

# Fintech Laws and Regulations 2022 | USA

Andy Lorentz and Thomas Kost

*GLI – Fintech 2022* 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 level. 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 vast network of laws that apply to Fintech are implemented and enforced by a similarly vast network of U.S. state and federal agencies, each with a differing (but often overlapping) scope of authority. Some agencies are focused on specific types of entities; other agencies are focused on specific types of financial services; 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 generally preempt (or displace) state laws and agencies where there is direct conflict. However, for some 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. can take 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 regulatory 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 is structured, 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.

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## **Major opportunities and challenges for Fintech**

The trends driving the 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, and a fragmented regulatory framework – leaving incumbent providers labouring under legacy compliance and technology infrastructures that are slow and costly to adapt (and hence create openings for new players).

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 has had varying degrees of impact on 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.

### **Money transmission**

Historically, money transmission in the U.S. was carried out by licensed money transmitters who relied on authorised delegates in multiple locations to act as their agents for collecting and disbursing cash and monetary instruments. Money transmitters generally had a transactional rather than an account relationship with their customers, did not store funds on behalf of customers, and often lacked the capability to provide other services ancillary to money movement to their clients.

The internet and mobile technology have fundamentally changed the business operations and relationship of U.S. money transmitters to their customers in several important ways.

First, although cash payments are still common, money is now primarily represented and stored in digital format. Second, electronic payment orders, instructions, and responses with respect to digital money can be transmitted and processed in real time, thereby enabling real-time clearing and settlement. Third, customers possess the means to initiate payment orders from their own electronic devices. These three factors have obviated the need for physical locations for the collection and disbursement of funds and payment instructions, and instead created a need for digital and mobile wallets where money can be stored and accessed through a customer device, and for digital and mobile interfaces and applications where payments orders can be created. For corporate entities, it has also created the opportunity to digitalise the invoicing, remittance, and reconciliation process, which has typically been a heavily manual process prone to error and delay.

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. In comparison, banks have been slow to develop an online presence and often charge for the same services that are made available by technology companies for free.

In contrast to the local regulation and provision of financial services contemplated under U.S. money transmission laws, digital and mobile services can be enabled in all 50 states as easily as they can in a single state. The requirement to obtain money transmission licences in 49 states<sup>1</sup> for digital wallet or payment service providers is a significant bottleneck in bringing such solutions to market. An increasing number of Fintech entities are seeking a bank charter (or special purpose Fintech charter, as discussed below) to avoid state-by-state licensure. In response, some state regulators are participating in initiatives to improve the efficiency of the money transmitter licensing and examination process.<sup>2</sup>



### **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.

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## Alternative lending

Fintech has democratized consumer and small business lending in the U.S. Working independently or in partnership with banks, Fintech entities have streamlined the loan application process through mobile apps and online interfaces that are accessible, intuitive, and easy to use. Fintech firms have also pioneered the use of new technologies like big-data mining and artificial intelligence to increase the speed and accuracy of the underwriting process. These innovations have benefitted consumers through new offerings in the marketplace, better pricing, and expanded access to credit. Some of the most notable gains have been made in the market for small business financing, reflecting the streamlined availability of loans from Fintech platforms and the introduction of alternative financing products such as factoring arrangements and merchant cash advances.

The increasing importance of alternative data – including personal data or additional data about income, expenses, or cash flow – and artificial intelligence in underwriting has presented unique regulatory challenges. On the one hand, Fintech lenders have used these innovations to make more refined assessments of the credit risk presented by individual applicants, with especially significant benefits for consumers with limited or poor credit histories. On the other hand, regulators have expressed concern about the potential for discriminatory outcomes of algorithmic decision-making processes where those processes rely on variables or factors that produce biases against racial or ethnic minorities or members of other protected classes.<sup>3</sup>

The Fintech-led emergence of alternative lending has accelerated during the global pandemic. Fintech entities have played a critical role in delivering financial assistance in connection with the federal government's COVID-19 relief efforts, including by originating loans through the Paycheck Protection Program. For example, several prominent Fintech entities worked with Cross River Bank – a state-chartered bank with a single branch – to lend nearly \$5 billion to PPP recipients.<sup>4</sup>



**Thomas Kost**

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## Buy now, pay later

First popularised in other countries, "buy now, pay later" products (or "BNPLs") have quickly gained a foothold in the U.S. in recent years. BNPLs offered by Fintech entities have given U.S. consumers yet another option to finance their online (and increasingly in-store) purchases beyond credit and debit cards and traditional purchase financing plans.

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 as a way to avoid carrying a credit card balance that may be subject to high interest rates and costly penalty fees.

Early BNPL providers in the U.S. were non-bank Fintech entities that, in general, operated outside of federal and state lending regimes, which gave them an initial advantage of offering their products unencumbered by the rules applicable to banks and licensed lenders. However, enforcement actions in 2020 against Fintech BNPL providers by California's Department of Financial Protection and Innovation signalled an important regulatory shift.<sup>5</sup> The enforcement actions focused on the risks created by the BNPL model, such as accumulated late fees, increased collection efforts, and potential harm to consumer credit profiles. As a result, Fintech BNPL providers are now required to obtain state lender licences, not only in California but in a number of other states as well. Moreover, with Europe and Australia considering whether to apply traditional consumer protections to BNPLs,<sup>6</sup> and with U.S. banks contemplating their own BNPL offerings, the BNPL market is likely to experience increased regulatory scrutiny from U.S. regulators at both the federal and state levels.



## 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.

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## Cryptocurrency

Cryptocurrency refers to digital units of value that can be transferred or exchanged without a central intermediary through the use of blockchain technology. Developers have created hundreds of tokens and coins (the distinction between these has become less important) that vary widely in use-case and popularity.

Cryptocurrency transactions and businesses engaged in facilitating such transactions are subject to money transmission laws to varying degrees. FinCEN regulates what it has dubbed "convertible virtual currency" under the Bank Secrecy Act.<sup>7</sup> Some states were early adopters of laws specifically targeting cryptocurrency activities, such as the New York BitLicense.<sup>8</sup> Meanwhile, other states are considering versions of the Uniform Regulation of Virtual-Currency Business Act, which would create a tailored cryptocurrency licensing framework.<sup>9</sup> A number of states have chosen to treat cryptocurrency activities as money transmission.<sup>10</sup> Still others have chosen not to regulate cryptocurrency under their money transmitter laws or virtual currency-specific laws.<sup>11</sup>

The expanding state licensing requirements for non-bank Fintech entities, combined with recent moves by bank regulators, have prompted banks to compete in the cryptocurrency market. In July 2020, the Office of the Comptroller of the Currency clarified that national banks and federal savings associations may provide cryptocurrency custody services and hold cryptographic keys on behalf of customers.<sup>12</sup> In September 2020, the state of Wyoming issued its first special purpose depository institution charter to Kraken, the cryptocurrency exchange, allowing it to take deposits and provide custody for digital assets.<sup>13</sup>

More recently, the Federal Deposit Insurance Corporation has sought information related to insured depository institutions engaging in digital asset activities.<sup>14</sup> And the Federal Reserve is exploring the implications of a central bank digital currency.<sup>15</sup>



### **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 as 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.

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## **3. Regulatory Bodies**

As discussed above, a broad constellation of state and federal agencies have been charged with regulating 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**

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## 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 covers large banks and some non-bank financial services companies, including mortgage lenders, debt collectors, and student loan servicers; its authority to write regulations and enforce consumer protection laws is much broader. The CFPB created an Office of Innovation to work with Fintech entities and other stakeholders to promote financial services innovation that benefits consumers.
- 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 and analyses information about financial transactions in order to prevent money laundering, terrorist financing, and other financial crimes, and prescribes rules for financial institutions' AML compliance programmes. FinCEN's Innovation Initiative promotes innovation in AML compliance through the adoption of new technologies.
- The Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission ("CFTC"), and Financial Industry Regulatory Authority ("FINRA") protect investors from Fintech-related scams, regulate the activities and operations of cryptocurrency exchanges, 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.



**Kevin Petrasic**



**Matthew Bornfreund**

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## 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.<sup>16</sup>

At the same time, some state regulators have pursued an aggressive agenda both to regulate Fintech and promote innovation. For example, while the New York Department of Financial Services ("NYDFS") has been a major antagonist in the efforts of the OCC to establish a Fintech national bank charter, NYDFS also has been at the forefront of efforts to license cryptocurrency businesses, including transmitting and buying/selling virtual currency and providing exchange services. In 2020, NYDFS also established its "FastForward" programme to support Fintech innovation.<sup>17</sup> Like New York, California has moved aggressively to regulate Fintech with an eye towards consumer protection while simultaneously trying to promote innovation. Reflecting its focus on Fintech-related developments, 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", with part of its mission to support Fintech.<sup>18</sup>

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 licences. 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.<sup>19</sup> Fintech entities also are subject to licensing and chartering regimes at the federal level and on a state-by-state basis, 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.<sup>19</sup> 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 first proposed in 2016, the OCC has not granted any Fintech charters. The lack of interest is likely due to uncertainty caused by state challenges to the OCC's legal authority to issue such charters.<sup>20</sup>



**Matthew Bornfreund**

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## Examination by the CFPB

On April 25, 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.<sup>21</sup> 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**

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## State credit and money transmitter laws

Fintech entities seeking to offer credit (particularly consumer credit) or payments 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.<sup>29</sup> 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.<sup>30</sup> Similarly, Fintech entities offering payment products to both consumers and businesses must comply with state money transmission laws that require licensure for anyone in the business of "receiving money for transmission" or "transmitting money". 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.<sup>31</sup>

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. 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.<sup>32</sup>



**Andy Lorentz**

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## 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 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.<sup>25</sup> In addition, the label given to any particular CVC (e.g., digital asset or cryptocurrency) is not dispositive of its regulatory treatment.<sup>26</sup>

Meanwhile, some cryptocurrencies are securities. Under the *Howey Test*, the SEC will deem a cryptocurrency to be a security if its sale involved: (1) the investment of money in a common enterprise; (2) a reasonable expectation of profits; and (3) the entrepreneurial or managerial efforts of others.<sup>27</sup> The *Howey Test* generally applies at issuance, and some cryptocurrencies already in wide circulation, such as bitcoin, are likely not securities.<sup>28</sup> The CFTC, however, views cryptocurrencies as commodities that are subject to its jurisdiction if used in a derivatives contract or is involved in certain types of fraud or manipulation.<sup>29</sup> Soon, though, there may be jurisdictional clarity. The Responsible Financial Innovation Act ("RFIA") introduced in June 2022 by Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) 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.<sup>30</sup> Under the RFIA, the CFTC would also be given authority to regulate cryptocurrency exchanges.



**Alexandra Steinberg Barrage**



**Matthew Bornfreund**

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## Anti-money laundering reform

On January 1, 2021, the U.S. Congress enacted the Anti-Money Laundering Act of 2020 ("AMLA"), which contains a number of substantive and administrative reforms to the Bank Secrecy Act ("BSA") and other federal AML and counter-terror financing laws.<sup>31</sup> Of primary importance may be the Corporate Transparency Act, which is part of the broader AMLA architecture and requires reporting companies, including Fintech entities, to submit documentation about beneficial account owners to a database maintained by FinCEN. Database information will be non-public and for use by federal, state, and local authorities, but may also be used by FinCEN to facilitate financial institution compliance with BSA requirements.

The AMLA also includes a number of provisions enhancing federal enforcement authorities 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**





## Rich Zukowsky

### Associate, New York

Rich Zukowsky counsels clients in the financial services industry on regulatory and litigation matters. His experience as a former associate in the regulatory compliance department at a major financial institution informs his approach, which emphasizes practical, business-focused solutions. Rich has advised on a wide range of consumer finance and FinTech laws and regulations, including the Truth-in-Lending Act/Regulation Z, the Fair Credit Reporting Act, and state money transmission acts.

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## 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 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.

On April 1, 2022, the CFPB announced it will convene a panel under the Small Business Regulatory Enforcement Fairness Act in November 2022, and release certain materials in advance of such panel, regarding consumer access to financial records and the implementation of Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>32</sup> Section 1033 requires consumer financial services providers to make financial data in their possession available to the consumer. This panel follows the Advance Notice of Proposed Rulemaking published by the CFPB in November 2020,<sup>33</sup> and the financial data sharing and aggregation principles published in 2017.<sup>34</sup> The CFPB has not yet proposed any regulation, but has sought public input on a broad array of concerns with respect to the "data access ecosystem", including effective consumer control over access to data, the impacts of regulatory uncertainty in open banking, data minimisation, consumer protection incentives of the different parties within the data access ecosystem, and the standardisation of data access methods and formats. While noting the many benefits of open banking in driving competition and innovation, the CFPB has highlighted concerns that certain emerging market practices may not reflect the access rights described in Section 1033, and whether the practices of Fintechs authorised by consumers to access their data are fair, transparent, and secure.

Because the committee tasked with drafting the rule will not meet until November 2022, the CFPB is unlikely to issue any rule on consumer access to financial records prior to 2023.



### **Bill Schuerman**

**Partner, Washington, D.C.**

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.

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## **5. Restrictions**

In general, substantive product and licensing restrictions applicable to Fintech entities are set forth in the federal and state laws discussed above. But 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. At the federal level, the Consumer Financial Protection Act further prohibits "abusive" acts or practices. Together, these laws are often referred to as "UDAAPs", and they generally apply to any entity that offers financial services to consumers or small businesses.

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.<sup>35</sup>



**Jonathan Engel**

**Partner, Washington, D.C.**

Jonathan Engel is the co-leader of the enforcement and investigations practice within DWT's banking and financial services group. As a former enforcement attorney at the Consumer Financial Protection Bureau and Assistant Attorney General in Massachusetts, Jonathan brings a regulator's perspective and experience leading large, complex, investigations, and enforcement proceedings at both the federal and state levels.



**Thomas Kost**

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## 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.<sup>36</sup> 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<sup>37</sup> (if its services are financial in nature) or another non-financial privacy regime (such as the California Consumer Privacy Act).

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 unfair or deceptive.



**Brian Hurh**

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## Engaging in the "business of banking"

Banks are among the most highly regulated entities in the U.S. Banks are empowered by their state or federal chartering authority to engage in the "business of banking", a group of activities that are generally restricted to banking organisations and other specialised licensees. Specific activities include taking deposits, making loans, and payments. As a result of the special status afforded to banks, including federal deposit insurance, many states carefully restrict the use of the term "bank" and related terms by non-banks,<sup>38</sup> including non-bank Fintech entities that engage in related activities.

As the number of innovative banking services and products increases, federal and state regulators have voiced concerns that consumers cannot sufficiently distinguish banks from non-bank Fintech entities providing similar services. Regulators have thus taken aim at potential misuse of the terms "bank" or "banking" by unlicensed entities through enforcement and rulemaking efforts. These efforts show that Fintechs working with banking partners to provide consumer banking products should be careful to avoid using the term "bank" in their business unless they become a bank or obtain the requisite authorisation to engage in the business of banking.<sup>39</sup>

In May 2022, the FDIC approved a final rule updating its official sign and advertising requirements to align with how Fintechs have advanced the traditional business of banking and provide for greater scrutiny of, and penalties for, misuse of the FDIC's name and logo.<sup>40</sup> The CFPB issued a simultaneous release indicating that it may consider such misuse a deceptive practice under UDAAP standards.<sup>41</sup>



### Bradford Hardin

#### Partner, Washington, D.C.

As chair of DWT's national banking and financial services practice, Bradford Hardin is committed to providing the highest level of client service and works with a fast, accurate, and frictionless team to solve clients' most pressing regulatory problems. With experience spanning lending, payments, and FinTech, clients seek Bradford's counsel for his pragmatic, solutions-oriented approach. He has worked with large banks and fast-moving challengers alike in developing innovative new products, overcoming regulatory barriers, and getting to market.

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## "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,<sup>42</sup> 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).<sup>43</sup> 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.<sup>44</sup>

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**

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## Third-party risk management

Regulators require that banks practice effective risk management when selecting, contracting with, and monitoring third parties with which the banks have business arrangements. The OCC has the most developed framework, elaborated in its guidance on third-party risk management, and recently updated supplementary FAQs explicitly addressing banks' business arrangements with Fintech entities.<sup>45</sup> Relationships between Fintech entities and banks make delivery of banking of a service ("BaaS") more efficient in some areas (e.g., simplifying regulatory requirements for lending and payments services) and are essential for enabling the BaaS elements that must be backed by a bank charter (e.g., access to bankcard, RTP, wire, and ACH networks).

The OCC has acknowledged that Fintech-bank relationships do not automatically require that banks exercise (and Fintech entities submit to) the heightened oversight requirements that the OCC expects in situations like high-risk outsourcing of a bank's critical activities. Rather than applying a strict, one-size-fits-all rule to Fintech relationships that would unnecessarily hamper innovation, the OCC expects that banks will make careful risk assessments to determine the diligence, contractual requirements, and monitoring appropriate for each third-party relationship.

The OCC's FAQs illustrate how to assess risk factors in certain Fintech-bank business arrangements, including: the use of data aggregators; performing diligence on and contracting with start-ups; backing marketplace lending arrangements; and providing consumer mobile wallets.

In July 2021, the FDIC and FRB joined with the OCC to proposed harmonised interagency guidance on managing risks from third-party relationships.<sup>46</sup> The proposed guidance incorporates the OCC's guidance and FAQs and then updates them to account for the massive technological changes that have occurred over the past 10 years. Among other topics, the guidance addresses how a smaller bank should conduct due diligence on larger technology partners, the importance of data security and ownership, and planning for operational resilience.



**Andy Lorentz**



**Matthew Bornfreund**

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## 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 aims to help fill gaps in the amount and quality of AML information that authorities can obtain regarding international transactions. The FATF establishes international standards and policies for combatting money laundering and terrorism financing. FinCEN and other U.S. regulators may turn to the FATF's Recommendations guide as they continue to seek ways to modernise and improve U.S. AML regulations.<sup>47</sup>
- 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.<sup>48</sup> 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. Endnotes

1. Every U.S. state but Montana has adopted laws regulating money transmission activities.
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8. See, e.g., Office of U.S. Senator Kristin Gillibrand, *Lummis, Gillibrand Introduce Landmark Legislation To Create Regulatory Framework For Digital Assets* (June 7, 2022), available at <https://www.gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-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>.
9. Gordon Y. Liao & John Caramichael, *Stablecoins: Growth Potential and Impact on Banking 7* (International Finance Discussion Papers No. 1334, 2022), <https://www.federalreserve.gov/econres/ifdp/files/ifdp1334.pdf>.
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12. Uniform Law Commission, *Regulation of Virtual-Currency Businesses Act* (2017), available at <https://www.uniformlaws.org/committees/community-home?communitykey=e104aaa8-c10f-45a7-a34a-0423c2106778>.
13. See, e.g., Washington Department of Financial Institutions, *Virtual Currency and Money Transmission Laws* (undated), available at <https://dfi.wa.gov/sites/default/files/virtual-currency-money-transmission-laws.pdf>.
14. See, e.g., Texas Department 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.

15. See Conference of State Banking Supervisors, *About CSBS*, <https://www.csbs.org/about> (last visited July 17, 2022).
16. See New York Department of Financial Services, *DFS Engagement Program: DFS Exchange*, [https://www.dfs.ny.gov/industry\\_guidance/innovation](https://www.dfs.ny.gov/industry_guidance/innovation) (last visited July 17, 2022).
17. See Jonathan Engel *et al.*, *FinTech Innovation at California's Newest Financial Regulator Webinar Recap* (Oct. 7, 2021), available at <https://www.dwt.com/blogs/financial-services-law-advisor/2021/10/dfpi-ofiti-fintech-priorities>.
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22. See Charge Letter, *Maryland Commissioner of Financial Regulation v. Fortiva Financial, et al.*, Case No. CFR-FY2017-0033 (Jan. 21, 2021), available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/05/Maryland.pdf>.
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30. Lummis-Gillibrand Responsible Financial Innovation Act, S.B. 4356, 117th Cong., <https://www.congress.gov/bill/117th-congress/senate-bill/4356/text>.
31. 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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33. *Id.*
34. Consumer Financial Protection Bureau, *Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation* (Oct. 18, 2017), available at

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38. See, e.g., N.Y. Banking Law § 131 (“No person, except a national bank, a federal reserve bank, or a corporation duly authorized 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...”).
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## 8. Acknowledgements

The editors would like to thank the following individuals for their invaluable contributions to this chapter: Amit Aulakh; Alexandra Steinberg Barrage; Matthew Bornfreund; Jonathan Engel; Bradford Hardin; Brian Hurh; Jin Kim; Kevin Petrasic; Bill Schuerman; Jordan Thompson; Dsu-Wei Yuen; and Rich Zukowsky.

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