I. Developments in Promoting Financial Inclusion

A. Introduction

A 2017 survey by the Federal Deposit Insurance Corporation (FDIC) found that approximately 6.5% of households in the United States were unbanked and 18.7% of households were underbanked.[1] While the percentage of unbanked families decreased from 8.2% in 2011 to 6.5% in 2017, there is room for additional progress in expanding access to banking in underserved communities.[2] The benefits of financial inclusion include increased earning potential and increased financial security.[3]

Unbanked and underbanked families face significant disadvantages by not having access to checking and savings accounts.[4] Many resort to Alternative Financial Services (AFSs), which charge high fees for check-cashing services, impose exorbitant interest rates for short-term lending services, and are less regulated than traditional financial institutions.[5] These factors exacerbate the financial stress that prevents financial inclusion.[6]

---

[1] FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1 (2018) [hereinafter FDIC] ("In 2017, 6.5 percent of U.S. households were 'unbanked,' meaning that no one in the household had a checking or savings account. . . . An additional 18.7 percent of U.S. households were 'underbanked . . . .'").

[2] *Id.* at 1 fig.ES.1 (displaying the chart showing unbanked households decreasing from 8.2% to 6.5%).

[3] WORLD BANK GRP., THE GLOBAL FINDEX DATABASE 2017: MEASURING FINANCIAL INCLUSION AND THE FINTECH REVOLUTION 1 (2018) [hereinafter WORLD BANK] (discussing benefits of financial inclusion in Kenya including increases in savings and transfers in times of need).

[4] *See* Christopher Choe, *Bringing in the Unbanked off the Fringe: The Bank on San Francisco Model and the Need for Public and Private Partnership*, 8 SEATTLE J. SOC. JUST. 365, 365–66 (2009) (discussing the high costs faced by two unbanked women).

[5] *Id.* at 366 ("Unfortunately, patronage of these alternative financial institutions involves a high cost for basic financial services, such as cashing a paycheck. For example, a person earning $20,000 per year after taxes might pay a total of approximately $400 per year in check-cashing fees.").

[6] *See id*. ("Given the high costs of such basic financial services, alternative financial service providers are being utilized by a clientele that is least able to afford them.").

Mobile banking and financial technology (FinTech) companies have become, and will continue to be, an increasingly important way for consumers to access their money.[7] Mobile banking access worldwide increased from 23.2% in 2013 to 40.4% in 2017.[8] Underbanked households were more likely to use mobile banking services than fully banked households, and two-thirds of unbanked adults worldwide have a mobile phone. This access to mobile phones creates an opportunity for FinTech companies to close the gap in access to traditional financial services.[9]

While innovation by FinTech companies has been rapid, regulators have been slow to catchup, and FinTech is constrained by regulations meant to protect developed national banks.[10] As a result, innovation in mobile banking has been tethered to traditional banking institutions.[11]

This article discusses the unbanked and underbanked populations and the problems lack of access to traditional financial services creates. Part B looks at the recent history of the underbanked and the challenges they face. Part C looks at efforts, domestically and internationally, undertaken to provide the unbanked and underbanked with access to traditional financial services. Finally, Part D looks at regulatory problems posed by the emergence of FinTech companies.

B. History of the Unbanked and Underbanked

Roughly 6.5% of all households in the United States were unbanked in 2017, meaning that no one in those households had a

---

[7] FDIC, *supra* note 1, at 5 (discussing a sharp increase in mobile banking usage).
[8] *Id*. at 5 tbl.ES.3 (displaying the chart showing mobile banking access increasing from 23.2% in 2013 to 40.4% in 2017).
[9] Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 254–55 (2018) (discussing improvements in access to banking experienced in non-US markets because of innovations in technology).
[10] *See id.* at 256–69 (reviewing challenges faced by FinTech companies because of complex current reporting structure).
[11] Catherine Martin Christopher, *Mobile Banking: The Answer for the Unbanked in America*, 65 CATH. U. L. REV. 221, 230–31 (2015) (reviewing new mobile banking programs and their attachment to entrenched banks and products).

traditional bank account, including a checking or savings account.[12] These households move in and out of the banking system, but the majority have not had an account in the twelve months before the survey.[13] The unbanked cite several reasons for not having a bank account, such as not trusting banks, privacy concerns, and high and unpredictable fees.[14] However, the most common reason is simply not having enough money to keep in an account.[15] Few households consider themselves "Very Likely" or even "Somewhat Likely" to open a new account in the next twelve months.[16] While this data is striking, the United States fairs better than the global average, with only 69% of adults worldwide having an account.[17]

In addition to the unbanked, 18.7% of households in the US are underbanked.[18] These households, while having a checking or savings account, have also accessed an AFS provider in the past twelve months.[19] AFSs supply financial services to underbanked families that are traditionally provided by mainstream banking and credit companies and include money orders, check cashing, payday loans, rent-to-own services, pawn shop loans, and auto title loans.[20]

Unbanked and underbanked households in the United States are more common in lower-income, less educated, younger, black,

---

[12] FDIC, *supra* note 1, at 1 ("In 2017, 6.5 percent of U.S. households were 'unbanked,' meaning that no one in the household had a checking or savings account.").
[13] *Id.* at 1–2 (discussing cyclical nature of bank account ownership).
[14] *Id.* at 4 (discussing responses to the survey asking why the unbanked did not have a bank account).
[15] *Id.* (listing the most common response as not having enough money to keep in an account).
[16] *Id.* at 3 tbl.ES2, 4 ("More than half (52.7 percent) of unbanked households cited 'Do not have enough money to keep in an account' as a reason for not having an account, the most commonly cited reason. This reason was also the most commonly cited main reason for not having an account (34.0 percent).").
[17] WORLD BANK, *supra* note 3, at 2 ("This means that 69 percent of adults now have an account, up from 62 percent in 2014 and 51 percent in 2011.").
[18] FDIC, *supra* note 1, at 17 ("An additional 18.7 percent of U.S. households (24.2 million) were 'underbanked' in 2017 . . . .").
[19] *Id*. (defining the underbanked as having a checking or savings account but using an alternative financial service in the past 12 months).
[20] *Id.* (listing AFSs as "money orders, check cashing, international remittances, payday loans, refund anticipation loans, rent-to-own services, pawn shop loans, or auto title loans"); Choe, *supra* note 4 at 369–71 (explaining the financial impact of using check cashing services and payday loans).

Hispanic, and disabled households.[21] Similar trends exist worldwide with poorer and less educated families being less likely to have access to a financial account.[22] Furthermore, internationally, there is a significant trend along gender lines with women constituting 56% of the unbanked population worldwide.[23]

In recent years, there has been a reduction in the unbanked and underbanked populations in the United States, with the unbanked decreasing from 8.2% in 2011 to 6.5% at the end of 2017, the lowest the rate has been since the FDIC began conducting the survey in 2009.[24] The declines were sharpest among younger, black, and Hispanic households.[25] Over the same time period, the percent of the underbanked fell from 20% to 18.7%.[26] The most significant driver of this decrease in the unbanked in the past two years has been improvement in the socioeconomic status of households, not outreach or technological advances by banks.[27]

Given that the unbanked and underbanked are more likely to be near the poverty line, use of AFSs undermine the societal goals of reducing poverty and maintaining our national economy by requiring

---

[21] *Id.* at 2 ("For example, unbanked and underbanked rates were higher among lower-income households, less-educated households, younger households, black and Hispanic households, working-age disabled households, and households with volatile income.").

[22] WORLD BANK, *supra* note 3, at 5 ("Unbanked adults are more likely to have low educational attainment. In the developing world about half of all adults have a primary education or less.").

[23] *Id.* at 4 ("Fifty-six percent of all unbanked adults are women. Women are overrepresented among the unbanked in economies where only a small share of adults are unbanked, such as China and India, as well as in those where half or more are, such as Bangladesh and Colombia.").

[24] FDIC, *supra* note 1, at 1–2 (detailing a decrease in unbanked from 8.2% in 2011 to 6.5%).

[25] *Id.* at 2 ("Recent declines in unbanked rates have been particularly sharp for younger households, black households, and Hispanic households.").

[26] *Id.* (detailing a decrease in underbanked rates from 20.0% in 2013 to 18.7%).

[27] *Id*. ("The decline in the unbanked rate from 2015 to 2017 can be explained almost entirely by changes in household characteristics across survey years, particularly improvements in the socioeconomic circumstances of U.S. households. After accounting for these changes, the remaining difference in the unbanked rate from 2015 to 2017 was very close to zero and no longer statistically significant.").

the poorest families to pay more to access their money.[28] For example, check cashing services charge fees to cash checks, a service that is ordinarily provided by banks for free.[29] Similarly, the annual percentage rate of a payday loan can exceed 350%.[30] These households tend to use AFSs because they lack access to mainstream credit providers.[31]

There are significant benefits to bringing these households into mainstream markets.[32] Banked households have better security, as keeping physical cash is unsafe and difficult to manage.[33] A bank account lets households receive payments from friends and family during rough times, and access to traditional credit helps families manage their finances if their income decreases.[34] In addition, it lowers the cost of accessing the household's money.[35] Banks and other financial institutions can also build their consumer base and increase

---

[28] Choe, *supra* note 4, at 366 ("The continued use of these high-cost financial services, paired with insufficient access to bank accounts, undermines the larger shared societal goals of reducing poverty and maintaining and bolstering our national economy.").

[29] *Id*. at 376 ("The unbanked and underbanked are paying millions of dollars every year for services that can be free, and in many instances are free.").

[30] *Id*. at 377 ("Payday loans are expensive because they have extremely high annual interest rates. Nearly all payday lenders charge APRs above 300 percent. The most typical APR is 390 percent, which is basically a $15 fee for a $100 two-week loan . . . ").

[31] *Id*. at 368 ("The underbanked are individuals with a banking account, but who also typically have low FICO scores, creating an impediment to accessing incremental credit.").

[32] WORLD BANK, *supra* note 3, at 1 ("A growing body of research reveals many potential development benefits from financial inclusion . . .").

[33] *Id*. ("Many poor people around the world lack the financial services that can serve these functions, such as bank accounts and digital payments. Instead, they rely on cash—which can be unsafe and hard to manage.").

[34] *Id.*, *supra* note 3, at 1 ("In Kenya researchers found that when hit with an unexpected drop in income, mobile money users did not reduce household spending—while nonusers and users with poor access to the mobile money network reduced their purchases of food and other items by 7–10 percent."); Eliza Platts-Mills & Justin Chung, *Challenging Payday Lenders by Opening up the Market for Small-Dollar Loans*, 33 BYU J. PUB. L. 101, 106 (2018) ("Almost all U.S. households encounter significant dips in income at some point, but families without savings and assets, and without access to a credit card, are not able to weather those ups and downs the same way families with savings, wealth, and credit cards can.").

[35] Platts-Mills & Chung, *supra* note 34, at 107–10 (discussing high fees associated with using payday loans).

revenue by providing services to these underserved markets.[36] For these reasons, there is a societal benefit in decreasing the number of unbanked and underbanked households.[37]

C. Relevance to Recent Developments

FinTech has become an increasingly important part of the financial service landscape, both domestically and abroad.[38] FinTech refers to a set of new companies that focus on digital products in financial services.[39] These do not include established players such as banks, brokerage firms, or other large financial institutions.[40] FinTech companies and traditional banking services have made significant strides in creating products and services that expand access to the unbanked and underbanked.[41]

1. Recent U.S. Developments

While there has been substantial progress in reducing unbanked and underbanked populations, companies continue to devote significant time and resources to attacking the problem.[42] Increased

---

[36] ACCENTURE & CARE, WITHIN REACH: HOW BANKS IN EMERGING ECONOMICS CAN GROW PROFITABLY BY BEING MORE INCLUSIVE 5 (2015), https://www.accenture.com/us-en/insight-banks-grow-profitably-emerging-economies [https://perma.cc/ZQV8-2XL7] (discussing revenue potential for banks by including more customers).

[37] *See* Choe, *supra* note 4, at 366–70 (discussing how the use of AFSs by the unbanked and underbanked imposes a financial penalty on poor families); Platts-Mills & Chung, *supra* note 34, at 112–13 (discussing financial impact of payday loans and opportunities for banks to engage their customer base).

[38] Van Loo, *supra* note 9 at 240–42 (discussing fintech innovation and potential threat to US banks).

[39] *Id.* at 239 ("An important institutional distinction is that between fintechs and traditional financial firms. Fintech is used here to refer to the relatively new category of companies whose business models are based on digital products.").

[40] *Id.* ("The term leaves out legacy banks, like Citibank and Wells Fargo, which may now offer similar products but whose services originally lacked a digital component.").

[41] *See infra* Sections III.A, III.B.

[42] WORLD BANK, *supra* note 3, at 89 ("Global Findex data reveal many opportunities to increase account ownership among the 1.7 billion adults who remain unbanked. The data also point to ways to leverage new products and

access to mobile banking is helping drive this change.[43] Ninety-six percent of Americans own a cell phone, and 81% of those phone users have smartphones—up from 35% in 2011.[44] This increase in access to mobile phones has led to a change in the banking landscape.[45] Specifically, the percentage of households with a bank account that used their phone to access their account was 40.4% in 2017, a significant increase from 23.2% in 2013.[46] Mobile banking as the primary source of banking is more common in underbanked households than fully banked households.[47] However, mobile banking first requires access to a traditional bank account. Therefore, there needs to be changes in mobile banking before there is additional expansion to unbanked households.[48]

Traditional banks have also created accounts designed for the unbanked by targeting the factors that prevent access to banks including fees, minimums, and language barriers.[49] Citi offers its Access

---

technologies to boost the use of accounts among those who already have one.").

[43] *Id*. ("Mobile phones and the internet have given rise to a new generation of financial services.").

[44] *Mobile Fact Sheet*, PEW RESEARCH CTR., INTERNET & TECH.(Jun. 12, 2019), http://www.pewinternet.org/fact-sheet/mobile/ [https://perma.cc/LA4P-AXMM] ("The vast majority of Americans – 96% – now own a cellphone of some kind. The share of Americans that own smartphones is now 81%, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011.").

[45] *See* FDIC, *supra* note 1, at 14 ("Increased use of mobile banking activities by these households may enable them to conduct a greater share of their basic financial transactions within the banking system.").

[46] *Id.* at 25 ("The growth in the use of mobile banking was particularly striking, rising from 23.2 percent in 2013 to 31.9 percent in 2015 and 40.4 percent in 2017.")

[47] *Id.* at 26 ("As in 2015, more underbanked households than fully banked households used mobile banking as their primary account access method in 2017 . . . .").

[48] Christopher, *supra* note 11, at 230–31 (discussing use of mobile banking by banked households).

[49] *See Axiom Bank Empowers Traditionally Underbanked Community with AxiomGo Launch*, BUSINESSWIRE (Mar. 22, 2018, 12:45 PM), https://www.businesswire.com/news/home/20180322005918/en/Axiom-Bank-Empowers-Traditionally-Underbanked-Community-AxiomGo [https://perma.cc/HC7B-3NHL] ("Designed for the underbanked, the app has a Spanish-language option and enables users to open and fund an account and set up direct deposit with a few simple taps on their smartphone. The

Account which waives a monthly fee if customers transact on the account and do not permit overdrafts.[50] Axiom Bank launched its AxiomGo service by partnering with the FinTech firm Malauzai to expand account access to traditionally underbanked households.[51] The app has a Spanish-language option and allows online setup alongside traditional banking services.[52] Chime Bank has targeted the under-banked by offering a no-minimum, fee-free checking account that allows overdrafts of up to $100 without an additional charge.[53]

Within the United States, companies have also expanded their financing, mobile banking, and credit services for underserved markets.[54] Amazon announced the launch of "Amazon Cash," a service that allows customers to add cash balances to their Amazon account at participating retailers including CVS, GameStop, 7-Eleven, and RiteAid.[55] This allows unbanked customers who pay primarily in cash

---

checkless checking account provides a valuable alternative to prepaid cards and traditional check cashing services that often include hefty fees.").

[50] *Access Account Package: Affordable Access Banking*, CITIGROUP INC. https://online.citi.com/US/banking/checking/citi.action?ID=access-account [https://perma.cc/6UML-6VJA] (last visited Oct. 27, 2019) (reviewing account fees and benefits including no overdrafts and a waivable monthly fee).

[51] BUSINESSWIRE, *supra* note 49 ("The bank partnered with Malauzai to design and deploy a mobile app that meets the unique needs of a traditionally underbanked community, providing users a dynamic, bilingual, mobile banking experience.").

[52] *Id*. (explaining the AxiomGo service offering and the benefits to traditionally underbanked markets).

[53] *Banking Features*, CHIME, https://www.chimebank.com/online-banking/ [https://perma.cc/F7N9-Y296] (last visited Oct. 27, 2019) (discussing Chime account features).

[54] *See* Sarah Perez, *Amazon launches Amazon Cash, a way to shop its site without a bank card*, TECHCRUNCH (Apr. 3, 2017, 10:27 AM), https://techcrunch.com/2017/04/03/amazon-launches-amazon-cash-a-way-to-shop-its-site-without-a-bank-card/ [https://perma.cc/6EZT-R92Z] (discussing the launch of "Amazon Cash").

[55] *Id.* ("Amazon Cash will be available at brick-and-mortar retailers across the U.S., including CVS Pharmacy, Speedway, Sheetz, Kum & Go, D&W Fresh Market, Family Fare Supermarkets, and VG's Grocery. Other stores will be added in the future."); *Amazon Cash*, AMAZON, https://www.amazon.com/b?ie=UTF8&node=14583169011 [https://perma.cc/T5WK-9NK8] (last visited Oct. 27, 2019) ("Add cash regularly at participating locations to save up for that special purchase or keep an eye on your Amazon Balance throughout the month. Your Amazon Balance is always available to you.").

to access the global retailer.[56] In addition to Amazon, PayPal and Walmart have similar products targeting cash-only customers.[57]

Companies have also targeted the underbanked by expanding access to credit.[58] Amazon has partnered with Synchrony Financial, a consumer financial services provider, to provide credit services for shoppers with no credit or a poor credit history.[59] Petal offers a new credit card for customers with no credit history that uses machine learning to assess more financial data than a simple credit score can.[60] Non-traditional lenders, such as Lending Club, have emerged that offer

---

[56] *Amazon Cash: Frequently Asked Questions,* AMAZON, https://www.amazon.com/b/ref=s9_acss_bw_cg_ACFNDT_md1_w?node=14720158011&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=merchandised-search-19&pf_rd_r=23BT708085BCS5ZA9KDF&pf_rd_t=101&pf_rd_p=e5b9af12-a4ed-4ed8-b54a-01c35fabf177&pf_rd_i=14583169011 [https://perma.cc/U55Z-C7L9] (last visited Oct. 27, 2019) ("Why did Amazon create Amazon Cash? We created Amazon Cash because we want to serve all customers, including those who prefer not to use debit or credit cards to shop. At Amazon we strive to give customers choice and are proud to allow customers to shop with the payment of their choice.").

[57] Perez, *supra* note 54 ("The service is not all that different from a similar effort by PayPal, whose PayPal My Cash Card lets you add funds to your online PayPal account, using cash from your wallet. It also has a barcode-only service, powered by Green Dot. Walmart, too, has a Pay with Cash option.").

[58] *See* Robin Saks Frankel, *Amazon, Synchrony Launch Secured Credit Builder Card*, NERDWALLET (June 10, 2019) https://www.nerdwallet.com/blog/credit-cards/amazon-store-card-secured-credit-builder-synchrony/ [https://perma.cc/E58W-574W] (reviewing Amazon's new offer providing credit to consumers with poor credit scores).

[59] *Id*. ("The online mega-retailer has teamed with Synchrony Bank to launch the Amazon.com Store Card Credit Builder. It offers the same benefits as the existing Amazon.com Store Card, except that the new product is a secured card aimed at customers looking to build or rebuild their credit — meaning it requires an upfront deposit.")

[60] Monty Munford, *Petal Set to Flourish with $34 Million Funding as US FinTech Finally Blossoms*, FORBES (Oct. 2, 2018, 12:47 PM) https://www.forbes.com/sites/montymunford/2018/10/02/petal-set-to-flourish-with-34-million-funding-as-us-fintech-finally-blossoms/#78d629184850 [https://perma.cc/4L9T-EG9C] ("Petal says its product has been 'established to help people build credit, not debt, by providing a credit card with no fees no financial traps and no prior experience with credit required'."); *FAQ*, PETAL https://www.petalcard.com/faq [https://perma.cc/QL5G-CL27] (last visited Nov. 1, 2019) ("We use machine learning to analyze your digital financial record, rather than just your credit score, which allows Petal to offer higher credit limits and lower rates than competing cards, and no fees whatsoever.").

peer-to-peer loans outside of traditional banks, but with lower interest rates than AFSs.[61] These new services provide a better option to consumers than AFSs.[62]

2. Recent International Developments

There has also been progress in international markets to revolutionize financial transactions to promote financial inclusion.[63] Despite the additional challenges developing countries face, such as a dependable physical infrastructure and regulatory safeguards to maintain confidence in the future of mobile banking, developing countries have made significant progress in increasing access to banking services for the unbanked.[64] For example, Kenya and China each have a distinct model for expanding mobile banking services.[65] Kenya's model allows non-bank companies to offer accounts outside of traditional banks while China's model focuses on partnerships between technology or communications companies and banks.[66]

---

[61] Van Loo, *supra* note 9, at 239 ("One of the earliest fintech areas was peer-to peer lending, in which companies link individuals who have money to those who want it.").

[62] *Id*. at 255 ("In probably the most comprehensive study to date, the Federal Reserve concluded that online lenders extended access to credit where it was insufficiently available. Account-level data also indicated that two fintechs, Lending Club and Y-14M, had used 'alternative information sources [to allow] some borrowers who would be classified as subprime by traditional criteria to be slotted into 'better' loan grades and therefore get lower priced credit.'").

[63] *See* WORLD BANK, *supra* note 3, at 89 ("In Sub-Saharan Africa relatively simple, text-based mobile phones have powered the spread of mobile money accounts. Similar services are available in other parts of the developing world.").

[64] *Id*. ("People will be less inclined to use digital payments if network outages or other technical problems undermine their dependability. Financial infra-structure is also needed.").

[65] *Id.* at 7–8 (explaining the difference between China's and Kenya's expansion of mobile financial services).

[66] Id. at 7 ("In China mobile financial services are provided primarily through third-party payment service providers such as Alipay and WeChat using smartphone apps linked to an account at a bank or another type of financial institution. By contrast, in Kenya mobile financial services are offered mainly by mobile network operators, and mobile money accounts do not need to be linked to an account at a financial institution.").

In Kenya, mobile financial services are offered mainly by mobile network operators and are not linked to financial institutions.[67] One product, M-PESA, is a mobile finance platform born out of the United Kingdom's Department for International Development.[68] Vodafone, a telecommunications service provider, partnered with Safaricom, a Kenyan communications company, to offer mobile financial services including deposits, ATM withdrawals, and transfers.[69] In particular, this service has expanded banking services to rural Kenyans who previously could not access large commercial banks or post offices which were located in larger urban cities.[70] Commercial banks are keen on partnering with M-PESA and are not threatened by the competition due to the small transaction size.[71]

On the other hand, in China, technology and communications companies partner with banks or other financial institutions to provide financial services such as savings accounts, transfers, and investment services.[72] Alibaba's subsidiary, Alipay, has partnered with 108 banks in China and other large financial service providers to offer micro-

---

[67] Mercy W. Buku & Michael W. Meredith, *Safaricom and M-PESA in Kenya: Financial Inclusion and Financial Integrity*, 8 WASH. J. L. TECH. & ARTS 375, 378 (2013) ("M-PESA, short for mobile money, is an SMS-based money transfer system that allows individuals to deposit, send, and withdraw funds using only their mobile phones."); Christopher, *supra* note 11, at 238–40 ("M-PESA is a mobile finance platform based in Kenya. 'M-PESA' is short for 'mobile money,' 'pesa' being the Swahili word for money. Unlike WIZZIT, which roots its business in the banking industry, M-PESA is fundamentally a telecommunications product.").

[68] Buku & Meredith, *supra* note 67, at 385 ("M-PESA was conceived of at the 2003 World Summit for Sustainable Development, when the United Kingdom's Department for International Development (DFID) approached a representative of Vodafone.").

[69] *Id.* at 385–85, 391–92 (discussing expansion of M-PESA services to include ATM withdrawals, deposits, and bill payments).

[70] *Id.* at 393 ("Since M-PESA allows the safe transfer and storage of money, rural Kenyans no longer need to make lengthy trips to urban areas to make monthly payments for basic services, such as light or heat.").

[71] Christopher, *supra* note 11, at 240 (discussing the small size of M-PESA transactions which do not threaten existing bank services).

[72] *See* Nizan Geslevich Packin &Yafit Lev-Aretz, *Big Data and Social Netbanks: Are you Ready to Replace Your Bank*, 53 HOUS. L. REV. 1211, 1240–42 (2016) (discussing expansion of social networking and technology companies into financial services).

financing transactions.[73] Tencent, a software and gaming giant, owns social network WeChat and allows consumers to conduct financial transactions over the phone through its online payment tool, Tenpay.[74] In addition, Tencent expanded its services in 2014 to include an investment platform and launched WeBank, China's first bank with only online services.[75] These new services in Kenya and China have significantly helped to expand financial inclusion.[76]

D. Current Regulations That Affect the Underbanked and FinTech

While FinTech companies have been successful in innovating many financial transactions in the United States, they have been slow to innovate traditional banking services.[77] Banking startups face significant barriers to entry in helping to serve unbanked and underbanked households.[78] In order to operate as a bank across the United States, a company needs to obtain a federal bank charter from the U.S. Office of the Comptroller of the Currency (OCC).[79] While it is

---

[73] *Id.* at 1240 ("Alibaba has already moved into microfinancing through its online payment platform Alipay, which is linked with 108 partner banks in China and companies like VISA and Western Union around the world.").

[74] *Id.* at 1241 ("Since 2013 when Tencent linked Tenpay, its online payment tool, to WeChat, enabling its users to conduct a variety of financial activities such as transferring payments and withdrawing money, more than 20 million users made purchases through Tenpay, and the numbers keep rising.").

[75] *Id.* (discussing Tencent's partnership with China Asset Management and the launch of China's first online-only bank).

[76] *See id.* at 1243 ("Mobile technology, therefore, has not only revolutionized access to broadband connectivity, but has also facilitated and may transform access to financial services for the underserved community, whether provided by traditional banks or by nonbanks, among which are big data giants and the major social networks."); Buku & Meredith, *supra* note 67 at 394 (discussing greater financial independence of M-PESA users).

[77] Van Loo, *supra* note 9, at 234 ("Other consumer industries, such as electronics, music, and books, have seen Fortune 500 companies dissolve and profits fall in the face of innovation. In contrast, the largest banks have steadily gained market share.").

[78] *Id.* at 242–44 (explaining several barriers faced by banking startups including regulation, lack of access to financial data, and aggressive state legislation).

[79] *How Can I Start a Bank*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/faqs/banking_12779.htm [https://perma.cc/6BUG-UN3R] (last updated Aug. 2, 2013) ("The proposed bank must first

possible for companies to perform certain financial functions without a charter, a charter allows a company to accept FDIC-insured deposits.[80] The process for obtaining a banking charter is expensive and time consuming.[81] FinTech companies without banking charters are limited to transactions such as transfers and lending, as opposed to traditional deposits.[82] Some FinTech companies have chosen to license their products to, or even merge with, traditional banks to solve this problem.[83]

In reaction to the problems faced by FinTech companies, the OCC launched a new special purpose FinTech charter.[84] The OCC recognized the public policy benefit in chartering FinTech companies to allow them to meet the evolving needs of U.S. consumers.[85] This

---

receive approval for a federal or state charter. The Office of the Comptroller of the Currency (OCC) has exclusive authority to issue a federal or 'national bank' charter, while any state (and the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) may issue a state charter.").

[80] William F. Stern & Alexander J. Callen, *So, You Want to Be a Bank? Benefits of Operating Through a Bank Charter and Charter Choice Considerations*, GOODWIN PROCTER LLP (Oct. 11, 2018), https://www.goodwinlaw.com/publications/2018/10/10_11-fintech-flash-so-you-want-to-be-a-bank [https://perma.cc/YX5Z-FW25] ("It is certainly possible for non-bank entities to provide a variety of financial services, but there are some very significant advantages to operating through a bank charter. In particular, while nonbank competitors of banks offer a variety of products that are not deposits but function like them . . ., only banks are permitted to take FDIC-insured deposits from the public and have access to deposits as a source of funding.")

[81] Van Loo, *supra* note 9, at 242–44 (recounting a FinTech entrepreneur's attempt to obtain bank licensure).

[82] *Id.* at 239 ("Since they do not have banking licenses, any money fintechs hold for consumers must not be for deposits, but instead for other purposes—such as transferring or lending.")

[83] Frank Martien, *Might Fintechs Become Banks?*, ACCENTURE (JAN. 15, 2018), https://bankingblog.accenture.com/might-fintechs-become-banks?lang=en_US [https://perma.cc/S28N-KTKN] (discussing "rent-a-charter" partnerships between banks and fintech).

[84] OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 1 (2018), https://www.occ.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf [https://perma.cc/7DCR-2YV2] (explaining the OCC's decision to create the FinTech charter).

[85] *Id.* at 2 ("Chartering a qualified fintech company as a national bank would also have important public policy benefits. The national bank charter provides a framework of uniform standards and robust supervision.").

charter allows FinTech firms to operate on a national scale without having to obtain fifty state licenses and place FinTech companies on the same regulatory plane as national banks.[86] The FinTech companies will be subject to the same stringent standards regarding capital, liquidity, and risk management as all federally-chartered banks.[87]

The OCC FinTech charter faces an uncertain future.[88] As of October 2019, the OCC has not received any applications.[89] While tech companies like Google and PayPal considered an application, they have not yet pursued the charter.[90] The New York Department of Financial Services (NYDFS) and the Conference of State Bank Supervisors (CSBS) have sued the OCC alleging that the FinTech

---

[86] Mark Nuccio, Gideon Blatt & Stephanie Ragland, *What New Bank Charters Mean for Fintech*, ROPES & GRAY LLP (Oct. 12, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/10/What-New-Bank-Charters-Mean-For-Fintech [https://perma.cc/YVN6-W858] ("The special-purpose fintech charter is designed to incentivize innovation by allowing fintech firms to operate on a national scale, like other national banks, without having to obtain 50 state licenses and navigate each state's unique regulatory scheme.").

[87] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 84, at 3 ("In addition, a fintech company with a national bank charter will be supervised like similarly situated national banks, including with respect to capital, liquidity, and risk management.").

[88] *See* Alan S. Kaplinsky, *Court dismisses lawsuit filed by state regulators to block OCC fintech charter*, BALLARD SPAHR LLP (Sept. 5, 2019), https://www.consumerfinancemonitor.com/2019/09/05/court-dismisses-lawsuit-filed-by-state-regulators-to-block-occ-fintech-charter/ [https://perma.cc/U2Q9-3CHJ] (discussing pending lawsuits against the OCC for creating the Fintech charter); Rachel Witkowski, *Google and PayPal explored OCC's fintech charter, then walked away*, AM. BANKER (June 16, 2019, 9:50 PM), https://www.americanbanker.com/news/google-and-paypal-explored-occs-fintech-charter-then-walked-away [https://perma.cc/3E5M-6XHD] (discussing lack of interest in charter).

[89] Witkowski, *supra* note 88 ("[I]n almost a year since the charter has been available, no fintech or technology firm has filed an application.").

[90] *Id.* (discussing Google and PayPal's decision not to pursue charter over relationships with state regulators and concerns over ongoing litigation).

Charter is outside the scope of the OCC's authority.[91] The CSBS suit was dismissed on September 3, 2019, but the NYDFS suit continues.[92]

Outside of the United States, other countries have taken strides towards different approaches to regulate FinTech, with some employing a "sand-box" approach to regulation.[93] A regulatory sand-box "is an environment that innovators and testers can use to mimic the characteristics exhibited by the production environment on a real-time basis."[94] It allows companies to test their products with limited regulatory risk while protecting consumers.[95] This approach has been employed in the United Kingdom, Australia, and other countries around the world.[96] The United Kingdom implemented one of the first sandbox models called Project Innovate through its Financial Conduct Authority.[97] It reduced barriers to entry and costs in order to attract innovation by FinTech companies.[98] The project provides a range of tools to projects that (1) target the United Kingdom financial services market, (2) are an innovation or new offering, (3) provide a benefit to

---

[91] Seth Berman et al., *Fintech in Brief: CSBS Challenge to OCC Fintech Charter Dismissed*, NUTTER MCCLENNEN & FISH LLP (Sept. 4, 2019), https://www.nutter.com/trending-newsroom-publications-fintech-in-brief-csbs-challenge-occ-charter-dismissed [https://perma.cc/N3R3-WCT9] (chronicling updates on litigation over the OCC's FinTech charter).

[92] *Id*. (discussing update on OCC litigation).

[93] *See* Luke G. Thomas, *The Case for a Federal Regulatory Sandbox for Fintech Companies*, 22 N.C. BANKING INST. 257, 257-58 (2018) (discussing implementation of sand-box approach in various countries); Van Loo, *supra* note 9, at 259 (discussing the U.K. regulator's programs to enable fintech startups to compete against entrenched banks).

[94] *The Sandbox Approach*, PWC, https://www.pwc.in/consulting/financial-services/fintech/fintech-insights/the-sandbox-approach.html [https://perma.cc/5P68-F3ZS] (last visited Oct. 27, 2019) (defining a regulatory sandbox).

[95] *Id*. ("Piloting a product or business model through a sandbox will help companies manage their regulatory risk during the testing period itself.").

[96] Thomas, *supra* note 93, at 258 ("The United Kingdom, Australia, 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.").

[97] *Id.* at 262 ("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').").

[98] *Id.* ("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.").

consumers, (4) have a genuine need to test the innovation in the sandbox, and (5) are ready for real consumers.[99] The sandbox has shown early success and its fifth cohort has already accepted another twenty-nine businesses.[100]

E. Proposed Reform Efforts

In response to the difficulties faced by FinTech companies, several U.S. states have also considered a sand-box approach to allow FinTech companies to test their product before facing the traditional regulatory burden of national financial institutions.[101] Arizona was the first state to pass sandbox legislation in response to slow movement by the federal government.[102] The program allows companies "to test innovative financial products or services without obtaining a license or other authorization that otherwise might be required."[103] Illinois is

---

[99] *Applying to the regulatory sandbox*, FIN. CONDUCT AUTH., https://www.fca.org.uk/firms/regulatory-sandbox/prepare-application [https://perma.cc/FXC8-A9QL] (last updated Oct. 22, 2019) (providing eligibility criteria for firms looking to join the sandbox).

[100] *Regulatory sandbox – cohort 5*, FIN. CONDUCT AUTH., https://www.fca.org.uk/firms/regulatory-sandbox/cohort-5 [https://perma.cc/982A-H9EC] (last updated May 20, 2019) ("29 businesses have been accepted into cohort 5 of the regulatory sandbox to test innovative products, services, business models and delivery mechanisms.").

[101] Thomas, *supra* note 93, at 264 ("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.").

[102] *Frequently Asked Questions*, ARIZ. ATTORNEY GEN.'S OFFICE, https://www.azag.gov/fintech/faq [https://perma.cc/U9A7-WD6N] (last visited Oct. 27, 2019) ("[Arizona] Attorney General Mark Brnovich initiated the Sandbox legislation, sponsored by Representative Jeff Weninger, to encourage businesses to develop innovative products and services in the financial services sector. Creating the Sandbox has sent a strong message that Arizona is leading the way in fostering innovation aimed at making financial products and services more available, affordable, and safe for consumers.").

[103] ARIZ. REV. STAT. ANN. § 41-5602 (2019) ("The attorney general shall establish a regulatory sandbox program in consultation with applicable agencies of this state to enable a person to obtain limited access to the market in this state to test innovative financial products or services without obtaining a license or other authorization that otherwise might be required.")

considering adopting a similar approach and looks to mirror Arizona's statute.[104]

Another pending proposal covering multiple states is the New England Regulatory FinTech Sandbox.[105] This proposal joins Vermont, Connecticut, Rhode Island, New Hampshire Massachusetts, and Maine in adopting a relaxed regulatory approach to FinTech.[106] The regulation is modeled after the European Union passport model, allowing a company that is regulated in one of the states to conduct business in another without additional approvals.[107]

There is also a movement at the federal level to overhaul FinTech regulations.[108] A 2018 Report to President Trump proposed adopting a modernized approach to regulation of FinTech companies.[109] It encouraged financial regulators "to stay abreast of developments in technology and to properly tailor regulations in a manner that does not constrain innovation" and asks the regulators to be more agile and not create unnecessary barriers to innovation.[110] New legislation by the federal government may allow further progress in decreasing unbanked and underbanked populations.

---

[104] Thomas, *supra* note 93, at 267 (discussing Illinois's plan to adopt Fintech legislation).

[105] *Id.* at 266 ("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').").

[106] *Id.* ("This proposed sandbox would take the form of a coalition between Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.").

[107] *Id.* ("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. This practice would be analogous to the European Union's ("EU") passport model . . .").

[108] *See* U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES NONBANK FINANCIALS, FINTECH, AND INNOVATION 4–6 (July 2018) (proposing a path for new regulations for FinTech companies).

[109] *See id.* at 9–14 (analyzing current regulatory burden on FinTech companies).

[110] *Id.* at 14 ("Treasury encourages all financial regulators to stay abreast of developments in technology and to properly tailor regulations in a manner that does not constrain innovation. Regulators must be more agile than in the past in order to fulfill their statutory responsibilities without creating unnecessary barriers to innovation.").

F. Looking Forward

Significant changes are needed if the United States wants to allow FinTech companies to continue to improve efficiency in underserved markets, especially in expanding financial inclusion to the underbanked.[111] Banks can continue to target the unbanked and underbanked by providing accounts that fit their unique needs.[112] This includes minimal account balance requirements, low fees, and quick access to payments.[113] While these accounts may not be profitable for banks,[114] they should be considered as part of a bank's charitable outreach.

Additionally, federal and state regulators need to modernize regulations of FinTech companies by balancing the protection of consumers and freedom of new companies to innovate.[115] The steep barriers to entry for banking institutions prevent FinTech from innovating traditional banking markets and expanding access to the underbanked.[116] If changes are not made, U.S. companies may lose market share to their international competitors.[117]

G. Conclusion

Significant progress has been made in reducing unbanked and underbanked populations in recent years.[118] These populations

---

[111] *See* Van Loo, *supra* note 9, at 242 (discussing barriers to entry for banking startups).

[112] *See* BUSINESSWIRE, *supra* note 49 (discussing plan for targeting under-banked with unique accounts).

[113] *Id*. (reviewing factors that Axiom targeted in accounts for underbanked).

[114] Christopher, *supra* note 11, at 225–26 ("Banks, for their part, believe there is little financial incentive to offer traditional banking products specifically to the unbanked. Because unbanked individuals make such small transactions and carry small balances, banks do not expect significant profit from these customers.").

[115] *See* U.S. DEP'T OF THE TREASURY, *supra* note 108 (discussing need for agile regulation).

[116] *See* Van Loo, *supra* note 9, at 234 (analyzing lack of progress by Fintech companies in traditional banking services).

[117] *Id*. at 236 ("Finally, the U.S. economy may miss out on consumer welfare gains, and cede market share to international firms, if its competition policy fails to pivot for the fintech era.").

[118] FDIC, *supra* note 1, at 1–2 (detailing a decrease in the unbanked from 8.2% in 2011 to 6.5%).

continue to benefit from improvements in the U.S. economy and technology developments from traditional financial services providers.[119] However, there is still significant room for improvement.[120] FinTech companies have become, and will continue to be, sources of innovation in expanding access to financial services to underserved populations.[121]

These FinTech companies face significant barriers to entry including the entrenchment of traditional banking services and extensive costs.[122] Federal regulators have been slow to adapt successful legislation to meet the needs of these new FinTech companies.[123] The new OCC FinTech charter faces litigation from CSBS and NYDFS and has received a lukewarm reception from large tech companies.[124] However, the current administration is keen on reducing barriers to innovation by FinTech companies.[125]

Doug Lajoie[126]

---

[119] *See supra* notes 38–62 and accompanying text.
[120] *See supra* notes 54–76 and accompanying text.
[121] *See* Christopher, *supra* note 11, at 241–42 (discussing expansion of mobile banking services in underserved markets including M-PESA).
[122] Van Loo, *supra* note 9, at 242 (reviewing barriers to entry for FinTech banking startups).
[123] *See supra* notes 77–92 and accompanying text.
[124] *See supra* notes 84–92 and accompanying text.
[125] U.S. DEP'T OF THE TREASURY, *supra* note 108 (discussing modernizing FinTech regulations).
[126] Student, Boston University School of Law (J.D. 2021).