FinTech in the United States: overview

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OVERVIEW OF FINANCIAL SERVICES SECTOR

1. What are the types of entities that form the financial services sector in your jurisdiction?

There are many different types of entities that comprise the financial services sector in the US. Traditional financial services entities include the following:

- Deposit-taking commercial banks and thrift institutions.
- Investment banks.
- Insurance companies.
- Brokerage firms.
- Investment advisory firms.
- Money transmitters.
- Payment, clearing and settlement systems.

Other types of financial services entities include the following:

- Credit bureaus.
- Private equity funds and hedge funds.
- Payment card networks.
- Other non-bank financial institutions.

Another group of financial services entities in the US are consumer finance companies or other entities that engage in lending activities, including the following:

- Mortgage origination and servicing.
- Payday lending.
- Auto lending.
- Unsecured consumer lending.
- Student lending.
- Small-dollar lending.

Traditional financial services entities also engage in extending these types of credit.

In recent years, there has been a significant increase in the provision of financial products and services by FinTech entities, which generally refer to companies that use technology and innovation to deliver financial products and services such as payments or lending products and companies that provide services to regulated financial institutions using technology and innovation.

FinTech entities include RegTech and InsurTech companies that similarly use technology to address financial services regulatory challenges and the provision of insurance products, respectively.

2. What are the key regulatory authorities that are responsible for the financial services sector?

Multiple federal and state regulatory authorities are responsible for the financial services industry in the US. The primary federal regulatory authorities include the following.

Board of Governors of the Federal Reserve System (Federal Reserve)

The Federal Reserve and the 12 Federal Reserve Banks across the US are responsible for US monetary policy. The Federal Reserve supervises the following:

- Bank holding companies (including financial holding companies) and their non-bank subsidiaries.
- Savings and loan holding companies.
- State-chartered Federal Reserve member banks.
- Foreign banking organisations operating in the US.
- Edge Act and agreement corporations.
- Certain systemically important non-bank financial institutions and financial market utilities.

Office of the Comptroller of the Currency (OCC)

The OCC is an independent bureau of the US Department of Treasury (Treasury) responsible for supervising national banks, federal savings associations, and federal branches and agencies of foreign banking organisations.

Federal Deposit Insurance Corporation (FDIC)

The FDIC is an independent agency responsible for administering the deposit insurance fund so that US depository institutions can offer deposit products that are insured up to USD250,000 per account by the federal government. The FDIC also supervises state-chartered non-member banks (that is, banks that are not members of the Federal Reserve System), and acts as receiver or conservator for depository institutions that have failed and are subject to resolution.

Consumer Financial Protection Bureau (CFPB)

The CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and is responsible for supervising a range of financial services entities with respect to federal consumer financial laws (including for issuing regulations to implement these laws and taking action to enforce them). The CFPB oversees the following:

- Banks, thrifts and credit unions with over USD10 billion in assets and their affiliates.
- Mortgage originators and servicers.
- Payday lenders, credit bureaus and private student lenders.

Financial Stability Oversight Council (FSOC)

The FSOC was also established by the Dodd-Frank Act and is a federal council of executive branch agencies, chaired by the Secretary of the Treasury. The FSOC is charged with overseeing macroeconomic risks and risks to the financial stability of the US financial services sector. FSOC is authorised to designate non-bank financial institutions for enhanced supervision by the Federal Reserve.

US Securities and Exchange Commission (SEC)

The SEC is responsible for overseeing the US securities markets by promulgating and enforcing the US securities laws and regulations to protect investors and maintain fair, orderly and efficient securities markets. The SEC supervises securities market participants including the following:

- Securities exchanges.
- Securities brokers and dealers.
- Investment advisors.
- Mutual funds.

Commodity Futures Trading Commission (CFTC)

The CFTC regulates the US commodities markets and oversees commodities industry participants, including the following:

- Trading organisations (that is, designated contract markets and swap execution facilities).
- Derivatives clearing organisations.
- Swap data repositories.
- Intermediaries acting on behalf of other entities and persons in connection with derivatives trading.

Financial Crimes Enforcement Network (FinCEN) and Office of Foreign Assets Control (OFAC)

FinCEN is a bureau of Treasury that issues regulations to enforce the US anti-money laundering (AML) and counter-terrorism financing laws, including the Bank Secrecy Act and the USA PATRIOT Act. FinCEN collects, analyses, and disseminates financial intelligence to other regulatory authorities and law enforcement, and establishes requirements for financial institutions' AML compliance programmes. OFAC is a financial intelligence and enforcement agency that administers and enforces economic and trade sanctions. Both FinCEN and OFAC are authorised to bring enforcement actions against companies and individuals that violate applicable AML and sanctions laws and regulations.

In addition to federal regulatory agencies, there are regulatory agencies in each state tasked with overseeing financial institutions such as banks, insurance companies and securities firms.

OVERVIEW OF FINTECH SECTOR

3. What areas of the financial services sector has FinTech significantly influenced so far?

FinTech entities have had a significant impact on the financial services sector in the US. FinTech entities provide a variety of financial services, including the following:

- Payments.
- Lending.
- Financial education and literacy.
- Financial advisory and robo-advisory services.
- Digital currency services (such as cryptocurrencies and tokens).

Payments. FinTech entities (such as PayPal, Venmo, Square, Google Wallet and Apple Pay) provide mobile payment and digital wallet services that allow individuals and businesses to make payments and send or receive money (online, through their mobile phone or through card readers). These are all payments that historically were made through brick-and-mortar locations of merchants and banks.

Lending. There has also been an increase in the availability of online lending services offered by FinTech entities (such as Lending Club, Prosper, OnDeck and Kabbage). These companies offer lending products online and through mobile applications, often by connecting borrowers to lenders or investors to obtain personal loans, auto refinancing loans, business loans and medical financing.

Financial advisory and robo-advisory services. Financial advisors and robo-advisors have also had a significant impact on the financial services sector by automating investment advice, allowing these companies to manage customer portfolios using artificial intelligence and other technologies. Investors are increasingly turning to FinTech entities for robo-advisory services that enable consumers to conduct their investment activities entirely online and generally with fees that are significantly less expensive than hiring a human financial advisor.

4. How do traditional financial services entities engage with FinTech?

Although FinTech entities were originally perceived as disruptors to the financial services sector, US banks and other traditional financial institutions have come to view them as strategic partners, investment opportunities and acquisition targets instead.

Banks and other financial institutions have partnered with FinTech entities, leveraging the FinTech entities' technology solutions to provide traditional financial services and products. This is mutually beneficial as FinTech entities have innovative technologies that can be scaled to a nationwide customer base, and traditional financial institutions generally have access to cheaper funding, an existing customer base and regulatory compliance systems. These partnerships may give smaller institutions (such as community banks) access to technology that they would otherwise not have the resources to develop.

FinTech entities also present attractive investment opportunities for financial services entities. These investments can include, for example, exclusivity and first refusal rights that are attractive to financial institutions, while simultaneously providing FinTech entities capital they very often need to expand their businesses. Financial institutions in many instances have sought to acquire FinTech entities of all sizes at varying stages of their lifecycle.

REGULATORY ENVIRONMENT

Alternative finance

5. How is the use of FinTech in alternative finance activities regulated?

In general, crowdfunding and peer-to-peer (P2P) lending platforms came into existence in the early 2000s due to increasing use of the internet and development of the financial technology to assess credit risks on an automated basis. Given the broad-based involvement of both individuals and small businesses in equity crowdfunding and P2P lending, alternative finance activities present unique regulatory concerns.

With respect to equity crowdfunding, the US implemented a regulatory regime to reduce the compliance requirements of platform operators and securities issuers, while also protecting investors. In April 2012, the Jumpstart Our Business Startups Act

(JOBS Act) was enacted to support start-ups. The JOBS Act established new regulatory frameworks:

- The JOBS Act created a new type of internet-based intermediary (that is, a funding portal) to offer securities to the public. All crowdfunding portals must be registered with the SEC and the Financial Industry Regulatory Authority (FINRA). The compliance requirements for these intermediaries are less stringent than those for registered broker-dealers operating in the securities markets.
- Fundraising companies must be incorporated in the US and a company must not raise more than USD1.07 million through crowdfunding platforms during a 12-month period.
- All US citizens can invest in crowdfunding but are subject to an investment ceiling based on their net worth and annual income in any 12-month period.
- Fundraising companies are exempt from preparing prospectus documents to be filed with the SEC. However, fundraising companies must provide certain disclosures to investors (such as business information, director and officer information, and financial statements).

There are two main P2P lending models:

- P2P platforms partner with banks to originate loans for borrowers, which they subsequently purchase to then sell to investors (either as whole loans or in the form of securities). For this model, platform operators act as a third-party service provider of banks and are therefore subject to examination by bank regulators. When P2P platforms sell loans to investors in the form of securities, they are subject to the US securities laws and regulations and must prepare prospectuses and register the securities offering with the SEC.
- P2P platforms originate loans and then hold the loans on their balance sheets.

If P2P lending involves loans to individuals, it is also regulated by other laws and regulations governing consumer credit (including but not limited to laws regarding AML, consumer protection, privacy and cybersecurity, and usury restrictions).

Payment platforms

6. How is the use of FinTech in payments-related activities regulated?

Payments-related activities in FinTech are subject to regulation under federal and state laws and regulations. Payments-related activities are also subject to compliance requirements imposed by various industry associations and participants such as:

- The payment card associations (such as Visa, MasterCard and American Express).
- Industry groups (such as NACHA and the Payment Card Industry Data Security Standard).

Federal and state regulators can issue regulations and guidance to impose requirements on payments-related activities. The primary regulators with rulemaking authority over payments are the CFPB, Federal Reserve and state banking agencies. The Federal Reserve, FDIC and OCC are the primary federal agencies that supervise banks, which play important roles in the payments ecosystem by processing payments and issuing payment cards. State banking agencies administer licensing and supervisory frameworks for money transmitters (many of which play important roles in the payments ecosystem by accepting funds from consumers and transmitting them elsewhere).

Particular types of payments (such as electronic funds transfers) are subject to specific laws and regulations (for example, the Electronic Fund Transfer Act and CFPB Regulation E, which establish error resolution requirements for unauthorised transfers and enhanced requirements for remittance transfers of funds outside of the US.

Regulated money transmitters are subject to (among other requirements) net worth requirements and disclosure requirements. Many financial institutions in the payments ecosystem are subject to US AML requirements, including the obligation to conduct due diligence of customers. The payment card associations have detailed operating requirements for:

- Merchants that accept payment cards.
- Acquiring banks that process card payments on behalf of merchants.
- Issuing banks that issue payment cards.

These requirements also apply to service providers that are acting on behalf of merchants and banks providing these services.

Investment/asset management

7. How is the use of FinTech in the securities market regulated, if at all?

Wholesale securities market

Many FinTech entities offer products and services that are subject to US securities laws and regulations, including crowdfunding, robo-advisory services, and digital asset management and custody services. The area of securities regulation that often draws the most attention is the regulation of initial coin offerings (ICOs), which FinTech entities have commenced as an alternative form of fund raising in the US.

An important threshold question is whether ICO sponsors are offering securities within the meaning of the US securities laws, specifically the:

- Securities Act of 1933 (Securities Act).
- Securities Exchange Act of 1934 (Exchange Act).

The question is generally whether the tokens constitute investment contracts under standards established by the US Supreme Court in *SEC v W.J. Howey Co*. Under the *Howey* test, a digital coin or token offering is an investment contract (and therefore is a security) if there is an investment of money in a common enterprise with a reasonable expectation of profits to be derived primarily from the entrepreneurial or managerial efforts of others. Whether a token is a security depends on the facts and circumstances surrounding the ICO and the function of the token in particular. For example, if the tokens issued in the ICO can be used solely to purchase existing goods and services from the platform (also known as a utility token), the tokens may not be an "investment contract" under the consumptive use doctrine developed by courts and the SEC applying the *Howey* test. On the other hand, a token that represents an interest in an enterprise (or a to-be-formed enterprise) will likely be considered a security.

If tokens are securities, the SEC has made clear that they may only be offered to US investors in a registered offering or in a transaction that is exempt from registration (for example, through a private placement to accredited investors pursuant to Regulation D under the Securities Act or an unregistered offering under Regulation A+). Tokens that are securities and offered publicly must be offered and sold pursuant to a registration statement that is filed with the SEC.

After deciding to do a private offering, the sponsor must decide whether to conduct the ICO under:

- Rule 506(b) of Regulation D as a traditional private placement, which prohibits general solicitations and advertising.

- Rule 506(c) of Regulation D, which allows general solicitations and advertising but requires private placement sponsors to follow additional steps to ensure that the investors are eligible to participate in the offering (that is, that they are accredited investors).

Regardless of the private offering method, a sponsor should also consider:

- The resale restrictions of tokens sold in a private placement and the impact on prospective investors' decisions to participate in the ICO.
- Whether they are offering investment advice. If it is offering investment advice, the sponsor must meet the SEC registration requirements that apply to investment advisers. The Investment Advisers Act of 1940, as amended (Investment Advisers Act), applies to any person who, for compensation, engages in the business of advising others as to the value of securities or the advisability of investing in, selling or purchasing them. Depending on the structure of a token offering, Investment Advisers Act considerations may apply if the token is a security.

Also, if a token is a security, the exchanges on which it is traded must be registered under the Exchange Act and intermediaries must be registered as broker-dealers under the Exchange Act or as registered investment advisers under the Investment Advisers Act. Because most (if not all) cryptocurrency exchanges are not registered, exchanges will only accept tokens for unrestricted trading if they believe the tokens are not securities.

InsurTech

8. How is the use of FinTech in the insurance sector regulated?

Insurance products offered in the US are generally regulated at the state-level. Each state has an administrative agency responsible for regulating insurance companies and the products they offer. The National Association of Insurance Commissioners (NAIC) acts as a co-ordinating body in setting uniform standards for agencies to use in supervising insurance companies. The NAIC established an Innovation and Technology task force in March 2017 to ensure regulatory agencies are informed of key developments affecting InsurTech.

One component of this state regulatory framework is a set of licensing processes that insurance companies (including FinTech companies offering regulated insurance products) must navigate before being able to offer insurance products in the state. To obtain approval to do business in the state, a FinTech company may be required to submit to the state regulatory agency the following:

- Detailed information about the company's shareholders, directors and officers.
- Business plan information and financial information.

In addition to these licensing frameworks, insurance products are subject to a number of laws and regulations regarding reserves, permissible investments and customer disclosures.

Blockchain-based solutions

9. How is the use of blockchain in the financial services sector regulated?

Blockchain technologies currently are not subject to their own dedicated financial services laws or regulations. The incidental use of blockchain technologies in cryptocurrencies and ICOs is not directly regulated (even though cryptocurrencies and ICOs are subject to dedicated laws, regulations and guidance, see *Question 7*).

Blockchain technologies are regulated under existing laws and regulations to the extent the technologies are used together with a particular product, service or use that is subject to requirements under these laws and regulations. For example, if a blockchain technology is used to transmit a consumer's funds electronically, the technology may be regulated under the Electronic Fund Transfer Act and CFPB Regulation E, which impose requirements on financial institutions that offer electronic fund transfer services. If a blockchain technology is used by a financial institution to track customer information and due diligence for AML compliance purposes, the technology may be subject to the Bank Secrecy Act and FinCEN regulations. Blockchain technologies may therefore be subject to a variety of financial services laws and regulations depending on their specific use.

Financial services infrastructure

10. What types of financial services infrastructure-related activities of FinTech entities are regulated?

Electronic products, services and controls (such as digital banking, financial research, and data and transactional security) are subject to regulation. This is mainly because these infrastructure-related activities are offered by regulated financial institutions (including banks, broker-dealers and their service providers). These activities are subject to federal and state laws and regulations, and are supervised by federal and state banking agencies.

Infrastructure-related activities must comply with detailed privacy and cybersecurity requirements under the Gramm-Leach-Bliley Act and guidance issued by the Federal Financial Institutions Examination Council (FFIEC). These activities are also often subject to disclosure requirements issued by the federal and state banking agencies and SEC.

Regulatory compliance

11. What are the key regulatory compliance issues faced by FinTech entities?

FinTech entities have a range of regulatory compliance obligations that vary based on their activities, the products and services they offer, and the licences they hold. For example, FinTech entities offering financial services to US consumers must generally comply with multiple federal laws that govern their information collection and sharing practices (such as the Gramm-Leach Bliley Act and the Fair Credit Reporting Act). The CFPB has broad jurisdiction over entities that provide financial services to consumers and FinTech entities offering these services may therefore be subject to the US federal consumer protection laws (such as the Truth in Lending Act and the Electronic Fund Transfer Act).

Cybersecurity has been a topic of increased regulatory scrutiny. Many federal and state regulatory authorities have issued guidance or rules setting standards for financial services entities with respect to cybersecurity. For example, the federal banking agencies issued an advanced notice of proposed rulemaking in October 2016 regarding enhanced cyber risk management standards for certain financial institutions. In addition, the New York State Department of Financial Services (NYDFS) was the first state regulator to issue a comprehensive cybersecurity regulation that broadly applies to financial services entities with a licence, charter or other approval from the NYDFS.

Many FinTech entities provide payment services or otherwise interact with payment systems (including by facilitating money transmission between individuals or offering credit and debit cards). Such activities may be subject to substantive requirements and restrictions under federal law (for example, consumer protection laws applicable to the issuance of debit and credit cards) or require licensing under state laws (such as a money transmission licence). FinTech entities may explore partnerships with regulated entities to take advantage of the regulated entities' licences under relevant federal and state laws, but these partnerships do not necessarily provide FinTech entities an exemption from licensing requirements. Also, merely partnering with a regulated entity may have the effect of subjecting the FinTech entity to additional compliance requirements. See *Question 12*. FinTech entities licensed as money transmitters under state laws must generally register with FinCEN as money service businesses to comply with the Bank Secrecy Act and any related AML rules and regulations (including customer due diligence requirements).

Federal and state regulators are also exploring several special licensing regimes for FinTech entities. For example, the OCC issued a White Paper in 2016 outlining its authority to issue special purpose national bank charters to FinTech entities. Despite legal challenges by the NYDFS and the Conference of State Bank Supervisors, the OCC announced in July 2018 that it would begin accepting applications from non-depository FinTech entities that engage in one or more core banking activities (such as paying checks or lending money) for a special purpose national bank charter. While they have not yet created a special licensing regime, the SEC and CFTC have been scrutinising the intersection of the securities and commodities laws and cryptocurrency (including ICOs and token sales), and whether the products offered by FinTech entities should be subject to SEC and CFTC regulation.

At the state level, several states are considering or have adopted virtual currency licensing regimes. For example, the NYDFS adopted a virtual currency regulatory framework in August 2015 that makes it compulsory to obtain a BitLicense before engaging in any of the following in relation to virtual currency in New York State:

- Transmission.
- Storing, holding and maintaining custody or control.
- Buying, selling, performing exchange services, controlling, administering or issuing.

Other states (including Washington and Wyoming) have passed legislation and modified their state money transmission laws to include virtual currency. In 2017, the Uniform Law Commission completed the Uniform Regulation of Virtual-Currency Business Act, which is a template that state governments can use to integrate cryptocurrency companies into the regulatory system.

12. Do FinTech entities encounter any additional regulatory barriers in entering into partnerships or other arrangements with traditional financial services providers? How common are these arrangements in your jurisdiction?

In addition to any regulatory requirements that apply to FinTech entities in relation to the products and services they provide, FinTech entities may be subject to additional regulation by entering into partnerships or other arrangements with regulated financial institutions. As part of these arrangements, financial services entities may outsource certain functions to FinTech entities, or otherwise rely on them to provide important products and services including (for example) underwriting services, customer due diligence and AML compliance, and customer analytics. FinTech entity-financial services provider partnerships have become common in the US. For example, a P2P lending platform will often partner with a bank to originate its loans, in which case the platform may be viewed as a service provider with respect to the bank's loan origination activities.

Outsourcing or partnership arrangements between banks and their service providers (including FinTech entities) are subject to comprehensive third-party risk management requirements, including due diligence, monitoring and oversight, and auditing by the bank and its regulators. Federal banking agencies have interpreted their authority to regulate and examine third-party service providers broadly under the Bank Service Company Act (BSCA). Also, the FFIEC has issued guidance regarding the authority of financial regulators to examine certain technology service providers to banks. The CFPB has similar examination and enforcement authority over the service providers of financial institutions regulated by the bureau, including FinTech entities that provide services to those institutions.

13. Do foreign FinTech entities intending to provide services in your jurisdiction encounter regulatory barriers that are different from domestic FinTech entities?

Aside from the licensing and regulatory compliance requirements that apply to domestic FinTech entities described throughout this chapter, non-US entities do not face any tangible regulatory hurdles or barriers to entry. However, the US has been criticised as lagging behind other jurisdictions (such as the UK, Singapore and Australia) that have had initiatives to facilitate the development of financial technology innovation and remove regulatory barriers for FinTech entities for several years.

US regulatory authorities have made statements indicating that they are co-ordinating with regulators in other jurisdictions, but have not entered into many notable formal co-operation agreements or memoranda of understanding.

However, in February 2018, the CFTC announced that it entered into a co-operation agreement with the UK Financial Conduct Authority that commits the regulators to collaborating and supporting innovative firms through each other's FinTech initiatives. In September 2018, the CFTC announced that it had entered into a similar co-operation agreement with the Monetary Authority of Singapore. The agreements are principally focused on information sharing on FinTech trends and developments. The agreements also facilitate referrals of FinTech companies interested in entering the others' market, and sharing information and insight derived from each authority's relevant sandbox, proof of concept or innovation competitions.

Moreover, in August 2018, the CFPB announced that it will join ten non-US financial regulators in an alliance, the Global Financial Innovation Network (GFIN), to encourage the growth of FinTech and potentially create a global sandbox for financial innovation. The alliance was initially proposed by the UK Financial Conduct Authority and includes financial regulators from Singapore, Hong Kong, Dubai International Financial Centre and Canada. Other US federal financial services regulators did not join the alliance, nor did financial regulatory authorities in the EU (except the UK Financial Conduct Authority). GFIN has issued for public comment an initial Consultation Document outlining its proposed function for financial services firms and other stakeholders.

14. What steps can be taken in your jurisdiction to protect FinTech innovations and inventions?

Patents

The US offers FinTech innovations extensive intellectual property protections. Most notably, FinTech entities can apply for patent protection for any useful invention (but not abstract ideas). The question of patent eligibility is extremely important for FinTech entities, as many of their products and services are inherently abstract concepts. The Supreme Court's decision in *Alice Corp. v CLS Bank, 134 S. Ct. 2347 (2014)* sets out a two-step test for determining patent eligibility. According to the test, even if an invention is directed to an abstract idea, the patent claim (that is, "the metes and bounds" of the intellectual property right) can, as a whole, show an inventive concept and therefore be patent-eligible. For example, while the concept of money lending among a group of peers is essentially an abstract idea, using a sophisticated software platform to implement such a lending scheme in a particular way may arguably be an "inventive concept" sufficient for the invention to be patent-eligible. Patent eligibility is only one of the requirements and an invention must also meet other requirements (such as being novel and not obvious) to qualify for a patent.

Trade secrets

As an alternative to obtaining a patent, a FinTech entity may secure intellectual property protection in the form of a trade secret. While patent law is premised on granting a temporary monopoly right in exchange for public disclosure of a new invention, trade secret law provides indefinite protection for economically valuable information as long as it is kept hidden from the public. However, the trade secret protection route presents its own set of concerns as the release of the information into the public domain (whether accidental or intentional) may eliminate the trade secret status of the FinTech entity's product or service.

Copyright

Additionally, certain aspects of software that a FinTech entity may design are eligible for US copyright protection.

GOVERNMENT INITIATIVES

15. To what extent have governments and/or regulators in your jurisdiction sought to create a more favourable regulatory environment for FinTech entities?

In addition to the special licensing regimes (*see Question 11*), several of the US federal and state regulatory authorities have explored regulatory sandboxes or FinTech pilot programmes. For example, in August 2018, Arizona became the first state to create a regulatory sandbox to facilitate FinTech innovation. The regulatory sandbox allows FinTech entities to test their products and services on up to 10,000 (and in certain instances, up to 17,500) state residents for up to two years (with the possibility of a one-year extension) without requiring additional state licensing. In May 2018, the CFPB announced that it is developing a FinTech regulatory sandbox in co-ordination with the CFTC.

Many regulators have also created special offices or initiatives aimed at working with FinTech entities and other members of the financial services industry to promote financial innovation. For example, the OCC created an Office of Innovation that has established a framework for supporting "responsible innovation". The Office of Innovation hosts conferences, publishes guides and White Papers, and meets regularly with industry participants during its office hours.

The CFPB also recently created a new Office of Innovation focused on implementing policies to facilitate innovation, engage with entrepreneurs and regulators, and importantly, review outdated or unnecessary regulations. The Office of Innovation replaces the CFPB's Project Catalyst initiative that (among other projects) aimed to facilitate innovation by implementing a no-action letter policy (that is, an entity can apply for a letter that the regulator has no present intention to recommend enforcement or supervisory action against it). The CFTC created LabCFTC to engage with new technologies, encourage innovation and fair competition, and leverage FinTech innovation to become a more efficient and effective regulatory agency.

16. Are there any special regimes in places to facilitate access to capital for FinTech entities?

FinTech entities in the US use traditional capital-raising sources to fund their business, including relying initially on:

- Venture capital.
- Angel investors.
- Personal or commercial lending.

Later rounds of funding often come from direct investments and rounds of equity and debt.

Other ways to raise capital include the following:

- **Crowdsourcing.** Like other start-up companies, FinTech entities have had increasing success with online crowdsourcing campaigns (such as Kickstarter).
- **ICOs.** Cryptocurrency crowdfunding through ICOs has drawn a considerable amount of investment for FinTech entities.
- **Initial public offerings (IPOs).** Several of the larger US FinTech entities have successfully completed IPOs (including OnDeck, Square, LendingTree and Lending Club).

There are no overarching special regimes in place to facilitate access to capital for FinTech entities, although companies may be able to take advantage of federal programmes aimed at community or start-up entities. For example, they may be eligible for small business loans from the Small Business Administration. Additionally, at the local level, state and municipal governments may have programmes in place, either targeted at FinTech entities or generally available, to facilitate economic growth in their jurisdiction.

17. Is the government taking measures to encourage foreign FinTech entities to establish a domestic presence?

There are no comprehensive government incentive programmes or measures to encourage non-US FinTech entities to establish a presence in the US. As discussed in *Question 13*, non-US entities must adhere to licensing requirements and meet the same regulatory compliance standards as US FinTech entities. The stringent, complex and fragmented nature of the US financial services regulatory environment has been criticised as a deterrent for non-US entities to establish a US presence (as the expense and time required for licensing and compliance are substantial). However, the financial services industry is increasingly global and many US financial services companies are partnering with non-US institutions, recruiting international talent or otherwise expanding their presence globally.

CROSS-BORDER PROVISION OF SERVICES

18. Are there any special rules that affect the cross-border provision of financial products or services by both domestic and foreign FinTech entities?

Domestic FinTech entities

There are no additional rules that affect the cross-border provision of financial products or services by a US FinTech entity abroad (provided the entity complies with the relevant US regulatory requirements applicable to its activities).However, if a domestic FinTech entity provides financial products and services to a customer located outside of the US, these products and services may be subject to any regulatory or compliance requirements in the jurisdiction where the customer is located.

Foreign FinTech entities

Foreign FinTech entities that provide financial products and services to customers in the US are generally subject to the same rules and requirements as a domestic entity providing the same products and services. For example, a company that offers funds transfer services to US customers may be required to obtain money transmission licences from state banking agencies (regardless of whether the company is a domestic or foreign FinTech entity). The requirements under state law relating to the terms and conditions of the fund transfer services would apply to domestic and foreign FinTech entities providing these services. In addition to these requirements, foreign FinTech entities that are themselves regulated entities (such as banks, investment advisers, insurance companies or other institutions) may be subject to additional requirements before they can provide services in the US.

THE FUTURE OF FINTECH

19. Are there any ongoing regulatory measures or initiatives that may affect FinTech in your jurisdiction?

US federal and state financial services regulatory authorities are focused on fostering the growth of FinTech entities in the US. The growth of FinTech entities in recent years has highlighted a burgeoning market with significant economic potential, and a commercial need to create efficiencies and modernise the provision of financial products and services.

It will be important to follow the direction of US public and private sector initiatives related to FinTech. Similar to the offices established by regulatory agencies to foster innovation, many large banks and other traditional financial institutions (and multinational technology and e-commerce companies) have massive efforts underway to create their own technological solutions and to partner with, invest in or acquire FinTech entities. It also remains to be seen to what extent federal and state financial services regulatory authorities will expand their current regulatory regimes to include or exempt FinTech entities and the new products and services they are offering. Currently, these may be outside the purview or statutory reach of the current regimes.

The commitment to financial innovation in the US extends beyond the regulators to the highest levels of the US government. In June 2018, the Treasury (at the direction of President Donald J. Trump) issued a financial reform report with over 80 recommendations for enhancing and promoting non-bank financial institutions, FinTech and innovation. The report signals the administration's continued interest in FinTech and ensuring that FinTech entities can provide innovative products and services to consumers without undue regulatory burden.

THE REGULATORY AUTHORITIES

Office of the Comptroller of the Currency (OCC)

Principal responsibilities. The federal banking regulator that has created an Office of Innovation to facilitate FinTech innovation and offered a special purpose national bank charter for non-depository FinTech entities.

W *https://occ.gov*

Commodity Futures Trading Commission (CFTC)

Principal responsibilities. The federal commodities regulator that has created LabCFTC to facilitate FinTech innovation in the commodities industry.

W *https://cftc.gov*

Consumer Financial Protection Bureau (CFPB)

Principal responsibilities. The federal consumer financial protection regulator that has created an Office of Innovation to facilitate FinTech innovation.

W *https://www.consumerfinance.gov*

Conference of State Bank Supervisors

Principal responsibilities. The nationwide organisation of US state financial regulators from all 50 US states, the District of Columbia, Guam, Puerto Rico, American Samoa and the US Virgin Islands.

W *https://www.csbs.org*

New York State Department of Financial Services (NYDFS)

Principal responsibilities. The New York State regulator of financial services sector that issues a specific licence for cryptocurrency companies.

W *https://www.dfs.ny.gov*

ONLINE RESOURCES

NYDFS Cybersecurity Regulation

W *https://www.dfs.ny.gov/legal/regulations/adoptions/dfsrf500txt.pdf*

Description. The NYDFS Cybersecurity Requirements for Financial Services Companies.

OCC Special Purpose National Bank Charter

W *https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html*

Description. A July 2018 press release stating that OCC will begin accepting applications for its special purpose national bankcharter. Links to the OCC's 2016 policy statement regarding the special purpose national bankcharter.

NYDFS BitLicense Regulatory Framework

W *https://www.dfs.ny.gov/legal/regulations/bitlicense_reg_framework.htm*

Description. Links to the NYDFS's virtual currency regulation and related frequently asked questions (FAQs).

Global Financial Innovation Network Consultation Document

W *https://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2018/20180807e5a1.pdf*

Description. Text of the GFIN consultation document.

Alice Corp v CLS Bank, 134 S. Ct. 2347 (2014)

W *https://www.supremecourt.gov/opinions/13pdf/13-298_7lh8.pdf*

Description. The final Supreme Court judgment.

Arizona FinTech Sandbox

W *https://www.azag.gov/fintech*

Description. Links to FinTech Application, FAQs and the Bill that created the sandbox.

OCC Office of Innovation

W *https://www.occ.treas.gov/topics/responsible-innovation/index-innovation.html*

Description. Links to events and publications of the Office of Innovation.

CFPB Office of Innovation Regulatory Sandbox

W *https://www.consumerfinance.gov/about-us/blog/CFPB-office-innovation-proposes-disclosure-sandbox-fintech-companies-test-new-ways-inform-consumers/*

Description. The CFPB press release announcing its proposed creation of a Disclosure Sandbox for FinTech entities.

LabCFTC

W *https://www.cftc.gov/LabCFTC/index.htm*

Description. Links to events and publications of LabCFTC.

Treasury Report on Non-bank Financials, Fintech and Innovation

W *https://home.treasury.gov/news/press-releases/sm447*

Description. Links to the full report, fact sheet and other Treasury Reports issued pursuant to Executive Order 13772.

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