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WILSON SONSINI

Focus on Fintech

FTX Bankruptcy and Increased Regulatory Scrutiny of Crypto Assets

FTX Bankruptcy

FTX Trading Ltd., one of the largest crypto asset exchanges, and a number of its affiliates filed for bankruptcy in Delaware on November 11. To date, the Securities and Exchange Commission (SEC), the U.S. Department of Justice, and the Commodity Futures Trading Commission (CFTC) have brought charges and/or entered into settlements with former FTX CEO Sam Bankman-Fried as well as some of his associates.

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In response to the FTX bankruptcy and the tumult in the crypto asset market, a number of federal regulators have indicated that they will continue to focus on the crypto asset industry.

Guidance on Disclosures for Public Companies

The staff of the Division of Corporation Finance at the SEC recently provided guidance on disclosures for public companies regarding recent developments in crypto asset markets. The guidance indicates that public companies should consider whether to address material impacts of crypto asset market developments, risks related to a company's liquidity and ability to obtain financing, and risks related to legal proceedings, investigations, or regulatory impacts in the crypto asset markets. The breadth of disclosures listed by the staff suggests the guidance is likely to apply even to companies that may not be directly involved in, but are materially affected by, crypto asset markets. For more information, please see our recent client alert.

CFTC Testimony

CFTC Chairman Rostin Behnam was the sole witness in the Senate Agriculture Committee's hearing to examine the failure of FTX. The hearing centered primarily on the need for comprehensive regulation for the U.S. crypto asset market (with some senators expressing concerns regarding overregulation), and the benefits of enacting the Digital

Commodities Consumer Protection Act (DCCPA), which would provide the CFTC with additional authority over crypto assets. Chairman Behnam largely agreed with senators that the DCCPA would assist regulators in preventing a future event similar to the FTX collapse and noted that the CFTC currently lacks the authority to detect crises in advance because its authority is generally limited to cases of fraud or manipulation that have already occurred.

FRB, FDIC, and OCC Joint Statement on Crypto Asset Risks to Banking Organizations

On January 3, the federal banking agencies (the Federal Reserve (Fed), Federal Deposit Insurance Corp. (FDIC), and the Office of the Comptroller of the Currency (OCC)) issued a joint statement highlighting crypto asset risks to banks. While acknowledging that banks are not broadly prohibited or discouraged from providing financial services to businesses legally operating in the crypto asset industry, the federal banking agencies state that "it is important that risks related to the crypto asset sector

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FTX Bankruptcy and Increased Regulatory Scrutiny of Crypto Assets *(Continued from page 1)*

that cannot be mitigated or controlled do not migrate to the banking system." The statement sends a clear message that banks will have to clear a rather high supervisory bar to (1) issue or hold (on balance sheet) crypto assets that are underpinned by an open, public, or decentralized network, or (2) have business models that are concentrated in crypto asset business activities or have concentrated exposures to crypto asset-focused companies. The statement is the clearest signal yet that the agencies view certain crypto asset-related risks as better kept outside the federal banking system.

SEC Suit Against Genesis and Gemini

The SEC filed a complaint against Genesis Global Capital, LLC (Genesis), a crypto asset lender, and Gemini Trust Company, LLC (Gemini), a crypto asset trading platform, for the unregistered offer and sale of securities to retail investors through the crypto asset lending program Gemini Earn. Both Genesis and Gemini were involved in Gemini Earn, with Genesis acting as the issuer and Gemini acting as the agent providing retail investors with access to Genesis. Following the collapse of FTX in November, Genesis froze withdrawals from the Gemini Earn program due to insufficient liquidity. The SEC alleges that the Gemini Earn program constituted an offer and sale of securities in the form of a "note" under *Reves v. Ernst & Young*, as well as an investment contract under *SEC v. W.J. Howey Co*. The suit follows the SEC's settlement last year with now-bankrupt crypto asset lender BlockFi, as well as the SEC's efforts to block Coinbase's "Coinbase Lend" program in 2021.

Following the suit against Genesis and Gemini, the SEC settled charges against Nexo Capital Inc. (Nexo) for failing to register the offer and sale of its retail crypto asset lending product, the Earn Interest Product. Similar to its suit against Genesis and Gemini, in its charges against Nexo, the SEC found that the Earn Interest Product constituted an offer and sale of securities in the form of a "note" under *Reves v. Ernst & Young*, as well as an investment contract under *SEC v. W.J. Howey Co*.

In addition to paying a $22.5 million penalty, Nexo agreed to cease offering its Earn Interest Product to U.S. investors and also agreed to pay an additional $22.5 million to settle similar charges with state authorities.

Payment Network Rules and Innovations

Final Rule on Debit Card Transactions

The Fed adopted a final rule amending Regulation II (Reg II) (Debit Card Interchange Fees and Routing) and its Official Commentary. Specifically, the new rule focuses on the network exclusivity provision of Reg II (12 C.F.R. § 235.7), which prohibits debit card issuers and payment card networks from restricting the number of networks on which a debit card transaction may be processed to fewer than two unaffiliated networks. The new rule amends that prohibition to specify that it also applies to card-not-present transactions (for example, online transactions) and clarify the responsibility of an issuer to "enable" at least two unaffiliated payment card networks. In its comments to the final rule, the Fed explained that it did not "intend to expand the regulation's

substantive requirements, but rather intended to specify that existing requirements also apply to card-not-present transactions and emphasize that issuers have an active role to play in order to comply with the prohibition on network exclusivity."

The Official Commentary explains that the network exclusivity prohibition does not require "the condition to be satisfied for each method of cardholder authentication" (e.g., signature, PIN, or any other type of cardholder authentication). Further, the Official

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Payment Network Rules and Innovations *(Continued from page 2)*

Commentary clarifies that it does not require an issuer to ensure that two unaffiliated payment card networks are available to process every debit transaction; rather, an issuer only needs to configure its debit cards to allow electronic debit transactions to be processed on at least two unaffiliated payment card networks. The Official Commentary also provides examples of how issuers may comply with the final rule. The Fed expects the final rule to promote and increase competition among networks and to potentially level the playing field between issuers of different sizes that have/have not enabled two unaffiliated networks to process card-not-present transactions.

Importantly, the final rule did not amend interchange fee requirements, though the Board reiterated that it will continue to review the interchange fee cap and may propose additional revisions in the future. The final rule is effective July 1, 2023.

Development of a Regulated Liability Network

The New York Innovation Center (NYIC), a division of the New York Federal Reserve established in partnership with the Bank for International Settlements (BIS) Innovation Hub, announced its participation in a proof-of-concept project with a number of major financial institutions to explore the feasibility of an interoperable network of digital central bank liabilities and commercial bank digital money using distributed-ledger technology. The NYIC collaborates with the Federal Reserve System to help bridge the worlds of finance, technology, and innovation. The 12-week project will test the technical feasibility, legal viability, and business applicability of distributed-ledger technology to settle wholesale digital asset transactions between regulated financial institutions. At the end of the experiment, the NYIC will produce a report of its findings and include guidelines for participants in the Regulated Liability Network construct.

Developments in CBDC Interoperability

Many central banks across the world are developing, or have developed, a central bank digital currency (CBDC). These platforms are based on different technological methods and protocols that could lead to inoperability between them unless a multilateral mechanism were to allow for global interoperability. In a promising development, SWIFT, a global provider of financial messaging services, reported in November 2022 that it had conducted experiments demonstrating the feasibility of connecting different CBDCs to allow for cross-border transactions. SWIFT achieved this by combining a simulation of an experimental platform and connector gateway. SWIFT reported that this would enable CBDCs and existing payment systems to communicate with one another, but emphasized that further collaboration and innovation would be necessary to allow for future cross-border transactions.

Collaboration Between New York Fed and Monetary Authority of Singapore to Enhance Cross-Border CBDC Payments

The NYIC and the Monetary Authority of Singapore (MAS) announced a joint experiment to investigate methods by which wholesale central bank digital currencies (WCBDCs) could improve cross-border payments that use multiple currencies. The project, called "Project Cedar Phase II x Ubin+," would enhance the process for atomic settlement of cross-border cross-currency transactions using WCBDCs as a settlement asset. An "atomic settlement" often refers to settlement that is simultaneous and instant. The aim of the effort is to reduce settlement risk, a key obstacle in such transactions, by "establishing connectivity across multiple heterogeneous simulated currency ledgers," according to the media release. Project Cedar is an effort to develop a framework for a theoretical WCBDC in the Federal Reserve context. MAS is Singapore's central bank and financial regulator. A report on the experiment and findings of the project will be released in 2023.

Sanctions Compliance Guidance for Instant Payments

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued "Sanctions Compliance Guidance for Instant Payment Systems" that "emphasizes the importance of taking a risk-based approach to managing sanctions risks in the context of new payment technologies." OFAC recommends that sanctions compliance programs incorporate the following five elements of compliance: (i) management commitment; (ii) risk assessment; (iii) internal controls; (iv) testing and auditing; and (v) training. There is no "one-size-fits all" approach, and sanctions compliance programs must be tailored to the company's size and sophistication, as well as the company's unique risks. Some considerations that may impact a company's sanctions compliance program include domestic versus cross-border payments, and the nature and value of the payment. There are also technological solutions that may be part of a company's sanctions compliance program, such as enhanced IP blocking, geolocation tools, and other electronic monitoring tools that technology companies may offer to help reduce sanctions risk.

Developments in Consumer Financial Protection

Assessing the Impact of New Entrant Non-Bank Firms on Competition in Consumer Finance Markets

In November 2022, the U.S. Department of the Treasury issued a report to the White House Competition Council entitled "Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets." The report focuses on fintech and other non-bank firms that provide consumer financial services and products. In the press release, Secretary of the Treasury Janet Yellen stated that "[w]hile non-bank firms' entrance into core consumer finance markets has increased competition and innovation, it has not come without additional risks to consumer protection and market integrity."

Generally, the report proposes enhanced oversight of non-bank firms that provide consumer financial services and products because "they are generally not subject to the same oversight for safety and soundness or consumer protection as [insured depository institutions]." The report encourages the creation of more competitive markets and innovation, but also encourages responsible innovation that benefits and protects consumers.

Treasury makes four recommendations: (i) regulators should "take various steps to ensure that credit underwriting practices of all lenders are designed to increase credit visibility, reduce bias, and prudently expand credit to consumers"; (ii) regulators should implement "a clear and consistently applied supervisory framework for an [insured depository institution's] role in bank-fintech relationships to address competition, consumer protection, and safety and soundness concerns"; (iii) regulators should "increase consistency in supervisory practices related to small-dollar lending programs"; and (iv) "banking regulators and the CFPB

[should] take steps to help promote a more unified approach to oversight of consumer-authorized data sharing."

Consumer Financial Data Access Rules

The Consumer Financial Protection Bureau (CFPB) released an Outline of Proposals and Alternatives Under Consideration for the Personal Financial Data Rights Rulemaking. The Outline discusses various proposals and alternatives that the CFPB is considering to prevent companies from hoarding consumer financial data. If enacted, the proposed rules would require companies to make consumer financial data and information available to consumers or third parties at the consumer's direction, allowing consumers to more easily switch service providers and transfer their personal data. CFPB Director Rohit Chopra stated that the CFPB will publish a report on inputs received by the CFPB in the first quarter of 2023, with a proposed rule to follow later in 2023.

Peer-to-Peer Payment Letter

The American Bankers Association published a letter addressed to the CFPB expressing concerns over potential CFPB efforts to shift liability for authorized (though fraudulently induced transactions, e.g., payments made to scammers) peer-to-peer (P2P) transactions to the banks and asking the CFPB to acknowledge the substantial benefits of P2P payments, the small number of incidences of fraud related to P2P transactions, and the banking industry's efforts to warn customers and prevent fraud. The letter further urged the CFPB to work with the financial services industry and other regulators to prevent scams, rather than focus on shifting liability to the banks.

The letter argues that the shift in liability from a consumer that initiated the transfer to a bank is not authorized by the federal Electronic Fund Transfer Act (EFTA) and Regulation E (promulgated pursuant to EFTA). Regulation E defines an "unauthorized electronic fund transfer" as an electronic fund transfer from a consumer's account "initiated by a person *other than the consumer* without actual authority to initiate the transfer and from which the consumer receives no benefit" (emphasis added). The letter argues that a shift in liability to banks for *authorized* payments to scammers would go beyond the EFTA's statutory authority.

CFPB's Proposed Rules to Establish Public Registry of Terms and Conditions in Form Contracts

On January 11, 2023, the CFPB proposed a rule that would require non-bank financial companies that are subject to the CFPB's supervisory jurisdiction (e.g., larger entities in the following markets: debt collection, consumer reporting, student loan servicing, international money transfer, and auto financing) to submit information to the CFPB about terms and conditions in their form contracts that "seek to waive or limit individuals' rights and legal protections." With this notice of proposed rulemaking, the CFPB highlighted its concern that consumers are being misled to believe such terms and conditions are legally enforceable in non-negotiable form contracts.

The proposed rule would establish a registry of existing terms and conditions in form contracts from covered non-

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Developments in Consumer Financial Protection *(Continued from page 4)*

bank financial companies that would be open to both the public and consumer financial regulatory enforcers. CFPB Director Rohit Chopra stated in an accompanying statement to the notice of proposed rulemaking that there are three main objectives: (1) establish a registry to help regulators monitor companies potentially using prohibited, void, or restricted contract terms more efficiently; (2) help consumers and stakeholders use the registry as an educational tool to understand the types of terms and conditions being used in today's marketplace and the related adequacy of consumer finance laws; and (3) enable the CFPB to better supervise, monitor, and investigate nonbank financial companies. The CFPB will accept written comments on the proposed rule until March 12, 2023.

Fintech-Bank Partnerships

Opportunity Financial LLC (OppFi), a platform that allows banks to offer short-term lending products for consumers, filed a cross-complaint against the Commissioner of California's Department of Financial Protection and Innovation (DFPI), challenging the DFPI's reliance on the "true lender" doctrine. The DFPI claims that OppFi retains the predominant economic interest in the loans that are originated by one of OppFi's bank partners and that OppFi should therefore be classified as the "true lender." However, OppFi claims that the DFPI's adoption of the true lender doctrine is an "underground regulation" that does not appear in any DFPI regulation or California statute and that DFPI's adoption of the true lender doctrine is a departure from previous enforcement of the California Financing Law's interest rate caps. The outcome of this case has the potential to impact the structure of fintech-bank partnerships in California.

Federal Trade Commission's Proposed Rule on Junk Fees and Related Actions

In October 2022, the Federal Trade Commission (FTC) proposed a rule targeting the use of "junk fees," defined as "unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price." Junk fees also encompass hidden fees only disclosed at a later stage in the payment process, fees that misrepresent optional pricing or upgrades that are later relegated as mandatory, and fees that consumers cannot easily avoid or opt out of due to limited or no competing options. The proposed rule is not cabined to a specific industry, but rather, notice of proposed rulemaking references examples from several industries and sectors, including auto financing, payday lending, telecommunications, live entertainment, travel (including airlines, hotels, room-sharing, car rentals, and cruises), higher education, financial products and services, telemarketing, publishing, insurance, and membership programs. In her dissenting statement, FTC Commissioner Wilson questioned whether such a rule could be uniformly applied across all sectors of the economy and highlighted that such a broad rule could cause more confusion among retailers. The FTC is still accepting public comments on its proposed rule related to junk fees and extended the comment period until February 8, 2023.

In a related enforcement action, in November, the FTC announced a $100 million settlement with Vonage, a Voice over Internet Protocol (VoIP) service provider to consumers and small businesses, over its practices of including hidden fees for consumer cancellation of its services.

New UK Regulation of Crypto Assets

Legislation currently making its way through the UK Parliament will regulate crypto assets as investments under UK law. For these purposes, the Financial Services and Markets Bill adopts a technologically neutral definition of "crypto asset" as any cryptographically secured digital representation of value or contractual rights that can be transferred, stored or traded electronically, and that uses technology supporting the recording or storage of data (including distributed ledger technology). This definition is potentially very broad and could cover crypto assets that the UK Government has not previously indicated an interest in regulating (e.g., NFTs).

These changes are intended to address, among other things, the UK Government's concerns about the potential risks posed to consumer and markets whilst crypto assets remain unregulated. Categorizing crypto assets as investments will give the Financial Conduct Authority the power to regulate the promotion of, and certain investment services provided in connection with, crypto assets in the UK. These developments could mean that any firm engaging in those activities would be required to obtain a regulatory license to carry on that activity. This could represent a material step-up in terms of compliance obligations for many crypto asset firms in the UK, which currently are typically only required to comply with certain anti-money laundering and counter-terrorism financing obligations under UK law.

SEC and Securities Regulatory Updates

SEC Market Overhaul Proposals

On December 14, 2022, the SEC proposed sweeping changes to U.S. market structure and a new standard for a broker-dealer's duty of best execution. The comment period for each rule proposal will remain open until the later of March 31, 2023, or 60 days after the release is published in the Federal Register. Notable proposed changes include the following:

- A new Order Competition Rule would require orders of individual investors for NMS securities to "be exposed to competition in fair and open auctions before such orders could be executed internally by trading centers that restrict order-by-order competition." This would disrupt the current payment for order flow model that many online brokers use to allow zero-commission trading.
- A new Regulation Best Execution would require broker-dealers to (i) "use reasonable diligence to ascertain the best market for a security, and (ii) buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions." Proposed Regulation Best Execution would also require broker-dealers to establish written policies and procedures to comply with the proposed standard and to review the execution quality of their customer transactions at least quarterly. The SEC has proposed that Regulation Best Execution should apply to crypto asset securities.

SEC Strategic Plan for FY 2022-2026

The SEC released its Strategic Plan for fiscal years 2022 to 2026 (Strategic Plan), outlining the agency's goals for this period. While its goals are stated in general terms, the Strategic Plan specifically notes some significant enforcement and regulatory priorities, including (i) updates to various disclosure requirements to include more robust reporting on climate impacts, cybersecurity practices, diversity and staffing, and similar areas of increased investor focus, and (ii) updates to existing SEC rules and regulatory approaches to effectively oversee new and growing products, technologies, and markets, including digital assets, derivatives, and fixed-income securities. The Strategic Plan also highlights the risks stemming from the increased use of new technologies and includes updating rules to reflect evolving technologies as a focal point.

M&A Brokers

An unexpected addition to The Consolidated Appropriations Act, 2023, H.R. 2617 signed by President Biden on December 29 is the inclusion of amendments to §15 of the Securities Exchange Act of 1934 that provide an exemption from registration for certain brokers that play a role in mergers and acquisitions (M&A Brokers) for smaller companies. The amendments largely codify the SEC's 2014 no-action letter, which allowed M&A Brokers in certain circumstances to avoid broker-dealer registration. One difference from that letter, however, is that the amendments only exempt M&A Brokers engaging in transactions for companies that, in the fiscal year immediately prior to the year in which the services of the M&A Broker are first engaged, (1) earn less than $25,000,000 before interest, taxes, depreciation, and amortization, or (2) have a gross revenue of less than $250,000,000. Among other conditions, the amendments require the broker to reasonably believe that any person acquiring securities or assets of the target company will (1) control the company or (2) directly or indirectly be active in the management of the company. While the amendments provide an exemption from registration at the federal level, M&A Brokers will still need to consider whether they need to register at the state level.

Bank Regulatory Updates

2023 OCC Supervision Operating Plan

In October, the OCC released its bank supervision plan for fiscal year 2023, which notes that examiners plan to focus on the impacts of volatile economic conditions and also lists a number of areas in which OCC risk-based supervision will heighten its focus. One such area of heightened focus is third parties and related concentrations. The bank supervision plan notes that examiners should consider whether banks provide adequate risk management governance of their third-party relationships (which may include relationships with fintech companies). Another area of heightened focus is new products and services. The bank supervision plan calls for examiners to determine whether banks "remain vigilant" when utilizing new and innovative products and activities, including in the payments, fintech, and crypto assets spaces, and notes that examiners should assess whether banks have proper oversight of such relationships "commensurate with the risks posed" and whether each party has "sufficient, qualified staff to meet contractual obligations." For banks and fintech companies, this highlights the importance of adequately assessing the risks and capabilities of third-party business partners.

Civil Money Penalties

The OCC released a revised civil money penalty manual, which it began using on January 1, 2023. The revisions will allow the OCC to better differentiate among varying levels of misconduct severity or by institution size, and updated mitigation factors to provide banks with a stronger incentive to address problems. The revised manual also reiterated the OCC's position that it may supplement fines with restrictions of business when appropriate. This practice was previously implemented in September 2021, when Wells Fargo was barred from acquiring third-party residential mortgage servicing businesses in conjunction with a $250 million fine for failing to make progress on a prior consent order addressing its illegal retail banking practices.

White House Blueprint for an AI Bill of Rights

The White House issued a Blueprint for an AI Bill of Rights (AI Bill of Rights), a non-binding policy document that lays out principles relating to the design and incorporation of automated systems and artificial intelligence (AI) into various administrative systems, products, and business operations. The principles discussed in the AI Bill of Rights focus on (i) cybersecurity and the use of collected data, (ii) preventing discriminatory outcomes and practices, (iii) promoting transparency around how AI is deployed, as well as when and how it affects outcomes, (iv) data privacy, and (v) providing individuals with the ability to opt out of AI products where appropriate and with user support to navigate and address issues with AI products and systems.

The AI Bill of Rights addresses a wide array of potential applications of AI tools and technology across various sectors, including medical diagnostic technologies, investment advice, mortgage applications, and public safety. As a result, some of the protections that it envisions are already required under existing laws and regulations. While the AI Bill of Rights is intended to serve as general guidance to lawmakers, market participants, and other stakeholders regarding the responsible and effective deployment of AI, continued formal regulation of AI at the state and federal levels is anticipated, and financial services companies that may be affected by any new regulations could benefit from taking the initiative to adopt effective policies and procedures that are consistent with the principles set out in the AI Bill of Rights.

Decisions, Settlements, Enforcement Actions, and Complaints

Celsius Decision

Judge Martin Glenn of the Bankruptcy Court for the Southern District of New York ruled that the crypto assets held in Celsius "Earn Accounts" are property of the bankruptcy estate and not property of the customers. In reaching his decision, Judge Glenn found that the Celsius Terms of Use for the Earn Accounts, which state that "…you grant Celsius . . . all right and title to such Eligible Digital Assets, including ownership rights," constituted a valid and enforceable contract between Celsius and the customer. The Celsius decision highlights the importance of digital asset platforms' Terms of Service and other customer agreements. The court's decision was limited to Celsius' Earn Accounts and did not determine ownership of crypto assets in its Custody Program, Withhold Accounts, or Borrow Program.

Despite the use of the term "loan" in the Terms of Use, the court dismissed the argument that the crypto assets were a "loan." The court noted that even if the crypto assets were treated as a loan to Celsius by its customers, the customers would have no perfected security interest in the crypto assets, leaving the customers as unsecured creditors.

LBRY (SEC)

The United States District Court for the District of New Hampshire granted summary judgment in favor of the SEC in an action against LBRY, Inc. (LBRY), finding that LBRY's proprietary token, LBC, constituted an "investment contract" and therefore a security. In reaching its decision, the court pointed to LBRY's and its representatives' statements to prospective purchasers regarding the expectation of an increase in value of LBC, noting that LBRY's disclaimers "cannot undo the objective economic realities of a transaction."

Kraken Settlement (OFAC)

On November 28, 2022, OFAC announced that Payward, Inc. d/b/a Kraken, a U.S.-based crypto asset exchange, agreed to pay $362,158.70 to settle charges relating to its apparent violations of the Iranian Transactions and Sanctions Regulations. While Kraken reviewed IP address information to ensure that users were not in a sanctioned jurisdiction when users initially created an account, Kraken did not continually monitor IP location on a transactional basis. As a result, Kraken processed transactions on behalf of customers who "established their accounts outside of sanctioned jurisdictions" and "appear to have accessed their accounts and transacted on Kraken's platform from a sanctioned jurisdiction." The Kraken settlement highlights the importance of continuously monitoring customers even after they are onboarded, especially at the time of initiating a transaction. This settlement highlights the practical importance of maintaining an OFAC screening program and implementing IP blocking. Please review our recent client alert to learn more about the settlement.

Coinbase Settlement (NYDFS)

The New York Department of Financial Services (DFS) announced a settlement with Coinbase for significant failures in its compliance program, including its anti-money laundering and sanctions compliance obligations, requiring Coinbase to pay a $50 million penalty to the DFS and invest an additional $50 million in its compliance program over the next two years. In the announcement, DFS stated that Coinbase had made itself susceptible to being used for "serious criminal conduct, including, among other things, examples of fraud, possible money laundering, suspected child sexual abuse material-related activity, and potential narcotics trafficking" due to its compliance failures. These failures include, among others, that (1) Coinbase's KYC and

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Decisions, Settlements, Enforcement Actions, and Complaints *(Continued from page 8)*

customer due diligence program was inadequate and treated as a "simple check-the-box exercise"; (2) Coinbase was unable to keep up with alerts generated by its transaction monitoring system and had a backlog of over 100,000 alerts; and (3) Coinbase failed to investigate and report suspicious activity in a timely manner due to the backlog of alerts. Notably, the DFS settlement is limited to Coinbase's violations of New York law. For more information, please see our recent client alert.

DK Automation Complaint (FTC)

In early 2022, the FTC announced a proposed rule on earnings claims.

In November 2022, following the rule proposal, the FTC announced a complaint and proposed court order against DK Automation for allegedly "lur[ing] consumers into purchasing business opportunities" involving Amazon business packages, business coaching, and cryptocurrency. The defendants allegedly promised to build purchasers an ability to "generate[] passive income on autopilot," but in reality, few consumers ever made money from these programs. Specifically, the FTC claims that DK Automation's marketing and sales pitches were filled with fake consumer reviews touting huge profits. The proposed order would require DK Automation to back up their claims in writing, stop deceptively advertising potential profits through fake customer reviews or other testimonials, and refund consumers $2.6 million. The FTC followed its DK Automation enforcement action with an action against WealthPress, which it alleged advertised false claims about investment trading strategies and how much consumers could earn from those strategies. The proposed order would prohibit WealthPress from making any claim about earnings without the evidence to back those claims up in writing and would require payment of a $1.7 million civil penalty.

State Round-Up

Missouri Updates Money Laundering Statute

In Missouri, as of August 28, 2022, money laundering (a class B felony) includes the use of "cryptocurrency." The General Assembly of the state of Missouri enacted legislation that effectively replaced the term "Currency" with "Monetary Instruments" and specifically named "cryptocurrency" as a Monetary Instrument so that financial transactions involving digital assets are captured within the elements of money laundering.

Similar legislation on the federal level may soon follow. In December 2022, Senators Elizabeth Warren (D-Mass.) and Roger Marshall, M.D., (R-Kan.) introduced S.5267 - Digital Asset Anti-Money Laundering Act of 2022.

New York DFS Issues Guidance for Banking Organizations Involved in Crypto Asset Activity

The New York DFS issued guidance to New York-licensed banking organizations that engage in, or wish to engage in, a crypto asset-related activity. The guidance emphasizes that banking organizations licensed in New York must first seek approval from the DFS before engaging in a crypto asset business. The DFS also explains the crypto asset activity approval process and associated requirements.

Select Publications

***The Banker* Article**
How fintech regulators can get ready for Gen Z
By D.C. Partner and Practice Group Leader Amy Caiazza, D.C. Partner Neel Maitra, and New York Partner Jess Cheng
January 18, 2023

Wilson Sonsini Alert
Coinbase Agrees to Pay $100 Million and Improve Compliance Program as Regulators Continue Scrutiny of Crypto Asset Companies
By D.C. Partner Stephen Heifetz, New York Partner Jess Cheng, D.C. Associate Troy Jenkins, and D.C. Senior Counsel Jahna Hartwig
January 12, 2023

Wilson Sonsini Alert
Money in 2023: What Tech Companies Need to Know About Instant Payments and FedNow
By New York Partner Jess Cheng and D.C. Partner and Practice Group Leader Amy Caiazza
January 9, 2023

Wilson Sonsini Alert
SEC Disclosure Considerations Arising from Recent Developments in Crypto Asset Markets
By D.C. Partner and Practice Group Leader Amy Caiazza, Palo Alto Partner Richard Blake, D.C. Partner Neel Maitra, Virtual Associate Lillian Jenks, and San Francisco Associate Mara Alioto
December 15, 2022

Wilson Sonsini Alert
Big Tech's Competition Impacts on Payments and Retail Finance in Regulatory Spotlight
By New York Partner Jess Cheng, Brussels Partner Jindrich Kloub, and Brussels Associate Petros Vinis
December 6, 2022

ESCB Legal Conference 2022, European Central Bank Article
Legal Interoperability and Retail CBDCs: Taming the Multiverse of (Payments) Madness
By New York Partner Jess Cheng and Federal Reserve Associate General Counsel Joseph Torregrossa
December 2022

Wilson Sonsini Alert
Information…or Advice? SEC Regulation of "Information Providers" May Expand to Include Providers of Innovative Investment Analytics
By D.C. Partner and Practice Group Leader Amy Caiazza, D.C. Partner Neel Maitra, and San Francisco Associate Mara Alioto
November 28, 2022

Recent Fintech Practice Highlights

Jess Cheng joins Wilson Sonsini
New partner Jess Cheng recently joined the Fintech and Financial Services Group in the New York office. Jess has more than a decade of experience handling—and shaping—the regulatory aspects of a broad range of payment services and technologies, spanning traditional systems and cutting-edge payments products. She joins Wilson Sonsini from the Board of Governors of the Federal Reserve System in Washington, D.C., where she served as senior counsel in the Monetary Affairs and Payment Systems Section. Jess recently spoke with *Law360* about her move.

Partners Amy Caiazza and Neel Maitra featured in *Law360* article
D.C. Partner and Practice Group Leader Amy Caiazza and D.C. Partner Neel Maitra discussed FTX's collapse and subsequent litigation in the *Law360* article "California Cases to Watch in 2023."

Amy Caiazza discusses SEC guidance with Kristen Savelle on Rock Center Shorts
D.C. Partner and Practice Group Leader Amy Caiazza recently joined Kristen Savelle on Stanford's Rock Center Shorts on Corporate Governance to discuss SEC guidance on company disclosure obligations in the crypto asset markets.

The following attorneys have editorial oversight of Wilson Sonsini's *Focus on Fintech*. They would like to take this opportunity to thank all of the contributors to this edition, including including Stephen Winick, Jin Ahn, Tanner Long, Eric Quang, Bridget Grier, and Stacy Okoro.

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