

# The Biden Administration: New Priorities in the Banking, Fintech and Derivatives Sectors

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Now that the first 100 days of the Biden Administration are in full swing, its financial regulatory priorities are becoming clearer. In this Client Alert, we discuss where we expect the Administration to focus, with respect to the banking, fintech, and derivatives sectors.

We believe these to be the principal takeaways:

- The Administration's whole-of-government emphasis on climate change issues should inform the regulatory agencies' agendas far more than in the past.
- The Administration's focus on racial justice will likely lead to increased enforcement activities, particularly by the Consumer Financial Protection Bureau (CFPB), as well as to a reexamination of the Office of the Comptroller of the Currency's (OCC) recently revised Community Reinvestment Act (CRA) regulations.
- President Biden's choices to head the OCC, Securities and Exchange Commission (SEC), and Commodity Futures Trading Commission (CFTC) will have significant input into the regulation of digital assets and fintech, with certain Trump-era regulations likely being subject to reexamination.
- The CFPB can be expected to return to Obama Administration priorities and enforcement activity, with large financial institutions the likely targets.
- The CFTC is likely to increase its aggressive enforcement in the derivatives and commodities markets, as well as maintain a keen focus on climate-related risks in those markets.
- At the federal legislative level, Representative Maxine Waters (D-CA) and Senator Sherrod Brown (D-OH), both committee chairs, will likely focus on pandemic relief, inequity in housing, consumer protection, and climate change; in addition, cannabis banking legislation may finally be advanced.
- In the immediate future, Congress is focused on the market volatility brought to light by the GameStop short squeeze, including a House Financial Services Committee hearing currently scheduled for February 18th with high-level executives of Robinhood, Citadel, Reddit, and Melvin Capital testifying. The House Financial Services Committee and Senate Banking Committee are also likely to consider legislation to ensure more market stability and possibly regulate order-flow payments.

## A. Overarching Administration Priorities: Combatting Climate Change and Advancing Racial Justice

### 1. Climate Change

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Climate change will be a new priority for the financial regulators. At her confirmation hearing, Treasury Secretary Janet Yellen called climate change an “existential threat” and stated that she plans to create a special unit, led by a senior official, to examine the risks that climate change poses to the financial system.<sup>[1]</sup> It is therefore reasonable to expect that the Financial Stability Oversight Council (FSOC), which Secretary Yellen chairs, will investigate climate-related risks. In December 2020, Senator Dianne Feinstein (D-CA) introduced the Addressing Climate Financial Risk Act, which among other things would establish a permanent FSOC committee to advise the FSOC in producing a report on how to improve the ability of the financial regulatory system to identify and mitigate climate risk.<sup>[2]</sup> Although Senator Feinstein’s bill will have to be reintroduced this year in the new Congress, Senator Feinstein has called on Secretary Yellen to implement key provisions of the bill via executive action.<sup>[3]</sup>

In a September 2020 report, titled “Managing Climate Risk in the U.S. Financial System” (the “Report”), the CFTC’s Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee recommended that the FSOC incorporate climate-related financial risks into its existing oversight function.<sup>[4]</sup> The Report makes the following policy recommendations:

- Congress should establish a price on carbon through legislation; this would be the single most important step to manage climate risk and drive an appropriate allocation of capital.
- Financial regulators should actively promote, and in some cases require, better understanding, quantification, disclosure, and management of climate-related risks by financial institutions and other market participants.
- Financial regulators should undertake and assist financial institutions to undertake their own pilot climate-risks stress testing.
- International collaboration and harmonization should be sought, and indeed, are critical for success in this area.

The Federal Reserve too has started to focus on climate issues. It created a Supervision Climate Committee, a system-wide group meant to build out the Federal Reserve’s capacity to understand the potential implications of climate change for financial institutions, infrastructure, and the markets.<sup>[5]</sup> In addition, the Federal Reserve is continuing its engagement with the Basel Committee on Banking Supervision’s Task Force on Climate-Related Financial Risks to develop recommendations for effective supervisory practices to mitigate climate-related financial risks, and has started to incorporate climate analysis into its Financial Stability Report and Supervision and Regulation Report.<sup>[6]</sup> And in December, the Federal Reserve became a full member of the Network for Greening the Financial System, a group of central banks and supervisors working to define and promote green finance best practices.<sup>[7]</sup> In addition, just this month, a paper published by the Federal Reserve Bank of San Francisco noted that the Federal Reserve has begun incorporating the impacts of global warming into its regulations, including by using climate stress tests and climate scenario analysis to measure banks’ vulnerability to climate-related losses.<sup>[8]</sup>

## **2. Advancing Racial Justice**

The financial regulatory agency most likely to take the lead on racial justice issues is the CFPB. Acting CFPB Director Dave Uejio recently wrote that, in addition to pandemic-related relief, racial equity was his top priority, and that fair lending enforcement would be a major part of this focus.<sup>[9]</sup> On February 4<sup>th</sup>, Acting Director Uejio stated that he was asking the CFPB’s Division of Research, Markets, and Regulations to

- prepare an analysis on housing insecurity, including mortgage foreclosures, mobile home repossessions, and landlord-tenant evictions;
- prepare an analysis of the most pressing consumer finance barriers to racial equity

to inform research and rulemaking priorities;

- explicitly include in policy proposals the racial equity impact of the policy intervention;
- resume data collections paused at the beginning of the pandemic, including HMDA quarterly reporting and the CARD Act data collection, as well as the previously completed 1071 data collection and the ongoing PACE data collection;
- focus the mortgage servicing rulemaking on pandemic response to avert, to the extent possible, a foreclosure crisis when the COVID-19 forbearances end in March and April; and
- explore options for preserving the status quo with respect to Qualified Mortgage and debt collection rules.[\[10\]](#)

Through such actions, the Biden CFPB would join in the efforts of certain states that have made strides in fair lending regulation, passing legislation to regulate more strictly student loan servicers[\[11\]](#) and to mandate small business truth-in-lending disclosures.[\[12\]](#) One should also expect the CFPB to investigate algorithmic models used in credit underwriting as to whether those models disproportionately impact minority borrowers.

The CRA will be another focus. In May 2020, under Acting Comptroller Brooks, the OCC finalized a substantial change to its CRA regulations, which community groups severely criticized.[\[13\]](#) The Federal Reserve and Federal Deposit Insurance Corporation declined to join the OCC's action, and in October 2020, the Federal Reserve published an Advanced Notice of Proposed Rulemaking to solicit input regarding modernizing its CRA regulatory and supervisory framework, taking a different approach from the OCC's.[\[14\]](#) We expect that a Biden-appointed Comptroller of the Currency is likely to revisit Acting Comptroller Brooks' revisions.

## B. Other Expected Priorities

### 1. Digital Assets and Cryptocurrencies

How President Biden staffs the heads of three regulatory agencies – the SEC, OCC and CFTC – may have significant effects on the regulation of digital assets and cryptocurrencies.[\[15\]](#) Gary Gensler, nominated to head the SEC and the former Chair of the CFTC, is now a Senior Faculty Advisor to the Digital Currency Initiative at MIT's Sloan School of Management, where he teaches classes on blockchain technology and digital currencies.[\[16\]](#) Michael Barr, a Treasury official in both the Clinton and Obama Administrations, has been identified as a leading candidate to head the OCC; Mr. Barr has served as an advisor to Ripple, on Lending Club's board, and on the fintech advisory council for the Bill and Melinda Gates Foundation.[\[17\]](#) And Chris Brummer, a Georgetown Law professor who was twice nominated as a CFTC Commissioner in the Obama Administration, has been mentioned as a potential CFTC Chair; when at Georgetown Law, he founded DC Fintech Week.[\[18\]](#)

Each of these agencies will have important digital asset and cryptocurrency issues on its agenda. Just at the end of the Trump Administration, the SEC brought an enforcement action against Ripple Labs Inc. and two of its executives on the grounds that the sale of Ripple's digital asset, XRP, was an unregistered securities offering under the federal securities laws.[\[19\]](#) A Gensler-led SEC will need to decide whether to continue this action, whether to provide guidance on which digital tokens are securities, and whether digital asset exchanges have to register as national securities exchanges or alternative trading systems.[\[20\]](#) Although Mr. Gensler has espoused openness to helping digital assets and cryptocurrencies reach their "real potential in the world of finance," even if doing so requires "tailor[ing] some of th[e] rules and regulations" to their ecosystem, he has also taken the view that "100 to 200" exchanges "are basically operating outside of U.S. law."[\[21\]](#)

A second issue that the Gensler-led SEC will need to address is custody. During the Trump Administration, the SEC issued a statement and requested comments regarding the application of the Customer Protection Rule (Rule 15c3-3) to cryptocurrencies and other digital assets. Similar to a safe-harbor provision, the statement essentially maps a path for specialized broker-dealers to operate for five years without fear of an enforcement action in this area where they maintain physical possession or control of digital asset securities.<sup>[22]</sup> With the request for comment, however, the SEC suggests that it is looking to establish permanent rules in this area.

At the end of the Trump Administration, the OCC moved to the forefront of cryptocurrency regulation by approving the charter conversion application of Anchorage Trust Company.<sup>[23]</sup> A second charter conversion application was approved just last week, for Protego Trust Company.<sup>[24]</sup> Whether the OCC will continue to stake out this leadership position under a new Comptroller is therefore a significant question. On these issues, the fact that there has been controversy about who the new Comptroller will in fact be – progressives have been pushing President Biden to name Professor Mehrsa Baradaran, in part because of her skepticism about fintech, rather than Michael Barr – makes it more difficult to offer definitive predictions.

The CFTC, moreover, remains an important regulator in the area. It has jurisdiction over futures and other derivatives contracts on cryptocurrencies, which continue to be developed, and it also has jurisdiction over manipulation in the spot markets for cryptocurrencies that are not securities (e.g., bitcoin and ether) if such manipulation affects a CFTC-regulated futures market. Given the recent significant volatility and meteoric rise in prices in Bitcoin and other cryptocurrencies, the CFTC's aggressiveness in exercising its legal authority in these areas could have substantial effects.

## **2. Fintech: The OCC and Trump Administration Rulemakings**

Before leaving government service, Trump Acting Comptroller of the Currency Brian Brooks oversaw several important actions of particular relevance to fintech companies.

The first relates to the so-called “Special Purpose National Bank Charter” for financial technology companies, which was first announced by Obama Administration Comptroller of the Currency Thomas Curry in late 2016.<sup>[25]</sup> The New York State Department of Financial Services (NYDFS) reacted to this development by suing the OCC, arguing that the OCC did not have the authority under the National Bank Act to grant such charters. A district judge in the United States District Court for the Southern District of New York agreed with NYDFS,<sup>[26]</sup> and this case is on appeal to the Second Circuit Court of Appeals.<sup>[27]</sup> In November 2020, the OCC accepted a charter application by the fintech Figure Technologies, Inc. and was shortly thereafter sued again – this time by the Conference of State Bank Supervisors Inc. (CSBS) in federal district court in Washington, DC.<sup>[28]</sup> The new Comptroller will have to determine whether to press ahead with – and defend in court – the “Special Purpose National Bank” and other non-traditional charters.

The other significant actions taken by the OCC under Acting Comptroller Brooks were two rules passed in response to the 2015 Second Circuit decision, *Madden v. Midland Funding LLC*.<sup>[29]</sup> *Madden* limited the application of National Bank Act preemption of state usury laws in the case of nonbanks that purchase debt originated by a national bank.<sup>[30]</sup> For many fintechs and other nonbank lenders that partner with loan-originating banks, the *Madden* decision increased uncertainty as to whether nonbanks become subject to state interest rate caps upon purchasing a loan that, at the time of origination, was not subject to the same requirements. In 2020, the OCC issued the “valid-when-made” rule, which took the position that “interest permissible before [a loan] transfer continues to be permissible after the transfer,”<sup>[31]</sup> and the “true lender” rule, which stated that a national bank is the “true lender” for a loan if the national bank is either named as such on the loan documents or funds the loan.<sup>[32]</sup>

As in the case of the “Special Purpose National Bank” charter, certain states challenged the rules in federal court.<sup>[33]</sup> The states argued that the OCC exceeded its statutory authority in issuing the rules and also focused on the rules’ effects on the states’ authority to regulate interest rates and enforce consumer protection laws more broadly, claiming that the rules are “contrary to Congressional actions to rein in the OCC’s ability to preempt state consumer protection laws.”<sup>[34]</sup> Briefing is underway on cross-motions for summary judgment regarding the “valid-when-made” rule, and a hearing is calendared for mid-March.<sup>[35]</sup> With the proceedings regarding the true lender rule only a few months behind, these two cases may provide early indications about the new Comptroller’s priorities.

### **3. An Invigorated CFPB**

Rohit Chopra, President Biden’s appointee for the CFPB Director, served in the Obama Administration as the CFPB’s expert on the student loan industry; he also served as a Democratic FTC Commissioner during the Trump Presidency. If confirmed, his appointment suggests that the CFPB will become a more active enforcement agency, as was the case in the Obama Administration. Mr. Chopra’s public statements while FTC Commissioner have encompassed the following important themes: (i) a focus of enforcement efforts on larger firms rather than small businesses; (ii) targeting firms that facilitate and profit from the largest frauds; (iii) shifting from one-off enforcement actions to systemic enforcement efforts; (iv) making greater use of rulemaking, including by codifying enforcement policy; and (v) co-operating with state attorneys general in the enforcement process.<sup>[36]</sup> The CFPB may also be expected – like the OCC as described above – to revisit certain Trump-era rulemakings, such as its rulemakings on payday lending, qualified mortgages, and debt collection.

### **4. Shifting Priorities and Continuing Enforcement at the CFTC**

Like the SEC, the CFTC will become a majority-Democratic Commission. It is possible that a new CFTC may seek to revisit some of the rules that were finalized on party-line votes under the Trump Administration. For example, in July 2020, the CFTC approved, by a 3-2 party line vote, a final rule addressing cross-border application of the swap dealer and major swap participant registration requirements.<sup>[37]</sup> In dissent, Commissioner Rostin Behnam criticized the final rule as “refusing to appropriately retain jurisdiction . . . over transactions that are arranged, negotiated or executed in the United States by non-U.S. [swap dealers].”<sup>[38]</sup> Commissioner Dan Berkovitz critiqued the final rule for “par[ing] back . . . extraterritorial application” of the Commodity Exchange Act (CEA) and setting “a weak and vague standard” for substituted compliance under a “comparable” regulatory regime.<sup>[39]</sup> Although Professor Brummer, a contender to lead the CFTC, has written extensively about the role of supervisory cooperation and coordination among international regulators,<sup>[40]</sup> he has also emphasized that the U.S. should “lead by example” and first “commit to the highest standards” before partnering with regulators abroad “who are like-minded,” indicating that he too would support a stronger cross-border rule.<sup>[41]</sup>

A changed CFTC is likely to result in increased enforcement and collaboration between the CFTC and other agencies, like the Department of Justice. For instance, in October 2020, the DOJ and the CFTC brought related actions against BitMEX based on allegations that BitMEX illegally operated a cryptocurrency derivatives trading platform and violated the anti-money laundering provisions of the Bank Secrecy Act.<sup>[42]</sup> In December 2020, the CFTC announced a settlement with Vitol, Inc., marking the CFTC’s first public action coming out of its initiative to pursue violations of the CEA involving foreign corruption.<sup>[43]</sup> The CFTC worked with the Department of Justice and the United States Attorney’s Office for the Eastern District of New York, which announced a Deferred Prosecution Agreement with Vitol the same day.

### **C. Congressional Priorities**

With a Democratic majority in both houses of Congress, legislative priorities will be shaped by the two relevant Committee chairs, Maxine Waters (D-CA) and Sherrod Brown (D-OH).

In December 2020, Representative Waters sent President Biden a public letter with recommendations on areas where she thinks immediate action should be taken.[\[44\]](#) These include:

- Promoting stable and affordable housing;
- Increasing CFPB enforcement of consumer financial protection laws;
- Restoring and enhancing regulatory safeguards on the financial system, including reversing rules that eased prudential requirements for large banks and strengthening the capital regulatory framework;
- Addressing discriminatory lending issues; and
- Focusing on climate risks, particularly in the insurance sector.

The hearings scheduled by the House Financial Services Committee also provide insight into what issues the committee believes are the most pressing, including the need for additional pandemic relief, particularly for small and minority-owned businesses, climate change, and lending discrimination. Given recent events, the Committee has also scheduled hearings on the recent market volatility involving GameStop and domestic terrorist financing.[\[45\]](#)

In the Senate, Sherrod Brown (D-OH), the chairman of the Senate Banking Committee, is likely to take a more aggressive stance toward the financial services industry than his predecessor, Senator Mike Crapo (R-ID). Senator Brown is known as one of Congress's fiercest critics of Wall Street, and plans to reorient the focus of the Banking Committee on addressing the fallout of the pandemic and climate change, and strengthening regulations.[\[46\]](#) Senator Brown's focus in the immediate future is extending protections from eviction, and affordable housing and housing access will continue to be a priority for the committee.[\[47\]](#) Senator Brown is also keen on a public-banking option and caps on interests rates for payday loans, and has said he intends to investigate the relationship among stock prices, executive compensation, and workers' wages.[\[48\]](#)

A final area of potential legislative action is cannabis banking. In Congress, the SAFE Banking Act, a bill that would enable banks to offer financial services to legitimate marijuana- and hemp-related businesses, could be re-introduced. Because cannabis remains classified as a Schedule I controlled substance, most financial institutions refrain from providing services to legal cannabis businesses out of fear of adverse regulatory and supervisory action and federal forfeiture based on racketeering or trafficking charges. The SAFE Banking Act would prohibit such regulatory actions and shield banks from liability premised solely on the provision of financial services to a marijuana- or hemp-related business. The SAFE Banking Act passed the House with bipartisan support in 2019, and was originally included in the Heroes Act, passed by the House in May 2020 in response to the COVID-19 pandemic. However, the bill was dropped from the COVID relief measures ultimately enacted in December 2020, and the bill has not come up for a vote yet in the Senate despite some bipartisan support.

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[1] Zachary Warmbrodt, *Yellen vows to set up Treasury team to focus on climate, in victory for advocates*, Politico (Jan. 19, 2021), <https://www.politico.com/news/2021/01/19/yellen-treasury-department-climate-change-460408>.

[2] Senator Dianne Feinstein, Press Releases, *Feinstein Introduces Bill to Minimize Climate Change Risk in Financial System* (Dec. 17, 2020),

<https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=27A04819-E44D-435C-AB06-FBC9D6051EB2>.

[3] Senator Dianne Feinstein, Press Releases, *Feinstein to Secretary Yellen: Use Financial System to Mitigate Climate Change Risk* (Jan. 28, 2021), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=F494CF21-B927-404B-876A-CF80D3231985>.

[4] U.S. Commodity Futures Trading Commission Climate-Related Market Risk Subcommittee, *Managing Climate Risk in the U.S. Financial System* (2020), available at <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

[5] Fed. Reserve Bank of N.Y., Press Release, *Kevin Stiroh to Step Down as Head of New York Fed Supervision to Assume New System Leadership Role at Board of Governors on Climate* (Jan. 25, 2021), <https://www.newyorkfed.org/newsevents/news/aboutthefed/2021/20210125>.

[6] Lael Brainard, *Strengthening the Financial System to Meet the Challenge of Climate Change* (Dec. 18, 2020), available at <https://www.federalreserve.gov/newsevents/speech/brainard20201218a.htm>.

[7] See Central Banks and Supervisors Network for Greening the Financial System, <https://www.ngfs.net/en>.

[8] Glenn D. Rudebusch, FRBSF Economic Letter, *Climate Change Is a Source of Financial Risk*, Fed. Reserve Bank of S.F. (Feb. 8, 2021), <https://www.frbsf.org/economic-research/publications/economic-letter/2021/february/climate-change-is-source-of-financial-risk/>.

[9] Dave Uejio, *The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable* (Jan. 28, 2021), <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.

[10] Dave Uejio, *The Bureau is working hard to address housing insecurity, promote racial equity, and protect small businesses' access to credit* (February 4, 2021), <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-working-hard-to-address-housing-insecurity-promote-racial-equity-and-protect-small-businesses-access-to-credit/>.

[11] See, e.g., Jeremy Sairsingh, *State Regulation of Student Loan Servicing Continues to Evolve*, Am. Bar Assoc. (July 13, 2020), [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/consumer/2020/202007/state-regulation/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2020/202007/state-regulation/).

[12] See, e.g., Dafina Williams, *Policies to Require Transparency in Small Business Lending Gain Momentum*, Opportunity Fin. Network (Oct. 14, 2020), <https://ofn.org/articles/policies-require-transparency-small-business-lending-gain-momentum>.

[13] See, e.g., Nat'l Cmty. Reinvestment Coal., et al., *Joint Statement on CRA Rule Changes from OCC* (May 21, 2020), <https://ncrc.org/joint-statement-on-cra-rule-changes-from-occ/>.

[14] Community Reinvestment Act, 12 C.F.R. 228 (proposed Oct. 19, 2020).

[15] Ephrat Livni, *What's Next for Crypto Regulation*, N.Y. Times (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/business/dealbook/crypto-regulation-blockchain.html>

[16] See Gary Gensler Faculty Advisor Profile, available at <https://dci.mit.edu/team>.

[17] John Adams, *Biden's OCC expected to chart new course for fintechs, crypto, AML*, Am. Banker (Jan. 27, 2021), <https://www.americanbanker.com/news/bidens-occ-expected-to-chart-new-course-for-fintechs-crypto-aml>.

[18] See About DC Fintech Week, available at <https://www.dcfintechweek.org/>; Chris Brummer, Faculty Profile, <https://www.law.georgetown.edu/faculty/chris-brummer/>.

[19] Complaint, *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832 (S.D.N.Y. Dec. 22, 2020).

[20] Although the SEC brought its first enforcement action for operating an unregistered exchange in 2018, and has brought at least one other such action, these matters have not been as significant as the Ripple action. See SEC, Press Release, *SEC Charges EtherDelta Founder with Operating an Unregistered Exchange* (Nov. 8, 2018), <https://www.sec.gov/news/press-release/2018-258>; SEC, Press Release, *SEC Charges Dallas Company and its Founders with Defrauding Investors in Unregistered Offering and Operating Unregistered Digital Asset Exchange* (Aug. 29, 2019), <https://www.sec.gov/news/press-release/2019-164>. For additional discussion of crypto securities registration cases, see our bi-annual Securities Enforcement updates, available [here](#).

[21] Annaliese Milano, *Everything Ex-CFTC Chair Gary Gensler Said About Cryptos Being Securities*, Coindesk (Apr. 24, 2018), <https://www.coindesk.com/ex-cftc-chair-gary-gensler-on-tokens-securities-and-the-sec>.

[22] SEC, Press Release, *SEC Issues Statement and Requests Comment Regarding the Custody of Digital Asset Securities by Special Purpose Broker-Dealers* (Dec. 23, 2020), <https://www.sec.gov/news/press-release/2020-340>.

[23] OCC, News Release 2021-6, *OCC Conditionally Approves Conversion of Anchorage Digital Bank* (Jan. 13, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html>.

[24] OCC, News Release 2021-19, *OCC Conditionally Approves Conversion of Protego Trust Bank* (Feb. 5, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

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

[26] *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019) (finding that “the term ‘business of banking,’ as used in the [National Bank Act], unambiguously requires receiving deposits as an aspect of the business”); *Lacewell v. Office of the Comptroller of the Currency*, 2019 WL 6334895, at \* 1–2 (S.D.N.Y. Oct. 21, 2019) (prohibiting the OCC from issuing charter to non-depository fintech applicants).

[27] See *Lacewell v. Office of the Comptroller of the Currency*, No. 19-4271 (2d Cir. Dec. 16, 2020), ECF No. 108.

[28] Complaint at ¶¶ 1, 3, *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, No. 20-cv-3797 (D.D.C. Dec. 22, 2020).

[29] See generally *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015).

[30] *Id.* at 250–51.

[31] Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 CFR Parts 7 and 160).

[32] National Banks and Federal Savings Associations as Lenders, 85 FR 68742 (Oct. 30, 2020) (to be codified at 12 CFR Part 7).

[33] See Sylvan Lane, *Seven states sue regulator over ‘true lender’ rule on interest rates*, The Hill (Jan. 5, 2021), <https://thehill.com/policy/finance/532759-seven-states-sue-regulator-over-true-lender-rule-on-interest-rates?rl=1>.

[34] Complaint at ¶¶ 11–12, *People of the State of New York v. Office of the Comptroller of the Currency*, No. 21-cv-00057 (S.D.N.Y Jan. 5, 2021) (challenging “true lender” rule); *accord* Complaint at ¶¶ 7–9, *People of the State of California v. Office of the Comptroller of the Currency*, No. 20-cv-05200 (N.D. Cal., July 29, 2020) (challenging valid-when-made rule).

[35] Order Granting As Modified Joint Stipulation, No. 20-cv-05200 (N.D. Cal. Oct. 5, 2020) (setting briefing schedule).

[36] See <https://www.ftc.gov/about-ftc/biographies/rohit-chopra/speeches-articles-testimonies>.

[37] CFTC, Press Release, *CFTC Approves Final Cross-Border Swaps Rule and an Exempt SEF Amendment Order at July 23 Open Meeting* (July 23, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8211-20>.

[38] Public Statement, Dissenting Statement of Commissioner Rostin Behnam Regarding the Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and MSPs – Final Rule (July 23, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement072320>

[39] Public Statement, Dissenting Statement of Commissioner Dan M. Berkovitz on the Final Rule for Cross-Border Swap Activity of Swap Dealers and Major Swap Participants (July 23, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement072320> (quoting Kadhim Shubber, *US regulator investigates oil fund disclosures*, Fin. Times (July 15, 2020), available at <https://www.ft.com/content/1e689137-2d1f-4393-a18f-fe0da02141cc>.)

[40] See, e.g., *Limiting the Extraterritorial Impact of Title VII of the Dodd-Frank Act: Before the House Financial Services Committee*, 112th Cong. (2012) (Written Testimony of Chris Brummer, Professor of Law, Georgetown University Law Center), <https://financialservices.house.gov/uploadedfiles/hhrig-112-ba-wstate-cbrummer-20120208.pdf>.

[41] *Nominations of Christopher James Brummer and Brian D. Quintenz to be Commissioners of the Commodity Futures Trading Commission: Hearing before the Committee on Agriculture, Nutrition, and Forestry*, 114th Cong. (2016) (testimony by Christopher James Brummer, Nominee), <https://www.congress.gov/114/chrg/shrg23593/CHRG-114shrg23593.htm>.

[42] CFTC, Press Release, *CFTC Charges BitMEX Owners with Illegally Operating a Cryptocurrency Derivatives Trading Platform and Anti-Money Laundering Violations* (Oct. 1, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8270-20>.

[43] Gibson Dunn, *What the CFTC’s Settlement with Vitol Inc. Portends about Enforcement Trends* (Jan. 20, 2021) <https://www.gibsondunn.com/what-the-cftcs->

[settlement-with-vitol-inc-portends-about-enforcement-trends/](#); see also CFTC, Press Release, *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>.

[44] Letter from Rep. Maxine Waters, Chairwoman, U.S. House of Representatives Committee on Financial Services, to President-elect Joseph Biden (Dec. 4, 2020), available at [https://financialservices.house.gov/uploadedfiles/120420\\_cmw\\_ltr\\_to\\_biden.pdf](https://financialservices.house.gov/uploadedfiles/120420_cmw_ltr_to_biden.pdf).

[45] U.S. House Comm. On Fin. Servs., Press Releases, *Waters Announces February Hearing Schedule* (Feb. 1, 2021), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=407103>.

[46] See, e.g., Zachary Warmbrodt, *Wall Street scourge Sherrod Brown to get 'gigantic megaphone'* as Senate Banking chair, Politico (Jan. 11, 2021), <https://www.politico.com/news/2021/01/11/sherrod-brown-senate-banking-chair-457692>.

[47] Sylvan Lane, *Brown puts housing, eviction protections at top of Banking panel agenda*, The Hill (Jan. 12, 2021), <https://thehill.com/policy/finance/533911-brown-puts-housing-eviction-protections-at-top-of-banking-panel-agenda>.

[48] Emily Flitter, *Next Senate Banking Chairman Sets Low-Income and Climate Priorities*, N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/business/banking-environment-housing-democrats-sherrod-brown.html>.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Financial Institutions or Derivatives practice groups, or the following authors:

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