

The Latest on Fintech: Federal and Beyond

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As one of the most rapidly growing industries in the financial services sector, financial technology (fintech) is receiving significant attention in the nation's capital and around the world.

This article analyzes and provides updates on recent key fintech developments at the regulatory level, on Capitol Hill, and in the courts – including a brief update on the international regulation of the fintech industry. A PDF version of this article can be found [here](#).

OCC

In March of this year, the Office of the Comptroller of the Currency (OCC) released a draft supplement to its licensing manual on the licensing of special purpose fintech banks (analyzed in greater detail [here](#)). The OCC provided an opportunity for public comments on the licensing supplement, a move intended to be consistent with the agency's guiding principles of transparency and fostering open dialogue with stakeholders.

The comment period closed on April 14, and since that time, we understand that the OCC has decided to press “pause” on considering applications for and issuing fintech bank charters for entities that would not be accepting deposits. Though the agency has yet to clarify what its next steps will be regarding issuing fintech bank charters to entities not already eligible for a national bank charter, there are a few critical factors likely to impact how the OCC ultimately decides to proceed.

Leadership Change

Importantly, the OCC is undergoing a change in leadership. Comptroller Curry's term expired on April 9, 2017, and on May 5, Comptroller Curry stepped down and Keith Noreika was named Acting Comptroller. Acting Comptroller Noreika was previously head of the financial institutions regulatory practice at an international law firm. President Trump has since nominated Joseph Otting – former

CEO of One West Bank – to serve as the Comptroller of the Currency. Mr. Otting will need to be confirmed by the Senate before taken the charge of the agency.

Until Mr. Otting takes the helm of the OCC, the fate of the agency's fintech bank charter proposal lies with Acting Comptroller Noreika. That said, it is notable that neither of the two has yet to opine on the concept. However, the fact that the Acting Comptroller failed to even mention the fintech proposal in either his written or oral testimony during his participation in last week's Senate Banking Committee hearing on regulatory reform could suggest a shift away from the OCC's current approach. Nevertheless, there are several possible outcomes under new OCC leadership. The agency could: (1) finalize the licensing supplement on fintech banks with no substantial changes from the draft released in March; (2) finalize the supplement with substantive changes, which would not be subject to public notice and comment; (3) withdraw the draft supplement and not move forward with chartering fintech banks; or (4) hit "pause" and take no action either in finalizing or in withdrawing the draft licensing supplement.

Any concrete shift away from the agency's current approach (i.e., hitting "pause" or withdrawing the draft manual entirely) likely would be well received by various stakeholders in Washington DC, including House Financial Services Committee Chairman Jeb Hensarling (R-TX). In March of this year, Chairman Hensarling wrote then-Comptroller Curry urging the OCC to not rush its decision and instead "provide a full and fair opportunity for stakeholders" to assess the charter. Relatedly – though for different reasons – Democratic Senators Sherrod Brown (D-OH) and Jeff Merkley (D-OR) also wrote to Curry in January warning that fintech charters could "undermine financial stability and jeopardize consumer protections."

Note, too, as was highlighted in a recent Senate Banking Committee hearing that examined the Upper Chamber's approach to financial services regulatory reform, there is concern by some that the OCC's fintech bank charter proposal could further impede the ability of community banks and credit unions to compete for deposits as they lose locational advantages to mobile banking platforms.

In sum, this bipartisan, bicameral opposition could spell trouble for the OCC's proposal going forward.

Challenges in Court

It is possible that the future of the OCC's fintech proposal will be determined by a court. Since the OCC released the draft licensing supplement in March, at least two entities have filed law suits challenging the OCC's authority to issue fintech bank charters. First, the Conference of State Bank Supervisors (CSBS) is seeking an injunction to prevent the OCC from issuing any fintech bank charters. CSBS argues that the OCC lacks the authority to issue a fintech bank charter and that doing so would violate the National Bank Act (NBA), the Administrative Procedure Act and the Supremacy Clause of the Tenth Amendment of the Constitution. CSBS claims that the OCC can only charter institutions that carry on either (1) the "business of banking" under the NBA, which CSBS contends requires – at a minimum – engaging in receiving deposits; or (2) certain special purposes expressly authorized by Congress. As detailed in the OCC's licensing supplement, these fintech banks would not receive deposits, nor has Congress expressly authorized their existence. The OCC's response to CSBS's complaint is due at the end of July, after having received an extension by the US District Court for the District of Columbia.

Separately, the New York Department of Financial Services (NYDFS) Superintendent Maria Vullo filed a complaint in the Southern District of New York alleging the OCC's actions to charter fintech

banks “grossly exceeds the agency’s statutory authority.” Superintendent Vullo makes similar arguments as CSBS. The OCC’s response will likely be due in July.

These cases are clearly in their early stages, but could easily impact the OCC’s ultimate decision on whether to move forward with the fintech bank charter.

CFTC and Other Regulators

The Commodity Futures Trading Commission (CFTC) recently announced the creation of LabCFTC, a new initiative aimed at promoting responsible fintech in the markets CFTC oversees. LabCFTC will focus on ways to use fintech to improve the quality, resiliency, and competitiveness of the markets. LabCFTC will also focus on the CFTC’s engagement with fintech and regtech solutions that may enable the agency to carry out its mission more effectively and efficiently. Though little information has been released about the program, LabCFTC, which will be located in New York, will have two core components: (1) GuidePoint – a dedicated point of contact for fintech innovators to engage with CFTC; and (2) CFTC 2.0 – an initiative to foster and help initiate the adoption of new technology within the CFTC’s own activities. Note, however, given the current makeup of the CFTC (i.e., there are only two Commissioners – and one, Commissioner Sharon Bowen, is set to resign), we do not anticipate significant developments until CFTC nominees Brian Quintenz and Chris Brummer are confirmed as commissioners.

LabCFTC is just one example of federal regulators’ increasing interest in fintech and its potential impact on the industries they regulate. Indeed, both the Federal Reserve System (Fed) and the Consumer Financial Protection Bureau (CFPB), among other regulators, have shown interest in fintech in recent months. In April of this year, Fed Governor Lael Brainard indicated that the Fed wants to provide input on future rules governing how technology companies move into consumer lending markets. At the CFPB, the agency released a report last year from its “Project Catalyst” on promoting consumer-friendly innovation and highlighting the importance of ensuring consumer protections are built into emerging products and services.

Legislative

Aside from regulatory efforts, lawmakers also have expressed an interest in oversight of the fintech industry. In September 2016, Representative Patrick McHenry (R-NC), Chief Deputy Whip in the House, introduced the Financial Services Innovation Act of 2016 to create a regulatory “sandbox” approach for fintech firms. The sandbox approach, which loosely mirrors a similar program in the UK, allows companies to work alongside a regulator when testing a fintech product or service. The bill intends to give these firms the ability to test a new product or service with a limited launch without going through the full regulatory process. Representative McHenry’s bill also requires the 12 financial federal regulators to develop an internal “Financial Services Innovation Office” where companies can seek help in testing a product or service. While the bill has not been reintroduced at the time of publication, we anticipate that a “2.0” version of the legislation will serve as the starting point for congressional action on fintech legislation this Congress – an effort that we believe may have much-needed support from some in the Senate.

International

As interest in fintech continues to grow in the US, the industry is also drawing attention from governments across the world, especially the European Union (EU). On March 23, 2017, the

European Commission (EC) [published](#) a new [Action Plan on Consumer Financial Services \(Action Plan\)](#). The Action Plan sets out ways to provide European consumers with greater choice and better access to financial services across the EU. As a complement to the Action Plan, the EC recently launched a [public consultation](#) on fintech, looking into technology and its impact on the European financial services sector. The [consultation](#) remained open until June 15, 2017. The responses of the public consultation will feed into the work of the EC's fintech task force. Note, in a March conference, EC Vice-President Valdis Dombrovskis pointed out the need to do more work towards harmonizing the standards of innovation within the fintech space across the EU, which would enable a coherent EU approach to fintech. Nevertheless, as the industry continues to expand, the EC appears to be taking a “wait-and-see” approach to promulgating fintech regulatory measures for the time being.

Additionally, in a recent firm fintech seminar, panelists from various regulators and the financial services industry discussed a number of fintech-related topics. Notably, one panel concurred that competition law provides a flexible and effective tool for fintech companies and that it can be used as a “shield” to disentangle the pro-competitive effects of certain cooperation arrangements (such as information exchanges in blockchain technology) from its potentially anticompetitive effects; or, conversely, can be used as a “sword” in commercial negotiations with more established companies to reduce artificial market barriers. Further discussion centered on the potential impact of Brexit on UK-based fintech companies and the payments industry, which will be significantly impacted given the lack of equivalence rules for third countries in the applicable EU Payment Services and Electronic Money Directives.

Patrick Kirby contributed to this post.

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