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What Now for the OCC's Fintech Proposal?

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On October 26, the Office of the Comptroller of the Currency ("OCC") announced plans to open an Office of Innovation in the first quarter of 2017. The new office is intended to provide innovators with a central point of contact at the OCC and to implement a formal framework for how the agency will understand and respond to financial innovation impacting the federal banking system. The office is to be run by a Chief Innovation Officer and will include staff in Washington, DC, New York City, and San Francisco.

Since the OCC's announcement, much has changed in Washington with the election of Donald Trump to serve as the new President of the United States upon his inauguration in January 2017. How this development impacts fintech, generally, and the OCC's plans for its Office of Innovation, particularly, remains unclear.

According to Comptroller of the Currency Thomas J. Curry, the new Office of Innovation represents an effort to "ensur[e] that institutions with federal charters have a regulatory framework that is receptive to responsible innovation and the supervision that supports it." Certainly, the new Office of Innovation represents an important milestone in the recognition and assimilation of fintech by the federal bank regulators; and it marks further development in the OCC's efforts to play a lead role in shaping fintech policy and regulation in the US. But the arrival of a new Administration adds uncertainty regarding the impact on fintech, particularly on any regulations that may be proposed to facilitate and provide clarity to fintech firms seeking the stability of a regulated and protected environment in which to operate in the financial services space.

For example, one function of the new office would be to design and implement a program–run by banks–to pilot innovative products or technologies. Though the OCC has not yet settled on any details as to what this bank-run pilot would look like, Comptroller Curry has stated he "does not support" an approach that creates a "safe space" to allow companies to try new products without the risk of penalty, as he believes the OCC does not have authority to waive compliance requirements. However, by the time the OCC's office launches, will its role be equivalent to that which the OCC envisioned a few weeks ago?

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Personnel and staffing the new office could also be a challenge. An acting Chief Innovation Officer “CINO”, Beth Knickerbocker, has been identified to head up the new office; and a separate Innovation Officer is to be identified to head each field office in New York City, San Francisco and Washington, DC. OCC staff in each of the field offices will facilitate “office hours” with companies. Each office will also report to an Innovation Technician and the CINO. The agency will also form a Responsible Innovation Committee within the OCC to promote internal agency collaboration across business units. Presumably, these are all welcome steps in the right direction, but it remains to be seen whether the new Administration views these efforts as constructive, not enough, or perhaps not the right approach given the pace of fintech to date.

Prospects and Impact of Other Government Innovation Programs

Where the new Administration positions itself on fintech innovation may also impact other government initiatives and programs. For example, the Consumer Financial Protection Bureau (the “CFPB”) originally made waves in 2012 when it announced its Project Catalyst, an office focused on outreach to companies offering innovative financial products or services to consumers. The CFPB released a report last month that charts the growth of the office since its inception.[1] The report discusses the CFPB’s efforts to formalize collaboration with industry players, including the Trial Disclosure Waiver policy and its No Action Letter (“NAL”) policy.[2] The first policy lets companies test an alternative means to provide required disclosures to consumers, while the NAL policy lets companies seek a written statement from the Bureau that it will not recommend action against a company, for at least for a limited period of time, as it tests certain new and innovative financial products or services. Such NALs are nonbinding on the CFPB and other federal agencies or individuals. It remains to be seen whether either of the CFPB policies ultimately remains relevant, given the possibility of a very different approach to fintech innovation under a new Administration.

For example, in September, Representative Patrick McHenry (R-NC) proposed the Financial Services Innovation Act of 2016,[3] which would require 12 federal agencies (including the CFPB and the OCC) to each form a financial services innovation office to act as a liaison between the respective agencies and companies working on financial innovation strategies. The bill would permit companies to seek limited waivers from certain laws as they test new financial products and services. It is unclear whether the bill, which remains in subcommittee, can be enacted in current form. However, the McHenry bill provides a detailed mechanism for how a petition and limited waiver process could work and serves as a model for promoting innovation at an agency such as the OCC. And perhaps, similarly, the McHenry bill could implicitly endorse the CFPB’s waiver and no action policies designed to promote innovation by overcoming regulatory obstacles.

The OCC Approach

While the OCC has clearly been thinking about innovation and fintech issues for some time, the agency’s efforts are still in a nascent stage. For example, the OCC has not clearly stated its preferred approach to encouraging responsible innovation. For now, the OCC has stated only that it cannot waive compliance requirements and that it will release a report on the expected economic and industry consequences of a so-called “fintech charter”—a potential national charter specific to fintech companies held to the same safety, soundness, and fairness standards as other federally chartered institutions—and will seek comments on that report. Presumably, the OCC will weigh industry comments and seek further input before proposing a charter, which means significant activity on a fintech charter will certainly be delayed until next year; and which also means the agency’s approach could end up being significantly modified or altered. Although it is clear that such a charter is still being considered by the OCC, the landscape remains uncertain. For now, payments companies, marketplace lenders and other fintech providers seeking alternatives to multi-state licensing regimes should not stake the future of their business models on an OCC national charter.

While the OCC is considering a possible national fintech charter, it has also expressed interest in encouraging open dialogue and collaborative work with the new office as banks run pilot programs of innovative technology. The new Administration’s approach to fintech and financial services innovation will certainly have a bearing on these issues. Certainly, the expectation for now is that the OCC’s new Office of Innovation will explore the ideas to advance innovation, including whether and, if so, how to collaborate with other regulators. One important guidepost to look for in this process will be the role of regulation in serving as a stabilizing force in the face of rapid change and innovation; while, at the same time, paring back regulations that are superfluous and counterproductive to advancing meaningful advancements in the delivery of financial products and services.

For now, we know the OCC's new Office of Innovation plans to take on the following roles, some of which raise a number of important questions for the new Administration:

- **Performing outreach and providing technical assistance.** Through its Office of Innovation, the OCC plans to host office hours, organize innovation workshops and roundtables, and sponsor various forums throughout the year. In addition to its local offices, the agency is contemplating hosting events in other fintech hubs such as Austin, Boulder, Raleigh-Durham and Seattle. It will also provide banks and nonbanks with technical assistance regarding complicated regulatory requirements to help promote compliance-minded financial innovation.

  Questions: Will the OCC be supported by Treasury and the new Administration in connection with the agency's efforts to promote innovation? Will the new Administration seek to coordinate all federal fintech/innovation initiatives through a central federal entity (*e.g.*, the Treasury Department) or will it allow individual agencies to innovate in their respective approaches to dealing with the opportunities and challenges of fintech? What weight will OCC efforts have in the context of a broader federal financial services debate on fintech and financial services innovation? How much latitude will the OCC have in the name of innovation under the new Administration to diverge from its primary mission of chartering, regulating and supervising national banks, federal savings associations, and federal branches and agencies of foreign banks?

- **Improving the OCC knowledge base through awareness and training activities.** Internally, the OCC intends to train employees on the fundamentals of emerging products, services, processes and technology. The stated goal of this effort is to broaden and improve OCC expertise in areas related to innovation.

  Questions: While staff training and development is an important part of the OCC's innovation efforts and initiatives, it is unclear how much latitude the agency will have to develop fintech and financial services innovation going forward. Certainly, an important question for the agency is how to obtain clarity during a very uncertain transition period regarding the agency's plans and efforts on fintech innovation. In the same vein, the agency will have to consider staffing needs to provide meaningful support to these efforts, while at the same time being mindful of the tremendous competition for valuable human resources in promoting these efforts. And, specifically, remembering that the agency is funded by the institutions it supervises, how much of the agency's resources should be dedicated to promoting fintech and innovation programs that may not produce immediate or tangible industry benefits?

- **Facilitating collaboration with industry and other regulators.** The OCC indicated that it will become more transparent about expectations for responding to innovation inquiries and will standardize response workflows to achieve that goal. The agency also plans to start an OCC-led information sharing group to establish an ongoing dialogue with other agencies involved in regulating and overseeing innovative technologies.

  Questions: Certainly, an immediate question is how much should the OCC invest in a process that may or may not be supported by an Administration that may have its own strong and differing views on fintech innovation. And, by the same token, what will other agencies view as the benefits of collaboration, as well as the potential drawbacks of getting too far ahead of folks in the new Administration? Will there be merit in forging ahead, or will uncertainty and accompanying instability slow things down for fintech innovation, including meaningful industry/agency collaboration activities?

- **Performing research on industry innovation.** In addition to promoting awareness of regulatory requirements, the OCC plans to conduct industry research on the effects of innovation on individual banks, bank segments and the financial industry as a whole. In addition, the agency plans to collect data on customer needs, demographics, and financial inclusion; however, it is unclear whether any additional data reporting is contemplated as part of this effort.

  Questions: Key questions that regulators are struggling with include how to keep up with the pace of innovation, particularly while promoting innovation, how to assess the competing costs and benefits of innovation, and how to assess the impact of innovation on the financial services industry, generally, and specifically on consumers. The OCC has indicated a willingness to engage in promoting innovation and, in so doing, is appropriately conducting its due diligence on exactly what innovation means, the role of fintechs in the banking sector going forward, and the risks confronting institutions and the financial system generally by failing to understand the potential vulnerabilities and weaknesses that could be exploited by unchecked or unfettered disruptive innovation. Data sets will be critical to this effort and the more granular the data and reliable the analyses conducted on data sets the better the information that can be gleaned for future policy development in the payments space and other rapidly developing areas of fintech. Certainly, a reasonable expectation is that the OCC and other regulators may seek data from the industry. Would such information requests be viewed as too burdensome going forward such that the new Administration would seek to quash such efforts and sacrifice more responsible and informed innovation going forward?

- **Updating agency and interagency guidance.** The OCC noted the need to modernize certain guidance it provides to the industry. To that end, the new office will work with applicable business units within the OCC to update guidance related to third-party risk management, partnerships, collaboration and the Community Reinvestment Act.

  Questions: This issue raises the most potential for harm. There has been speculation that the new Administration may rapidly move to stifle any new regulations–at least for a period of time. Although this approach may appeal to a notion of a smaller and leaner government, it ignores the very real benefits that regulation can bring to provide order and stability to the financial markets, particularly in a space, such as fintech, in which there is rapid change. There are also a number of important questions regarding financial sector stability that are implicated by efforts to social engineer which laws will be enforced and promoted and which will be relegated to a lower priority status, particularly in the context of a rapidly developing area such as fintech and financial innovation, that is already operating within blurred lines. Thus, while it may counter-intuitive, more regulation may actually do more to promote innovation than to stifle it. Will policymakers under the new Administration recognize this important perspective?

Conclusion

We are at a critical time for the future of financial services. Many of the innovations that are the product of today's efforts may be around for many tomorrows, provided that these initiatives are guided by sound legal, regulatory and supervisory policies. And the role and tone set by the new Administration will be particularly pivotal in influencing these issues. It is uncommon for a federal regulator to open a new office, and the OCC's decision to create the Office of Innovation seems to reflect a serious commitment to advancing the dialogue of fintech regulation at a critical moment when regulators and industry stakeholders must work to balance the promotion of innovation with the need for oversight. What happens next with respect to the OCC's innovation efforts and the new Administration's response to the same may profoundly impact the future of fintech and financial innovation. This is not to suggest that innovation will stop; rather, the extent to which it is encouraged to grow and flourish in a stable environment will likely dictate how rapidly and effectively financial innovation is assimilated in our financial system.

At this point, it is reasonable to expect that the degree of interaction between the financial service and fintech industries and the OCC's new Office of Innovation may hinge somewhat on the agency's ultimate decisions on a potential bank-run pilot program and fintech charter. Those decisions, however, may be influenced by a range of issues that were not relevant or even considered just a few weeks ago. It is this new level or layer of uncertainty that poses further challenges to the efforts of the OCC and other federal regulators to promote innovation. Ultimately, it is important to note that the new office will focus not only on industry outreach, but also cross-agency collaboration and performing industry research and, thus, regardless of the interplay in terms of policy agenda of the new Administration, the office should be a welcome resource for companies—banks and fintech firms alike—looking to innovate responsibly.

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[1] *See* http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102016_cfpb_Project_Catalyst_Report.pdf.

[2] *See* http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-policy-to-facilitate-consumer-friendly-innovation.

[3] *See* https://www.congress.gov/bill/114th-congress/house-bill/6118/text.