

Financial Services

Providing Strategic Legal Guidance to the Global Financial Services Industry

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OCC Requests Advice on the Nature of the Digital

The Office of the Comptroller of the Currency (OCC) released an Advance Notice of Proposed Rulemaking (ANPR) on June 4, 2020, announcing a review of 12 CFR part 7, subpart E related to national bank electronic activities and requesting public input. Issued under the direction of Acting Comptroller of the Currency, Brian P. Brooks, who joined the OCC in April 2020, the ANPR demonstrates a focus on examining current regulations with the intention of promoting innovation and economic growth and taking into account continuing technological changes in the provision of financial services, while providing for fair access and protecting consumers.¹ The areas identified by the ANPR for comment contrast with the existing regulations in 12 CFR part 7, in that they relate to all aspects of the banking business and not just to permissible activities.

The questions on which comments are requested, eleven in all, address issues related to the numerous ways in which digital innovation might affect the types, structure and security of the products and services offered by banks and the nature of the relationships banks have with third parties, from employees and service providers to customers and third party suppliers and partners. The areas for comment center around the evolving digital environment, the transformation of products and services in the financial services industry and the competitive landscape for such services. The ANPR requests that thought be given to principles-based, as opposed to prescriptive, approaches, on the grounds that a principles-based approach will allow more flexibility and decrease the likelihood of regulations becoming rapidly outdated.²

Among the issues on which comment is sought are the following:

- The adequacy and clarity of existing regulation, both in form and content;
- Whether existing regulations create unnecessary hurdles or burdens to the use of new technologies;



- The nature of activities not currently covered by regulation, such as new activities as a digital finder or software that either is a product or underlies a product or service;
- The terms used to characterize digital activities in general;
- Regulatory aspects of digital currencies and assets;³
- The usefulness and effects of various digital frameworks, such as distributed ledger structures or artificial intelligence techniques;
- The ways in which digital payment techniques might affect bank operations and the roles of banks in general;
- The potential for improving bank compliance practices by utilizing digital techniques⁴ (i.e., “regtech”); and
- The potential for more general change in bank structure and operation made possible by digitalization and by whatever is learned from responses to the COVID-19 pandemic, including changes that reflect the needs, resources and capabilities of different kinds of customers.

The ANPR also clarifies that the OCC is not seeking comment on its authority to issue a special purpose national bank charter in this rulemaking.

August 3, 2020 is the deadline for the receipt of comments. Almost everyone that deals regularly with banks, either as a customer, service provider, investor or advisor may have some experience or special competence that can contribute to the OCC’s effort. Please don’t hesitate to contact the authors of this alert should you have any further questions or require additional assistance.

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¹ News Release 2020-76, available on the OCC’s website, occ.treas.gov.

² It is unclear that prescriptive approaches become outdated more quickly or that principles-based approaches can necessarily be more easily adapted to a fundamental change in the way business is conducted. It might be preferable to respond with suggestions that, however phrased, are intended to allow rapid adjustment to technologically changed circumstances.

³ Outside the regulatory realm, other projects are currently underway to understand the ways in which the current Uniform Commercial Code and other statutes may be inadequate to handle digital currency matters and may require revision.

⁴ Certain types of software may not only change the manner in which compliance is effectuated, but might also change the nature and scope of the information that is used to define what compliance and safety and soundness are in the first place.