

OCC Invites Public Comment on Potential Revisions to Rules Affecting Bank Fintech Activities

June 8, 2020

On June 4, 2020, the Office of the Comptroller of the Currency (“OCC”) issued an advance notice of proposed rulemaking (“ANPR”) inviting public comment on its regulations broadly relating to the “digital activities” of national banks and Federal savings associations (collectively, “banks”). Comments are due by August 3, 2020.

The ANPR invites comment on any banking issue related to digital activities, use of technology and innovation, including blockchain technology, cryptocurrency and artificial intelligence. The ANPR follows on the heels of a statement by Acting Comptroller of the Currency Brian P. Brooks that a key OCC priority is supporting innovation that allows banks to take advantage of new technologies, products and models that “safely and fairly accelerate the velocity of money, create greater financial inclusion, and empower consumers and businesses with more control over their financial affairs.”¹ Comments to the ANPR will help the OCC determine what, if any, revisions to its regulations to propose through a subsequent notice of proposed rulemaking and invitation to comment (“NPR”).

PREPARING FOR A MORE DIGITAL FUTURE

In the ANPR, the OCC highlights several technological advances that have altered how banks conduct their business and provide products and services to their customers.

- **Cryptocurrency.** The OCC points to data that show the number of cryptocurrencies rapidly growing from just one in 2009 to over 1,000 in 2018. Depending on the source, the number of cryptocurrencies could be upwards of 3,000 today.
- **Blockchain and distributed ledger technology.** Banks are beginning to use blockchain and distributed ledger technologies. The OCC identifies credit

¹ OCC, Brian P. Brooks Statement on Becoming Acting Comptroller, May 29, 2020, available [here](#).

underwriting or monitoring, identity verification, payments processing and records management as uses or potential uses.

- **Artificial intelligence (“AI”).** Banks use AI and machine learning for fraud identification, anti-money laundering, trading and hedging activities, transaction monitoring and loan underwriting, among other things.
- **Money transfers and deposits.** Many Americans regularly use person-to-person platforms for money transfer services (e.g., Venmo, Zelle) and remote deposit capture for electronic check processing.
- **Relationships with technology companies.** The OCC recognizes that banks increasingly are entering into relationships with technology companies with respect to new delivery channels, products and services and that such relationships help banks remain competitive in a changing industry.

In turn, the OCC notes that banks must balance technological innovation and competition with other banks and non-bank entities against safety and soundness concerns, consumer protection laws, anti-money laundering requirements, and cybersecurity threats, among other issues.

The OCC believes the banking system is “well positioned for change.” To that end, the OCC states that it seeks to regulate banking in ways that facilitate “responsible creation or adoption of technological advances.” For example, the ANPR describes the OCC’s “responsible innovation” framework and its Office of Innovation that support bank innovation and increase OCC understanding of industry trends and issues.

As the OCC undertakes its review, three principles will guide the OCC’s approach to any regulatory changes.

- **Technology-neutral.** Regulations should be technology-neutral to encourage innovation regardless of the changes in underlying technology.
- **Consumer protection and privacy.** Regulations should facilitate appropriate levels of consumer protection and privacy, including transparency and informed consent.
- **Principle-based.** Regulations should be principle-based, rather than prescriptive, to enable effective management of evolving risks and mitigate the potential for outdated rules.

COMPREHENSIVE REVIEW

Existing regulations at 12 CFR part 7, subpart E address specific electronic and digital activities, including the following: (1) electronic activities that are part of or incidental to the business of banking; (2) furnishing of products and services by electronic means and facilities; (3) engaging in an electronic activity that comprises several component activities (composite authority); (4) the sale of excess electronic capacity and by-products; (5) acting as digital certification authority; (6) data processing; (7) correspondent services; (8) the location of a national bank conducting electronic activities; (9) the location under 12 U.S.C. 85 (covering interest rates on loans) of national banks operating exclusively through the internet; and (10) shared electronic space. Separate regulations at 12 CFR part 155 address Federal savings associations' use of electronic means and facilities and related requirements.

The ANPR is part of the OCC's review of whether these regulations effectively accommodate the evolution of the financial services industry, promote economic growth and opportunity, ensure safe and sound operation, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations.

In addition to broadly inviting comments on digital activities, technology and innovation, the ANPR poses 11 specific questions (which include various sub-questions) regarding the current regulatory framework, including:

- Whether the **current rules are sufficiently flexible and clear** or, if not, how they should be revised;
- Whether the **scope of digital banking activities** is broader than currently addressed in the rules and descriptions of any additional activities that should be addressed, including whether there are digital finders' activities in which financial services companies engage or banks wish to engage that are not included or sufficiently addressed in current regulations;
- What types of **cryptocurrency or cryptoasset activities** are financial services companies or customers engaged in, to what extent does customer engagement in crypto-related activities impact the banking industry and any barriers or obstacles to further adoption of such activities in the industry, and any specific activities that should be addressed in regulatory guidance;
- How **distributed ledger technology** is used in banking activities and whether any specific applications should be clarified in regulatory guidance;

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- How **AI** is used in banking activities; whether there are instances in which the banking industry currently cannot use AI because of regulatory barriers, lack of transparency, or challenges in auditing these technologies; and recommendations for how the OCC could address such instances, including by providing additional guidance or issuing regulations;
 - Descriptions of **new payments technologies** and processes and whether they are facilitated or hindered by current rules;
 - Whether banks are using “**regtech**” tools to comply with applicable regulations and supervisory expectations and how the OCC’s regulatory approach enables or hinders advancements in this area; and
 - Issues relating to changes in the banking system that have occurred in response to the **COVID-19 pandemic**.

CONCLUSION

The ANPR is a key development toward clarifying the scope of financial technology activities in which banks can engage and follows on the heels of recent industry calls for further technological changes to the U.S. financial infrastructure, including by former Secretary of the Treasury Henry Paulson, Jr.² Although the ANPR is an OCC effort, we anticipate that it or a subsequent NPR will encourage the other banking agencies to follow suit.

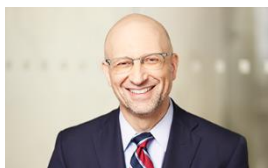
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Please do not hesitate to contact us with any questions.

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² “China and the Future of the Dollar,” *Foreign Affairs*, May 19, 2020, available [here](#).



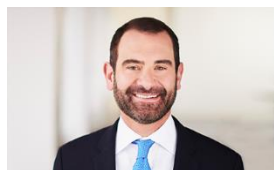
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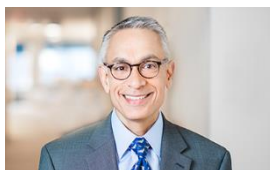


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