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# NC Regulatory Sandbox Act: Encouraging Innovation Despite Missing Some Opportunities

## I. INTRODUCTION

In a perfect world, economic regulations would always achieve their intended goals, such as protecting consumers and the economy from dishonest or risky activities. But in the world we live in, regulations are often fallible constructions that reflect the imperfections of the humans who wrote them. Of course, they cannot be eliminated altogether. The costs of removing regulations entirely would far outweigh the benefits.<sup>1</sup> This reality has led governments around the world to experiment with an alternative to this seemingly two-sided choice: the regulatory sandbox.

A regulatory sandbox is a legislative construct that gives companies a fixed period of time in which to test novel financial products without being subject to full government regulation.<sup>2</sup> Proponents of regulatory sandboxes see them as an essential response to the ever-increasing pace of technological innovation.<sup>3</sup> Critics view them with a wary eye, arguing that sandboxes can enable the opportunistic and predatory practices that existing regulations seek to prevent in the first

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1. PEW CHARITABLE TR., *Government Regulation: Costs Lower, Benefits Greater Than Industry Estimates* (May 26, 2015), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/05/government-regulation-costs-lower-benefits-greater-than-industry-estimates> [https://perma.cc/V6F9-AKNG].

2. Thomas A. Hemphill, *How State 'Regulatory Sandboxes' are Laboratories for Innovation*, THE NAT'L INT. (June 13, 2021), <https://nationalinterest.org/feature/how-state-%E2%80%98regulatory-sandboxes%E2%80%99-are-laboratories-innovation-187259> [https://perma.cc/QZ5P-KQ32].

3. See Cristina Rosemberg et al., *Regulatory Sandboxes and Innovation Testbeds: Final Report*, INTER-AM. DEV. BANK (2020), <https://publications.iadb.org/publications/english/document/Regulatory-Sandboxes-and-Innovation-Testbeds-A-Look-at-International-Experience-in-Latin-America-and-the-Caribbean.pdf> [https://perma.cc/ZPT3-X585] (discussing how the “pacing problem” of regulation “has never been more prevalent due to the nature and speed of digital transformation and innovation,” and suggesting that “[r]egulators can . . . play a more active role in nurturing and supporting innovation by exploring the application of regulatory sandboxes”).

place.<sup>4</sup> The truth is that sandboxes can do both of these things, and the details of a particular regulatory scheme will determine its efficacy.<sup>5</sup>

On October 15, 2021, Governor Roy Cooper signed into law the North Carolina Regulatory Sandbox Act (“N.C. Act”) which established a regulatory sandbox in North Carolina.<sup>6</sup> The N.C. Act is an essential first step towards making institutional changes and will ensure that financial, banking, and insurance companies doing business in North Carolina can innovate safely under minimal regulatory restriction.<sup>7</sup> The Act will help position North Carolina as one of the leading states with regard to attracting financial, insurance, and blockchain innovators.<sup>8</sup>

While the N.C. Act is a step in the right direction, the North Carolina legislature missed an opportunity to capitalize on lessons learned in other jurisdictions where sandboxes are already in effect.<sup>9</sup> Since it is unlikely that the Act will be amended so shortly after its passage, there are two alternative approaches to correcting any deficiencies. The “Innovation Council,” an entity established by the N.C. Act to administer the sandbox, could first make minor adjustments as it rolls out the program, although these changes must be limited to

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4. See Lee Reiners, *North Carolina’s Proposed Regulatory Sandbox Needs Work*, DUKE UNIV. SCH. OF L.: THE FINREG BLOG (May 28, 2019), <https://sites.law.duke.edu/finregblog/2019/05/28/north-carolinas-proposed-regulatory-sandbox-needs-work/> [<https://perma.cc/F57P-6V39>] (recognizing that “[t]here is nothing inherently wrong with a state promoting specific industries in furtherance of economic growth... [t]he problem with this approach, when it has historically been applied to financial services, is that it can lead to consumer abuses and potentially, more widespread economic harm” - the reduction in mortgage lending regulations leading up to the financial crisis is a good example).

5. See *infra* Part VIII.

6. N.C. Regulatory Sandbox Act, ch. 169, 2021 N.C. Sess. Ls., <https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-166.pdf> [<https://perma.cc/LW6H-MBNH>].

7. Andrea O’Sullivan, *Expanding Regulatory Sandboxes to Fast-Track Innovation*, JAMES MADISON INST. (Jan. 2021), [https://www.jamesmadison.org/wp-content/uploads/2021/01/Regulatory\\_Sandbox\\_1.27.21.pdf](https://www.jamesmadison.org/wp-content/uploads/2021/01/Regulatory_Sandbox_1.27.21.pdf) [<https://perma.cc/NN6R-TQ5K>] (defining a regulatory sandbox as an environment in which “innovative companies may safely experiment under the watch and guidance of regulatory agencies”).

8. See Richard B. Levin et al., *Hardly Child’s Play: North Carolina Joins the Growing Number of States with a Fintech Regulatory Sandbox*, NELSON MULLINS: IDEA EXCH. (Oct. 19, 2021), [https://www.nelsonmullins.com/idea\\_exchange/blogs/Fintech-nostradamus/fn-in-the-news/hardly-child-s-play-north-carolina-joins-the-growing-number-of-states-with-a-fintech-regulatory-sandbox](https://www.nelsonmullins.com/idea_exchange/blogs/Fintech-nostradamus/fn-in-the-news/hardly-child-s-play-north-carolina-joins-the-growing-number-of-states-with-a-fintech-regulatory-sandbox) [<https://perma.cc/RCF9-LLCS>] (recognizing that N.C. recently became the tenth state to offer a regulatory sandbox, and that sandboxes can “pave the way for a more attractive and predictable marketplace for developing new FinTech solutions”).

9. See Reiners, *supra* note 4 (criticizing an earlier version of the N.C. Act and recommending changes based on existing sandboxes).

discretionary details that are under the Council's control.<sup>10</sup> With regard to bigger changes, the Council could implement the sandbox as-written for a period of two years and then recommend a set of refinements to the General Assembly. This will enable the program to operate unchanged for the benefit of any participants and also give the Council plenty of time to evaluate which substantive changes may be needed. Allowing the Innovation Council to tinker with the program is consistent with the experimental nature of the sandbox idea itself.

This Note proceeds in five parts. Part II provides a background of regulatory sandboxes, a procedural history of the regulatory sandbox concept in North Carolina, and the specific provisions of the N.C. Act.<sup>11</sup> Part III examines the myriad benefits that will result from the Act, and addresses some general critiques that the Act is vulnerable to.<sup>12</sup> Part IV addresses criticisms the N.C. Act is vulnerable to, and Part V forecasts a number of changes that will likely improve the effectiveness of the N.C. Act, whether they are effectuated by the Council itself or through subsequent amendments of the statute by the General Assembly.<sup>13</sup> Part VI concludes that while the Act as-written has some important benefits, it could function much more effectively by incorporating what other jurisdictions have learned over the years.<sup>14</sup>

## II. HISTORY OF REGULATORY SANDBOXES AND SPECIFIC PROVISIONS OF THE N.C. ACT

A regulatory sandbox is a government program which allows companies to operate for a limited period of time without being subject to the full ambit of regulations that would normally apply.<sup>15</sup> Regulators developed these sandboxes in order to influence economic activity

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10. See N.C. GEN. STAT. § 150B-19 (2011) (prohibiting an agency from adopting rules that interpret a law unless the law specifically authorizes an agency to do so).

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV-V.

14. See *infra* Part VI.

15. See N.C. Regulatory Sandbox Act § 169-1(b)(11) (defining regulatory sandbox as a program that “permits a person or entity to temporarily test an innovative financial or insurance product or service and make it available to consumers on a limited basis without being subject to certain licensing or other regulatory obligations imposed under applicable State law”).

outside traditional channels.<sup>16</sup> Adjusting the regulatory regime can be a powerful tool for the government to guide economic policy and incentivize certain activity.<sup>17</sup>

The general goal of N.C. Act's program is to support innovation and job creation in North Carolina by allowing companies to experiment and iterate with innovative products and services.<sup>18</sup> The program also intends to give regulators the experience they need to modernize North Carolina's banking and insurance laws in a way that enables the state to remain competitive, possibly by eliminating or amending existing regulations.<sup>19</sup> For participating firms, the goal is to successfully navigate the program and gain the experience and traction needed to legally operate outside the sandbox once the testing period has ended.<sup>20</sup>

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16. See Adam A. Millsap, *Utah's Effort to Expand Regulatory Sandboxes is Smart Move*, FORBES (Feb. 1, 2021, 9:32 AM), <https://www.forbes.com/sites/adammillsap/2021/02/01/utahs-effort-to-expand-regulatory-sandboxes-is-smart-move/?sh=e81668b6a09c> [<https://perma.cc/V4BB-ALLG>] (finding that adjusting regulations is an alternative to taxation, spending, and monetary policy as traditional government controls).

17. Mark Horton & Asmaa El-Ganainy, *Fiscal Policy: Taking and Giving Away*, FIN. & DEV. – INT'L MONETARY FUND (Feb 24, 2020), <https://www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm> [<https://perma.cc/3YC3-99C8>]; see Christian Gonzales et al., *How State and Local Governments Win at Attracting Companies*, MCKINSEY & CO. (Sept. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/how-state-and-local-governments-win-at-attracting-companies> [<https://perma.cc/7LDA-TKR6>] (claiming that state and local governments often use “fiscal incentives, including cash grants, rebates, and tax credits, to entice them to relocate, expand, or stay in a specific locality”); see *Economics of Taxation*, U.S. DEP'T OF THE TREASURY (Dec. 5, 2010, 10:27 AM), <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/economics.aspx> [<https://perma.cc/9C2F-WVF9>] (finding that tax increases can discourage and penalize industries that have harmful or negative externalities, and that excise taxes are used to discourage alcohol and tobacco use, and are used during a war or national emergency to reduce demand for scarce resources); see also *Environmental Taxation: A Guide for Policy Makers*, ORG. FOR ECON. CO-OPERATION AND DEV. (Sept. 2011), <https://www.oecd.org/env/tools-evaluation/48164926.pdf> [<https://perma.cc/ZC5J-7RF5>] (discussing how taxes can correct the market's failure to adequately recognize the environmental impacts of industry).

18. See N.C. Regulatory Sandbox Act § 169-4(a) (“The purpose of the Innovation Council is to support innovation, investment, and job creation within North Carolina by encouraging participation in the regulatory sandbox.”).

19. See § 169-2(d) (“[T]he General Assembly finds that modernization of relevant banking, insurance, and related laws will contribute to the economic vitality of all areas of the State and will help North Carolina remain competitive in the twenty-first century.”).

20. See Hemphill, *supra* note 2 (“[B]y lowering the initial regulatory costs for new market entrants, these firms have the opportunity to develop into competitors that can absorb standard compliance costs, at which point they “graduate” from the sandbox.”).

The United Kingdom (“UK”) implemented the first regulatory sandbox in 2016 through the Financial Conduct Authority (“FCA”).<sup>21</sup> Before the UK sandbox program began, the FCA identified three potential benefits of a regulatory sandbox: (1) it could reduce the time and cost needed to bring products to market, (2) it might increase access to finance, and (3) it might allow more innovative products to reach the market.<sup>22</sup> The UK’s sandbox also attempts to address the fact that businesses are often unable to safely implement new products because of uncertainties in the regulatory environment.<sup>23</sup>

The UK’s FCA used its regulatory sandbox to give fledgling companies the opportunity to pursue innovative financial products without requiring them to first build out large compliance programs, which can be expensive to develop and require specific expertise.<sup>24</sup> However, a firm’s time in the sandbox is limited: the UK’s sandbox typically allows participation for a period of three to six months before firms must implement a compliance function or stop operating.<sup>25</sup> For instance, participants from the UK’s most recent “cohort” of participants include the companies Bayfibr and Blockpass.<sup>26</sup> Bayfibr is an application that enables immigrants living in the UK to pay bills in their home country securely and without setting up foreign bank accounts.<sup>27</sup> Blockpass is a software service which helps businesses comply with their “know your customer” and anti-money laundering regulatory requirements when they accept new customers.<sup>28</sup>

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21. *Id.*

22. *Regulatory Sandbox*, FIN. CONDUCT AUTH. at 5 (2015), <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf> [<https://perma.cc/52HJ-WRX2>].

23. See Andrew Moyle & Fiona Maclean, *World-First Regulatory Sandbox Open for Play in the UK*, LATHAM & WATKINS (May 9, 2016), <https://www.lw.com/thoughtLeadership/LW-world-first-regulatory-sandbox-open-for-play-in-UK> [<https://perma.cc/FCB5-G6ZD>] (claiming that “[u]ntil now, many businesses have struggled to find a safe way to implement these technologies given the unknowns in the regulatory environment and the risk of public scrutiny”).

24. See Hemphill, *supra* note 2 (recognizing that the UK sandbox is intended to allow innovative businesses to test their products and overcome the high initial regulatory costs that usually serve as a barrier to entry).

25. *Default Standards for Sandbox Testing Parameters*, FIN. CONDUCT AUTH. (2016), <https://www.fca.org.uk/publication/policy/default-standards-for-sandbox-testing-parameters.pdf> [<https://perma.cc/FXR7-XCSH>].

26. *Regulatory Sandbox – Cohort 7*, FIN. CONDUCT AUTH. (2021), <https://www.fca.org.uk/firms/regulatory-sandbox/regulatory-sandbox-cohort-7> [<https://perma.cc/9WE3-RSGE>].

27. *Id.*

28. *Id.*

It did not take long for the sandbox idea to make its way across the ocean.<sup>29</sup> Arizona, Nevada, Utah, Wyoming, Florida, and West Virginia, Texas, and North Carolina have each enacted legislation creating regulatory sandboxes.<sup>30</sup> As of this Note's publication, regulatory sandbox bills have been introduced in South Carolina and Louisiana.<sup>31</sup>

Proponents of regulatory sandboxes suggest they are necessary for financial regulations to have a fighting chance at keeping pace with rapid technological innovation.<sup>32</sup> This is because the sandbox gives regulators time to understand recent innovations before they attempt to regulate them.<sup>33</sup> Some advocates have said that regulators have a duty to understand the benefits and risks of innovation, so that they can develop regulations that can capitalize on the benefits while minimizing the risks to consumers.<sup>34</sup>

#### A. North Carolina's Regulatory Sandbox Act

In 2019, lawmakers introduced a regulatory sandbox bill but it failed to progress beyond the Committee on Banking in the N.C. House of Representatives.<sup>35</sup> Key stakeholders criticized the 2019 version

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29. See Chrys D. Lemon et al., *Two Industries Play in the Sand: Recent Fintech and Insurtech Developments*, 22 No. 5 FINTECH L. REP. NL 1 (2019), [https://1.next.westlaw.com/Document/I5d79f0e2fa4911e99b9e81cceb1c823/View/FullText.html?originationContext=docHeader&contextData=\(sc.Search\)&transitionType=Document&needToInjectTerms=False&docSource=a406d26933c44a44bcf6110d5bf14a4c&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/I5d79f0e2fa4911e99b9e81cceb1c823/View/FullText.html?originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&needToInjectTerms=False&docSource=a406d26933c44a44bcf6110d5bf14a4c&firstPage=true&bhcp=1) [<https://perma.cc/X5RG-6CBV>] (noting that Arizona was the first state to create a fintech regulatory sandbox and had 7 participating companies by June, 2019).

30. ARIZ. REV. STAT. ANN. § 41-5601 (LexisNexis 2018); NV S.B. 161, 2019 80th Leg., [https://www.leg.state.nv.us/Session/80th2019/Bills/SB/SB161\\_EN.pdf](https://www.leg.state.nv.us/Session/80th2019/Bills/SB/SB161_EN.pdf) [<https://perma.cc/BV3E-QQGS>]; UTAH CODE ANN. §13 – 55 (2020); WYO. STAT. ANN. § 40-29-101 (2019) (Wyoming); FLA. STAT. § 559.952 (2020) (Florida); W. VA. CODE § 31A-8G-8 (2020); TEX. CODE ANN. § 2005.001 (2019); N.C. Regulatory Sandbox Act § 169-1.

31. H. 4351, 2019 Gen. Assemb., 123rd Sess., (S.C. 2019); H.B. 482, 2021 Reg. Sess., (La. 2021).

32. See Hemphill, *supra* note 2 (stating that Martec's Law is a theory which claims that innovation will always outpace regulation).

33. See Levin et al., *supra* note 8 (recognizing that “regulators can gather empirical data about new business models and use an evidence-based approach for future policy decisions”).

34. See Dan Quan, *A Few Thoughts on Regulatory Sandboxes*, STAN. CTR. ON PHILANTHROPY AND CIV. SOC'Y, <https://pacscenter.stanford.edu/a-few-thoughts-on-regulatory-sandboxes/> [<https://perma.cc/B3AX-US47>] (arguing that “regulatory uncertainty is the result of outdated regulations unable to catch up with innovation,” and that “agencies need to actively seek to understand the benefits and risks of innovation, while developing appropriate policies, guidance, and/or regulations to reap those benefits, protect consumers, and safeguard the financial system”).

35. H.R. 1013, 2019 Gen. Assemb., Reg Sess. (N.C. 2019).

because it did not require companies to disclose to consumers that they were sandbox participants, or that they did not have a license to offer products outside the sandbox, the products could possibly expose consumers to financial risk, and companies could participate in the program indefinitely.<sup>36</sup>

A new bill, with significant changes from the 2019 version, was introduced on April 20, 2021.<sup>37</sup> The North Carolina Regulatory Sandbox Act passed unanimously in the Senate on October 6, 2021, and received unanimous approval in the House the next day.<sup>38</sup> Governor Roy Cooper signed the bill into law on October 15, 2021.<sup>39</sup>

*B. Specific Provisions of the North Carolina Regulatory Sandbox Act*

The N.C. Act creates an “Innovation Council” with a goal of “support[ing] innovation, investment, and job creation within North Carolina” by encouraging companies and individuals to participate in the regulatory sandbox program.<sup>40</sup> The N.C. Act also tasks the Council with deciding which innovations the regulatory sandbox will support by determining the policy priorities of the program.<sup>41</sup> The Council plays the gatekeeping role of deciding which entities to admit into the sandbox program, based upon enumerated criteria.<sup>42</sup> The Council must also assign admitted participants to a state regulatory agency, which will in turn make additional decisions concerning what regulations will be waived for a sandbox participant.<sup>43</sup>

The eleven-member Council consists of a mixture of government employee “designees” and policy experts who are called “public” members.<sup>44</sup> Designees are government employees chosen by the

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36. Reiners, *supra* note 4.

37. N.C. Regulatory Sandbox Act § 169-1.

38. *Id.*

39. *Id.*

40. N.C. Regulatory Sandbox Act § 169-4(a).

41. *See id.* (“The Council is empowered to set standards, principles, guidelines, and policy priorities for the types of innovations that the regulatory sandbox program will support.”).

42. *See* N.C. Regulatory Sandbox Act § 169-6(a), § 169-6(d)(1-6) (empowering the Innovation Council to “select and refer applicants to the applicable State agency” and requiring the Innovation Council to consider a number of criteria when making the determination of whether to admit applicants); *see infra* Part D.

43. *Id.* § 169-6(a).

44. *Id.* § 169-4(b).



leadership of their respective agency to participate on the Innovation Council.<sup>45</sup> Public members are individuals who do not work in government and are not designees appointed by government officials.<sup>46</sup> North Carolina's Commissioner of Banks and Commissioner of Insurance each appoint a designee.<sup>47</sup> The Secretary of State and Attorney General also select designees.<sup>48</sup> Two public members are appointed by the Governor, and one public member is appointed by the Lieutenant Governor.<sup>49</sup> The President Pro Tempore of the Senate recommends two public members from academia, and the Speaker of the House of Representatives recommends two public members from North Carolina's entrepreneurial or blockchain community.<sup>50</sup>

This results in a council composed of four government members and seven public members.<sup>51</sup> Based on the current political makeup of the NC General Assembly, five of the seven public members will be chosen by Republicans, and remaining two will be chosen by Democrats.<sup>52</sup> Members will serve staggered four-year terms.<sup>53</sup> Members can be reelected, but are limited to a total of two consecutive terms.<sup>54</sup>

### C. *Requirements of Applicants*

The Act currently allows firms implementing financial, insurance, and blockchain technology to apply for participation in the sandbox.<sup>55</sup> Essentially, this encompasses all firms that would otherwise be regulated by either the Office of the Commissioner of Banks or the Department of Insurance.<sup>56</sup> An additional requirement is that applicants

45. *Id.* § 169-4(b)(1-4).

46. *See id.* (requiring “public members” to have a “background in one or more of the following areas: financial services; insurance; blockchain; Fintech; Insurtech; or entrepreneurship”).

47. *Id.* § 169-4(b)(1-2).

48. *Id.* § 169-4(b)(3-4).

49. *Id.* § 169-4(b)(5-6).

50. *Id.* § 169-4(b)(7-8).

51. *Id.* § 169-4(b)(1-8).

52. *North Carolina State Executive Offices*, BALLOTPEDIA [https://ballotpedia.org/North\\_Carolina\\_state\\_executive\\_offices](https://ballotpedia.org/North_Carolina_state_executive_offices) [https://perma.cc/WF8J-2Q3U].

53. N.C. Regulatory Sandbox Act § 169-4(c).

54. *Id.*

55. *Id.*

56. *See* Erin Jane Illman & Lindsay E. Medlin, *Technology Boom in NC? What You Should Know About the Proposed Regulatory Sandbox in the Tarheel State*, BRADLEY:

offer an “innovative product or service,” defined as a product that uses emerging technology, or a product that does not currently have a widespread offering in the state.<sup>57</sup> For example, firms that qualify for participation in the sandbox could be involved in peer-to-peer lending, cryptocurrency, or money transmission.<sup>58</sup> According to the North Carolina statute, a money transmission occurs when an entity sells or issues payment instruments primarily for household purposes, or when an entity receives money for transmission by any means, including electronic transfers and maintaining virtual currency on behalf of others.<sup>59</sup> For example, in Arizona, several innovative money transmitter companies participated in the sandbox to test their products.<sup>60</sup> These participants included a cryptocurrency payments company that enables payment to marijuana businesses, and a company that provides cash to consumers in exchange for a share of their future earnings.<sup>61</sup>

All applicants must be corporations or other organized business entities and must have a physical presence in North Carolina.<sup>62</sup> Although the N.C. Act does not explicitly prohibit or allow large, established firms to enter the sandbox solely to test a particular product or service and remain otherwise regulated, it can be inferred from the Act’s language that the sandbox program is not intended to serve incumbent firms with plenty of resources.<sup>63</sup> It is clear that the Innovation Council can deny applications at its discretion, which indicates that the drafters might have intended the Council to make these decisions.<sup>64</sup> The Council will consider a number of different criteria when determining whether to

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ONLINE & ON POINT (July 20, 2021), <https://www.onlineandonpoint.com/2021/07/technology-boom-in-nc-what-you-should-know-about-the-proposed-regulatory-sandbox-in-the-tarheel-state/> [https://perma.cc/P6HN-LAKZ] (“The NC Sandbox Act would apply to entities regulated by the Office of Commissioner of Banks or the Department of Insurance.”).

57. N.C. Regulatory Sandbox Act § 169-1(b)(6-7).

58. Miriam Cross, *States Entice Fintechs by Giving Them Freedom to Experiment*, AM. BANKER (Aug. 26, 2020, 1:16 PM), <https://www.americanbanker.com/news/states-entice-fintechs-by-giving-them-freedom-to-experiment> [https://perma.cc/XU23-7EG8].

59. N.C. GEN. STAT. § 53-208.42(13)(a-b) (2016).

60. Sophie Quinton, *Relaxed Rules Attract Entrepreneurs to State ‘Sandboxes’*, PEW CHARITABLE TR. (June 15, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/15/relaxed-rules-attract-entrepreneurs-to-state-sandboxes> [https://perma.cc/2RG5-3AQV].

61. *Id.*

62. *See* N.C. Regulatory Sandbox Act § 169-6(c) (requiring applicants to be a “corporation or other organized entity with a physical presence in North Carolina”).

63. *See id.* (finding that establishing the Innovation Council is intended to promote “entrepreneurial development”).

64. *Id.* § 169-6(e).

admit applicants.<sup>65</sup> These criteria include the nature of the innovative product or service, the methods that will be used to protect consumers, the applicant's business plan, and the availability of capital.<sup>66</sup> The council will also make its determination based on characteristics of the firm's management, including whether the management has the necessary expertise, and whether anyone substantially involved with the applicant has been convicted or investigated for fraud or securities violations.<sup>67</sup> In the name of transparency, the council must provide a reason for denying an applicant, but the N.C. Act otherwise gives the council considerable leeway in determining which applicants to admit.<sup>68</sup>

Once the council admits an applicant, the council will direct it to a state agency—either the Commissioner of Banks or Commissioner of Insurance—that determines which regulations the applicant may be exempted from.<sup>69</sup> These regulations must currently prevent the entity from offering its innovative product or service in North Carolina.<sup>70</sup> The applicant can participate in the program for twenty-four months, with the possibility of an extension if approved by the applicable state agency.<sup>71</sup> The agency can make several other determinations.<sup>72</sup> It may prescribe, on a case-by-case basis, the maximum number of consumers to whom an applicant may offer its product or service to, and the maximum amount of money that consumers can invest, in an effort to permit experimentation while limiting the exposure of consumers.<sup>73</sup> The state agency may also require the entity to post a consumer protection bond to provide as security in the event that consumers suffer losses.<sup>74</sup>

At the end of the firm's participation in the sandbox program it must submit a final report,<sup>75</sup> the specifics of which will be determined by

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65. *Id.* § 169-6(d).

66. *Id.*

67. *See id.* § 169-6(c) (requiring all individuals who are significantly involved in the firm to submit to a criminal background check).

68. N.C. Regulatory Sandbox Act § 169-6(d-e).

69. *See id.* § 169-3(b) (“[A] waiver . . . shall be no broader than necessary to accomplish the purposes set forth in this Act, as determined by the applicable State agency.”).

70. *Id.* § 169-3(a) (“[A] person who makes an innovative product or service available to consumers in the regulatory sandbox may be granted a waiver of specified requirements . . . if these statutes or rules do not currently permit the product or service to be made available to consumers.”).

71. *Id.* § 169-7(a).

72. *Id.*

73. *Id.*

74. N.C. Regulatory Sandbox Act § 169-7(b).

75. *Id.* § 169-7(c).

the applicable State agency.<sup>76</sup> The firm must also keep certain business records for five years after the conclusion of the testing period.<sup>77</sup> These records must include documents and data produced by the business and be made available to the state agency upon request.<sup>78</sup>

The N.C. Act envisions nonprofits playing an important role in the sandbox process.<sup>79</sup> It provides for a designated nonprofit organization, authorized by the Secretary of State, to help sandbox participants with the application process.<sup>80</sup> These organizations may help entities develop their product or service during their participation in the program.<sup>81</sup> They may also make recommendations to participants regarding the design and application of innovative technologies.<sup>82</sup> Nonprofits that want to assist in this capacity must submit an application to the Innovation Council for approval.<sup>83</sup> It is unclear from the N.C. Act's language whether the nonprofit must have no previous connection with sandbox participants, or whether a participant could establish a nonprofit for the purpose of advising firms participating in the sandbox.<sup>84</sup>

The Act specifically lists a number of consumer protection statutes from which a participant's operations may not be exempted.<sup>85</sup> For example, participants must abide by Chapter 24 of North Carolina's General Statutes, which sets maximum interest rates and origination fees.<sup>86</sup> Participants also remain subject to the Consumer Finance Act, which in part prohibits the advertising of false or misleading statements about the rates or conditions of loans.<sup>87</sup>

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76. *See id.* (“[T]he sandbox participant shall submit a final report in a manner and format prescribed by the applicable State agency.”).

77. *Id.* § 169-9.

78. *Id.*

79. *See id.* § 169-2(d) (“The General Assembly finds that certain nonprofit organizations are to be recognized as having a significant contribution for guiding companies through the regulatory sandbox process and providing technical assistance”).

80. N.C. Regulatory Sandbox Act § 169-5.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* (stating only that a “designated nonprofit” that has been “authorized by the Office of the Secretary of State” and whose application has been approved by the Innovation Council shall assist in implementing the program).

85. *Id.* § 169-8(a)(1-8).

86. N.C. Regulatory Sandbox Act § 169-8(a)(1); *see also* N.C. GEN. STAT. §24-1.1 (2020) (setting the maximum interest rate at 16% for principal amounts of \$25,000 or less and limiting origination fees to \$100 for principal amounts of \$1499.99 or less).

87. *See* N.C. GEN. STAT. § 53-183 (2020) (“No licensee subject to this Article shall advertise, display, distribute, telecast, or broadcast or cause or permit to be advertised,

Participants must disclose to consumers that the innovative product or service is only temporarily authorized by the state, and that by this authorization, the state does not endorse or recommend the product and is not liable for losses suffered by consumers as a result of using the product or service.<sup>88</sup> The entity must also tell consumers how to file complaints or other comments to the applicable state agency.<sup>89</sup>

In sum, the North Carolina Sandbox Act contains a number of provisions that are aimed at helping participants test out innovative products<sup>90</sup> while still protecting consumers.<sup>91</sup> The following section illustrates how this Act will improve the regulatory system in North Carolina.

### III. WHY A SANDBOX WILL BENEFIT NORTH CAROLINA

Businesses and consumers alike will benefit from a regulatory sandbox because it will encourage innovation by reducing barriers to entry for small firms, increase North Carolina's competitiveness with other states, encourage investment, and spur competition.<sup>92</sup>

#### A. *Reducing Barriers to Entry*

One of the largest barriers to market entry by Fintech firms is the regulatory burden and the costs associated with setting up a compliance program.<sup>93</sup> A study on the effects of regulations on market entry found that lower entry costs were associated with a higher rate of market entry, while higher costs were predictive of fewer market entrants.<sup>94</sup>

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displayed, distributed, telecasted, or broadcasted, in any manner whatsoever, any false, misleading, or deceptive statement or representation.”).

88. N.C. Regulatory Sandbox Act § 169-8(b)(1-4).

89. *Id.* § 169-8(b)(4).

90. *See id.* § 169-3(a) (allowing participants to waive certain rules and requirements).

91. *See id.* § 169-8(a) (prohibiting the waiver of specified consumer protection statutes).

92. Illman & Medlin, *supra* note 56.

93. *See* O’Sullivan, *supra* note 7 at 2 (“Because new companies lack the capital and lawyers to navigate established regulatory structures, they are often preemptively shut out of the market.”).

94. *See* Leora Klapper et al., *Entry Regulation as a Barrier to Entrepreneurship*, 82 J. OF FIN. ECON. 591, 591 (2006) [https://www.sciencedirect-com.libproxy.lib.unc.edu/science/article/pii/S0304405X06000936?via%3Dihub](https://www.sciencedirect.com.libproxy.lib.unc.edu/science/article/pii/S0304405X06000936?via%3Dihub) [<https://perma.cc/BE7E-PUBR>] (explaining the low rate of incorporation in Italy by the high regulatory cost associated with incorporation, which is twice as high in Italy as other European countries).

Regulations constrain businesses by imposing licensure, auditing, and reporting requirements.<sup>95</sup> This requires new firms to develop a compliance program, which can be expensive and significantly increase start-up costs.<sup>96</sup> In many cases, the cost of meeting these regulatory requirements is significant enough to dissuade innovators.<sup>97</sup> Regulations are often not designed for “fail fast” ideas.<sup>98</sup> “Fail fast” is a theory which prioritizes adaptation and flexibility over adherence to a specific idea.<sup>99</sup> The theory holds that expending resources in pursuit of a single innovation can be inefficient—it is better to cut one’s losses and move on if the idea seems likely to fail.<sup>100</sup>

The legislative findings of the N.C. Act recognize that current laws can be outdated because they were not written to reflect current technologies.<sup>101</sup> For instance, the Consumer Finance Act was passed in 1961, and N.C. General Statute Chapter 24 - 1.1 was passed in 1969, although they both have been amended.<sup>102</sup>

The existing state regulations restrict innovation because they were largely created at a time when technology did not play as large a role in the financial industry as it now does.<sup>103</sup> Regulatory sandboxes encourage innovation by lowering these barriers to entry for smaller

95. O’Sullivan, *supra* note 7, at 2.

96. See Lemon et al., *supra* note 29 (“The high upfront compliance and regulatory costs facing FinTech and InsurTech startups, coupled with this uncertain consumer demand, often deter businesses from testing innovative products and services in the marketplace.”).

97. *Id.*

98. Erin Jane Illman & Lindsay E. Medlin, *A Fintech Leader’s Thoughts on the North Carolina Regulatory Sandbox Act*, BRADLEY: ONLINE & ON POINT (Aug. 4, 2021), <https://www.onlineandonpoint.com/2021/08/a-fintech-leaders-thoughts-on-the-north-carolina-regulatory-sandbox-act/> [<https://perma.cc/PD8W-9S6G>].

99. Rick Goldberg & Jim Ruehlin, *Fail Fast and Learn Fast*, IBM: GARAGE METHODOLOGY, <https://www.ibm.com/garage/method/practices/culture/failing-fast/> [<https://perma.cc/ZRA9-FGXJ>] (last visited Feb. 5, 2022).

100. See Rajat Khanna et al., *Fail Often, Fail Big, and Fail Fast? Learning From Small Failures and R&D Performance in the Pharmaceutical Industry*, 59 ACAD. OF MGMT. SCI. 436, 459 (2016) (finding that the voluntary expiration of patents by pharmaceutical firms results in fewer patents, but an increase in the overall quality of patents).

101. See N.C. Regulatory Sandbox Act § 169-2(a) (“[E]xisting legal and regulatory frameworks are restricting innovation because these frameworks were established largely at a time when technology was not a fundamental component of industry ecosystems, including banking and insurance.”).

102. N.C. GEN. STAT. § 53-183 (1961); N.C. GEN. STAT. § 24-1.1 (1969).

103. See N.C. Regulatory Sandbox Act § 169-2(a) (“[T]he General Assembly finds that existing legal and regulatory frameworks are restricting innovation because these frameworks were established largely at a time when technology was not a fundamental component of industry ecosystems, including banking and insurance.”).

firms.<sup>104</sup> The goal of sandboxes is to empower firms to test a new product in order to gauge how much value consumers place on it,<sup>105</sup> and to enable firms to become established enough to be able to bear the costs associated with regulatory compliance.<sup>106</sup>

*B. Helping North Carolina Compete with Other States*

Lower barriers to entry will, in turn, help North Carolina's economy remain competitive on a national scale.<sup>107</sup> Allowing innovation to occur unfettered is extremely important to remaining competitive—both at the state level and globally.<sup>108</sup> The General Assembly recognized that the banking and insurance industries are both currently major drivers of economic activity for the state, and the emerging fields of Fintech and Insurtech are essential for sustaining future growth.<sup>109</sup>

The Act also acknowledges that these industries are currently undergoing a “transformational period.”<sup>110</sup> Because innovators need some regulatory flexibility to bring new products or services to market, the drafters of the N.C. Act recommend adopting a “taxonomy” related to emerging technologies into state law.<sup>111</sup> Businesses seeking a location for expansion or to deploy a new innovative product or service will likely be attracted to a state with a regulatory framework friendly towards innovation.<sup>112</sup>

The N.C. Act also provides North Carolina regulators with the ability to enter into “recognition agreements” with regulators in other states or countries.<sup>113</sup> Regulators in other states can give permission for

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104. Hemphill, *supra* note 2.

105. See Millsap, *supra* note 16 (recognizing that sandboxes “give entrepreneurs a chance to see if their products work and are valued by customers even when those products do not fit within the current regulatory framework”).

106. Hemphill, *supra* note 2.

107. See David N. Bass, *Regulatory Sandbox Bill One Step Closer to Becoming Law After Clearing N.C. House*, CAROLINA J. (June 17, 2021), <https://www.carolinajournal.com/news-article/regulatory-sandbox-bill-one-step-closer-to-becoming-law-after-clearing-n-c-house/> [<https://perma.cc/9CHW-Q5CQ>] (recognizing that “[b]eing able to innovate at a greater pace than everyone else will be the great measuring stick over the next century, and the tough truth is there will have to be winners and losers”).

108. *Id.*

109. N.C. Regulatory Sandbox Act § 169-2.

110. *Id.*

111. *Id.*

112. Cross, *supra* note 58.

113. Lemon et al., *supra* note 29.

sandbox participants to operate in their jurisdiction.<sup>114</sup> Likewise, the N.C. Act permits entities that are authorized to operate as sandbox participants in other states to operate in North Carolina.<sup>115</sup> This parity of recognition can help firms expand without having to comply with duplicitous or inconsistent regulations, and will enable North Carolina to keep pace with other states that have sandboxes.<sup>116</sup>

### C. *Encouraging Investment*

Another benefit of the regulatory sandbox is that it encourages investment.<sup>117</sup> By gaining entry into a sandbox program, startups might be able to secure financing from investors who would otherwise be hesitant.<sup>118</sup> Even though participating firms must disclose that their participation in the program is not equivalent to a government endorsement, the fact that they cleared the initial hurdle of acceptance into the program could reassure potential investors and alleviate concerns.<sup>119</sup>

### D. *Spurring Competition*

One of the main obstacles faced by innovative new firms is the perception that they are disruptive and are an existential threat to incumbent firms, rather than beneficial to everyone.<sup>120</sup> Regulatory sandboxes can help firms overcome this perception problem by demonstrating to consumers and incumbents alike that they can benefit everyone involved.<sup>121</sup>

Regulatory sandboxes can be beneficial by spurring competition in the finance and insurance industries.<sup>122</sup> A study on the effectiveness of UK's regulatory sandbox found that incumbent firms responded to

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114. *Id.*

115. N.C. Regulatory Sandbox Act § 169-12(c).

116. Lemon et al., *supra* note 29.

117. See UK FIN. CONDUCT AUTH., PUB REF: 00598, *The Impact and Effectiveness of Innovate 1*, 18 (Apr. 2019), <https://www.fca.org.uk/publication/research/the-impact-and-effectiveness-of-innovate.pdf> [<https://perma.cc/2DP4-M7JC>] (finding that 17 of the 44 participants in cohorts 1-3 were either acquired by incumbents, or received investment during or after their test).

118. Lemon et al., *supra* note 29.

119. N.C. Regulatory Sandbox Act § 169-8(b)(3); Lemon et al., *supra* note 29.

120. Illman & Medlin, *supra* note 98.

121. *Id.*

122. Cross, *supra* note 58.



“disruptive innovation” from sandbox participants by increasing their own efforts at pursuing innovation.<sup>123</sup> In some cases, incumbent firms incorporated these innovations into their own novel products and services.<sup>124</sup>

Lowering regulatory barriers enables smaller firms to enter the marketplace and offer products that can disrupt outdated business models and products that have dominated in the past.<sup>125</sup> In many cases, sandboxes can encourage partnerships between established firms and those participating in the program.<sup>126</sup> Even when incumbents do not partner with newcomers, they often decide to pursue their own versions of these products or services in order to compete.<sup>127</sup> This motivates large, established companies to invest in innovations themselves, and also enables them to learn from the participation of smaller firms.<sup>128</sup>

While regulations provide important protections for consumers against unscrupulous or incompetent firms, increased competition benefits consumers by giving them more choices.<sup>129</sup> Competition also benefits consumers by putting pressure on incumbent firms who may otherwise have no reason to innovate.<sup>130</sup> Advocates of regulatory sandboxes view them as a way to balance these competing goals and expand consumer choices without sacrificing protections.<sup>131</sup>

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123. See UK FIN. CONDUCT AUTH., PUB REF: 00598 (finding that incumbent firms expanded “their focus at an organisation level by expanding their innovation capabilities and strategies”).

124. See *id.* (finding that incumbent firms responded to “specific instances of disruption by launching similar new products and services, sometimes in response to firms that have received Innovate support”).

125. Illman & Medline., *supra* note 56.

126. See Erin Jane Illman & Lindsay Medlin, *What the Proposed North Carolina Regulatory Sandbox Could Mean for Fintech and the Financial Services Community*, JD SUPRA (July 29, 2021), <https://www.jdsupra.com/legalnews/what-the-proposed-north-carolina-1558682/> [<https://perma.cc/MH26-R3DK>] (noting that sandboxes have the “potential to foster early partnerships between the existing North Carolina financial firms and the fintech companies participating in the sandbox program”).

127. O’Sullivan, *supra* note 7, at 2.

128. Cross, *supra* note 58.

129. Jon Sanders, *Regulatory Sandboxes: Test Runs with Lighter Regulation for Innovative Products*, JOHN LOCKE FOUND. (Apr. 22, 2021) <https://www.johnlocke.org/update/regulatory-sandboxes-test-runs-with-lighter-regulation-for-innovative-products/> [<https://perma.cc/2KQK-VL2Y>].

130. O’Sullivan, *supra* note 7.

131. Sanders, *supra* note 129.

*E. Increasing Positive Outcomes of Participation*

Another benefit of regulatory sandbox programs is that firms that participate are much better off than those that were not accepted into the sandbox program, whether or not they successfully graduate from the program.<sup>132</sup> Firms that do successfully exit from the sandbox are better off because they are able to delay compliance costs until they have proof that their product is viable and can attract consumers.<sup>133</sup> Unsuccessful firms are also better off because they will lose less money overall by avoiding initial regulatory compliance costs.<sup>134</sup>

A 2019 study conducted in the United Kingdom tracked the performance of sandbox participants against innovative firms who chose not to participate.<sup>135</sup> The study found that participants got their product or service to market 40% faster than nonparticipants.<sup>136</sup> Additionally, 80% of participants “graduated” and continued to operate longer than nonparticipants, and half of the participants secured partnerships with incumbent firms.<sup>137</sup>

*F. Benefits to Lower-Income Consumers*

An unexpected benefit of sandboxes is that lower-income consumers may benefit from their products and services.<sup>138</sup> Innovative products and services are often targeted towards consumers from these market segments.<sup>139</sup> For example, Verdigris Holdings participated in Arizona’s regulatory sandbox and was able to test out its digital banking service which is intended to serve underbanked communities.<sup>140</sup> Grain, another Fintech company that participated in Arizona’s regulatory sandbox, avoided capital barriers and introduced a revolving credit line service based on the credit and debit activity associated with a

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132. See UK FIN. CONDUCT AUTH., PUB REF: 00598 (finding that 76% of the firms who were accepted into the first cohort are still active in the UK two years later, compared to 57% of the firms who applied but were not accepted).

133. O’Sullivan, *supra* note 7.

134. See *id.* (“[F]irms whose business models are found to be unworkable or unprofitable may fold without losing as much investment as they otherwise would if they had to comply with the full regulatory burdens from the start.”).

135. UK FIN. CONDUCT AUTH., PUB REF: 00598 at 16.

136. *Id.* at 5.

137. *Id.*

138. *Id.* at 23.

139. *Id.*

140. Cross, *supra* note 58.

consumer's bank account.<sup>141</sup> This service allows underserved consumers who may not otherwise qualify for a credit card to use their debit card like a credit card and bridge the gap between paychecks for unexpected emergency costs.<sup>142</sup> Without the sandbox, these companies and the benefits they bring would be lost.

#### IV. CRITICISMS

##### A. *Weakening of Consumer Protections*

Relaxing regulations could be bad for both established businesses and consumers.<sup>143</sup> It could harm consumers, because some regulations are clearly in place to protect individuals.<sup>144</sup> Even though the N.C. Act proposes leaving existing consumer protection laws in place, allowing firms to waive other regulations opens consumers up to more risk.<sup>145</sup> Relaxing regulations could be bad for established businesses as well.<sup>146</sup> “Reasonable but fair” regulations are in place to protect businesses from themselves.<sup>147</sup> In other words, without certain regulations, businesses might pursue products or services that expose customers to risk and themselves to liability and negative publicity.

For example, sandbox participants could waive a North Carolina law that requires the licensing of mortgage lenders and accompanying oversight and enforcement provisions.<sup>148</sup> Without these protections, mortgage lenders could be more likely to engage in unfair, deceptive, and fraudulent practices that harm consumers, such as charging excessive interest rates.<sup>149</sup>

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141. *Id.*

142. *Id.*

143. See Andrew G. Simpson, *15 Emerging Risks from Policies to Playgrounds, Sandboxes to Scooters*, INS. J. (Oct. 18, 2018) <https://www-proquest-com.libproxy.lib.unc.edu/docview/2121560397/fulltext/C9D3D164577F4174PQ/1?accountid=14244> [<https://perma.cc/TDM9-STTP>].

144. *Id.*; see also N.C. GEN. STAT. § 53-166 (2021) (subjecting lenders to licensure requirement and penalties for failure to comply with or attempting to evade application of the statute); see also N.C. GEN. STAT. § 53-169 (2021) (requiring licensure for individuals or firms who want to loan money).

145. Simpson, *supra* note 143.

146. *Id.*

147. *Id.*

148. See N.C. GEN. STAT. § 53-244.020 (2009) (protecting “consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators”).

149. *Id.*

Another law clearly intended to protect consumers applies to check-cashing businesses and imposes various requirements, such as licensure rules, minimum asset thresholds, and limitations on fees charged.<sup>150</sup> If check-cashing businesses that participate in the Sandbox were allowed to charge unlimited fees, they could prey on vulnerable consumers who lack access to traditional banking services.

*B. Regulators Legitimizing Dangerous and Unproven Technology*

An additional criticism leveled at regulatory sandboxes is that they result in regulators playing the improper role of authorizing untested technology and providing valuable publicity to participants.<sup>151</sup> Critics point out that financial regulators' foremost mandate generally is to protect consumers, not give startups free marketing or a perceived "stamp of approval."<sup>152</sup> Firms might participate in the sandbox for its public relations value, rather than out of a legitimate need for relief from regulations.<sup>153</sup> Indeed, most firms see their sandbox experience as a "badge of honor" and view their acceptance as a boost to credibility with customers and investors alike.<sup>154</sup> Those who adhere to this viewpoint believe that the list of firms participating in sandboxes should be kept confidential, instead of being published for all to see.<sup>155</sup> They claim that keeping the list confidential would reduce the use of sandbox designation by participants as a cheap source of positive public relations.<sup>156</sup>

Related to this line of criticism is the recognition that not all innovations are good and sandboxes could do real harm by giving legitimacy to risky, unproven financial technologies.<sup>157</sup> Some recent examples of such harmful innovations include so-called "NINJA" mortgages, "CDO squared" derivatives, and Payment Protection

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150. See N.C. GEN. STAT. § 53-275(2) (1997); see also N.C. Gen Stat § 53-280 (1997) (imposing maximum fees on check-cashing businesses).

151. Jemima Kelly, *A "Fintech Sandbox" Might Sound Like a Harmless Idea. It's Not.*, FIN. TIMES (Dec. 5, 2018), <https://www.ft.com/content/3d551ae2-9691-3dd8-901f-c22c22667e3b> [<https://perma.cc/2GSD-UVPV>].

152. *Id.*

153. *Id.*

154. David Strachan & Suchitra Nair, *A Journey Through the FCA Regulatory Sandbox*, DELOITTE: PERSPECTIVES at 3 (2018) <https://www2.deloitte.com/uk/en/pages/financial-services/articles/journey-through-financial-conduct-authority-regulatory-sandbox.html> [<https://perma.cc/M32V-HC6H>].

155. Kelly, *supra* note 151.

156. *Id.*

157. *Id.*

Insurance.<sup>158</sup> NINJA (no income, job, or assets) mortgages are loans which do not require verification of an applicant's income, assets, or job.<sup>159</sup> They were part of the aggressive lending practices that became popular in the years leading up to the 2008 Financial Crisis, and are believed to have contributed to the downfall of the U.S. housing market.<sup>160</sup>

A "CDO squared" is a collateralized debt obligation ("CDO") that is composed of securities from other CDOs.<sup>161</sup> Whereas a regular CDO is backed by mortgages themselves, a CDO squared is comprised of various tranches of mortgage backed securities contained in CDOs.<sup>162</sup> CDO-squared investments have been criticized for their complexity, which makes the risk of loss difficult to judge.<sup>163</sup> Losses in CDO-squared derivatives are hard to estimate because it is difficult to predict the location of defaults within the different CDO tranches of which they are comprised.<sup>164</sup> Therefore, for a given rate of default of the underlying CDOs, the rate of loss for a CDO-squared derivative could vary considerably depending on the location of the defaults within the CDO tranche structure.<sup>165</sup> Another reason that CDO-squared derivatives can be deceptively risky is that they can bear credit ratings which are much higher than the underlying securities they are comprised of.<sup>166</sup> For instance, a CDO-squared derivative composed of CDOs with A and BBB credit ratings can result in a security with investment-grade credit.<sup>167</sup> Research suggests that CDO-squared derivatives contributed to the severity of the 2008 financial crisis because in a time of financial stress,

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158. *Id.*

159. Sara Routhier, *What is a NINJA Loan?*, LOANS.ORG (Aug. 3, 2021) <https://www.loans.org/mortgage/what-is-a-ninja-loan/> [<https://perma.cc/ETJ7-2DKR>].

160. *Id.*

161. Andrew Adams, et al., *The Risks in CDO-Squared Structures*, 13 MULTINATIONAL FIN. J. 55, 56 (2009) <https://www.mfsociety.org/modules/modDashboard/uploadFiles/journals/MJ~768~p16uegdip1bc011qebroctpem64.pdf> [<https://perma.cc/7PHY-7ZS4>].

162. *Id.* at 56.

163. *Id.*

164. Rajiv Bhatt et al., *Hidden Risks in the CDO – Squared Market*, CTR. FOR FIN. MKT. RSCH. 1, 17 (2005) [https://era.ed.ac.uk/bitstream/handle/1842/1825/CFMR\\_053.pdf?sequence=1&isAllowed=y](https://era.ed.ac.uk/bitstream/handle/1842/1825/CFMR_053.pdf?sequence=1&isAllowed=y) [<https://perma.cc/28KA-CVL5>].

165. *Id.* at 17-18.

166. FIN. CRISIS INQUIRY COMM'N, *Final Report of National Commission on the Causes of the Financial and Economic Crisis in the United States*, 127, 132 (2011), [https://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_chapter8.pdf](https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_chapter8.pdf) [<https://perma.cc/JGW8-KEEH>].

167. *Id.*

the derivative can result in higher-than-expected losses depending on the location of the defaults and the quality of the underlying securities.<sup>168</sup>

Payment Protection Insurance (“PPI”) was another financial innovation that led to the exploitation of consumers.<sup>169</sup> When borrowers received loans from banks, they also purchased PPI as a hedge against inability to repay the loan because of illness or job loss.<sup>170</sup> PPI was very profitable for banks, and it could increase the overall cost of loans by as much as fifty percent.<sup>171</sup> However, the contracts contained numerous “exclusions clauses” which restricted the ability of purchasers to make claims. This rendered as many as a third of the insurance contracts worthless.<sup>172</sup> Since 2011, banks in the UK have had to pay out forty-five billion dollars as compensation to consumers for inappropriately selling this insurance product.<sup>173</sup> Because all of these financial “innovations” resulted in harm to both consumers and the economy, opponents of the regulatory sandbox idea urge caution in blind support of innovation for its own sake.<sup>174</sup>

Skeptics also claim that sandboxes do not actually help regulators understand new technologies because of the small scale of sandbox innovation experiments.<sup>175</sup> These critics assert that by restricting the amount of money at stake and the number of consumers that firms can interact with, sandboxes preclude regulators from understanding the full extent of an innovation’s impact on the stability of the broader financial system.<sup>176</sup>

## V. MISSED OPPORTUNITIES

This section will survey some missed opportunities that were left on the table with the N.C. Act. The Innovation Council can strengthen the sandbox by drawing on lessons learned in other jurisdictions that have

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168. Adams et al., *supra* note 161.

169. Frances Coppola, *The UK’s Biggest Financial Scandal Bites its Biggest Bank – Again*, FORBES (July 31, 2019, 3:20 PM), <https://www.forbes.com/sites/francescoppola/2019/07/31/the-u-k-s-biggest-financial-scandal-bites-its-biggest-bank-again/?sh=2d281af57e20> [https://perma.cc/5HDP-VPJ7].

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. See Kelly, *supra* note 151.

175. *Id.*

176. *Id.*

effectively rolled out similar programs and incorporating these lessons into the sandbox program.<sup>177</sup>

Although the N.C. Administrative Procedures Act prohibits agencies from adopting rules that implement or interpret a law unless the law specifically authorizes the agency to do so,<sup>178</sup> such authority might be found in the N.C. Act itself.<sup>179</sup> The statutory language may therefore provide the Innovation Council with enough discretionary authority to interpret the N.C. Act with regard to the application process and for setting “standards, principles, guidelines, and policy priorities” for the type of innovations that the N.C. Act will support.<sup>180</sup>

A. *Adopt a Collaborative “Checks and Balances” Approach for the Admissions Process*

To begin, the N.C. Act could benefit from adopting a “checks and balances” approach to the admission of participants, rather than relying upon the Innovation Council to make a unilateral decision regarding which firms to admit to the sandbox.<sup>181</sup> Under the “checks and balances” approach, regulators have some input in the admissions process.<sup>182</sup> For instance, in some jurisdictions the entity responsible for administering the sandbox must get approval from the applicable regulatory agency before it can admit an applicant.<sup>183</sup> In seeking this approval, the authority may consult with the applicable agencies and may request information relating to the applicant.<sup>184</sup>

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177. Hilary J. Allen, *Regulatory Sandboxes*, 87 GEO. WASH. L. REV. 579, 642 (2019), <https://www.gwlr.org/wp-content/uploads/2019/06/87-Geo.-Wash.-L.-Rev.-579.pdf> [<https://perma.cc/MX3D-3EUW>].

178. See N.C. GEN. STAT. § 150B-19 (2011) (“An agency may not adopt a rule that does one or more of the following . . . [i]mplements or interprets a law unless that law or another law specifically authorizes the agency to do so.”).

179. See N.C. Regulatory Sandbox Act § 169-4(a) (recognizing that the Innovation Council “is empowered to set standards, principles, guidelines, and policy priorities for the types of innovations that the regulatory sandbox program will support” and the Innovation Council is “responsible for admission into the regulatory sandbox program and for assigning selected participants to the applicable State agency”).

180. *Id.*

181. See Allen, *supra* note 177, at 622 (advocating that “decisions to grant regulatory sandbox relief should be made by a committee of regulators, which would set the terms of the sandbox relief, including the parameters for testing”).

182. UTAH CODE ANN. §13-55-103(9)(a) (2020).

183. *Id.*

184. See UTAH CODE ANN. §13-55-103(9)(b)(i-iv) (2020) (stating that the sandbox authority can request information from applicable agencies such as: whether the agency has

In the N.C. Act, the Innovation Council has the sole authority to decide which firms are admitted, and the Council performs this function with complete independence.<sup>185</sup> A preferable alternative to this approach is to allow the state regulatory agencies to have some input in this decision, but not necessarily to require their approval before the Council can admit an applicant.<sup>186</sup> For example, the Innovation Council could allow the applicable regulator, either the Commissioner of Banks or the Department of Insurance, to review applications first and provide its opinion through a preliminary report. The Innovation Council could then engage in its own analysis of the applicant, utilizing the agency's report, and ultimately render the final decision.

There are several distinct benefits of this approach: it will better inform regulators, encourage cooperation and collaboration among regulatory agencies, and mitigate the Act's misplaced reliance on nonprofits.<sup>187</sup>

### 1. Regulators Will be Better-Informed

This collaborative admissions process can balance the regulatory agency's expertise with the Innovation Council's own analysis, which is guided by the overarching goal of promoting innovation.<sup>188</sup> This approach is preferable because it requires the Innovation Council to rely on the specialized knowledge of the regulatory agencies but leaves the ultimate decision to the Council, which may be better-suited to make an independent decision.<sup>189</sup> Since the regulatory agencies will be burdened with the bulk of oversight responsibility, they may have a vested interest in excluding firms who will be difficult or problematic to regulate, even

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previously issued a license to the applicant, whether the agency has previously investigated or sanctioned the applicant, and whether certain regulations should not be waived notwithstanding the applicant's admission to the sandbox).

185 N.C. Regulatory Sandbox Act § 169-6(a).

186. See Allen, *supra* note 177 at 600 (quoting Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 427 (2011)) (advocating for a collaborative regulatory process which recognizes "ongoing deliberation as the most legitimate and most effective mechanism for making decisions in complex organizational structures").

187. See Reiners, *supra* note 4 (recognizing that the N.C. Act's reliance on nonprofits is confusing and will detract from the benefits of sandbox participation).

188. See N.C. Regulatory Sandbox Act § 169-4(a) (proposing that the purpose of the Council is to "support innovation, investment, and job creation within North Carolina").

189. See Allen, *supra* note 177 at 620 (concluding that "ideally, the regulator operating the regulatory sandbox would have a perspective and expertise that spans the full range of financial products and services available").



if the benefits of the innovation outweigh the hassle.<sup>190</sup> Therefore, the Innovation Council may be a more unbiased and representative group than the regulatory agencies themselves.<sup>191</sup>

## 2. Encourage Collaboration Between Regulators

This revised approach will also likely facilitate greater communication between regulators.<sup>192</sup> Because institutional change is often slow and deliberate, regulators can have a hard time keeping pace with innovation.<sup>193</sup> The dialogue and collaboration driven by regulatory sandboxes can help regulators and innovators learn from one another.<sup>194</sup> Innovators can learn more about which regulations they will eventually encounter, and regulators have the opportunity to examine regulations from the perspective of companies who offer novel products that may not easily fit within the existing regulatory framework.<sup>195</sup>

Adopting a collaborative approach to the sandbox application process may also encourage North Carolina regulators from different agencies to collaborate.<sup>196</sup> This collaboration would most likely take place between Department of Insurance, the Commissioner of Banks, and the Innovation Council itself—although other agencies could be included in the discussion as needed.<sup>197</sup> Regulators can identify common challenges faced by the entities they regulate and brainstorm ways to ease these burdens on new firms.<sup>198</sup>

Regulators would also have the chance to learn about emerging Fintech and Insurtech trends and could leverage this knowledge to

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190. *See id.* at 619-620 (arguing against state-run regulatory sandboxes because state regulators lack incentives to promote financial stability, but also recognizing that federal regulators in the past have used their preemption powers to the detriment of consumers).

191. O'Sullivan, *supra* note 7, at 3.

192. Hemphill, *supra* note 2.

193. O'Sullivan, *supra* note 7, at 3.

194. *See* Levin et al., *supra* note 8 (“The opportunities for regulators to collaborate and share evidence about a broad range of FinTech solutions will help support informed policies, tests, and avoid problems that could arise if the sample size of applicants in one jurisdiction is too small or concentrated.”).

195. Cross, *supra* note 58.

196. Lemon et al., *supra* note 29.

197. *See* N.C. Regulatory Sandbox Act § 169-1(b)(1) (defining the “applicable state agency” as either the Commissioner of Banks or the Department of Insurance, depending on the agency’s regulatory oversight and whether they are responsible for the product or service in question).

198. Lemon et al., *supra* note 29.

improve the regulatory system overall.<sup>199</sup> Through this self-reflective process, regulators could update regulations in the name of efficiency, and could even eliminate regulations that are burdensome and do not protect consumers or the economy.<sup>200</sup>

### 3. Mitigate North Carolina's Reliance on Nonprofits

Another important benefit of imbuing the admissions process with a collaborative component is that it could help resolve the issues created by the N.C. Act's overt reliance on nonprofits.<sup>201</sup> The N.C. Act provides that nonprofits will play an important but undefined role in the sandbox; it stipulates that authorized nonprofit organizations shall provide consulting services to sandbox applicants and participants alike.<sup>202</sup> The Innovation Council will recognize certain nonprofits to assist firms in navigating the application process and help firms with the design and implementation of their products and services during their participation in the sandbox program itself.<sup>203</sup> These organizations will specifically be empowered to help firms by providing input and recommendations with regard to the application of innovative technologies.<sup>204</sup> There is considerable uncertainty surrounding the role of nonprofits in the N.C. Act.<sup>205</sup> It is unclear whether the nonprofits would be created for this particular purpose, or whether existing nonprofits can step into this role.<sup>206</sup> While the nonprofit's role is ill-defined by the N.C. Act, it appears that nonprofits are included to reduce the burden on the innovation council or the applicable state agencies of guiding applicants through the process.<sup>207</sup>

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199. See Illman & Medlin, *supra* note 126.

200. Hemphill, *supra* note 2; Millsap, *supra* note 16.

201. See Reiners, *supra* note 4 (arguing that “[t]he language around consulting with nongovernmental organizations should be deleted. In order to codify one of the main benefits of a sandbox, legislators may want to consider adding language that references information sharing between sandbox participants and the Innovation Commission.”).

202. N.C. Regulatory Sandbox Act § 169-5.

203. See *id.* (stipulating that nonprofits will be “recognized as partners that may help sandbox applicants navigate the regulatory sandbox application process”).

204. *Id.*

205. See *id.* (explaining that the N.C. Act proposes only that a nonprofit will be recognized by the Office of the Secretary of State to assist participants, while only mentioning in passing that other nonprofits “may” assist participants, and otherwise leaves the extent of the nonprofit role undefined).

206. *Id.*

207. *Id.*

North Carolina's Sandbox Act would be more effective if the Innovation Council, rather than nonprofits, played a consulting role.<sup>208</sup> Communication between regulators and applicants will benefit both parties, and the N.C. Act's current reliance on nonprofits will likely detract from the interaction between regulators and firms.<sup>209</sup> The N.C. Act will forego some of the most valuable collaborative benefits to come out of the sandbox concept by outsourcing some of this communication to nonprofits.<sup>210</sup> Participating firms will be denied the important advantage of interacting personally with the regulators who will hopefully be overseeing them directly in the future.<sup>211</sup> Participants will also be at a disadvantage because nonprofits are not as qualified as regulators themselves to provide useful advice and guidance.<sup>212</sup> There is certain information that only regulators will be able to provide, such as agency interpretations of ambiguous rules and emerging trends in the field.<sup>213</sup>

*B. Give Extra Consideration to Competitors of Admitted Applicants*

Another feature of the application process utilized by other jurisdictions that North Carolina could benefit from is the requirement that competitors of admitted participants be given special consideration for inclusion in the sandbox.<sup>214</sup> In other jurisdictions which have implemented a sandbox, the equivalent of the Innovation Council is required to determine whether the competitor of an applicant has been admitted.<sup>215</sup> If so, then this must weigh in favor of the Council's decision to admit the applicant.<sup>216</sup> The purpose of this extra consideration is to avoid the fundamental competitive unfairness that would result from selectively excluding competing firms from the important benefits available through the sandbox program.<sup>217</sup>

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208. Reiners, *supra* note 4.

209. *Id.*

210. *See id.* (claiming that endorsing the use of nonprofits is problematic because "it denies one of the essential sandbox benefits to both fintech firms and regulators").

211. *Id.*

212. *Id.*

213. *Id.*

214. *See* UTAH CODE ANN. §13-55-103 (2020) (mandating the sandbox administrator determine whether an applicant's competitor has already been admitted; if it has, then the Department must weigh this in favor of admitting the applicant).

215. *Id.*

216. *Id.*

217. *See* O'Sullivan, *supra* note 7, at 6.

Including the competitors of admitted sandbox participants could also remedy the negative optics of the sandbox being viewed by investors or consumers as a state endorsement of the participating firm.<sup>218</sup> Even though the N.C. Act requires participants to disclose to consumers that being admitted to the sandbox is not an endorsement by the state, it is still conceivable that some investors will be misled by the mere fact that the firm has been admitted to participate in the program.<sup>219</sup> A UK study which found that sandbox participants attracted investors more easily than nonparticipants suggests that this could be an issue.<sup>220</sup>

C. *Require a Proof of Concept*

Yet another aspect of the N.C. Act's application process that could be improved by borrowing from other jurisdictions is the requirement that firms make extensive disclosures and justify their participation in the program as a prerequisite to their admission.<sup>221</sup> In its current iteration, the N.C. Act allows the Innovation Council to consider several criteria when deciding which applicants to admit.<sup>222</sup> Among these criteria are the firm's business plan and the nature of the innovative product or service, including the potential risk to consumers.<sup>223</sup>

In jurisdictions that have implemented regulatory sandboxes successfully, applicants have been required to provide more detailed disclosures than those required by the N.C. Act.<sup>224</sup> For instance, in Utah, Florida, Kentucky, and Nevada, firms are sometimes required to explain

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218. *Id.*

219. N.C. Regulatory Sandbox Act § 169-8(b)(3).

220. See O'Sullivan, *supra* note 7, at 3 (finding that "sandbox participants may have an easier time attracting finance than non-participants. This could be because investors (rightly or wrongly) view sandbox participation as a kind of government endorsement of this business model, or at the very least a sign that these firms will have fewer regulatory issues than non-participants.").

221. UK FIN. CONDUCT AUTH., *Regulatory Sandbox Application* (2021), [https://www.onlinesurveys.fca.org.uk/jfe/form/SV\\_3aBdq3jfkmuRSK](https://www.onlinesurveys.fca.org.uk/jfe/form/SV_3aBdq3jfkmuRSK) [<https://perma.cc/TD7S-WGJJ>].

222. N.C. Regulatory Sandbox Act § 169-6(d)(1-6).

223. *Id.*

224. See UK FIN. CONDUCT AUTH., PUB REF: 00598 (recognizing that because the UK Sandbox has been in operation since 2015, it has benefited from a relatively long period of experimentation and has matured as a result. This is evidenced by statistics which reflect the effectiveness of the program: In 2019, out of about 1,500 applications, 686 firms received support from the sandbox program).

why they need to test their innovation in the sandbox.<sup>225</sup> In other jurisdictions, applicants must also show how the product or service is a genuine innovation, how it will benefit consumers, and that it is ready for testing.<sup>226</sup> Applicants must also prove to the sandbox authority that they have a testing plan which has clear objectives and criteria for success, and that they have already completed some testing.<sup>227</sup> A failure to show the above could result in the rejection of a sandbox applicant.<sup>228</sup> By incorporating some of these specific criteria, the N.C. sandbox can avoid expending resources on firms that do not truly need to participate in the sandbox, and avoid firms who need to do more groundwork before they are ready.<sup>229</sup>

#### D. *Provide a Declaratory Statement*

Another area in which the N.C. Act could be improved is by borrowing from other jurisdictions the practice of disclosing to participants which statutes may be eligible for waiver.<sup>230</sup> This would benefit participants by increasing certainty with regard to what statutes can be waived, and therefore whether participation in the sandbox is a worthwhile expenditure of time and money.<sup>231</sup> Currently, the N.C. Act does not offer participants any guidance with regard to which laws may be waived through participation in the sandbox.<sup>232</sup>

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225. UTAH CODE ANN. §13-55-103 (2020) (requiring applicants to show how “participating in the regulatory sandbox would enable a successful test of the innovative product or service); FLA. STAT. § 559.952 (2020) (requiring applicants to list the laws which prevent the innovative product or service from being offered); KY. ACTS § 147 (2019) (requiring applicants to state why the innovation is currently prohibited by regulation); NV S.B. 161 (requiring applicants to state the manner in which participation in the program will facilitate a successful test of the product or service).

226. See UK FIN CONDUCT AUTH., *Regulatory Sandbox Application*.

227. *Id.*

228. *Id.*

229. See Victor Chatenay, *More Than One Fifth of Fintechs in the UK Regulator’s Sandbox Have Collapsed*, INSIDER INTEL. (Apr. 27, 2021), <https://www.emarketer.com/content/more-than-one-fifth-of-Fintechs-uk-regulator-s-sandbox-have-collapsed> [<https://perma.cc/X5A6-3KGG>] (demonstrating through more recent statistics that participants in the sandbox are more likely to survive the first few years, which is the most vulnerable time for a new business. As of April, 2021, 22% of participants in the UK’s sandbox participants had failed. In comparison, 60% of all new businesses that start in the UK will fail within the first three years).

230. FLA. STAT. § 559.952 (2020).

231. O’Sullivan, *supra* note 7.

232. N.C. Regulatory Sandbox Act § 169-7.

In other jurisdictions, applicants can request a declaratory statement about whether existing regulations would apply to their firm, and therefore whether they would stand to benefit from participating.<sup>233</sup> The N.C. Innovation Council could provide applicants with a declaratory statement listing specific rules and provisions that would not be applicable to the participant during the sandbox period.<sup>234</sup> Some of these rules may be licensure requirements that are ordinarily imposed on companies who want to operate in the state as a financial services or money transmitter firm.<sup>235</sup> For instance, some provisions may exempt firms from some quarterly reporting requirements, exempt some activities from licensure, and create exemptions from certain fees.<sup>236</sup> However, these jurisdictions also require the applicant to include in their request for a declaratory statement the specific statute that they believe should be waived.<sup>237</sup> Other jurisdictions have included language which makes it clear to participants that the relevant sandbox authority will not provide “horizon scanning” for all possible regulations that might be applicable to a business.<sup>238</sup>

By providing participating firms with a declaratory statement listing which rules and regulations can be waived, the Innovation Council could make participation in North Carolina’s sandbox more attractive and could avoid some of the issues that could depress participation in the sandbox.<sup>239</sup> For example, if the criteria for admissions is as burdensome as the regulations themselves, and if firms are uncertain whether the regulations can actually be waived, then the sandbox is not offering firms an advantage.<sup>240</sup> A declaratory statement would provide greater certainty and clarity to applicants, and help them determine what they have to gain from the sandbox and whether this benefit is worth the cost of admission.<sup>241</sup> In addition, the Innovation Council should incorporate the requirement that participants include in their request for a declaratory

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233. § 559.952.

234. *Id.*

235. *Id.*

236. § 559.952(4a).

237. *Id.*

238. UK FIN. CONDUCT AUTH., *FCA Regulatory Sandbox Application Guide* (2017), <https://www.fca.org.uk/publication/information-sheets/fca-regulatory-sandbox-application-guide.pdf> [<https://perma.cc/TD7S-WGJJ>].

239. O’Sullivan, *supra* note 7.

240. *Id.*

241. *Id.*

statement the specific statute or rule that they think should be waived.<sup>242</sup> By requiring applicants to specify which rules they believe may be eligible for waiver, the burden on the Innovation Council can be reduced.<sup>243</sup>

*E. Clarify the Possibility of an Extension*

The N.C. Act could also be improved by clarifying the process of requesting an extension of the sandbox period.<sup>244</sup> Although the N.C. Act provides for the possibility of a twelve-month extension of a firm's participation in the sandbox, more specific language would be helpful.<sup>245</sup> For instance, the N.C. Act does not explicitly limit firms to a single twelve-month extension; this restriction must be inferred from the wording of the statute.<sup>246</sup> In addition, the N.C. Act does not establish requirements that participants must satisfy before extension requests may be granted by the Innovation Council.<sup>247</sup>

Other sandbox programs are more explicit in the renewal process, and impose heightened requirements on firms who want to take advantage of this possibility. For instance, some sandbox programs clearly limit applicants to a single renewal.<sup>248</sup> These programs may also impose requirements on applicants before they may take advantage of an extension.<sup>249</sup> An applicant may be required to show that either (1) a law must be amended for the firm to legally offer the product, or (2) the applicant has submitted an application for licensure and it is pending.<sup>250</sup>

Limiting firms to a single extension and requiring firms to meet these requirements can have several benefits.<sup>251</sup> Allowing only a single extension increases clarity and predictability for firms and regulators

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242. FLA. STAT. § 559.952 (2020).

243. O'Sullivan, *supra* note 7, at 3.

244. *See* Reiners, *supra* note 4 (suggesting that sandbox extensions should be limited to one year or less).

245. *Id.*

246. *See* N.C. Regulatory Sandbox Act § 169-7(a) (emphasis added) (contemplating that the duration of participation in the sandbox is "not to exceed 24 months from the date of admission into the regulatory sandbox program unless an extension is granted.").

247. *Id.*

248. FLA. STAT. § 559.952(7)(a) (2020).

249. § 559.952(7)(b).

250. *Id.*

251. Reiners, *supra* note 4.

alike.<sup>252</sup> In addition, requiring firms to show that they have already submitted a licensure application will preclude extensions for participants who are overly-reliant on the sandbox and do not have a realistic pathway to regulatory compliance.<sup>253</sup> This will incentivize participating firms to file an application for licensure, which will keep them focused on the long-term goal of viability outside the sandbox.<sup>254</sup>

*F. Require Bi-annual Reports*

The N.C. Act should also follow the lead of other jurisdictions and require participants to submit a report twice per year while they are in the program.<sup>255</sup> Other sandbox programs require participants to report financial information and the number of consumers who have received the financial product or service.<sup>256</sup> In contrast, the N.C. Act requires a report at the end of the sandbox period, and the contents of the report are determined by the applicable state agency.<sup>257</sup>

Requiring bi-annual reports will be an easy way for the regulatory agencies to gather up-to-date information about each firm's progress in the sandbox.<sup>258</sup> Frequent reports could also minimize the potential harm to consumers by enabling the Innovation Council to keep a closer eye on firms and take preventative steps sooner than otherwise possible.

*G. Emphasize the Value of Partnerships*

One final way that the sandbox program that could be improved upon is by instilling an emphasis on the importance of partnerships to a firm's success.<sup>259</sup> Other jurisdictions acknowledge in the application process that many firms will need to partner with an established company in order to successfully test their innovation.<sup>260</sup> These jurisdictions also make it clear to applicants that while partnering with an incumbent is often beneficial, the sandbox administrator will not assist applicants in

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252. *See id.* (recommending that the N.C. Act be explicit about limiting participants to a single extension, because the Act is unclear as written).

253. § 559.952.

254. *Id.*

255. O'Sullivan, *supra* note 7.

256. *Id.* at 3.

257. N.C. Regulatory Sandbox Act § 169-7(c).

258. O'Sullivan, *supra* note 7, at 4.

259. *Id.* at 2.

260. UK FIN. CONDUCT AUTH., *Regulatory Sandbox Application*.



finding potential partners.<sup>261</sup> This enables applicants in these jurisdictions to make a fully informed choice about whether or not to participate based on clear disclosures of what the program does and does not offer.<sup>262</sup>

In its current state, the N.C. Act is silent on the issue of partnerships, and it could be improved by adopting similar language so that applicants can maximize their experience in the sandbox and have a clear understanding of the assistance they can expect to receive.<sup>263</sup>

## VI. CONCLUSION

In conclusion, the creation of a regulatory sandbox for financial and insurance technologies in North Carolina will likely be a net positive for the state's economy and consumers.<sup>264</sup> However, regulatory sandboxes have their drawbacks; they can result in state endorsement of harmful and unproven technologies,<sup>265</sup> and they have the ability to weaken existing consumer protections.<sup>266</sup> The N.C. Regulatory Sandbox could specifically be improved by building on the experiences of other jurisdictions operating similar programs. The N.C. Act would benefit from adding a collaborative application process, providing applicants with a declaratory statement, requiring a proof of concept and bi-annual reports from applicants, emphasizing the importance of partnerships, and increasing the clarity of extension opportunities. The Innovation Council could implement some of these changes through its discretionary authority, but other changes likely must be made by amendment to the statute by the state legislature. One path forward is for the Innovation Council to operate the program for several years and then, armed with additional practical experience, reexamine fundamental aspects of the N.C. Act. In this way, the Council can determine if the program's structure can be improved to achieve the dual objectives of stimulating the development of innovation financial products and services while

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261. See UK FIN. CONDUCT AUTH., *FCA Regulatory Sandbox Application Guide*; See UK FIN. CONDUCT AUTH., PUB. REF.: 00598 at 5 (noting that about fifty percent of the sandbox tests in the UK involved a partnership between an incumbent and a startup).

262. See UK FIN. CONDUCT AUTH., PUB REF: 00598.

263. See N.C. Regulatory Sandbox Act § 169-6.

264. Illman & Medlin, *supra* note 126.

265. Kelly, *supra* note 151.

266. Reiner, *supra* note 4.

protecting consumers. As an experimental concept, the program could itself benefit from a sandbox-like experience.

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