XIV. How FinTech Firms Provide a New Path to Regulatory Relief for Banks

A. Introduction

Following the financial crisis of 2007–2009, many regulators, both domestic and international, responded with a variety of regulations across all sectors.[1] According to the Institute of International Finance, JPMorgan Chase spent $2 billion on 13,000 new positions focusing on regulatory compliance, and spent another $600 million on regulatory technology between 2012 and 2014; UBS spent $946 million in 2014 on regulatory demands; and Deutsche Bank spent €1.3 billion on regulatory compliance in 2014.[2] These examples illustrate the vast resources that banks spend to navigate the often-complicated regulatory framework, especially in the wake of the financial crisis.[3]

Financial technology (FinTech) companies use technology to provide financial services.[4] FinTech firms, including Lending Club, a peer-to-peer lending platform,[5] and Square, a merchant services and mobile payment program,[6] are at the intersection of finance and technology; the term FinTech can refer to startups, technology companies, or legacy providers.[7] "The lines are blurring, and it's getting harder to know where technology ends and financial services begin."[8] The Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Consumer Finance Protection Bureau (CFPB), and other federal regulatory bodies have

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1 INST. OF INT'L FIN., REGTECH: EXPLORING SOLUTIONS FOR REGULATORY CHALLENGES 3 (2016).

2 *Id.*

3 *Id.*

4 *Fintech Definition*, FINTECH WEEKLY, https://www.fintechweekly.com/fintech-definition [https://perma.cc/G8ZL-AQQT].

5 *What We Do*, LENDING CLUB, https://www.lendingclub.com/public/about-us.action [https://perma.cc/5S9J-8M3R].

6 SQUARE, https://squareup.com/ [https://perma.cc/WZF6-J7XV].

7 Paul Schaus, *Legacy Systems Prevent Banks from Delivering on Digital Promises*, BANK INNOVATION (June 1, 2015), http://bankinnovation.net/2015/06/legacy-systems-prevent-banks-from-delivering-on-digital-promises/ [https://perma.cc/Q3PT-RYSJ].

8 HASKELL GARFINKEL & DEAN NICOLACAKIS, PWC, Q&A: WHAT IS FINTECH? 1 (2016), https://www.pwc.com/us/en/financial-services/publications/viewpoints/assets/pwc-fsi-what-is-fintech.pdf [https://perma.cc/SV6N-AWZF].

yet to develop a comprehensive framework for regulation of FinTech firms.[9] The OCC has suggested several regulatory options including full or limited-purpose federal charters, yet nothing has come of any such suggestions.[10] The desire for regulation by firms and firms' willingness to work alongside regulatory agencies provide a unique landscape with great potential for regulation.[11]

In this article, I will begin in Section B with an introduction to FinTech, discussing both the benefits of FinTech and why it poses problems for regulators. Section C discusses the current regulatory structure or, more accurately, the lack thereof, surrounding FinTech. Section D outlines and analyzes the eight factors the OCC has indicated as the guiding principles of FinTech regulation. Finally, Section E highlights proposed regulations, focusing on possible solutions as proposed by members of Congress and industry members.

B. What Is FinTech?

FinTech is understood as "an economic industry composed of companies that use technology to make financial systems more efficient."[12] FinTech firms range from know-your-customer technologies that collect information, risk management tools, and capital assessment procedures.[13] For example, know your customer technologies allow financial institutions to mitigate illicit and illegal transactions, such as money laundering and terrorist financing, by improving institutions' knowledge of clients' identities and business relationships.[14] These technologies do perform this function by

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[9] *See generally* INST. OF INT'L FIN., *supra* note 1.

[10] OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE 2 (2016).

[11] *See* Rachel Witkowski & Telis Demos, *Fintech Startup Craves More Regulation*, WALL. ST. J. (June 9, 2016), http://www.wsj.com/articles/fintech-startup-craves-more-regulation-1465517775 [https://perma.cc/RN9D-WAD8].

[12] Brendan McManus, *What is Fintech?*, WHARTON FINTECH (Feb. 16, 2016), http://www.whartonfintech.org/blog-archive/2016/2/16/what-is-fintech [https://perma.cc/Q2AD-2QK7].

[13] *See id*.

[14] Dan Ryan, *FinCEN: Know Your Customer Requirements*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 7, 2016), https://corpgov.law.harvard.edu/2016/02/07/fincen-know-your-customer-requirements/ [https://perma.cc/S9ZN-78QZ].

reporting suspicious activity when criminal activities, such as money laundering, credit card fraud, and identity theft, are suspected.[15]

Pricewaterhouse Coopers has conceptualized four different categories of FinTech, which it calls the As, Bs, Cs, and Ds:

> As are large, well-established financial institutions such as Bank of America, Chase, Wells Fargo, and Allstate . . . . Bs are big tech companies that are active in the financial services space but not exclusively so, such as Apple, Google, Facebook, and Twitter. Cs are companies that provide infrastructure or technology that facilitates financial services transactions. . . . Ds are disruptors: fast-moving companies, often startups, focused on a particular innovative technology or process.[16]

FinTech is incredibly diverse, yet all firms have one thing in common—"they build and implement technology which is used to make financial markets and systems more efficient."[17]

It is unclear where FinTech fits in the regulatory scheme because banks traditionally perform two main functions: deposit taking and peer-to-peer lending.[18] FinTech firms perform similar activities, but are not federally regulated.[19] Existing regulatory structures are not comprehensive enough to cover FinTech firms; firms unaffiliated with banks are subject to regulations based on the services they provide, while those affiliated with banks are also subject to banking regulations.[20]

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[15] *SAR Filing Requirements Suspicious Activity Reporting Requirements*, ADVISORYHQ, http://www.advisoryhq.com/articles/sar-filing-requirements-suspicious-activity-reporting-requirements/ [https://perma.cc/Q6VN-4T7Y].

[16] Garfinkel, *supra* note 8, at 2.

[17] *See* McManus, *supra* note 12.

[18] *See* John L. Douglas, *New Wine into Old Bottles: FinTech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 23–28 (2016).

[19] *See id.*

[20] Tara Jeffries, *Fintech Proves Puzzlign for Regulators, Lawmakers*, MORNING CONSULT (Aug. 3, 2016), https://morningconsult.com/2016/08/03/fintech-proves-puzzling-regulators-lawmakers/ [https://perma.cc/37MA-RSJB].

There are concerns about FinTech partnering with banks, cybersecurity among them.[21] Craig Miller, co-chair of the financial services practice at Manatt, Phelps, & Phillips LLP, has stated in relation to such cybersecurity concerns that "[f]intech opens numerous doors for traditional banks, but at the same time, it leaves the possibility of a cyber breach wide open."[22] Some firms, including Tally Technologies, Inc., a company that lends money to finance customers' credit card debt, opted to garner state operating licenses rather than partner with a bank.[23] Doing so, Tally CEO Jason Brown suggests, gave Tally more credibility with investors because state-by-state licensing is more conservative than federal bank regulations.[24] Additionally, bank legacy systems often stifle innovation, when FinTech firms are designed to adapt to often fast-changing technological environments.[25]

Due to the lack of established federal regulation for FinTech firms, banks such as JPMorgan or Bank of America are wary of and less likely to do business with FinTech firms.[26] Some, including Ryan Lichtenwalk with Lend Academy, argue for a "more symbiotic relationship between FinTechs and banks" while others, like Lalita Clozel of American Banker, urge for a federal limited-purpose charter from the OCC to regulate FinTech firms separate from banks.[27]

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[21] *See, e.g.*, *The Fintech Revolution Comes to Regional and Community Banks*, MANATT, PHELPS & PHILLIPS LLP (Nov. 24, 2016), https://www.manatt.com/Communications/PressReleases/2016/The-Fintech-Revolution-Comes-to-Regional-and-Commu [https://perma.cc/8NQQ-LAJA] (discussing the impact of fintech on regional community banks).

[22] *See id.*

[23] Telis Demos, *Fintech Startups Face Dilemma on Banks: Are they Friend or Foe?*, WALL ST. J.: MONEYBEAT (Sept. 2, 2016, 11:01 AM), http://blogs.wsj.com/moneybeat/2016/09/02/fintech-startups-face-dilemma-on-banks-are-they-friend-or-foe/ [https://perma.cc/T3HW-Y8WD].

[24] *Id.*

[25] *Banking and Fintech: An Uncommon Partnership*, FIN. BRAND (Nov. 30, 2015), https://thefinancialbrand.com/55543/partnership-competition-fintech-banking-disruption/ [https://perma.cc/TD66-BSJS].

[26] Ryan Lichtenwalk, *Should Fintechs Become Banks?*, LEND ACAD. (Sept. 19, 2016), http://www.lendacademy.com/fintechs-become-banks/ [https://perma.cc/V4E2-7K5B].

[27] *Id.*; *see also* Lalita Clozel, *OCC's Curry: Limited-Purpose Charter for Fintech Is Possible*, AM. BANKER (June 14, 2016), http://www.americanbanker.com/news/law-regulation/occs-curry-limited-purpose-charter-for-fintech-is-possible-1081511-1.html [https://perma.cc/9CW4-J7KM].

Accordingly, there is a real lack of clarity regarding whether and how certain regulations apply to FinTech firms currently, and what the future of FinTech regulation will hold.[28]

C. OCC's Guiding Principles on FinTech Regulation

In March 2016, the OCC released a whitepaper outlining eight guiding principles for the future of FinTech regulation.[29] This article seeks to develop a framework to better understand and evaluate "innovative products, services, and processes that OCC-regulated banks may offer or perform."[30]

The OCC's first principle—supporting reasonable innovation—focuses on making internal OCC processes, such as decision making and review, more efficient and streamlined, with a special focus on the way banks and nonbanks communicate with the OCC.[31] There are currently many ways banks and nonbanks can communicate with the OCC, as explained in the OCC's whitepaper:

> Currently, banks and nonbanks use a variety of formal and informal entry points to communicate with the OCC. For example, a bank interested in an innovative process to speed payments may approach its examiners with a proposal, request a legal opinion from the OCC, file any required application with the appropriate licensing office, or contact one of the agency's experts on credit, compliance, payments, cybersecurity, or modeling.[32]

The OCC has three proposed solutions to resolve inconsistencies and inefficiencies in communications regarding innovation: (1) forming a centralized office on innovation, (2) adopting less formal processes, and (3) creating exceptions that would allow banks and nonbanks to pilot new products before committing resources to a full rollout.[33] The office on innovation would serve as a centralized place for banks and

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[28] *See* McManus, *supra* note 12.
[29] *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10.
[30] *Id.* at 5.
[31] *Id.*
[32] *Id.* at 5–6.
[33] *Id.* at 6.

nonbanks to receive feedback on idea before launching a new product or service.[34] It would facilitate meetings with stakeholders and OCC officials to identify issues early in the process, hold regular meetings with innovators, and create educational materials.[35] Less formal communication processes would allow greater streamlining, because one unit would act as the central point of contact and would be responsible for involving the appropriate OCC staff in considering innovative proposals.[36] Allowing banks to roll out new technologies before limited consumers would allow for more accurate consumer protection.[37] Together, these reforms aim to clarify the OCC's expectations of banks and nonbanks, streamline procedures, and develop new procedures that better help innovative activities.[38] They also aim to foster greater understanding and responsiveness to the needs of banks and nonbanks and their customers, especially in our rapidly changing regulatory environment.[39]

The second guiding principle for OCC FinTech regulation is to foster internal culture receptive to innovation.[40] The OCC defines responsible innovation as, "[t]he use of new or improved financial products, services, and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank's overall business strategy."[41] After extensive research, the OCC found that the regulated institutions under its jurisdiction believed that the OCC had a low tolerance for innovative products and services, a vetting process that discourages innovation, a need for increased education, and employee desire for expert resources.[42] The need for an environment that is receptive to responsible innovation is vital to the OCC's regulatory framework surrounding FinTech, especially in order to identify the risks present in specific types of innovation.[43]

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34 *Id.*
35 *Id.*
36 *Id.*
37 *See id.* ("Such a program could entail board approval and appropriate limitations that would protect consumers and would not involve giving banks a safe harbor from consumer laws and regulations during the testing phase of a new product.").
38 *See id.*
39 *See id.*
40 *Id.*
41 *Id.* at 5.
42 *Id.* at 6.
43 *Id.*

The OCC has already begun fostering a culture receptive to innovation; it created the Payment Systems Policy Group to provide support and training as a resource for institutions on both traditional and innovative payment structure.[44] Moreover, it has an internal working group to monitor market lending and innovations in that sector.[45] The OCC's receptiveness to innovation is vast and encompassing. It has entertained ideas from webpage design to specific trainings in order to adequately foster innovation.[46]

Third, the OCC also seeks to leverage agency experience and expertise within the FinTech industry when undertaking the task of developing regulatory structures for FinTech regulation.[47] Each institution is currently designated an OCC examiner that has both unique insight and knowledge of the institution and its processes and strategies, risk allocation, and overall business goals.[48] The OCC hopes to utilize these examiners in a greater capacity as banks and nonbanks begin to diverge from traditional services.[49] Moreover, the OCC aims to foster a collaborative environment in which communication between institutions and agency experts is encouraged.[50] "These discussions include the introduction of new products, services, third-party relationships, changes in risk management or audit activities, and other planned corporate activities."[51] Institutions can also benefit from the examiners' expertise in compliance with consumer protection laws, banking laws, banking law interpretation, cyber risks, risk modeling and analysis, and the like.[52] To supplement this, the OCC has said it would consider

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[44] *See id.* at 6–7.
[45] *See id.* at 7.
[46] *See id.*
[47] *See id.*
[48] *See id.* ("The agency's examiners, policy and compliance experts, legal staff, information technology professionals, and economists have a deep understanding of the financial system and a growing understanding of the emerging technology that can bring innovative products, services, and processes to businesses and consumers.").
[49] *See id.* ("The examiner also understands the local economy and the operating conditions in specific markets. As banks progress into new products or services, examiners can be important sources of information.").
[50] *See id.*
[51] *Id.*
[52] *See id.* ("Industry stakeholders also benefit from the agency's expertise in other areas. OCC compliance policy experts support agency examiners and

appointing lead experts on innovation for the banking system who would assist with development and provide advice to banks.[53] The OCC is looking to expand its expertise and better connect experts with the industry to streamline regulation and simplify complex regulatory structures.[54] Currently, some experts provide consulting services independent of regulators. For example, JP Nicols, a premier thought leader in financial services for FinTech firms, acts as President and CEO of Innosect, a global innovation and analytics company, and provides consulting services to other FinTech firms.[55] The OCC would like to streamline these experts into the regulatory process.[56]

Fourth, the OCC seeks to impose FinTech regulations that expand financial services and protections to the unbanked and underbanked populations, particularly low-income neighborhoods.[57] The agency believes that innovations—including, online banking, small business loans, improved payment services, and social responsibility funds—can provide more affordable services to these communities and "expand opportunities in affordable housing and community or economic development."[58] According to the Bill and Melinda Gates Foundation, "[c]ompounding [poverty] is the fact that the majority of those living in or near poverty lack even the most basic banking services."[59] The current banking system does not support low-income communities where many transactions are conducted with

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assist the banks they supervise on issues related to a variety of consumer protection and banking laws, such as the Bank Secrecy Act (BSA).").

[53] *See id.*

[54] *Id.*

[55] EUROPE MONEY 20/20, https://www.money2020europe.com/speakers/jp-nicols [https://perma.cc/8MGB-D5YJ]; Jaidev Shergill, *A Conversation with JP Nicols*, CAPITAL ONE GROWTH VENTURES, http://growthventures.capitalone.com/a-conversation-with-jp-nicols/ [https://perma.cc/A87Q-TSG9].

[56] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 7.

[57] *See id.* at 8 ("Current innovations in the financial industry hold great promise for increasing financial inclusion of underserved consumers, who represent more than 68 million people and spend more than $78 billion annually.").

[58] *Id.*

[59] *Strategy Overview: Financial Services for the Poor*, BILL & MELINDA GATES FOUND., http://www.gatesfoundation.org/What-We-Do/Global-Development/Financial-Services-for-the-Poor [https://perma.cc/T7JN-V79E].

cash, which is costly for banks to process and store.[60] Greater access to FinTech can mitigate financial risk to low-income communities by offering the opportunity to reach greater long-term financial stability.[61]

To do this, the OCC plans on sharing success stories of innovators that have successfully reached unbanked, underbanked, and low-income populations, as well as promoting knowledge of projects that qualify for the Community Reinvestment Act.[62] For example, a joint venture between Vodafone and Safaricom, a Kenyan phone company, transformed the Kenyan market when they introduced M-Pesa, a mobile wallet that was among the first and most successful in Kenya.[63] The technology not only increased businesses cash flow, but also reduced the cost of everyday transactions.[64] Especially in rural parts of the country, M-Pesa has revolutionized the way that people conduct banking, all from their mobile phones.[65] The OCC seeks to ensure that the all, not only the sophisticated and educated, have equal access to banking and financial services; its primary objective is for FinTech to serve as a positive force in improving access and treatment.[66] Generally, the agency seems to want to demystify the financial sector while appealing to the needs of unrepresented populations.[67]

The OCC's fifth guiding principle for FinTech regulations is to further safe operations through risk management.[68] The OCC recognizes the importance of managing current risks while monitoring future risks in the financial and banking sector.[69] In recent years, the OCC has enhanced its National Risk Committee (NRC) in an effort to improve risk identification and management.[70] The NRC is comprised agency regulators as well as officials from the "law, policy, accounting

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[60] *See id.* ("Handling cash transaction is costly for banks, utilities companies, and other institutions, which pass along the costs associated with storing, transporting, and processing cash to their customers.").
[61] *See id.*
[62] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 8.
[63] Fiona Graham, *M-Pesa: Kenya's Mobile Wallet Revolution*, BBC NEWS (Nov. 22, 2010), http://www.bbc.com/news/business-11793290 [https://perma.cc/D669-D2XY].
[64] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 8.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 9.
[69] *Id.*
[70] *Id.*

and economics departments", and monitors the federal banking system and supervises threats to its soundness.[71] The committee identifies risks and reports them to institutions while also publishing semiannual reports on industry risk assessment.[72] In its spring 2016 report, the NRC discussed the importance of innovation in managing risks and remaining competitive in the marketplace.[73] The OCC plans on enhancing the position of the NRC to deal with emerging risks in FinTech as a responsible team player in the regulatory framework.[74]

FinTech firms also work independently to monitor and mitigate risk. Lending Club, for example, has formed a Risk Committee of the Board of Directors to "assist the Board in its oversight of the Company's management of key risks, including credit, technology/security, strategic, legal, and compliance and operation risks, as well as the guidelines, policies and processes for monitoring and mitigating such risks."[75] The Risk Committee, in conjunction with an Audit Committee, monitors and reports on the company's risks and risk management structure and troubleshoots risk scenarios.[76] The Audit Committee is responsible for complying with laws and regulations regarding financial reporting and rules and regulations promulgated under the Securities and Exchange Commission.[77] Finally, the Audit Committee is responsible for auditing internal functions to make sure they are in conformity with regulatory requirements.[78]

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[71] OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEPT. OF TREAS., SEMIANNUAL RISK PERSPECTIVE FROM THE NATIONAL RISK COMMITTEE 4 (2016).
[72] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 9.
[73] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 71, at 6.
[74] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 9.
[75] LENDING CLUB, CHARTER OF THE RISK COMMITTEE OF THE BOARD OF DIRECTORS OF LENDING CLUB CORPORATION 1 (2016), http://ir.lendingclub.com/Cache/1001215071.PDF?Y=&O=PDF&D=&FID=1001215071&T=&IID=4213397 [https://perma.cc/XBB5-6NVW].
[76] *Id.*
[77] LENDING CLUB, CHARTER OF THE AUDIT COMMITTEE OF THE BOARD OF DIRECTORS OF LENDINGCLUB CORPORATION 1–2 (2015), http://ir.lendingclub.com/Cache/1500079460.PDF?Y=&O=PDF&D=&FID=1500079460&T=&IID=4213397 [https://perma.cc/J3V2-E3EB] (detailing the duties and responsibilities of Lending Club's Audit Committee).
[78] *Id.* at 7.

Sixth, the OCC aims to encourage banks to integrate innovation into their planning.[79] The agency finds it necessary that a bank seeking to partner with a third party or roll out innovative technologies company ensures that such partnership or technology aligns with the bank's strategic objectives and business plans.[80] The traditional strategic planning criteria would still apply to institutions hoping to development innovative technologies.[81] These considerations include: consistency with governance, risk objectives, and business plan; financial realism; adequate staffing; technological support; risk consideration; and exit plans.[82] The OCC's encouragement of strategic innovation planning seems to encapsulate the agency's priority of long-term sustainability and planning over merely innovation.[83]

The OCC's seventh guiding principle for FinTech regulation is to incorporate into its regulatory framework an ongoing dialogue between stakeholders, including consumer, banks, and innovators.[84] These collaborations can take the form of workshops, forums, and fairs, or might be fostered through the OCCs website. The OCC website has future papers and other innovation resources, including publications Federal Financial Institutions Examination Council (FFIEC) on conducting technology examinations and the OCC's Annual Report and Strategic Plan.[85] Encouraging the sharing of resources will allow the agency to remain knowledgeable about current developments, understand motivations behind developments, disseminate expectations on innovations, increase effectiveness and efficiency in responding to innovations, and give feedback on responsible innovation.[86]

Finally, as previously stated, the OCC hopes to work with institutions and other regulatory bodies to better understand and apply the constantly changing regulatory laws surrounding banks and other

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[79] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10, at 9.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 9–10.
[83] *Id.* at 9.
[84] *Id.* at 10 ("Outreach is a key component of encouraging and supporting responsible innovation, and the OCC intends to incorporate formal outreach into its framework.").
[85] *See id.*
[86] *See id.*

financial institutions.[87] Together with the CFPB, state, other federal, and international regulatory bodies, the OCC plans to better understand the intersection of each regulatory body's roles and minimize regulatory burdens.[88] The agency believes "[s]uch coordination gives banks greater confidence that regulators who share responsibilities will consider innovative ideas consistently."[89] To effectively collaborate, the OCC hopes to avoid inconsistent regulations; give other agencies notice on innovation activities; determine information to be shared; and foster regular communication among agencies.[90] Given the OCC's objectives and guiding principles in developing a regulatory framework, the type of framework that would adequately regulate FinTech must next be examined.

D. Proposed Regulations

1. Regulators as Collegial Participants

T.J. Grasmick, senior counsel in financial services at Manatt Phelps & Phillips LLP, argues that all regulators should work together to implement and comply with FinTech regulations:

> Just as there is no crying in baseball, there should be no competition in compliance. Bankers, regulators, vendors and fintech innovators should be able to openly agree on what compliance is necessary at a minimum to meet the risks to their mutual industries and to customers and consumers, work together on implementation, and move on.[91]

The sort of top-down-and-across collaboration that Grasmick proposes would lead to an open compliance culture where bankers, regulators, vendors, and FinTech companies could collectively devise a working

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See id.*
[91] T.J. Grasmick, *A New Path To Regulatory Relief for Banks, Fintech Firms*, LAW360 (July 7, 2016, 11:36 AM), http://www.law360.com/articles/814707/a-new-path-to-regulatory-relief-for-banks-fintech-firms [https://perma.cc/JFN8-SXR5].

regulatory scheme in real time.[92] Grasmick emphasizes the importance of "expanding regulators' roles from supervisors to collegial participants in establishing compliance approaches in a format accessible to all."[93] For example, the Financial Conduct Authority (FCA) in the United Kingdom and the Australian Securities & Investments Commission both work with FinTech firms to make it easier for firms to pursue opportunities in either country.[94] Grasmick argues that such collaboration would relieve uncertainty from banks because it allows for a more involved regulatory process and engages all interested parties.[95] According to Grasmick, this would result in five major benefits to banking: (1) a refocus on banking instead of compliance; (2) a reduction in cost of compliance because expertise more widely available; (3) open communication of new compliance measures; (4) redefinition of the regulators' role as advisors and validators instead of mere enforcers; and (5) the elimination of the traditional halting of banking activities when non-compliance is discovered by regulators.[96]

Grasmick suggests there be an open database of shared compliance information that would allow banks and FinTech firms to focus on innovation.[97] Ironically, some FinTech firms provide this service: for example, two financial regulators created Vizor after observing inefficiencies in the financial regulation market.[98] Vizor's clients rely on it to collect and validate data from financial institutions.[99] Solvency II, on the other hand, is a program "of regulatory requirements for insurers, covering authorisation, corporate governance, supervisory reporting, public disclosure and risk assessment & management, as well as solvency and reserving."[100]

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[92] *See id.*
[93] *Id.* (discussing the desired change in regulators role from enforcers to participants).
[94] *Global Regulators Collaborate as Fintech Goes Cross-Border*, TRULIOO (May 23, 2016), https://www.trulioo.com/blog/regulators-collaborate-fintech-firms/ [https://perma.cc/M2AK-Y33K].
[95] Grasmick, *supra* note 91.
[96] *See id.*
[97] *Id.*
[98] *About*, VIZOR SOFTWARE, http://vizorsoftware.com/about/ [https://perma.cc/A233-3BLK].
[99] *Clients*, VIZOR SOFTWARE, http://vizorsoftware.com/clients/ [https://perma.cc/ZDB6-83EF].
[100] *Solvency II*, VIZOR SOFTWARE, http://vizorsoftware.com/solvency-ii/ [https://perma.cc/53AH-J9XQ**]**.

Instead of marketing themselves to the consumers through customization, FinTech compliance vendors would have to market to the industry and regulators "as participants in establishing a menu of acceptable generic and less customized compliance solutions that all could tap and share."[101]

2. Federal Bank Charters for FinTech Firms

Many, including Comptroller of the Currency, Thomas J. Curry, who also acts as head of the OCC, have suggested that FinTech firms should be required to obtain a federal limited-purpose bank charter in order to operate.[102] The OCC has the authority to charter limited-purpose banks, in addition to full-service institutions that have deposit insurance, and must consider whether such charters could work for FinTech firms as well.[103] Many FinTech firms have supported this regulatory solution because, under the current system, FinTech firms must apply for licenses to operate in many different states. The federal charter would preempt any state regulators, allowing for operation throughout the country.[104] Because states often have different standards and requirements, the federal charter would apply a federal set of standards and therefore, reduce barriers to entry and improve efficiency.[105]

Alternatively, when a FinTech firm does not want to deal with the varied regulatory process of each state in which it seeks to operate, it can partner with a bank.[106] This solution, however, has its drawbacks: (1) it can be extremely costly for new firms to comply with bank compliance standards; (2) there are simply not enough banks to partner with the growing number of FinTech firms; and (3) innovation firms do not want to be beholden to traditional banks, and see it as self-defeating.[107] FinTech firms and banks agree that, for start-ups to

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[101] Grasmick, *supra* note 91.
[102] *See* Clozel, *supra* note 27.
[103] *Id.*
[104] Lalita Clozel, *OCC Weighs New Charter for Fintech Firms*, AM. BANKER (May 9, 2016), http://www.americanbanker.com/news/law-regulation/occ-weighs-new-charter-for-fintech-firms-1080908-1.html [https://perma.cc/WZ6V-AS9Z].
[105] *See id.* ("This regulatory maze has the effect of slowing down the growth of online companies, which are built to be accessible everywhere.")
[106] *Id.*
[107] *See id.*

be able to develop, there needs to be an incubation period during which they can test technologies without overbearing regulations.[108] Many attorneys urge regulators to develop a U.S. version of the United Kingdom's FCA, including a "'sandbox' for up-and-coming technology, but that it will also require collaboration among regulators."[109] The maze of regulation surrounding FinTech is often cited as a benefit to creating a federal limited-purpose charter and allowing firms to operation nationwide without trouble.[110]

There are concerns about a federal charter for FinTech firms, however. First, if not many firms will be granted the charter, it will create a barrier to enter market.[111] Second, state regulators are especially concerned about what a federal charter would mean for the regulatory systems they currently have in place.[112] However, given each state's different requirements, "advocates for a nationwide FinTech chartering system say a state-by-state licensing system is not a good solution either, and that it could be holding back the innovation and sustainability of new firms."[113] The OCC has not yet released a plan to mandate federal charters for FinTech firms, although it will likely be seriously considered as an option for regulation.

3. The Financial Services Innovation Act

On September 22, 2016, Representative Patrick McHenry introduced the Financial Services Innovation Act of 2016.[114] The bill would require twelve regulatory agencies, including the OCC and Securities Exchange Commission, to establish a Financial Services

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108 Jon Marino, *Banks and Start-ups Debate Regulation*, CNBC (June 6, 2016), http://www.cnbc.com/2016/06/06/banks-and-start-ups-debate-regulation.html [https://perma.cc/G6JQ-K526].
109 *Id.*
110 Clozel, *supra* note 104.
111 Lalita Clozel, *State Regulators Balk at OCC Fintech Charter*, AM. BANKER (Aug. 19, 2016), http://www.americanbanker.com/news/law-regulation/state-regulators-balk-at-occ-fintech-charter-1090823-1.html [https://perma.cc/A8WY-U6U5] (quoting Jo Ann Barefoot, consultant for fintech, stating, "If there is a national charter, it won't be easy to get").
112 *Id.*
113 *Id.*
114 Financial Services Innovation Act, H.R. 6118, 114th Cong. (2d Sess. 2016).

Innovation Office (FSIO).[115] The bill then provides for greater regulatory specialization:

> Digital currency, online investment and peer-to-peer lending companies would then be able to apply for an enforceable compliance agreement with the FSIOs that would let them provide an innovative financial product or service under an "alternate compliance plan" that waives or modifies out-of-date or burdensome regulation, according to the bill proposal.[116]

Representative McHenry cited the need for "an evolved regulatory framework that encourages financial innovation" while maintaining a commitment to consumer and market safety as reasoning for the bill.[117] Additionally, because the United States is facing increasing competition from Europe in attracting FinTech firms, the bill is designed to prevent increased attraction to European regulatory structures.[118]

Neither house of Congress has acted on the Financial Services Innovation Act, though it has been assigned to the House Subcommittee on Commodity Exchanges, Energy, and Credit.[119] Nevertheless, the bill has generated attention. J.D. Alois, a writer with Crowdfund Insider, has said this legislation is one to watch because it "level[s] the playing field for both innovative FinTech startups AND

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[115] *See* Joyce Hanson, *GOP Rep. Proposes Bill to Ease FinTech Regulations*, LAW360 (Sept. 23, 2016, 7:08 PM), http://www.law360.com/articles/843968/gop-rep-proposes-bill-to-ease-fintech-regulations [https://perma.cc/Q2VY-KD2N].

[116] *Id.*

[117] Press Release, U.S. Representative Patrick McHenry, McHenry Introduces Financial Services Innovation Act of 2016 (Sept. 22, 2016), http://mchenry.house.gov/news/documentsingle.aspx?DocumentID=398355 [https://perma.cc/9JR5-D9HA].

[118] *See* Hanson, *supra* note 115 ("The House bill is designed to prevent the United States from losing any further ground to the United Kingdom's regulatory sandboxes, largely London-based, that are run under the auspices of the U.K.'s Financial Conduct Authority.").

[119] Financial Services Innovation Act, H.R. 6118, 114th Cong. (2d Sess. 2016) (status as referred to House Subcommittee on Commodity Exchanges, Energy, and Credit).

established financial firms."[120] The Consumer Financial Services Group at Ballard Spahr LLP called the legislation a "step in the right direction" because it recognizes the need for a flexible regulatory environment for FinTech firms.[121] Squire Patton Boggs sees this legislation as "a starting point in 2017 for congressional action on FinTech legislation, although it is unclear whether both sides will be able to agree on enough issues to garner widespread support."[122]

4. Possible Solution

The OCC has allowed for comments on its whitepaper, and many—from academics to researchers, to large banks and industry members—have taken advantage of the opportunity.[123] Some suggest that regulators focus on "agency coordination to minimize inter-regulatory friction and maximize consistency."[124] Others agree that that inter-agency coordination should be a priority, but also believes there should be greater focus on limiting regulatory uncertainty because regulations likely will not be able to keep up with the changing FinTech industry.[125] Finally, the safety and soundness of

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[120] JD Alois, *Financial Services Innovation Act (Deck)*, CROWDFUND INSIDER (Sept. 24, 1016), http://www.crowdfundinsider.com/2016/09/90541-financial-services-innovation-act-2016-deck/ [https://perma.cc/TBE6-AV9D].

[121] Scott M. Pearson, *Congressman Introduces Fintech Bill*, BALLARD SPAHR (Sept. 27, 2016), https://www.cfpbmonitor.com/2016/09/27/congressman-introduces-fintech-bill/ [https://perma.cc/5L3E-L24V].

[122] SQUIRE PATTON BOGGS, 2016-POST ELECTION ANALYSIS, A NEW ADMINISTRATION AND A NEW CONGRESS: WHAT TO EXPECT 20 (2016), http://www.squirepattonboggs.com/~/media/files/insights/publications/2016/11/2016-post-election-analysis/25170postelectionanalysisthoughtleadership.pdf [https://perma.cc/SU6B-BLS2].

[123] *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10.

[124] *See, e.g.*, Oracle Corporation, Comment Letter on Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective, at 3 (May 31, 2016), https://occ.gov/topics/bank-operations/innovation/comment-oracle-white-paper.pdf [https://perma.cc/4EJ3-4RGE].

[125] *See* Jo Ann S. Barefoot, Comment Letter on Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective, at 3–4 (May 31, 2016), https://occ.gov/topics/bank-operations/innovation/jsbarefoot-occ-innovation-comment.pdf [https://perma.cc/LF2V-SG22].

both the market and consumers is a high priority for many industry experts.[126]

Many support the OCC's mission to create a central office on innovation, which is also a central part of the Financial Services Innovation Act and would achieve Grasmick's desire to foster a more collaborative environment.[127] Others have expressed concern that a central office on innovation would add another layer to an already complicated regulatory structure.[128]

Considering the OCC's goals in FinTech regulation, there are drawbacks to mandating a federal limited-purpose charter for innovation firms, chiefly, that a one-size-fits-all approach would hinder innovation.[129] As many of the commenters suggest, the main priority is to ensure that the regulatory environment supports innovation. Representative McHenry's solution is to allow agencies to specialize their innovation by working with the regulators to whom they answer.[130] The Financial Services Innovation Act creates a Financial Services Innovation Office Liaison Committee (Committee) that would coordinate regulation of firms hoping to introduce new, innovative technologies.[131] These firms could then petition regulators for a compliance plan that allows them to implement innovation.[132] Thesis solution allows FinTech regulation to be both coordinated and tailored to fit specific firm needs.

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[126] *See* Pew Charitable Trusts, Comment Letter on Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective, at 2 (May 31, 2016), https://occ.gov/topics/bank-operations/innovation/comment-pew.pdf [https://perma.cc/P7AJ-XBND].

[127] *See* Barefoot, *supra* note 125, at 3–4 (discussing the problem with a fast-pace and changing industry environment); Pew Charitable Trusts, *supra* note 126 at 2; Oracle Corporation, *supra* note 124, at 3.

[128] Morrison & Foerster, Comment Letter on Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective, at 1, 4 (May 31, 2016), https://occ.gov/topics/bank-operations/innovation/mofo-response-occ-innovation-papers.pdf [https://perma.cc/EYH6-5NV6].

[129] *See* Clozel, *supra* note 104.

[130] *See* Hanson, *supra* note 115.

[131] C. Todd Gibson & Tyler Kirk, *Financial Services Innovation Act: The U.S. Wants a Sandbox Too*, NAT. LAW REVIEW (Nov. 3, 2016), http://www.natlawreview.com/article/financial-services-innovation-act-us-wants-sandbox-too [https://perma.cc/7XFC-BR57].

[132] *Id.*

E. Conclusion

FinTech firms are eager to establish a fixed regulatory framework under which they can operate.[133] Regulators want to ensure the framework encourages innovation and community responsiveness, while protecting consumers.[134] Banks stand to benefit from FinTech regulation, because they will be able to focus more on dealing with the business of banking and less on compliance and regulation.[135] As the industry comments suggest, the OCC's guiding principles are a significant step in the right direction. Industry members want more collaboration, a digestable regulatory framework, to reach under-banked communities, to manage risks, and to promote responsible innovation.[136]

Like many other industries, however, FinTech finds itself having to readjust after the unanticipated election of Donald Trump. Specifically, the prospect that some regulations imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 may be rescinded, as Mr. Trump has previously suggested.[137] Some have suggested that bank deregulation may cause FinTech to lose its place at the center of innovation, because as banks have more freedom to lend money, they have less of a need to partner with FinTech firms.[138]

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[133] *See generally* Witkowski & Demos, *supra* note 11.

[134] *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10.

[135] *See* Matthias Memminger, Mike Baxter & Edmund Lin, *You've Heard of Fintech, Get Ready for 'Regtech'*, AM. BANKER (Sept. 7, 2016), http://www.americanbanker.com/bankthink/youve-heard-of-fintech-get-ready-for-regtech-1091148-1.html?zkPrintable=true [https://perma.cc/WES4-GCUE] (discussing how regtech can reduce costs of compliance by over $9 million through onboarding and know-your-customer technologies); Katie Wechsler & Zachary Luck, *The Federal FinTech Promised Land*, 19 FINTECH L. REP. NEWSL., no. 4, July 2016.

[136] *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 10.

[137] Jacob M. Schlesinger, *Donald Trump Took Aim at Dodd-Frank on the Stump*, WALL ST. J. (Nov. 9, 2016), http://www.wsj.com/articles/donald-trump-took-aim-at-dodd-frank-on-the-stump-1478691726 [https://perma.cc/V3WQ-5QNQ].

[138] Telis Demos, *Silicon Valley-Backed Fintech Firms may Lose Under a Lighter Regulatory Regime*, WALL ST. J. (Nov. 10, 2016), http://www.wsj.com/articles/silicon-valley-backed-fintech-firms-may-lose-under-a-lighter-regulatory-regime-1478800852 [https://perma.cc/9WNL-8QL3] ("But if

The opposite, however, may also be true, as FinTech firms and banks might be more willing to jointly innovate with less oversight.[139] Although the future of FinTech regulation is unclear, regulators and industry members alike are open to collaboration and optimistic about the ability to foster a system responsive to innovation, whether FinTech is regulated with or separate from banks.[140]

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attention turns to broader relief for all of banking and financial services, there is certainly a higher risk that fintech could lose the status it has enjoyed as the locus of innovation and activity—at least when it comes to being disruptive, rather than complementary to traditional banks.").

[139] *Id.*

[140] *See generally* Witkowski & Demos, *supra* note 11.

[141] Student, Boston University School of Law (J.D. 2018).