National Bankers Association
1513 P Street, NW
Washington, DC 20005

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Dear Chair Gensler:

The onset of the COVID-19 pandemic triggered a variety of shifts in consumer and business behavior as businesses around the world have sought to mitigate risk and enhance efficiency by shifting from in-person interactions to digital-based interactions. This trend can be clearly seen in consumer banking and retail investing. As early as April 2020, survey data from J.D. Power and consumer data from FIS found large upticks in customers using mobile and online services relative to 2019. Similarly, a 2021 Morning Consult survey found that the pandemic increased the use of mobile and online banking and investment tools even as visits to branches and ATMs have decreased substantially.

The pandemic also proved to be an accelerating force for the growth of fintech which benefited on the demand side from an increase in online interaction and on the supply side from an investment-friendly economic environment. The rise of cryptocurrency and blockchain technology, as well as growing trends in embedded finance and data-driven personalization, suggest that the future of banking and finance is increasingly digital. In addition to innovation, these trends are being driven on the supply side by new market competitors such as fintechs and major retailers, and on the demand side by the increased purchasing power of Millennial and Gen Z consumers. These next generation consumers are digitally native and represent strong market demand for online and mobile banking and investing tools, as well as for increasingly personalized financial services and products.

Discussion of digitalization in the banking sector often includes specific capabilities such as: creating integration with third-party web applications to link bank accounts with Venmo or other mobile payment services; automating back-end processes that rely on routine tasks such as automated projections for lending activity based on machine learning analysis of multi-year lending data; and leveraging analytics to identify opportunities for cross-selling that can include automated and tailored product placement in a mobile banking or investing app. But as digitalization deepens opportunities for personalization, digitalization will go beyond these features to include significant customization of products and services for users based on unique needs or desires as highlighted in our recent report on "Navigating the Digital Frontier in Banking."

Since 2020, non-white Americans who either stopped investing or had never invested were more likely to cite lack of trust in the stock market compared to white Americans (39% vs. 29%) and in financial institutions (34% vs. 19%), as well as having had a bad investing experience (18% vs. 9%), as reasons. However, this same survey indicates that "minority investors who do engage with financial institutions say they feel more respected now than in the past." Similarly, when it comes to traditional banking, distrust among lower-income and minority households was cited as

a leading reason why those communities are largely unbanked (do not have a checking or savings account) or underbanked (have a checking account but use alternative financial services, which can be costly). A 2022 study by the Government Accountability Office estimated that approximately 17.9% of U.S households remain underbanked based on 2019 Federal Deposit Insurance Corporation (FDIC) findings. Those who cited a lack of trust with traditional banking noted negative past experiences with banks, the view that bank accounts include hidden or unpredictable fees, or a culture of not trusting banks.

As a result of these factors, among others, tens of millions of Americans, including many from diverse backgrounds, have been shut out of the financial markets which, in turn, has inhibited their ability to save and build wealth over time. Fortunately, over the last few years, new innovations have begun to create more opportunities for previously underserved communities to participate in our financial system, including in the areas of banking and investing. This trend holds promise to begin to remedy persistent economic inequality in the U.S., particularly among diverse demographics.

Given the various trends in banking outlined above, the most pressing question for Minority Depository Institutions (MDIs), Community Development Financial Institutions (CDFIs), and all other community banks is the following: will they be able to integrate technology with their mission and relational knowledge to better serve customers who are underserved by major banks and other financial institutions, or will they instead be made obsolete by traditional players who can leverage greater economies of scale.

It is an unfortunate reality that MDIs and CDFIs cannot address these issues alone. As the premier trade association for the country's MDIs, we believe it is essential for Congress and federal regulators to assist our institutions in their efforts to maintain and grow with the times.

Regulators need to ensure there is sufficient focus on the critical work of understanding the nature of the minority banking and investment business environment and the implications of the associated risks of that environment on MDI's business models. Regulators also need to take the time necessary to study new technologies, how banks, investing platforms, and other financial services providers are using technology to serve their customers, and, relatedly, how consumers and investors are interacting with technology (including why they prefer to bank, invest, and conduct other forms of commerce online).

Unfortunately, the FDIC and other bank regulators have so far failed to implement or recognize important federal statutory directives for flexibility and support in the most critical area of all -- the examination of these institutions. This includes, but is not limited to, the diversity of the examination teams and the appropriate cultural training of those teams. Moreover, the examination process significantly penalizes and restricts MDIs' operations and creates impediments to innovation that we believe are antithetical to Section 308 of the Financial Institutions Reform Recovery and Enforcement Act's goals of preserving and promoting minority depository institutions.

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Similarly, a recently proposed regulation from the U.S. Securities and Exchange Commission designed to address conflicts of interest associated with the use of "predictive data analytics" by broker-dealers and investment advisers ("PDA Proposal") would, as described below, have the impact of stifling innovation amongst strategic partners and result in fewer opportunities for smaller institutions to grow and compete, and fewer investing opportunities for historically underserved demographics who are only now starting to engage in the market in greater numbers. We believe the proposed rule would not only limit potential avenues for the expansion of services to the communities serviced by MDIs but has the real potential to turn back the clock and threaten future innovations that drive financial inclusion.

NBA supports efforts designed to protect customers and investors from material conflicts of interest that can result in financial harm, including conflicts of interest associated with new and complex technologies such as artificial intelligence. The PDA Proposal's terms are so broad, however, that the use of essentially any technology by brokers and advisers (from basic technologies that have been used for decades to advanced AI programs) in almost any interaction with a customer would be defined as "conflicted". Brokers and advisers would then have to engage in extensive efforts to "eliminate or neutralize" conflicts associated with the use of technologies that cause the firm to put its interest ahead of the customer's – full and fair disclosure of the conflict to the customer would no longer suffice.

In practice, the Proposal's broad terms and extensive regulatory compliance requirements are likely to cause firms both to pass along higher costs to investors and to stop using many technologies that are helping provide broad market access to millions of Americans from all socio-economic backgrounds. Moreover, as the SEC acknowledges, the Proposal's "conflicts rules could also result in costs that could act as barriers to entry or create economies of scale, potentially making it challenging for smaller firms to compete with larger firms utilizing covered technologies – as firms continue to increasingly rely on covered technologies for investor interactions." NBA is concerned that the Proposal's potential anticompetitive effects could disproportionately harm minority-owned firms, which are often smaller and increasingly reliant on technology to compete with larger firms.

NBA respectfully requests that the SEC revisit its expansive approach to rulemaking in this area and instead consider further clarifying that existing SEC regulations governing broker-dealer and investment adviser conflicts of interest, including Regulation Best Interest and the fiduciary duty under the Investment Advisers Act, also apply to conflicts associated with firms' use of technology like predictive data analytics and AI.

Sincerely,

Nicole A. Elam, Esq.
President & CEO