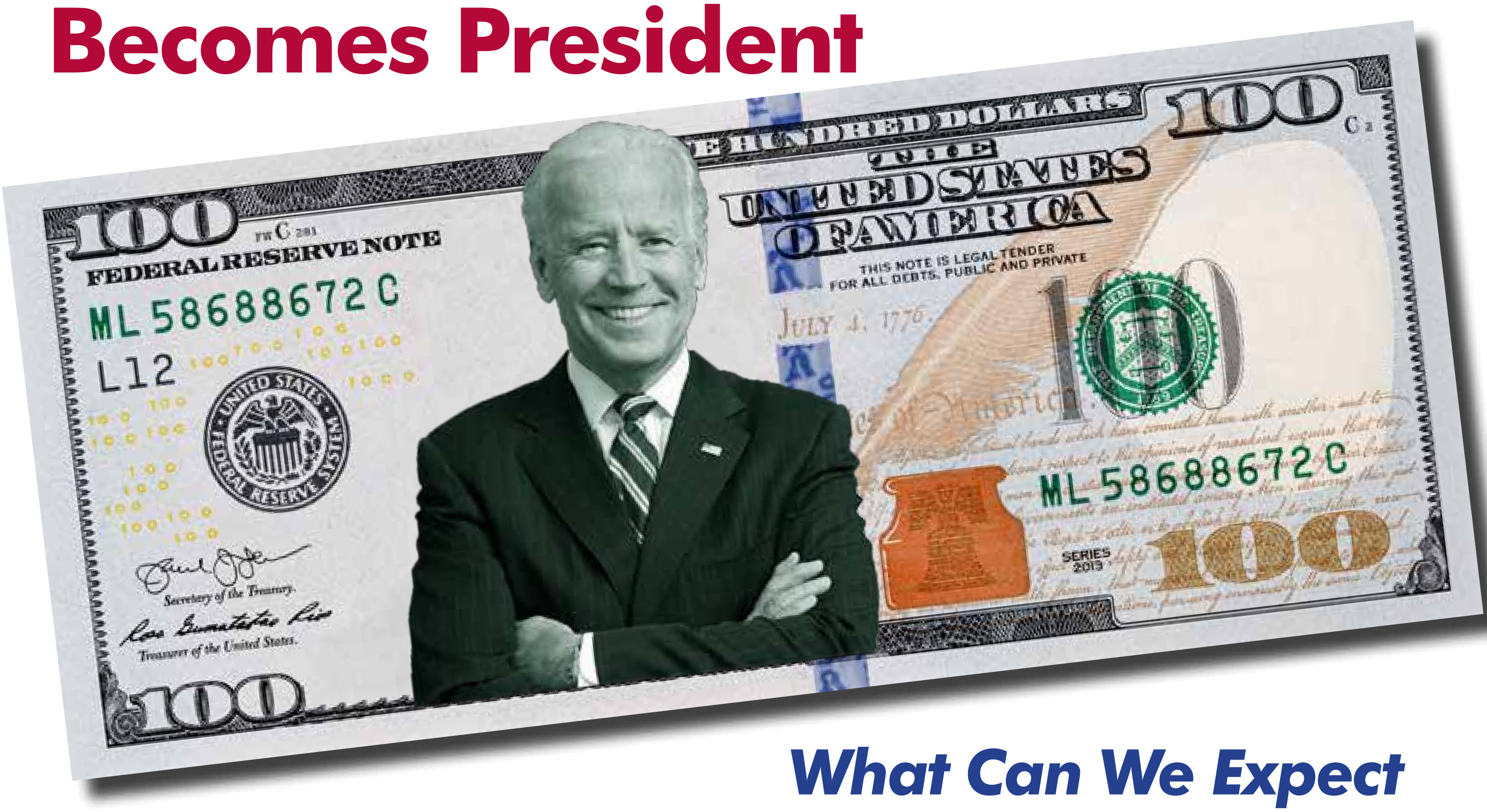
Cover Story

Joe Biden Becomes President



What Can We Expect in the Banking and Financial Services?

by

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Most Delawareans know Joe Biden or have met him over the almost 50 years since he was elected to the U.S. Senate in 1972 in an upset win over the incumbent Senator and former governor Cal Boggs. He has seen Delaware grow from a backwater financial services provider to the home of many of the largest banks and credit card companies in the country as a result of the passage of the Financial Center Development Act in 1981. He has been helpful during his time in the Senate to the financial services industry, a very large and important constituency, and knows of its importance to Delaware. His election to the highest office of the land will test his abilities to navigate the shoals between his natural moderate liberal voting record and the strong progressive forces in the Sanders/Warren wing of the Democratic party, which helped get him elected.

With the recent victories of Raphael Warnock and Jon Ossoff in the Georgia runoff elections, President Biden will be in a strong position of having Democratic control of both the House and Senate, which will be helpful in successfully implementing his legislative agenda. In addition, Biden's recent high-level appointments to the CFPB and OCC provide initial insight into Biden's promise that his presidency will restore stronger regulatory protections to consumers.

Strengthening the CFPB: Nomination of Chopra as Director

On January 18, President Joe Biden announced that he will nominate current Federal Trade Commission (FTC) Commissioner Rohit Chopra to be the next director of the Consumer Financial Protection Bureau (CFPB) to succeed Kathleen Kraninger as director of the financial industry watchdog. Following this announcement, Kraninger tendered her resignation at the behest of the incoming Biden administration. Chopra, a former CFPB official, is well-known as an aggressive consumer advocate. He holds a B.A. from Harvard and an MBA from Wharton. In 2011, Senator Elizabeth Warren, who then served as a special advisor in the Obama administration, tapped Chopra to serve as assistant director of the CFPB, where he led the agency's student lending agenda. In that role, he became known for his hard-charging style and frequent criticisms of private student lenders. As an FTC commissioner since 2018, Chopra supported more aggressive rulemaking and enforcement efforts. Indeed, he openly acknowledged his efforts to encourage "vigorous agency enforcement" and to demand "aggressive remedies against lawbreaking companies."

Consumer advocates have hailed Chopra's nomination, including Ashley Harrington, Center for Responsible Lending Federal advocacy director and senior counsel. She remarked, "Commissioner Chopra has long fought for financial markets that are fair for consumers, including student loan borrowers. We are encouraged that the CFPB will now return to its mission of protecting people's finances, which has heightened significance in this economic downturn, and which includes a strong fair lending program." With Chopra's nomination, Biden has signaled that the CFPB will be taking a more aggressive stance in both its rulemaking and enforcement efforts.

The Biden-run CFPB will be positioned to strengthen oversight of consumer financial services, and will also target predatory lending. Maxine Waters, chairwoman of the House Financial Services Committee, has sharply criticized the Trump administration's actions to limit the CFPB's oversight and enforcement efforts. Chairwoman Waters, along with the new Senate Banking Chairman Sherrod Brown hope to bolster those efforts emphasizing consumer benefits wherever possible. Along these lines, President Biden has expressed his intentions to restore enforcement power to the Office of Fair Lending and Equal Opportunity within the CFPB after a 2018 reorganization stripped the office of its enforcement powers. Fair lending enforcement is likely to feature heavily on Chopra's policy agenda, as part of the agency's overall ongoing response to the COVID-19 pandemic.

In addition, under the Biden Presidency, the CFPB, with Chopra at its helm, is likely to attempt unwinding the CFPB's elimination last summer of ability-to-repay underwriting requirements from the agency's 2017 payday lending regulations and its issuance last year of a policy statement narrowing when and how the agency plans to police prohibited "abusive acts or practices" under the Dodd-Frank Act. There has also been speculation that Chopra may seek to expand the CFPB's supervisory footprint by revisiting the agency's rules that define which larger nonbanks fall under its oversight. This may include consideration of a rule that would cover both traditional installment lenders as well as online lenders, and give the CFPB both supervisory authority and enforcement authority over companies in those markets.

Finally, under the Biden presidency, a reinvigorated CFPB will have a renewed focus on curtailing abusive or deceptive lending practices and increasing lending cost transparency for borrowers. In addition to a more aggressive enforcement role, the CFPB will likely implement policies to strengthen underwriting requirements and borrower protections, to monitor student-loan servicers, and to possibly establish a public credit-reporting agency under the CFPB's control, as an alternative to Equifax, TransUnion and Experian.

Community Reinvestment Act: Combatting Social and Racial Injustice

Biden stressed social and racial justice movements on the campaign trail. The concept of financial inclusion, in particular access to credit and financial services for minorities and low-to-middle income (LMI) neighborhoods, has been a significant issue for Biden. That said, a fractured regulatory framework overseeing the Community Reinvestment Act (CRA) has threatened consistent application of the CRA, in part due to the federal banking agencies proceeding in separate directions. The Federal Reserve, OCC, and FDIC all recently proposed rule changes, but currently the OCC stands alone with a proposed final rule broadening qualifying activity for CRA credit.

President Biden has expressed support for strengthening and expanding the CRA to ensure banks and nonbank financial institutions, particularly mortgage and insurance companies, are providing credit access to all members of the community while closing loopholes that could enable institutions to circumvent investing in community development. To that end, Biden will likely pressure regulators to broaden the CRA in its application, seeking to benefit more communities in need. Such an effort led by Biden and a Democratic Congress will work toward Biden's broader goal of creating greater racial equity and eliminating redlining.

Regulating FinTech: A Careful Balance

Biden's support of ensuring greater access to financial services, creating a public credit-reporting agency alternative, and promoting fair lending practices could create a fertile environment for advancing a new regulatory framework for financial technology. The tension of balancing the massive potential for financial technology innovation with the simultaneous need to develop adequate regulations without stifling innovation has

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long been recognized. A Biden administration and Democratic Congress will want to ensure that FinTech entities offer services that benefit consumers and are safe and sound in their practices. The Biden administration is expected to support and foster innovation while balancing consumer protection efforts.

A friendly regulatory environment for FinTechs will likely create a path for more partnerships between FinTechs and banks that would enable FinTechs to leverage a bank's capital reserves and existing customer base while banks would be positioned to leverage a FinTech's innovative technology infrastructure, which may include artificial intelligence and machine learning, to provide more affordable financial services to a broader segment of the U.S. population. A Biden administration will likely ensure that firms seeking new "FinTech charters" will provide increased access to the "unbanked" and "underbanked." That said, there have been predictions that the OCC may take a slower stance with respect to applications for nondepository trust company charters. The OCC is predicted to be more focused on operational and compliance risks tied to "innovation" proposals and interpretive requests, particularly with respect to payments and custody activities relating to digital assets and currency. In sum, new regulations of FinTechs will be closely examined to ensure consumer protection while also allowing for the fostering of innovation through regulatory sandboxes, allowing FinTech innovators to conduct live experiments in a controlled environment under a financial services regulator's supervision.

Housing Finance: Supporting Affordable Housing

Biden has already provided a detailed plan of the areas he would like his administration to address concerning housing policy and the systemic inequities within the housing market. His plan is focused on undoing what is viewed as modern day redlining. Biden has proposed to invest $640 billion over 10 years to create a more stable and equitable housing market, including a new refundable tax credit for first-time buyers that could be issued in advance. Biden's affordable housing plans also includes establishing a $100 billion affordable housing fund similar to what Chairwoman Waters proposed in 2019. In addition, Democratic majorities in both the House and Senate will ease the passing of Biden's affordable housing, rent, and tenant support initiatives into law.

In addition, Biden is likely to take a drastically different policy approach to Fannie Mae ("Fannie") and Freddie Mac ("Freddie"), in their role as purchasers of residential mortgage loans while under government conservatorship and will revert to the Obama-era approach of empowering Fannie and Freddie to facilitate access to affordable housing. To do so, Biden likely would move to appoint leadership at the Federal Housing Finance Agency who would keep capital requirements for Fannie and Freddie low. In addition, during Biden's presidency, it is likely that he will ensure that both entities remain under conservatorship, rather than being privatized, as was strongly considered during President Trump's administration. Finally, there has been speculation that Biden may treat Fannie and Freddie as public utilities, which could place limits on their profitability and lead to lower borrowing costs for consumers.

OCC: Michael Barr Tapped as Comptroller

Michael S. Barr, a former U.S. Treasury Department official, is likely to become the next Comptroller of the Currency. If confirmed by the U.S. Senate, Barr will succeed Brian Brooks, who stepped down on January 14, 2021, and has served as Acting Comptroller for the last half of 2020. Barr is currently a dean at the University of Michigan Ford School of Public Policy, and was part of the Treasury Department in President Barack Obama's administration, where he worked on bank regulations in the form of the Dodd-Frank Act. New Senate Banking Chairman Sherrod Brown, and other progressive activists, however, are opposing President Biden's choice to lead the OCC, citing nominee Michael Barr's connection to the financial industry. Progressives, such as Brown, favor law professor Mehrsa Baradaran, an advocate for the creation of banking services through the U.S. Postal Service.

If Barr is confirmed, he would become the second individual with a connection to cryptocurrency to lead the OCC. Under Brooks, the OCC published a number of interpretative letters that crypto advocates believe can bring the industry closer to the traditional financial system by making it easier for these startups to tap banking services. Some of these interpretive letters would also let banks participate in the cryptocurrency ecosystem by using stablecoins for payments or acting as node operators on blockchain networks. With Barr at the helm of the OCC, support of the cryptocurrency industry is likely to continue and possibly increase.

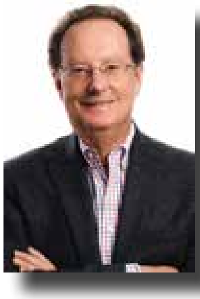
A new rule, The Fair Access rule, however, that aims to bar large banks from declining services to unpopular industries is unlikely to survive during the Biden administration. In a final act of Comptroller Brooks' tenure and on the day of his departure, the OCC finalized the rule to ensure "fair access to banking services provided by large national banks, federal savings associations, and federal branches and agencies of foreign bank organizations."

According to Brooks, the rule, promulgated to prevent future Operation Chokepoints from occurring, is aimed at preventing banks with more than $100 billion in assets from denying loan applications and refusing to provide services to certain industries and entire categories of customers without conducting "individual risk assessments." Brooks stated, "it is inconsistent with basic principles of prudent risk management to make decisions based solely on conclusory or categorical assertions of risk without actual analysis."

After considering more than 35,000 stakeholder comments during the public comment period that ended on January 4, the OCC softened the rule somewhat from its initial proposal, but the future of the rule is unclear. The rule was not published in the Federal Register, and thus, it has not yet taken effect. Ronald Klain, Biden's White House Chief of Staff, issued a memo on January 20, 2021, directing agency heads to rescind or freeze any rules not yet published which is typical for new Administrations to do.

Conclusion

President Biden understands the importance of banking to Delaware. His appreciation of banking industry's significant role to the Delaware economy may continue to influence his policy considerations and appointees, as he works to navigate his moderate liberal record against the pressures of the more progressive wing of the Democratic party, headed by Senator Elizabeth Warren. As an example, Biden's nomination of Chopra, an ally of Warren's, may serve to appease progressives and ease the confirmation of Biden's selection of Barr to head the OCC. The next four years under President Biden will most certainly represent a pendulum swing towards stricter banking regulation, but just how far remains to be seen, and will be the result, in part, of President Biden's compromises with progressive Democrats. Regardless of where the pendulum ultimately lands, bankers must be prepared to address the changing regulatory landscape under President Biden.



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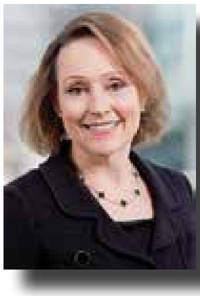

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