

August 3, 2020

Chief Counsel's Office  
Office of the Comptroller of the Currency  
Department of the Treasury  
400 7th Street SW Suite 3E-218  
Washington, D.C. 20219

RE: Advance Notice of Proposed Rulemaking - National Bank and Federal Savings Association Digital Activities [Docket ID OCC-2019-0028; RIN 1557-AE74; 85 FR. 40827]

Dear Chief Counsel Gould:

As the Office of the Comptroller of the Currency (OCC) reassesses digital activities permitted by national banks and federal savings associations (hereinafter referred to collectively as “national banks”), the undersigned civil rights and racial justice advocates write to urge the OCC to heed concerns regarding disparate impact, “predatory inclusion,”<sup>1</sup> “digital redlining,”<sup>2</sup> and the “color of surveillance.”<sup>3</sup> We urge the OCC to adopt a precautionary approach to digital banking activities, refraining from assuming these activities are similar to those already permitted via regulations, or that they should be permitted at all.<sup>4</sup>

While technology and financial technology (fintech) companies may have adopted tools that ostensibly grant them a competitive edge over national banks, many of these tools merit skepticism from regulators. Without appropriate civil rights protections in place, consumers from certain communities will not be able to equitably participate in our national banking system.<sup>5</sup>

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<sup>1</sup> Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 199-200 (2017) (describing the targeting of mortgagors and students who borrow to purchase homes or education as “predatory inclusion.”).

<sup>2</sup> See, e.g., *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Dr. Christopher Gilliard, PhD), available at <https://democrats-financialservices.house.gov/UploadedFiles/HHRG-116-BA00-Wstate-GilliardC-20191121.pdf> (arguing “digital redlining” is the creation and maintenance of technology practices that further entrench discriminatory practices against already marginalized groups).

<sup>3</sup> See, e.g., Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016), [http://www.slate.com/articles/technology/future\\_tense/2016/01/what\\_the\\_fbi\\_s\\_surveillance\\_of\\_martin\\_luther\\_king\\_says\\_about\\_modern\\_spying.html](http://www.slate.com/articles/technology/future_tense/2016/01/what_the_fbi_s_surveillance_of_martin_luther_king_says_about_modern_spying.html) (analyzing the racist history of surveillance in the United States); *The Color of Surveillance: Monitoring of Poor and Working People*, GEO. L. CTR. ON PRIVACY & TECH. (NOV. 17, 2019), <https://www.law.georgetown.edu/privacy-technology-center/events/color-of-surveillance-2019/> (for additional reading on this subject matter).

<sup>4</sup> See OCC Docket ID OCC-2019-0028, 85 Fed. Reg. 40827 (July 7, 2020), <https://www.federalregister.gov/documents/2020/07/07/2020-13083/national-bank-and-federal-savings-association-digital-activities>.

<sup>5</sup> This is already the case and the existing unfair treatment is bad enough. See, e.g., Faith Karimi, *A 911 call, a racial slur, a refusal to cash a check. This is what it's like for some Black bank customers*, CNN (July 2, 2020), <https://www.cnn.com/2020/07/02/us/banking-while-black-racism-trnd/index.html> (“Banking while Black is another entry in an ever growing list of people calling the police on African Americans doing everyday things.”).

Overall, we are concerned that new kinds of “data processing” proposed by national banks may meet the low standard of permitted activity — providing “anything of value in banking and financial decisions” — but still harm consumers, especially consumers of color, and our national banking system as a whole.<sup>6</sup>

We strongly urge the OCC to take the following issues into account:

### **New Digital Banking Activities Threaten Our Civil Rights and Can Lead to Disparate Impact**

As national banks increasingly enter into partnerships with technology companies and adopt new tools themselves, we maintain deep concerns regarding their use of artificial intelligence and predictive analytics for marketing, loan underwriting and monitoring, and the pricing of products and services.

Data analytics can potentially benefit individual consumers, especially consumers who have a “thin file” or no file on record with a traditional credit reporting agency.<sup>7</sup> However, use of data analytics also stands to worsen existing disparities.<sup>8</sup> In light of the way that exploitation of unbanked and underbanked communities of color is baked into our financial system, even national bank plans for greater “financial inclusion” demand careful scrutiny.<sup>9</sup> Too often, promises of technological empowerment yield “predatory inclusion” — a process whereby financial institutions offer needed services to specific classes of users, but on exploitative terms that limit or eliminate their long-term benefits.<sup>10</sup>

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<sup>6</sup> See 12 C.F.R. § 7.5006.

<sup>7</sup> National Bureau of Economic Research, The Role of Technology in Mortgage Lending, Working Paper 24500, April 2018 available at [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr836.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr836.pdf).

<sup>8</sup> See, e.g., Carol Evans, Board of Governors of the Federal Reserve System, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP Risks*, Consumer Compliance Outlook (Second Issue 2017) 4 (“[T]he fact that an algorithm is data driven does not ensure that it is fair or objective.”); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Lauren Saunders, Assoc. Dir., Nat’l Consumer Law Center), available at <https://www.nclc.org/images/pdf/cons-protection/testimony-lauren-saunders-data-aggregator-nov2019.pdf> (discussing fintech and the Equal Credit Opportunity Act); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Dr. Seny Kamara, Assoc. Prof., Dept. of Comp. Sci., Brown Univ.), available at <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-kamaras-20191121.pdf> (“[Algorithmic bias] is a serious concern in the context of the Equal Credit Opportunity Act and the Fair Housing Act, both of which prohibit discriminatory lending practices”); Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 *FORDHAM L. REV.* 499, 505, 517–21 (2019) (arguing fintech firms may “hardwire predatory inclusion” into financial markets for the “next several generations”).

<sup>9</sup> See, e.g., NAT’L CONSUMER LAW CTR., PAST IMPERFECT: HOW CREDIT SCORES AND OTHER ANALYTICS “BAKE IN” AND PERPETUATE PAST DISCRIMINATION 2, (2016), [http://www.nclc.org/images/pdf/credit\\_discrimination/Past\\_Impерfect050616.pdf](http://www.nclc.org/images/pdf/credit_discrimination/Past_Impерfect050616.pdf) [<https://perma.cc/S8ED-WTDR>].

<sup>10</sup> See Seamster & Charron-Chénier, *supra* note 1.

In general, many longer-term loans originated based on alternative data are marketed toward “underbanked” low and moderate income families, but carry extremely high interest rates and are made with little regard for the borrower’s ability to repay the loan while meeting other expenses.

Creditworthiness is often determined by a black box of algorithms that assesses our 'digital character' in an opaque manner.<sup>11</sup> Firms using algorithmic technologies may analyze this data and make decisions in a manner that perpetuates discrimination.<sup>12</sup> In theory, facially neutral algorithms mitigate the risk that consumers will face intentional discriminatory treatment based on protected traits such as race, gender, or religion.<sup>13</sup> But evidence demonstrates that their data sets are often incomplete or inaccurate, and that discriminatory outcomes can result from use of data that correlates with race.

Creditors using alternative data may run afoul of credit discrimination laws if use of that data leads to disparate outcomes. The Equal Credit Opportunity Act (ECOA) prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, and other factors.<sup>14</sup> The Fair Housing Act (FHA) prohibits discrimination in the sale, rental or financing of dwellings and other housing-related activities on the basis of race, color, religion, national origin, sex, disability or familial status.<sup>15</sup> Both statutes prohibit policies or practices that have a disproportionately negative impact on a protected class even though the creditor has no intent to discriminate and the practice appears neutral on its face.

Much like the factors that drive the disparities in traditional credit scores, the new sources of data reflect deeply ingrained structural inequalities in employment, education, housing and economic opportunity.<sup>16</sup> Geolocation data reflects deeply entrenched racial and ethnic segregation in housing. Even seemingly neutral variables, when used alone or in combination, can correlate with race, ethnicity and other prohibited factors. Learning algorithms, processing large volumes of information, will likely pick up subtle but statistically significant patterns that

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<sup>11</sup> See Tamara K. Nopper, *Digital Character in the "Scored Society": FICO, Social Networks, and the Competing Measurements of Creditworthiness*, in CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 170, 170-188 (Ruha Benjamin ed., 2019), (coining and analyzing the concept of “digital character”).

<sup>12</sup> See, e.g., Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 13 (2014).

<sup>13</sup> See Alex P. Miller, *Want Less-Biased Decisions? Use Algorithms*, HARV. BUS. REV. (July 26, 2018), <https://hbr.org/2018/07/want-less-biased-decisions-use-algorithms> [<https://perma.cc/8PFS-4MGE>].

<sup>14</sup> 15 U.S.C. §§ 1691 et seq. The ECOA applies to consumer and commercial credit.

<sup>15</sup> 42 U.S.C. §§ 3601 et seq.

<sup>16</sup> See NAT'L CONSUMER LAW CTR., *supra* note 9 (noting African American, Latinx, and Asian consumers have lower credit scores as a group than whites).

correlate with race and other protected characteristics and replicate existing bias.<sup>17</sup> Machine learning algorithms may also analyze variables that engineers did not intend them to analyze.<sup>18</sup> Overall, patterns in alternative credit data can be mined to extract race, ethnicity or other protected characteristics and produce discriminatory outcomes.

Any data used for credit decisions must comply with the ECOA and the Fair Credit Reporting Act (FCRA), which at a minimum mandate that the data used be accurate and predictive of creditworthiness.<sup>19</sup> Yet Big Data's records are often inaccurate. For example, an examination of consumer reports generated by eBureau, which has since been acquired by TransUnion, revealed that the underlying information used to assess income and education level was incomplete and primarily gathered without the consumer's knowledge.<sup>20</sup> Moreover, these reports provided no definitive guidance or explanation of how they measure creditworthiness.

The use of alternative data combined with sophisticated algorithms, especially machine learning algorithms, in online marketing and underwriting also raises concerns regarding price discrimination, redlining and steering. Steering occurs online when a consumer is directed towards or away from a loan product or feature because of his race, gender or other prohibited characteristic, rather than based on an applicant's need or other legitimate factor.<sup>21</sup> For example, a creditor may steer limited English proficient (LEP) consumers to a different range of products than non-LEP borrowers.<sup>22</sup> Digital redlining occurs when a creditor provides unequal access to credit or unequal terms of credit based on prohibited characteristics.<sup>23</sup> Data-driven marketing that targets consumers based on prohibited characteristics may engage both forms of discrimination.

Alternative data and analytics have enabled creditors to target people of color and those living in low-income neighborhoods with high-cost loans, including payday loans and subprime mortgages.<sup>24</sup> Such algorithmic profiling also leads to online price discrimination, raising the

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<sup>17</sup> See Moritz Hardt, *How Big Data is Unfair, Understanding Unintended Sources of Unfairness in Data Driven Decision Making*, MEDIUM (Sept. 26, 2014), <http://www.cs.yale.edu/homes/jf/HardtHowBigDataIsUnfair.pdf>; Andrew Selbst, *A New HUD Rule Would Effectively Encourage Discrimination by Algorithm*, SLATE (Aug. 19, 2019), <https://slate.com/technology/2019/08/hud-disparate-impact-discrimination-algorithm.html>.

<sup>18</sup> Johnson et. al., *supra* note 8 at 510.

<sup>19</sup> ECOA, 15 U.S.C. § 1691 et seq.; FCRA, 15 U.S.C. § 1681 et seq.

<sup>20</sup> NAT'L CONSUMER LAW CTR., *BIG DATA, A BIG DISAPPOINTMENT FOR SCORING CONSUMER CREDITWORTHINESS* 18, (2014), <https://www.nclc.org/issues/big-data.html>.

<sup>21</sup> Carol Evans, Board of Governors of the Federal Reserve System, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook (Third Issue 2019) at 4.

<sup>22</sup> See Consumer Financial Protection Bureau, Supervisory Highlights, Issue 13 (Oct. 2016), [http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory\\_Highlights\\_Issue\\_13\\_Final\\_10.31.16.pdf](http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13_Final_10.31.16.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> Comment from Nathan Newman, Research Fellow, New York Univ. Information Law Institute, to FTC (Aug. 2014), [https://www.ftc.gov/system/files/documents/public\\_comments/2014/08/00015-92370.pdf](https://www.ftc.gov/system/files/documents/public_comments/2014/08/00015-92370.pdf).

price of goods and services for consumers in low-income, less technologically-enabled households. HUD's action against Facebook highlighted the discriminatory impact of these targeted advertising and marketing practices. The data used to target Facebook users was unwittingly provided through the actions of users, and those associated with them, on and off the platform.<sup>25</sup> Such behavioral data enabled Facebook to classify users based on protected characteristics and invited advertisers to discriminatorily target or exclude housing-related ads to users based on these imputed protected traits.

Concerns about this form of discrimination extend beyond underwriting to how credit is priced. For example, consumers may be directed to subprime credit cards even though they could qualify for more competitive rates, based on personal characteristics. In the mortgage context one study noted that fintech lenders reduced but did not erase discriminatory lending patterns, particularly with respect to the pricing of loans.<sup>26</sup> Latinx and African American borrowers paid 7.9 and 3.6 basis points more in interest for home purchase and refinance mortgages respectively because of discrimination. These magnitudes represent 11.5% of lenders' average profit per loan.<sup>27</sup>

Additionally advocates are concerned about the lack of transparency inherent in many of the machine learning models that limit disclosure of the justification for credit based decisions. The ECOA and FCRA notice provisions require that creditors provide credit applicants with notices stating the reasons for credit denial or for taking other adverse actions on an application. These notices may provide clues to help uncover whether the creditor's decision was in fact, discriminatory.

The ECOA notice requirement was designed to fulfill the dual goals of consumer protection and education.<sup>28</sup> Regulation B, which implements ECOA, requires creditors to provide a statement of specific reasons for the action taken or a disclosure of the applicant's right to request a statement of such reasons, with the name, address, and telephone number of the person or office from which the statement of reasons can be obtained.<sup>29</sup> The reasons disclosed must relate to and accurately describe those factors actually reviewed, considered, or scored.<sup>30</sup> No factor that was a principal reason for the adverse decision may be excluded, even if the relationship of that factor to creditworthiness may not be clear to the applicant.<sup>31</sup>

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<sup>25</sup> HUD v. Facebook, Charge of Discrimination, FHEO No. 01-18-0323-8 at paragraph 12.

<sup>26</sup> Robert Bartlett, Adair Morse, et al., *Consumer Lending Discrimination in the Fintech Era*, National Bureau of Economic Research, Working Paper 25943 (June 2019), <https://www.nber.org/papers/w25943>.

<sup>27</sup> *Id.*

<sup>28</sup> *Fischl v. Gen. Motors Acceptance Corp.*, 708 F.2d 143, 146 (5th Cir. 1983).

<sup>29</sup> Reg. B, 12 C.F.R. § 1002.9(a)(3)(i)(B). *See also* *Curley v. JP Morgan Chase Bank*, 2007 WL 1343793 (W.D. La. May 7, 2007) (discussing the provision), *aff'd*, 261 Fed. Appx. 781 (5th Cir. 2008).

<sup>30</sup> Official Interpretations of Reg. B, 12 C.F.R. pt. 1002, supp. I, § 1002.9(b)(1)-2.

<sup>31</sup> *Id.* at § 1002.9(b)(2)-4.

The notices required by Regulation B raise fundamental transparency issues. Under Regulation B, consumers are statutorily entitled to know what type of information is being used to assess them and how that information is being used. However where complex algorithms are used based not on standard underwriting factors, but rather unknown alternative data, it is impossible to know exactly what factors were used and how they were used to determine a consumer's creditworthiness. Opaque algorithms which fail to apprise a consumer of the specific and accurate reasons for the credit denial undermine the legislative intent of ECOA and could lead to discriminatory conduct by creditors. Artificial intelligence and machine learning must not be used to reinforce existing discriminatory conduct.<sup>32</sup>

### **National Banks and National Bank Charter Applicants Are Not Immune from Financial Inclusion Concerns**

Existing partnerships between national banks and surveillance-based technology companies have already raised civil rights concerns. For instance, the new Apple Card — offered in partnership with Goldman Sachs — is currently the subject of a New York State investigation for gender discrimination complaints.<sup>33</sup> Amazon now offers credit cards in tandem with Synchrony Bank, formerly GE Capital Retail Bank, which the Consumer Financial Protection Bureau (CFPB) ordered to provide an estimated \$225 million in relief to consumers harmed by illegal and discriminatory credit card practices.<sup>34</sup> A new checking account partnership between Google and Citibank has drawn criticism from privacy advocates, who argue Google wants to sell or share financial data for targeted advertisement or other purposes.<sup>35</sup>

The history of the financial technology companies that have applied or intend to apply directly for national bank charters contributes to these concerns. The OCC has now granted a national bank charter to private equity-funded mobile banking start-up Varo Money.<sup>36</sup> Varo aspires to become the “first national bank in American history designed for people who want to bank on their smart phones.”<sup>37</sup> When Varo first applied for a charter, the National Community

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<sup>32</sup> For a list of studies, see NAT'L CONSUMER LAW CTR., *supra* note 9.

<sup>33</sup> Neil Vigdor, *Apple Card Investigated After Gender Discrimination Complaints*, N.Y. TIMES (Nov. 10, 2019), <https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html>.

<sup>34</sup> Kate Rooney, *Amazon launches a credit card for the 'underbanked' with bad credit*, CNBC (Jun. 10, 2019), <https://www.cnbc.com/2019/06/10/amazon-launches-a-credit-card-for-the-underbanked-with-bad-credit.html>; CFPB, CFPB Orders GE Capital to Pay \$225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices (Jun. 19, 2014), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/>.

<sup>35</sup> John Constine, *Leaked pics reveal Google smart debit card to rival Apple's*, TECHCRUNCH (April 17, 2020), <https://techcrunch.com/2020/04/17/google-card/>.

<sup>36</sup> Payne Lubbers, *Varo Becomes First Consumer Fintech to Land a National Bank Charter*, BLOOMBERG (July 31, 2020), <https://www.bloomberg.com/news/articles/2020-07-31/varo-becomes-first-consumer-fintech-to-land-a-national-charter>.

<sup>37</sup> David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1434 (2020).

Reinvestment Coalition (NCRC) responded with a nine-page comment outlining how the bank would not meet Community Reinvestment Act (CRA) priorities.<sup>38</sup> The OCC ultimately approved Varo even though it failed to appropriately delineate locally-based assessment areas for CRA examination.<sup>39</sup>

Social Finance (SoFi) has also applied for a national bank charter a *second time*.<sup>40</sup> The company pulled its previous application after former CEO Mike Cagney announced he would resign due to allegations of sexual harassment and skirting risk and compliance controls.<sup>41</sup> SoFi uses an underwriting model that examines free cash flow, professional history and education in addition to a history of bill payment to evaluate debtors. As recently as 2019, the Federal Trade Commission (FTC) approved a final consent order with SoFi, resolving allegations that it misrepresented how much money student loan borrowers have saved or will save from refinancing their loans with the company.<sup>42</sup> SoFi has also been the target of a class action lawsuit alleging it systematically denied and limited access to lending and refinancing opportunities for participation in the federal Deferred Action for Childhood Arrivals (DACA) program.<sup>43</sup> Finally, consumer and racial justice advocates opposed SoFi's previous proposal for an Industrial Loan Charter (ILC), arguing its CRA plan baldly proposed serving low-and-middle income (LMI) consumers with substandard products.<sup>44</sup>

We are especially concerned because the OCC has recently failed to hold banks accountable with respect to discrimination. It is our understanding that at least six investigations into discriminatory mortgage “redlining” have been halted or stalled — against staff recommendations — under OCC leadership over the past four years.<sup>45</sup> Despite requests from several organizations, the OCC has declined to meaningfully explore more serious consequences

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<sup>38</sup> See Office of the Comptroller of the Currency, Conditional Approval No. 1205 2 (Sept. 2018), <https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2018/ca1205.pdf> [<https://perma.cc/6W5H-8MET>].

<sup>39</sup> Letter from NCRC to OCC (Nov. 8, 2018), [https://ncrc.org/ncrc-comments-regarding-advance-notice-of-proposed-rulemaking-docket-id-occ-2018-0008-reforming-the-community-reinvestment-act-regulatory-framework/#\\_edn33](https://ncrc.org/ncrc-comments-regarding-advance-notice-of-proposed-rulemaking-docket-id-occ-2018-0008-reforming-the-community-reinvestment-act-regulatory-framework/#_edn33).

<sup>40</sup> Dan DeFrancesco, *SoFi just filed an application for national banking charter*, BUSINESS INSIDER (July 10, 2020), <https://www.businessinsider.com/sofi-files-application-national-bank-charter-fintech-with-occ-2020-7>.

<sup>41</sup> Katie Brenner & Nathaniel Popper, *Chief Executive of Social Finance, an Online Lending Start-Up, to Step Down*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/technology/sofi-mike-cagney-sexual-harassment.html>.

<sup>42</sup> Press Release, FTC, FTC Approves Final Order with SoFi (Feb. 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-approves-final-order-sofi>.

<sup>43</sup> Press Release, Lawyers for Civil Rights, *DACA Discrimination Class Action Against Online Lender* (May 19, 2020), <http://lawyersforcivilrights.org/our-impact/economic-justice/daca-recipient-files-discrimination-class-action-against-major-online-lender/>.

<sup>44</sup> See Letter from Ams. for Fin. Reform to FDIC (July 19, 2017), <https://ourfinancialsecurity.org/2017/07/letter-regulators-af-r-opposes-sofis-deposit-insurance-application/>.

<sup>45</sup> Patrick Rucker, *Trump Financial Regulator Quietly Shelved Discrimination Probes Into Bank of America and Other Lenders*, PROPUBLICA (July 13, 2020), <https://www.propublica.org/article/trump-financial-regulator-quietly-shelved-discrimination-probes-into-bank-of-america-and-other-lenders>.

for Wells Fargo’s violations of federal banking laws, including its steering of Black and Latinx borrowers into subprime loans.<sup>46</sup> We also remain concerned that the recently proposed rule regarding the true lender doctrine will only exacerbate the possibility of predatory lending.<sup>47</sup> Given the OCC’s record, why should communities of color or the broader public expect accountability if banks engage in more complicated, sophisticated digital activities? We cannot afford digital banking activities that stand to further segregate financial services.

## **Regulators Should Consider Links Between Data Collection and Law Enforcement**

“Bulk” financial surveillance eventually creates a detailed picture of our most private social, familial, romantic, religious, and political activities. Data about a single transaction can be linked to purchase history, creating a “picture of the person behind the payment.”<sup>48</sup> A massive data broker industry connects data regarding our finances to data about our employment, marital status, homeownership status, medical conditions, and even our interests and hobbies.

Law enforcement authorities use sensitive corporate data, including financial data, to target vulnerable communities.<sup>49</sup> As a general matter of course, “surveillance-as-a-service” companies sell data, including financial data, to local police departments.<sup>50</sup> Historically, the National Security Agency (NSA) and other federal law enforcement agencies have exploited corporations’ growing troves of records.<sup>51</sup> Indeed, tech companies have a long history of spying on users at the behest of government agencies (which disregard court rulings as to the

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<sup>46</sup> Press Release, Dept. of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>. See also Letter from Demand Progress et al. to OCC (Oct. 4, 2017), <https://demandprogress.org/joint-letters-key-consumer-labor-and-financial-reform-groups-push-regulators-to-revoke-wells-fargos-charter-and-deposit-insurance/>.

<sup>47</sup> See Letter from Ams. for Fin. Reform to OCC (July 20, 2020), <https://ourfinancialsecurity.org/2020/07/news-statement-occ-plan-would-destroy-state-protections-on-predatory-lending/>.

<sup>48</sup> Albert Fox Cahn & Melissa Giddings, *In the Age of COVID-19, the Credit Card Knows All*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT - URBAN JUSTICE CENTER (May 18, 2010), <https://www.stopspying.org/latest-news/2020/5/18/in-the-age-of-covid-19-the-credit-card-knows-all>.

<sup>49</sup> See, e.g., SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 10-29 (2015) (“Surveillance is nothing new to black folks. It is the fact of antiblackness.”); VIRGINIA EUBANKS, AUTOMATING INEQUALITY 1-38 (2017) (detailing how programs have demanded poor people sacrifice their rights to privacy and self-determination); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 61 (2019) (noting law enforcement agencies have conducted prolonged, intrusive surveillance of Muslim and Latinx communities, relying on corporate communications metadata).

<sup>50</sup> See, e.g., SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 37 (2019).

<sup>51</sup> See, e.g., COHEN, *supra* note 49, at 238-242 (arguing bulk collection and analysis of data generated by networked communications intermediaries have become “pillars” of state surveillance).



unconstitutionality of their practices).<sup>52</sup> It would be unwise for regulators to divorce analysis of corporate surveillance from government surveillance.<sup>53</sup>

As Justices Thurgood Marshall and William Douglas warned in the 1970s, technology that allows for faster and better banking has led to easier law enforcement access to depositor data.<sup>54</sup> While it is true that bank account holders are protected by statutes like the Right to Financial Privacy Act of 1978, this law only requires government agencies provide individuals with a notice and an opportunity to object before a bank discloses personal information to the federal government.<sup>55</sup> There is also a general carveout for certain law enforcement, rendering the law more of a procedural rather than substantive barrier to violations of civil liberties.<sup>56</sup>

Like other financial institutions, national banks must comply with Title III of the USA PATRIOT Act, which requires they implement robust customer identification programs, commonly labeled “know your customer” (KYC) provisions.<sup>57</sup> Financial institutions must generally assist police investigations requiring financial information and provide specific

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<sup>52</sup> See SEAN VITKA, DEMAND PROGRESS, “INSTITUTIONAL LACK OF CANDOR” A PRIMER ON RECENT UNAUTHORIZED ACTIVITY BY THE INTELLIGENCE COMMUNITY (Sept. 27, 2017),

[https://s3.amazonaws.com/demandprogress/reports/FISA\\_Violations.pdf](https://s3.amazonaws.com/demandprogress/reports/FISA_Violations.pdf).

<sup>53</sup> See, e.g., COHEN, *supra* note 49, at 43 (describing a “surveillance-innovation complex”, wherein the state and private sector producers of surveillance technologies form a “symbiotic relationship”).

<sup>54</sup> Dean Galaro, *A Reconsideration of Financial Privacy and United States v. Miller*, 59 S. TEX. L. REV. 31, 54 (2017).

<sup>55</sup> See 12 U.S.C. § 3404.

<sup>56</sup> See *id.* at §§ 3406-08 (financial institutions can disclose customer records in response to a search warrant, subpoena, or written request from a government authority).

<sup>57</sup> See, e.g., Letter from Rep. Tlaib, et al., to the Treas. Sec. Steve Mnuchin, et al., (July 17, 2019), [https://tlaib.house.gov/sites/tlaib.house.gov/files/Final\\_BWM\\_Regulators.pdf](https://tlaib.house.gov/sites/tlaib.house.gov/files/Final_BWM_Regulators.pdf) (arguing many Muslim and Arab Americans have been automatically labeled “high-risk” and are therefore unable to maintain access to financial services). For a history of the relevant PATRIOT Act amendments, see, e.g., Maria A. de Dios, *The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy*, 10 BROOK J. CORP. FIN & COM. L. 495 (2016); Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States Patriot Act?*, 11 MICH. J. RACE & L. 557, 564 (2006) (arguing the Patriot Act ‘puts banks in the business of practicing selective enforcement and racial profiling with every transaction, every hour of every business day’); Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

information to law enforcement agencies,<sup>58</sup> including by filing “suspicious activity reports” (SARs).<sup>59</sup>

Given these obligations, and the racial injustices perpetrated by law enforcement, we are especially concerned by suggestions that national banks — on their own initiative or in partnership with tech companies — should collect more geolocation or biometric data.<sup>60</sup> Geolocation data revealed by payment histories is uniquely difficult to anonymize.<sup>61</sup> Privacy and racial justice advocates vehemently oppose the use of biometric tools like facial recognition technology, iris-scanning, and palm prints.<sup>62</sup> Facial recognition software is likely to mislabel or misrecognize members of racial minority groups, especially Black Americans.<sup>63</sup> Yet some tech companies engaged in financial services are attempting to create entire biometric-based, portable digital identities to substitute for government ID.<sup>64</sup> Although supporters predictably cite “financial inclusion” as a business justification, biometric tools in question have proven to be of limited value in the context of financial services provision.<sup>65</sup> Overall, the general use of this kind

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<sup>58</sup> The information in the database is accessible by federal, state and local law enforcement agencies, and can be used in investigations. *See, e.g.*, Daniel Bush, *How banks and the government keep track of suspicious financial activity*, PBS NEWSHOUR (June 12, 2020), <https://www.pbs.org/newshour/politics/how-banks-and-the-government-keep-track-of-suspicious-financial-activity>. For further background, *see, e.g.*, Ben Hayes, *Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance, Regulating Civil Society*, 14 INT'L J. NOT-FOR-PROFIT L. 5, 19 (2012); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of Cointelpro and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1116 (2002) (noting many companies report being pressured to “turn over customer records voluntarily, in the absence of either a court order or a subpoena, ‘with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.’”).

<sup>59</sup> 31 C.F.R. § 1022.320.

<sup>60</sup> *See, e.g.*, Letter from Demand Progress et al. to Leaders McConnell and Schumer, Speaker Pelosi and Leader McCarthy: (July 1, 2020), [https://s3.amazonaws.com/demandprogress/letters/2020-07-01\\_Facial\\_Recognition\\_Moratorium\\_and\\_Divestment\\_Letter\\_FINAL.pdf](https://s3.amazonaws.com/demandprogress/letters/2020-07-01_Facial_Recognition_Moratorium_and_Divestment_Letter_FINAL.pdf); Alfred Ng, *Facial recognition has always troubled people of color. Everyone should listen*, CNET (June 12, 2020), <https://www.cnet.com/news/facial-recognition-has-always-troubled-people-of-color-everyone-should-listen/>.

<sup>61</sup> *See, e.g.*, Cahn & Giddings, *supra* note 48.

<sup>62</sup> *See, e.g.*, *A Biometric Backlash Is Underway — And A Backlash To The Backlash*, PYMNTS (May 17, 2019), <https://www.pymnts.com/authentication/2019/biometric-backlash-privacy-law/>; *Mandatory National IDs and Biometric Databases*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/national-ids> (last visited Apr. 25, 2020); de Dios, *supra* note 57, at 501 (describing how prior to September 11, 2001, even non-biometric KYC data collection was widely considered an unacceptable, “massive invasion of financial privacy.”).

<sup>63</sup> *See, e.g.*, Victoria Burton-Harris & Philip Mayor, *Wrongfully Arrested Because Face Recognition Can't Tell Black People Apart*, ACLU (June 24, 2020), <https://www.aclu.org/news/privacy-technology/wrongfully-arrestedbecause>.

<sup>64</sup> *See* LIBRA ASS'N MEMBERS, WHITE PAPER v2.0 (2020), <https://libra.org/en-US/white-paper/> (last visited June 22, 2020).

<sup>65</sup> *See, e.g.*, ET Bureau, *Aadhaar verdict: Telcos, banks & financial companies may feel the pinch*, THE ECON. TIMES (Sept. 27, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/aadhaar-verdict-telcos-banks-financial-companies-may-feel-the-pinch/articleshow/65973414.cms> (noting that biometric IDs linked to a central registry are still not acceptable for KYC purposes).

of sensitive data not only increases the risk of predation by banks and civil liberties violations by governments, but security breaches by competitors and hackers.<sup>66</sup>

Some financial services firms have flocked to distributed ledger technology, including blockchain, to ostensibly bolster privacy and security for customers. But here, the devil is in the details. Most distributed ledger technology is not decentralized in the sense that certain actors cannot exercise concentrated power over others.<sup>67</sup> In "permissioned" distributed ledger systems, for instance, firms actively manage blockchains.<sup>68</sup> Moreover, as a general matter, *node validators* in a distributed ledger system can still collaborate to change it. Companies can also take advantage of contextual "off-chain" data, or otherwise collude with third parties to determine the true identities of transacting parties and better monitor their behavior.<sup>69</sup>

In general, we should question whether specific forms of financial exclusion are in fact technological at their roots. Heightened surveillance may actually stand to chill financial inclusion. FDIC surveys consistently note that many "unbanked" households refuse to open bank accounts due to privacy concerns.<sup>70</sup> While providing increased access to digital financial services is important, a rapid shift to digitization — not to mention the broader "war on cash"<sup>71</sup> — stands to harm low-income people of color in particular. The fintech revolution presumes a certain

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<sup>66</sup> See, e.g., Jason Leopold & Jessica Garrison, *US Intelligence Unit Accused Of Illegally Spying On Americans' Financial Records*, BUZZFEED (Oct. 6, 2017), <https://www.buzzfeednews.com/article/jasonleopold/Us-Intelligence-unit-accused-of-illegally-spying-on> (reporting that FinCEN employees have accused colleagues at the Office of Intelligence and Analysis of illegally collecting and storing private financial records); Aaron Mackey & Andrew Corker, *Secret Court Rules That the FBI's "Backdoor Searches" of Americans Violated the Fourth Amendment*, ELECTRONIC FRONTIER FOUND. (Oct. 11, 2019), <https://www.eff.org/deeplinks/2019/10/secret-court-rules-fbis-backdoor-searches-americans-violated-fourth-amendment>; Chen Han & Rituja Dongre, *Q&A. What Motivates Cyber-Attackers?*, TECH. INNOV. MGMT. REV. 40, 40-41 (2014), <https://timreview.ca/article/838> (describing economic motivations for hacking).

<sup>67</sup> See Angela Walch, *Deconstructing 'Decentralization': Exploring the Core Claim of Crypto Systems*, in CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 39, 39-69 (Chris Brummer ed., 2019) (arguing misleading claims of "decentralization" function as a liability shield for developers operating the systems, creating a "Veil of Decentralization").

<sup>68</sup> See, e.g., LIBRA ASS'N MEMBERS, *supra* note 64, at 5, 15, 24-25.

<sup>69</sup> See, e.g., Rainey Raitman, *In Foreshadowing Cryptocurrency Regulations, U.S. Treasury Secretary Prioritizes Law Enforcement Concerns*, ELECTRONIC FRONTIER FOUND. (Feb. 13, 2020), <https://www.eff.org/deeplinks/2020/02/foreshadowing-cryptocurrency-regulations-us-treasury-secretary-prioritizes-law> (noting that even pseudonymous wallet systems can still reveal a "huge number" of identities and financial transactions); Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 394 (2016) (describing how reidentification creates large unsecured data reservoirs).

<sup>70</sup> FDIC, NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS, 2017 4, 23-24, <https://www.fdic.gov/householdsurvey/>. See also, *id.* at 3 (noting Black households are nearly six times more likely to be unbanked than white households, while Hispanic households are nearly five times more likely to be unbanked than white households.)

<sup>71</sup> Jay Stanley, *Say No to the "Cashless Future" — and to Cashless Stores*, ACLU (Aug. 12, 2019), <https://www.aclu.org/blog/privacy-technology/consumer-privacy/say-no-cashless-future-and-cashless-stores>.

technological infrastructure (like universal broadband),<sup>72</sup> not to mention a certain level of household financial stability and certain type of bookkeeping.<sup>73</sup>

## Conclusion

The regulatory expansion of national bank powers in this area could permit national banks to engage in activities that may present risks that are not fully understood by the OCC.<sup>74</sup> Moreover, while providing data processing, data storage, and data transmission services is permissible for Bank Holding Companies (BHCs) and their subsidiaries,<sup>75</sup> it is questionable how much Big Data collection would actually be used to improve banking and how much would be used for other business endeavors. As a general matter, we strongly agree with other commenters that the OCC should respect Congress's strongly articulated purpose of separating banking and commerce.<sup>76</sup> Historically, commercially-owned banks have made unsound loans to business partners, denied services to competitors, and generally engaged in imprudent financial activities to spur purchases of commercial goods and services.<sup>77</sup>

Although the OCC is not seeking comment on its authority to issue a special purpose national bank charter in this rulemaking, it is impossible to separate the Office's plan for that charter, as well as special purpose payments charters.<sup>78</sup> In any format, we oppose the provision of banking privileges to companies that do not take deposits or that use technologies that could threaten our safety and wellbeing, especially for communities of color. Some sorts of digital activities should be kept out of the business of banking, period.<sup>79</sup>

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<sup>72</sup> See, e.g., Terri Friedline, *An Open Internet is Essential for Financial Inclusion, FinTech Revolution*, HUFF. POST (Dec. 14, 2017), [https://www.huffpost.com/entry/an-open-internet-is-essential-for-financial-inclusion\\_b\\_5a3345dce4b0e1b4472ae520](https://www.huffpost.com/entry/an-open-internet-is-essential-for-financial-inclusion_b_5a3345dce4b0e1b4472ae520).

<sup>73</sup> See Stanley, *supra* note 71.

<sup>74</sup> See, e.g., Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1409 (2018).

<sup>75</sup> See 12 U.S.C. § 1843(a)(2).

<sup>76</sup> See Comment from Arthur E. Wilmarth, Jr., Prof. of Law, Geo. Wash. Univ. L. Sch., to FDIC (Apr. 10, 2020), <https://www.fdic.gov/regulations/laws/federal/2020/2020-parent-companies-of-industrial-banks-3064-af31-c-002.pdf>.

<sup>77</sup> Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN L. REV. 1539, 1598-1606 (2007).

<sup>78</sup> See, e.g., Jason Brett, *OCC Floats New Payments Charter For Stripe, PayPal, And Crypto Firms*, FORBES (May 12, 2020), <https://www.forbes.com/sites/jasonbrett/2020/05/12/occ-floats-new-payments-charter-for-stripe-paypal-and-crypto-firms/#6f89640b5195>.

<sup>79</sup> See, e.g., Graham Steele, *Facebook's Libra cryptocurrency is part of a disturbing financial trend*, WASH. POST (Aug. 12, 2019), <https://www.washingtonpost.com/outlook/2019/08/12/facebooks-libra-cryptocurrency-is-part-disturbing-financial-trend/>.

We appreciate the opportunity to comment on this ANPR. If you have questions, please contact Odette Williamson (Staff Attorney, National Consumer Law Center<sup>80</sup>) at [owilliamson@nclc.org](mailto:owilliamson@nclc.org), Jeremiah Battle (Staff Attorney, National Consumer Law Center) at [jbattle@nclc.org](mailto:jbattle@nclc.org), or Raúl Carrillo (Fellow, Americans For Financial Reform Education Fund<sup>81</sup>; Policy Counsel, Demand Progress Education Fund<sup>82</sup>) at [raul@ourfinancialsecurity.org](mailto:raul@ourfinancialsecurity.org).

Sincerely,

American Economic Liberties Project  
Americans for Financial Reform Education Fund  
Better Markets  
California Reinvestment Coalition  
Center for Digital Democracy  
Center for Responsible Lending  
Color of Change  
Consumer Action  
Consumer Federation of America  
Demand Progress Education Fund  
Massachusetts Communities Action Network (MCAN)  
NAACP  
National Consumer Law Center (on behalf of its low-income clients)  
National Fair Housing Alliance  
New Economy Project  
Public Citizen  
Take On Wall Street  
The Revolving Door Project  
Woodstock Institute

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<sup>80</sup> Since 1969, the nonprofit [National Consumer Law Center® \(NCLC®\)](http://www.nclc.org) has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

<sup>81</sup> AFR Education Fund is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR Education Fund include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.

<sup>82</sup> Demand Progress Education Fund is a fiscally-sponsored project of New Venture Fund, a 501(c)3 organization. DPEF and our more than two million affiliated activists seek to protect the democratic character of the internet — and wield it to make government accountable and contest concentrated corporate power.