

# Client Alert

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## Senators Ask Banking Agencies to Outline FinTech Oversight

By **Obrea O. Poindexter, Donald C. Lampe, Sean Ruff**

On July 21, 2016, Senators Sherrod Brown (D-Ohio) and Jeff Merkley (D-Ore.) sent a [letter](#) to the heads of five federal agencies requesting that they outline the steps they are taking to “ensure effective oversight” of the FinTech market.

Senator Brown is the Ranking Member of the Senate Banking Committee and Senator Merkley is the Ranking Member of the Senate Banking Committee’s Subcommittee on Financial Institutions and Consumer Protection. The agencies to which the letter was sent are the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Consumer Financial Protection Bureau (“Agencies”).

In the letter, Senators Brown and Merkley noted that FinTech companies have expanded their presence and products in recent years, emphasizing a statement by the Financial Stability Oversight Council in its recent [2016 annual report](#) that financial innovations “merit special attention from financial regulators who must be vigilant to ensure that new products and practices do not blunt the effectiveness of existing regulations or pose unanticipated risks to markets or institutions.”

Senators Brown and Merkley requested the Agencies’ views on a number of FinTech issues.

**Diverse Business Models.** The Senators asked each of the Agencies what it has done to study and understand the various types of FinTech companies involved in marketplace lending, alternative payments, consumer lending, blockchain and distributed ledger, virtual currencies, personal finance management, robo-investing or saving, small business financing, merchant cash advances, education financing, crowdfunding, or invoice financing.

In addition, the Senators inquired as to the role of each of the Agencies in supervising or regulating FinTech firms, including what considerations should be given to enabling non-bank companies to obtain a full or limited federal banking charter.

The Senators also asked each of the Agencies to provide its views on the impact of FinTech firms on the institutions the agency regulates.

**Regulation of Third-Party Service Providers.** Senators Brown and Merkley requested that each of the Agencies describe how its guidance related to third-party relationships applies to FinTech companies, and what expectations the agency has for financial institutions that partner or otherwise engage with FinTech companies.

The Senators also asked each of the Agencies to reply regarding the factors it considers when determining whether and how to use its authority to examine and regulate third party service providers; steps each of the Agencies are taking to ensure that financial institutions of all sizes understand the risks and benefits of partnering with or acquiring FinTech companies, and regulatory expectations for FinTech relationships with financial institutions; how often each of the Agencies has directly examined third-party service providers that are FinTech

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companies; and whether the agency has sufficient examination and enforcement authority over third-party service providers.

**Consumer and Small Business Protections.** Senators Brown and Merkley expressed concern that if a FinTech company is neither directly regulated by one of the Agencies nor as a third-party service provider, applicable federal consumer laws may not extend to consumers engaging with the company, and consumers or small business owners may not understand that protections provided by federal financial institutions do not apply to the products and services offered by the company.

In addition, the Senators expressed concern that, while many FinTech firms use alternative data and proprietary algorithms to underwrite loans, which may offer expanded access to credit, these alternative approaches may have the potential for violations of fair lending laws as well as consumer protection laws such as the Fair Credit Reporting Act.

The Senators requested that each of the Agencies describe the direct and indirect authority the agency has to supervise companies that make consumer and small business loans or advances, and provide views on the use of alternative data to underwrite loans or advances and the ability of the agency to enforce consumer protection and fair lending laws and ensure that FinTech companies are Community Reinvestment Act compliant.

The Senators noted that concern has been raised about consumer rights to access information held by private companies, and asked the Consumer Financial Protection Bureau to reply regarding its plans to implement Dodd-Frank Act Section 1033 on this topic.

The Senators also requested that each of the Agencies address the Treasury Department's May 2016 assessment that small business loans under \$100,000 share common characteristics with consumer loans but do not have the same consumer protections.

**Coordination.** Finally, Senators Brown and Merkley asked each of the Agencies to provide information on coordination between agencies and through interagency bodies, as well as international coordination, including the effectiveness of the agency's efforts to raise agency-specific concerns to other agencies or international bodies. The Senators also asked each of the Agencies to comment on how the agency balances fostering innovation with the agency's regulatory and supervisory responsibilities.

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The letter raised important policy and regulatory considerations that have been in play in Washington, D.C. for some time, such as use of "big data" in credit decisioning, appropriate protections for small business borrowers akin to consumer protections and management of third-party service providers in a technology environment. In light of diverse business models that have proliferated in recent times, the letter appears to call for greater oversight and regulation by federal financial and consumer protection regulators of FinTech providers of products and services to consumers and small businesses. Agency responses to these wide-ranging requests no doubt will be of great interest to the FinTech community. We will continue to monitor regulatory and Congressional developments affecting FinTech providers.

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