

## THE OCC UNDER THE TRUMP AND BIDEN ADMINISTRATIONS

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The new Administration offers an opportunity to assess how well the Office of the Comptroller of the Currency (OCC) navigated Community Reinvestment Act (CRA) reform and financial technology innovation under the former administration.<sup>1</sup> It also presents an opportunity to speculate how a new Comptroller of the Currency (Comptroller) may reassess and perhaps reverse some of those actions and chart a new course in prudential, consumer protection, community reinvestment, climate change, financial technology and financial inclusion matters.

### I. *CRA Reform*

CRA reform was a signature policy initiative of the Trump OCC. In 2017, the OCC rescinded policies on the impact of discriminatory credit practices policies on CRA ratings (no longer permitting double downgrades of CRA performance ratings)<sup>2</sup> and lessening the impact or weight of CRA performance in merger and acquisition

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<sup>1</sup> The OCC is the chartering and supervisory authority for national banks and federal savings associations holding over 70% of the nation’s banking assets, including most U.S. globally significant banking institutions. *See About Us*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://occ.gov/about/index-about.html>.

<sup>2</sup> OCC Bulletin 2017-40, Office of the Comptroller of the Currency, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (Oct. 12, 2017), <https://www.occ.gov/static/rescinded-bulletins/bulletin-2017-40.pdf> (subsequently rescinded and replaced as announced by OCC Bulletin 2018-23, Office of the Comptroller of the Currency, Community Reinvestment Act: Revisions to Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (Aug. 15, 2018), <https://occ.gov/news-issuances/bulletins/2018/bulletin-2018-23.html>).

applications by banks with “less than satisfactory” CRA ratings.<sup>3</sup> Community advocates opposed these changes.

Comptroller Otting spearheaded modernizing the CRA in response to the growth of digital banking channels and its growing displacement of traditional “brick and mortar” branches. Comptroller Otting sought to make identifying qualifying CRA activities easier, use more quantitative performance measures, and to expand assessment areas beyond a bank’s branch geographic footprint. Throughout the process, the OCC largely went it alone. Comptroller Otting ultimately filed the OCC’s final CRA regulation in his last week in office without the FDIC and Federal Reserve joining.<sup>4</sup> The final rule was panned by community groups because of its reduced focus on low-to moderate income individuals and geographies and by trade groups because of the lack of uniform CRA rules among federal bank regulators.

A Biden Comptroller likely will pause the OCC CRA regulation and related pending proposals.<sup>5</sup> The OCC eventually may join the Federal Reserve and the FDIC on a new joint CRA proposal based upon the Federal Reserve’s September 2020 Advance Notice of Proposed Rulemaking.<sup>6</sup> The future Comptroller may also reverse the OCC’s restrictive CRA merger application policies. New initiatives

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<sup>3</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, PPM 6300-2, IMPACT OF CRA RATINGS ON LICENSING APPLICATIONS 3 (2017), <https://www.occ.gov/news-issuances/bulletins/2017/ppm-6300-2.pdf> (discussing the adoption of a “facts and circumstances” test that looks to whether “substantial progress” in correcting deficiencies has been made and approval would “facilitate the bank’s ability to increase its CRA activities to the benefit of its communities”).

<sup>4</sup> Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734 (June 5, 2020) (codified at 12 C.F.R. pts. 25 & 195) (“adopting a final rule to strengthen and modernize the Community Reinvestment Act”).

<sup>5</sup> News Release 2020-63, Office of the Comptroller of the Currency, OCC Finalizes Rule to Strengthen and Modernize Community Reinvestment Act Regulations (May 20, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-63.html> (addressing final rule 85 Fed. Reg. 34,734 (June 5, 2020) (to be codified at 12 C.F.R. parts 25, 196)); News Release 2020-160, Office of the Comptroller of the Currency, OCC Proposes Rule Regarding the CRA General Performance Standards (Nov. 24, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-160.html> (addressing proposed CRA measures and benchmarks).

<sup>6</sup> Community Reinvestment Act, 85 Fed. Reg. 66,410 (Oct. 19, 2020) (to be codified at 12 C.F.R. pt. 228) (discussing the Federal Reserve’s proposed rule in the context of its “modernizing the Board’s Community Reinvestment Act regulatory and supervisory framework.”).

fostering financial inclusion and support of minority owned depository institutions (MDI) can be expected. Larger OCC banks will be urged to partner with MDI mentees. Organizationally, the new Comptroller may restore the dissolved Compliance and Community Affairs Division and increase its operational independence from OCC prudential supervisors.<sup>7</sup>

## **II. Financial Technology Innovation**

### **A. Charter Activity**

The Trump OCC expanded potential avenues for fintech firms to obtain banking powers. Charter options include: a special purpose fintech charter;<sup>8</sup> a full service FDIC-insured national bank;<sup>9</sup> acquiring existing national banks;<sup>10</sup> an uninsured commercial deposit taking

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<sup>7</sup> Unlike its FDIC and Federal Reserve peers, the OCC does not have a separate compliance and CRA division.

<sup>8</sup> OFFICE OF COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGIES (July 2018) ("This Supplement to the *Comptroller's Licensing Manual* provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies and clarifies the OCC's expectations that companies with a fintech business model demonstrate a commitment to financial inclusion. It also explains the contingency planning each bank will be expected to undertake. Finally, the document describes the OCC's approach to supervising newly chartered special purpose national banks.").

<sup>9</sup> See News Release 2020-99, Office of Comptroller of the Currency, Acting Comptroller of the Currency Presents Varo Bank, N.A. Its Charter (July 31, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-99.html> [<https://perma.cc/6AWN-FXXV>] (addressing the charter the OCC accorded to Varo Bank, N.A.).

<sup>10</sup> See Press Release, Radius Bank, LendingClub Closes Acquisition of Radius Bancorp (Feb. 2, 2021) <https://radiusbank.com/lendingclub-closes-acquisition-of-radius-bancorp/> [<https://perma.cc/2MFA-WHZ7>] ("LendingClub today announced the completion of its acquisition of Radius Bancorp, Inc. and its digital bank subsidiary, Radius Bank."); Press Release, PR Newswire, Jiko Acquires Mid-Central National Bank to Deploy Its Innovative Money Platform (Sep. 3, 2020), <https://www.prnewswire.com/news-releases/jiko-acquires-mid-central-national-bank-to-deploy-its-innovative-money-platform-301124093.html> [<https://perma.cc/XVZ4-LF92>] ("Jiko Group, Inc., a new bank holding company building an innovative money platform, today announced it has completed its acquisition of Mid-Central National Bank—

national bank<sup>11</sup> and the chartering and/or conversion of state-chartered trust company cryptoasset custodians into limited purpose national trust banks.<sup>12</sup> The OCC's fintech charter and the uninsured national bank charter are being litigated by state regulators. The cases remain unresolved and it is unclear whether the new Comptroller will defend the litigation or pursue a legislative solution.<sup>13</sup> The Biden OCC also

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formerly Mid-Central Federal Savings Bank—headquartered in Wadena, MN.”).

<sup>11</sup> See Press Release, Figure, National Bank Charter Will Enable Figure to Fulfill Promises of Efficiency, Affordability and Financial Inclusion (Nov. 6, 2020), <https://www.figure.com/blog/figure-applies-for-national-bank-charter-from-the-occ/> [<https://perma.cc/NC93-WGCL>] (“Figure Technologies, Inc ... a leader in transforming financial services through the power of blockchain technology, today announced it has applied for a national bank charter from the Office of the Controller of the Currency ...”).

<sup>12</sup> OFFICE OF COMPTROLLER OF THE CURRENCY, INTERPRETIVE LETTER #1176, OCC CHIEF COUNSEL’S INTERPRETATION ON NATIONAL TRUST BANKS (Jan. 11, 2021), <https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1176.pdf> [<https://perma.cc/NT3E-XQQF>] (discussing “the authority of the Office of the Comptroller of the Currency (OCC) to charter national banks within the scope of 12 U.S.C. § 27(a)”); News Release 2021-19, Office of the Comptroller of Currency, OCC Conditionally Approves Conversion of Protego Trust Bank (Feb. 5, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html> [<https://perma.cc/8985-NRXX>] (stating “[t]he Office of the Comptroller of the Currency (OCC) today announced conditional approval of the conversion of Protego Trust Company, a Washington state-chartered trust company, to become Protego Trust Bank, National Association” and referencing Stephen A. Lybarger, Conditional Approval of Application by Protego Trust Company, Seattle, Washington, to Convert to a National Trust Bank, Application for Director Residency Waiver, 2020-HQ-Conversion-318271, 2021-HQ-Waiver-319182, 2 (Feb. 4, 2021) (“As its core product offering, PTBNA [Protego Trust Bank, National Association] will provide cryptocurrency custody services in a fiduciary capacity for its clients by holding the unique cryptographic keys associated with Bitcoin and Ethereum.”); News Release 2021-6, Office of the Comptroller of the Currency, OCC Conditionally Approves Conversion of Anchorage Digital Bank (Jan. 13, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> [<https://perma.cc/AB86-S4LX>] (“The Office of the Comptroller of the Currency (OCC) today announced conditional approval of the conversion of Anchorage Trust Company, a South Dakota chartered trust company, to become Anchorage Digital Bank, National Association.”).

<sup>13</sup> *Vullo v. Office of the Comptroller of the Currency*, 378 F. Supp. 3d 271, 278 (S.D.N.Y. 2019) (denying the OCC’s motion to dismiss plaintiff’s action

will closely supervise fintechs with traditional charters. It may be quick to sanction noncompliance with charter conditions or substantial deviations from approved business plans.

### B. Bank Partnerships

The Trump OCC moved to administratively resolve legal ambiguities in the “bank partnership” model stemming from the *Midland Funding v. Madden* case.<sup>14</sup> The OCC adopted its “valid when made” regulation stating that the legal interest rate on loans made by a national bank is unchanged when transferred to a third party fintech.<sup>15</sup> The OCC went further by adopting a broad “true lender” regulation validating the bank partnership model.<sup>16</sup> The FDIC pursued a parallel

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“challeng[ing] the decision made by OCC to begin accepting applications for—and thereafter potentially granting—special-purpose national bank ... charters to ‘financial technology’ ... companies.”) (citation and footnote omitted); see Press Release, CSBS, CSBS Files New Complaint Against OCC Approval of Figure Technologies Inc. Application Would Exceed OCC’s Chartering Authority (Dec. 22, 2020), <https://www.csbs.org/newsroom/csbs-files-new-complaint-against-occ> [<https://perma.cc/MF3Z-GC85>] (“The Conference of State Bank Supervisors (CSBS) announced today it has filed a complaint in the U.S. District Court for the District of Columbia opposing the Office of the Comptroller of the Currency’s (OCC) creation of a new national bank charter for nonbank companies and its acceptance and impending approval of a charter application from Figure Technologies Inc.”).

<sup>14</sup> *Madden v. Midland Funding, LLC*, 786 F.3d 246, 250, 255 (2d Cir. 2015) (holding [t]he preemptive interest rate exportation authority under Section 85 of the National Bank Act loans does not transfer to a subsequent nonbank acquiror).

<sup>15</sup> News Release 2020-71, Office of the Comptroller of the Currency, OCC Issues Rule to Clarify Permissible Interest on Transferred Loans (May 29, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-71.html> (“The Office of the Comptroller of the Currency (OCC) today finalized a rule to clarify that when a national bank or savings association sells, assigns, or otherwise transfers a loan, interest permissible before the transfer continues to be permissible after the transfer.”).

<sup>16</sup> News Release 2020-139, Office of the Comptroller of the Currency, Office of the Comptroller of the Currency Issues True Lender Rule (Oct. 27, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-139.html> (“The Office of the Comptroller of the Currency (OCC) today issued a rule that determines when a national bank or federal savings association (bank) makes a loan and is the ‘true lender,’ including in the context of a partnership between a bank and a third party.”).

“valid when made” rulemaking governing nonmember banks but declined to adopt a “true lender” rule.<sup>17</sup>

A Biden Comptroller likely will revisit the bank partnership regulations. The OCC will vigorously scrutinize OCC banks’ third-party relationships with fintechs and initiate enforcement actions if such arrangements are unsafe and unsound or violate applicable consumer protection regulations.

### C. Crypto Assets

The Trump OCC broadly interpreted national bank fiduciary and banking powers to include cryptocustody and other cryptocurrency activities. The OCC recently opined that national banks may hold cryptocurrency reserves.<sup>18</sup> It also opined that payment-related activities that involve the use of new technologies, including the use of independent node verification networks (INVNs or networks) and stablecoins, to engage in and facilitate payment activities are permissible activities for national banks.<sup>19</sup>

The incoming Comptroller may suspend any additional crypto national trust company applications pending a review of OCC appro-

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<sup>17</sup> Federal Interest Rate Authority, 85 Fed. Reg. 44,146, 44,147 (July 22, 2020) (“The regulations also provide that whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined at the time the loan is made ... The regulations do not address the question of whether a State bank or insured branch of a foreign bank is a real party in interest with respect to a loan or has an economic interest in the loan under state law, *e.g.* which entity is the ‘true lender.’ Moreover, the FDIC continues to support the position that it will view unfavorably entities that partner with a State bank with the sole goal of evading a lower interest rate established under the law of the entity’s licensing State(s).”).

<sup>18</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERPRETIVE LETTER #1172 OCC CHIEF COUNSEL’S INTERPRETATION ON NATIONAL BANK AND FEDERAL SAVINGS ASSOCIATION AUTHORITY TO HOLD STABLECOIN RESERVES (Sept. 21, 2020) (“For the reasons discussed below, we conclude that a national bank may hold such stablecoin ‘reserves’ as a service to bank customers.”) (footnote omitted).

<sup>19</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERPRETIVE LETTER, 1174, OCC CHIEF COUNSEL’S INTERPRETATION ON NATIONAL BANK AND FEDERAL SAVINGS ASSOCIATION AUTHORITY TO USE INDEPENDENT NODE VERIFICATION NETWORKS AND STABLECOINS FOR PAYMENT ACTIVITIES (Jan. 4, 2021) (“National banks and Federal savings associations ... may use new technologies, including INVNs and related stablecoins, to perform bank-permissible functions, such as payment activities.”).

val processes and potential risks. A Biden Comptroller, however, may be hesitant to reverse interpretations of national bank crypto-related powers as they are grounded upon the OCC's longstanding view that the business of banking is evolving and that new technological means of exercising traditional powers are permissible for national banks.

### **III. Other Matters**

Biden's Comptroller is likely to play a more assertive role in prudential and consumer protection policymaking.<sup>20</sup> The Trump OCC largely followed the Federal Reserve's lead in implementing the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act's changes to the DFA. The incoming Comptroller may also focus supervisory attention on the financial risk management and financial stability impacts of climate change. This would entail a substantial change from the Trump OCC's recent Fair Access Regulation,<sup>21</sup> which was paused indefinitely and may be subject to repeal under the Congressional Review Act or by OCC action.

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<sup>20</sup> The promulgation and enforcement of bank capital, liquidity, risk management, anti-money laundering and many of the Dodd Frank Wall Street Reform and Consumer Protection Act (DFA) rules fall within the OCC's portfolio. It also plays a major role in amending and assessing compliance with the CRA and consumer protection rules such as the "unfair and deceptive acts and practices" provisions of the Federal Trade Commission Act. *See* 2020 OFFICE OF THE COMPTROLLER OF THE CURRENCY ANN. REP 2 ("OCC Examiners ... analyze banks' ability to identify, measure, monitor, and control risk, such as with banks' loan and investment portfolios, capital adequacy, earnings, liquidity, and sensitivity to market conditions. Examiners assess corporate governance and banks' compliance with laws and regulations.").

<sup>21</sup> News Release 2021-8, Office of the Comptroller of the Currency, OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services, Capital and Credit (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html#> ("The Office of the Comptroller of the Currency (OCC) today released its finalized rule to ensure fair access to banking services provided by large national banks, federal savings associations, and federal branches and agencies of foreign bank organizations.").