 1960 (2018).

54. Ariz. Rev. Stat. § 41-5611(F).

55. On December 13, 2018, the CFPB published its proposed Policy on No-Action Letters and the BCFP Product Sandbox to create a streamlined No Action Letter process and a regulatory sandbox at the federal level. No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64036 (Dec 13, 2018). This development will be addressed in next year's Annual Survey as it occurred after this article was complete and is outside the period covered in this Annual Survey.

56. *See* Brian Knight, *Could the CFPB Create Its Own Regulatory Sandbox?*, FinRegRag (July 17, 2017), https://finregrag.com/could-the-cfpb-create-its-own-regulatory-sandbox-888b19077f44.

57. *See* Neil Haggerty, *CFPB Looking to Hop on Fintech Sandbox Bandwagon*, Am. Banker (May 29, 2018), https://www.americanbanker.com/news/cfpb-looking-to-hop-on-fintech-sandbox-bandwagon-mick-mulvaney.

basis from applicable federal disclosure requirements so as to allow those firms to test trial programs.[58] The policy relied on the CFPB's authority to permit providers of consumer financial services and products "to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers."[59] The revisions were intended to address the policy's shortcomings, as the CFPB acknowledged that the policy "failed to effectively encourage trial disclosure programs: The Bureau did not permit a single such program in the nearly five years since the Policy was issued."[60]

The proposal would make several changes to the existing Trial Disclosure Programs Policy to streamline the application process and reduce the review timeframe, provide procedures for extensions of successful trial disclosure programs, and provide for coordination by the CFPB with sandbox programs offered by other regulators.[61] A related CFPB initiative was announced in August 2018 with the formation of the Global Financial Innovation Network, which is a coalition of eleven other financial regulators and related organizations in several other countries, including Australia, Singapore, and two Canadian provinces, "to provide a more efficient way for innovative firms to interact with regulators."[62]

No-Action Letters

The CFPB implemented its No-Action Letter Policy in February 2016.[63] The goal of the policy was to allow applicants that had "innovative financial products or services that promise substantial consumer benefit" to avoid "substantial uncertainty" about compliance with statutes and regulations.[64] The commentary that accompanied the publication of the policy indicated that the CFPB recognized both the potential benefits that financial innovation could bring for consumers and the risks that such technologies could simultaneously pose.[65] In recognition of the value offered by innovative technologies, the policy offered the promise of a no-action letter indicating that, upon review, the CFPB has no present intention to recommend enforcement or supervisory action with respect to

58. Policy to Encourage Trial Disclosure Programs, 83 Fed. Reg. 45574 (Sept. 10, 2018) [hereinafter 2018 Trial Disclosure Policy]; *see* Policy to Encourage Trial Disclosure Programs, 78 Fed. Reg. 64389 (Oct. 28, 2013).

59. 2018 Trial Disclosure Policy, *supra* note 57, at 45574; *see* 12 U.S.C. § 5532(e) (2018).

60. 2018 Trial Disclosure Policy, *supra* note 57, at 45574.

61. *Id.* at 45574–75.

62. Press Release, Consumer Fin. Prot. Bureau, BCFP Collaborates with Regulators Around the World to Create Global Financial Innovation Network (Aug. 7, 2018), https://www.consumerfinance.gov/about-us/newsroom/bcfp-collaborates-regulators-around-world-create-global-financial-innovation-network/.

63. Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 16, 2016) [hereinafter No-Action Letter Policy]; *see also* Press Release, Consumer Fin. Prot. Bureau, CFPB Finalizes Policy to Facilitate Consumer-Friendly Innovation (Feb. 18, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-policy-to-facilitate-consumer-friendly-innovation/.

64. No-Action Letter Policy, *supra* note 62, at 8686.

65. *Id.* at 8692, 8693.

the subject of the letter.[66] The policy stated that a no-action letter would not constitute a waiver of any law or regulation, would not grant an exemption from any laws or regulations, and would not restrict the CFPB from changing its mind at any time and subsequently initiating an enforcement action.[67] As a result, the utility of a no-action letter must be measured against the likelihood of its continuance and the possibility that state regulators might place increased scrutiny on the recipients of such letters.

As of this writing, the CFPB has issued one no-action letter, to Upstart Network, Inc. ("Upstart").[68] Upstart provided a detailed description of the following: (1) the consumer financial product involved and how it would be offered to consumers; (2) a timetable upon which the product would be offered; (3) an explanation of the benefits of the product and an explanation of how to evaluate the product; (4) a discussion of the risks posted by the product; (5) a showing of why the no-action letter was necessary and appropriate; (6) a description of the data possessed at the time of application and intended to be possessed in the future; and (7) certain other information.[69] In its description of the product, Upstart explained that its online lending platform enabled consumers with limited credit or work history to obtain credit on better terms than otherwise available.[70] This would be made possible through Upstart's proprietary underwriting system, which would enable more effective analysis of individuals with a "thin file" containing less information to evaluate than those of other consumers.[71] Upstart's underwriting methodology used advanced computer modeling that captured more information than traditional underwriting, particularly for consumers with shorter credit histories, a category that is shown as less creditworthy under traditional credit scoring systems.[72] The underwriting framework was based upon a combination of traditional underwriting factors, such as a credit score, along with other variables.[73]

Upstart's application stated that it was already offering its product and using its underwriting methodology when it submitted its no-action letter application.[74] Upstart requested the no-action letter, in part, due to difficulty raising capital in light of underwriting methodological concerns regarding compliance with the Equal Credit Opportunity Act ("ECOA").[75] The application explained that use of Upstart's underwriting methodology demonstrated the ability to consistently offer loans at lower interest rates to many consumers who otherwise

66. *Id.* at 8692.

67. *Id.* at 8690, 8695.

68. Press Release, Consumer Fin. Prot. Bureau, CFPB Announces First No-Action Letter to Upstart Network (Sept. 14, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/.

69. *See* Upstart Network, Inc., Request for a No-Action Letter, https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf (last visited Jan. 19, 2019).

70. *Id.* at 1.

71. *Id.*

72. *Id.* at 3.

73. *Id.* at 1.

74. *Id.* at 6.

75. *Id.*

were unable to obtain loans at favorable interest rates from traditional sources, particularly those with shorter credit histories.[76] To support this assertion, Upstart compared the results from relying exclusively on traditional underwriting factors with the results of its innovative underwriting approach.[77] The data reflected a consistently more favorable reduction in the interest rates for loans using Upstart's approach.[78] The data also allowed Upstart to continually evaluate and improve its methodology.[79]

Motivating its request for the letter was Upstart's particular concern with the anticipated evolution of its underwriting methodology and changes to the pool of loan applicants, uncertainty regarding how to apply ECOA principles, and what actions could be taken to prevent, mitigate, or remedy any potential discrimination.[80] In defense of its product, Upstart highlighted extensive testing designed to discover any potential disparate impact on protected classes of borrowers, its willingness to provide full access to these data to the CFPB, and its willingness to take any necessary corrective action during the term of the no-action letter.[81] Upstart also stated that there was no available method to mitigate the uncertainty surrounding its methodology other than through a no-action letter.[82]

The CFPB issued its no-action letter to Upstart in September 2017.[83] The letter stated that the CFPB's staff had no present intention of recommending an enforcement or supervisory action against Upstart arising from the application of the ECOA to Upstart's automated model for underwriting applicants for unsecured, non-revolving credit.[84] The no-action letter was effective for a three-year period, but is subject to renewal at Upstart's request.[85]

76. *Id.* at 6–7.
77. *Id.* at 7–8.
78. *Id.*
79. *Id.*
80. *Id.* at 9.
81. *Id.*
82. *Id.* at 10.
83. Christopher M. D'Angelo, Assoc. Dir. for Supervision, Enf't & Fair Lending, Consumer Fin. Prot. Bureau, to Thomas P. Brown, Upstart Network, Inc. (Sept. 14, 2017), https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf.
84. *Id.* at 1.
85. *Id.*