



## **Policy Considerations to Foster Economic Growth and Innovation**

The Electronic Transactions Association (“ETA”) is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include financial institutions, mobile payment service providers, mobile wallet providers, and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, and rewarding payment solutions and lending alternatives. ETA members are at the forefront of economic development by increasing participation in and access to financial services for both consumers and small businesses. As a result, ETA supports a positive regulatory environment for financial innovation and has outlined several proposals below to achieve that goal.

### **1. Support the OCC FinTech Charter and ILC Charters**

In addition to the avenues for simplifying and improving non-bank financial services regulation described above, ETA supports the Office of the Comptroller of the Currency’s (“OCC”) proposal to offer a Special Purpose National Bank to financial technology, or “FinTech,” companies. Such a charter will provide numerous public policy benefits, including a regular and consistent regulatory framework for chartered FinTech companies and increased competition to develop cost-efficient, inclusive products and services. ETA supports the OCC’s chartering initiative and encourages the OCC to work collaboratively with the FinTech community to develop a process that takes full advantage of the potential benefits offered by the proposed FinTech charter. Additionally, the ILC charter provides options in an ever-changing landscape of businesses. The standards governing such charters should be appropriately tailored to address distinctions between FinTechs and traditional banks.

### **2. Streamline/Modernize State Licensing Requirements for Non-Bank Financial Services Companies**

- Non-bank financial services companies, which include FinTech companies, are at the forefront of financial innovation and are largely responsible for expanding the availability of financial services in recent years. Unlike depository institutions, which are typically exempt from state licensing, non-bank financial services providers are often required to obtain authority to provide their services at the state level – potentially in every U.S. state and territory. The time and expense involved in obtaining these licenses are a significant impediment to the growth and development of innovative financial products and services. ETA supports the efforts of institutions like the Conference of State Bank Supervisors to streamline and simplify state licensing requirements.

- **Support Uniform National Money Transmitter License**

ETA members operate across the country and the patch-work arrangement of complying with each states' money licenses creates unnecessary expense. Creating a uniform national standard for money transmission will provide for increased competition as well as enhance AML/BSA compliance.

### **3. Promote Free Market for Small Business Lending**

The Department of the Treasury and other federal regulators are considering a regulatory approach that would apply existing legal requirements for *consumer lending* to *small business loans* (under \$100,000). Goals of the proposal include promoting a transparent marketplace for borrowers and investors and ensuring safe and affordable credit for borrowers. The proposal potentially impacts the offering of loan products to small merchants that are facilitated by members of the payments industry (including online marketplace lenders), and it underscores a belief shared by many regulators that small businesses and sole proprietors should be protected just like consumers.

A regulatory approach that would simply apply existing requirements for consumer lending to small business loans would have detrimental effects for both online small business lenders and the small business community by limiting access to credit and available lending options. The application of consumer lending laws (such as the Truth in Lending Act) to small business lending is unworkable and would result in credit being unavailable to small business borrowers. There are many differences between consumer loans and commercial loans, including: (i) how the loans are used; (ii) the different expectations of the parties and level of sophistication of the borrower; and (iii) how commercial loans are marketed, structured, and repaid.

### **4. Increase Consistency in State Non-Bank Financial Services Laws**

Even where a non-bank financial services company is successful in obtaining the necessary licenses to offer its products and services, ongoing compliance with various state requirements remains an impediment to growth and progress. Each state applies different and at times conflicting compliance requirements related to disclosures, permissible fees and charges, reporting and recordkeeping, and examinations, among others. Although ETA believes greater overall consistency would improve regulation for non-bank financial services companies, we focus here on the following specific issues of particular interest to ETA members:

- **Streamline State Cybersecurity Requirements**

ETA and its members are dedicated to working with federal and state regulators to address the important and growing issue of cybersecurity. The prevailing cybersecurity best

practices developed and implemented in the financial and payments industries are the product of innovation and cooperation between industry and government. In the electronic transactions industry, financial information data is governed by federal law, including the Gramm-Leach-Bliley Act and the Federal Trade Commission’s Safeguards Rule, and robust self-regulatory programs, including the Payment Card Industry Data Security Standard, which sets forth requirements designed to ensure companies that process, store, or transmit credit card information maintain a secure environment for such data.

ETA is concerned that state-specific attempts to regulate cybersecurity will undermine the progress that these federal and self-regulatory efforts have made in combating cybersecurity threats in the financial industry. First, the introduction of overlapping and potentially conflicting state regulations will cause confusion and compliance challenges for the financial industry. Second, the state adoption of prescriptive and static rules would likely hinder the ability of financial services companies to design and calibrate their cybersecurity programs for emerging threats. In contrast, the federal government has long supported a flexible, risk-based approach to cybersecurity, as demonstrated by the National Institute of Standards and Technology Cybersecurity Framework, which encourages industry to adapt to ever-changing cyber threats.

ETA believes that a flexible national framework is the most effective approach for addressing cybersecurity risks and would encourage efforts to preempt a patchwork of state-specific requirements in this area.

- **Streamline Data Breach Notification Requirements**

ETA also supports streamlining the various state data breach notification requirements. Almost every state has its own data breach law, which can leave consumers with inconsistent protection and companies in the difficult position of dealing with conflicting requirements. One standard will provide certainty and predictability to consumers and the industry.

- **Support the Valid-When-Made Doctrine**

“Valid when made” is a longstanding usury doctrine that states that if a loan was not usurious when it was made, it does not become usurious solely because it is assigned to another party. As you may be aware, that doctrine has been called into question in recent years due to a Second Circuit case called *Madden v. Midland*. The court in *Madden* declined to extend federal preemption of state usury laws to a non-bank assignee of credit card receivables originated by a bank. In other words, a non-bank entity in the Second Circuit may not charge a rate of interest inconsistent with state usury laws, even if that rate

of interest was valid when made by the original bank lender. By rejecting the valid-when-made doctrine, the *Madden* court created significant uncertainty for a wide range of business models, including debt buying, factoring, and marketplace lending. ETA supports a clear return to the valid-when-made doctrine, including through a legislative solution, such as the *Protecting Consumers' Access to Credit Act*<sup>1</sup>.

- **Support the True Lender Bill**

ETAs membership includes both traditional financial institutions as well as non-depository FinTech companies that make loans as a third-party service provider. In recent years, ambiguity in an existing law with regard to the “true lender” definition, has made it challenging for FinTech companies to compete in the lending space. ETA supports partnerships between FinTech companies and federally insured depository institutions and encourages policymakers to support legislative efforts that clarify the definition of true lender, such as HR 4439<sup>2</sup>, the *Modernizing Credit Opportunities Act*, authored by Representative Trey Hollingsworth.

The bipartisan bill would clarify that the role of the insured depository institution as lender and the location of an insured depository institution under applicable law are not affected by any contract between the institution and a third-party service provider. It would also clarify that federal preemption of state usury laws applies to any loan to which an insured depository institution is the party to which the debt is initially owed according to its terms.

## 5. Support Innovation in Technology

- **Support IRS Data Verification Modernization Act of 2017**

As part of their underwriting process, many lenders, including FinTech companies, review tax transcript data to confirm an applicant’s income. A lender can gain access to this information through the IRS’ Income Verification Express Service (“IVES”) by requiring the loan applicant to complete and submit an IRS Form 4506-T. Currently, the form can only be submitted to the IRS by fax machine. According to industry reports, this process can take between two and eight days – a significant delay for lenders that use data analytics

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1. H.R.3299 - Protecting Consumers' Access to Credit Act of 2017 115th Cong.(2017-2018)  
<https://www.congress.gov/bill/115th-congress/house-bill/3299>

<sup>2</sup> H.R.4439 - MODERNIZING CREDIT OPPORTUNITIES ACT115TH CONGRESS (2017-2018)  
<https://www.congress.gov/bill/115th-congress/house-bill/4439>

and automation to make credit decisions as quickly as possible for their consumer and small business lender customers.

To avoid this unnecessary delay, the *IRS Data Verification Modernization Act of 2017* would require the IRS to provide access to IVES through “fully automated and electronic means accessible through the Internet” to ensure the disclosure process is “as close to real-time as is practicable.”<sup>3</sup> If enacted, the Act would provide consumers and small businesses nearly instantaneous access to their tax data and would significantly accelerate and simplify the process of applying for credit.

## **6. Support Access to Consumer Data Initiatives**

Over the past several years, FinTech companies have developed new, innovative products and services that help consumers manage their financial lives, expand financial offerings, lower costs, improve financial management, and increase transaction security. In many cases, accessing and porting consumer and financial data is critical to the success of these new products and services. While ETA supports industry access to and use of consumer-permissioned data, the critical point is that consumers must have choice over how their data is used and shared. ETA believes that in general, the best way to address these challenges is to allow financial institutions, the FinTech industry, and consumer groups to work together to develop mechanisms for the continued safe and secure transmission of permissioned consumer data rather than inserting a governmental entity into a highly technical policy question.

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<sup>3</sup> H.R. 3860, 115th Cong. (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/3860>