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The Case for a Federal Regulatory Sandbox for Fintech Companies

I. INTRODUCTION

*“We cannot solve a problem by using the same kind of thinking we used when we created [it].”*¹ Albert Einstein

Approximately 65% of Americans use at least one website or mobile application to manage their financial lives.² Many of these financial products and services are created by financial technology (“fintech”) companies.³ Fintech companies, like Credit Karma⁴ and PayPal,⁵ are businesses that leverage innovation and technology to develop improved financial services for businesses and consumers in the marketplace.⁶ Currently, there are over 4,000 fintech companies operating in the United States and United Kingdom alone.⁷ Furthermore, investment in fintech companies has grown to over \$24 billion worldwide.⁸

1. David Mielach, *5 Business Tips from Albert Einstein*, BUSINESS NEWS DAILY (Apr. 18, 2012, 12:36 PM), <https://www.businessnewsdaily.com/2381-albert-einstein-business-tips.html>.

2. *See Prosper Marketplace Financial Wellness Survey*, PROSPER MARKETPLACE, INC. 5 (Feb. 2016), <https://www.prosper.com/about-us/wp-content/uploads/FinancialWellnessSurveyv5-1.pdf> (conducting a survey to determine, among other things, the American use of technology in personal finance).

3. *See Ranking the Top Fintech Companies*, N.Y. TIMES DEALBOOK (Apr. 6, 2016), <https://www.nytimes.com/interactive/2016/04/07/business/dealbook/The-Fintech-Power-Grab.html?mcubz=0&r=0> (discussing the broad definition of a fintech company and the various roles within the financial services marketplace these companies occupy).

4. *Id.*

5. *Id.*

6. *Id.*

7. Thomas J. Curry, Comptroller of the Currency, Remarks Regarding Special Purpose National Bank Charters for Fintech Companies at the Georgetown University Law Center 1 (Dec. 2, 2016) [hereinafter Thomas J. Curry, Georgetown Law Remarks], <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.

8. *Id.*

The United Kingdom, Australia,⁹ and other countries around the world have begun to implement a novel regulatory concept called the “regulatory sandbox” to enable fintech companies to innovate and test products, services, and business models without having to worry about certain regulatory constraints and liabilities.¹⁰ The sandboxes have been implemented to both spur innovation and attract prospective fintech companies to their favorable regulatory environments.¹¹ The United States, however, has declined to follow suit.¹²

Due to the current regulatory landscape in the United States, fintech companies are often faced with ambiguity and confusion as to which laws, regulations, and agencies govern their products and services.¹³ In an effort to ease this regulatory burden on fintech companies, the Office of the Comptroller of the Currency (“OCC”) announced its plans to create a special purpose national bank charter for Fintech Companies (“Fintech Charter”).¹⁴ Obtaining a Fintech Charter from the OCC essentially places a fintech company under the same

9. *Regulatory Sandbox*, AUSTL. SECURITIES & INVESTMENTS COMMISSION, <http://asic.gov.au/for-business/your-business/innovation-hub/regulatory-sandbox/> (last updated June 14, 2017) (providing an in-depth view of Australia’s regulatory initiative).

10. Stephanie Forshee, *Barriers Remain to Letting US Fintechs Play in the Regulatory ‘Sandbox,’* INSIDE COUNSEL, <http://www.insidecounsel.com/2017/06/01/barriers-remain-to-letting-us-fintechs-play-in-the> (June 1, 2017, 12:10 PM).

11. See Mike Faden, *Regulatory Sandboxes Provide “Safe Spaces” for Fintech Payment Services Innovation*, AM. EXPRESS, <https://www.americanexpress.com/us/content/foreign-exchange/articles/regulatory-sandboxes-for-innovative-payment-solutions/> (last accessed Feb. 10, 2018) (stating the major countries and nations that have already implemented a regulatory sandbox and the purposes of a regulatory sandbox).

12. See e.g., The Financial Services Innovation Act of 2016, H.R. 6118, 114th Cong. (2016) (providing information on The Financial Services Innovation Act of 2016, which would have created a federal regulatory sandbox in the United States); Paul Sweeney, *Fintech Sandbox? States, OCC Mull Regulatory Options*, DEBANKED (May 2, 2017), <http://debanked.com/2017/05/fintech-sandbox-states-occ-mull-regulatory-options/> (providing information on state discussions regarding the creation of a “New England Regulatory Fintech Sandbox”); see Forshee, *supra* note 10 (discussing barriers that remain to creation of a regulatory sandbox in the United States).

13. See Nicholas Elliott, *Where Fin-Tech is Struggling with Regulation*, WALL ST. J., <https://blogs.wsj.com/riskandcompliance/2015/11/24/where-fin-tech-is-struggling-with-regulation/> (Nov. 24, 2015, 1:28 PM) (analyzing the major areas of concern amongst fintech companies in the United States).

14. OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 2 (Dec. 2016), <https://www.occ.treas.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>.

regulatory framework as any other national bank, thus reducing the regulatory ambiguity commonly faced by fintech companies.¹⁵

Currently, the OCC is facing pushback from state regulators, consumer protection groups, and community banks, all of whom argue that the OCC lacks the legal authority to establish a Fintech Charter.¹⁶ Other opponents suggest that the Fintech Charters offered by the OCC would provide a legitimate option for only the largest fintech companies, due to uncertainty as to capital and other requirements for a Fintech Charter.¹⁷ Therefore, only a true regulatory sandbox could benefit fintech companies of all sizes, especially those that lack either the capital and expertise to seek a Fintech Charter from the OCC or the ability to navigate the United States' complex regulatory landscape with proficiency.¹⁸

This Note discusses the history, value, and function of the regulatory sandbox concept, as well as the current status of implementing a regulatory sandbox in the United States. Part II chronicles the history of the regulatory sandbox and provides a brief introduction to the categories of fintech companies that stand to benefit from the implementation of a regulatory sandbox.¹⁹ Part III discusses the United States' attempts to implement federal and state regulatory sandboxes, compares the proposed federal sandbox with the United Kingdom's current sandbox model, and addresses the benefits and drawbacks of creating a fintech sandbox as compared to the OCC's proposed Fintech Charter.²⁰ Finally, Part IV concludes by reiterating the importance of adopting a regulatory sandbox in the United States, both to reduce regulatory ambiguity and encourage fintech companies to operate and innovate within the United States.²¹

15. *Id.*

16. Lalita Clozel, *State Regulators Sue OCC over Fintech Charter*, AM. BANKER, Apr. 26, 2017, at 1–3.

17. See Gregory Roberts, *OCC Fintech Charter May Be a Poor Fit for Fintechs*, BNA (Feb. 2, 2017), <https://www.bna.com/occ-fintech-charter-n57982083191/> (arguing that the OCC's Fintech Charter would only benefit the largest fintechs and would not affect the business operations of smaller fintechs).

18. See Mark Brnovich, *Regulatory Sandboxes Can Help States Advance Fintech*, AM. BANKER, Sept. 5, 2017, at 1–5 (discussing the challenges to fintech companies under the United States' current regulatory landscape).

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

II. FINTECH AND THE UK'S REGULATORY SANDBOX

A. *What is a Fintech Company?*

Fintech encompasses all forms of innovative digital and software technologies applied directly to the financial services sector.²² The fintech moniker embraces almost any company that is using novel technology to solve existing problems in the financial services landscape.²³ While “fintech” is a relatively new term, technological innovation has long been present in the banking and financial services industry.²⁴ One notable characteristic of fintech companies, as opposed to banks, is that they utilize disruptive innovation to chip away at the financial services market share of the banking industry.²⁵ For example, peer-to-peer lending fintech companies match providers of funds with borrowers of funds.²⁶ As a result, these fintech companies utilize technology to engage in financial intermediation—a financial service traditionally offered by the banking industry.²⁷ A few well-known examples of American fintech companies include Credit Karma, PayPal, SoFi, Venmo, Coinbase, Lending Club, and Kickstarter.²⁸

Fintech companies are not only competing with banks as a source for lending, but have also imbedded themselves into other financial-related markets.²⁹ Fintech companies like Envestnet now operate in the personal finance and investment management market to offer consumers cheaper alternatives to expensive brokers.³⁰ Payment fintechs like PayPal

22. See Kathryn Reed Edge, *Fintech: Fad or Future*, TBA LAW BLOG (Aug. 1, 2017, 11:00 PM), <http://www.tba.org/journal/fintech-fad-or-future> (“Loosely defined, a ‘fintech’ company is a firm that uses new technology and innovation with available resources in order to compete in the marketplace of traditional financial institutions and intermediaries in the delivery of financial services.”).

23. *Ranking the Top Fintech Companies*, *supra* note 3.

24. See *History of ATMs and a New Way to Bank*, BBVA, <https://www.bbva.com/en/history-atms-new-way-bank/> (last updated June 27, 2017) (indicating that banks have been innovating since 1967 when Barclays unveiled the first ATM in London).

25. John L. Douglas, *New Wine into Old Bottles: Fintech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 21 (2016).

26. *Id.*

27. See *id.* (“[T]he entry of nonbank competitors using new technologies to capture what has traditionally been the hallowed turf of the banking industry is an oft-repeated story . . .”).

28. *Ranking the Top Fintech Companies*, *supra* note 3.

29. See *Ranking the Top Fintech Companies*, *supra* note 3. (laying out the various sectors of the financial market in which fintech companies operate).

30. *Ranking the Top Fintech Companies*, *supra* note 3.

and Venmo allow merchants and consumers to avoid fees which are normally associated with credit card transactions.³¹ Fintech companies are also competing with traditional financial institutions in Wall Street trading, data analytics, national and international currency transfers, and crowdfunding sectors of the financial market.³² To further explain and simplify the fintech ecosystem, Pricewaterhouse Coopers (“PwC”) coined what it calls the “As, Bs, Cs, and Ds” of fintech firms.³³ “As” are major financial institutions such as Bank of America, Chase, Wells Fargo, and Allstate.³⁴ “Bs” are large technology companies that have some operations in the financial services marketplace, such as Apple and Google.³⁵ “Cs” are the firms, like MasterCard, that facilitate financial services transactions by providing infrastructure or technology to other fintech firms.³⁶ Finally, “Ds” are the disruptors, or the start-ups focused on a singular innovative technology or business model.³⁷

Regardless of whether the company is an “A” or a “D,” the key element central to the business model of all fintech companies is to benefit consumers through “lower[ing] costs, expand[ing] access to unserved markets, and [providing] user-friendly interfaces” by disrupting the traditional financial marketplace.³⁸ This disruption, however, has also created problems for both fintech firms and regulators.³⁹ Because fintech companies are not subject to all of the same regulations and requirements as a traditional bank, regulatory confusion and concerns over consumer protection have generated unease amongst politicians and fintech companies alike as to the future of the United States fintech industry.⁴⁰

31. *Ranking the Top Fintech Companies*, *supra* note 3.

32. *Ranking the Top Fintech Companies*, *supra* note 3.

33. Haskell Garfinkel & Dean Nicolacakis, *Q&A: What is Fintech?*, PwC 2 (Apr. 2016), <https://www.pwc.com/us/en/financial-services/publications/viewpoints/assets/pwc-fsi-what-is-fintech.pdf>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See Matthew D. Cutts & Brandon C. Román, *The Future of Fintech: A Washington Perspective*, 19 FINTECH L. REP. NL 1 (Nov./Dec. 2016) (discussing the benefits of fintech companies to the financial industry and the regulatory problems faced by both fintech companies and regulators alike).

39. *Id.*

40. *Id.*

B. *Regulatory Sandbox: The First Example*

The United Kingdom, the pioneer of the regulatory sandbox, first introduced the sandbox concept in 2015 through an initiative called “Project Innovate” by its Financial Conduct Authority (“FCA”).⁴¹ This project was aimed at allowing fintech companies to introduce their innovative products, services, business models, and delivery mechanisms to the financial market, outside the full set of regulatory constraints imposed by the FCA.⁴² By lowering administrative barriers and costs to both market entrants and established financial institutions, the FCA’s sandbox sought to provide a safe space for fintech companies to innovate.⁴³

In order to accomplish this goal, the FCA developed a flexible and supervised regulatory sandbox.⁴⁴ Through the creation of a “sandbox unit” that is charged with handling sandbox applications and supervising the testing process by the fintech companies, the FCA is able to make decisions regarding which regulations to relax for a particular fintech company on a case-by-case basis.⁴⁵ Therefore, Project Innovate is not tailored to a discrete category of fintech firms.⁴⁶ Instead, it is aware that each fintech firm faces unique regulatory challenges and will help each firm individually during testing in the sandbox.⁴⁷

Equally as important as the flexibility of Project Innovate is the FCA’s supervision over the testing process.⁴⁸ In order to adequately protect consumers and the financial system, fintech companies accepted

41. See FIN. CONDUCT AUTH., REGULATORY SANDBOX 1, 2 (Nov. 2015), <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf> [hereinafter FCA REGULATORY SANDBOX OUTLINE] (outlining the FCA’s plan to implement a regulatory sandbox).

42. See FIN. CONDUCT AUTH., REGULATORY SANDBOX, <https://www.fca.org.uk/firms/regulatory-sandbox> (last updated Dec. 15, 2017) [hereinafter FCA REGULATORY SANDBOX DISCUSSION] (providing an in-depth discussion on the United Kingdom’s regulatory sandbox).

43. FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 2; see DR. PHILIP TRILLMICH & KATRINA JOKIC, WHITE & CASE, TECHNOLOGY NEWSFLASH: UK ‘REGULATORY SANDBOX’ TO FOSTER FINTECH INNOVATION (Apr. 22, 2016), <https://www.whitecase.com/publications/alert/uk-regulatory-sandbox-foster-fintech-innovation> (discussing the goals and purpose of the FCA’s regulatory sandbox).

44. FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 2.

45. FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3.

46. See FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3 (indicating that the FCA’s sandbox unit will consider applications and monitor the testing process for each firm).

47. FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3.

48. See FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3 (considering consumer safeguards to be among the three key questions when investigating the feasibility of sandbox implementation).

into the regulatory sandbox work directly with the FCA and its sandbox unit throughout the testing process.⁴⁹ This ensures that a balance is struck between enforcing regulations essential to consumer protection and relaxing unnecessary regulations that burden the fintech firm.⁵⁰

The FCA began accepting applications from fintech companies in May 2016 for its first sandbox cohort.⁵¹ In order to be eligible for the sandbox, a fintech company must operate within one of seven sectors of business within the United Kingdom.⁵² These sectors include retail banking, retail lending, general insurance and pensions, pensions and retirement income, retail investments, investment management, and wholesale financial markets.⁵³ Additionally, the fintech company must satisfy the following criteria to qualify for the FCA's sandbox protections: (1) the fintech company must be seeking to deliver innovation that is regulated in the U.K. financial services market; (2) the innovation must be ground-breaking or significantly different from those already in the marketplace; (3) the innovation must benefit consumers and promote competition; (4) the fintech company must display a genuine need to test its innovation within the sandbox; and (5) the fintech company must have a well-developed plan for testing and be prepared to test the innovation.⁵⁴

Thus far, the FCA's sandbox has had great success.⁵⁵ The FCA tested eighteen businesses as part of Project Innovate's first cohort, twenty-four more fintech companies have been approved for testing as

49. See FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3 (“[The sandbox unit] will be responsible for considering sandbox applications and monitoring the testing process”).

50. See FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3 (“We believe that it is feasible for the FCA to reduce some of the existing regulatory barriers to firms that are testing new ideas, while also maintaining suitable safeguards.”).

51. See TRILLMICH & JOKIC, *supra* note 43.

52. See *Regulatory Sandbox – Application Form*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/regulatory-sandbox-application-form> (last updated June 16, 2017) [hereinafter FCA REGULATORY SANDBOX APPLICATION FORM] (displaying the criteria for a fintech company to apply to the FCA's sandbox).

53. *Id.*

54. See *How to Prepare a Sandbox Application*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/regulatory-sandbox/prepare-application> (last updated Dec. 15, 2017) (providing fintech companies with detailed instructions for determining whether they are eligible to participate in the sandbox).

55. See *e.g.*, STUART DAVIS ET AL., FCA REGULATORY SANDBOX UPDATE: SUCCESSSES IN ROUND ONE, APPLICATION WINDOW FOR ROUND THREE OPEN, LATHAM & WATKINS (June 16, 2017), <http://www.latham.london/2017/06/fca-regulatory-sandbox-update-successses-in-round-one-application-window-for-round-three-open/> (indicating that round one of the FCA's sandbox was a success and that the FCA intends to continue this success with future cohorts).

part of the second cohort, and applications for cohort three have already closed.⁵⁶ Looking to the success of the FCA's sandbox in the United Kingdom, many other countries around the world have developed similar, but not identical, sandboxes of their own.⁵⁷ For example, Australia, Bahrain, Canada, Hong Kong, Malaysia, Singapore, Switzerland, Thailand, and Russia have all implemented some form of a regulatory sandbox.⁵⁸

III. STATE AND FEDERAL REGULATORY SANDBOX EFFORTS IN THE UNITED STATES

A. *State Efforts at Creating a Regulatory Sandbox*

Currently, no state or region in the United States has enacted its own regulatory sandbox.⁵⁹ There is, however, movement in Arizona, Illinois, and amongst a coalition of the six New England states to create a state- or regional-level fintech sandbox.⁶⁰ This state-level movement is motivated by both state desire to not be viewed as an impediment to

56. *Regulatory Sandbox – Cohort 3*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/regulatory-sandbox/cohort-3> (last updated Aug. 8, 2017); *Regulatory Sandbox – Cohort 2*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/regulatory-sandbox/cohort-2> (last updated June 15, 2017); *Regulatory Sandbox – Cohort 1*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/regulatory-sandbox/cohort-1> (last updated June 15, 2017).

57. Dan Cummings, *Regulatory Sandboxes: A Practice For Innovation That Is Trending Worldwide*, ETH NEWS (Feb. 28, 2017, 8:10 PM), <https://www.ethnews.com/regulatory-sandboxes-a-practice-for-innovation-that-is-trending-worldwide>.

58. See Jessie Willms, *New Regulatory Sandbox Could Boost Blockchain Tech in Canada*, NASDAQ (Mar. 7, 2017, 12:12:24 PM), <http://www.nasdaq.com/article/new-regulatory-sandbox-could-boost-blockchain-tech-in-canada-cm757328> (discussing the Canadian Security Administrators' launch of a "Regulatory Sandbox Initiative"); Cummings, *supra* note 57 (discussing the trend of implementing a regulatory sandbox that started in the United Kingdom and spread to other countries across the world); AUSTL. SECURITIES & INVESTMENT COMMISSION, *supra* note 9; CENTRAL BANK OF BAHRAIN, REGULATORY SANDBOX FRAMEWORK 1 http://www.cbb.gov.bh/assets/Whitepapers/Regulatory_Sandbox_Framework.pdf (last visited Feb. 10, 2018); *FinTech Regulatory Sandbox*, MONETARY AUTHORITY OF SINGAPORE, <http://www.mas.gov.sg/Singapore-Financial-Centre/Smart-Financial-Centre/FinTech-Regulatory-Sandbox.aspx> (last modified Jan. 9, 2017).

59. Sara Merken, *States Embrace Fintech Sandbox Concept as Federal Action Stalls*, BNA (Sept. 21, 2017), <https://www.bna.com/states-embrace-fintech-n73014464317/> [hereinafter Merken, *States Embrace Fintech*]; see Brnovich, *supra* note 18, at 4–5 (discussing the movement of Arizona policymakers toward a regulatory sandbox); see also Sweeney, *supra* note 12 (discussing the proposed "New England Regulatory FinTech Sandbox" in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut).

60. Sweeney, *supra* note 12.

innovation and state awareness of the regulatory burdens on fintech companies to comply with regulatory requirements which may be applicable in each state.⁶¹

Outside the scope of federal regulations and requirements placed on fintech companies, a fintech company often incurs thousands of dollars in costs and fees simply through the process of seeking approval and a license to operate in a state.⁶² If the state regulatory burden is scaled to include compliance and operation in all fifty states, a typical fintech company can expect millions in expenses and years of frustration in the pursuit of national expansion.⁶³ Arizona Attorney General Mark Brnovich has noted that this problem forces start-ups to pursue one of three routes: (1) the start-up can bear the cost and delays of regulatory compliance and hope that no other company rolls out a similar innovation in the interim;⁶⁴ (2) the fintech start-up could elect to skip the licensing process, either due to lack of capital or fear of newcomers, and “hope they don’t get caught;”⁶⁵ or (3) the fintech company could decide to close its doors and move the firm abroad, likely to a place where regulations are uniform and tailored to facilitate the growth of small start-ups.⁶⁶

Gradually, states and regions are realizing that the lack of regulatory uniformity across state lines functions as a barrier to innovation rather than as a safeguard for consumers.⁶⁷ By overburdening fintech start-ups, the patchwork state regulatory system only serves to create an additional problem for a company already dealing with the challenge of raising capital and developing a product.⁶⁸ One possible

61. Sweeney, *supra* note 12.

62. See Brnovich, *supra* note 18, at 1 (indicating that compliance costs and legal work are a significant regulatory barrier for start-up companies).

63. Brnovich, *supra* note 18, at 1.

64. See Brnovich, *supra* note 18, at 1 (“Such delay and expense is unacceptable in an industry where today’s startup ideas quickly become yesterday’s news . . .”).

65. Brnovich, *supra* note 18, at 1.

66. See Brnovich, *supra* note 18, at 2 (“[O]ur global competitors are certainly exploiting their regulatory advantage to get ahead in fintech.”).

67. See Brnovich, *supra* note 18, at 3 (discussing the movement of Arizona policymakers toward a regulatory sandbox); see also Sweeney, *supra* note 12 (discussing the proposed “New England Regulatory FinTech Sandbox” in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut).

68. See Brnovich, *supra* note 18, at 1 (discussing the need for a state-level regulatory sandbox and the problems faced by fintech firms in today’s regulatory landscape).

solution to this dilemma would be the creation of a state-level regulatory sandbox for fintech companies.⁶⁹

To this end, David Cotney, the former Massachusetts Commissioner of Banks, and Cornelius Hurley, director of Boston University's Center for Finance, Law, and Policy, have conceptualized what has come to be known as the "New England Regulatory FinTech Sandbox" ("NERFS").⁷⁰ This proposed sandbox would take the form of a coalition between Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.⁷¹ While NERFS is still in its infancy, it has been received with "universal openness" from financial regulators in all six states.⁷² NERFS will "stitch[] together elements of [the U.K. sandbox] . . . and the European Union's 'passport' model for cross-border banking operations."⁷³ Essentially, NERFS would bring uniformity to fintech regulation across the six participating New England states and allow a fintech company licensed to test within one state to conduct business in any of the other five states.⁷⁴ This practice would be analogous to the European Union's ("EU") passport model which allows a bank operating in one EU member state to open branches and provide services, without further authorization, in other EU member states.⁷⁵ Therefore, NERFS participants could expect uniform regulatory standards regardless of which member state or states they choose to operate out of.⁷⁶ With the New England states' regulators on board, American fintech companies would finally be able to enjoy some of the same sandbox benefits as their foreign counterparts, at least within geographical limits of NERFS member states.⁷⁷ Furthermore, there is no indication that a fintech operating within the boundaries of NERFS would be precluded from seeking licensing to operate within a non-member

69. See Brnovich, *supra* note 18, at 3 (discussing the need for a state-level regulatory sandbox).

70. Sweeney, *supra* note 12.

71. Sweeney, *supra* note 12.

72. Sweeney, *supra* note 12.

73. Sweeney, *supra* note 12.

74. Sweeney, *supra* note 12.

75. Maria J. Nieto & Larry D. Wall, *Breaking Down Geographic Barriers on Banks: U.S. and EU Recent Experiences*, FED. RESERVE BANK OF ATLANTA (July 2015), <https://www.frbatlanta.org/cenfis/publications/notesfromthevault/1507>.

76. See Sweeney, *supra* note 12 ("In harmonizing the regulatory regime for the sandbox across state lines . . . the program emulates the EU's 'passport.' [A] bank licensed in one EU country [is] able to . . . operat[e] seamlessly throughout the [other] states of the EU . . .").

77. Sweeney, *supra* note 12.

state.⁷⁸ Therefore, a fintech operating within all NERFS states could also choose to provide products and services to North Carolina residents, although the fintech would be without the regulatory harmonies it experiences within NERFS.⁷⁹

Contrary to the regional NERFS approach, Arizona and Illinois have taken steps to implement state-level sandboxes within their respective geographic boundaries.⁸⁰ Arizona was the first state to announce its own sandbox plans, and draft legislation in the state would allow fintech companies to test innovations on up to 5,000 consumers within its sandbox.⁸¹ Attorney General Brnovich states that Arizona's sandbox will require certain consumer protection safeguards, but that the initiative would also reduce regulatory and licensing burdens on fintechs.⁸² In Illinois, lawmakers are planning to mirror Arizona's sandbox approach and hope to introduce the bill in their next legislative session.⁸³

State-level sandboxes, whether regional or confined to a singular state, would unquestionably ease regulatory and licensing burdens on fintechs.⁸⁴ Furthermore, state sandboxes could provide these benefits to fintechs while simultaneously augmenting U.S. competitiveness in the global fintech marketplace during times of federal gridlock.⁸⁵ However, while there is “real potential value to states serving as true ‘laboratories of democracy,’” a few major problems still plague state initiatives.⁸⁶ First, should Arizona and Illinois cause other states to follow suit and implement their own sandbox, the purpose of a sandbox—to decrease regulatory burdens and ambiguity—could be defeated by each state

78. See Sweeney, *supra* note 12 (indicating that the regulatory regime is only harmonized among the NERFS states, and making no indication that a NERFS fintech could not also seek licensing with non-member states).

79. Sweeney, *supra* note 12.

80. Merken, *States Embrace Fintech*, *supra* note 59.

81. Merken, *States Embrace Fintech*, *supra* note 59.

82. Merken, *States Embrace Fintech*, *supra* note 59.

83. Merken, *States Embrace Fintech*, *supra* note 59.

84. Brnovich, *supra* note 18, at 3.

85. Brnovich, *supra* note 18, at 3.

86. See Brian Knight, *How the CFPB Could Help State Regulatory Sandboxes*, MEDIUM (July 5, 2017), <https://finregrag.com/how-the-cfpb-could-help-state-regulatory-sandboxes-d299c2e95ca5> [hereinafter Knight, *CFPB Helps State Regulatory Sandboxes*] (analyzing some of the problems associated with a state-level regulatory sandbox and the possible solutions necessary to ensure an effective state sandbox).

enacting a sandbox with distinct rules and procedures.⁸⁷ This issue indicates that regional sandboxes, like NERFS, would at least reduce this concern by providing fintechs with uniform standards across multiple borders.⁸⁸ Second, applicable to regional and state-specific sandboxes alike, federal regulators from agencies such as the Bureau of Consumer Financial Protection (“CFPB”) would still maintain the authority to enforce a federal regulation upon a fintech company operating within a state sandbox.⁸⁹ Absent promulgation of a rule by these federal regulators exempting, for example, NERFS participating fintech companies from certain conduct, it seems unlikely that any fintech company would “bet the business” on federal non-enforcement.⁹⁰ Therefore, until the day the federal government backs a state-led sandbox initiative with consistent regulation and possible exemptions, it would seem prudent to strive for a federal fintech sandbox.⁹¹

*B. A Federal Attempt: The Financial Services Innovation Act of 2016*⁹²

In 2016, Congressman Patrick McHenry of North Carolina introduced H.R. 6118, the “Financial Services Innovation Act of 2016” (“FSIA”), to the House of Representatives, which would have created a federal regulatory sandbox.⁹³ Development on the FSIA, however, has been stagnant since October 2016, likely due to both the OCC’s strong opposition to a federal sandbox and the OCC’s emerging Fintech Charter program.⁹⁴ Former Comptroller of the Currency, Thomas Curry, stated unequivocally that the OCC does not support the sandbox approach because (1) the agency itself does not have the authority to waive compliance with regulations; (2) it “never makes sense” to waive

87. Merken, *States Embrace Fintech*, *supra* note 59.

88. Merken, *States Embrace Fintech*, *supra* note 59.

89. See Knight, *CFPB Helps State Regulatory Sandboxes*, *supra* note 86 (analyzing some of the problems associated with a state-level regulatory sandbox).

90. Knight, *CFPB Helps State Regulatory Sandboxes*, *supra* note 86.

91. See Knight, *CFPB Helps State Regulatory Sandboxes*, *supra* note 86 (laying out the benefits and drawbacks of a state-level fintech sandbox).

92. The Financial Services Innovation Act of 2016, H.R. 6118, 114th Cong. (2016).

93. *Id.*

94. *Id.*; see Lalita Clozel, *OCC’s Curry Rules Out ‘Safe Space’ for Fintech Companies*, AM. BANKER, Nov. 3, 2016, at 1–2 [hereinafter Clozel, *OCC’s Curry*] (discussing the OCC’s opposition to a regulatory sandbox and preference for a Fintech Charter).

compliance with consumer protection or safety and soundness; and (3) ensuring the soundness and safety of financial products before rolling them out is the responsibility of the fintech.⁹⁵ The FSIA, however, remains an important milestone, because a similar sandbox bill could certainly be re-introduced at a later date.⁹⁶ This day could come sooner rather than later, as Congressman McHenry has unequivocally stated that he intends to promptly re-introduce the FSIA to Congress.⁹⁷

Under the FSIA, the United States' regulatory sandbox initiative would have incorporated a two-pronged approach.⁹⁸ First, the FSIA would create a government-wide "fintech oversight regime."⁹⁹ In order to implement this regime, the FSIA would have required each of the following federal agencies to establish their own Financial Services Innovation Office ("FSIO"): (1) the Board of Governors of the Federal Reserve System; (2) the CFPB; (3) the Commodity Futures Trading Commission ("CFTC"); (4) the Department of Housing and Urban Development; (5) the Department of the Treasury; (6) the Farm Credit Administration; (7) the Federal Deposit Insurance Corporation; (8) the Federal Housing Finance Agency; (9) the Federal Trade Commission; (10) the National Credit Union Administration Board; (11) the OCC; and (12) the Securities and Exchange Commission.¹⁰⁰ Initially, the FSIA requires each of these agencies to identify areas of regulation applicable to financial innovation that they would consider modifying or waiving under the sandbox, and to utilize the newly created FSIOs to "promote financial innovations" through such a waiver or modification.¹⁰¹ Furthermore, each agency's FSIO director and one state banking supervisor would comprise the FSIO Liaison Committee, a body tasked

95. Clozel, *OCC's Curry*, *supra* note 94.

96. See Susan Gault-Brown & John Sullivan, *Foreign Regulators Easing Regulatory Burdens on Fintech Companies – Will the U.S. Follow Suit?*, WSGR FINTECH UPDATE (May 2017), <https://www.wsgr.com/publications/PDFSearch/fintech-update/May2017/index.htm> (analyzing the FSIA and the status of a regulatory sandbox in the United States).

97. Sara Merken, *Fintech Firms May Receive More No-Action Letters from CFPB*, [2017] Banking Daily (BNA) No. 186, at 2 (Sept. 27, 2017).

98. See H.R. 6118 §§ 2–6 (discussing the establishment of FSIOs at federal agencies and the ability of a covered person to petition the federal agencies for an enforceable compliance agreement).

99. See C. Todd Gibson & Tyler Kirk, *Financial Services Innovation Act: The U.S. Wants a Sandbox Too*, THE NAT'L L. REV. (Nov. 3, 2016), <https://www.natlawreview.com/article/financial-services-innovation-act-us-wants-sandbox-too> (laying out the framework of the FSIA and the two-pronged approach employed by the FSIA).

100. H.R. 6118 § 2(2).

101. *Id.* § 3.

with facilitating the cooperation of each FSIO.¹⁰² Thus, the FSIOs and the FSIO Liaison Committee comprise the oversight regime prong.¹⁰³

The second prong of the FSIA establishes the sandbox itself, allowing a “covered person” (a fintech firm “that offers or intends to offer a financial innovation”) to petition one or more FSIOs for an “alternative compliance plan under an ‘enforceable compliance agreement.’”¹⁰⁴ In submitting a petition for an alternative compliance plan, a fintech firm must first delineate the regulatory waivers or modifications sought, and subsequently demonstrate that the firm’s proposed financial innovation would satisfy the following conditions: (1) serve the public interest; (2) improve access to financial products or services; (3) present no systemic risk to the United States financial system; and (4) promote consumer protection.¹⁰⁵

Upon submitting a petition to one or more FSIO agencies, a covered person automatically triggers the safe harbor provision of FSIA for the duration of the period between the petition submittal and the agency decision on the petition.¹⁰⁶ Under this provision, a fintech company is protected from agency enforcement action “relating to the financial innovation that was the subject of the petition.”¹⁰⁷ In order to balance out this added layer of protection for fintech companies, the FSIA also authorized federal agencies to seek injunctive relief upon a determination that the fintech innovation in question poses a threat to consumers or presents a systemic risk to the financial system.¹⁰⁸

Once a petition is approved by the relevant FSIO and the parties agree to the enforceable compliance agreement’s terms and conditions, the fintech company and its potential innovation are officially operating within the sandbox.¹⁰⁹ At this stage, the fintech company enjoys the modifications or waivers granted by the compliance agreement, as well as a limitation on enforcement actions brought by other federal or state

102. *Id.* § 5.

103. *See id.* §§ 2–6 (discussing the creation of FSIOs and the FSIO Liaison Committee).

104. *See id.* §§ 2, 6 (defining “covered person” and allowing a covered person to petition the relevant agency for an enforceable compliance agreement); *see also* Gibson & Kirk, *supra* note 99 (laying out the framework of the FSIA and its two-pronged approach).

105. *Id.* § 6(b).

106. *Id.* § 6(d).

107. *Id.*

108. *Id.* § 6(d)(2).

109. *Id.* § 8.

agencies.¹¹⁰ Only in the case of a judicial determination that the FSIO's approval of the fintech innovation was arbitrary, capricious, and caused substantial harm to consumers can a state commence an enforcement action against a fintech firm operating within the sandbox.¹¹¹ Therefore, the FSIA provides fintech firms with increased safety from federal or state enforcement actions while simultaneously reserving some enforcement power to the state in which the fintech firm is operating.¹¹²

All in all, the FSIA would have created a federal oversight regime comprised of twelve FSIOs and a FSIO Liaison Committee to supervise the operation of the proposed regulatory sandbox.¹¹³ In order to provide a safe space for innovation, the FSIA also incorporated appropriate safeguards for consumers, the financial system, and fintech firms operating within the sandbox.¹¹⁴ The FSIA, however, is stagnant in Congress and merely serves as an example of what a federal regulatory sandbox might look like in the future.¹¹⁵

C. Comparing the FSIA to the FCA's Project Innovate

Not all sandboxes are created equal. The unique financial system of each nation or country will necessitate the development of a sandbox tailored to its specific needs.¹¹⁶ While the main goal of a sandbox—allowing fintech companies to “test innovative products, services, business models and delivery mechanisms in the real market, with real consumers[,]”¹¹⁷ without fear of certain regulatory consequences—might

110. *See id.* § 8(d)(1)(B) (“a State may not commence an enforcement action against the covered person . . . if the covered person provides the State with the enforcement compliance agreement and a statement of the policies and procedures the covered person has in place to comply with State laws . . .”).

111. *Id.* § 8(d)(2).

112. *See id.* §§ 2–8 (providing information on The Financial Services Innovation Act of 2016, which would create a federal regulatory sandbox in the United States).

113. *Id.* § 2(2), (6).

114. *See id.* §§ 2–6 (comprising the oversight regime prong by establishing FSIOs at twelve federal agencies which receive petitions from fintechs).

115. *See Gault-Brown & Sullivan, supra* note 96 (“Although the proposed bill died in committee, a similar bill could be re-introduced in the current or future Congress.”).

116. *See Patrick McHenry, CFPB's 'Project Catalyst' Failed. Fintech Deserves Better, AM. BANKER*, Apr. 25, 2017, at 3 (“While it is true that the American financial system—and therefore our financial regulators—are different than other countries, that does not mean we cannot put forward policies that allow for more regulatory flexibility.”).

117. FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 1; *see* H.R. 6118 § 4(a) (establishing FSIOs to “promote financial innovations.”).

ring true across all sandbox models, the tools and framework used to accomplish this goal certainly differ.¹¹⁸

Common to both the FSIA and the FCA's sandbox is the emphasis placed on consumer benefit and safety, flexibility, and supervision.¹¹⁹ Regulatory flexibility allows fintech firms in either sandbox to seek agency guidance, petition for regulatory modifications or waivers, and relinquish the threat of enforcement actions for the duration of the sandbox test.¹²⁰ To counteract the flexibility of reduced regulation, fintech companies operating within either sandbox are closely supervised by their respective regulatory agencies—the FSIOs of the FSIA and the FCA's sandbox units—to ensure safety to consumers and the respective nations' financial system.¹²¹

The frameworks of the FSIA and the FCA's sandbox differ, however, primarily due to the distinct regulatory environment in which they operate.¹²² For example, the U.K. financial system is comprised of only five regulatory agencies, while the U.S. financial system incorporates twelve federal regulators working alongside myriad state bank, insurance, and securities regulators.¹²³ While the FCA's sandbox indicates that it is the only agency in the United Kingdom that could take enforcement action against a fintech company, fintech firms in the United States must worry about both federal and state agency enforcement actions.¹²⁴ Therefore, the FSIA framework explicitly sought to protect fintech firms from enforcement actions on the state and federal level, a

118. Compare H.R. 6118 §§ 2–6, with FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 1.

119. H.R. 6118 § 6(b); FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3.

120. H.R. 6118 §§ 6, 8; FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3.

121. See H.R. 6118 §§ 2–6 (comprising the FSIA's oversight regime); see also FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 3 (outlining the FCA's plan to implement a regulatory sandbox, which includes the FCA's oversight regime comprised of “sandbox units”).

122. Compare H.R. 6118 § 2(2) (listing the U.S. financial regulators), with *UK Regulators, Government and Other Bodies*, FIN. CONDUCT AUTH. (“FCA”), <https://www.fca.org.uk/about/uk-regulators-government-other-bodies> (last updated Jan. 9, 2017) (listing the United Kingdom's financial regulators).

123. See H.R. 6118 § 2(2) (listing the U.S. financial regulators); see also *UK Regulators, Government and Other Bodies*, *supra* note 122 (listing the FCA, the Prudential Regulation Authority, the Bank of England, the Financial Policy Committee, and The Treasury as the United Kingdom's financial regulators).

124. See H.R. 6118 § 8(d) (indicating that federal agencies and states could seek enforcement actions against a fintech firm); see also FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 9 (indicating that the FCA would be the authority bringing enforcement actions in its capacity as the singular financial regulator in the U.K.).

problem not encountered by the FCA.¹²⁵ Furthermore, there is no indication that the FCA's sandbox includes a safe harbor provision similar to that of the FSIA, which provides a free pass to fintechs awaiting agency decision post-petition submittal.¹²⁶

As compared to the FCA's sandbox, the FSIA is truly unique in that it "gives the benefit of the doubt to fintech companies and places the onus on federal regulators to come up with credible reasons for why a waiver or modification should not be granted."¹²⁷ According to the FSIA, an agency is required to approve a fintech firm's petition to enter into the sandbox so long as the firm "shows that it is more likely than not that [it] meets the requirements for establishing an alternative compliance plan."¹²⁸ Should an agency reject a fintech company's petition under the FSIA, however, the agency is then required to explain the reason for disapproval and identify "persons likely to benefit[] from rejecting the petition."¹²⁹ The objective of this identification requirement is both transparency and promotion of fair competition in the marketplace.¹³⁰ Utilizing PwC's "As, Bs, Cs, and Ds" of fintech, imagine a scenario in which an "A" (a large, well-established financial institution) stands to lose part of its overall financial services market share if a "D" (a disruptor or fast moving start-up fintech firm) were permitted to bring its innovation to market through the FSIA.¹³¹ By requiring the FSIO to disclose the "A" that stands to benefit from the "D's" absence in the sandbox, the FSIA makes a good faith effort to require regulators to be

125. See H.R. 6118 § 8(d)(2) (indicating that "a State may [only] commence an enforcement action against a covered person . . . if . . . [a] court determines the agency's action was arbitrary and capricious and the financial innovation has substantially harmed consumers within such State.").

126. See *id.* § 6(d)(1) ("During the period after a covered person submits a petition under this section and before the agency receiving the petition makes a determination on the petition . . . an agency may not take an enforcement action against a covered person relating to the financial innovation that was the subject of the petition.").

127. Lee Reiners, *New Legislation Designed to Make the U.S. a Fintech Leader*, THE FINREG BLOG (Nov. 17, 2016), <https://sites.duke.edu/thefinregblog/2016/11/17/new-legislation-designed-to-make-the-u-s-a-fintech-leader/>.

128. H.R. 6118 § 7(b).

129. *Id.* § 7(c).

130. See Reiners, *supra* note 127 ("By publicly identifying incumbent firms that benefit from a banking agency rejecting a fintech company's petition, it brings transparency to the process and ensures that regulation does more than simply protect firms already under the regulatory umbrella.").

131. Garfinkel & Nicolacakis, *supra* note 33.

transparent and impartial to the “As, Bs, Cs, and Ds” of the fintech ecosystem.¹³²

D. Keeping up with the Joneses: The United States Needs a Sandbox Too

Under the current federal regulatory environment, fintech companies are faced with a multitude of questions and very few answers.¹³³ Which agencies govern the fintech’s innovation?¹³⁴ Which rules and regulations are applicable to the innovation?¹³⁵ Do the pre-mobile and pre-Internet regulations and rules apply to the fintech firm?¹³⁶ How can a small start-up maintain compliance in the ever-changing regulatory ecosystem?¹³⁷ Likewise, regulators are faced with novel questions of their own.¹³⁸ How do rules and regulations apply to the modern fintech firm business model?¹³⁹ How can regulators “get their arms more firmly around” the fintech sector to stop regulatory arbitrage, while also promoting innovation?¹⁴⁰

The regulatory response to these questions has yet to provide clarity on the matter.¹⁴¹ Citing consumer protection concerns, the OCC has “soundly rejected the possibility of creating a [regulatory sandbox]” in the United States.¹⁴² Instead, regulators are looking for other, non-sandbox avenues to promote innovation and competition in the United

132. See H.R. 6118 § 7 (requiring transparency after disapproval of a fintech’s petition by the relevant regulator); Garfinkel & Nicolacakis, *supra* note 33.

133. See Elliott, *supra* note 13 (summarizing the regulatory questions and concerns facing fintechs).

134. Elliott, *supra* note 13.

135. Elliott, *supra* note 13.

136. Elliott, *supra* note 13.

137. Elliott, *supra* note 13.

138. See Brian Knight, *Innovation Will Stall Without a Regulatory Fintech ‘Sandbox,’* AM. BANKER, Nov. 15, 2016, at 1–3 [hereinafter Knight, *Innovation Will Stall*] (indicating that financial regulators, like the OCC, are unsure of the impact a sandbox might have on consumer safety).

139. See Elliott, *supra* note 13 (“[I]t’s not always clear specifically which rules and regs [a fintech has] to be in compliance with.”).

140. Elliott, *supra* note 13.

141. See Elliott, *supra* note 13 (“[T]here has been an obvious groundswell by the regulatory agencies that they need to get a deeper understanding of the proliferation of new financial services models that simply didn’t exist four or five years ago.”).

142. See Clozel, *OCC’s Curry*, *supra* note 94 (“Thomas Curry . . . soundly rejected the possibility of creating a ‘safe space’ for fintech firms to operate outside of consumer protection rules while they develop and test new products.”).

States.¹⁴³ For example, the CFTC announced an innovation lab, called “LabCFTC,” which serves as a point of contact for “fintech innovators to engage with the CFTC [and] learn about the CFTC’s regulatory framework”¹⁴⁴

The CFPB also launched “Project Catalyst,” which allows innovators to request no-action letters from the CFPB.¹⁴⁵ While acquiring a no-action letter would allow a fintech firm to take a product to market without fear of enforcement by the CFPB, relatively little success has been realized through Project Catalyst, likely because the no-action letters are “subject to modification or revocation at any time at the discretion of the [CFPB].”¹⁴⁶ Since Project Catalyst’s inception in 2012, the CFPB has only issued one no-action letter, which was granted in September 2017 to “Upstart,” a fintech company that uses artificial intelligence to make credit and loan pricing decisions.¹⁴⁷ This no-action letter, which lasts for three years, states that the CFPB has no “present intention” to recommend any supervisory or enforcement action, pursuant to the Equal Credit Opportunity Act, against Upstart with regards to one of the fintech’s products.¹⁴⁸ Furthermore, the no-action letter also states that it is not binding upon the CFPB, and that the CFPB may initiate a retroactive enforcement or supervisory action against Upstart if appropriate.¹⁴⁹ Therefore, it would seem that the CFPB’s no-action letters operate as more of a revocable promise than a safe harbor for innovators.¹⁵⁰ Accordingly, Upstart could have the rug pulled out from under its feet at any time and for any reason deemed appropriate by the CFPB.

143. See Forshee, *supra* note 10 (introducing the CFTC’s LabCFTC and stating that “many . . . are skeptical that a sandbox will [ever] happen in the U.S. . . .”).

144. U.S. COMMODITY FUTURES TRADING COMMISSION, LABCFTC OVERVIEW, <http://www.cftc.gov/LabCFTC/Overview/index.htm> (last visited Feb. 10, 2018).

145. CONSUMER FIN. PROT. BUREAU, POLICY ON NO-ACTION LETTERS; INFORMATION COLLECTION 25 n.7 (Feb. 18, 2016), http://files.consumerfinance.gov/f/201602_cfpb_no-action-letter-policy.pdf.

146. *Id.* at 33; see McHenry, *supra* note 116 (describing the failed attempt by the CFPB at creating attractive no-action letters).

147. CONSUMER FIN. PROT. BUREAU; UPSTART NO-ACTION LETTER (Sept. 14, 2017), http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf; Merken, *supra* note 97.

148. CONSUMER FIN. PROT. BUREAU, *supra* note 147.

149. CONSUMER FIN. PROT. BUREAU, *supra* note 147.

150. CONSUMER FIN. PROT. BUREAU, *supra* note 147 (stating the various exceptions of the no-action letter that leave fulfilment of the CFPB’s “present intentions” up to the agency’s discretion).

Not without controversy, the OCC has proposed to foster innovation and reduce ambiguities through its Fintech Charter initiative.¹⁵¹ This special purpose charter aims to place an accepted fintech company under the same rules and regulations as national banks.¹⁵² Aside from the question of whether the OCC even has the authority to create a Fintech Charter, it is unclear that a special purpose charter for fintechs would provide regulatory relief to all but the most experienced and capital-flush fintech firms.¹⁵³ While the “As” and “Bs” of the fintech ecosystem could certainly pass the OCC’s adequate capital and experienced management criteria, it is unlikely that a newly formed start-up could do the same.¹⁵⁴ Therefore, it appears that the OCC’s Fintech Charter favors larger innovators while presenting a fruitless opportunity to smaller firms.¹⁵⁵

The OCC has also proposed the implementation of a bank-run “pilot” program to foster innovation and support fintech companies.¹⁵⁶ The OCC equates its pilot program with a regulatory sandbox, because the program would require regulators to create a safe space for innovation for the pilot program’s participants.¹⁵⁷ This safe space, however, would provide absolutely no benefit to the vast majority of fintech firms, because “[e]ligible participants for the program . . . include OCC-supervised banks and significant service providers, [and] fintechs in

151. See Edge, *supra* note 22 (discussing the lawsuit filed by the Conference of State Bank Supervisors in opposition of the OCC’s Fintech Charter).

152. OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL: CHARTERS 50 (2016), <https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf> [hereinafter Comptroller’s Licensing Manual].

153. See Roberts, *supra* note 17 (arguing that the OCC’s Fintech Charter would only benefit the largest fintechs and would not affect the business operations of smaller fintechs); see also Press Release, Jim Kurtze, Vice President of Communications, Conference of State Bank Supervisors, Statement by the Conference of State Bank Supervisors on Comptroller’s Announcement of New Federal Charters (Dec. 12, 2016), <https://www.csbs.org/news/press-releases/pr2016/Pages/120216.aspx> (arguing that the OCC lacks the power to establish full-service bank charters to institutions that do not engage in deposit taking without Congress’ approval).

154. Comptroller’s Licensing Manual, *supra* note 152; see e.g., Roberts, *supra* note 17 (indicating that the OCC’s Fintech Charter would only benefit the largest fintech companies).

155. Roberts, *supra* note 17.

156. OFFICE OF THE COMPTROLLER OF THE CURRENCY, RECOMMENDATIONS AND DECISIONS FOR IMPLEMENTING A RESPONSIBLE INNOVATION FRAMEWORK 12 (2016), <https://www.occ.gov/topics/responsible-innovation/comments/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf> [hereinafter OCC, IMPLEMENTING A RESPONSIBLE INNOVATION FRAMEWORK].

157. *Id.*

partnership with an OCC-supervised bank or significant service provider”¹⁵⁸ While an independent fintech firm could not meet the pilot program’s criteria for entry, PayPal, for example, would be eligible for the OCC’s pilot program due to its partnership with Bank of America, an OCC-supervised bank.¹⁵⁹ This eligibility requirement creates a catch-22 situation for fintech firms, because the firm would be forced to choose between gaining the benefits of the sandbox by partnering with the competition—assuming that the fintech firm even has a partnership offer—or forego its benefits in favor of maintaining its separate existence and ability to compete directly with all OCC-regulated institutions.¹⁶⁰ Therefore, when compared to the FCA’s sandbox in the United Kingdom, the OCC’s pilot program is not a true fintech regulatory sandbox.¹⁶¹

Based on the current impact of the pseudo-sandbox initiatives by the OCC, CFPB, and CFTC, the only viable option to promote innovation for fintech companies of all sizes would be a true regulatory sandbox.¹⁶² Aside from logistical problems, consumer protection concerns appear to be the major federal and state concern about implementing a true regulatory sandbox.¹⁶³ In a speech in London, former Comptroller of the Currency, Thomas Curry,¹⁶⁴ said “[w]aiving compliance with consumer

158. *Id.*

159. See Press Release, Bank of America, Bank of America and PayPal Partner to Enable In-Store Payments and Account Linking (July 26, 2017), <http://newsroom.bankofamerica.com/press-releases/consumer-banking/bank-america-and-paypal-partner-enable-store-payments-and-account-li> (announcing the partnership between Bank of America and PayPal).

160. See OCC, IMPLEMENTING A RESPONSIBLE INNOVATION FRAMEWORK, *supra* note 156, at 8 (requiring pilot participating fintechs to partner with an OCC-supervised bank).

161. See OCC, IMPLEMENTING A RESPONSIBLE INNOVATION FRAMEWORK, *supra* note 156, at 11–12 (requiring a fintech to partner with a bank); see also FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 1–20 (lacking a bank partnership requirement).

162. See Brnovich, *supra* note 18 (discussing the challenges to fintech companies under the United States’ current regulatory landscape and stating that a sandbox would “maintain our country’s competitiveness in the global marketplace.”).

163. See Clozel, *OCC’s Curry*, *supra* note 94 (indicating that the OCC’s opposition to sandbox implementation centers around consumer protection concerns).

164. Joseph Otting was confirmed as Curry’s replacement on November 16, 2017. Otting has yet to opine on the OCC’s proposed fintech charter or the regulatory sandbox concept. *Otting Confirmed as Comptroller of the Currency*, ABA BANKING J. (Nov. 16, 2017), <https://bankingjournal.aba.com/2017/11/otting-confirmed-as-comptroller-of-the-currency/>; MATTHEW CUTTS ET AL., THE LATEST ON FINTECH: FEDERAL AND BEYOND, SQUIRE PATTON BOGGS (2017), <https://www.squirepattonboggs.com/~media/files/insights/publications/2017/06/the-latest-on-fintech-federal-and-beyond/27235public-policy-financial-services-the-latest-on-fintech—federal-and-beyondthought-leadership.pdf>.

protection or safety . . . never makes sense”¹⁶⁵ Due to his remarks, it would seem that Mr. Curry views a regulatory sandbox as the beginning of a “race to the bottom”—when a nation or region lessens regulation or oversight to attract investment during a state of cutthroat competition.¹⁶⁶ While a regulatory sandbox would likely attract venture capital investment in the U.S. economy, this does not necessitate that a “race to the bottom” would also occur.¹⁶⁷ If the FCA’s sandbox is any indication, a properly tailored sandbox can “offer an environment where companies can innovate while ensuring consumers are protected.”¹⁶⁸ This scenario seems like a win-win or a race to the top, not to the bottom.¹⁶⁹

IV. A REGULATORY SANDBOX FOR THE UNITED STATES

The FSIA is a great example of how the United States could solve some of the regulatory problems affecting fintech firms, while also protecting consumers.¹⁷⁰ Regulatory ambiguity would be quashed by the transparency and supervision required under the FSIA.¹⁷¹ Regulatory clarity and supervision would, in turn, reduce the often daunting upfront compliance costs incurred by disruptive fintechs who are forced to speculate as to the applicability of existing regulations to their specific business model.¹⁷² This problem is solved by continuous dialogue between the fintech company and its regulators within the sandbox,

165. Clozel, *OCC’s Curry*, *supra* note 94.

166. *Race to the Bottom*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/race-bottom.asp> (last visited Feb. 10, 2018).

167. See Thomas J. Curry, Georgetown Law Remarks, *supra* note 7, at 1 (stating that investment in fintech companies has grown to over \$24 billion worldwide); see also Sam Pearse, *How the FCA’s Regulatory Sandbox scheme could help UK FinTech Startups*, UK TECH NEWS (May 2, 2016), <https://www.uktech.news/news/how-the-fcas-regulatory-sandbox-scheme-could-help-uk-fintech-startups-20160502> (arguing that a regulatory sandbox attracts investment through lessening regulatory ambiguity while, at the same time, enabling the U.K. to evolve its regulatory environment to better understand how to regulate similar fintechs in the future).

168. See Knight, *Innovation Will Stall*, *supra* note 138 (promoting the regulatory sandbox and explaining the regulatory disfavor of a fintech sandbox).

169. Pearse, *supra* note 167 (arguing that a regulatory sandbox attracts investment through lessening regulatory ambiguity while, at the same time, enabling the U.K. to evolve its regulatory environment to better understand how to regulate similar fintechs in the future).

170. The Financial Services Innovation Act of 2016, H.R. 6118, 114th Cong. (2016).

171. See *id.* § 6 (requiring transparency by regulators who disapprove of a fintech’s petition for an enforceable compliance agreement).

172. See Pearse, *supra* note 167 (indicating that engaging in a direct dialogue with a regulator would relieve startups of some upfront costs).

which also allows the regulators to remain flexible, adapt, and learn how to better regulate novel business models within the financial marketplace.¹⁷³ In this regard, the sandbox is mutually beneficial to innovators and regulators alike.

Additionally, under the protections of a regulatory sandbox, fintech companies would be exempt from state or federal enforcement actions relating to their innovations, thereby increasing investor confidence and attracting capital contributions to the innovation.¹⁷⁴ Investors are not the only market participants whose confidence is increased by the presence of a sandbox, however.¹⁷⁵ Fintechs also see a rise in the confidence of their customers due to the sandbox, because the sandbox supervision and regulation is an important hook to sell their products in the market.¹⁷⁶

Furthermore, there is no indication that consumers would be any less protected under a regulatory sandbox.¹⁷⁷ The FSIA, for example, could be expanded to require regulators to limit a fintech company's liability for inadvertent consumer protection violations to merely compensating the public for the harm it caused.¹⁷⁸ In this manner, fintech companies would be exempt from federal fines or penalties, while still being required to re-pay harmed consumers.¹⁷⁹ "Of the three justifications for sanctioning a company—compensation, punishment[,] and deterrence—only the first is appropriate for companies operating

173. See Pearse, *supra* note 167 (pointing out that the FCA's early involvement and direct dialogue with fintechs and their innovations will position the regulator in a better place to "advise the [U.K.] on the changes necessary to evolve the [country's] regulatory environment.").

174. H.R. 6118 § 8; see DELOITTE, REGULATORY SANDBOX MAKING INDIA A GLOBAL FINTECH HUB 26 (July 2017), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-fintech-regulatory-sandbox-web.pdf> (indicating that a fintech sandbox increases investor confidence).

175. See *I participated in a 'Regulatory Sandbox'*, BBVA (June 14, 2017), <https://www.bva.com/en/participated-regulatory-sandbox/> (interviewing a participant in the FCA's sandbox and learning that the fintech's regulation was an important hook to sell its products to customers).

176. See *id.* ("[R]egulation is an important hook to sell our products. There's no need to be afraid of the regulator.").

177. See Knight, *Innovation Will Stall*, *supra* note 138 (indicating that fintech companies operating in a sandbox would still be responsible for remuneration to harmed consumers).

178. See Knight, *Innovation Will Stall*, *supra* note 138 ("[A] U.S. sandbox could help encourage innovation without jeopardizing consumers. In exchange for greater transparency from the company, regulators could agree to limit the company's potential liability for future consumer protection violations.").

179. Knight, *Innovation Will Stall*, *supra* note 138.

with transparency and good faith.”¹⁸⁰ Contrary to the position of the OCC, a regulatory sandbox is compatible with consumer protection.¹⁸¹

A federal regulatory sandbox would also provide the same consumers it protects with ample benefits.¹⁸² Consumers would “be able to enjoy the fruits of innovation” created and augmented by the fintech sandbox, through increasing the sheer number of innovative products reaching the marketplace.¹⁸³ Such fruits could also translate into lower costs for consumers and financial inclusion for the unserved and underserved consumers in emerging markets and developing economies.¹⁸⁴ Additionally, fintech companies could see increased access to financial investment and higher company valuations due to decreased regulatory uncertainty.¹⁸⁵

Therefore, in order for the United States to both foster innovation and remain globally attractive to fintech firms and investors, implementing a sandbox in the near future is a necessity, not an option.¹⁸⁶ The FSIA was a great example of what an American regulatory sandbox could contribute to fintech innovators.¹⁸⁷ Using the FSIA as a model, regulators and politicians should sit down and reconsider the need for a regulatory sandbox—before we start losing players to a more attractive team.

180. Knight, *Innovation Will Stall*, *supra* note 138.

181. Knight, *Innovation Will Stall*, *supra* note 138.

182. Knight, *Innovation Will Stall*, *supra* note 138.

183. Knight, *Innovation Will Stall*, *supra* note 138.

184. See Ivo Jenik, *Regulatory Sandboxes: Potential for Financial Inclusion?*, CGAP (Aug. 17, 2017), <http://www.cgap.org/blog/regulatory-sandboxes-potential-financial-inclusion> (discussing the potential utility of a regulatory sandbox for the unserved and underserved markets).

185. See FCA REGULATORY SANDBOX OUTLINE, *supra* note 41, at 5 (indicating that implementation of a regulatory sandbox would provide fintechs with better access to financing such as equity funding).

186. See Knight, *Innovation Will Stall*, *supra* note 138 (promoting the regulatory sandbox and explaining the sandbox’s compatibility with consumer protection); see also Brnovich, *supra* note 18 (discussing the challenges to fintech companies under the United States’ current regulatory landscape and stating that a sandbox would “maintain our country’s competitiveness in the global marketplace.”).

187. The Financial Services Innovation Act of 2016, H.R. 6118, 114th Cong. (2016).

V. CONCLUSION

Regulatory sandboxes, if properly developed, benefit fintech companies and consumers alike by encouraging innovation.¹⁸⁸ Countries and nations all over the world are following the United Kingdom's lead and have established, or plan on establishing, their own regulatory sandboxes.¹⁸⁹ Other than the possible reintroduction of the FSIA to Congress and a few state-led sandbox discussions, the United States seemingly does not intend to follow suit.¹⁹⁰ Based upon misconceptions and preconceived notions regarding the dangers of sandbox implementation, the OCC and other federal regulators have all but turned their back on the concept.¹⁹¹ Therefore, in order to stay competitive in the global fintech landscape, it is time for Congress to reconsider implementing a federal sandbox with legislation similar to the FSIA.¹⁹²

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188. See Knight, *Innovation Will Stall*, *supra* note 138 (“[S]andboxes need not be a Hobbesian ‘war of all against all,’ where the powerful prey on the weak. Instead—provided they are done right—sandboxes can offer an environment where companies can innovate while ensuring consumers are protected.”).

189. See Cummings, *supra* note 57 (discussing the potential utility of a regulatory sandbox and the many nations that are following the lead of the United Kingdom).

190. See Clozel, *OCC’s Curry*, *supra* note 94 (providing former Comptroller of the Currency Thomas Curry’s view that a U.S. sandbox doesn’t “make sense” and surpasses the current authority of the OCC to implement).

191. Clozel, *OCC’s Curry*, *supra* note 94; see Michael J. Bologna, *Fed Official Dismisses ‘Regulatory Sandboxes’ for Fintech*, BNA (Sept. 15, 2017), <https://www.bna.com/fed-official-dismisses-n57982088022/> (“I don’t see that sandboxes are likely going to be something that we in the United States are going to be using much in the near future.”); see also Knight, *Innovation Will Stall*, *supra* note 138 (promoting the regulatory sandbox and explaining the regulatory disfavor of a fintech sandbox).

192. See Exec. Order No. 13772, 82 Fed. Reg. 9,965 (Feb. 8, 2017) (stating that part of the Trump administration’s financial regulatory policy includes “enabl[ing] American companies to be competitive with foreign firms in domestic and foreign markets”).

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