

Memorandum

Regulating FinTech

Office of the Comptroller of the Currency Signals New Regulatory Framework for FinTech Firms

September 20, 2016

The Office of the Comptroller of the Currency (“OCC”) has indicated its intent to unveil a blueprint for a broader regulatory framework for financial technology, or “fintech,” firms later this fall. In a speech at the Marketplace Lending Policy Summit on September 13, 2016, Comptroller of the Currency Thomas Curry raised the prospect of a limited-purpose charter for non-bank fintech firms. In conjunction with the speech, the OCC also released a proposed rule setting forth a framework for placing uninsured national banks into receivership that would cover fintech firms.

Comptroller Floats Federal FinTech Charter

In his speech, Curry outlined details of the new regulatory framework would be revealed by the OCC this fall. Noting that fintech firms’ new underwriting and business models have not endured a complete credit cycle that would sufficiently test their integrity, Curry mentioned a number of policy questions shaping the OCC’s regulatory considerations:

- Whether new techniques and technologies raise concerns about compliance with existing laws and regulations (for example, the Equal Credit Opportunity Act applies to all creditors, not only insured banks and thrifts), including whether new algorithms for determining the creditworthiness of consumers potentially violate fair lending regulations by creating a disparate impact on a particular protected class;
- Whether existing laws and regulations adequately address recent innovations in the lending space (for example, the Community Reinvestment Act applies only to insured banks and thrifts and evaluates activities through a geographic lens), including the need to extend consumer protections to new service delivery channels;

- Whether product or service innovations, such as digital currencies, pose unique risks that require entirely new regulations to protect the public's interest and to effectively mitigate risk for the broader financial system; and
- Whether new innovations should be regulated and who specifically should be tasked with regulatory responsibility.

Curry noted that federal charters would place fintech firms squarely under the primary federal supervision of the OCC. It could also ensure rigorous bank-like federal regulation, provide a more level playing field for nationwide financial services, and help fintech firms navigate the existing regulatory landscape through consolidated oversight and uniform rules. Curry recognized concerns that federal charters may be attractive to fintech firms as a means to avoid consumer protections granted by state laws, but he cautioned that if the OCC decides “to grant limited-purpose charters in this area, the institutions who receive the charters will be held to the same strict standards of safety, soundness, and fairness that other federally chartered institutions must meet.” As such, Curry emphasized that the development of a new regulatory framework would be underpinned by certain core principles, including the need for “responsible innovation” that ensures the fair treatment of bank customers, a desire to encourage effective risk management and strong corporate governance, and collaboration with other regulators.

Ultimately, the framework that the OCC is expected to propose later this year will have important legal implications for the rapidly evolving fintech market space.

OCC Proposes New Rule for Receivership for Uninsured National Banks, Setting the Stage for a FinTech Charter

In conjunction with Curry's speech, the OCC issued a proposed rule addressing the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation, such as national trust banks and special purpose banks with operations limited solely to providing fiduciary services. According to OCC rules, special purpose banks include institutions that conduct at least one of three core banking functions—including receiving deposits, paying checks, or lending money—thereby encompassing many fintech firms. Although the OCC has not placed an uninsured national bank into receivership since the Great Depression, the move is intended to contribute to global efforts to coordinate responses to financial crises and to provide greater clarity to market participants. The OCC's proposal also interconnects with its consideration of a limited purpose charter for fintech firms. Comments on the proposal are due by November 14.

The proposed framework addresses the:

- appointment of a receiver, which may be any person, including the OCC or another governmental agency;
- procedure for submitting claims against the receivership;

- order of priorities for payment of administrative expenses and claims by creditors;
- powers and duties of the receiver;
- payment of claims and dividends to shareholders;
- sources of funds for payments and claims; and
- status of fiduciary and custodial assets and accounts.

These recent public announcements underscore the OCC's regulatory interest in the non-bank lending and fintech sector and the agency's commitment to the development of a comprehensive federal regulatory structure covering fintech firms.

Simpson Thacher is at the forefront of regulatory issues affecting the fintech sector. For more information regarding Curry's speech (available [here](#)) and the proposed receivership framework (available [here](#)), please contact any member of the Firm's Financial Institutions Group, including those listed below.

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