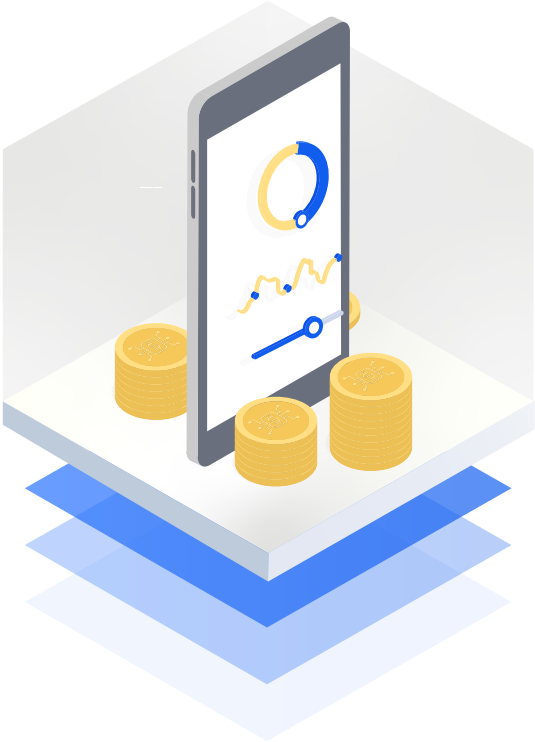

FINTECH

AND DIGITAL ASSETS

Technology is revolutionizing the financial industry at a remarkable rate. The way we transact, save, bank, and shop have significantly evolved because of technological innovations in the financial services sector.

The Chamber has established a robust FinTech effort that brings together traditional financial institutions and new entrants to the marketplace with the goals of better understanding the FinTech ecosystem and educating policymakers. Today's financial services are not limited by country or state borders and no longer exist within the confines of brick and mortar branches. The rapid rate of change coupled with the potential benefits of FinTech innovation make it critical that companies have clear standards to follow. Failure or hesitation to act would have detrimental impacts on innovation.

It is critical that policymakers in the U.S. quickly move to update rules and regulations. Other countries are quickly moving to update their rules, and the U.S. runs the risk of falling behind. The U.S.—drawing on its entrepreneurial values and access to capital for bold ideas—has always been known as an incubator of innovation. There are numerous opportunities for new technology, partnerships, and other innovations that will expand access to and improve the experience with financial products and services for consumers and businesses.

During this time of rapid innovation, the Chamber is pleased to see collaboration between multiple regulators and innovative approaches to solve complex problems. The FinTech revolution is just beginning, and policymakers should remain focused on achieving its vision.

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OCC AND FDIC: UPHOLD VALID WHEN MADE PRINCIPLE

The National Bank Act is intended to facilitate a national credit market. This has the effect of permitting market competition and providing consumers access to a broad range of affordable credit options. National banks are clearly authorized to transfer the loans they make to facilitate this national market. However, a recent legal decision has called this into question.

In *Madden v. Midland Funding (2015)*, the Second Circuit Court ignored the longstanding "valid when made" doctrine when it held that an assignee of a valid credit card agreement violated state usury laws when attempting to collect on the agreement. The Second Circuit thereby overturned marketplace expectations, and legal precedent, thus creating enormous confusion that is hurting consumers—and that persists almost five years later.

The OCC and FDIC issued regulations in 2020 that codify the "valid when made" doctrine and clarify that the interest rate on a loan originated by a national bank or federal savings association, if permissible at the time of origination, will continue to be a permissible and enforceable term of the loan following a sale, transfer, or assignment of the loan, regardless of whether the third-party debt buyer is a federally chartered bank. However, while these regulations are an important step for clarifying the law, there is still legal uncertainty that must be resolved by Congress or the courts.

ACTION: Policymakers should support the "valid when made" doctrine in order to provide certainty to credit providers and borrowers.

OCC: UPHOLD TRUE LENDER PRINCIPLE

Banks frequently partner with nonbank businesses that specialize in loan origination. This partnership has been challenged in some legal proceedings by questioning which entity—the bank funding the loan or the nonbank partner—is the "true lender" when a bank makes a loan and then sells the loan to a nonbank. Courts have taken on the questions in individual cases, but it's not clear what legal framework applies if there is uncertainty regarding the true lender.

In June 2020, the OCC issued a proposed rule establishing a clear test to determine when a national bank or federal savings association makes a loan and is the true lender in the context of a partnership between a bank and a third party. In October 2020, they finalized the rule.

ACTION: Policymakers should support banks partnering with nonbanks to fund loans that expand access to credit by upholding the True Lender rule finalized by the OCC.

CONGRESS: MODERNIZE E-NOTARIZATION RULES

The ability to notarize documents when the signature is witnessed in a virtual setting is currently subject to a complex patchwork of state laws, making it more difficult to complete the myriad legal documents, including those necessary to secure a loan such as a mortgage. Additionally, obtaining notarized spousal consent for retirement plan distributions has been challenging given the delayed and expiring relief granted by the Internal Revenue Service (IRS). For example, real estate closings increasingly involve parties that are not physically in the same city or state as the property they are buying or selling. When this occurs, a complex choreography takes place to get wet signatures on hard copies of important documents that are necessary to complete the transaction. These challenges have long existed but have recently been made even more evident to consumers during the COVID-19 crisis and the imposition of social distancing requirements.

The Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act (S. 3533 and H.R. 6364–116th) would establish minimum standards for electronic and remote notarization and require states to recognize notarizations performed by a notary public commissioned by another state. The legislation also includes consumer protections requiring tamper-evident technology in electronic notarizations and provides fraud prevention through use of multifactor authentication. These important updates will ensure that lenders can close loans in a way that keeps consumers safe from harm, is consistent across the U.S., and results in a security instrument that will be accepted and recorded by all recording offices.

ACTION: Congress should enact the SECURE Notarization Act of 2020 (S. 3533/H.R. 6363–116th).

CONGRESS: MODERNIZE E-SIGN RULES

The Electronic Signatures in Global and National Commerce Act (E-SIGN) allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent. The E-SIGN Act currently requires consumer consent "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information." This reasonable demonstration requirement is an impractical impediment to realizing the benefits of the E-SIGN Act by requiring consumers who request to engage digitally with companies, such as online banking, to jump through additional hoops. In June 2020, when financial firms such as credit card servicers were attempting to provide flexibility to consumers during the height of the economic uncertainty of the COVID-19 pandemic, the CFPB issued a statement on supervisory practices noting, "Obtaining E-Sign consent may thus delay assistance to consumers seeking relief."

These consumer protections for electronic documentation and signatures may have been reasonable when the law was enacted in 2000, but significant improvements in technology and advances in consumer behavior now need to be recognized.

The E-SIGN Modernization Act (S. 4159–116th) would eliminate the "reasonable demonstration" requirement that documents can be accessed in a non-electronic format.

ACTION: Congress should enact the E-SIGN Modernization Act of 2020 (S. 4159–116th).

FEDERAL FINANCIAL REGULATORS: CREATE AND COORDINATE FINANCIAL INNOVATION OFFICES

Government bureaucracy can be difficult to navigate, even for the most sophisticated companies. Communicating with a regulator—that has the authority to determine if a business succeeds or fails—can be an especially daunting experience, even for companies that believe they are following the law. Receiving regulatory approval can be difficult for an established company but is generally more difficult for startups that are less familiar with the law and unstated expectations. This environment unnecessarily inhibits innovation, especially in the highly regulated financial services industry. Many financial regulators have begun to recognize these issues—and some have created new offices or dedicated policy initiatives—but more must be done to promote innovation and market competition.

ACTION: Each financial regulator should establish a dedicated office with the necessary resources to understand updates in financial technology, identify products and services that improve consumer experience and market competition, and advise leadership on the appropriate amendments to regulation.

ACTION: Each financial innovation office should institute a process for regular coordination among each other office in order to prevent standards that unintentionally conflict.

SOCIAL SECURITY ADMINISTRATION: PREVENT SYNTHETIC IDENTITY THEFT

Synthetic identity theft—which involves the use of stolen Social Security Numbers (SSNs) to create fictitious "synthetic" credit reports, which are ultimately used to open new credit lines—is a growing issue in the U.S. Most often, the victims are minors or other consumers with no or very thin credit histories. It is estimated that total annual losses from synthetic identity fraud are $6 billion.

Bipartisan legislation—the Protecting Children from Identity Theft Act—was enacted in 2018 that requires the Social Security Administration (SSA) to develop a database to facilitate the verification of consumer information upon request by a certified financial institution. The verification is provided only with the consumer's consent and in connection with specific types of financial account openings or transactions. The SSA has been working with future users of the system and has begun an initial pilot program to test and scale the system. However, SSA has been hesitant to ensure the system meets the technical requirements of the financial industry, which will limit its ability to protect consumers.

To ensure that the system the SSA is building meets congressional expectations and can serve as a model for other federal agencies to emulate, it is critical that the SSA be more flexible and collaborative during development with the future users of the system. The SSA has been reluctant to discuss many of the critical baseline technologies that should be implemented—such as industry-standard "fuzzy logic" capabilities that would provide users more precise information to help spot fraud.

ACTION: The SSA should move quickly to operationalize the database for all legally eligible users and embrace a more forward-looking approach to the SSN verification system.

SEC AND CFTC: PROTECT SOURCE CODE AND INTELLECTUAL PROPERTY

Congress should require the SEC and CFTC to provide more stringent safeguards for the intellectual property imbedded in source code that underlies trading algorithms. Nearly the entire value of some companies is embodied in its source code. We need to have strong safeguards in place to prevent negligent or inappropriate action by bad actors at regulators so companies maintain the confidence their intellectual property will be protected.

ACTION: Congress should adopt legislation that requires the SEC and CFTC to obtain a subpoena before a person can be compelled to produce or furnish source code, including algorithmic trading source code or similar intellectual property.

CLARIFY REGULATORY TREATMENT OF DIGITAL ASSETS

There has been considerable growth in the marketplace for digital assets spurred by technological innovation. Digital assets that are pecuniary in nature include, for example, stable coins, digital currencies, and in some cases investment contracts. The market has recognized the possible benefits of digital assets—including lower transaction costs—and has expressed a clear interest for this marketplace to grow. However, the regulatory framework has not kept up with the technological advances that underpin digital assets.

Innovators oftentimes are unsure what regulatory framework a digital asset falls under. This regulatory uncertainty makes it difficult to bring new products to market. The interpretation of existing laws by regulators has also dampened innovation. For example, the SEC has taken an approach that relies more heavily on enforcement actions than stating clear rules of the road. This not only makes it difficult for firms to operate for fear of an enforcement action, but also means they need to try to interpret enforcement actions against other firms—instead of clear rules of the road—to determine if they are in compliance with applicable securities laws, or need to be in compliance with them at all if the firm is not offering an investment contract. The SEC has relied on the Howey Test, which refers to a 1946 ruling by the Supreme Court that does not befit decentralized transactions, to guide its legal analysis and enforcement actions.

ACTION: Regulators should construct a reasonable categorization of digital assets to identify the jurisdictional boundaries of disparate regulatory regimes.

ACTION: The SEC should provide greater clarity concerning when a digital asset is or is not a security. This process could start with recognizing that, if the predominant purpose for a digital asset is to allow its holders to access a good or service, then the digital asset should not be treated as a security, consistent with longstanding jurisprudence under the Howey Test.

ACTION: The SEC should fashion an approach that allows sponsors to distribute their digital assets so long as there is a well-articulated path toward achieving decentralization in order to avoid inappropriate categorization as an investment contract.