# The OCC Licensing Drama Continues

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The week starts with a bang for American FinTech fans watching closely the evolving drama over whether and/or how the Office of the Comptroller of the Currency (OCC) will extend a chartering option to FinTech firms. The OCC today provided fresh—but low key—hints as to how it will approach the FinTech charter issue.

The hints are embedded in deeply technical language. Here is the best part: since the OCC materials never once mentioned "FinTech" or "online lending," search engines and other automated alert mechanisms will not have been triggered this morning. The FinTech RegTrends Blog was paying attention, however.

This blogpost describes the OCC's actions today and explains what they could mean, but not in that order.

## What It Means 1.0

Try not to yawn. The OCC today updated two manuals: on licensing and fiduciary powers applications. These two manuals are small cogs in a much larger regulatory policy process.

If you are already asleep, then you are not real FinTech aficionado.

Licensing has been at the epicenter of the FinTech regulatory policy debate ever since the OCC indicated that trust banks (non-depository, non-lending institutions that exercise fiduciary powers) could serve as a template for "special purpose" OCC banking licenses to FinTech firms.

Consequently, any action the OCC takes regarding its oversight of fiduciary powers or the licensing process requires close attention.

Now that you are awake, let's focus on what actually happened this morning in Washington and what it could mean for policy trajectories in the future.

## What The OCC Did

The OCC's moves today were nuanced. Technically, no policies have been changed. But as a practical matter, the moves effectively hold the door open just a little bit more for FinTech firms without necessarily expressing a preference for those firms relative to incumbents.

**Licensing**: The new licensing manual provides a nice, clear, concise summary of exactly what the OCC requires from new applicants seeking any kind of banking charter and the process it will pursue when an application has been received. There is no indication that any of the standards have changed. But since FinTech firms have been expressing irritation periodically about the convoluted nature of the government affairs process, the updates provide a user-friendly snapshot of all that will be required throughout the application process.

The also updates highlight the OCC's commitment to requiring potential applicants for bank charters to demonstrate their plans to comply with the Community Reinvestment Act's requirements regarding lending to under-served communities.

*The emphasis on the Community Reinvestment Act (CRA) is as much a gift to the FinTech sector as it is to consumer advocates.*

A broad range of FinTech firms in the United States pride themselves on providing alternative sources of credit to under-served communities due to innovations regarding

(i) which data sets they use to undertake credit analysis,

(ii) which algorithms they use to assess risks associated with credit relationships, and

(iii) which user-interface enhancements they provide relative to traditionally regulated commercial banks.

Highlighting the importance the OCC attaches to ensuring that all new applicants have concrete and credible CRA plans provides potential FinTech applicants with a roadmap for what a successful new licensing application must contain.

The updated OCC Licensing Manual also highlights the various ways in which an application for any bank charter can be derailed or delayed. In particular, it notes that applicants need to publish information about their applications in addition to the OCC's other public notice

activities. “Interested parties” have up to thirty days to request that (i) the review period be extended, (ii) that a public hearing be conducted or (iii) that the OCC convene a private meeting with the interested party and the applicant.

This is where it becomes interesting. Consider the scenario where a FinTech firm requests a banking charter. Its competitors, technology providers, banks, AND/OR consumer advocates can all use this process to create roadblocks and competitive hurdles.

**Fiduciary Powers Applications**: Technically, the fiduciary powers manual applies only to *existing* commercial banks and federal savings associations. Nonetheless, the manual holds implications for FinTech firms.

The OCC Fiduciary Manual effectively revives the FinTech charter discussion regarding trust banks:

“Fiduciary powers and services are commonly known as trust powers and services. Accordingly, the term “fiduciary” and ‘trust” are used interchangeably.”

This definitional equivalence holds for so long as the entity seeking the authorization does not accept deposits, does not pay out checks, and does not lend money. The OCC further indicates that a regular banking license confers on banks full fiduciary powers but that the “the OCC may grant limited powers on request.”

The OCC Manual does not acknowledge that this authority is currently the subject of litigation filed last week by the Conference of State Bank Supervisors. It does, however, concede that the federally enumerated fiduciary powers

located at 12 USC 92a(s) are subject to state-level opt-outs. For more detail on this litigation and its FinTech policy implications, have a look at the series of blogposts from the FinRegRag which is dissecting methodically the issues raised in the litigation.

The OCC Manual exclusions are just as interesting as its articulation of authority. The new OCC Manual indicates that no advance approval to exercise fiduciary powers is required for operating subsidiaries (including operating subsidiaries that offer investment advice) if the parent bank already has authority to exercise fiduciary powers. No advance authorization is required if two banks merge. Again, this is not new policy but it holds particular implications in the current competitive marketplace between banks and FinTech firms.

Specifically: a bank can establish an operating subsidiary to offer investment advice or other fiduciary/trust services without receiving advance authorization from the OCC.

*It might be wise to keep an eye peeled for updates on the OCC's merger rules, especially with respect to operating subsidiaries that happen to be trust banks.*

Paired with the licensing manual updates, one implication is that the OCC could be friendly to FinTech applications focused on trust bank structures, particularly if those applications involve cooperative relationships with existing licensed banks as corporate partners. This also begs the question of whether OCC approval is required in the event that the operating subsidiary acquires or is acquired in whole or in part by a third party FinTech firm.

At some point, the burden of complying with third party vendor requirements will outweigh the burden of complying with the bank regulatory framework. The OCC Manuals released today provide FinTech firms, at a minimum, with a very clear sense of what kinds of hurdles remain for those seeking direct access to the payment system through a banking charter issued by the OCC.

## What It Means 2.0—Policy Trend Projections

Last week, the Comptroller of the Currency left his post, as expected. The new Comptroller has not yet been confirmed. Changes in leadership can have a material impact on the shape and scope of the OCC's policy regarding the FinTech sector, particularly given the newly filed judicial challenges to the OCC's preferred FinTech policy.

Today's moves by the OCC seem designed to keep the door open for a broad range of policy choices by the new leadership. If the new manuals accelerate action by FinTech firms and their potential banking partners, those actions will create concrete market facts against the twin backdrops of leadership changes and judicial challenges at the OCC.

Under these circumstances, otherwise dull changes in these two operational manuals take on renewed interest. They suggest that the policy debate regarding FinTech licensing standards in the United States is about to intensify as the year progresses.

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