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FinTech University

FinTech Exits and Investable Businesses

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What Investors and Buyers Expect – Proposal/LOI

- Purchase price or valuation range, financial and other assumptions and adjustments
- Diligence requirements and timing
- Material conditions
- Non-binding

What Investors and Buyers Expect – Diligence/Data Room

- Organization, Capitalization, Governance
- Financial Information
- Assets
- Indebtedness, Other Liabilities
- Intellectual Property
- Material Contracts
- Employees and Benefits
- Regulatory Compliance
- Licenses and Permits
- Litigation, Insurance
- Tax
- Customers, Suppliers
- Management meetings
- Other

What Investors and Buyers Expect – Definitive Agreements

- Purchase price and adjustments
- Seller reps, disclosure schedules
- Seller covenants
- Purchase price holdback for Seller indemnity
- Closing conditions
- Termination rights

Regulatory and Compliance Considerations

Regulatory and Compliance

Compliance with Laws and Government Permits – Company Representations

- The Company has complied, and is now complying, with all Laws applicable to it or its business, properties, or assets.
- All Permits obtained, or required to be obtained, from Governmental Authorities for the Company to conduct its business have been obtained and are valid and in full force and effect.

FinTech: Areas of Concentration

Payments & Transaction Processing

Digital / Online / Mobile Payments • Processing & Gateways • Money Transfer • Point-of-Sale Technology • Fraud / Security • eCommerce & Loyalty Solutions

Digital Banking / Bank Tech

Enterprise Banking Tech • Core Processors • Online / Mobile Banking • Lending Tech • Credit Scoring / Data • Mortgage / Real Estate Tech • Personal Financial Management Platforms

Alternative Lending

Online / Non-bank Lending • Pawn / Asset Backed Lending • Leasing • Mortgage Originators • Loan Servicing • Other Specialty Lending

Wealth & Capital Markets Tech

Digital Wealth Management • Online Brokers & Exchanges • Trading Technology • Back-Middle Office Technology • Big Data Analytics & Data Management

InsurTech

Digital Insurance • Online Distribution / Platforms • Carrier, Broker & Agency Software • Claims Management • Billing & Payments • Policy Administration • Data & Analytics

Healthcare Payments / IT

Healthcare Payments • Revenue Cycle Management & Billing • Payer Payment Integrity • Health Insurance Sales & Distribution • Financial Data & Analytics

Financial Management Solutions

Enterprise Resource Management • Accounting & Budgeting • HR / Payroll • B2B & B2C Invoicing • Receivables Management • Risk Management

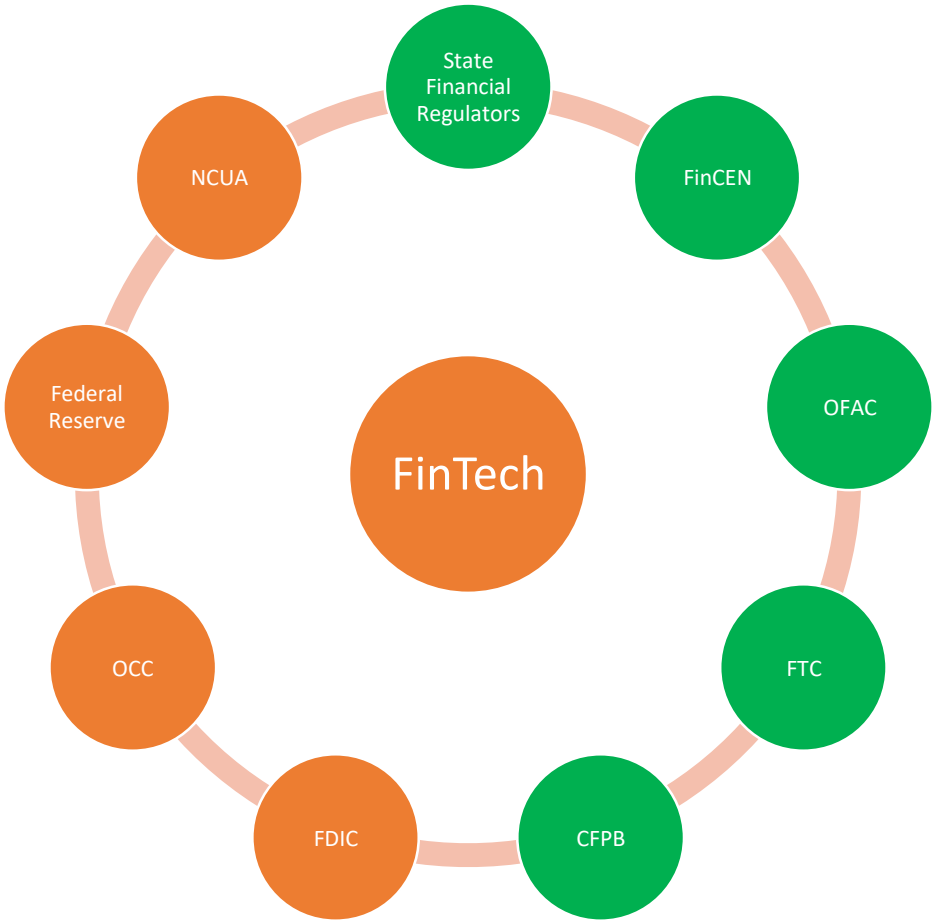
Financial BPO / IT Services

Accounting • Finance • Staffing • Document Management • Collections • Call Center Management Software

New Technology – Same Regulations

- Electronic Fund Transfer Act / Regulation E
- Truth in Lending Act / Regulation Z
- PCI – DSS
- BSA/AML/KYC
- UDAAP
- FinCEN – Money Transmission
- Gramm-Leach-Bliley Act / Regulation P
- Securities Act of 1933
- Securities Exchange Act of 1934

Challenges to Fintech



- A FinTech is faced with multi-level regulatory complexity, at a minimum facing compliance with 50 states' financial regulations, FinCEN, OFAC, FTC, and the CFPB.
- To avoid the 50 state financial regulators, the FinTech may partner with a bank, but now faces differing positions taken by each of the prudential banking regulators.

Challenges to Fintech Continued…

- **Digital Asset Securities**
  - The definitions of "security" under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 are nearly identical and each is broad enough to include the various types of instruments that are used in commercial marketplaces that one might suspect to fall within the ordinary concepts of a security.
  - This would include common instruments like stocks, bonds, and notes, as well as the various collective investment pools and common enterprises devised by persons seeking to generate profits from the efforts and investments of others (i.e. investment contracts and instruments commonly known as securities).
  - Section 2(a)(1) of the Securities Act defines a "security" as:

> [A]any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, . . . transferable share, ***investment contract***, . . . any put, call, straddle, option, or privilege on any security, certificate of deposit, . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Challenges to Fintech Continued…

- **Exchanges**
  - Section 3(a)(1) of the Exchange Act defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."
  - Exchange Act Rule 3b-16(a) interprets the definition to mean any organization, association, or group of persons that: (1) ***brings together the orders of multiple buyers and sellers*** and (2) uses established, nondiscretionary methods (***whether by providing a trading facility*** or by setting rules) ***under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade***.
  - If a blockchain technology platform brings together multiple buyers and sellers of digital assets that are deemed securities, the platform could be required to register as a securities exchange unless it falls within an exclusion from registration.

- **Alternative Trading Systems**
  - An "alternative trading system" means any organization, association, person, group of persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act, and (2) that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading.
  - A blockchain technology platform may be required by the SEC to register as an ATS if it maintains a marketplace or facilities for bringing together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform.
  - If the platform is not required to register as an ATS, the operator of the platform may be required to register as a broker-dealer.

Challenges to Fintech Continued…

- **Broker-Dealers**
  - Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments).
  - Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."
  - The Exchange Act and the rules thereunder do not define these terms.
  - The courts and the SEC have taken an expansive view of the scope of these terms.
  - The SEC and the courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.
  - Depending on the circumstances, the operator of a blockchain technology platform may be deemed a broker-dealer if the operator of the platform is deemed to be engaged in the business of effecting transactions in securities for the account of others.

Data Security and Privacy - Issues and Risks

Data Security and Privacy

Data Security and Privacy – Company Representations

- In connection with its collection, storage, use and/or disclosure of any information that constitutes Personal Information by or on behalf of the Company, the Company is and has been in compliance with
  - All applicable laws (including, without limitation, laws relating to privacy, data security, telephone and text message communications, and marketing by email or other channels) in all relevant jurisdictions
  - The Company's privacy policies and public written statements regarding the Company's privacy or data security practices
  - The requirements of any contract codes of conduct or industry standards by which the Company is bound

Data Security and Privacy

Data Security and Privacy – Company Representations

- The Company maintains and has maintained reasonable physical, technical, and administrative security measures and policies designed to protect all Personal Information owned, stored, used, maintained or controlled by or on behalf of the Company from and against unlawful, accidental or unauthorized access, destruction, loss, use, modification and/or disclosure.

- The Company is and has been in compliance in all material respects with all laws relating to data loss, theft and breach of security notification obligations.

Data Security and Privacy

- Start-ups and Middle Market Companies:
  - Often are unaware of (and thereby non-compliant with) the myriad of US and foreign data privacy, security and breach notifications laws that apply.
    - There is no one overarching law.
    - Resources: Examples: IAPP US privacy law tracker; Bloomberg; etc.
- Representations are broadly drafted, and Buyers are often unwilling to allow carve backs or broad disclosures.
- Much easier to build compliant programs from infancy of the Company – or at a minimum, prepare before going to market.
  - Privacy and Security by Design are key to long-term compliance.
- All Companies should assess past Data Incidents and consider Incident Response Preparedness.
- Operational due diligence is critical.
- Post-Closing: Often best to pull new acquisitions under corporate compliance program but be cautious when merging IT systems.

International Business and Operations – Issues and Risks

International Business and Operations

Foreign Corrupt Practices Act – Company Representations in addition to general compliance with laws

Neither the Company nor any of its directors, officers, employees or agents have, directly or indirectly

- Made, offered, promised or authorized any payment or gift of any money or anything of value to or for the benefit of any "foreign official" (as such term is defined in the FCPA), foreign political party or official thereof or candidate for foreign political office for the purpose of
  - influencing any official act or decision of such official, party or candidate,
  - inducing such official, party or candidate to use his, her or its influence to affect any act or decision of a foreign governmental authority, or
  - securing any improper advantage

  In each such case to assist the Company or any of its affiliates in obtaining or retaining business for or with, or directing business to, any person.
- Made or authorized any bribe, rebate, payoff, influence payment, kickback or other unlawful payment of funds or received or retained any funds in violation of any law, rule or regulation.

International Business and Operations

Foreign Corrupt Practices Act – Company Representations

- The Company has maintained, and has caused each of its subsidiaries and affiliates to maintain, systems of internal controls (including accounting systems, purchasing systems and billing systems) and written policies to ensure
  - Compliance with the FCPA or any other applicable anti-bribery or anti-corruption law
  - That all books and records of the Company accurately and fairly reflect, in reasonable detail, all transactions and dispositions of funds and assets.

International Business and Operations

Export Control Laws – Company Representations

- The Company has conducted all export transactions in accordance with applicable provisions of United States export control laws and regulations, including the Export Administration Regulations, the International Traffic in Arms Regulations, the regulations administered by the Office of Foreign Assets Control of the U.S. Treasury Department, and the export control laws and regulations of any other applicable jurisdiction.

- The Company has obtained all export licenses and other approvals, timely filed all required filings and has assigned the appropriate export classifications to all products, as required for its exports of products, software and technologies from the US and any other applicable jurisdiction.

International Business and Operations

Export Control Laws – Company Representations

- The Company is in compliance with the terms of all applicable export licenses, classifications, filing requirements or other approvals
- There are no actions, conditions, or circumstances pertaining to the Company's export transactions that would reasonably be expected to give rise to any material future claims.

International Business and Operations

- U.S. and other Western Economic Sanctions
- CFIUS
- FCPA and other ABC laws
- Supply Chain – Ethical Sourcing

Economic Sanctions Pose Investment and Transactional Risk

- Investor Screening for Sanctioned Persons and Entities
  - UBO diligence on investment entities
  - Don’t blow up your cap table!
  - Subsequent investors and underwriters will diligence your investors
- Transactional Risk – dangers to your business model
  - Sanctioned counterparties
  - Sanctioned financial institutions
  - Sanctioned state entities
  - Sanctioned economic sectors

FCPA and Other ABC Risk

- U.S. Foreign Corrupt Practices Act reaches international conduct of all U.S. persons and U.S. legal entities and their agents
  - Prohibits corruptly influencing government officials to render favorable decisions
  - Applies broadly to a variety of transactions involving government officials
    - Transactions with state-owned commercial enterprises (e.g., airlines, banks, hospitals, ports)
    - Regulatory activity (such as tax and customs treatment, immigrant visa status for employees
- Other Anti-Bribery and Anti-Corruption Regimes are being enforced – Canada, UK, France, Brazil
- Sophisticated investors will scrutinize international lines of revenue

Ethical and Legal Supply Chain Risks

- Increasing focus on observation of labor, employment and environmental laws by suppliers of component parts and materials
- PE firms need to be mindful of such risk in their portfolios
- Major U.S. businesses (e.g., Walmart) demanding increasing warranties from suppliers and vendors
- Uyghur Forced Labor Prevention Act
- Supplier Due Diligence is challenging
- Increasing Focus of Civil Plaintiffs' Litigation

CFIUS

- CFIUS is a U.S. interdepartmental group called the Committee on Foreign Investment in the U.S.
  - Its purpose is to scrutinize acquisitions and investments by non-U.S. persons of U.S. businesses that are deemed to have sensitive technology, infrastructure or personal data
  - Traditionally, focus was on defense, nuclear and other energy businesses
  - Increasing focus on emerging technologies, biotech and even finance
- Mandatory screening of certain transactions, with possibilities of delays in closing transactions or remedial restructuring of a deal
- CFIUS can block a transaction

Presenter Biographies

LORI ANNE CZEPIEL

Lori Anne counsels early stage, middle market and public companies, investors, entrepreneurs, family offices, and funds on corporate, M&A, investment, and finance issues, as well as governance, strategy, risk management, compliance, dispute resolution, executive comp, IP, entity structuring, cross-border and U.S. expansion matters. She has sophisticated experience in M&A transactions, venture capital and private equity investments, joint ventures, reorganizations, IPOs and other securities and capital raising transactions and has led hundreds of transactions valued at more than $120 billion in the aggregate. She advises FinTechs involving blockchain, AI and digital assets. She has led deals involving US and international companies across the financial services and regulatory spectrum including commercial and investment banks, broker-dealers, asset managers, exchanges and payments, structured finance, insurance and real estate companies.

ADAM SAFWAT

Adam regularly represents companies and individuals before the Department of Justice and the Securities and Exchange Commission in investigations and compliance-related matters. His practice is multi-faceted, and in addition to Foreign Corrupt Practices Act (FCPA) and U.S. economic sanctions compliance counseling, he focuses on issues related to white collar and regulatory enforcement impacting public and private companies, including securities and accounting fraud, financial fraud, and anti-money laundering issues.

KEVIN TRAN

Kevin assists financial institutions and technology clients with financial regulatory, securities, and corporate matters. He focuses on the representation of early stage, mid-stage, and publicly traded FinTech companies focused on blockchain technology, digital assets, and cryptocurrencies, including broker-dealers, digital asset and currency trading platforms, digital asset custodians, alternative trading systems, and securities exchanges and swap execution facilities.

Moderator Biography

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.S. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

Contact Details

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