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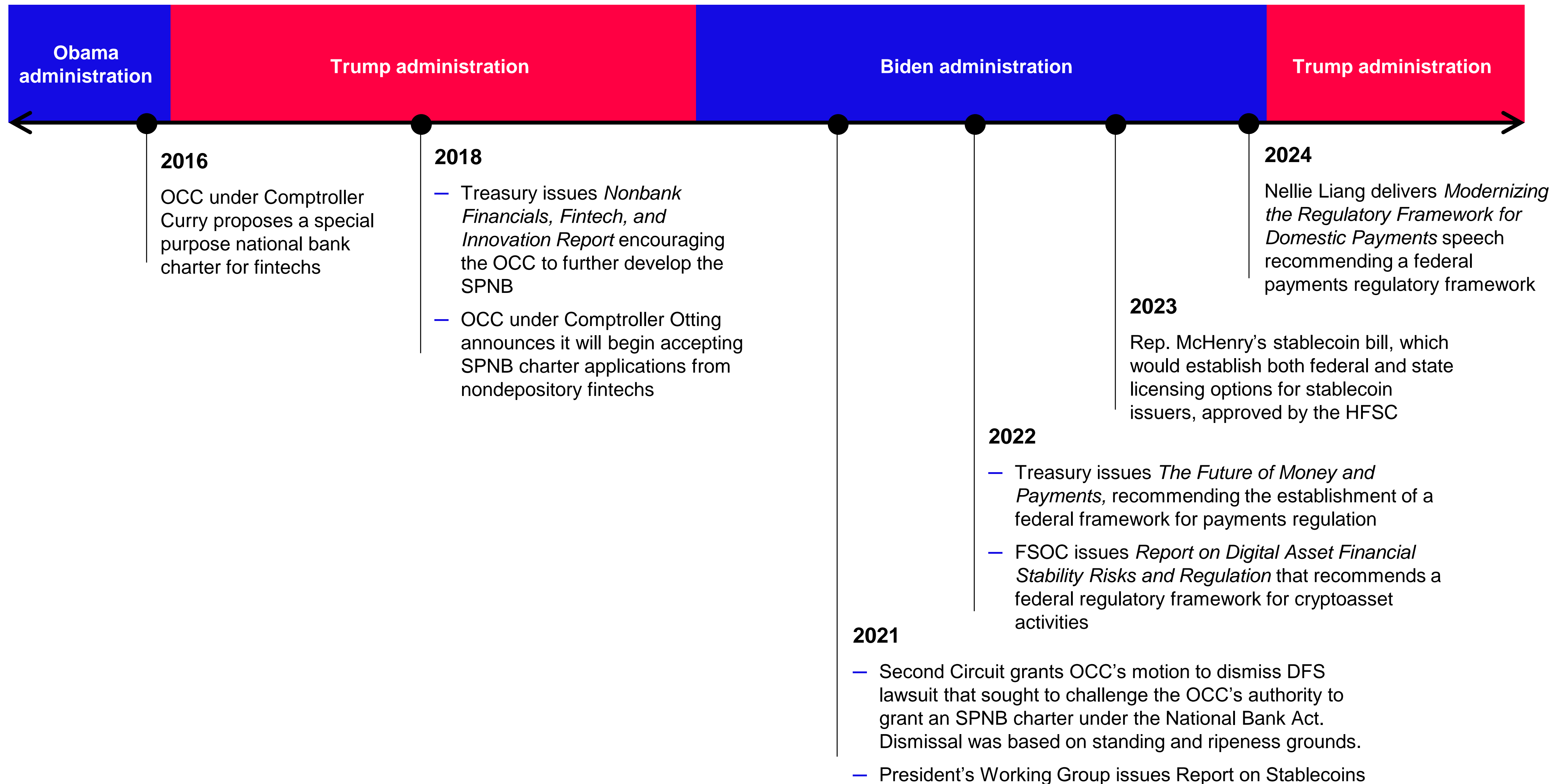
The future of payments and banking under the Trump administration

January 21, 2025

Introduction – Is there momentum for a federal payments framework?

- A federal charter for nonbanks engaged in payments activities has been on the policy agenda since the first Trump administration and has garnered support from policymakers on both sides of the aisle. New technologies that can be used to conduct payments activities, such as stablecoins, have been the subject of similar regulatory debates.
- A history of bipartisan support suggests that federal action in this area may be possible.
  - U.S. Treasury Under Secretary for Domestic Finance Nellie Liang delivered a speech in October 2024 that builds on a 2022 Treasury Report that recommended that the United States should establish a federal regulatory framework for domestic payments.
  - Acting Comptroller Michael Hsu also endorsed calls for a federal payments charter, citing a "regulatory gap" in the oversight of digital payments companies.
- A federal regulatory framework could address policy issues including:
  - state-by-state regulations that exist today;
  - access to federal backstops like Federal Deposit Insurance Corporation (**FDIC**) insurance and Federal Reserve services for nonbanks;
  - regulatory clarity regarding new forms of money such as stablecoins; and
  - standards for interoperability or use of customer data.
- In anticipation of this debate reemerging, this deck reviews the policy and legal history surrounding these issues.

Timeline of key events



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The OCC and the special purpose national bank charter

With the landscape of payments and banking rapidly changing, the Office of the Comptroller of the Currency (OCC), which regulates and supervises national banks, was the first federal financial regulator to invite nonbank fintech companies under its regulatory perimeter.

- Following a series of innovation initiatives, the OCC released a framework for establishing a special purpose national bank charter (**SPNB charter**) in December 2016 under former Comptroller Thomas Curry. Here is our client update that discussed the potential benefits, uncertainties and regulatory pitfalls of the SPNB charter. In particular, we explained why the SPNB charter would be of limited practical utility to businesses that engage in deposit-taking activity.
  - Charter holders would have to engage in **receiving deposits, paying checks and/or lending money**.
  - The OCC would consider tailoring some requirements that apply to a full-service national bank to address the business model of SPNB applicants, including adapting capital requirements for a fintech applicant.
  - Fintech applicants that propose to accept deposits other than trust funds would still be required to apply for deposit insurance and receive approval from the FDIC. Definition of deposit is quite broad: "[T]he unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally . . . ."

The OCC and the special purpose national bank charter

- If the SPNB had been successfully implemented, companies providing payment services would have essentially had three choices:
  - state-by-state licensing;
  - structuring their business to avoid needing a license; or
  - opting for the SPNB, which would have preempted state licensing requirements and state usury laws, and potentially provided access to Federal Reserve services through **membership in the Federal Reserve System**; however, the parent company and affiliates could have become subject to the **Bank Holding Company Act**, including its restrictions on mixing of banking and commerce, if the applicant proposed accepting deposits, and any applicant would have been subject to **litigation risk** as a result of resistance from state regulators and community banks.
- We discuss each of these three issues (i.e., membership in the Federal Reserve System, bank holding company status and litigation risk) on the following slides.

Membership in the Federal Reserve System

- One of the potential benefits of an SPNB charter would have been access to Federal Reserve services through membership in the Federal Reserve System, including:
  - Access to master accounts at a Federal Reserve Bank
  - Direct access to Federal Reserve-operated financial market utilities (**FMUs**)
  - Discount window access
- National banks, including insured and uninsured trust banks and other special purpose national banks, are required to be members of the Federal Reserve System.
- However, at the time, the Federal Reserve did not decide whether or how access to the discount window and payment systems would work for SPNB charter holders.

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Federal Reserve Board's 2022 master account guidelines

- Since the proposed introduction of the SPNB charter, the Federal Reserve Board has issued guidance to the Federal Reserve System's 12 regional Reserve banks on how they should review master account applications that could influence policymaking.
- The guidance split applicants into three tiers:
  - Tier 1: Federally insured depository institutions are generally subject "to a less intensive and more streamlined review."
  - Tier 2: Uninsured state or federally chartered depository institutions that are subject to federal prudential regulation and have a holding company parent that is subject to Federal Reserve oversight generally receive "an intermediate level of review."
  - Tier 3: Uninsured state or federally chartered depository institutions that are not subject to federal prudential supervision or do not have a holding company subject to Federal Reserve oversight generally receive "the strictest level of review."
- Subsequent litigation indicated that the guidance was accompanied by a nonpublic S-letter that requires the Reserve Banks to consult with the Federal Reserve Board before granting a master account to a Tier 2 or Tier 3 institution.
- This guidance would be relevant if the idea of an SPNB charter were to be reintroduced.
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Bank holding company status

- A key consideration for potential SPNB applicants was whether they needed to accept deposits. An SPNB that takes deposits (other than trust funds) is generally required to obtain FDIC deposit insurance. Unless organized as an industrial loan company (**ILC**), any company that takes FDIC-insured deposits is generally treated as a **bank** under the **Bank Holding Company Act (BHCA)**.
- Any entity that **controls** the bank under the BHCA:
  - must register as a bank holding company (**BHC**); and
  - is subject to regulation and supervision by the Federal Reserve as such.
- BHCs are subject to:
  - enterprise-wide oversight and regulation by the Federal Reserve;
  - restrictions on their investments and activities;
  - other prudential requirements, including minimum capital and liquidity requirements; and
  - ongoing reporting and compliance obligations and examination, supervision and enforcement.
- At the time, it was unclear how the Federal Reserve would regulate firms that control SPNB entities and the question was never fully resolved.

Control under the BHCA is much broader than a common business understanding of the term:

- Own, control or have the power to vote 25% or more of a class of voting securities; power to elect a majority of the board; or power to exercise a ***controlling influence**** over management or policies
- Under the Federal Reserve's control rules, holding 5% or more of any class of voting securities, together with other indicia, can be enough to indicate control

* In determining whether a firm has a controlling influence over a bank, the Federal Reserve uses an all facts and circumstances approach. As applied by the Federal Reserve, this approach seems to turn the controlling influence test into an important influence test to most people when they see it for the first time.

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Viewpoints of state regulators and community banks

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- Despite support from the first Trump administration, with the Treasury encouraging the OCC to further develop the SPNB charter in its Nonbank Financials, Fintech, and Innovation Report to the President, it faced significant legal challenges.
- Promptly following the OCC's announcement that it would accept applications for SPNB charters (and allegedly discussing the charter with potential applicants), the New York Department of Financial Services (**DFS**) and the Conference of State Bank Supervisors (**CSBS**) separately filed lawsuits against the OCC to stop it from granting applications for the special purpose national bank charter, arguing that the agency lacks the legal authority to charter non-depository institutions. Both cases were dismissed for lack of standing and ripeness.
- In July 2018, under former Comptroller Joseph Otting, the OCC issued a policy statement announcing that it would consider applications from fintech companies to become special purpose national banks. Concurrent with the announcement, the OCC issued a supplement to its licensing manual to provide guidance for evaluating special purpose national bank charters for fintech companies.
- Here is our client update on the OCC's supplement to its licensing memo.

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- The press release accompanying the release of the policy statement emphasized that “[t]he **OCC has statutory authority**, regulations, and policies that govern its review and decision making with respect to chartering national banks, including special purpose national banks. That authority includes companies that engage in one of the core banking functions (paying checks, lending money, or taking deposits) and is described at 12 CFR 5.20(e)(1). That authority does not require the bank to take deposits within the meaning of the Federal Deposit Insurance Act and therefore would not require insurance from the Federal Deposit Insurance Corporation.”
- Following the announcement, the DFS and the CSBS each promptly filed new lawsuits against the OCC.
- Although the CSBS case was dismissed by the D.C. court for a second time in 2019, the SDNY found that the DFS this time had standing and reached the merits of DFS’s argument. The court concluded that “the term ‘business of banking,’ as used in the [National Bank Act], unambiguously requires **receiving deposits** as an aspect of the business.”
- The OCC appealed and, in 2021, the Second Circuit reversed the SDNY decision on procedural grounds, on the basis that “[a]t this time, no non-depository fintech has applied for—let alone been granted—an SPNB charter.”

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Acting Comptroller Brooks and the pivot to cryptoassets

Wyoming SPDI

- At the same time, state lawmakers were considering and, in some cases, authorizing specialized nonbank charters of their own.
- The Wyoming "special purpose depository institutions" (**SPDI**) charter was authorized in 2019 under Wyoming Statute Section 13-12-101 *et seq.*
- SPDIs are fully reserved banks that are permitted to take deposits, but are not required to obtain FDIC deposit insurance and typically focus on digital assets.
- The Wyoming Banking Board has approved four SPDI charters to date.

- In 2020, with the SPNB charter caught up in litigation, former Acting Comptroller Brian Brooks announced plans to create an additional national banking charter for payment companies that would be a "national version of a state money transmitter license."
- Under Brooks, many applicants with novel business models sought charters from the OCC, including one that would have voluntarily limited its deposit-taking to uninsured wholesale deposits only.
- Nonbank companies also became increasingly interested in new technologies like blockchain and distributed ledger technology, which could support new types of digital assets such as stablecoins.
- However, the regulatory treatment of these new technologies was uncertain, and some policymakers were of the view that they could pose unknown benefits and risks to consumers and market participants.
- As part of efforts to enhance and promote financial innovation, regulators and lawmakers alike undertook to gain a better understanding of these emerging technologies and began processes for updating their rules and regulations to incorporate cryptoassets within the regulatory perimeter.
- For example, under Brooks' tenure, the OCC also issued three digital-asset-friendly Interpretive letters (Interpretive Letter 1170, Interpretive Letter 1172 and Interpretive Letter 1174) that outlined the digital-asset activities that are legally permissible for OCC-supervised banks to engage in, provided that supervisory standards are met.

The Biden Administration and the stablecoin debate

The Biden Administration had its own approach to these issues.

- The President's Working Group on Financial Markets (**PWG**), together with the FDIC and OCC, issued a joint report on stablecoins on November 1, 2021, which recommended that Congress promptly enact legislation to regulate stablecoin arrangements, including a requirement for stablecoin issuers to be insured depository institutions (**IDIs**) (see our client update). There have been several legislative proposals following the release of the PWG report (discussed in the following slides).
- On November 23, 2021, the federal banking agencies issued a joint statement in recognition that "the emerging crypto-asset sector presents potential opportunities and risks for banking organizations, their customers, and the overall financial system." The statement announced the agencies' plans to provide greater clarity on five areas: (1) cryptoasset safekeeping and custody; (2) facilitation of customer crypto transactions; (3) crypto-collateralized lending; (4) the issuance and distribution of stablecoins; and (5) activities involving the holding of cryptoassets on balance sheet.
- On November 18, 2021, the OCC issued Interpretive Letter 1179, which construes narrowly the prior digital asset interpretive letters issued under Comptroller Brooks' leadership.

Current status of cryptoasset regulation

- Since the November 2021 joint statement, the federal banking agencies have taken a number of actions to address each of the five issues they said they would address (see our client update).
- The Federal Reserve also finalized guidelines for the Federal Reserve System's 12 regional Reserve Banks to grant master accounts and access to Federal Reserve services to novel financial firms. Notably, in January 2023, Custodia Bank, a Wyoming SPDI, was denied in its application to join the Federal Reserve System, including its application to establish a master account with the Federal Reserve. Custodia challenged this denial in court, and its case is currently pending before the U.S. Court of Appeals for the Tenth Circuit.

Stablecoin debate

Representatives Patrick McHenry (R-NC) and Maxine Waters (D-CA), the respective former Chair and Ranking Member of the House Financial Services Committee (HFSC), have been negotiating legislation to regulate the issuance and oversight of payment stablecoins. The negotiations have underscored the fact that the key regulatory questions regarding emerging technologies in the payments landscape are similar to the concerns voiced over a federal payments charter.

- In a notice announcing a May 18, 2023 hearing on stablecoin legislation, the HFSC published a discussion draft of Rep. Waters' proposed stablecoin bill.
- On July 27, 2023, the HFSC approved Rep. McHenry's bill over Rep. Waters' opposition.
- On September 24, 2024, Rep. Waters pressed McHenry for a stablecoin "grand bargain," saying "I know we can get this done if we focus, so let's make it happen."
- On October 10, 2024, Senator Bill Hagerty released a discussion draft of a stablecoin bill that builds on Rep. McHenry's bill.
- Like McHenry's and Waters' bills, Hagerty's bill would not provide stablecoin issuers with deposit insurance or access to a Federal Reserve master account or the discount window.
- The new Chair of the HFSC, Rep. French Hill, has recently said that stablecoin and crypto market structure legislation are "top priorit[ies]" for Congress.

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Stablecoin debate

- All three bills also would impose bank-like regulation on federal nonbank stablecoin issuers, including:
  - Capital, liquidity and risk management requirements, perhaps calibrated to the lower risk profile of stablecoin issuers with a 100% reserve in high-quality liquid assets compared to banks engaged in maturity or liquidity transformation;
  - Application of the Bank Secrecy Act and Gramm-Leach-Bliley Act's customer privacy requirements;
  - Certain activities limitations; and
  - Broad supervision and enforcement authority.
- At the forefront of the debate among Waters, on the one hand, and McHenry and Hagerty, on the other, remains competing views on how to allocate authority between federal and state regulators over stablecoin issuers.
- We will separately be publishing a client update on Senator Hagerty's discussion draft.

Biden Administration reports

President Biden's March 9, 2022 Executive Order on Ensuring Responsible Development of Digital Assets mandated multiple reports and studies, tasking an alphabet soup of government agencies with responsibilities for the effort.

Executive Order on Ensuring Responsible Development of Digital Assets | Action Items

Legend: Primary Actor (P) | Consultation (C)

EO Section	Action item:	Deadline (T+ date of EO)	Treasury	DoJ	OSTP	Commerce	Fed	FTC	CFPB	State	DHS	OMB	DNI	SEC	CFTC	FDIC	OCC	CTO	FSOC	Energy	EPA	CEA	USAID	Labor	Nat'l Climate Adv.
4(b)	CBDC report	180	P	C		C				C	C	C	C												
4(c)	CBDC continued research and reporting	-					P																		
4(d)(i)	CBDC legislative changes assessment	180	C	P			C																		
4(d)(ii)	CBDC legislative proposal	210	C	P			C																		
5(b)(i)	Report on implications of digital assets	180	P				C	C	C					C	C	C	C							C	
5(b)(ii)	Technical evaluation	180	C		P		C											P							
5(b)(iii)	Role of law enforcement agencies	180	C	P							C														
5(b)(iv)	Consider effects on competition policy	-		P				P	P																
5(b)(v)	Consider privacy/consumer protection	-						P	P																
5(b)(vi)	Consider investor/market protection	-					P							P	P	P	P								
5(b)(vii)	Report on energy and climate change	180	C		P															C	C	C			C
5(b)(viii)	Update 5(b)(vii) report	n.1	C		P															C	C	C			
6(b)	Financial stability report	210	P																P						
7(b)	Annexes on illicit finance risks	n.2	P	P		P				P	P	P	P												
7(c)	Coordinated action plan on illicit finance	n.2	P	C		C				C	C	C	C												
7(d)	Notification of any illicit finance rulemaking	n.2	P																						
8(b)(i)	Framework for international engagement	120	P			C				C													C		
8(b)(ii)	Report on framework actions	n.3	P			C				C		C											C		
8(b)(iii)	Framework for economic competitiveness	180	C			P				C															
8(b)(iv)	Report on international law enforcement	90	C	P						C	C														

Notes to table:

1. To be submitted one year after submission of the 5(b)(vii) report
2. Timeline of these reports to be determined based on submission of other reports
3. To be submitted one year after establishment of framework for international engagement

Additional points:

- The interagency coordination process required by Section 3 of the EO also includes the following departments or agencies as appropriate, though not in relation to a particular action item: Defense, the Domestic Policy Council, OIRA, and the NSF
- Primary actors are generally directed to issue a report or take an action, though sometimes these actors—usually the independent agencies—are instead "encouraged" to consider a topic or "invited" to participate

Biden Administration reports

- Two reports issued pursuant to former President Biden's Executive Order included FSOC's "Report on Digital Asset Financial Stability Risks and Regulation" (the **FSOC Report**) and the Treasury's report on "The Future of Money and Payments" (the **Treasury Report**).
- Each report offers important perspectives on policymakers' views on the development of innovative technologies in the payments landscape under the Biden administration.

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FSOC report

- The FSOC report makes clear that FSOC under the Biden Administration strongly believed that digital asset activities should be subject to a federal regulatory framework created by Congress.
- The report is highly skeptical of the sufficiency of state money services regulation to address the full scope of digital asset activities, saying that state regulation focuses on consumer protection and AML/CFT instead of prudential regulation and financial stability.
- For example, the report states:
  - "[Money services business (**MSB**)] regulation is not designed for the purpose of comprehensively mitigating vulnerabilities arising from the potential failure of a large, interconnected platform, or for other purposes, such as market integrity."
  - "State-level MSB laws might affect the capital positions of platforms that are MSBs through requirements to maintain a minimum net worth or surety bonds. However, these requirements typically form only very limited loss absorbing buffers for the purpose of consumer protection of money transmission activities, and states differ widely in the strength and application of these requirements."
  - "MSB regulations apply only to the activity of transmitting money or monetary value. Because an MSB license does not prohibit a business from engaging in other activities as long as it follows the necessary regulatory requirements, it imposes few limitations on potential interconnections or on the platform's overall capital position. These other activities may or may not be regulated, and hence vulnerabilities may build up in these activities."
- Although the FSOC report makes these statements specifically in the context of digital asset activities, other regulatory actions suggest it reflects the federal financial regulators' view with respect to payments regulation more broadly.

Treasury report

- Treasury's report under the Biden Administration on the future of money and payment systems recommended that the U.S. government "establish a federal framework for payments regulation to protect users and the financial system, while supporting responsible innovations in payments."
- The report notes that "state oversight of nonbank payment providers varies significantly, and is generally not designed to address run risk, payments risks, or other operational risks in a consistent and comprehensive manner."
- It also states that "an appropriate federal framework for payments regulation could provide a pathway for allowing nonbank payment providers to participate directly in instant payment systems."

Under Secretary Liang's speech

- Against this backdrop, former Under Secretary Liang's October 9, 2024 speech outlining a plan for a federal payments regulatory framework may provide a strawman against which the new Trump Administration regulators and Republican-controlled Congress may develop what is likely to be a more permissive federal framework for nonbank payment, stablecoin and cryptocurrency companies, including greater respect for alternative state regulatory frameworks.
- Liang identifies three key benefits of a federal framework:
  1. **Trust in money and payments**: a federal framework would be better than various state frameworks to address risks that are essential to confidence in the money and payments system, like customer runs, payments disruptions and financial stability risks.
  2. **Innovation and competition**: a federal framework would be more likely than various state frameworks to promote innovation and fair competition, potentially by providing e-money issuers direct access to some public payment rails, like FedNow.
  3. **Global financial leadership**: a federal framework would promote a level playing field internationally.
- Liang also identifies four foundational elements of a federal framework:
  1. **Financial resources**: to function as money, an e-money claim needs to be backed by high-quality and liquid assets so that a claim representing $1 is worth $1 when redeemed.
  2. **Risk management**: needs to address operational and third-party risks.
  3. **Supervision and enforcement**: must empower a federal supervisory authority to examine e-money issuers and enforce violations.
  4. **Affiliation and activity restrictions**: e-money issuers "need" to be restricted to payments-related activities (e.g., no credit extension or significant maturity transformation) and a framework "may consider" whether an e-money issuers' affiliates should also be subject to activity limitations.

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