

States' Model Payments Law May Ease Entry For Fintechs

By Philip Rosenstein

Law360 (June 14, 2019, 10:38 PM EDT) -- State banking regulators are collaborating on a uniform model payments law that would facilitate compliance with different state rules, and in the absence of federal government action, some attorneys say the effort could benefit fintech companies by providing multistate consistency.

As companies await a decision on the viability of the Office of the Comptroller of the Currency's fintech charter, the Conference of State Banking Supervisors has charged ahead with an initiative to address numerous pain points in state banking regulations. Through its Vision 2020 plan, the group hopes to provide consistency across money services business licensing requirements that vary by state.

The cost and time it takes to register in all relevant states in which a fintech company wants to do business can create considerable barriers to entry for many smaller players, and the CSBS says it wants to address that.

"CSBS, for example, has released a series of recommendations aimed at streamlining and simplifying the multiple state requirements that apply when nonbank firms conduct business across state lines," Karen Solomon, who was chief counsel at the Office of the Comptroller of the Currency and now practices at Covington & Burling LLP, told Law360. "The CSBS' Vision 2020 initiative is aimed squarely at trying to streamline the many state application processes required for fintech companies to deploy products on a nationwide basis."

Much of this complication stems from the dual-banking system born of federalism in the United States, Solomon said, creating a situation in which fintech companies need to make complex decisions about how they want to be regulated and by whom. Every company that wants to engage in banking needs to understand which federal and state banking regulations apply, and it might not always be obvious, she said.

"In most cases, we are looking at whether there are any licensing or registration requirements that might apply to the client's activities, such as lender or loan broker licenses, money transmitter licenses, or whether the client may be acting as a securities broker or an investment adviser," said William Stern, a partner in Goodwin & Procter LLP's fintech practice who also focuses on banking and consumer financial services.

Beyond licenses, Stern said fintech companies need to be aware of the myriad disclosure requirements

that might apply, including privacy notices, consumer disclosure and consent compliance requirements, or further information on what type of product is being provided under the Truth in Lending Act and Truth in Savings Act.

The CSBS put together a fintech industry advisory panel that presented recommendations in early 2019 on how to start addressing a variety of these issues. The model payments law has taken center stage in the discussion around conforming state money services business regulations, given the rise in companies looking to move into the industry, with many of them touting novel technologies.

"It can be enormously difficult to have a national program and still comply with all these varying requirements," David Beam, a partner in Mayer Brown LLP's financial services regulatory and enforcement group, told Law360.

The CSBS put out a request for information on their model payments law in February and received encouraging comments from large fintech companies including PayPal and TransferWise.

"We agree with the stated mission of money transmitter regulation consumer protection, stopping bad actors and protecting the financial system, and believe it can be better achieved by aligning state standards and moving beyond the patchwork of rules that currently exist," TransferWise said in its comments.

The CSBS found that despite general similarities between how states regulate money transmission, there are considerable differences in definitions, interpretations and exemptions. The fintech industry advisory panel outlined in the request for information various suggestions for how definitions and exemptions should be harmonized, including lending an eye to federal definitions.

CSBS senior vice president and deputy general counsel Margaret Liu told Law360 that state regulators are currently working on reviewing industry comments in response to the request for information, and said she expects at least some language to be released for public comment by the end of the year.

"What Vision 2020 is is a commitment by all the states to meet innovation with innovation and work toward a more networked and efficient system, importantly one that does not dilute regulatory responsibility, especially in the consumer protection space," Liu said.

"When we talk about a model law, you might also think about it in terms of model approaches," she added. "There are lots of different ways to get to consistency."

Meanwhile, the CSBS has locked horns in federal court with the OCC over the latter's special purpose national bank charter for fintech companies, with a similar case brought by the New York Department of Financial Services.

The OCC said last July it was ready to begin accepting applications for a special purpose national bank charter for fintech companies, providing a simplified avenue to engage in banking activities on a national scale. The CSBS and DFS promptly challenged the federal agency in court, saying it was reaching beyond its congressional mandate by redefining the business of banking.

Both the model payments law and the OCC fintech charter are trying to do largely the same thing: simplify banking regulations for companies not chartered as banks.

Beam, however, thinks the states can take the lead on addressing regulatory issues fintech companies face.

With legal challenges to the OCC's fintech charter making their way through the federal courts and expected to be appealed, many nondepository fintech companies will be required to continue conforming to regulatory requirements at the state level.

The states "are the ones who are going to have to find a way to make the state licensing and regulatory system more workable for early stage fintech companies," Beam said.

Through Vision 2020, Liu said the CSBS is applying tenets borrowed from the startup world, including agility and the drive to continually innovate.

"We recognize that there's an opportunity here and a responsibility" to address these concerns around regulatory consistency, Liu said. "Through all this interaction with the industry and other stakeholders, we think we see an opportunity for some real improvement."

--Editing by Philip Shea and Michael Watanabe.