

Clients & Friends Memo

The Development of a Bank Regulatory Framework for Fintech and Digital Assets: OCC's Approval of Full Charter for a Fintech Company Continues the Movement of Fintech within the U.S. Bank Regulatory Perimeter¹

January 28, 2022

I. Introduction

The Office of the Comptroller of the Currency (“OCC”) continues along its cautious course of allowing fintech and digital asset firms into the so-called “regulatory perimeter,” not through any special or novel charter, but through traditional national bank charters. The OCC is working with the other federal banking agencies to address the potential opportunities and risks associated with the growing interest in fintech and crypto issues. This memorandum summarizes some of the recent actions related to fintech issues, the most recent of which is the approval of a full, deposit-taking charter for a fintech lender. We have also simultaneously issued a companion memo that looks more closely at digital asset issues.²

II. Reviewing Prudential Regulators' Recent Actions

A. Digital Assets and The Bank Regulatory Perimeter³

At the Federal Reserve Bank of Philadelphia's Fifth Annual Fintech Conference on November 16, 2021, Acting OCC Comptroller Michael J. Hsu gave a speech underscoring, in his view, the need to “modernize the [financial] regulatory perimeter” by subjecting fintech and digital

¹ Earlier versions of portions of this memorandum were previously published on the Cadwalader Cabinet website (www.FindKnowDo.com).

² See Daniel Meade, Steven Lofchie, Scott Cammarn, and Sebastian Souchet, *The Development of a Bank Regulatory Framework for Fintech and Digital Assets: Reviewing U.S. Prudential Regulators' Recent Digital Asset Actions* (Jan. 28, 2022).

³ This memorandum uses interchangeably the following terms: “crypto,” “crypto asset,” “cryptocurrency,” and “digital asset.”

asset firms that offer banking services to the U.S. prudential regulatory framework.⁴ Acting Comptroller Hsu's speech built on remarks he made at the American Fintech Council's Fintech Policy Summit, in which he warned of the risks posed by keeping entities he identified as "synthetic banking providers"—digital asset firms that are, in effect, providing what are traditionally considered banking services—outside of the bank regulatory system, and called for "comprehensive, consolidated supervision" of such firms.⁵ Identifying that banking is traditionally considered to consist of "three bundled activities: taking deposits, making loans, and facilitating payments," Acting Comptroller Hsu noted that technological advances have enabled nonbanks to engage in such traditional banking activities. He argued that rapidly growing digital asset firms have unbundled and "synthetically" reassembled these banking activities outside of the bank regulatory perimeter, and that such "synthetic banking" activities have raised numerous threshold questions of first impressions for U.S. financial regulators, including: "At what point do fintech and crypto firms begin to function like banks? Are the risks the same? ... How should bank regulators and the bank regulatory perimeter adapt?"⁶ Furthermore, because of the nature of fintech-bank "partnerships," which enable fintech firms to provide banking services to customers, Acting Comptroller Hsu argued that it is not sufficient for a modernization of the bank regulatory perimeter to simply redefine what activities constitute "doing banking."⁷ Rather, prudential regulators must seriously consider what is appropriate with respect to the relationships between banks and fintech firms.⁸

⁴ Acting Comptroller of the Currency Michael J. Hsu, [Modernizing the Financial Regulatory Perimeter](#), Remarks Before the Federal Reserve Bank of Philadelphia Fifth Annual Fintech Conference (Nov. 16, 2021). See also [Acting Comptroller Wants to "Modernize the Bank Regulatory Perimeter"](#), CADWALADER CABINET (Nov. 16, 2021).

⁵ See Acting Comptroller of the Currency Michael J. Hsu, [Leveling Up Banking and Finance](#), Remarks Before the American Fintech Council Fintech Policy Summit 2021, pp. 1-4 (Nov. 3, 2021). See also [Acting Comptroller Wants to "Modernize the Bank Regulatory Perimeter"](#), CADWALADER CABINET (Nov. 16, 2021); [OCC Acting Comptroller Calls for Regulation of Crypto Banking](#), CADWALADER CABINET (Nov. 4, 2021). In particular, Acting Comptroller Hsu expressed concern about the "ambitions of some of the larger financial services crypto firms to become 'universal,'" by engaging in a range of financial services activities including crypto custody, retail brokerage, prime brokerage, market making, and asset management. Indeed, he raised another significant regulatory policy question posed by digital assets: "whether there ought to be Glass-Steagall-like [sic] separation of activities in the crypto space." Compare Hsu, at 3, with Federal Reserve Board Member Randal K. Quarles, [Between the Hither and the Farther Shore: Thoughts on Unfinished Business](#), Remarks at the American Enterprise Institute, p. 16 (Dec. 2, 2021); see also, [FRB Governor Randal Quarles Offers Parting Thoughts](#), CADWALADER CABINET (Dec. 3, 2021).

⁶ See Hsu, *supra* note 4 at pp. 1-3; see also Hsu, *supra* note 5 at pp. 5-9. For further background on the U.S. financial regulatory perimeter, see Nicholas Tabor et al., [A Brief History of the U.S. Regulatory Perimeter](#) (Aug. 2021) (last accessed January 24, 2022); see also Alexandros Vardoulakis, Asad Kudiya, Byoung Hwa Hwang, Courtney Demartini, Dan McGonegle, Gavin Smith, Jess Cheng, Katherine E. Di Lucido, Kathy Wilson, Jeffery Y. Zhang, Joseph Cox, Mary L. Watkins, Meg Donovan, Nicholas K. Tabor, Nick Ehlert, and Stacey L. Schreft, [Lessons from the History of the U.S. Regulatory Perimeter](#), FEDS Notes (Oct. 15, 2021).

⁷ Hsu, *supra* note 4 at 4.

⁸ *Id.* Acting Comptroller Hsu identified two models of bank-fintech partnerships—"banking-as-a-service" and "rent-a-charter." With "banking-as-a-service" arrangements, synthetic banking providers can offer banking and bank-like services to customers through bank partnerships (often with smaller banks), at a "fraction of the cost of becoming a bank." See Hsu,

Because digital asset and fintech firms have generally been structured to fall outside of the bank regulatory perimeter, their banking activities are not subject to the U.S. prudential regulators' supervision, hindering regulators, in Acting Comptroller Hsu's view, from understanding the full scope of risks posed by such firms. Thus, Acting Comptroller Hsu concluded that before a digital asset firm poses substantial systemic risk, or "take[s] excessive risk and implode[s],"⁹ financial regulators must work together to begin modernizing the bank regulatory perimeter by considering "which crypto activities should be separated; where the line for comprehensive, consolidated supervision should lie; and how much supervision can be best achieved."¹⁰

B. *The SoFi National Bank Charter*

On January 18, 2022, the OCC conditionally approved Social Finance, Inc.'s applications to charter a full-service national bank—SoFi Bank, National Association ("**SoFi Bank**").¹¹ As noted in the OCC's press release, the conditions imposed require "specific capital contributions, adherence to an Operating Agreement, and confirmation that the resulting

supra note 5 at p. 7; Hsu, *supra* note 4 at p. 4. Such arrangements are, in Acting Comptroller Hsu's view, "a harbinger of the future, in which the comparative advantage of technology firms to amass users shifts the bank business model away from consumer interaction and towards facilitation." Hsu, *supra* note 4 at 4. "Rent-a-charter" arrangements allow fintech and digital asset firms to avoid banking regulations "at the expense [in Acting Comptroller Hsu's view] of customer protection and bank safety and soundness." *Id.*

⁹ In remarks before the Blockchain Association in September 2021, Acting Comptroller Hsu warned of similarities he saw between the trajectory of (i) the digital asset and decentralized finance industries and (ii) the derivatives business leading up to the 2008 financial crisis. In those remarks he likened the proliferation of synthetic collateralized debt obligation-squared deals and negative amortization mortgages to the creation of stablecoin savings accounts, asserting that these products lack straightforward explanations as to their function and how returns are generated. See Acting Comptroller of the Currency Michael J. Hsu, [Cryptocurrencies, Decentralized Finance, and Key Lessons from the 2008 Financial Crisis](#), Remarks before the Blockchain Association, pp. 4-5 (Sept. 21, 2021); see also [Acting OCC Comptroller Identified Financial Crisis Lessons for the Crypto Industry](#), CADWALADER CABINET (Sept. 22, 2021).

¹⁰ Hsu, *supra* note 4 at 5. Tucked away in the conclusion of Acting Comptroller Hsu's remarks, Acting Comptroller Hsu appears to subtly indicate a shift in, if nothing else, regulatory tone at the OCC with respect to digital assets. Specifically, he states the following: The OCC will soon "provide clarity on the recently concluded review of crypto-related interpretive letters. The message...is that the [federal banking agencies] are approaching crypto activities very carefully and with a high degree of caution. We expect banks to do the same. *To the extent the OCC's prior communications have been interpreted as tacit encouragement to engage in crypto activities, the forthcoming releases will clarify that safety and soundness is paramount. The releases should not be interpreted as a green light or a solid red light, but rather as reflective of a disciplined, deliberative, and diligent approach to a novel and risky area. We will proceed carefully and cautiously and will hold banks to the same.*" Hsu, *supra* note 4 at 7 (emphasis added).

¹¹ See News Release 2022-4, Office of the Comptroller of the Currency, [OCC Conditionally Approves SoFi Bank, National Association](#) (Jan. 18, 2022) [hereinafter "**OCC News Release 2022-4**"]; Letter of Conditional Approval, Office of the Comptroller of the Currency, [Conditional Approval to Charter SoFi Interim Bank, National Association, Cottonwood Heights, Utah and for SoFi Interim Bank, National Association to Merge With and Into Golden Pacific Bank, National Association, Sacramento, California and Engage in a Change in Asset Composition](#) (Jan. 18, 2022); see also [OCC Conditionally Approves FinTech Company Applications to Charter National Bank](#), CADWALADER CABINET (Jan. 19, 2022).

bank will not engage in any crypto-asset activities or services.”¹² Additionally, SoFi Bank’s parent company, SoFi Technologies, has an application pending before the FRB to become a bank holding company and thus subject to consolidated prudential regulatory supervision.¹³

The OCC’s conditional approval of SoFi Bank represents one of the first approvals bringing a large fintech company within the federal banking regulatory perimeter, and the first full-purpose (*i.e.*, insured deposit-taking) national bank charter for a fintech company.¹⁴ Indeed, as part of the OCC’s conditional approval of SoFi Bank, Acting Comptroller Hsu issued a statement saying that subjecting SoFi Bank to comprehensive U.S. prudential regulation, including the Community Reinvestment Act, (i) “levels the playing field”; (ii) “will ensure that SoFi’s deposit and lending activities are conducted safely and soundly”; and (iii) “is consistent with the comprehensive legal and policy review of pending licensing decisions [Acting Comptroller Hsu] initiated last May, and [the OCC’s] work with other federal and state regulators to develop a coordinated approach to modernizing the federal regulatory perimeter.”¹⁵

The OCC conditional order’s specific inclusion of the condition that the bank will not engage in any crypto-asset activities or services for the three years the Operating Agreement will be in effect, unless it has received prior written determination of no supervisory objection from the OCC under the procedures set out in the Operating Agreement, is in essence a requirement the OCC makes of all national banks since it issued Interpretive Letter 1179.¹⁶ Thus the crypto-asset activities already engaged in by SoFi will need to remain at the parent company in the near term.¹⁷

III. Conclusion

As Acting Comptroller Hsu stated, the OCC and the other federal and state banking regulators will continue to “develop a coordinated approach to modernizing the federal

¹² OCC News Release 2022-4, *supra* note 11.

¹³ *Id.*

¹⁴ See Comment, [OCC Conditionally Approves FinTech Company Applications to Charter National Bank](#), CADWALADER CABINET (Jan. 19, 2022).

¹⁵ OCC News Release 2022-4, *supra* note 11.

¹⁶ See Office of the Comptroller of the Currency, [Interpretive Letter #1179](#) (Nov. 18, 2021); see also News Release 2021-121, Office of the Comptroller of the Currency, [OCC Clarifies Bank Authority to Engage in Certain Cryptocurrency Activities and Authority of OCC to Charter National Trust Banks](#) (Nov. 23, 2021); [OCC Clarifies Permitted Bank Cryptocurrency Activities](#), CADWALADER CABINET (Nov. 23, 2021).

¹⁷ See Comment, [OCC Conditionally Approves FinTech Company Applications to Charter National Bank](#), CADWALADER CABINET (Jan. 19, 2022).

regulatory perimeter."¹⁸ As the OCC and the other financial regulators modernize existing charters, their willingness to modernize raises the question of whether the more controversial proposal of an OCC special fintech charter will be pursued.

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¹⁸ OCC News Release 2022-4, *supra* note 11.