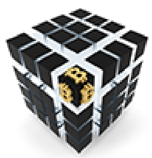
July 26, 2018

LOCKE LORD® QUICK Study
FinTech Industry Group



New Kid in the Sandbox: Bureau of Consumer Financial Protection to create FinTech "Regulatory Sandbox" for cryptocurrencies and blockchain technologies

By: John E. Viskocil, William D. Foley, Jr. and Andrew Braunstein

On July 18, 2018, the Bureau of Consumer Financial Protection (the "Bureau") (announced the appointment of the head of its newly-created Office of Innovation,[1] which will have as its first order of business the creation of a "regulatory sandbox" for financial technology – or "FinTech" – companies.[2] In an interview with the Wall Street Journal, the Bureau's Acting Director, Mick Mulvaney, stated that this new regulatory framework will allow FinTech companies to develop new products and services, particularly those involving cryptocurrencies, other blockchain technologies, microloans, and loans by individuals.[3] Mr. Mulvaney identified Paul Watkins, formerly of the Arizona Office of the Attorney General, as the head of the Office of Innovation. Mr. Watkins previously oversaw the launch of Arizona's own FinTech regulatory sandbox, which is planned to go live in the next month and is the first of its kind at the state level.[4]

Regulatory sandboxes, while not an entirely new concept, are becoming more common around the world, particularly in jurisdictions seeking to encourage innovation while maintaining their existing regulatory oversight. In a regulatory sandbox, the regulatory agency overseeing the sandbox allows emerging financial services companies to subject themselves to the jurisdiction of said agency, even though they previously may not have been formally regulated. In return, the newly-regulated companies are then able to develop and engage in new financial products within the limits set by that agency. Proponents argue this reduces the regulatory burden on companies in the sandbox and eliminates some of the uncertainty associated with operating in a space with potentially overlapping regulatory regimes or with unpredictable future regulations. This is particularly an issue for the cryptocurrency industry, where significant legislative change to remedy the regulatory complexity is improbable in near future.

While the scope of the Bureau's FinTech sandbox has not yet been defined in detail, it is anticipated that the program will likely offer many of the benefits provided by regulatory sandboxes in other jurisdictions. For example, under Arizona's FinTech sandbox, "companies are able to test their products for up to two years and serve as many as 10,000 customers before needing to apply for formal licensure."[5] Similarly, the United Kingdom's FinTech sandbox, administered by the UK's Financial Conduct Authority, aims to spur innovation in cryptocurrencies and other financial technologies by decreasing the time typically required to bring a product to market, loosening regulations on obtaining financing, and working to reduce burdens on cross-border testing and interaction.[6] The UK sandbox, one of the earliest in the world, was launched in 2016, and since its inception has supported 60 companies, allowing them to test their products with real customers in

1 Bureau of Consumer Financial Protection Announces Director for the Office of Innovation

2 CFPB Wants to Help Launch New Fintech Products

3 *Id.*

4 Bureau of Consumer Financial Protection Announces Director for the Office of Innovation; CFPB Wants to Help Launch New Fintech Products

5 Arizona Becomes First U.S. State To Launch Regulatory Sandbox For Fintech

6 Global sandbox

the live market.[7] The sandbox has largely been seen as a success in the United Kingdom and has inspired the creation of similar programs in other countries including China, the United Arab Emirates, Singapore, Australia, Canada and, now, with the launch of the Bureau sandbox, the United States.[8]

The Bureau is not the only federal agency making an effort to provide regulatory clarity for FinTech companies. In 2016, the Office of the Comptroller of the Currency announced that it was considering a program to charter certain FinTech companies as special-purpose national banks.[9] According to the white paper published by the OCC, this would help FinTech companies operate in a "safe and sound" manner to protect customers, business partners, and communities, promote consistency of regulation across the country, and strengthen the national banking system.[10] In addition, FinTech companies that receive such a charter would effectively be exempted from many state banking and financial services laws and regulations, whether by fitting into already-existing carve-outs for federally chartered banks or by receiving the benefits of federal preemption law where applicable. Proponents of the OCC charter also state that it would provide FinTech companies with the clarity and certainty of knowing both who their regulator is and which regulations apply to them.

However, the OCC has not yet issued a final determination on whether it will move forward with its proposed plan. In fact, since announcing its plan in 2016, the OCC has reflected hesitation and uncertainty, undoubtedly in part because of recent political changes and lawsuits by state financial and banking regulators alleging that the implementation of the OCC's plan would exceed the agency's authority. Nevertheless, two such lawsuits in federal courts in the District of Columbia and New York were recently dismissed on the ground that the injuries alleged by the Conference of State Bank Supervisors and the New York Department of Financial Services, respectively, were too speculative because the OCC had not yet actually chartered any FinTech entities.[11]

Ultimately, the Bureau sandbox and the OCC charter initiative both have the potential to ease the regulatory burden and unpredictable future for on FinTech companies. Perhaps more importantly, regulatory sandbox frameworks may provide clarity for companies developing new financial technology products that are inherently cross-transactional and cross-jurisdictional.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

John E. Viskocil | 646-217-7405 | john.viskocil@lockelord.com
William D. Foley, Jr. | 212-812-8344 | wfoley@lockelord.com
Andrew Braunstein | 646-217-7879 | andrew.braunstein@lockelord.com

7 *Id.*

8 Arizona Becomes First U.S. State To Launch Regulatory Sandbox For Fintech. Other states, most notably Illinois, have been debating measures to adopt and move towards creation of regulatory sandboxes. But, thus far, Arizona is the only state that has actually implemented a FinTech regulatory sandbox. States Embrace Fintech Sandbox Concept as Federal Action Stalls

9 Exploring Special Purpose National Bank Charters for Fintech Companies

10 *Id.*

11 *See Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, et. al.*, Civ. Action No. 17-0763 (DLF), 2018 WL 2023507 (D.D.C. Apr. 30, 2008); *Vullo v. Office of Comptroller of the Currency*, 17 Civ. 3574 (NRB), 2017 WL 6512245 (S.D.N.Y. Dec. 12, 2017).

Locke Lord LLP disclaims all liability whatsoever in relation to any materials or information provided. This piece is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. If you wish to secure legal advice specific to your enterprise and circumstances in connection with any of the topics addressed, we encourage you to engage counsel of your choice.

Attorney Advertising © 2018 Locke Lord LLP