

Compliance Considerations After OCC Ups Fintech Scrutiny

By Jon Langlois, Max Bonici and Marisa Perfetti (November 3, 2022)

The Office of the Comptroller of the Currency recently noted bank-fintech partnerships as a key element of its fiscal year 2023 bank supervision operating plan,[1] putting both OCC-supervised depository institutions and fintech companies looking to partner with them on notice that their relationships and activities will draw attention during OCC examinations.

The plan is a milestone in a line of OCC statements and guidance regarding fintech partnerships that reveal its deep interest in — and in the eyes of some observers, potential skepticism of — these relationships.

The OCC's conception of the partnerships has consequences that could extend beyond its traditional supervisory ambit to encompass a wide range of companies offering ancillary or supporting services to banking providers.

While attention is likely to focus most heavily on OCC-supervised institutions and fintech companies, other technology companies that work with, or provide services to, such institutions also may want to review their internal policies and procedures and be prepared to answer examiner questions, particularly about their risk management practices.

On Oct. 27, the OCC also took an organizational step to accommodate these priorities outlined in the supervisory plan, establishing an Office of Financial Technology that will incorporate its current Office of Innovation.

"Financial technology is changing rapidly and bank-fintech partnerships are likely to continue growing in number and complexity," said acting Comptroller of the Currency Michael J. Hsu. "To ensure that the federal banking system is safe, sound, and fair today and well into the future, we need to have a deep understanding of financial technology and the financial technology landscape."

Supervisory Plan Emphasizes OCC Scrutiny of Partnerships

While prior years' plans have deemed third-party relationships a supervisory priority, this year's plan put the attention squarely on partnerships between OCC-supervised institutions and fintech companies.

The plan said examiners should assess the governance and risk attributes of the partnerships, emphasizing among other priorities whether they involve customer-facing products and services or influence how such institutions comply with consumer protection laws — and whether these institutions and their partners have appropriate staff to meet contractual obligations. As it did last year, the plan also directed examiners to look at the risks that third-party relationships pose to operational resilience and cybersecurity.

The increased focus comes in the absence of any meaningful movement on the proposed interagency guidance on third-party relationships, but remains consistent with previous OCC guidance. For example, the OCC's semiannual risk perspective this spring[2] noted OCC-



Jon Langlois



Max Bonici



Marisa Perfetti

supervised institutions' increasing work with fintech companies, which in turn elevates the importance of compliance and cyber risks.

The OCC's interest in these partnerships extends back at least as far as 2017, when it released a set of frequently asked questions directed at the institutions that it supervises, related to third-party relationships and expressly addressed fintech partnerships. The FAQs provided those institutions with suggestions on how to partner with startups or less established fintech companies with limited financial information.

The OCC replaced those FAQs with updated guidance in 2020.[3] And last year, the OCC, the Federal Deposit Insurance Corp., and the Board of Governors of the Federal Reserve System released a guide[4] on how banks can conduct proper due diligence on fintech companies. The guide recommended considering the business experience, financial condition, legal and regulatory compliance, risk management and controls, information security, and operational resilience of the fintech companies.

Who This Affects

The OCC supervises national banks, federal savings associations and the federal branches of non-U.S. banks, but its powers extend beyond those institutions. The Bank Service Company Act generally subjects any company that provides a service to an institution to the same regulation and examination by the federal banking agencies as the institution itself.

That covers a great deal of territory. The OCC's 2020 guidance bulletin defined a third-party relationship as "any business arrangement between the bank and another entity, by contract or otherwise." Third parties include any company that provides any service to an OCC-supervised institution, whether or not the activity, service or the entity is financial.

Fintech partners are clearly within this scope, and those that wish to be, should be similarly aware of these expectations. OCC guidance puts the onus on its supervised institutions to ensure that their fintech partnerships comply with their own policies and procedures.

An OCC-supervised institution's board and management must also determine if the institution's relationship with a fintech company involves critical bank activities — payments and settlements, information technology, or other activities that pose significant risk — and engage in more rigorous oversight and management of them.

What to Do

OCC-supervised institutions should review, and where necessary, strengthen their internal policies and procedures on due diligence before partnering with fintech companies, with particular attention to relationships that involve critical banking activities. They should also assess procedures related to the oversight of existing relationships to confirm they are effective in identifying and mitigating associated risks.

Fintech companies looking to partner with OCC-supervised institutions should conduct a similar review of their internal policies and procedures — or consider developing them — with a view toward their scrutiny in an examination, and prepare for the level of oversight that depository institutions, and by extension the OCC, will require.

Even companies that do not consider themselves fintech by nature, but still partner with OCC-supervised institutions, may still wish to complete these assessments, to the extent that their services have nexus with the financial services marketplace.

Ultimately, aligning expectations and ensuring the onboarding, diligence and oversight of fintech partners is conducted with the same rigor that OCC-supervised institutions apply to their most important third-party relationships will go a long way toward meeting the OCC's vision for these fintech partnerships.

What's Next?

Hsu has said^[5] fintech partnerships are an ongoing area of concern, and lawmakers are carefully watching the OCC's direction.

Five Republican members of the U.S. House of Representatives Financial Services Committee, including ranking member Patrick McHenry, R-N.C., recently wrote a letter^[6] to Hsu questioning his approach to the partnerships and asking him to clarify the OCC's position on fintech partnerships to ensure that its regulatory oversight will not stifle innovation.

Meanwhile, the OCC also faces pressure from consumer advocates^[7] and state attorneys general^[8] who believe the OCC has been too lenient in supervising high-cost lending involving third-party relationships, and claim that these relationships are harmful to depository institutions and consumers.

All of this points toward applying and documenting rigorous upfront diligence and ongoing oversight of fintech partners by OCC-supervised institutions. OCC-supervised institutions and their fintech and other partners should consider themselves on notice and prepare accordingly for the increased OCC supervisory scrutiny.

Jon Langlois is a partner, Max Bonici is an associate, and Marisa Perfetti is a law clerk at Buckley LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-124a.pdf>.

[2] <https://www.occ.gov/publications-and-resources/publications/semiannual-risk-perspective/files/semiannual-risk-perspective-spring-2022.html>.

[3] <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html>.

[4] <https://www.fdic.gov/news/press-releases/2021/pr21075a.pdf>.

[5] <https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-106.pdf>.

[6] https://republicans-financialservices.house.gov/uploadedfiles/2022-10-11_letter_to_occ_re_partnerships_final_updated.pdf.

[7] <https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Consumer%20Advocates%20Letter%20to%20FDIC%20re%20Proposed%20Interagenc>

y%20Guidance%20on%20Third-Party%20Risk%20Management%202021.10.18.pdf.

[8] <https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20State%20AG%20Letter%20to%20FDIC%20re%20Proposed%20Interagency%20Guidance%20on%20Third-Party%20Risk%20Management%202021.10.18.pdf>.