

As House Financial Services Committee Chair Maxine Waters (D-CA) noted earlier this year:

As new technologies emerge and the financial services industry puts those technologies to use, Congress must make sure that responsible innovation is encouraged, and that regulators and the law are adapting to the changing landscape to best protect consumers, investors, and small businesses.¹

This article first briefly reviews the current legislative and regulatory landscape in the financial technology (FinTech); it then details ongoing efforts on Capitol Hill and in the states to ensure that the legal framework for FinTech is able to adapt to keep pace with developments in the industry.

Current Legislative and Regulatory Landscape

Legislative

In September 2016, current House Financial Services Ranking Member Patrick McHenry (R-NC) introduced the [Financial Services Innovation Act of 2016](#) (H.R. 6118) – legislation that is largely considered to be the starting point for developing a modern FinTech framework. Ranking Member McHenry’s legislation would create a regulatory “sandbox” approach for FinTech firms. Effectively, the “sandbox” approach would provide a streamlined regulatory process that would allow companies to work alongside a regulator when testing a FinTech product or service, thus allowing these firms the ability to test a new product or service with a limited launch, without going through the full regulatory process.

Representative McHenry’s bill also would require the 12 federal financial regulators (Consumer Financial Protection Bureau (CFPB), Commodities and Futures Trading Commission (CFTC), Department of Housing and Urban Development (HUD), Department of the Treasury, Farm Credit Administration, Federal Deposit Insurance Commission, Federal Housing Finance Agency, Federal Reserve System, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency (OCC), and Securities and Exchange Commission (SEC)) to develop an internal “Financial Services Innovation Office” (FSIO) where companies would be able to seek help in testing a product or service. These FSIOs would process and share data amongst each other and periodically report to Congress. Under his legislation, FinTech firms would be permitted to petition for an “enforceable compliance agreement” with the FSIOs that, if accepted, would allow the firms to provide their product or service under an alternative compliance plan, which would replace or modify existing regulations. While a petition is pending, the bill would also create a safe harbor barring the agency from bringing an enforcement action relating to the financial innovation that is the subject of the petition.

Regulatory

Though Representative McHenry did not reintroduce his legislation last Congress – nor has he done so thus far in the 116th Congress – various regulators have already begun to work within their current statutory authority to help advance FinTech regulation. To date, the OCC, CFPB, CFTC, and SEC have each taken steps to regulate FinTech companies within their jurisdiction; these efforts are briefly described below.

OCC

Towards the end of 2016, the OCC announced that it would allow FinTech firms to apply for limited-purpose bank charters and released a white paper titled “Exploring Special Purpose National Bank Charters for FinTech Companies,” which sets forth the principles for FinTech chartering.² In 2018, the OCC announced that it would begin considering “applications for special purpose bank charters from [FinTech] companies that are engaged in the business of banking but do not take deposits.”³ Thus far, there has been little interest in the OCC’s FinTech Charter; this is largely believed to be the result of regulatory uncertainty, which underscores the need for a unified legal framework for the FinTech industry.

CFPB

The CFPB launched its Office of Innovation (previously called “Project Catalyst”) in 2012.⁴ The Office of Innovation was established to promote innovation, competition, and consumer access in the financial services sector through regulatory relief, engagement with the FinTech community, and collaboration with other financial regulators. Similar to the FSIO concept in Ranking Member McHenry’s Bill, the Office of Innovation would allow FinTech firms to apply for research pilot projects and issue No Action letters. There has also been discussion about potentially offering regulatory safe harbors and exemptions down the road.

CFTC and SEC

The CFTC and SEC have also both taken steps toward beginning to regulate the FinTech industry. The CFTC’s LabCFTC⁵ and the SEC’s FinHub⁶ – created in 2017 and 2018, respectively – allow the regulators to engage with the industry, consolidate and clarify communications, and inform interested parties of policy developments.

Updating the Current Legal Framework for FinTech

As noted at the outset of this article, advancements in the FinTech industry are outpacing policymakers' efforts (or abilities?) to update the current legal framework for FinTech. Thus far this Congress, however, two important bodies have begun taking steps to change that: (1) the bipartisan Congressional FinTech and Payments Caucus (CFTPC); and (2) the House Financial Services Committee's Task Force on Financial Technology (FinTech Task Force). Their respective developments are discussed below, as are the efforts of state regulators.

CFTPC

Earlier this year, Representatives David Scott (D-GA) and Barry Loudermilk (R-GA) – both members of the House Financial Services Committee – were named co-chairs of the CFTPC. According to Representative Scott, "it is very important for [] Congress to be proactive and help our FinTechs get prepared to safely and successfully navigate our complex, multi-faceted federal financial regulatory structure." Representative Loudermilk has also made clear that "[t]he mad dash for regulatory control often results in conflicting regulations from multiple agencies, which stifles innovation, ultimately harming consumers." To that end, the two CFTPC co-chairs in March 2019 introduced the [FINTECH Act of 2019](#) (H.R. 1491).

Specifically, the FINTECH Act of 2019 would:

- Mandate Federal Financial Regulatory Harmonization: Each federal financial regulator that regulates FinTechs is required to harmonize, coordinate, and eliminate any duplication and any conflicting regulations with any other federal FinTech regulator.
- Establish a Point of Entry for FinTechs into the Federal Regulatory Structure: The Treasury Department is required to establish a FinTech Council to serve as a single point of entry into the federal financial regulatory system, allowing FinTechs who meet certain requirements to be assigned one or more designated regulator(s) through which regulatory action is funneled.

As of the time of publication, there are no additional co-sponsors to the FINTECH Act of 2019. This is likely the result of the House Financial Services Committee establishing the FinTech Task Force, which is intended to "help Congress to stay on top of new developments... so that [it is] well-positioned to make policy" in the FinTech arena.⁷

FinTech Task Force

In May 2019, the House Financial Services Committee unanimously agreed to establish a FinTech Task Force, with Representative Stephen Lynch (D-MA) named as Chair. In taking the helm of the FinTech Task Force, Chair Lynch noted:

We are witnessing an exciting evolution in the financial services space, which will vastly improve the use and quality of services in lending, payments and money management. The lives of consumers are changing with user-friendly financial service apps but these emerging technologies come with vulnerabilities and the need to reevaluate our consumer protection standards. As we explore the future of financial services, this bipartisan task force will give us the opportunity to educate Congress on the opportunities and challenges posed by these technologies and what we can do to produce the best outcomes for consumers.⁸

In its inaugural hearing, the FinTech Task Force highlighted in its Committee Memorandum that:

Underlying, cross-cutting technological advancements that enable FinTech include: increased capability in data collection, storage, and processing; development of algorithmic decision-making (and the related technological evolutions towards machine learning and artificial intelligence); and increasingly widespread, easy access to the internet and mobile technology. The complementary use of these technologies in the delivery of financial services could potentially create efficiencies, possibly leading to reduced prices for and increased access to financial services, including for consumers and small businesses.

New technologies can also generate risks. It may be difficult to predict how an innovation with little track record will perform, so there could be instances, for example, where certain technologies involving payments ultimately may not distribute funds as intended. In addition, FinTech startups may be inexperienced in complying with applicable laws and regulations. Some studies suggest that the use of FinTech can result in disparate impact on protected groups, and that the increasing use of high-speed internet and mobile devices in finance may be leaving behind groups that cannot afford those services and devices. Given that most of the federal financial regulatory framework was created prior to the development and deployment of many recent technologies, regulators are grappling with how to regulate in a way that appropriately mitigates the risks these technologies may present while fostering the adoption of potentially beneficial technologies.⁹

The FinTech Task Force has held one hearing each month since its inaugural hearing and has thus far focused on: (1) leveraging FinTech to expand access to credit; and (2) real-time payments. The themes of these hearings – which are summarized below – likely provide a preview as to direction the FinTech Task Force is headed in developing new policies to regulate the FinTech industry.

Expanding Access to Credit

On July 22, 2019, the FinTech Task Force held a hearing titled "Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit." As discussed during the hearing, emerging technologies have changed how data is used in lending decisions and credit scoring.¹⁰ While lenders and credit reporting agencies have relied on a consumer's ability to repay – based on factors such as payment history, credit utilization, length of credit history, and new credit accounts – in making their decision, there are millions of consumers who are "credit invisible."

Fortunately, the rise of FinTech has allowed lenders and credit rating agencies to begin leveraging alternate sources of data (i.e., utility bill payments, online behavioral data, educational or occupational attainment, social network connections, etc.) in making their decisions. That said, there are concerns about the regulatory uncertainty as relates to the use of alternative data – particularly the potential negative impact such uncertainty could have on lower-income consumers. As such, the FinTech Task Force used this hearing to discuss two pieces of legislation aimed at resolving some of this uncertainty: (1) [Credit Access and Inclusion Act of 2019](#); and (2) [FHA Additional Credit Pilot Program Reauthorization Act](#) (H.R. 123). Both proposals are summarized below.

Credit Access and Inclusion Act of 2019

The *Access and Inclusion Act of 2019* would amend the *Fair Credit Reporting Act* to clarify reporting requirements of certain consumer credit information to consumer reporting agencies. Specifically, the draft legislation would allow consumers ability to choose to include their rent and telecom payments as data sources when creating their credit score. According to the bill's author, Representative Josh Gottheimer (D-NJ):

In this new era, there needs to be a better way to create a comprehensive picture of a consumer's creditworthiness – to add to their credit file – even if they don't use all of the traditional sources from the past. We need to give the next generation of consumers the ability to build a stronger credit file through new data sources, and to do so in a way that protects their privacy... Adding the information from alternative credit data sources could lower costs for lenders and, in turn, benefit consumers through lower prices and greater access to credit, which is the ultimate goal.¹¹

As of the time of publication, Representative Gottheimer has yet to formally introduce this legislation.

FHA Additional Credit Pilot Program Reauthorization Act

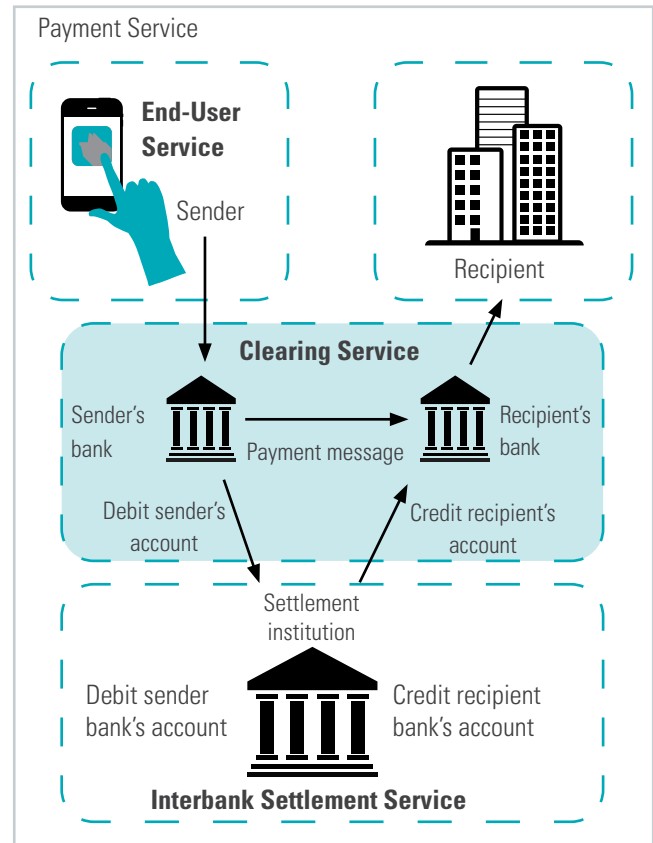
The *FHA Additional Credit Pilot Program Reauthorization Act* would authorize for five years a HUD pilot program under Federal Housing Administration that would permit borrowers to opt into utilizing credit scoring models that incorporate alternative data. The legislation would also require HUD to provide Congress with interim and final reports on the demographics of participating mortgagors – including changes in premiums and interest rates, and whether such changes are found to be a result of the use of alternative data. According to the bill's lead sponsor, Representative Al Green (D-TX):

This critical legislation represents one more step forward in responsibly expanding access to homeownership to hardworking persons who pay all of their bills in a timely manner, including rent which often exceeds a mortgage... Homeownership is essential to moving our economic recovery forward and expanding our middle class.¹²

Representative Green formally reintroduced his bill this Congress on September 18, 2019. As of the time of publication, the legislation has two additional co-sponsors: Representatives Brad Sherman (D-CA) and Emanuel Cleaver (D-MO) – both of whom are also members of the House Financial Services Committee.

Real-Time Payments

The FinTech Task Force held its second hearing on September 26, 2019, which focused on the "Future of Real-Time Payments." As the Task Force notes in its Committee Memorandum, an electronic payment involves three steps: (1) a sender initiates a payment through an end-user service, which directs the payer's financial institution to pay the identified recipient; (2) the payer's financial institution sends the payment details to the recipient's financial institution through a clearing service; and (3) the payment is settled between the two financial institutions and funds are transferred through a settlement system.¹³



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Importantly, though, technological advances in digitization, data processing, and storage have resulted in greater availability of electronic payments – including the development of real-time payments. While most electronic payments are settled on the same or next business day,¹⁵ the FinTech industry is developing a variety of real-time payment options, which has necessitated regulatory action. In fact, according to Federal Reserve Chairman Jerome Powell, "the United States is far behind other countries in terms of having real-time payments available to the general public."¹⁶ As such, the Federal Reserve in August 2019 announced FedNow – "an interbank 24x7x365 real-time gross settlement service with integrated clearing functionality to support faster payments in the United States...[that] would process individual payments within seconds...[and] would incorporate clearing functionality with messages containing information required to complete end-to-end payments, such as account information for the sender and receiver, in addition to interbank settlement information."¹⁷

Despite the announcement of FedNow, the FinTech Task Force's Committee Memorandum notes that "[t]he various levels of regulatory oversight of payment systems raises concerns by private [real-time payment] system stakeholders as to whether or not the Fed can justify creating a [real-time payment] system in the presence of competing private systems. On the other hand, small banks, credit unions and others are concerned that a market dominated by a single, privately-run RTP system could behave anti-competitively."¹⁸ Additionally, the hearing also highlighted a myriad of other concerns surrounding real-time payments, including as relate to consumer fraud, cybersecurity, data privacy, and financial access and inclusion.

To address these issues, the FinTech Task Force used the hearing to consider the [Payments Modernization Act of 2019](#) (H.R. 3951), which would require the Federal Reserve within three years of enactment to create a real-time payments system that makes funds be readily available in real time. The system would operate as a public utility and prioritize security, consumer health, and transparency; the Federal Reserve would be required to submit semiannual reports to Congress on implementation. According to the bill's lead sponsor, Representative Ayanna Pressley (D-MA):

[Too many] people...live paycheck to paycheck and cannot afford to wait days for their checks to clear...The Federal Reserve Bank has a responsibility to respond to the needs of the American public, such as establishing an inclusive and faster payments system. [This legislation] will ensure that the Federal Reserve speeds up the process of clearing payments so that all hardworking Americans can access and move their money quickly, safely, and securely 24/7/365."¹⁹

Representative Pressley formally introduced her bill on July 24, 2019. As of the time of publication, the legislation has four additional co-sponsors: Representatives Chuy Garcia (D-IL), Rashida Tlaib (D-MI), Cynthia Axne (D-IA), and Gregory Meeks (D-NY) – all of whom are also members of the House Financial Services Committee. Notably, while the Senate Banking Committee has been less active on FinTech issue than its House counterpart, the Committee has considered ways to facilitate faster payments. And, while the Senate Banking Committee's September 25 hearing on real-time payments was not focused on specific legislation, it is important to note that there is a Senate companion bill (S. 2243). The legislation was introduced by Senator Chris Van Hollen (D-MD) and is co-sponsored by Senator Elizabeth Warren (D-MA).

State Regulators

Another key component of FinTech regulation is being driven by the states and state-level regulators. According to the Conference of State Bank Supervisors (CSBS), "[s]tate regulators, who are the primary regulators of non-bank and FinTech firms, are committed to fostering the innovation of FinTech companies while protecting consumers from predatory products and services."²⁰ Concerned over the lack of streamlined of regulation that exists for the FinTech industry, the CSBS in June 2018 launched "Vision 2020" – an initiative aimed at modernizing regulation of non-banks, including FinTech firms. The goal of this initiative is for state regulators – by 2020 – to adopt an integrated, 50-state licensing and supervisory system that leverages technology and "smart" regulatory policy to streamline interactions between industry, regulators, and consumers.

Outlined below in a summary explanation²¹ by the CSBS, Vision 2020 consists of six distinct initiatives:

- 1. The Fintech Industry Advisory Panel** provides industry input to help states: modernize regulatory regimes; identify points of friction in licensing and multi-state regulation; and discuss a wide array of solutions. The panel will focus on payments and money transmission; lending; and community banks and innovation.
- 2. Redesigned Nationwide Multistate Licensing System (NMLS)** – the common platform for state regulation – will transform the licensing process thru data/analytics; automate most new applicants; and enable states to focus more on higher-risk cases while streamlining state regulation on a multi-state basis.

3. Harmonize Multi-State Supervision by establishing model approaches enhancing uniformity in examinations; facilitating best practices; and identifying and reporting non-bank violations. CSBS is also building a new technology platform for state exams.

4. Assist State Banking Departments, through education programs, analytics and stronger standards, CSBS is helping state departments: identify their weaknesses; put expertise where it is most needed; update supervisory processes; compare and learn from other states; and validate higher performance thru accreditation.

5. Enable Banks to Service Non-Banks, through enhanced industry awareness campaigns to address de-risking practices – where banks are cautious about doing business with non-banks – CSBS is increasing industry awareness that strong regulatory regimes exist for compliance with laws for money laundering, the Bank Secrecy Act, and cybersecurity.

6. Improve Third Party Supervision through CSBS support of federal legislation to amend the Bank Services Company Act to allow state and federal regulators to better coordinate supervision of TSPs and, in turn, produce an easier supervisory experience for FinTechs and other non-banks.

In August 2018, the CSBS released a progress report²² on implementation of each of Vision 2020's six initiatives.

- 1. The Fintech Industry Advisory Panel:** 33 companies in payments or lending had joined the panel, resulting in more than 100 hours of collaboration and the organizing of a National FinTech Forum.
- 2. Redesigned Nationwide Multistate Licensing System (NMLS):** Participants had defined a strategy (i.e. "*a one-step platform spanning licensing thru supervision*") and determined system requirements; development of the system, with continuous user feedback, had also begun.
- 3. Harmonize Multi-State Supervision:** Efforts to build the first, national State Examination System and create a uniform approach to licensing for a "seamless regulatory process" had begun.
- 4. Assist State Banking Departments:** A new online accreditation system had been deployed and implementation of a nationwide cybersecurity training had been launched.
- 5. Enable Banks to Service Non-Banks:** Efforts to increase industry awareness that strong regulatory regimes exist for compliance with laws for cybersecurity, anti-money laundering, and Bank Secrecy Act were underway – including the release of a whitepaper titled "The State of State Money Service Businesses Regulation and Supervision."
- 6. Improve Third Party Supervision:** Efforts were undertaken to advocate for enactment of H.R. 3626, *Bank Service Company Examination Coordination Act*, which would enhance state and federal regulators' ability to share information on bank's technology vendors and produce streamlined supervisory experience for FinTechs and other nonbanks.

Additionally, in February 2019, CSBS agreed to implement 14 specific [recommendations](#)²³ made by the FinTech Industry Advisory Panel, including to:

- Develop a 50-state model law to license money services businesses;
- Create a standardized call report for consumer finance businesses;
- Build an online database of state licensing and FinTech guidance, while encouraging a common standard;
- Develop a new technology offering, a State Examination System, to simplify examinations of nonbanks operating in more than one state; and
- Expand the use of the Nationwide Multistate Licensing System among all state regulators and to all nonbank industries supervised at the state level

While the CSBS has made significant progress in its efforts to provide for a unified, state-level regulatory framework for the FinTech industry, much work remains to bring Vision 2020 to fruition. However, whether state regulators' vision is achieved through this initiative – or through federal regulation – it is clear that such efforts will help shape the ultimate regulatory framework that governs the FinTech industry.

Conclusion

As can be seen in this review of the current – and developing – FinTech legislative and regulatory landscape, much uncertainty exists despite valiant attempts to provide much-needed clarity and streamline oversight of, and compliance by, the industry. That said, policymakers in Washington and in the states are making significant strides and appear to be well on their way to regulating the FinTech industry in such a way that protects consumers, while at the same time allowing them to reap the benefits that the FinTech industry provides. In other words, that's one small step for FinTech, one giant leap for consumers!

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