

## Stars Align For Clarity In Fintech Banking Regulations

By **Philip Rosenstein**

*Law360 (June 11, 2020, 9:44 PM EDT)* -- Banking regulators have struggled to keep up with emerging financial technology, but the newly appointed comptroller of the currency, with experience in both traditional banking and fintech including a stint at a cryptocurrency exchange, is moving quickly to reassess regulations in the area.

Acting Comptroller of the Currency Brian Brooks took the reins on May 29, having joined the OCC earlier this year after serving as chief legal officer at cryptocurrency exchange Coinbase.

The move comes as the financial services industry grapples with offering remote banking and gradually implements novel technologies to originate loans, make digital payments, take deposits, provide investment advice, handle compliance questions and much more.

Attorneys who spoke with Law360 said that under Brooks' leadership, the Office of the Comptroller of the Currency is expected to move swiftly to address the lingering tension between ensuring the safety and soundness of the banking industry and allowing for the type of speedy innovation embodied by fintech.

"He's really the first comptroller to have both the banking background, which he had at OneWest, and a fintech background, which he got at Coinbase," Chris Daniel, head of the payments and fintech practice at Paul Hastings LLP, told Law360. He added that from what they've seen in Brooks' first few weeks in the role, "he's trying to lay the groundwork to bring these closer together: fintechs on the one hand, and banks on the other."

Brooks arrives with plenty of experience with government affairs and more traditional segments of finance, having run the legal departments for Fannie Mae and OneWest Bank. Before that, he was a managing partner at O'Melveny & Myers LLP's Washington, D.C., office and chaired the firm's national financial services practice group.

On his first day as acting comptroller, he expressed "a personal passion" for innovation, outlining a plan to support the adoption of new technologies and products that he said could "accelerate the velocity of money, create greater financial inclusion, and empower consumers and business with more control over their financial affairs."

## **Regulating Activities, Not Technologies**

The pace at which the OCC is moving to tackle regulatory questions around the use of fintech was exemplified by an advance notice of proposed rulemaking published June 4, less than a week after Brooks joined. The notice confirmed the active review of regulations that address digital activities in banking, and solicited comments on how existing regulations on such use of digital technology may be out of date.

One of the major tenets in the notice is that any new or updated rules governing fintech should be technology-agnostic, and principles-based, rather than prescriptive. This was echoed as an important precept by fintech attorneys who spoke with Law360.

Jeffrey Silberman, a partner at Reed Smith LLP, suggested that any regulations that come out of the OCC's redoubled effort to oversee fintech steer away from regulating specific technologies.

He explained that the space would benefit from the regulation of "activities: the banking activities, the activities with customers, the interactions with customers, the financial products themselves — versus people purely trying to talk about regulation that is technology-specific."

The OCC has wrestled with digital innovation in banking since it first issued regulations that governed data processing in 1996, with more guidance released in 2002 and updated in 2008. Other regulations were issued in 1998, with updates in 2001 and 2017, addressing the use of technology by federal savings associations.

As the agency undertakes a review of these regulations, it has asked the industry and other stakeholders to provide input on the efficacy of existing rules given the quickly changing technological landscape. In addition to seeking thoughts on how banks are using digital assets, blockchain technology, artificial intelligence and machine learning, it is also interested in learning about developments in payments innovation and "regtech."

Importantly, the OCC is asking for comments on whether the existing legal standards around the use of digital technology in banking creates "unnecessary hurdles or burdens to innovation by banks."

Jonathan Gould, senior deputy comptroller and chief counsel at the OCC, spoke during a webinar hosted by the Online Lending Policy Institute on Thursday about how "the business of banking" has quickly changed over the past years.

"We acknowledge how quickly things are changing, whether it's the business of banking itself ... or technology developments and so forth that drive its medium for delivery, as well as the actual substantive content of what it is," Gould said. "So we want to get at that and recognize that we, too, need to stay up to date with that to the best we can."

## **Offering Guidance in the Meantime**

While Gould made clear that specific regulations addressing the use of novel technologies outlined in last week's notice are likely a ways off given the involved rulemaking process, Daniel told Law360 the agency could take quicker actions to ease some concerns about fintech's place in the overall regulatory framework.

What Brooks could do, he said, is "encourage national banks to partner with fintechs to provide bank services for money transmitters, to provide banking services for cryptocurrency firms, and make a statement that as a general matter, doing so is not in and of itself a risky proposition."

"Allowing for those banks to provide services to fintechs that are innovating and cryptocurrency firms that are innovating is probably the easiest and first best step," he added. "And that is not something difficult for him to do. He has that authority."

Among the fintech initiatives that predate Brooks' tenure is an attempt by the agency to address the matrix of state laws that regulate money transmitters that do not have national bank status.

Brooks' predecessor, Joseph Otting, left behind a key item of unfinished business in the fintech charter, a specialized national banking license that the OCC finally committed to offering in 2018. Although pitched as a way to give fintech firms a smoother path to nationwide operation, the charter program was almost immediately bogged down in litigation from state regulators who viewed it as a power grab and a threat to consumers.

The OCC fought back and is now trying to persuade the Second Circuit to clear the way for the program to resume after a New York federal judge halted it last year, but the charter's future remains clouded, and no company has yet even applied for one.

Figuring out a path forward now falls to Brooks, who has said he is committed to supporting the charter. But he has also floated the idea of a national payments framework that could help regulate fintechs looking to do business in the payments space on a nationwide basis.

"Fundamentally, the regulations that are currently in place address a number of topics including electronic activities that are part of or incidental to the business of banking," Michelle Gitlitz, a partner at Crowell & Moring LLP and global head of the firm's digital assets and blockchain practice, told Law360.

She said there is a sense in the industry that digital assets are emerging as incidental to the business of banking. The OCC could mold future regulations to allow for non-banking institutions to partner more easily with banks or provide their services to banks, and doing so would allow for the proliferation of digital assets in the traditional banking sector, Gitlitz said.

"We could increase the level of partnerships between traditional banking with fiat currency, and the less traditional new asset class of crypto," she said.

### **Clearing Up Bank-Fintech Partnerships**

Silberman also pointed to the importance of the growth in fintech-bank partnerships that have become mainstays in the modern banking world.

"You can find a fintech platform that's partnered with a bank or broker-dealer to offer just about anything these days," he said. "And that's only increasing."

However, Silberman noted there really isn't true guidance for banks if they want to be more than just a user of a fintech service and rather a supporter. When an unlicensed fintech wants to engage in banking activities, it can partner with a national bank, but the obligations that flow through to the bank

providing the services remain murky.

Daniel agreed it would be helpful to receive some more concrete guidance from the OCC with respect to a bank's legal obligations when it provides banking as a service to an unlicensed fintech company.

"One of the hard questions is: does the bank have to treat the users of the fintech service as customers of the bank for know-your-customer and sanctions purposes?" Daniel said. "It depends on the service being offered, but a general statement on guidance from the OCC about how banks could in a compliant manner offer banking as a service would be very helpful."

--Additional reporting by Jon Hill. Editing by Philip Shea and Brian Baresch.