Fintech Laws and Regulations 2023 | USA

Andy Lorentz and Thomas Kost

GLI –Fintech 2023 is a U.K.-based online guide to key Fintech developments across the globe. Each chapter covers approaches and developments, Fintech offerings, related technology, regulatory bodies, key regulations and restrictions, and cross-border business considerations for 26 jurisdictions.

We have preserved the chapter in its original format, with the addition of highlighting our contributing attorneys for each section.

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1. Approaches and developments

Overview of U.S. approach to regulating financial services

Fintech, like all financial services in the U.S., is regulated at both the state and federal levels. Each of the 50 states and the federal government have passed their own body of laws that may apply to financial services and providers of financial services. This is also true of the subset of financial services providers who operate in the banking industry, which is subject to the dual banking system in the U.S., under which banks are chartered and supervised by either a U.S. state or the federal government.

The broad network of laws that apply to Fintech are implemented and enforced by a similarly broad network of U.S. state and federal agencies, each with a differing (but often overlapping) scope of authority. Some agencies focus on specific types of entities, other agencies focus on specific products and services, and yet others have a general mandate to protect consumers from harm across a range of entities and services. Federal law and the authority of federal agencies often pre-empt (or displace) state laws and agencies where there is direct conflict. However, for numerous Fintech-related issues, there is no specific federal law, subjecting the industry to both levels of authority.

Regulation of financial services in the U.S. takes many forms. State and federal agencies may: be empowered to write new rules and regulations with the force of law; interpret existing rules and regulations; grant licences to entities to engage in specialised activities like banking or lending; examine entities' records or practices; investigate entities' compliance with the law; and, ultimately, enforce the law through administrative or court proceedings in the event of alleged violations.

The regulatory landscape for Fintech is continually evolving as each regulator takes its own approach to establishing a framework that is consistent with its mandate while also promoting beneficial innovation. The specific mix of compliance obligations and regulators to whom a Fintech entity must answer will depend on how the entity structures its program, the types of products or services it offers, and the particular jurisdictions in which it operates.

Andy Lorentz

Partner, Washington, D.C.

Andy Lorentz helps clients find the shortest path through the maze of regulations between their vision and the launch of a commercial Product. As the co-chair of DWT's FinTech practice, he advises on complex regulatory issues and transactions and helps resolve disputes. Andy is committed to driving change within the delivery of legal services, drawing on lessons learned from the industry's most innovative and disruptive companies.

Thomas Kost

Counsel, Seattle

Thomas Kost draws on his experience as a federal regulator to guide financial services companies through high-stakes enforcement and supervisory matters, litigation, and compliance challenges. A former staff attorney with the FTC's Bureau of Consumer Protection, Thomas has handled all aspects of complex governmental investigations and litigation involving a wide variety of consumer financial laws.

Major opportunities and challenges for Fintech

The trends driving disruption of financial services in the U.S. continue to accelerate – including changes in customer preferences, the speed and capacity of data networks and processing, the ubiquity of data exchange via ever-more capable APIs, and a fragmented regulatory framework – leaving incumbent providers labouring under legacy compliance and technology infrastructures that are slow and costly to adapt (and hence creating openings for new players). Cloud computing continues to grow in importance for financial services across various deployment models, both for traditional financial institutions and Fintechs, and is attracting increasing regulatory attention as the key platform for artificial intelligence and modeling. Commercial applications of quantum computing in financial services are also coming to market.

The division of the U.S. into over 50 jurisdictions, each with its own regulatory authority, creates constant tension with the preferred Fintech "software-as-a-service" model that depends on the ability to scale products for a national market. The industry has trended towards increasing sophistication and beneficial collaboration between Fintech entities and chartered and licensed financial institutions in launching products. This trend has led U.S. federal and state regulators to engage in sincere efforts to likewise innovate in their oversight of financial services.

In addition to the major contributions of U.S. Fintech entities in offering innovative products, Fintech entities from other countries are injecting energy and dynamism into the U.S. market for financial services. Nevertheless, Fintech in the U.S. continues to be challenged by inconsistent regulatory expectations – even from the same regulators depending on the political climate – and by the struggle of U.S. regulators to adapt their dated regulatory frameworks to keep pace with new Fintech models.

Andy Lorentz

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2. Fintech offerings in the U.S.

Fintech is disrupting virtually every aspect of the U.S. market for financial services. Below, we highlight a few of the most prominent Fintech offerings, as well as efforts by regulators to ensure that these offerings conform to appropriate guardrails.

Bank-fintech partnerships

Bank partnership agreements form the foundation of many U.S. Fintech offerings for lending, deposit, and payments products. When done correctly, these partnerships offer immense mutual benefits to the parties. Regulators expect that the bank will retain complete oversight and control over the delivery of the financial products and services, which must be offered by the bank itself through direct customer relationships with end users. This requirement of control may generate friction with the business objectives of the Fintech concerning its parallel relationship with the end user.

For banks, Fintechs present an opportunity to engage in new markets and diversify their product portfolios and customer base. For Fintechs, partnering with banks allows them to expand their geographical reach, leverage the bank's deep regulatory knowledge, and mitigate compliance burdens. Fintechs can rely on the bank's charter to avoid onerous licensing requirements, as is the case for money transmission or consumer lending. The bank-Fintech partnership thus enables innovation and creates a faster path for new products to get to market. For so-called "Banking-as-a-Service" and "embedded finance" models, the technology provider provides a technology layer between the customer-facing Fintech and the financial institution, enabling a broader range of both banks and Fintechs to deliver their combined solutions. The increased distance between the bank and the end user, however, presents its own set of challenges in lessened transparency and flexibility with a more commoditized set of offerings.

Ryan Richardson

Partner, New York

Ryan Richardson has deep experience negotiating and documenting strategic, business-critical relationships for fintechs, banks, retailers, and their financial services and tech partners. Ryan's broad deal experience encompasses the enablement of payment products, marketplace lending platforms, BaaS offerings, and related technologies such as identity verification and data mining. A lifelong points and miles geek, Ryan has significant experience with card-based and tender-neutral loyalty programs.

Kristal Rovira

Associate, Washington, D.C.

Kristal Rovira is an associate in the Financial Services practice group, where she counsels clients on regulatory and transactional matters in the banking and payments space. Kristal's practice focuses on anti-money laundering, data-protection, and other compliance matters. She advises financial institutions and fintech companies on payment network rules, state and federal money transmission regulations, and consumer compliance.

Commercial financing

In recent years, Fintechs have transformed the market for commercial financing by making a range of innovative products available to small businesses. These products take many forms from traditional credit products like fixed-term loans, business lines of credit, and commercial mortgages to non-credit products like factoring, merchant cash advance, and other sales-based financing repaid as a percentage of a business's future receipts. Fintechs have expanded access to these products to small businesses that have historically been unable to meet strict bank underwriting standards by leveraging technologies that increase the speed and accuracy of credit decisioning, including technologies that enable cash-flow underwriting to assess an applicant's eligibility.

While generally not subject to consumer credit laws, Fintechs are faced with increasing regulatory oversight of their commercial financing offerings –regardless of whether those offerings are characterized as "credit." At the state level, California,[1] New York,[2] and several others have recently enacted laws and regulations requiring commercial financing providers to make consumer-like disclosures to applicants. Providers of commercial credit must also comply with certain aspects of the Equal Credit Opportunity Act ("ECOA"), which is a federal fair lending law, and its implementing Regulation B. In March 2023, the CFPB amended Regulation B to require commercial lenders to collect and report certain demographic data on applications for credit from small businesses, including those that are owned by women or minorities.[3] Notably, the CFPB made clear that it considers merchant cash advance and other types of sales-based financing (but not factoring) to be "credit" for purposes of ECOA and Regulation B. Finally, state and federal regulators have brought enforcement actions against Fintechs offering commercial financing under laws that prohibit unfair or deceptive acts and practices, including the federal FTC Act.

Thomas Kost

Aisha Smith

Counsel, Washington, D.C.

Aisha provides sound transactional and regulatory advice to a broad clientele in the financial services sector, including banks, nondepository financial institutions, loan servicers, payment processors, and fintechs. She has extensive experience guiding clients through complex matters before state banking regulators, federal agencies, and congressional committees.

“Earned wage access”

In the U.S., most employers pay employees on a periodic basis, meaning employees usually accrue weeks of wages that they cannot access until payday. Earned wage access products (“EWA”) have emerged to bridge this gap and allow employees to access earned wages before payday, providing increased liquidity to individuals living paycheck-to-paycheck. EWAs are a rapidly growing product with widely varied implementation and an uncertain regulatory future.

There are two primary EWA structures. In employer-based EWAs, the employer identifies the wages currently owed to employees, the provider delivers the employees funds up to that amount, and the provider recovers the funds through payroll deductions. In direct-to- consumer EWAs, the provider reviews a consumer’s wage history and delivers an amount of funds (the estimated earned wages based upon such history), and the provider recovers the funds by withdrawing from the consumers bank account after payday. EWA revenue can come from the employer, consumer subscriptions or tips, or transaction or interchange fees, but EWAs do not charge interest.

Regulators are still developing their regulatory approach to EWAs, and they may treat different structures differently. At the federal level, the Consumer Financial Protection Bureau (“CFPB”) issued an advisory opinion about employer-based EWAs, stating they are not “credit” under certain federal consumer credit laws if they meet specific characteristics.[4] Also, the U.S. Treasury has described these programs as “on-demand pay arrangements” and proposed that they be treated as weekly payroll and not as loans for tax purposes.[5] In the meantime, states have begun actively regulating EWAs: California’s Department of Financial Protection and Innovation proposed a rule that would oblige EWA providers to register with the state, and it entered several Memoranda of Understanding with providers.[6] Nevada instituted the first EWA licensing regime in June 2023 with Missouri following close behind in July 2023 with a law requiring registration.[7] The EWA regulatory environment will continue to develop as EWAs mature and more regulators step into this space.

Jonathan Engel

Partner, Washington, D.C.

Jonathan guides financial services clients through their most delicate and high-stakes controversies and regulatory matters. Having served as an enforcement attorney at the Consumer Financial Protection Bureau and Assistant Attorney General in Massachusetts, Jonathan offers clients the experience and perspective they need to solve problems and identify regulatory hot spots.

Andy Lorentz

Samuel P.A. Fox

Associate

Sam Fox helps DWT clients bring their products to market. Prior to joining the firm, Sam served as lead counsel for Arizona's fintech Sandbox – the first such program in the country – giving Sam a regulator's perspective on new and novel financial products and services. That experience allows Sam to anticipate and mitigate the legal and operational challenges that innovative companies face.

Rich Zukowsky

Associate, New York

Rich Zukowsky counsels clients across the financial services and technology industries on regulatory, enforcement, and transactional matters. His experience as a former in-house associate at a major financial institution informs his approach, which emphasizes pragmatic, business-focused solutions.

Buy now, pay later

Over the last few years, "buy now, pay later products (or "BNPLs") are now one of the leading point-of-sale financing solutions in the U.S. BNPLs offered by Fintech entities provide U.S. consumers yet another option to finance their online (and increasingly instore) purchases beyond credit and debit cards and traditional purchase financing plans.

Traditionally, BNPLs are zero-interest payment plans repaid in four instalments every two weeks, with the first payment often due at the time of purchase. They have proven beneficial to both merchants and consumers. For merchants, BNPLs offer an alternative to high-cost credit cards without the need to adhere to onerous private credit card network rules. Consumers view BNPLs as a more efficient way to access credit, as most BNPL providers do not rely on credit scores or other prerequisites that traditionally create barriers to credit. Other consumers look at BNPLs to avoid carrying a credit card balance that may be subject to high interest rates and costly penalty fees.

Early BNPL providers were Fintech entities that, in general, took the view that they were not subject to federal and state lending laws. The BNPL market experienced exponential consumer adoption and gained increased scrutiny from federal and state regulators. In 2020, however, state enforcement actions led by the California Department of Financial Protection and Innovation resulted in the industry coming under state consumer licensed lending laws in California and certain other states, leading to a re-appraisal of this approach. In 2022, the CFPB issued a report with key findings on the BNPL industry, concluding that BNPL products create financial risk for consumers. The report highlighted the industry's lack of standardized disclosures, dispute resolution complaints, and other consumer protection issues.[8] The Federal Trade Commission ("FTC") also called attention to BNPL providers, reminding them of the extensive reach of Section 5 of the FTC Act for potential violations.[9] In 2022, the CFPB published a survey examining the financial profiles of consumers using BNPL products.[10] The survey found average users of BNPL products made substantial use of credit products, were more likely to be indebted and typically had lower credit score. In July 2023, the CPFB issued a joint statement with the Commissioner for Justice and Consumer Protection of the European Commission, which included a specific mention of "[n]ew forms of credit such as Buy Now, Pay Later' products, and the related risks to consumers, including over-consumption and over-indebtedness," further emphasizing increased scrutiny over the effects of BNPL on the consumer credit market.[11]

Today, the term "BNPL" is often used to describe more generally any point-of-sale financing option, including interest or fee-based loans. Moreover, BNPL providers have expanded their offerings to include card-based BNPL plans. They have also leveraged their customer relationships to enhance the shopping experience, with more targeted advertising, buying advice and other related services. In response, traditional lenders, including banks, are increasingly offering their own BNPL-like products, in order to make their loans and other credit offerings more accessible to customers at the point-of-sale.

Brian Hurh

Partner, Washington, D.C.

As co-lead for the regulatory business line of DWT's Banking and Financial Services practice group, Brian helps financial services and technology clients navigate the complex array of federal and state banking, payments, and financial privacy laws. A former systems engineer and computer programmer for an internet payment startup, Brian has both the legal and technical expertise to understand the regulatory and business needs of FinTechs.

Cryptocurrency

Cryptocurrency refers to digital units of value that can be transferred or exchanged without a central intermediary through the use of blockchain technology. Cryptocurrency is not backed by a government (e.g., no deposit insurance). Developers have created hundreds of tokens and coins that vary widely in use-case and popularity.

Cryptocurrency generally falls into two categories: bitcoins/altcoins (e.g., Ether); and stablecoins. Bitcoin is volatile, whereas a privately issued stablecoin backed 100 per cent by cash or high-quality liquid assets is designed to maintain a fixed value. Stablecoins are digital tokens whose value is tied to an external asset. The value of "payment" stablecoins, for example, is pegged to a fiat currency (e.g., the U.S. Dollar).[12] Payment stablecoins are backed by reserves (cash, U.S. Treasuries). Algorithmic stablecoins, however, have no associated reserve asset. An algorithm sets rules for balancing supply and demand. In May 2022, the TerraUSD algorithmic stablecoin broke its one-dollar peg, eroding $60 billion in value.

Federal regulators have identified varied and significant risks associated with payment stablecoins.[13] There have been a number of legislative efforts focused on addressing these risks.[14] It is possible that future federal regulation and oversight could make the payment stablecoin system while also supporting financial inclusion by making cross-border remittances cheaper. Because stablecoins can be used to transfer funds, near instantaneously, on peer-to-peer networks across digital wallets for potentially low fees, some have noted that '[s]tablecoins have the potential to spur growth and innovation in payment systems, allowing for faster, cheaper payments".[15]

In addition, cryptocurrency transactions and businesses engaged in facilitating such transactions are subject to money transmission laws to varying degrees. The Financial Crimes Enforcement Network ("FinCEN") regulates what it has dubbed "convertible virtual currency" under the Bank Secrecy Act.[16] Some states were early adopters of laws specifically targeting cryptocurrency activities, such as the New York BitLicense.[17] Meanwhile, other states are considering versions of the Uniform Regulation of Virtual-Currency Business Act, which would create a tailored cryptocurrency licensing framework.[18] Some states have chosen to treat cryptocurrency activities as money transmission,[19] while others have chosen not to regulate cryptocurrency under their money transmitter laws or virtual currency-specific laws.[20]

Alexandra Steinberg Barrage

Partner, Washington, D.C.

Alexandra Barrage leverages her years of legal and policymaking experience with the Federal Deposit Insurance Corporation (FDIC), as well as over a decade advising clients in the private sector on corporate bankruptcy matters, to provide financial institutions and technology companies with strategic advice on matters including prudential regulation, bankruptcy, digital assets, and related legislative and regulatory developments.

Matthew Bornfreund

Associate, Washington, D.C.

Matthew Bornfreund leverages experience as a federal regulator to counsel FinTechs on all aspects of their regulated operations and help them launch new products and services. He draws on his experience an attorney in the Legal Division at the Federal Reserve Board and his background in IT to help his clients see around corners and navigate the complex and evolving laws in the banking and financial services sectors.

3. Regulatory Bodies

A broad constellation of state and federal agencies regulate Fintech entities and products. Many of these agencies have created innovation offices specifically to address Fintech- related developments.

Federal banking regulators

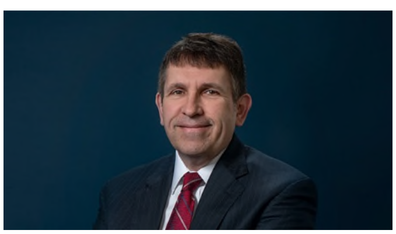
Four federal prudential regulators are principally responsible for regulating the banking industry, including Fintech entities that engage in the business of banking. Each agency focuses on different elements of the industry, but all have taken actions to embrace Fintech.

- The Federal Deposit Insurance Corporation ("FDIC") is the primary federal regulator of state-chartered banks that are not members of the Federal Reserve System. The FDIC is in the midst of a significant update to modernise the bank call report based on Fintech and artificial intelligence solutions.

- The Office of the Comptroller of the Currency ("OCC") regulates and charters national banks and federal savings associations. The OCC has established an Office of Innovation to develop a regulatory framework that supports responsible innovation.

- The Board of Governors of the Federal Reserve System ("FRB") is the primary regulator of all state-chartered banks that are members of the Federal Reserve System and oversees the operations of all depository institution holding companies. The FRB continues to support responsible innovation, with a focus on facilitating real-time payments, studying the risks and opportunities with digital currencies, and supporting the use of artificial intelligence in financial services.

- The National Credit Union Administration ("NCUA") charters national credit unions and regulates all national and state-chartered credit unions. The NCUA has taken a more measured approach to Fintech-related developments.



Kevin Petrasic

Partner, Washington, D.C.

Kevin Petrasic advises leading U.S. and international financial institutions on core bank regulatory issues, critical compliance and policy matters, and risks arising from innovative financial technology. The breadth and sophistication of Kevin's practice, his long relationships with financial services providers, and his broad government experience—including service in senior posts with the U.S. Treasury Department's Office of Thrift Supervision and the House Banking Committee—have equipped him to develop practical solutions.

Matthew Bornfreund

Other federal regulators

In addition to the federal banking agencies, other federal regulators play an important role in regulating the impact and influence of Fintech.

- The Consumer Financial Protection Bureau ("CFPB") supervises and enforces compliance with many federal consumer financial protection laws that impact Fintech. The CFPB's supervisory authority typically covers large banks and some non-bank financial services companies, including mortgage lenders, debt collectors, and student loan servicers. The CFPB also has broad authority to write regulations and enforce consumer protection laws.

- The Federal Trade Commission ("FTC") promotes competition and protects consumers from unfair or deceptive acts and practices in the marketplace. The FTC's authority extends to non-bank Fintech entities that provide a variety of financial services, including lending, payments, and cryptocurrency offerings.

- The Financial Crimes Enforcement Network ("FinCEN") collects, analyses and disseminates financial intelligence to combat money laundering and terrorist financing and promote national security, and prescribes rules for financial institutions' anti-money laundering ("AML") compliance programmes. FinCEN's Innovation Initiative promotes innovation in AML compliance through the adoption of new technologies.

- The Office of Foreign Assets Control ("OFAC") administers U.S. sanctions programs with a significant extra-territorial reach. OFAC's authority extends to all U.S. persons and in practice, any transaction with a link to the United States.

- The Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission ("CFTC"), and Financial Industry Regulatory Authority ("FINRA") protect investors from Fintech-related scams and enforce federal securities and commodities trading laws implicated in Fintech offerings. The agencies also promote Fintech through initiatives such as the SEC's Strategic Hub for Innovation and Financial Technology, the CFTC's LabCFTC, and FINRA's Office of Financial Innovation. responsible for collection, analysis, and dissemination of financial intelligence to combat money laundering and terrorist financing and promote national security.

Kevin Petrasic

Matthew Bornfreund

State regulators

Over the past several years, most state banking and financial services regulators have expanded the scope and reach of their oversight and regulation of Fintech, particularly with respect to the Fintech offerings from state-chartered banks and non-bank financial services providers (which traditionally have been regulated at the state level).

A state banking regulator organisation, the Conference of State Banking Supervisors ("CSBS"), helps to coordinate and promote uniformity and consistency among state regulators with respect to these issues.[21] The non-bank state regulators operate the Money Transmitter Regulators Association for similar purposes.[22]

At the same time, some state regulators have pursued an aggressive agenda both to regulate Fintech and promote innovation. For example, the New York Department of Financial Services ("NYDFS") has been at the forefront of efforts to license cryptocurrency businesses, including transmitting and buying/selling virtual currency and providing exchange services. NYDFS has also established a "DFS Exchange" programme to support Fintech innovation by engaging with financial innovators and stakeholders.[23] Like New York, California has moved aggressively to regulate Fintech with an eye towards consumer protection while simultaneously trying to promote innovation. California even changed the name of the agency responsible for financial services regulation from the "Department of Business Oversight" to the "Department of Financial Protection and Innovation" and created an Office of Financial Technology Innovation to foster innovation in consumer financial products and services.[24]

In addition, several states have established so-called "sandboxes", which are intended to enable entities to test new Fintech products and services in the marketplace without the need to obtain otherwise-required licenses. States that have established Fintech sandboxes include Arizona, Florida, Nevada, Utah, West Virginia, and Wyoming.

Kevin Petrasic

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4. Key regulations and regulatory approaches

Fintech offerings are subject to extensive product-level regulation by the federal government and individual states. The relevant laws and regulations, which collectively form the bedrock of the U.S. system for regulating the financial services industry, are too numerous to mention here.[25] Fintech entities also are subject to licensing and chartering regimes at both the federal and state levels, which collectively determine whether and how firms are supervised by regulatory authorities.

Within this broader regulatory architecture, U.S. regulators have responded in various ways to Fintech-related innovations.

Fintech charters

To provide a uniform regulatory structure, the OCC has proposed issuing special purpose national bank charters (Fintech charters) to qualifying Fintech entities.[26] These so-called Fintech banks would be authorised to lend money and transmit funds, but not accept deposits. Because the Fintech charter would be issued under the National Bank

Act, Fintech banks would benefit from federal pre-emption of state lending and money transmission licensing requirements.

Although companies have been able to apply for a Fintech charter since 2018, none have been granted.[27] The lack of interest is likely due to uncertainty caused by state challenges to the OCC's legal authority to issue such charters.[28]

Matthew Bornfreund

Supervision by the CFPB

In April 2022, the CFPB announced its intent to begin using a "largely unused legal provision" of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to conduct examinations of certain nonbank Fintech entities that are deemed to pose risks to consumers.[29]

The CFPB Director explained that asserting this authority is necessary for the CFPB to "move as quickly as the market" when regulating Fintech offerings. Fintech entities selected for examination should expect to be held to the same high standards that banks are held to by the CFPB. Indeed, supervisory examinations can be especially daunting because the CFPB has wide latitude to "review the books and records of regulated entities".

The CFPB's rediscovery of this previously dormant authority could ultimately lead to increased enforcement activity against Fintech entities based on issues uncovered during examinations.

Thomas Kost

Federal credit laws

Secured and unsecured credit products, including credit cards, lines of credit, and mortgages, may be governed at the federal level by the Truth In Lending Act ("TILA"), Fair Credit Opportunity Act ("FCRA"), ECOA, and their respective implementing regulations. Most such laws and regulations apply only to consumer products, with the important exception of ECOA.

TILA and Regulation Z require disclosure of important credit terms in marketing materials, at the time of application and at account opening. Additional disclosures are required with each billing cycle and in cases of transaction disputes. Credit cards have specific requirements under TILA; examples include ability-to-pay analysis, restrictions on fees and rate increases, and requirements for marketing on college campuses. The CFPB's 2023 rulemaking on fees may impose further restrictions on credit card fees. Mortgages also have specific disclosure and servicing requirements under TILA and Regulation Z.

ECOA and Regulation B require that creditors do not discriminate on a prohibited basis (e.g., race, religion, sex) in the making of any loan, including for business purposes or discourage applicants from such protected classes. Additionally, ECOA and Regulation B require creditors to notify applicants of credit decisions, counteroffers, or requests for additional information within certain timeframes. When a creditor takes an adverse action (e.g., denies an application, decreases a credit limit) against a credit applicant or accountholder, the creditor's notice must inform the applicant about the nature of the adverse action decision.

FCRA and Regulation V, while largely data privacy laws, include various requirements associated with credit products. For example, creditors must send adverse action notices where personal consumer report information is used to make the adverse decision. Additionally, creditors must send a "risk-based pricing notice" when consumer report information is used to extend credit on terms materially less favourable than the terms available to a substantial proportion of consumers.

Aisha Smith

Rich Zukowsky

State money transmitter and consumer credit laws

Technology companies have capitalised on the shift to digital and mobile payments by offering free or low-cost bank account substitutes with payment capabilities to unbanked or underbanked consumers. They also have developed applications that allow users to send and receive electronic payments instantly from their computer or phone, often in conjunction with other financial and non-financial services.

The ease with which digital payments can be enabled nationwide means that the requirement to obtain money transmission licences in 49 states[30] for digital wallet or payment service providers has become a significant bottleneck in bringing such solutions to market. Many Fintechs partner with a bank to increase their range of financial product offerings and speed to market, however the "banking-as-a-service" model is coming under some pressure from regulators.[31] An increasing number of Fintech entities are alternatively seeking a bank charter to avoid state-by-state licensure, with Varo Bank becoming the first "neobank" to obtain a national charter in 2020. In response, state regulators have taken significant steps in collaborating to improve the efficiency of the money transmitter licensing and examination process.[32]

Fintech entities seeking to offer credit (particularly consumer credit) products and services, confront particular challenges under the U.S. system of parallel regulation by federal and state authorities. Consumer credit is subject to a thicket of product regulation at both levels. As a result, applicable disclosure and substantive requirements are inconsistent across states and often not well suited to modern financing products.

In order to charge a rate of interest that allows for a profitable product, Fintech lenders that choose to lend directly (i.e., without a bank or credit union partner) must confront state small loan licensing laws that often impose an antiquated licensing regime under which Fintech lenders are subject to state licensing requirements and regular examination. Even out-of-state banks may face claims by state regulators that they should obtain a state lending licence to lend to borrowers in other states, and Fintech entities working with bank lender partners also may be obliged to obtain state loan broker licences.[33] State loan broker laws may also apply, and in fact state licensed lending laws may apply to the Fintech even where the Fintech itself is not the creditor.

While there are some similarities in language and requirements among the states under both credit and money transmission regulation, there are also many state-by-state nuances, calling for a very robust compliance programme for a national offering.[34]34 Prospects for harmonising state-licensed lending laws seem unlikely, emphasising the need for Fintech financing providers to be able to rely on bank partnerships for the foreseeable future. However, efforts to harmonise state money transmission regimes and streamline their effects are brighter, with the efforts by the CSBS in this regard of special note.[35]35

Andy Lorentz

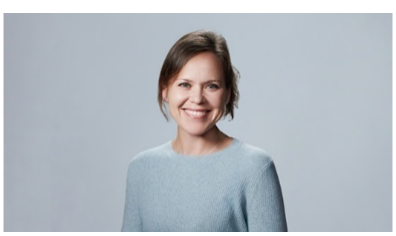
Regulatory framework for cryptocurrency

The regulatory framework around cryptocurrencies still lacks a definitive means to determine the legal character of any given token or coin. This uncertainty comes from a combination of the overlapping jurisdictions at the federal level of the SEC, CFTC, and FinCEN and the piecemeal opinions and rulemakings from the regulators trying to catch up with the industry.

Since 2013, FinCEN has defined convertible virtual currency ("CVC") as a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency.[36] In addition, the label given to any particular CVC (e.g., digital asset or cryptocurrency) is not dispositive of its regulatory treatment.[37]37

Meanwhile, some cryptocurrencies are securities. Under the Howey Test, the SEC deems the sale of a cryptocurrency to constitute an "investment contract," and thus, a security, if its sale involved: (1) the investment of money in a common enterprise; (2) with a reasonable expectation of profits; (3) and/or from the entrepreneurial or managerial efforts of others.[38]38 The Howey Test generally applies at issuance, and some cryptocurrencies already in wide circulation, such as bitcoin, are likely not securities.[39]39 The CFTC, however, views cryptocurrencies as commodities that are subject to its jurisdiction if they are (1) the subject of a derivatives contract, (2) sold on a leveraged basis to retail customers, or (3) sold in fraudulent or manipulative transactions.[40]40 Efforts in Congress to provide greater jurisdictional clarity have yet to bear fruit, but continue to sprout. In July 2023, Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced a revised version of their Responsible Financial Innovation Act ("RFIA") first introduced in the previous Congress in June 2022. Like the original RFIA, the 2023 bill proposes to more clearly delineate which cryptocurrencies are securities (still based largely on the Howey Test) to be regulated by the SEC and which would be regulated by the CFTC.[41] Under the RFIA, the CFTC would also be given authority to regulate cryptocurrency exchanges. The 2023 version adds significantly greater customer protection provisions including mandating segregation and third-party custody requirements for customer property, banning rehypothecation and setting up a customer protection and market integrity authority to be jointly chartered by the CFTC and SEC.

At the state level, some states have adopted specialized licensing regimes,[42] while others have applied their money transmission[43] and trust charter standards to cryptocurrency businesses.[44]



Alexandra Steinberg Barrage

Matthew Bornfreund

Anti-money laundering reform

On January 1, 2021, the U.S. Congress enacted the Anti-Money Laundering Act of 2020 ("AMLA"), which mandates sweeping reforms to the Bank Secrecy Act ("BSA") and other federal AML and counter-terror financing laws.[45] The AMLA requirements are currently in varying stages of implementation and the most significant progress has been made on the Corporate Transparency Act within the AMLA, which effective January 1, 2024 will require reporting companies to submit documentation about their beneficial owners to a database maintained by FinCEN. Database information will be non-public and for use by federal, state, and local authorities. The scope of access to the database by financial institutions and conforming changes to the Customer Due Diligence Rule are still the subject of pending or future rulemakings.

The AMLA also includes a number of provisions enhancing federal enforcement authorities, including significant whistleblower incentives and protections, and providing for additional administrative mechanisms to ensure compliance. Most notably for new entrants to the U.S. financial services market, the AMLA also permits FinCEN and the U.S. Department of Justice to subpoena non-U.S. banks that maintain correspondent accounts in the U.S. in order to request both U.S. and international AML records.

Dsu-Wei Yuen

Counsel, Seattle

Dsu-Wei Yuen helps connect senders and recipients of payments and the networks, processors, financial institutions, and FinTechs that sit between them. She combines prior experience as in-house counsel with a focus on emerging technologies to provide clear and practical advice on even the most complex regulatory and transactional issues.

Open banking

Unlike some other jurisdictions, U.S. regulators have not yet mandated the sharing of financial data between banks and consumers – commonly known as "open banking." However, the CFPB is currently engaged in a rulemaking process regarding consumer access to financial records and the implementation of Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires consumer financial services providers to make financial data in their possession available to the consumer.[46]

In reference to this rulemaking, the CFPB has clearly stated its belief that increasing the portability of consumer financial transaction data will benefit consumers by allowing them to more easily switch banks and to take advantage of Fintech-enabled services. The CFPB has recently gone a step farther, (1) stating that it is working to accelerate the shift to open banking in the U.S. through a new personal data rights rule intended to break down these obstacles, jumpstart competition and protect financial privacy, and (2) acknowledging that many of the details in open banking will be handled through standard-setting outside the CFPB.[47]

To facilitate this rulemaking, the CFPB convened a panel under the Small Business Regulatory Enforcement Fairness Act in October 2022 and released a final report of the Small Business Review Panel on March 30, 2023.[48] This panel followed the Advance Notice of Proposed Rulemaking published by the CFPB in November 2020,[49] and the financial data sharing and aggregation principles published in 2017.[50] The final report of the Small Business Review Panel primarily summarized the differing viewpoints of market participants on various topics, such as whether exemptions should be permitted for certain data providers, the risks and benefits of different data access methods, the scope of data required to be made available by covered data providers, options for promoting consistency in standards relating to the availability of information (such as data formats, data security), whether limitations on secondary uses of consumer data should be imposed, and the impact of various requirements on small businesses.

The CFPB anticipates publishing and soliciting comments on its formal proposal in Q3 or Q4 of 2023 and finalizing the rulemaking in 2024.[51]

Bill Schuerman

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Bill Schuerman assists financial institutions, financial services organizations, and technology companies in structuring and negotiating agreements for new products and technology offerings in the FinTech space—including data access and use arrangements, customized payments platforms for merchants and cardholders, B2B payments products for commercial users, and consumer-facing banking tools. His practice further includes representing clients both established and emerging growth companies in a diverse range of technologies and businesses.

Amit Aulakh

Counsel, New York

Amit Aulakh brings an engineer's precision and a consultant's curiosity to the practice of law, helping clients to execute their ideas with confidence. Amit's career trajectory, from teenage tech nerd to software engineer, and from IT consultant to finance attorney, provides him with a knack for understanding complex concepts and demystifying them for his clients.

Jordan Thompson

Associate, Washington, D.C.

Jordan Thompson is a member of the firm's technology transactions practice group where he focuses on the development, licensing, and commercialization of technology, data, and intellectual property rights. He helps clients structure and negotiate agreements across a broad range of technologies, including media, entertainment, video games, Fintech, and cloud services.

New technology focus: artificial intelligence and cloud computing

Fintechs are rapidly expanding their use of artificial intelligence ("AI") and machine learning in the delivery of financial services. Early uses of AI drove innovations in underwriting and loan origination, enabling Fintech lenders to incorporate alternative data in loan pricing and decisions. More recently, AI has been used by other Fintechs to generate customer communications, anticipate needs to personalize the customer experience, improve trading and investment performance, and enhance fraud detection. Fintechs are also using AI for robotic process automation, including risk and compliance monitoring.

While state and federal financial regulators have increased their scrutiny of AI, none have initiated rulemaking uniquely applicable to AI. Regulators have, however, issued policy statements and guidance clarifying their expectation that all uses of AI comply with existing financial services laws and regulations.[52] Additionally, NIST, an agency of the U.S. Department of Commerce, released its Artificial Intelligence Risk Management Framework 1.0, as a voluntary risk-management guide for all technology companies that are designing, developing, deploying, or using AI systems to help manage the many risks of AI.[53]

Financial regulators are also focused on cloud service providers and their partnerships with financial institutions. While not directly related to AI, all uses of AI require substantial resources and infrastructure that are only available in cloud environments. While regulators are still educating themselves on cloud environments and AI generally, Fintechs must navigate compliance with existing laws and regulations, some of which may be outpaced by technological innovations.

Andy Lorentz

Aisha Smith

5. Restrictions

In general, substantive product and licensing restrictions applicable to Fintech entities are set forth in the federal and state laws discussed above. However, certain aspects of these laws have proved especially fluid and continue to evolve to meet perceived regulatory challenges created by new innovations. A few such developments are highlighted below.

UDA(A)P enforcement

Unfair or deceptive acts or practices in trade or commerce are widely prohibited by both state and federal laws. The federal Consumer Financial Protection Act further prohibits "abusive" acts or practices. Together, these practices are often referred to as "UDAAPs", and the laws prohibiting them generally apply to any entity that offers financial services to consumers or small businesses.

Under federal law,[54] a practice is "deceptive" if it involves a material representation or omission that is likely to mislead a consumer acting reasonably in the circumstances. A practice is "unfair" if it is likely to cause substantial injury to consumers, is not reasonably avoidable, and is not outweighed by countervailing benefits to consumers or to competition. A practice is "abusive" if it materially interferes with consumers' understanding of a term or condition of a financial product or service or if it takes unreasonable advantage of consumers in certain circumstances. While the legal standards for "unfairness" and "deception" are supported by decades of precedent, the standard for "abusiveness" is relatively new and underdeveloped. For this reason, in April 2023, the CFPB issued a policy statement to resolve persistent confusion over the "abusiveness" standard. The policy statement emphasizes that the "abusiveness" standard is meant to address "gaps in understanding, unequal bargaining power, and consumer reliance".[55]

Fintech entities must navigate a regulatory environment in which UDAAP standards are deliberately broad and continually evolving. Indeed, regulators use the flexible nature of these laws to fill perceived gaps left by other, more prescriptive regulatory schemes. In the absence of detailed laws or regulations clarifying what is and is not a UDAAP, Fintech entities often need to rely on agency precedent in the form of enforcement actions, including litigation and negotiated consent orders, to better understand regulators' expectations. For instance, the FTC has brought several recent enforcement actions against Fintech entities alleging "unfair or deceptive" practices relating to online lending, crowdfunding, payment processing, peer-to-peer payments, and cryptocurrency that establish the guardrails within which Fintech entities are expected to operate.[56]

Jonathan Engel

Thomas Kost

“Junk fees”

In early 2022, the CFPB and FTC launched a coordinated campaign to crack down on so- called “junk fees” charged in connection with consumer financial products and services. Regulators use “junk fees” as a catch-all term to describe fees that are “unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value.”[57] Specific examples of junk fees include: unnecessary charges for worthless, free, or fake products or services; unavoidable charges imposed on consumers; or surprise charges that increase the purchase price.

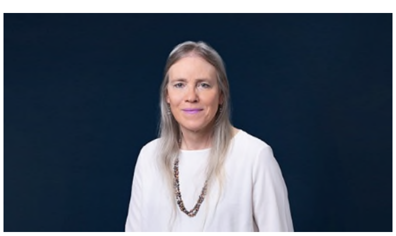
The campaign against “junk fees” includes both rulemaking and enforcement efforts. In October 2022, the FTC published an Advance Notice of Proposed Rulemaking (ANPR) that would define “junk fees” as prohibited deceptive or unfair acts or practices and enable the FTC to impose civil penalties on entities that violate the prohibition.[58] Even in the absence of a final rule, the CFPB and FTC have already been aggressive in bringing enforcement actions aimed at alleged junk fees using their existing UDAAP authority.[59]

Thomas Kost

Kristal Rovira

SEC, CFTC, state cryptocurrency enforcement

In 2022 and 2023, the SEC and state securities regulators have continued to use federal and state securities laws prohibiting the unregistered sale of securities and fraud in such sales to bring actions against issuers of cryptocurrencies and those who tout them.[60] In newer developments, however, the SEC has used its authority to bring cases against intermediaries offering interest paying cryptocurrency accounts and staking services. In one case, the SEC asserted that the portfolio of underlying investments made one defendant an unregistered investment company,[61] and in others the SEC alleged the interest paying product[62] or staking service constituted an investment contract or a note requiring registration.[63] In addition, the SEC has brought actions against trading platforms alleging that their offer to trade cryptocurrencies that are securities makes them illegal, unregistered securities exchanges.[64] The CFTC has continued to use its traditional cash market anti-fraud authority in response to the collapse of the FTX cryptocurrency platform,[65] but has also brought a first-of-its- kind action against a decentralized autonomous organization ("DAO") for the illegal sale of cryptocurrency on margin to retail customers.[66] The CFTC has also brought another precedent-setting enforcement action against a trader for allegedly exploiting coding flaws on another DAO to manipulate the price of cryptocurrency trading on the DAO.[67]



Katherine Cooper

Partner, New York

Katherine advises on the sale and trading of commodities, derivatives, securities, and digital assets. She also represents clients in related regulatory and grand jury investigations, enforcement actions, and criminal prosecutions.

Data privacy and security requirements

Financial institutions are generally subject to federal (and some state) privacy and security requirements, including the Gramm-Leach-Bliley Act ("GLBA"), its implementing Regulation P, and the FTC's Safeguards Rule.[68] For Fintech entities that partner with financial institutions (such as when offering banking as a service), the determination as to which privacy regime applies – and how to manage data under those regimes – can be difficult. For example, as servicer to a financial institution, a Fintech entity would normally operate under the GLBA –directly as a recipient of the financial institution's data but also contractually under its agreement with the financial institution. In providing its own services, a Fintech entity would have its own privacy compliance obligations, whether under the GLBA[69] (if its services are financial in nature) or another privacy regime.

Other privacy regimes may include one or more of the numerous comprehensive state data protection laws that have been enacted over recent years, such as the California Consumer Privacy Act ("CCPA"). The CCPA, which has a scope that extends beyond California, does not apply to personal data subject to GLBA but otherwise applies to personal data processed by the Fintech if that entity meets the other CCPA financial or data processing thresholds. This is in contrast to the comprehensive data protection laws enacted by ten other states to date, which do not apply to financial institutions regulated by GLBA. The landscape is changing quickly however as more states join in with their own laws. For example, Oregon's Consumer Privacy Act, awaiting signature by the Oregon Governor at the time of this publication, exempts personal information subject to GLBA and financial institutions as defined by Oregon law, which is a narrower category of entities than are subject to GLBA. Regardless of which privacy regime applies, however, Fintech entities should be aware that UDAAP standards are always operating in the background. As such, regulators have often cited to UDAAP as a basis to initiate an enforcement action against a Fintech entity for problematic privacy practices, even if the Fintech entity has not clearly violated other privacy-focused laws that may apply. In other words, a Fintech entity's efforts to come into technical compliance with a particular privacy regime, while necessary as a legal matter, may be less relevant to a regulator if the Fintech entity's privacy practices are deemed to be unfair or deceptive.

Michael Borgia

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Mike Borgia leads DWT's information security group in the technology, communications, and privacy and security practice. He advises clients on data breach prevention, readiness and response, complex internal investigations, and compliance with global security laws and regulations.

Brian Hurh

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Partner, Seattle

David leverages more than 20 year of experience in privacy and security to guide clients through the challenge of complying with rapidly multiplying and complex laws in a multi-jurisdictional environment. Drawing on his extensive knowledge of the full spectrum of federal, state, and international privacy and data protection laws, David advises clients on a wide range of difficult privacy questions.

Engaging in the "business of banking"

Banks are among the most highly regulated entities in the U.S. Banks are authorised by their state or federal charter to engage in the "business of banking", which is generally defined as taking deposits, making loans, transferring payments, and other closely related activities. Due to the special status afforded to banks, including federal deposit insurance, many states prohibit the use of the term "bank" and related terms by non-banks,[70] including by Fintech entities. With increasingly more financial services being delivered through bank-Fintech partnerships, federal and state regulators have become concerned that consumers cannot sufficiently distinguish banks from non-banks and that non-banks may be engaging in the business of banking without authorisation. Fintechs partnering with banks to provide financial services should avoid describing themselves as "banks" or giving consumers the impression they are banks.[71]

In May 2022, the FDIC approved a final rule updating its official sign and advertising requirements to account for how Fintechs participate in delivering banking services and provide for greater scrutiny of, and penalties for, misuse of the FDIC's name and logo.[72] The CFPB issued a simultaneous release indicating that it may consider such misuse a deceptive practice under UDAAP standards.[73]

Bradford Hardin

Partner, Washington D.C.

Bradford Hardin co-chairs DWT's Financial Services Practice Group – an efficient and frictionless team that solves regulatory problems by combining deep industry expertise with the highest level of service. He has repeatedly been recognized as a leading practitioner by The National Law Journal, Super Lawyers, and Law360, and clients say he is "responsive, thoughtful, and pragmatic," and "great for complicated, cross-functional projects."

"True lender" doctrine

In the U.S., interest rates are generally regulated through state-by-state usury laws, creating a patchwork of permissible rates across the country. Under Section 27 of the Federal Deposit Insurance Act,[74] FDIC-insured banks are permitted to charge the interest rates permitted in the state where the bank is located regardless of where the borrower resides, enabling banks to offer uniform rates nationally. As a result, Fintech lenders often establish partnerships with banks to take advantage of their special status and avoid the complications of state-by-state rate regulation.

Plaintiffs and regulators have challenged the legitimacy of these partnerships in a number of high-profile cases in recent years, arguing that the Fintech entity is the "true lender" and the bank partnership was created for the sole purpose of avoiding state interest rate regulation. In resolving these cases, courts have considered either the structure of the partnership relationship – including how the credit is originated, serviced, or sold, and which party controlled the underwriting and servicing – or the economic benefits and risk of the partnership for the parties, or applied a combination of these approaches. When courts and regulators have concluded that the bank is not the "true lender," state-by-state rate limits are held to apply to the loans offered by the Fintech entity.

In October 2020, the OCC issued a final rule relating to "National Banks and Federal Savings Associations as Lenders" seeking to clarify these issues as to national banks and federal thrifts (the "true lender" rule).[75] On June 30, 2021, Congress rescinded the rule, and the OCC has not reissued the same or a substantially similar rule and may not do so without new congressional authorisation.[76]

The landscape has become even more complex with the passage of state-level legislation. The Illinois Predatory Loan Prevention Act, effective March 23, 2021, set a 36% rate cap on loans offered to consumers in Illinois.[77] Additionally, Maine and New Mexico passed similar legislation in 2021 and 2023, respectively.[78] These laws consider non-bank entities as the "true lender" if they hold the predominant economic interest in the loans.

As a result, Fintech-bank lending partnerships remain subject to the risk that a court or regulator will apply a 'true lender' theory to undermine the partnership's approach to interest rate limitations, calling into question the enforceability of the partner bank's loan agreement.

Bradford Hardin

Third-party risk management

Regulators expect that banks practice effective risk management when selecting, contracting with, and monitoring third parties with which the banks have business arrangements. These arrangements include working with or supporting Fintech to deliver banking-as-a-service ("BaaS"), offer lending and payments services, and provide essential financial activities that must be backed by a bank charter (e.g., deposit accounts and direct access to payments networks).

In June 2023, federal banking regulators issued final third-party risk management guidance for supervised banking institutions ("Final Guidance"), superseding each agency's previously separate guidance.[79] The Final Guidance establishes risk management principles that apply across the life cycle of banks' third-party relationships. These include the diligence and third-party selection process, ongoing monitoring, and considerations for the termination of relationships. The principles-based approach in the Final Guidance is applicable to all types of third-party relationships, including Fintech partnerships.

Regulators expect banks will make careful risk assessments for each third-party relationship. Two recent enforcement actions against banks that are prominent BaaS providers demonstrate the increased regulatory scrutiny in this area. In 2022, the OCC entered a written agreement with a bank highlighting the importance of bank oversight over Fintech partners, including the monitoring of suspicious and high-risk customer activity.[80] In 2023, the FDIC entered a consent order with another bank demonstrating the importance of fair lending compliance and consumer protection risk management when a bank makes loans through Fintech partnerships.[81]

Alexandra Steinberg Barrage

Matthew Bornfreund

6. Cross-border business

Regulators in the U.S. have participated in international initiatives to address the impact of new technologies in financial services. Two of the most notable cross-border collaborations are with the following organisations:

- The Financial Action Task Force ("FATF") is an intergovernmental body that coordinates the global response to preventing organised crime, corruption and terrorism. The FATF establishes international standards and policies for combatting money laundering and terrorism financing. FiAs, a FATF member the United States, is committed to implementing FATF's Standards and responsibility for devising implementing policies and regulations largely falls to Treasury and FinCEN.[82]

- The CFPB is a member of the Global Financial Innovation Network ("GFIN"), which is an alliance of regulatory agencies from across the globe who seek to encourage responsible financial innovation.[83] The GFIN works with international regulators to facilitate innovation in financial services and promote regulatory best practices. The CFPB works with GFIN through its Office of Innovation.

Rich Zukowsky

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7. Acknowledgements

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from the industry's most innovative and disruptive companies. Named as one of the country's top fintech lawyers for payments and lending by Chambers & Partners (Band 2), Andy has represented major banks and non-depository financial institutions, global technology companies, e-commerce and payment companies, and retailers. A large part of Andy's leadership in DWT's financial services group and his own practice concentrates on emerging technologies, the business models they enable, and the novel legal issues that arise as they intersect with ever-changing financial regulations. Many of Andy's clients have cross-border operations, and he and the DWT team have advised many companies on their initial entry to the U.S. market. Clients frequently comment on the breadth of perspective as a particular strength of his practice.

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Thomas Kost draws on his experience as a regulator to guide financial services companies through high-stakes enforcement and supervisory matters, litigation, and compliance challenges. A former staff attorney with the FTC's Bureau of Consumer Protection, Thomas has handled all aspects of complex governmental investigations and litigation involving a wide variety of consumer financial laws.

Thomas's experience spans a range of traditional and emerging consumer financial products and services. While with the FTC, Thomas also helped develop the agency's enforcement strategy relating to small business financing. He has also represented banks, card issuers, and non-bank financial services providers in matters involving retail deposit products, overdraft services, mortgage lending and servicing, unsecured lending, credit cards, and prepaid cards.

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to-create-regulatory-framework-for-digital- assets; Alexandra Steinberg Barrage et al., ***Gaining Momentum: The First Senate Discussion Draft on Stablecoins*** (Apr. 8, 2022), ***available at*** https://www.dwt.com/-/ media/files/blogs/financial-services-law-advisor/2022/04/first-senate-discussion-draft- on-stablecoins.pdf.

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[20] ***See, e.g.***, Texas Dept. of Banking, ***Supervisory Memorandum – 1037*** (April 1, 2019), ***available at*** https://www.dob.texas.gov/public/uploads/files/consumer-information/ sm1037.pdf. But note that stablecoins and other cryptocurrencies pegged to and redeemable for sovereign currency are considered "money or monetary value" subject to Texas' money transmitter law.

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[23] ***See*** N.Y. Dept. of Fin. Services, ***DFS Engagement Program: DFS Exchange***, https:// www.dfs.ny.gov/industry_guidance/innovation (last visited July 17, 2022).

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[26] OCC, ***Exploring Special Purpose National Bank Charters for Fintech Companies*** (Dec. 2016), ***available at*** https://www.occ.gov/publications-and-resources/ publications/ banker-education/files/pub-special-purpose-nat-bank-charters-fintech.pdf.

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[34] Federal consumer credit regulation is also very demanding and supplements the state regimes with product disclosure and substantive requirements; the whole lifecycle of consumer credit is regulated from application, underwriting, and servicing up to and including debt collection. For payments, states also regulate “stored value” under their money transmission laws, and the federal FinCEN regulates the analogous “prepaid access” to implement the Bank Secrecy Act’s anti-money laundering requirements.
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[43] Ga. Code Ann. § 7-1-680(26) (monetary value subject to money transmission licensing requirements includes “virtual currency”).
[44] Wy. Admin. Rules Chap. 19 (Wyoming Special Purpose Depository Institution Digital Asset Custody Framework).
[45] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6001, ***et seq.*** (2021), ***available at*** https://www.congress.gov/ bill/116th-congress/house-bill/6395.
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[53] National Institute of Standards and Technology, ***Artificial Intelligence Risk Management*** Framework (January 26, 2023), ***available at*** https://nvlpubs.nist.gov/nistpubs/ai/NIST. AI.100-1.pdf.
[54] The applicable legal standards for "deception" and "unfairness" under Section 5 of the FTC Act and the Consumer Financial Protection Act are substantially similar.
[55] CFPB, ***Policy Statement on Abusive Acts or Practices*** (April 3, 2023), ***available at*** https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness.
[56] ***See, e.g.***, Complaint, ***FTC v. Beam Financial Inc.***, No. 3:20-cv-08119-AGT (N.D. Cal. Nov. 18, 2020), ***available at*** https://www.ftc.gov/enforcement/cases- proceedings/182-3177/beam-financial-inc; Complaint, ***FTC v. AlliedWallet, Inc. et al***, No. 2:19-cv-4355 (C. D. Cal. May 20, 2019), ***available at*** https://www.ftc.gov/news- events/press-releases/2019/05/operators-payment-processing-firm-settle-charges- assisting; Federal Trade Commission, ***FTC Data Shows Huge Spike in Cryptocurrency Investment Scams*** (May 17, 2021), ***available at*** https://www.ftc.gov/news-events/ press-releases/2021/05/ftc-data-shows-huge-spike-cryptocurrency-investment-scams.
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[58] FTC, ***Advance Notice of Proposed Rulemaking on Unfair or Deceptive Fees Trade Regulation Rule***, 87 Fed. Reg. 67,413 (Nov. 8, 2022) (FTC Matter No. R207011).
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[60] ***In re Kimberly Kardashian***, SEC No. 3-21197 (Oct. 3, 2022) (noted influencer fined $1,000,000 for promoting a crypto asset security without disclosing that she was being paid to do so).
[61] ***In re Blockfi Lending LLC***, SEC No. 3-20758 (Feb. 14, 2022) (32 state securities joined in the terms of the SEC settlement with Blockfi in an arrangement coordinated by the North American Securities Administrators Association: https://www.nasaa.org/62000/nasaa- and-sec-announce-100-million-settlement-with-blockfi-lending-llc/#:~:text=In%20 the%20past%20year%2C%20state,BlockFi%20interest%20accounts%20(BIAs).).
[62] ***SEC v. Genesis Global Capital, LLC & Gemini Trust Co., LLC***, No. 23-cv-287 (S.D.N.Y. Jan. 12, 2023) (interest paying program involved the sale of unregistered notes or investment contracts); ***In re Nexo Capital Inc***., SEC No. 3-21281 (Jan. 19, 2023) (same).
[63] ***SEC v. Payward Ventures, Inc. (d/b/a Kraken)***, No. 23-cv-588 (N.D. Cal. Feb. 9, 2023) (charging that staking-as-a-service constituted the offer of an investment contract).
[64] ***SEC v. Binance Holdings Ltd.***, No. 23-cv-01599 (D.D.C. June 5, 2023); ***SEC v Coinbase, Inc.***, No. 23-cv-04738 (S.D.N.Y. June 6, 2023).
[65] ***CFTC v. Samuel Bankman-Fried***, No. 22-cv-10503 (S.D.N.Y. Dec. 13, 2022) (complaint alleging fraud in sale of cryptocurrency).
[66] ***CFTC v. Ooki DAO***, No. 22-cv-05416 (N.D. Cal. June 8, 2023) (granting default judgment).
[67] CFTC v. Avraham Eisenberg, No. 23-cv-00173 (S.D.N.Y. Jan. 9, 2023).
[68] ***See, e.g.***, 16 C.F.R. part 314 (Safeguards Rule).
[69] The FTC has established specific information security requirements for non-bank financial institutions subject to the GLBA. The requirements are incorporated into the Safeguards Rule, which was updated in late 2021. ***See*** FTC, ***FTC Strengthens Security Safeguards for Consumer Financial Information Following Widespread Data Breaches*** (Oct. 17, 2021), ***available at*** https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-strengthens-security-safeguards-consumer-financial-information- following-widespread-data.
[70] ***See, e.g.***, N.Y. Banking Law § 131 ("No person, except a national bank, a federal reserve bank, or a corporation duly authorised by the superintendent to transact business in this state, shall make use of any office sign at the place where such business is transacted having thereon any artificial or corporate name, or other words indicating that such place or office is the place of business or office of a bank or trust company...").
[71] ***See, e.g.***, Cal. Dept. of Fin. Protection and Innovation, Settlement Agreement, ***In the Matter of The Commissioner of Financial Protection and Innovation v. Chime Financial, Inc.*** (Mar. 29, 2021), ***available at*** https://dfpi.ca.gov/wp-content/uploads/ sites/337/2021/04/Admin.-Action-Chime-Financial-Inc.-Settlement-Agreement.pdf.
[72] FDIC, ***False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo***, 87 Fed. Reg. 33415 (June 2, 2022), ***available at*** https://www. fdic.gov/news/board-matters/2022/2022-05-17-notice-dis-a-fr.pdf.
[73] CFPB, ***Consumer Financial Protection Circular*** 2022-02 (May 17, 2022), ***available at*** https://www.consumerfinance.gov/compliance/circulars/circular-2022-02-deception- representations-involving-the-fdics-name-or-logo-or-deposit-insurance/.
[74] 12 U.S.C. § 1831d.
[75] OCC, ***Final Rule: National Banks and Federal Savings Associations as Lenders***, 85 Fed. Reg. 68742 (Oct. 30, 2020), ***available at*** https://www.federalregister.gov/ documents/2020/10/30/2020-24134/national-banks-and-federal-savings-associations- as-lenders.
[76] S.J. Res. 15, 117th Congress (passed May 11, 2021), ***available at*** https://www.congress. gov/bill/117th-congress/senate-joint-resolution/15?r=1&s=8.
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[78] 9-A Maine Revised Statutes §§ 2-701, 2-702; N.M. STAT. § 58-15-3.
[79] Board of Governors of the Federal Reserve System, FDIC, & OCC, ***Interagency Guidance on Third-Party Relationships: Risk Management***, 88 Fed. Reg. 37920 (June 9, 2023), ***available at*** https://www.federalregister.gov/documents/2023/06/09/2023-12340/ interagency-guidance-on-third-party-relationships-risk-management.
[80] ***OCC v. Blue Ridge Bank, N.A.***, AA-NE-2022-43 (Aug. 17, 2022), ***available at*** https:// www.occ.gov/static/enforcement-actions/ea2022-043.pdf.
[81] ***FDIC v Cross River Bank***, FDIC-22-0040b (Mar. 8, 2023), ***available at*** https://orders. fdic.gov/sfc/servlet.shepherd/document/download/0693d000007xEStAAM.
[82] ***See*** Financial Action Task Force, ***The FATF Recommendations 2012 (as amended February 2022)***, ***available at*** https://www.fatf-gafi.org/publications/ fatfrecommendations/documents/fatf-recommendations.html#:~:text=The%20 FATF%20Recommendations,-Send&text=As%20amended%20March%20 2022.,of%20weapons%20of%20mass%20destruction (last visited July 18, 2023).
[83] CFPB, ***The Consumer Financial Protection Bureau and the Global Financial Innovation Network*** (GFIN), https://www.consumerfinance.gov/rules-policy/innovation/global- financial-innovation-network (last visited July 18, 2023).