

The Second Coming of FinTech – Regulatory and Antitrust Considerations with Artificial Intelligence and Blockchain

June 27, 2019

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Today's Agenda

Results of W&S/ALM *Corporate Counsel Survey*

- Danielle Williams

Regulatory

- Michael Loesch

Antitrust

- Susannah Torpey

Results of W&S/ALM *Corporate Counsel Survey*

Danielle Williams – Litigation Partner



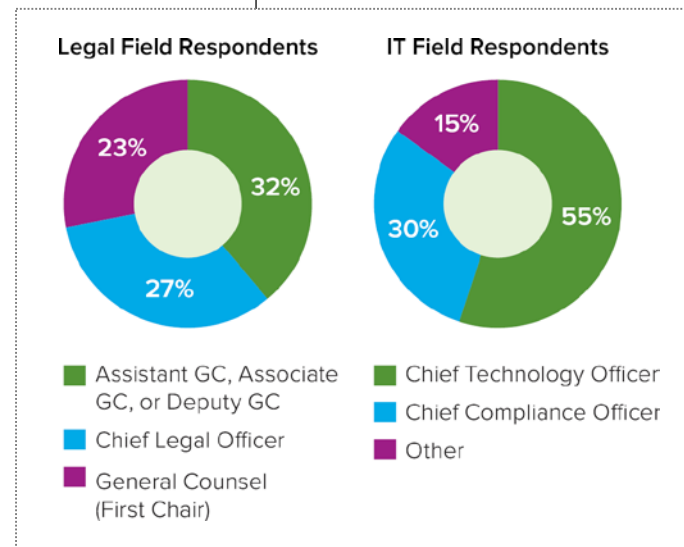
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Introduction

- In conjunction with Winston & Strawn, ALM's *Corporate Counsel* conducted a survey to capture the thoughts and opinions of legal and IT professionals regarding the legal and regulatory impact of disruptive technologies in the financial services industry.
- The results of that survey show that industry executives have high expectations but are not blind to the risks.



Disruptive Technology – Focus on Customers

Areas of Focus



Customer service/
customer
empowerment



Increase efficiency
in business
processes



Streamline
compliance



Create data-driven
products



>3/4 are using DT in one
or more of these areas.

Types of Technology

48%



Use AI/
machine learning

35%



Use social banking/
peer-to-peer lending

32%



Use blockchain

30%



Use facial
recognition

Disruptive Technology – Obstacles to Implementation

Obstacles



1. Fear of external cybercrime, data breaches



2. Uncertain legal/regulatory environment

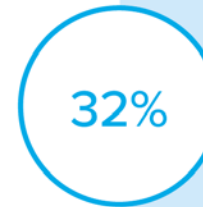


3. Lack of confidence in ability to manage internally



4. Technology not mature

Concerns



Industry groups



State regulators



DOJ and state attorneys general



Private civil litigation

Disruptive Technology – Managing Risk to Create Opportunity



●●●●● 6/10 have changed their compliance programs because of DT. Of those, virtually all have implemented one or more improvements:

- Training, compliance-focused hiring
- Purchase new tools to support compliance
- Revise manuals, policies, compliance systems

- Create new self-reporting, investigation and remediation processes
- Hire outside compliance/cybersecurity experts
- Conduct global risk assessments



are protecting innovations from IP theft through patents, trademarks, etc.

Disruptive Technology – Learn More

- Check your email for an advance copy of ALM's and Winston's white paper, *Disruptive Technology: Understanding the Risks and Rewards*.
- Stay tuned for a three-part online series based on our white paper on CorporateCounsel.com.
- Join us on July 23, 2019, for our next webinar: "FinTech: Disruption in Digital Currency."
- Save the Date – Winston's Second Annual Disruptive Technologies Summit on September 12, 2019, at Santa Clara University School of Law's High Tech Law Institute.

Regulatory Overview

Michael Loesch— Financial Services Partner
Co-Chair, Disruptive Technologies Team



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Responsible Innovation Crucial for Financial Sector Growth

Creating a regulatory environment that supports responsible innovation is crucial for economic growth and success, particularly in the financial sector. We must keep pace with industry changes and encourage financial ingenuity to foster the nation's vibrant financial services and technology sectors.

Treasury Secretary Steven Mnuchin



2018 Treasury Report

Nonbank Financials, Fintech, and Innovation

Identifies Four Primary Recommendations

1. Adapting regulatory approaches to changes in the aggregation, sharing, and use of consumer financial data, and to support the development of key competitive technologies
2. Aligning the regulatory framework to combat unnecessary regulatory fragmentation, and account for new business models enabled by financial technologies
3. Updating activity-specific regulations across a range of products and services offered by nonbank financial institutions, many of which have become outdated in light of technological advances
4. Advocating an approach to regulation that enables responsible experimentation in the financial sector, improves regulatory agility, and advances American interests abroad



“

Unsurprisingly, for financial services firms, **data analytics and machine learning** (or artificial intelligence) are two of the top three areas of tech investment. Other technology developments that are poised to impact innovation in financial services include advances in **cryptography and distributed ledger technologies**, giving rise to blockchain-based networks.

”

July 2018 – U.S. Department of the Treasury Report:
Nonbank Financials, Fintech, and Innovation

Distributed Ledger, Blockchain, and Digital Assets

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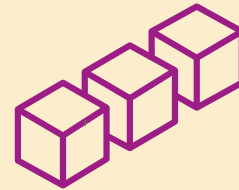


Distributed Ledger, Blockchain, and Digital Assets

How They Fit Together

- Distributed ledger technology (DLT)
- Blockchain types
 - Decentralized or centralized
 - Permissioned or permissionless
 - Private or public
- Digital assets
 - Cryptocurrencies, security tokens, utility tokens
- Smart contracts
 - Refers to self-executing code stored and executed on a blockchain

32%



of financial services
institutions use blockchain



Distributed Ledger, Blockchain, and Digital Assets

Benefits & Challenges

- Potential benefits
 - Security, Speed, Certainty, Standardization, Innovation
- Many potential uses
 - Trade clearing & settlement, supply chain & trade finance, data reporting, post-trade processing
- Significant compliance challenges
 - Regulatory risk – application of current regulatory regimes
 - Cybersecurity, operational, and technical risks
 - Fraud / manipulation
 - Anti-money laundering / KYC concerns



Customer service/
customer
empowerment



Increase efficiency
in business
processes



Streamline
compliance



Create data-driven
products



>3/4 are using DT in one
or more of these areas.



The Regulatory Landscape

Digital Assets (Cryptocurrencies)

- Cryptocurrencies (e.g., Bitcoin, Ether, Litecoin, Ripple) and other digital assets (e.g., digital tokens) continue to develop and evolve
- **Federal, State, and International** regulators are active in considering whether and how to regulate cryptocurrencies and related activities
- Some of the chief regulatory issues include:
 - Application of securities, commodities, and banking laws
 - Tax treatment
 - AML / KYC
 - Customer protection



The Regulatory Landscape

Digital Assets (Cryptocurrencies)

Securities and Exchange Commission

- The SEC has asserted that digital tokens are securities and that the offer and sale of most digital tokens must comply with the securities laws and SEC regulations

Commodity Futures Trading Commission

- The CFTC has asserted that Bitcoin and other virtual currencies are “commodities,” and therefore subject to the Commodities Exchange Act and CFTC Regulations



The Regulatory Landscape

Digital Assets (Cryptocurrencies)

• Other US Federal Regulators

OCC	Proposed granting limited-purpose bank charters to FinTech companies, e.g. digital currency banking or blockchain platform lending start-ups
FinCen	FinCen guidance applies Anti-Money Laundering (AML) requirements to digital currencies
CFPB	Issued an advisory regarding risks of transacting with digital currency (e.g., volatile exchange rates, unclear costs, hacking, and risks re lost or stolen funds)
IRS	IRS has declared digital currencies to be property, not money, thereby subjecting them to capital gains taxes
FTC	FTC has established an internal working group re cryptocurrency and blockchain technology and has taken action with respect to “deceptive practices” concerning token-based programs



The Regulatory Landscape

Digital Assets (Cryptocurrencies)

• SROs

FINRA	<ul style="list-style-type: none">• FINRA Encourages Firms to Notify FINRA if They Engage in Activities Related to Digital Assets (Regulatory Notice 18-20 (July 6, 2018))• 2019 Exam Priorities Letter
NFA	<ul style="list-style-type: none">• NFA issued notice requiring CPOs, CTAs and IBs that execute, solicit or accept orders for virtual currency derivatives or cash-market virtual currency transactions to immediately notify the NFA. Notice I-17-28 and I-17-29 (December 2017).• NFA issued interpretive guidance requiring any CPO or CTA member engaging in an underlying or spot virtual currency transaction in a commodity pool, exempt pool or managed account program to include a specific legend re such activity in its disclosure document. Interpretive Notice 9073 (July 20, 2018)



The Regulatory Landscape

Digital Assets (Cryptocurrencies)

- **US States**

- There have been a wide range of legal and regulatory developments at the State level
- Many states have regulated cryptocurrency activities under **money transmission laws** (when converting between fiat and digital currency), and some have provided guidance re activity that triggers regulation
 - The Conference of State Bank Supervisors as part of its Vision 2020 effort to update state regulation of FinTech companies, stated in February 2019 that it will develop a model money services business act and encourage streamlined multi-state examinations to better harmonize inconsistent state approaches to money transmission
- States have also **enforced blue sky laws** in connection with digital assets that were issued in violation state laws, with a focus on ICOs and cryptocurrency investment schemes
- Some states have **enacted new regimes**
 - New York BitLicense – regulation under NY Department of Financial Services established a comprehensive licensing regime to engage in digital currency-related business (e.g. operating exchanges)



The Regulatory Landscape

US Securities and Exchange Commission

- The SEC determined that certain **digital tokens issued via the blockchain meet the definition of an “investment contract”**
 - Thus such tokens must be offered and sold in compliance with the securities laws
 - Related market actors (advisors, trading platforms, brokers, etc.) must also meet securities law requirements
- The SEC has developed its regulatory approach concerning crypto assets slowly through:
 - **Guidance** – the SEC has issued a string of announcements aimed at providing interpretive guidance to market participants
 - **Enforcement** – the SEC has brought numerous enforcement actions against token issuers and crypto businesses
 - **Regulatory action** – the SEC rejected bitcoin exchange traded fund applications



The Regulatory Landscape

US Securities and Exchange Commission

Key Guidance

- April 2019, the SEC staff issued a “Framework for ‘Investment Contract’ Analysis of Digital Assets”
 - On the same day, the SEC’s Division of Corporation Finance issued a “no action” letter to TurnKey Jet, Inc. relating to Turnkey’s issuance of digital utility tokens.
- June 2018, SEC Director Hinman’s speech (‘Digital Asset Transactions: When Howey Met Gary (Plastic)’)
 - Provided clarity to the SEC’s position on the application of federal securities law to digital assets and tokens
 - Hinted that tokens could move from securities to “utility tokens” once the network on which the token or coin is to function is sufficiently decentralized
 - Stated that Ether and Bitcoin are not currently considered securities

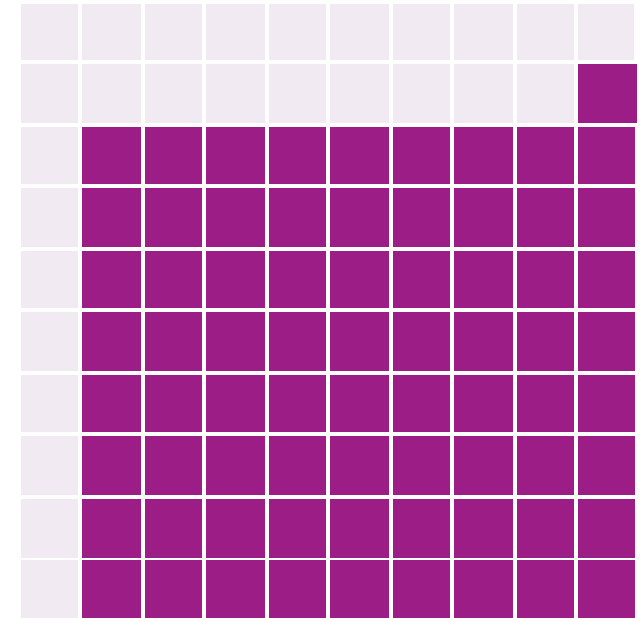


The Regulatory Landscape

US Securities and Exchange Commission

Other SEC Issues & Developments

- The SEC and FINRA are grappling with **novel compliance and investor protection issues** posed by the **treatment of tokens as securities** (in particular relating to broker and trading platform registration and compliance)
- **Custody** of cryptocurrencies and related issues
- Crypto ETFs
- Regulatory “Sandboxes”



73% of financial services companies are using one or more DTs



Old Rules – New Technology

SEC Enforcement/Examination Developments

The SEC has identified **digital assets as a top examination and enforcement priority** and has actively pursued a range of enforcement investigations related to crypto assets.

- SEC Enforcement established a **Cyber Unit** to focus its enforcement efforts and has announced the digital asset market as a 2019 enforcement priority
- OCIE also identifies digital assets as one of its top examination priorities in 2019
 - “OCIE will take steps to identify market participants offering, selling, trading, and managing these products or considering or actively seeking to offer these products and then assess the extent of their activities. For firms actively engaged in the digital asset market, **OCIE will conduct examinations focused on, among other things, portfolio management of digital assets, trading, safety of client funds and assets, pricing of client portfolios, compliance, and internal controls.**”
- DOJ – **The Department of Justice is also pursuing parallel criminal actions** in several of the crypto asset matters being investigated by the SEC



The Regulatory Landscape

U.S. Commodity Futures Trading Commission

- The CFTC has regulatory authority over commodity futures, options and other derivatives (e.g., “swaps”)
 - It does not directly regulate commodity “spot” markets, but has authority to bring fraud and manipulation cases concerning any commodity in interstate commerce
- The CFTC considers Bitcoin and other digital currencies to be commodities
 - Thus **subject to its anti-fraud and anti-manipulation authorities**
- Courts have agreed with CFTC assertion of jurisdiction
 - CFTC v. Patrick K. McDonnell and Cabbagetech, Corp. d/b/a Coin Drop Markets, No. 18-CV-361 (E.D.N.Y. March 6, 2018)
- **Exclusive jurisdiction over derivatives with digital currencies** as the underlying commodity



The Regulatory Landscape

US Commodity Futures Trading Commission

Bitcoin-related Derivatives

- The CFTC has allowed certain of its registrants to launch Bitcoin-related products for trading:
 - Fully Collateralized Options and Swaps (LedgerX – July 2017)
 - Binary Options (Cantor Exchange – December 2017)
 - Non-Deliverable Forwards (TeraExchange – May 2016)
 - Futures (CME; CBOE Futures Exchange – December 2017)
- But, the CFTC expects an exchange to proactively engage with CFTC Staff to ensure compliance when listing any virtual currency derivative product (Staff Advisory No. 18-14 Virtual Currency Derivative Product Listings)



The Regulatory Landscape

US Commodity Futures Trading Commission

- **LabCFTC** - a CFTC initiative to promote FinTech innovations
 - Released **primers** on Virtual Currencies and Smart Contracts
 - LabCFTC issued a **Request for Input on Crypto-Asset Mechanics and Markets**, soliciting public comment on Ether and the Ethereum Network in light of Ether's size in the virtual currency market and its potentially unique attributes relative to Bitcoin.
- **Guidance** - CFTC issued guidance on its approach to oversight of the virtual currency futures markets (Jan. 4, 2018)
- **CFTC Divisions Announce 2019 Exam Priorities** - For the first time, the CFTC publicly announced its examination priorities:
 - Including “crypto surveillance practices”
- **Enforcement** - CFTC is continuing to **aggressively pursue fraud, manipulation, and other activity in the digital currency space.**



International Developments

Basel Committee on Banking Supervision - Statement on Crypto Assets

- On March 13, 2019, the Basel Committee on Banking Supervision issued a Statement on Crypto Assets setting out its “**prudential expectations**” **related to banks’ exposures to crypto-assets** and related services.
- Although the Committee acknowledges that “the crypto-asset market remains small relative to that of the global financial system” and that “banks currently have very limited direct exposures,” the Committee nonetheless believes that “**the continued growth of crypto-asset trading platforms and new financial products related to crypto-assets has the potential to raise financial stability concerns and increase risks** faced by banks.”
- The Committee laid out several **precautions banks should take if dealing with crypto assets**, including due diligence, governance and risk management, disclosures, and supervisory dialogue.



Recent Activity

From Theory to Implementation

- **Libra** – a cryptocurrency and financial blockchain-based infrastructure announced by Facebook
- **Utility Settlement Coin / USC** - a token to be used to settle cross-border trades developed by a group of 14 financial firms led by UBS Group AG
- **JPM Coin** - a digital coin designed to make instantaneous payments using blockchain technology developed by JP Morgan
- **VAKT** - a digital ecosystem for physical post-trade processing
- **Trade Lens** – a blockchain platform for supply chain management involving ocean cargo carriers

Antitrust

Susannah Torpey – Litigation Partner

High-Tech Competitor Disputes, Investigations, & Antitrust Counseling



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What is Antitrust?

“ [Antitrust] is a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange.... [T]he **promotion of competition** through restraints on **monopoly** and **cartel behavior** clearly emerges as the first principle of antitrust. ”

E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* 1, 4 (5th ed. 2009)



What is Antitrust?

- Antitrust laws have developed to protect consumers and competition.
- At a high level, antitrust laws prohibit:
 - **Price-fixing**
 - **Bid-rigging**
 - **Allocating customers or territories**
 - **Tying**
 - **Boycotts**
 - **Using Monopoly Power to Exclude Competitors**
 - Other conspiratorial or monopolistic behavior that unfairly restrict free trade



Why Antitrust?



Global Scrutiny

Antitrust enforcement authorities worldwide are paying attention. Some are more strict than others; others may head in that direction.

Enormous Fines

Antitrust violations can cost a company hundreds of millions of dollars. In 2017-18, five major banks paid \$2.5 billion for antitrust violations.



Potential Jail Time

Antitrust violations are punishable as criminal felonies under U.S. law. Jail time is the norm for price-fixing agreements among competitors.

Why Now?

Criminal Enforcement: Corporate Liability

DEFENDANT	FY	PRODUCT	FINE
Citicorp	2017	Foreign currency exchange	\$925 million
Barclays, PLC	2017	Foreign currency exchange	\$650 million
JPMorgan Chase & Co.	2017	Foreign currency exchange	\$550 million
AU Optronics (imposed after conviction at trial)	2012	Liquid crystal display (LCD) panels	\$500 million
F. Hoffmann-La Roche, Ltd.	1999	Vitamins	\$500 million
Yazaki Corporation	2012	Automobile parts	\$470 million
Bridgestone Corporation	2014	Anti-vibration rubber products for automobiles	\$425 million
Royal Bank of Scotland	2017	Foreign currency exchange	\$395 million
BNP Paribas USA, Inc.	2018	Foreign currency exchange	\$90 million



Why Now?

FinTech Convergence Increasing Antitrust Risk



Why Now?

FinTech Convergence Increasing Antitrust Risk

SILICON VALLEY IS COMING

Jamie Dimon, CEO, JP Morgan Chase (2015)



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The Economist (May 4, 2019)

Why Now?

FinTech Convergence Increasing Antitrust Risk

Algorithmic Trading

Robo Advising

Chat Bots and Virtual Assistants

Automated Approvals

Automated Clearing and Settling

Sophisticated Walleting Services

Open Banking and Integrated Transactions

Digital Assets and Cryptocurrency Trading and Investing

Fraud Detection and Compliance Services



FinTech Convergence Increases Risk of Conspiracy Claims

Price Fixing

Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).



Key Cases

Joint efforts to increase market prices are condemned. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

Agreements to establish minimum or maximum prices also condemned. *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332 (1982).

Efforts to stabilize prices are illegal. *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

So are agreements to establish uniform discounts or terms of sale. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).



FinTech Convergence Increases Risk of Conspiracy Claims

Price Fixing and Market Manipulation

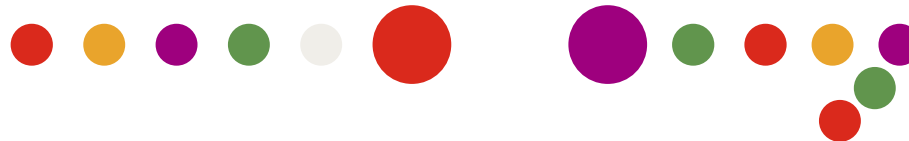
*In re Treasuries Securities
Auction Antitrust Litigation*



*In re Foreign Exchange
Benchmark Rates
Antitrust Litigation*



*In re London Silver
Fixing Antitrust
Litigation*



*In re Commodity
Exchange Inc., Gold
Future and Options
Trading Litigation*



*In re LIBOR-Based
Financial Instruments
Antitrust Litigation*



Digital Asset /
Cryptocurrency
Market
Manipulation

FinTech Convergence Increases Risk of Conspiracy Claims

Algorithmic AI Pricing & Trading Not Immune

Use of automated pricing algorithms to shift prices to adjust to competitors' price changes

United States v. Topkins (N.D. Cal. 2015)

The Department of Justice prosecuted e-commerce sellers for agreeing to align their pricing algorithms to increase online prices for posters sold on Amazon.





FinTech Convergence Increases Risk of Conspiracy Claims

Hub and Spoke Conspiracies Affecting Prices

It is illegal to set up an agreement among competitors that affects prices or other competitive terms, even if your company does not compete with the other companies.

“A conscious commitment to a **common scheme** designed to achieve an **unlawful objective**” may be enough to show an agreement among competitor “spokes.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

In re Electronic Books Antitrust Litigation (S.D.N.Y. 2012)

Apple conspired with five e-book publishers to increase e-book prices. Before the conspiracy, market leader Amazon was charging \$10 for some e-books. But as a result of the conspiracy, prices for many of the same e-books rose to \$13 or \$15. The court found that Apple violated the antitrust laws by coordinating the conspiracy. Apple settled the case for \$450 million.



Why Now?

FinTech Convergence Increasing Antitrust Risk

 quantitative
brokers

Bloomberg


Trade/Invest/Inform

CQG 



TRADING
TECHNOLOGIES

REFINITIV



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FinTech Convergence Increases Risk of Conspiracy Claims

Group Boycotts and Conspiracies to Foreclose Emergent Competitors

*In re Credit Default
Swaps Antitrust
Litigation*



*In re Interest Rate
Swaps Antitrust
Litigation*



Joint Refusals
to Deal with
Emergent
Competitors

Joint
Agreements to
Deny Access
to Platforms or
Data

Joint
Exclusion
from Private
Blockchains



FinTech Convergence Increases Risk of Conspiracy Claims

Group Boycotts and Conspiracies to Restrain Dominant Competitors

- Agreements not to deal except on joint terms
- Joint abuses of licensee's monopsony power in standard-setting organizations



Calling your meetings a standard-setting organization, or even in fact publishing some standards necessary for interoperability, is not a free pass for coordination designed to reduce common competitive threats or forestalling innovative developments in the industry that put a legacy business model at risk. ”



Makan Delharim, Assistant Attorney General, DOJ Antitrust Division (2018); see Susannah Torpey *et al.*, Practical Guidance for Participants in Standard-Setting Organizations, *General Counsel Today* (2019)

FinTech Convergence Increases Risk of Conspiracy Claims Group Boycotts and Conspiracies to Restrain Dominant Competitors

“ Whatever the publishers' initial concerns about retail prices, dealing with this situation through collusion is not acceptable. ”

Joaquin Almunia, former European
Commissioner for Competition



FinTech Convergence Increases Risk of Conspiracy Claims

Wage-Fixing and No-Poach Agreements



Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, **are per se illegal under the antitrust laws.**

Going forward, the **DOJ intends to proceed criminally** against naked wage-fixing or no-poaching agreements.



*Antitrust Guidance for Human Resources Professionals,
Department of Justice & Federal Trade Commission (Oct. 2016)*



- Criminal investigation into no-poach agreement between Barclays and J.P. Morgan
- *In re High-Tech Employee Antitrust Litigation*

FinTech Convergence Increases Risk of Conspiracy Claims Information Exchange



Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.



United States v. Container Corp. of America,
393 U.S. 333, 338 (1969).



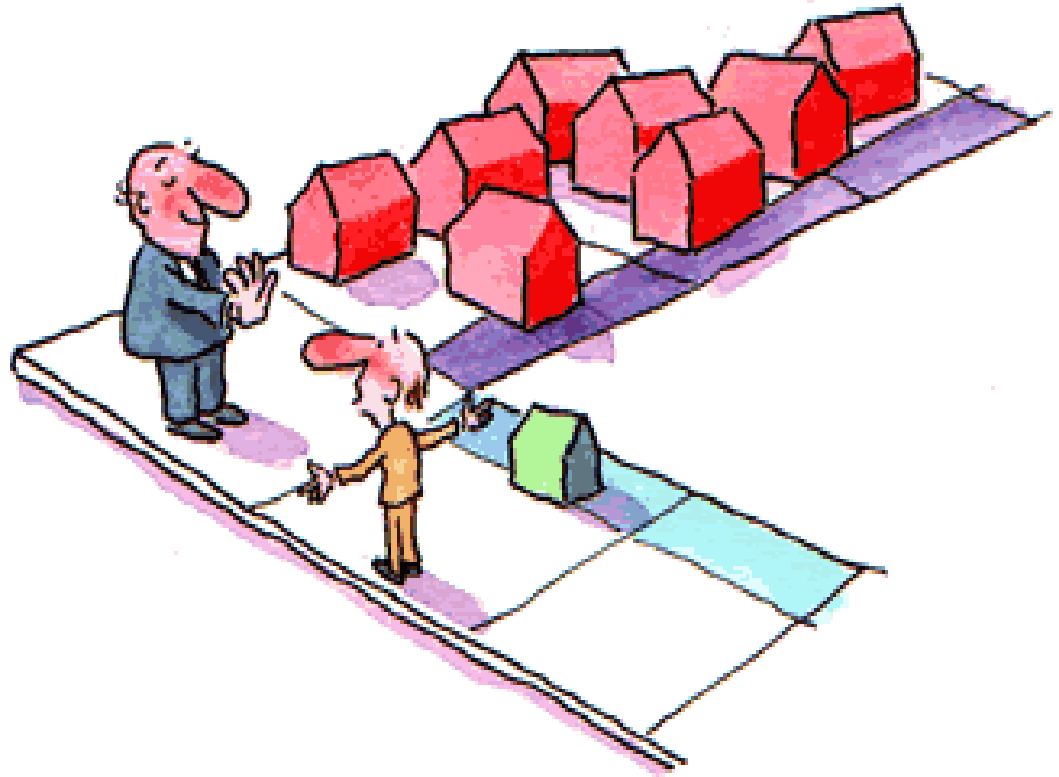
FinTech Convergence Increases Risk of Conspiracy Claims

Information Exchange

- Unrestricted distributed ledgers across competitors; faulty security patches
- Bitcoin consortia with emergent tech companies new to compliance
- Increased competitor collaborations creating opportunities for information exchanges and joint venture spillover effects
- Increased need for interoperability, cross-licensing, and standard-setting organization participation
- Increased commoditization of competitor data from emergent tech like IoT or payment and wallet services coordinating across multiple banks

FinTech Convergence Increases Risk of Monopolization Claims

A monopoly is essentially when **one** company has the power to exclude competitors or maintain prices above competitive levels.





FinTech Convergence Raises Risk of Monopolization Claims

Monopolization

FinTech Fact Patterns

- Cutting Off Customer Competitors
- Refusals to Deal
- Monopoly Leveraging
- Attempt to Monopolize
- Standard-Setting Manipulation
- Bad Faith Patent Assertions/Misuse
- Technological Tying
- Predatory Innovation/ Anticompetitive Redesign



FinTech Convergence Raises Risk of Monopolization Claims

Predatory Innovation/Anticompetitive Redesign

U.S. COURT OF APPEALS

In a competitive market, firms **routinely innovate** in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals Judicial deference to product innovation, however, **does not mean that a monopolist's product design decisions are per se lawful.**

In order to violate the antitrust laws, the incompatible product must have an **anticompetitive effect** that outweighs any procompetitive justification for the design.

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)



FinTech Convergence Raises Risk of Monopolization Claims

Increased Scrutiny of Tech Platforms and Data



In some areas, these data are extremely valuable. They can **foreclose the market**—they can give the parties that have them immense business opportunities that are not available to others.



Margrethe Vestager, European Commissioner for Competition



FinTech Convergence Raises Risk of Monopolization Claims

Increased Scrutiny of Tech Platforms and Data

“ **Companies today gather more data** on everything from where we work to where we shop, to our political views, to what we eat for breakfast. There’s this belief, when it comes to tech companies, that when people don’t pay up front, there’s no antitrust concern. But that’s a myth.

Data is power. And data allows companies to push tailored advertisements to both shape and drive our preferences, and ultimately to benefit the corporation’s bottom line. That’s why it’s **critically important** that antitrust enforcers focus on **the ways data can be used to undermine competition**.

”

Elizabeth Warren, speaking to TheNation.com

Torpey's Top 5 FinTech Compliance Tips



Torpey's Top 5 FinTech Compliance Tips



#1

Tech May Not Accomplish What a Human Cannot

- Algorithmic Price Fixing
- Algorithmic Market Manipulation and Spoofing
- Information Exchange
- Smart Contracts and Approvals
- Technological Tying

Torpey's Top 5 FinTech Compliance Tips



#2

Know Your Tech

- Understand Your Tech to Understand Your **Risks**
 - Exclusionary; Double-Sided Platform; Unique and Valuable Data; Unrestricted Access for Competitors Using Blockchain?
 - Plan for Dominance: Start Up Today; Monopolist Tomorrow
- Understand Your Tech to Understand and Document **Procompetitive Justifications**
- Compliance Moves to the Back Room/IT

Torpey's Top 5 FinTech Compliance Tips



#3

Create AT - IT - In House Partnerships with Speed Dial Accessibility

- Early and Often
- Find Creative Ways to Get to Yes
- Update Compliance Policies
- Shift to a Seek Permission – Not Forgiveness – Mentality
- Rules of the Road for High Risk Situations

Torpey's Top 5 FinTech Compliance Tips



#4

Tech Design Is Antitrust Compliance

- Ounce of Prevention = Pound of Cure
- Firewalls (See, e.g., Bookish)
- Predatory Innovation/Anticompetitive Product Redesign
- Trifecta of Interoperability Claims: Technological Tying, Monopoly Leveraging, Attempted Monopolization

Torpey's Top 5 FinTech Compliance Tips



#5

Conduct an Early Risk Assessment

- Market Effects
- Potential Plaintiffs
- Risk of Enforcement Across Jurisdictions
- Risk of Criminal Liability/Potential Leniency
- Business Review Letter
- Anticipate Potential Regulation

Questions?

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Thank You

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Services

Complex Commercial Litigation
IP/IT Transactions & Licensing
Litigation
Patent Litigation
Trade Secrets
White Collar, Regulatory
Defense & Investigations

Education

Wake Forest University, JD
Wake Forest University, MBA
University of North Carolina, BA

Bar Admissions

North Carolina
Georgia

An experienced trial and arbitration attorney, Danielle handles a wide range of business disputes, including patent infringement, securities fraud, and complex contract matters in a number of federal and state courts. She was recognized in the 2016-2019 editions of *Best Lawyers in America* for Commercial Litigation and Intellectual Property Litigation.

Danielle is a litigation partner in Winston's Charlotte office. She has extensive experience in handling high-risk, multi-patent, multi-product, and multi-defendant cases in a broad range of technologies, in federal courts across the country. She regularly advises clients regarding various pre-suit patent litigation issues, including indemnity obligations and declaratory judgment options.

She plays an active leadership role in a number of organizations including:

- Salem Academy & College, Board of Trustees (May 2016 to present)
- Co-Chair, Women of Purpose Campaign (December 2015 to present)
- Forsyth Country Day School, Board of Trustees (July 2015 to present)
- Brenner Children's Hospital, Advisory Board Chair (2003 to present)
- Wake Forest Baptist Medical Center, Board of Visitors (July 2014 to present)
- National Association of Women Lawyers, Member
- Georgia Bio, Legal & Regulatory Affairs Committee, co-chair (2014-present)



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Services

Corporate & Finance
Corporate Governance
Derivatives & Structured Products
Electric Power Transactions
Energy & Environmental
Energy Industry Investigations & Litigation
Litigation
Securities Litigation
White Collar, Regulatory
Defense & Investigations

Education

University of San Diego, JD
Penn State University, BA

Bar Admissions

Pennsylvania
District of Columbia

Michael counsels clients with respect to CFTC and SEC enforcement investigations and compliance matters, including those involving energy trading and derivatives market activity. He has extensive enforcement and compliance experience that stems from his private practice and more than 14 years of federal regulatory and legislative service. He previously served in senior leadership positions at the CFTC and the SEC, including:

- **Chief of Staff and Chief Operating Officer, US Commodity Futures Trading Commission:** As Chief of Staff under CFTC Acting Chairman Walter Lukken, Michael provided counsel regarding the full range of legal, regulatory and policy matters before the CFTC, including energy market oversight, enforcement investigations, futures market surveillance, derivatives clearing, and litigation. In that role, Michael also served as the primary CFTC staff representative to the President's Working Group on Financial Markets.
- **Counsel to the Chairman, US Securities and Exchange Commission:** Michael served for seven years at the SEC in various roles, including Counsel to the Chairman for enforcement matters. He provided legal advice to the SEC Chairman regarding many of the highest profile SEC enforcement proceedings at the time.
- **Branch Chief, US Securities and Exchange Commission:** As a supervisor in the SEC's Enforcement Division, Michael supervised investigations of federal securities law violations including matters involving market manipulation, insider trading, accounting fraud and broker dealer conduct.
- **Extensive Investigation Experience:** Michael obtained extensive investigation experience as a Senior Counsel in the SEC's Enforcement Division, where he handled several complex investigations that resulted in SEC enforcement actions involving broker dealer fraud and accounting fraud.



Susannah Torpey

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Services

Antitrust / Competition
Antitrust Litigation
Class Actions
Complex Commercial Litigation
Compliance & Counseling
Global Cartel Defense
Government Investigations
Intellectual Property
Litigation
White Collar, Regulatory
Defense & Investigations

Education

New York University, JD
Colgate University, BA

Bar Admissions

New York

Susannah has over a decade of experience representing Fortune 500 companies in multimillion and billion dollar antitrust class actions, high-tech competitor disputes, investigations, and counseling partnerships. She has been repeatedly recognized as a “SuperLawyer,” “Top Woman Attorney,” and “Rising Star” in antitrust litigation for obtaining critical wins for her clients, whether at trial on behalf of plaintiffs or by winning complete dismissals on behalf of defendants.

With respect to her high-tech competitor litigation and counseling practice, Susannah has worked with a wide array of technologies, including artificial intelligence, web apps, ecommerce, data exchange platforms, semiconductors, IoT products, numerous computer and memory products, VoIP, and biotech. She has played a central role in the rise of FinTech antitrust disputes, including defending global financial institutions from conspiracy claims relating to the purported suppression of emergent electronic trading platforms as well as conspiracy litigations alleging that banks artificially manipulated various financial markets to impact the value of financial instruments. In just the past year, Susannah, along with Danielle Williams, secured the dismissal of two antitrust litigations relating to authentication technology and banking apps. She also routinely represents high-tech competitors in antitrust litigations concerning the assertion of patent rights and joint IP licensing. Susannah also works with tech companies to minimize antitrust risks relating to tech design and to protect against exchanges of competitively sensitive information across competitor collaborations and interoperable products. For example, she served as lead antitrust counsel to Bookish and designed firewalls among the publisher defendants in the eBooks case, which protected the joint venture from prosecution.