REGULATORS ENCOURAGE FINTECH INNOVATION BUT CARRY A BIG STICK

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With the rapid advancement of FinTech innovation, federal regulators have engaged in a balancing act intended to favor innovation while still holding companies accountable to consumer protection laws. The Consumer Financial Protection Bureau (CFPB) recently issued its Project Catalyst report, which details its ongoing efforts to encourage and promote innovation in consumer-friendly financial products. Project Catalyst encompasses a number of programs, from the Office Hours program that brings regulators and innovators together to exchange information on industry developments and regulatory priorities, to the Trial Disclosure Waiver Policy, which allows the CFPB to waive federal disclosure requirements in some circumstances for companies that are trial testing potential disclosure improvements that would benefit consumers. Similarly, through its No-Action Letter Policy, the CFPB is hoping to encourage innovation in areas where regulation may be uncertain by informing a company that the CFPB has no "present" intention of recommending enforcement or supervision.

On the other hand, the CFPB has signaled it has no intention of going from watchdog to lapdog, and will not hesitate to wield its broad enforcement powers to hold any size company to "high standards of regulatory diligence." In its Project Catalyst report, the CFPB notes that it plans to use all its tools, including enforcement actions, supervisory oversight, rule writing, and others, to protect consumers from potential risks posed by new and existing consumer financial products and services.

In the FinTech space, this commitment to oversight was clear through several recent CFPB enforcement actions In 2016, the CFPB obtained partial summary judgment against a small loan servicer that had partnered with a tribal entity to fund and purchase online loans, a partnership that is typically designed to avoid, among other things, state usury limits. The CFPB successfully argued that the servicer was the "true lender" and any loans that violated state usury laws were therefore wholly or partially void and uncollectable, and the servicer's efforts to collect on these loans were deceptive under the Consumer Financial Protection Act.

The CFPB also took action in 2016 against an online payment processer, Dwolla, Inc., for failing to offer safe and secure payment processing despite the company's claims that its transaction system complied with the Payment Card Industry Data Security Standard. More recently, the CFPB ordered $3.6 million in restitution and penalties against an online provider of single-payment and installment loans, pointing to the company's failure to provide consumers with access to more affordable loans and opportunities to build credit, despite the company's claims otherwise.

Like the CFPB, the Office of the Comptroller of the Currency (OCC) is taking steps to encourage innovation, establishing its own Office of Innovation to stimulate advances that provide fair access to financial services. This dovetails with the OCC's decision to explore special purpose national bank charters for FinTech companies, which could provide a more uniform regulatory environment and eliminate burdensome state licensing and supervisory requirements. But, like the CFPB, the OCC is not shying away from its enforcement functions. The

Comptroller of the Currency, Thomas J. Curry, warned that it will hold nationally chartered FinTech companies "to the same high standards of safety, soundness, and fairness that other federally chartered institutions must meet."

Whether the big stick of CFPB enforcement will continue to loom over the rapidly expanding FinTech space will likely depend on how successful the Trump administration's efforts will be to restructure the CFPB and limit its mission, while also reigning in the CFPB's fellow regulators. Regardless of permutations in the regulatory space, there is no doubt that FinTech innovation will continue apace.

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