

## Focus on Fintech

Welcome to Wilson Sonsini's *Focus on Fintech* newsletter. This quarterly newsletter provides ongoing analysis and commentary on regulatory developments impacting the fintech industry.

In this issue, our attorneys discuss updates and developments from federal regulators, including those related to the intersection of fintech and artificial intelligence, crypto-asset and central bank digital currencies, and consumer protection. We also discuss rule updates from the Consumer Financial Protection Bureau (CFPB), the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), and the Federal Trade Commission (FTC), and we look at enforcement actions and consent orders from several regulatory bodies, as well as the Securities and Exchange Commission's (SEC's) 2024 examination priorities. Finally, we wrap up this edition with our state law round-up, which discusses the New York Department of Financial Services' amendments to its cybersecurity regulations and Florida's recent declaratory statement on money transmitters.

As a reminder, FinCEN's regulations on [Beneficial Ownership Information Reporting Requirements](#) went into effect on January 1, 2024, potentially impacting over 30 million companies. For more information, please see "[New Year, New Laws, New Obligations: The Corporate Transparency Act's Beneficial Ownership Information Reporting Requirements](#)." For any questions on the reporting requirements, please contact [CTA@wsgr.com](mailto:CTA@wsgr.com).

## Artificial Intelligence in Fintech

### Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence

In October 2023, President Biden issued the [Executive Order on the Safe, Secure,](#)

### In This Issue

**Artificial Intelligence in Fintech** ..... [Page 1](#)

**Crypto and Central Bank Digital Currency Updates** ..... [Page 2](#)

**Consumer Protection Updates**..... [Page 4](#)

**Rule Amendments and Proposed Rules** ..... [Page 4](#)

**Enforcement Actions, Consent Orders, and Examination Priorities** ..... [Page 5](#)

**State Round-Up**..... [Page 7](#)

**Select Publications**..... [Page 8](#)

**Recent Fintech Practice Highlights**..... [Page 8](#)



[and Trustworthy Development and Use of Artificial Intelligence](#). "The Executive Order establishes new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership around the world, and more." While promoting responsible AI innovation, one guiding principle of the Executive Order is to protect consumers from

the risks associated with AI, such as fraud, discrimination, and bias. With respect to the use of AI in the financial services industry, understanding an AI system's outputs and reasoning and being able to explain the decision-making process may help mitigate some of those risks. Please see our recent alert, "[AI in the Biden Administration's Crosshairs – Summarizing the Sweeping New Executive Order and Ten Top Takeaways](#)," for more information.

*Continued on page 2...*

## Artificial Intelligence in Fintech *(Continued from page 1)*

### SEC Chairman Gary Gensler's Remarks on AI

At the recent [Messenger AI Summit](#), SEC Chair Gary Gensler cautioned public companies against “AI washing”—overstating their AI capabilities or the role of AI in their businesses. Chair Gensler drew a parallel to “greenwashing” in the ESG context, where a company misleads investors by overstating its environmental or sustainability impact, and he noted that misrepresentations are governed by the same securities laws, regardless of the

topic. Chair Gensler stressed that, like other public statements by reporting companies, claims about AI must be “full, fair, and truthful.” Wilson Sonsini partners Amy Caiazza and Maneesha Mithal recently spoke with [CIO Dive](#), providing their insights on AI washing.

### FTC Streamlines Ability to Initiate AI-Related Investigations with New Omnibus Resolution

In November 2023, the FTC [announced](#) a resolution authorizing the use of compulsory process in nonpublic investigations involving products and

services that use or claim to be produced using AI or claim to detect its use. Per the resolution, AI includes, but is not limited to, machine-based systems that can, for a set of defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. The FTC may now more easily issue Civil Investigative Demands to AI-related entities, compelling them to produce documents, information, and testimony that advance FTC consumer protection and competition objectives. The resolution will be in effect for 10 years.

## Crypto and Central Bank Digital Currency Updates

### Governor Bowman's Remarks on Money and Payments

In October 2023 [remarks](#) on “Responsible Innovation in Money and Payments,” Federal Reserve Board Governor Michelle Bowman discussed crypto assets, central bank digital currency (CBDC), and payments innovations. She emphasized the importance of integrating these innovations responsibly into the U.S. banking system, focusing on safety and soundness considerations, and underscored the importance of ongoing research to understand the implications of crypto assets on payment systems, financial stability, and monetary policy. In her remarks, Governor Bowman noted that she does not see a compelling argument that a U.S. CBDC would address friction within the payment system, promote financial inclusion, or provide the public with access to safe central bank money any more effectively or efficiently than alternatives that may have fewer downside risks. She also expressed concerns with stablecoins, noting their lack of security, stability, and regulation. Finally, Governor Bowman discussed technological innovations in wholesale payments,



urging policymakers to focus on the potential risks and tradeoffs attendant on any payments innovations.

### PayPal Subpoena

Shortly after PayPal released its U.S. dollar-denominated stablecoin (PayPal USD), it disclosed in its [regulatory filings](#) that it received a subpoena from the SEC related to PayPal USD. PayPal noted that the subpoena requested the production of documents and PayPal is cooperating with the SEC.

### FDIC Strategies for Crypto-Related Risks

In October 2023, the Office of the Inspector General (OIG) issued its

[Evaluation Report](#) regarding Federal Deposit Insurance Corporation (FDIC) Strategies Related to Crypto-Asset Risks. The purpose of the report was to determine whether the FDIC has developed and implemented strategies designed to address the risks posed by crypto assets. The report concludes that the FDIC has started to do so, but states that the FDIC “has not assessed the significance and potential impact of the risks.”

According to the FDIC, the Board of Governors of the Federal Reserve, and the Office of the Comptroller of the Currency (OCC), the key risks that financial institutions should consider are: “(1) volatility in the crypto-asset



## Crypto and Central Bank Digital Currency Updates *(Continued from page 2)*

market which could potentially impact deposit flows associated with crypto-asset companies; (2) susceptibility to stablecoin run risk which could potentially impact deposit outflows for banking organizations that hold stablecoin reserves; and (3) contagion risk resulting from interconnections among certain crypto-asset participants, including through lending, investing, funding, service, and operational arrangements...” These risks could impact deposit flows (inbound and outbound) and, with respect to the contagion risk, lead to concentration risk through various crypto-asset services, such as lending and investing. If the risks identified arise, they may impact the ability of the FDIC to “maintain stability and public confidence in the Nation’s financial system.” The report contains two recommendations to the FDIC: “(1) establish a plan with timeframes for assessing risks pertaining to crypto-related activities and (2) update and clarify the supervisory feedback process related to its review of supervised institutions’ crypto-related activities.”

### Coinbase Bid for Rulemaking

The SEC [denied](#) Coinbase’s [petition for rulemaking](#) to govern the regulation

of crypto asset securities. In his statement on the denial, SEC Chair Gary Gensler stated that existing laws and regulations already apply to crypto asset securities markets. Chair Gensler also stated that the SEC and its staff are currently pursuing numerous rules applicable to crypto asset securities and intermediaries. Finally, Chair Gensler highlighted the importance of the SEC’s ability to determine how best to deploy its resources and prioritize its rulemaking agenda. Commissioners Peirce and Uyeda [disagreed](#) with the SEC’s denial, noting the importance of public roundtables, concept releases, and requests for comment in connection with issues presented by new technologies and other innovations.

### GAO Determines That SEC Accounting Bulletin Regarding Crypto Assets Requires Congressional Review

The U.S. Government Accountability Office (GAO) [found](#) that the [Staff Accounting Bulletin No. 121](#) (SAB 121) meets the definition of a “rule” for purposes of the Congressional Review Act (CRA) and thus should have been subject to the CRA rulemaking process. SAB 121 describes how the SEC staff would expect entities to account for and

disclose their obligations to safeguard crypto assets and notes that crypto companies may need to present such obligations as a liability on their balance sheet.

The CRA requires agencies to report the issuance of “rules” to Congress and provides Congress with special procedures, in the form of a joint resolution of disapproval, under which to consider legislation to overturn rules. Following the GAO’s finding, SAB 121 is still in effect; however, Congress could pass a joint resolution to disapprove of the issuance of SAB 121. Members of Congress have expressed their disapproval of SAB 121, [urging](#) prudential regulators not to enforce it. House Financial Services Committee Chair Patrick McHenry [characterized](#) the rule as one that would impose “massive new requirements on financial institutions” and thus should be subject to congressional review.

### SEC Charges Kraken for Operating as an Unregistered Securities Exchange, Broker, Dealer, and Clearing Agency

The SEC [charged](#) Payward Inc. and Payward Ventures Inc., together known as Kraken, with operating Kraken’s crypto trading platform as an unregistered securities exchange, broker, dealer, and clearing agency. According to the [complaint](#), Kraken has taken in billions of dollars of fees and trading revenue without complying with the federal securities laws. The SEC also alleged that Kraken’s business practices, internal controls, and recordkeeping present risks due to commingling of customer crypto assets with its own. Similar to other actions filed by the SEC against crypto trading platforms, the claim includes a list of crypto assets that the SEC states are being offered and sold as investment contracts, and thus as securities.



## Consumer Protection Updates

### OCC Issues Guidance on Risk Management for “Buy Now, Pay Later” Lending

The OCC issued [Bulletin 2023-37](#) that provides guidance to banks on managing risks associated with “buy now, pay later” (BNPL) loans, which the OCC defines as loans that are payable in four installments or fewer and carry no finance charges. The OCC warns that BNPL loans can lead to credit, compliance, operational, strategic, and reputational risks to banks, as well as risks to consumers. In the bulletin, the OCC highlights the risks to consumers, including overextension (increasing the likelihood of default), the lack of standardized disclosure language, the risks of merchant disputes, and the risk that consumers may not fully understand BNPL repayment obligations, among others. The OCC urges banks to implement a risk management system commensurate with the risk of BNPL loans; maintain underwriting, repayment terms, pricing, and safeguards that minimize adverse customer outcomes; and ensure marketing materials and disclosures are clear and conspicuous.

### CFPB Report on Overdraft Fees

The CFPB issued a [report](#) finding that many Americans are surprised



by overdraft fees and nonsufficient funds (NSF) fees. In the report, the CFPB noted that more than a quarter of consumers who responded to the survey had someone in their household who was charged an overdraft fee or NSF fee within the past year. The report highlights the fact that households that frequently incur overdraft and NSF fees have lower average credit scores and are more likely to have delinquent debt. In its Fall 2023 [rulemaking agenda](#), the CFPB indicated that it plans to issue a proposed rule on whether fees imposed in connection with various types of overdraft services are considered finance charges, which would subject such fees to the requirements of the Truth in Lending Act and Regulation Z.

### CFPB Issues Advisory Opinion Regarding Junk Fees

In October 2023, the CFPB [issued](#) an advisory opinion interpreting Section

1034I of the Consumer Financial Protection Act to help large banks and credit unions comply with their 1034(c) obligations. Among other requirements and prohibitions, Section 1034(c) requires large banks and credit unions to respond to consumer requests for information about their accounts in a timely manner. The CFPB’s opinion generally prohibits large banks and credit unions from charging consumers fees for obtaining basic information about their accounts. In addition, covered institutions may not unreasonably impede a consumer from making an information request, such as by implementing excessively long wait times or requiring customers to interact with a chatbot that does not respond to the consumer’s request. Finally, the advisory opinion states that the CFPB will not seek monetary relief for potential violations of Section 1034(c) that occur prior to February 1, 2024.

## Rule Amendments and Proposed Rules

### CFPB Proposes New Examination Authority over “Larger Participants” in the Digital Wallet and Consumer Payment App Markets

The CFPB issued a [proposed rule](#) to expand its oversight authority to certain nonbank providers of consumer payment apps. These apps include digital wallets, funds transfer services, and P2P apps—for both U.S. dollar payments and,

perhaps somewhat surprisingly, also bitcoin and other crypto asset payments. Under the proposed rule, if finalized, the CFPB would exercise examination powers under the Consumer Financial Protection Act (CFPA) over larger participants in this market, which would entail conducting on-site examinations, imposing reporting requirements, and conducting periodic monitoring, on top of its existing rule-writing and

enforcement powers. Please see our recent alert, [“CFPB Proposes New Examination Authority over ‘Larger Participants’ in the Digital Wallet and Consumer Payment App Markets,”](#) for more information on the proposed rule.

### FinCEN Proposed Rule on CVC Mixing

In October 2023, FinCEN released a [Notice of Proposed Rulemaking](#) (proposed rule) addressing



## Rule Amendments and Proposed Rules *(Continued from page 4)*



“mixing transactions” that involve convertible virtual currency (CVC). The proposed rule would require “covered financial institutions,” including banks, broker-dealers, and money services businesses (including money transmitters), to report certain information about CVC mixing transactions and maintain records of those transactions. CVC is currency that lacks legal tender status (e.g., the status afforded U.S. Dollars or Mexican Pesos), and mixing means facilitating

transactions that are designed to obfuscate the “source, destination, or amount involved” in the transaction.

The proposed rule would apply to transactions that a “covered financial institution knows, suspects, or has reason to suspect involves CVC mixing within or involving a jurisdiction outside the United States.” If the proposed rule is adopted, all covered financial institutions will be required to report to FinCEN particular information about

the CVC transaction and the customer within 30 days of detecting a covered transaction. Please see our recent alert, “[FinCEN Released Proposed Rule Designating CVC Mixing as ‘Primary Money Laundering Concern.’](#)” for more information.

### **FTC Expands Data Security Requirements for Non-Banking Financial Institutions under Safeguards Rule**

In October 2023, the FTC [announced](#) its amendment to the Gramm-Leach-Bliley Act Safeguards Rule. The amendment requires non-bank financial institutions, such as mortgage brokers, motor vehicle dealers, and payday lenders, to notify the FTC as soon as possible, and no later than 30 days, after the discovery of a “notification event” involving the information of at least 500 people. Please see our [WSGR Data Advisor Alert](#) for more information about the new notification requirements and the key takeaways.

## Enforcement Actions, Consent Orders, and Examination Priorities

### **FTC Brings Action Against Personal Finance App**

In November 2023, the FTC [announced](#) an \$18 million settlement against personal finance app provider Brigit. The FTC alleged in its [complaint](#) that Brigit falsely promised that certain members could receive cash advances of up to \$250, would receive “instant” delivery of such advances, would not be charged late fees or interest on outstanding advances, and could cancel any time, among other violations. The FTC also alleged that Brigit violated the Restore Online



Shoppers’ Confidence Act (ROSCA) by failing to adequately disclose the

membership’s terms and making it difficult for consumers to cancel their subscription.

Under the [stipulated order](#), Brigit is prohibited from misrepresenting any material fact to consumers concerning the company’s service, including the amount of funds available to consumers and timing of distribution. The company must also clearly disclose the membership’s terms, receive informed consent for the subscription, and provide a simple means for consumers to cancel.

## Enforcement Actions, Consent Orders, and Examination Priorities *(Continued from page 5)*

### CFPB Hits the Brakes on Toyota's Lending and Credit Reporting Practices

In November 2023, the CFPB [announced](#) a \$60 million enforcement action against Toyota Motor's auto finance division, Toyota Motor Credit Corporation (TMCC). The CFPB's action against TMCC serves as a reminder to fintechs of the importance of upholding fair and transparent practices when dealing with consumers. Specifically, the CFPB alleged that TMCC violated the Consumer Financial Protection Act and the Fair Credit Reporting Act by (1) making it difficult for customers to cancel these bundled programs, (2) not providing refunds to canceled customers, (3) failing to correct consumer reporting errors it knew were wrong, and (4) falsely reporting missed payments to consumer reporting companies.

The CFPB's order requires TMCC to pay almost \$48 million in consumer redress and an additional \$12 million civil penalty. Further, TMCC is prohibited from certain conduct, including tying employee compensation to consumer retention of bundled products, inadequately disclosing certain terms, and making it difficult for consumers to cancel.

### FDIC Order Against First Fed Bank

First Fed Bank, a wholly owned subsidiary of First Northwest Bancorp, entered into a consent order with the FDIC in connection with its relationship with Quin Ventures. The [consent order](#), which was disclosed in First Northwest Bancorp's [Form 8-K](#), focuses on, among other things, First Fed Bank's deficiencies in reviewing and assessing risks associated with third-party relationships, including the need for a thorough review of the third party's marketing material and the need for First Fed Bank to provide sufficient oversight



of third-party relationships and products and services.

The consent order alleges that, in connection with its relationship with Quin Ventures, First Fed Bank engaged in (1) unsafe or unsound banking practices; (2) deceptive and unfair acts and practices by making implied claims that credit products with non-optional debt cancellation features were unemployment insurance, approving consumers who did not qualify for the debt cancellation feature, and misrepresenting the fees and benefits for those products; (3) violations of the Truth in Lending Act; (4) violations of the Real Estate Settlement Procedures Act; (5) violations of the Electronic Fund Transfer Act; and (6) violations of Section 18(a)(4) of the FDI Act related to false or misleading representations about deposit insurance. In the consent order, the FDIC requires (1) First Fed Bank to correct any violations; (2) First Fed Bank's board to participate fully in the oversight of First Fed Bank's compliance management system; (3) First Fed Bank to submit a list of all of its new products and third-party partners to the regional FDIC director for review; (4) First Fed Bank to conduct a thorough review and revise as necessary each aspect of its agreements with third parties and the services performed under those agreements; and (5) First Fed Bank to review and revise its compliance program. Please see our alert, "[Guardrails for Bank-Fintech Partnerships: The Federal Banking Agencies Finalize](#)

[Third-Party Risk Management Expectations](#)," for more information on third-party risk management considerations.

### SEC's Division of Examinations Announces 2024 Examination Priorities

The SEC's Division of Examinations released its 2024 [Examination Priorities](#), which will focus on investment advisers, broker-dealers, cybersecurity, and fintech, among other areas. The Examination Priorities focus on investment advisers' fiduciary duty, in particular with respect to investment advice provided in connection with complex products; the process for determining whether or not advice is provided in the client's best interest; economic incentives and related conflicts that an adviser may have; and providing appropriate disclosures, as well as specific risk areas pertaining to advisers of private funds. In a similar vein, the Examination Priorities include four focus areas for broker-dealers: (1) Regulation Best Interest; (2) Form CRS; (3) broker-dealer financial responsibility rules; and (4) broker-dealer trading practices. The SEC also highlighted risks that apply to various market participants, including information security and operational resilience, use of third-party vendors, digital assets, emerging financial technology (including the use of artificial intelligence), and compliance with AML requirements.



## State Round-Up

### New York Department of Financial Services Amends Cybersecurity Regulations

As previewed in the firm's 2023 Cybersecurity Predictions [alert](#), the New York Department of Financial Services (NYDFS) issued [amendments](#) to its "nation-leading cybersecurity regulations." The amendments, which were [announced](#) on November 1, 2023, include new requirements such



as broader cybersecurity incident reporting obligations, extortion payment reporting, chief information security officer (CISO) or equivalent oversight, and additional security controls. The NYDFS also created a new class of companies with heightened requirements. Companies that meet the "Class A" company two-part threshold test are subject to new auditing, monitoring, and alerting obligations.

The amendments have different transitional periods for compliance and enforcement, with some new requirements already in effect. We recommend speaking with counsel if you have questions or want to create a compliance plan.

### FTC and the State of Florida Sue Chargeback Mitigation Company

In April 2023, the FTC and the State of Florida sued Chargebacks911, alleging that it unfairly thwarted consumers' attempts to dispute credit card charges with various merchants. The FTC alleges that Chargebacks911 submitted false or misleading information to credit card companies on behalf of merchants, attempting to prove that consumers

agreed to the disputed charges. For example, the complaint alleges Chargebacks911 sent screenshots that supposedly show that consumers had agreed to the disputed charges, but in many instances, the screenshots were not actually from the website where consumers made the disputed purchases. In November 2023, the defendants agreed to a [stipulated order](#) that would prevent them from working with certain high-risk clients and using deceptive tactics to stop consumers trying to dispute credit card charges through the chargeback process. The order also requires the defendants to pay \$100,000 in civil penalties and \$50,000 in legal costs to the State of Florida.

### Florida Money Transmission Declaratory Statement

In a recent [Declaratory Statement](#), the Florida Office of Financial Regulation (OFR) held that an introducing broker registered with the CFTC is required to be licensed as a money transmitter in Florida and is not exempt. The petitioner was seeking to launch its introducing brokerage services in Florida, but sought a confirmation from the OFR that it did not need to be licensed as a Florida money transmitter. Generally, the petitioner argued that since it is exempt from federal money services business registration, particularly because it is "a person registered with, and functionally regulated or examined by, . . . the CFTC. . .," and any money transmission conducted is integral to its foreign exchange service, it should be exempt from Florida money transmission licensure. The petitioner urged Florida to interpret its money transmission laws consistently with federal money services business laws, but the OFR generally held that being exempt from money services business registration under federal law does not automatically exempt a person from Florida money transmission licensure.

As a general rule of thumb, while the applicability of federal and state money transmission laws is generally similar, the scope of exemptions between federal and state law differs, and federal law should not exclusively be relied upon when determining whether a person is required to be licensed as a money transmitter at the state level.

## Select Publications

### **TechCrunch Article**

[The SEC's Broadening of Investment Adviser Obligations Comes with Hidden Costs](#)

October 24, 2023

### **Wilson Sonsini Alert**

[New Year, New Laws, New Obligations: The Corporate Transparency Act's Beneficial Ownership Information Reporting Requirements](#)

January 3, 2024

### **Wilson Sonsini Alert**

[CFTC Proposes Guidance Regarding the Listing of Voluntary Carbon Credit Derivatives, and Requests Comment from the Public](#)

December 19, 2023

### **Wilson Sonsini Alert**

[Incoming: California's Digital Financial Assets Law Dropping July 1, 2025](#)

November 14, 2023

### **Wilson Sonsini Alert**

[CFPB Proposes New Examination Authority over "Larger Participants" in the Digital Wallet and Consumer Payment App Markets](#)

November 13, 2023

### **Wilson Sonsini Alert**

[FinCEN Releases Proposed Rule Designating CVC Mixing as a "Primary Money Laundering Concern"](#)

November 7, 2023

### **Wilson Sonsini Alert**

[AI in the Biden Administration's Crosshairs—Summarizing the Sweeping New Executive Order and Ten Top Takeaways](#)

November 2, 2023

### **Wilson Sonsini Alert**

[The Fed Proposes a Sea Change in Debit Card Interchange Fee Regulation](#)

October 30, 2023

### **Wilson Sonsini Alert**

[Navigating the Current State of Financial Services for Marijuana Businesses and Preparing for Future Changes in Cannabis Banking](#)

October 18, 2023

## Recent Fintech Practice Highlights

### **Chambers and Partners Recognizes Wilson Sonsini Among Leaders of its 2024 Chambers Fintech Guide**

Wilson Sonsini's [fintech and financial services](#) practice, which was ranked in the nationwide "FinTech Legal" category, was noted for its strong regulatory practice and ability to advise early-stage fintech companies on a wide range of transactional and financing issues. Sources find the Wilson Sonsini fintech team to be "entrepreneurial and responsive," "very practical," and an "amazing value."

### **Wilson Sonsini Partner Jess Cheng Elected as a Member of The American Law Institute**

On December 19, 2023, Wilson Sonsini partner Jess Cheng was elected to serve as a new member of The American Law Institute (ALI), the leading independent organization in the United States producing scholarly work to clarify,

modernize, and improve the law. Jess and other new ALI members will bring their expertise to the Institute's work of clarifying the law through Restatements, Principles, and Model Codes.

### **Wilson Sonsini Webinar – AI-volution in Financial Services: Navigating the Legal and Regulatory Complexities**

On November 2, 2023, fintech and financial services partners Amy Caiazza and Jess Cheng were joined by Ivy Gupta, Payments Product Counsel at Plaid, Don Riddick, Chief Legal Officer at Featurespace, and Seth Rosenbloom, General Counsel at Betterment, for a [panel](#) on the emergence of AI in financial services. The panelists discussed how AI is impacting the financial services landscape and the key legal considerations at this fast-changing intersection of technology and regulation.

### **Wilson Sonsini Partner Amy Caiazza Joins the Cato Institute for a Discussion on Financial AI and the Regulatory Future**

Fintech and financial services partner and practice group leader Amy Caiazza joined the Cato Institute for a [panel](#) on financial AI and the regulatory future. The discussion explored the regulatory treatment of AI and the policy implications of financial AI developments.

### **Wilson Sonsini Partners Amy Caiazza and Maneesha Mithal Speak with CIO Dive on AI-Washing**

Wilson Sonsini partners Amy Caiazza and Maneesha Mithal recently spoke with *CIO Dive* to provide their [insights](#) regarding "AI-Washing," which describes marketing efforts in which vendors make false or misleading claims about a solution's AI capabilities.



The following attorneys have editorial oversight of Wilson Sonsini's *Focus on Fintech*. They would like to take this opportunity to thank Eric Quang, Rebecca Weitzel Garcia, and Boniface Echols, who contributed to this edition.



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