

OCC Initiates Push To Reassess Banking Innovation Rules

By Philip Rosenstein

Law360 (June 4, 2020, 11:00 PM EDT) -- The Office of the Comptroller of the Currency is moving full steam ahead with plans to get up to speed with digital transformation in banking, asking for input on an expansive set of issues ranging from cryptocurrency and blockchain to artificial intelligence and machine learning.

Newly appointed acting Comptroller of the Currency Brian Brooks issued an advance notice of proposed rulemaking on Thursday, confirming that the federal banking regulator is actively reviewing regulations on digital activities in banking. The notice asks stakeholders to submit comments on how existing regulations on the use of digital technology in banking may be out of date in light of the dramatic technological advances.

Notably, the OCC is seeking thoughts from the industry and stakeholders on what can be done to reduce obstacles to the adoption of digital currencies, how blockchain can be used to enhance banking activities and how the agency could generally lower barriers to financial innovation, among various other considerations.

"The request for stakeholder comment is part of the OCC's commitment to responsible innovation and aligned with our understanding that banks must be able to evolve to meet the needs of the consumers, businesses, and communities that rely on them," OCC spokesman Bryan Hubbard said in an email to Law360. "Our role is to ensure there is a clear, supportive regulatory framework for banks to do so. The request for comments helps ensure we hear from stakeholders of all kinds on those important issues."

The notice comes days after Brooks took the reins at the OCC last Friday, having joined the agency earlier this year after a stint as chief legal officer at the cryptocurrency exchange Coinbase. In a statement upon taking office, Brooks 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."

"Acting Comptroller Brooks has been a strong advocate for the use of technology in banking," Karen Solomon, former acting senior deputy comptroller and chief counsel at the OCC and current senior of counsel at Covington & Burling LLP, told Law360. "This ANPR clearly places technology and innovation at the top of his agenda for the OCC."

Thursday's notice delineated certain overarching principles for future regulations on digital innovation in banking.

To ensure that such regulations do not become stale in short order given the breakneck speed of technological innovation, regulations should be "technology-neutral," the notice said. Further, potential regulations should ensure "appropriate levels of consumer protection and privacy." Regulations should also not be prescriptive but rather principles-based, the notice said, to ensure their longevity.

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, according to the notice. Other regulations were issued in 1998, with updates in 2001 and 2017, addressing the use of technology by federal savings associations.

The OCC is undertaking a review of these regulations and has asked the industry and other stakeholders to provide input on the efficacy of these 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, the agency is also interested in learning about developments in payments innovation and regtech.

Importantly, the agency 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."

"Although the OCC has previously conducted specific technology-related initiatives — the non-depository fintech charter is an important one — this advance notice of proposed rulemaking signals an intention to make comprehensive changes in the agency's rules; it is not necessarily limited to revisions targeted to a specific area of activity," Solomon said.

Solomon said that input from fintechs, banks and consumers will be an important resource for the OCC as it seeks to develop updated regulations around digital innovation in financial services.

"The better the OCC understands the use cases in banking for, say, artificial intelligence and machine learning or distributed ledger technology or other new technologies as they develop, the more likely it is to be comfortable supervising those activities which, in turn, should encourage additional innovation," she said.

The notice made clear that it was not seeking comment about the agency's ability to issue special purpose national banking charters to fintech companies, also known as the fintech charter. The OCC committed to offering the fintech charter 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 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 applied for one, let alone received one.

--Editing by Brian Baresch.