Loyola of Los Angeles Law Review

Volume 56 | Number 1 Article 10

Spring 2-24-2023

Fostering Responsible Innovation in Fintech

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FOSTERING RESPONSIBLE INNOVATION IN FINTECH

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The California Consumer Financial Protection Law (CCFPL) was passed in 2020. This piece of legislation rebranded the state's financial services regulator as the "Department of Financial Protection and Innovation" (DFPI) and authorized the creation of an "Office of Financial Technology Innovation" (OFTI) within the DFPI. The CCFPL grants the DFPI expanded supervision over "fintech" providers—firms that leverage software-based technologies to deliver financial services to consumers via nontraditional conduits. Recognizing that fintech presents both potential benefits and risks for consumers, the California legislature took measures to ensure that the new regulatory scheme does not stifle innovation. Using the DFPI as a lens, this Note examines and analyzes the balancing act regulators engage in to promote innovation in fintech, all while avoiding regulatory capture and still providing consumer protection. The Note goes on to describe and evaluate the DFPI's "innovation hub" approach to achieve its stated goal of fostering responsible innovation. Finally, the Note offers a working definition of "responsible innovation" and provides a series of recommendations to help guide the DFPI's—and other financial regulators'—efforts in this area.

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I. INTRODUCTION

On January 1, 2021, the California Consumer Financial Protection Law[1] (CCFPL) came into effect.[2] This law rebranded the state's existing financial regulator—the Department of Business Oversight (DBO)—as the Department of Financial Protection and Innovation (DFPI).[3] While the law was drafted in response to a perceived diminution of federal consumer protection in financial services during the Trump administration, it also contained an implicit recognition that continued technological innovation in finance might improve social welfare.[4] Given the importance of tech startups to the California economy, it should come as little surprise that the legislature would pay homage to innovation in its bill.[5] Although any regulator's promotion of innovation can generate some types of value for consumers, that objective can be at odds with other goals when consumer protection calls for more stringent rulemaking and broadened regulatory supervision. This Note explores California's recent attempt to balance these competing values with the CCPFL and the concomitant changes that law made to the DFPI.

Part II begins by surveying the history of the "fintech" moniker and some of its typical referents in contemporary culture. It continues by providing the historical and political context behind U.S. financial regulation and the CCFPL, before describing the law's provisions that specifically bear on fintech. Next, this part provides background on the evolving use of the word "innovation" and its connotations in policy development. Finally, it posits a working definition for the phrase "responsible innovation." Part III examines the inherently conflicting mandates that many financial regulators face. It then discusses the inherent risk of regulatory capture that arises when regulators of all varieties promote the industry they are tasked with regulating. It goes on to discuss some of the major threats that fintech products and services present to consumers, with reflections on how the DFPI currently addresses or may come to address such risks. It concludes by comparing and contrasting the DFPI's approach to fostering innovation with other jurisdictions' approaches, including the use of "sandboxes" and

1. Assemb. B. 1864, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

2. *Department of Financial Protection and Innovation History*, DFPI (Mar. 11, 2022, 12:08 PM), https://dfpi.ca.gov/history [https://perma.cc/4TZT-5FX4].

3. *Id.*

4. *See* discussion *infra* Section II.D.

5. *See* discussion *infra* Section II.C.

"innovation hubs." Part IV takes the working definition of "responsible innovation" proposed in Section II.D and uses it to develop a set of concrete recommendations that the DFPI and its innovation hub can use to best fulfill its overall mandate of "fostering responsible innovation."

II. BACKGROUND

A. *"Fintech"*

Merriam-Webster added "fintech" to the online edition of its dictionary in 2018.[6] It defines "fintech" as "products and companies that employ *newly* developed digital and online technologies in the banking and financial services industries," while tracing the portmanteau's first known use with this meaning back to early 1970s.[7] Although neither the word "fintech" nor the use of technology in finance is anything new,[8] popular interest in fintech has grown exponentially from the mid-2010s to today.[9] Perhaps reflecting a connection between this growing popular interest and recent innovation in financial technology, many definitions of "fintech" (like *Merriam-Webster*'s) include some reference to novelty.[10] Accordingly, a particular firm or product

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6. *Fintech Enters the Dictionary*, FINEXTRA (Sept. 7, 2018), https://www.finextra.com/newsarticle/32624/fintech-enters-the-dictionary [https://perma.cc/L4J6-CM9J].

7. *Definition of Fintech*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fintech [https://perma.cc6WEE-6YQN] (emphasis added). The coiner of "fintech" has been identified as banking executive Abraham Leon Bettinger, who used the term in 1972 to refer to the combination of "bank expertise with modern management science techniques and the computer." *See* Patrick Schueffel, *Taming the Beast: A Scientific Definition of Fintech*, 4 J. INNOVATION MGMT. 32, 36 (2016) (discussing early documented uses of the term, including Bettinger's 1972 publication and a Citigroup project from the early 1990s).

8. *See* Aaron C. F. Salerno, Note, *Regulating the Fintech Revolution: How Regulators Can Adapt to Twenty-First Century Financial Technology*, 75 N.Y.U. ANN. SURV. AM. L. 365, 367–69 (2019) (discussing precursors to twenty-first century financial technology, including the abacus, telegraph, real-time electronic stock delivery, automated teller machines, etc.).

9. *See id.* at 367 n.5; Frans Wiwanto, *Three Factors Driving the Rise of Fintech and What the Banking Industry Can Learn From Them*, FORBES (Apr. 2, 2020), https://www.forbes.com/sites/forbesfinancecouncil/2020/04/02/three-factors-driving-the-rise-of-fintech-and-what-the-banking-industry-can-learn-from-them [https://perma.cc/7SAA-F97S].

10. *See* Schueffel, *supra* note 7, at 45 (defining fintech as "a new financial industry that applies technology to improve financial activities"); Heather S. Knewtson & Zachary A. Rosenbaum, *Toward Understanding FinTech and Its Industry*, 46 MANAGERIAL FIN. 1043, 1044 (2020) (defining fintech as "technology used to provide financial markets a financial product or financial service, characterized by sophisticated technology relative to existing technology in that market"); Ramona Rupeika-Apoga & Eleftherios I. Thalassinos, *Ideas for a Regulatory Definition of FinTech*, 8 INT'L J. ECON. & BUS. ADMIN. 136, 151 (2020) (asserting that a general definition of fintech is based on two conditions, namely, "the application of new/innovative technologies to financial services" and "the development of new business models . . . or products based on new/innovative technologies").

considered a fintech today might not be so considered in the future.[11] "Fintech" is a mercurial term in two key respects, because (1) it may refer to either an individual technology or a company that somehow utilizes that technology, and (2) its meaning is tied to newness. What qualifies as fintech today, then? For some observers, the classification might be as intuitive to make as Justice Stewart's famous test for obscenity.[12] However, since the fintech umbrella is so wide, it will be useful to lay out a few categories pertinent to the consumer protection focus of this Note.

In 2016, the Federal Reserve System's *Consumer Compliance Outlook* identified four major fintech categories "most likely to impact current banking practices": (1) alternative lending; (2) digital payments; (3) savings, investments, and personal finance management tools; and (4) distributed ledger technology (also known as blockchain).[13] Although these categories are of a six year vintage, practically ancient in the world of high tech, they remain helpful. While novelty has an appropriate place in any working definition of "fintech,"[14] a discussion of the foregoing categories demonstrates that most recent financial innovations build on trends or practices established many decades earlier.[15] One is left wondering, then, whether these technologies are game changing enough to necessitate new regulatory approaches. On the other hand, today's fintech can specifically be distinguished from the financial technology of the past in its "use of big data, automation/AI [(artificial intelligence)], and the pervasiveness of nontraditional firms as key actors."[16] These features require financial regulators to adapt in order to effectively mitigate the new kinds of risks these technologies and practices pose.[17]

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11. *See* Knewtson & Rosenbaum, *supra* note 10, at 1058.

12. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").

13. *See* Tim Marder, *Fintech for the Consumer Market: An Overview*, CONSUMER COMPLIANCE OUTLOOK, no. 3, 2016, at 4, 16 https://www.consumercomplianceoutlook.org/assets/2016/third-issue/ccoi32016.pdf [https://perma.cc/AY4D-AMR4].

14. *See supra* note 10 and accompanying text.

15. *See* discussion *infra* Section II.B.

16. Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 264 (2019); *see infra* Section II.B. Although distinct concepts, big data and AI can be seen as two sides of the same coin. This is because massive datasets are needed to train effective AI and AI is needed to make massive datasets intelligible and useful to humans. *See, e.g.*, Kathleen Walch, *How Do Big Data and AI Work Together?*, TECHTARGET (June 29, 2021), https://www.techtarget.com/searchenterpriseai/tip/How-do-big-data-and-AI-work-together [https://perma.cc/AV6P-PNEL].

17. *See* William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1226 (2018).

B. Fintech (Today)

Alternative lending, also known as fintech or "platform" lending, makes significant departures from ordinary bank lending, while still following many traditional conventions.[18] At the most superficial level, alternative lenders operate solely online, unlike banks with brick-and-mortar branches.[19] Also unlike banks (and despite appearances to the contrary), alternative lenders are not the ones lending the money: instead, they act as direct matchmakers between borrowers and sources of capital.[20] Traditional banks act similarly in an intermediary fashion, but they directly take on risk by lending deposited funds.[21]Alternative lenders do not maintain capital reserves and therefore do not assume any risk.[22] Like banks, alternative lenders engage in underwriting to determine borrowers' creditworthiness, but alternative lenders are distinguished by their leverage of big data and machine learning to make these determinations.[23]

The next category, digital payments, requires some delineation to distinguish the "fintech" from mere "financial technology." Credit cards began interfacing with computers using magnetic strips as early as the 1980s,[24] and some claim that the first online payment was made in 1994.[25] Much more recent—and more technologically sophisticated—trends include the transition from physical credit or debit cards to digital wallets,[26] and the rise of mobile peer-to-peer payment

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18. *See* Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 787 (2018).

19. *See id.*

20. *See id.* A deep discussion of the varieties of alternative lending business models is beyond the scope of this piece, but Professor Odinet's article contains a quite detailed and cogent one. *See id.* at 788–95.

21. *Id*. at 787.

22. *Id.*

23. *See id.* at 787–88.

24. *See* Jason Steele, *The History of Credit Cards*, EXPERIAN (Mar. 15, 2018), https://www.experian.com/blogs/ask-experian/the-history-of-credit-cards/ [https://perma.cc/LEK6-6WS3].

25. *See* John Rampton, *The Evolution of the Mobile Payment*, TECHCRUNCH (June 17, 2016, 7:00 AM), https://techcrunch.com/2016/06/17/the-evolution-of-the-mobile-payment/ [https://perma.cc/Q2YQ-7CYR]. That first online purchase allegedly was for a pepperoni and mushroom pizza. *Id.* Coincidentally, the first commercial Bitcoin transaction was also for pizza. *See Bitcoin Pizza Day 2021: Some Interesting Facts About This Special Cryptocurrency Day*, MONEYCONTROL (May 22, 2021, 12:50 PM) [hereinafter *Bitcoin Pizza Day*], https://www.moneycontrol.com/news/business/cryptocurrency/bitcoin-pizza-day-2021-some-interesting-facts-about-this-special-cryptocurrency-day-6924731.html [https://perma.cc/LRJ7-V8Y7].

26. *See* Jami Farkas, *Will Digital Wallets and Payments Replace Credit Cards?*, YAHOO! FIN. (Oct. 8, 2021), https://finance.yahoo.com/news/digital-wallets-payments-replace-credit-181109296.html [https://perma.cc/JLZ2-HLPU].

platforms.[27] Discourse about digital payments typically revolves around the rapid acceleration of transaction times[28] and the potential transition to a "cashless society."[29] Within this category includes products like earned wage access, which allow employees to draw from their paychecks as soon as the wages are earned.[30] For better or worse, commentators have identified a link between the COVID-19 pandemic and the increased adoption of digital payments technology.[31] Digital payment technologies are increasingly provided by nontraditional firms (i.e., not banks or credit unions)[32] and leverage AI trained by consumer data and automation to, ideally, improve transaction speed and support fraud detection.[33]

According to the Federal Reserve's 2016 report, the fintech realm of "savings, investments, and personal financial management [(PFM)]" focuses mainly on "automated investment advisory services (commonly known as 'robo-advisors')" and "financial management tools that collect and analyze consumer habits to simply saving, investing, and planning."[34] While both robo-advisors and PFM tools

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27. *See* Clark Newlove, *The Rise of Peer-to-Peer (P2P) Payments on Mobile—What Makes It Such a Crucial Feature?*, N26 U.S. MAG. (Aug. 10, 2018), https://medium.com/n26-us/the-rise-of-peer-to-peer-p2p-payments-on-mobile-what-makes-it-such-a-crucial-feature-921355ba4ad8 [https://perma.cc/B3HF-WME8]. Major players here include PayPal, Venmo, Zelle, Cash App, among others. *Id.*

28. *See, e.g.*, DELOITTE, REAL TIME PAYMENTS ARE CHANGING THE REALITY OF PAYMENTS 6 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/strategy/us-cons-real-time-payments.pdf [https://perma.cc/69C7-DB86].

29. *See, e.g.*, Matt High, *Will We See a Cashless Society by 2023?*, FINTECH (May 16, 2020), https://fintechmagazine.com/venture-capital/will-we-see-cashless-society-2023 [https://perma.cc/VY6R-46K9]; *see also* Justin Pritchard, *The Pros and Cons of a Cashless Society*, THE BALANCE (Apr. 19, 2022), https://www.thebalance.com/pros-and-cons-of-moving-to-a-cashless-society-4160702 [https://perma.cc/HV8S-ZTDZ] (comparing the benefits and disadvantages of transitioning to a truly cashless society).

30. *Earned Wage Access*, AM. PAYROLL ASS'N, https://www.americanpayroll.org/compliance/compliance-overview/hot-topics/earned-wage-access [https://perma.cc/R6KW-2NDQ].

31. YING LEI TOH & THAO TRAN, FED. RSRV. BANK OF KAN. CITY, HOW THE COVID-19 PANDEMIC MAY RESHAPE THE DIGITAL PAYMENTS LANDSCAPE 1 (2020), https://www.kansascityfed.org/documents/7581/psrb20tohtran0624.pdf [https://perma.cc/E65L-UHWW]; RAPHAEL AUER ET AL., SUERF, INCLUSIVE PAYMENTS FOR THE POST-PANDEMIC WORLD 1 (2020), https://www.suerf.org/policynotes/16645/inclusive-payments-for-the-post-pandemic-world [https://perma.cc/B32P-3U26].

32. Alex Rolfe, *74% of Consumer Payments to Be Handled by Non-Traditional Financial Service Providers*, PAYMENTS CARDS & MOBILE (Jan. 31, 2022), https://www.paymentscardsandmobile.com/74-of-payments-to-be-handled-by-non-traditional-financial-providers/ [https://perma.cc/2X78-W2R2].

33. *See AI Payments Revolution*, BARCLAYS (Apr. 26, 2019), https://www.barclayscorporate.com/insights/innovation/ai-payments-revolution [https://perma.cc/QU88-GDUB].

34. *See* Marder, *supra* note 13, at 15.

have remained popular in recent years,[35] the sixth largest fintech U.S. company by valuation in 2021 was basically an app for securities trading.[36] As with the other categories, much of the technological novelty in this category comes through the application of big data and machine learning.[37]

Finally, distributed ledger technology (DLT) refers to forms of bookkeeping or data tracking that do away with the need for a centralized database. The "distributed ledger" exists across separate locations and participants simultaneously.[38] One variety of DLT is blockchain, a type of distributed ledger that uses methods from cryptography to protect against manipulation of the records.[39] Blockchain is the technology that underlies most cryptocurrencies, including Bitcoin.[40] Although Bitcoin wasn't invented until 2008, the blockchain concept has its origins in a 1991 paper that proposed cryptographic methods for authenticating digital documents.[41] In a use case more conceptually similar to the blockchain's theoretical origins, this technology also underlies so-called "smart contracts."[42] "Smart contracts" are basically "self-executing" digital contracts that purport to be more inherently enforceable and transparent than traditional "paper" contracts.[43]

35. *See* Taylor Tepper, *5 Best Robo-Advisors of August 2022*, FORBES ADVISOR (Aug. 1, 2022), https://www.forbes.com/advisor/investing/best-robo-advisors/ [https://perma.cc/R3QF-VMQG]; Margot Page, *Best Personal Finance Software for 2021*, TOM'S GUIDE (Feb. 9, 2021), https://www.tomsguide.com/best-picks/best-personal-finance-software [https://perma.cc/N269-4QBH].

36. *See* Eliza Haverstock, *The 11 Biggest Fintech Companies in America 2021*, FORBES (June 8, 2021), https://www.forbes.com/sites/elizahaverstock/2021/06/08/the-11-biggest-fintech-companies-in-america-2021 [https://perma.cc/292L-DSLY]. The app is called "Robinhood." *Id.*

37. *See* Anna Oleksyuk, *5 Uses of Machine Learning in Finance and FinTech*, MEDIUM (Jan. 25, 2019), https://medium.com/@annoleksyuk/5-uses-of-machine-learning-in-finance-and-fintech-9cf4a7530695 [https://perma.cc/G3SD-3MQV].

38. *See* Andrew Meola, *Distributed Ledger Technology & the Blockchain Explained*, INSIDER (Jan. 16, 2020), https://www.businessinsider.com/distributed-ledger-technology-blockchain [https://perma.cc/LGD3-HA8C].

39. *See What Is the Difference Between DLT and Blockchain?*, BBVA (May 3, 2018), https://www.bbva.com/en/difference-dlt-blockchain/ [https://perma.cc/G5VN-NYXB].

40. *See* Kendall Little, *What Is Blockchain and How Does It Work?*, NEXTADVISOR (May 3, 2022), https://time.com/nextadvisor/investing/cryptocurrency/what-is-blockchain/ [https://perma.cc/D8N2-W5TX].

41. *See* Daniel Oberhaus, *The World's Oldest Blockchain Has Been Hiding in the New York Times Since 1995*, VICE (Aug. 27, 2018), https://www.vice.com/en/article/j5nzx4/what-was-the-first-blockchain [https://perma.cc/5KGW-FY7S].

42. *See* Dmytro Spilka, *Can the Future of Fintech Really Be Found in Blockchain-based Smart Contracts?*, IBM (May 25, 2021), https://www.ibm.com/blogs/blockchain/2021/05/can-the-future-of-fintech-really-be-found-in-blockchain-based-smart-contracts/ [https://perma.cc/YV8Z-M6KM].

43. *See id.*

Although distributed ledgers inherently involves large quantities of data, the blockchain does not require AI to function as designed.[44] However, the technology industry is well on its way to pairing blockchain with AI for a wide range of functionalities.[45]

Aside from the proliferation of big data and AI technologies, a number of factors have combined since 2008's global financial crisis to both (1) create a lucrative global market for nontraditional (i.e., nonbank) fintech firms and (2) catch the eye of academics and regulators alike.[46] The use of consumer data and AI in business generally has also warranted increased scrutiny from regulators over the past decade—and will likely continue to be a focal point in regulatory developments across industries.[47] To understand how the various categories of fintech are and might be specifically regulated in the United States, we must turn to our domestic financial regulation system.

C. Consumer Protection Regulation in Finance—and Fintech

To begin, a truism: the financial regulation system in the U.S. is complicated.[48] The Congressional Research Service identifies consumer protection as one of six interrelated goals served by this complex system.[49] While the federal government plays a substantial role in regulating most financial markets, state regulators compose an important part of the system as well.[50] Each individual agency's regulatory scope and authority is often defined by the type of entities

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44. *See* Philipp Sandner et al., *Convergence of Blockchain, IoT, and AI*, FRONTIERS (Sept. 11, 2020), https://www.frontiersin.org/articles/10.3389/fbloc.2020.522600/full [https://perma.cc/U8TK-FJF8] ("[B]lockchain . . . and AI are typically used separately.").

45. *Blockchain and Artificial Intelligence (AI)*, IBM, https://www.ibm.com/topics/blockchain-ai [https://perma.cc/4G58-89GM].

46. *See* Salerno, *supra* note 8, at 368. Salerno identifies three specific factors behind fintech's growth, namely, "(1) changes in the public perception of the financial industry, (2) new labor market shifts to technology firms, and (3) reduced barriers of entry into the [fintech] market." *Id.* at 370.

47. *See* François Candelon et al., *AI Regulation Is Coming*, HARV. BUS. REV. (Sept. 1, 2021), https://hbr.org/2021/09/ai-regulation-is-coming [https://perma.cc/2GW3-DG5C].

48. *See Modernizing the U.S. Financial Regulatory System*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/highrisk/modernizing-u.s.-financial-regulatory-system [https://perma.cc/UN94-A54B] ("The U.S. financial regulatory structure remains complex, with responsibilities fragmented among a number of regulators that have overlapping authorities."). *See generally* MARC LABONTE, CONG. RSCH. SERV., RL44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020), https://sgp.fas.org/crs/misc/R44918.pdf [https://perma.cc/7ZC6-W3UW] (summarizing and describing the interlocking U.S. financial regulatory framework).

49. *See* LABONTE, *supra* note 48, at 4–5.

50. *See id.* at 24–25.

regulated.[51] Some regulators, for example, only have authority over entities that have obtained certain types of business charters (e.g., nationally or state-chartered banks).[52] Others, however, such as the federal Consumer Financial Protection Bureau (CFPB), are able to "regulate a particular type or set of transactions, regardless of where the business occurs or which entities are engaged in it."[53] Thus, agencies of the latter type are poised—at least in theory—to enforce consumer protection regulations against fintech companies operating without a charter, or nontraditional firms in general.[54]

The Dodd-Frank Wall Street Reform and Consumer Protection Act[55] ("Dodd-Frank") created the CFPB.[56] The act was passed in response to the 2008 financial crisis.[57] The CFPB portion of Dodd-Frank was created in response to certain types of financial innovation.[58] As Penn Law Professor David Skeel put it, the 2008 "crisis . . . was exacerbated by financial instruments and new forms of financing that were not dreamed of in [the Great Depression] era."[59] These innovations, including adjustable rate mortgages, novel mortgage securitization, and credit default swaps, were more financial than technological in nature.[60] In President Obama's speech at Dodd-Frank's signing, he said that the act would "help foster innovation, not hamper it."[61] In

51. *See id.* at 6–7.

52. *Id.* at 6.

53. *Id.* at 7.

54. *See* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1771 (2021).

55. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

56. *Building the CFPB*, CFPB (July 18, 2011), https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/ [https://perma.cc/NC2V-4A87].

57. Keith Goodwin, *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, FED. RSRV. HIST. (July 21, 2010), https://www.federalreservehistory.org/essays/dodd-frank-act [https://perma.cc/VZ77-BYA3].

58. *Id.*

59. DAVID SKEEL, THE NEW FINANCIAL DEAL 1 (2011).

60. MARTIN NEIL BAILY ET AL., THE ORIGINS OF THE FINANCIAL CRISIS 7–8 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf [https://perma.cc/GA3R-C3LQ**]**.

61. *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act*, WHITE HOUSE (July 21, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act [https://perma.cc/LD3Y-M9UF] ("The fact is, the financial industry is central to our nation's ability to grow, to prosper, to compete and to innovate. There are a lot of banks that understand and fulfill this vital role, and there are a whole lot of bankers who want to do right—and do right—by their customers. This reform will help foster innovation, not hamper it. It is designed to make sure that everybody follows the same set of rules, so that firms compete on price and quality, not on tricks and not on traps.").

context, it appears that Obama was referring to innovation at a more general level—the idea being that businesses and individuals need a well-functioning financial system in order to raise and manage the capital necessary to innovate across industries.[62] However, the President's reference to competition on "tricks" in close proximity to the word "innovation" might have been an allusion to the particular novelties that emerged in the years preceding the 2008 crisis.[63] If so, the President surely meant that Dodd-Frank would foster only "good" kinds of financial innovation. Either way, Obama's remarks reveal an additional tension in the financial regulator's balancing act: the recognition that if regulations unduly burden the financial system, there will be repercussions reaching much further than stakeholders within the finance industry itself.

Dodd-Frank also authorized the states to both enforce federal consumer protection regulations and adopt their own legislation providing further consumer protection.[64] This may have been added to the bill because preemption by federal banking authorities and general underregulation helped precipitate the 2008 crisis.[65] For its part, California already had a history of state-level finance regulators dating back over a century.[66] Before the CCFPL was passed, the relevant California regulator was the DBO.[67] During that pre-CCFPL time, the DBO had explicit authority to enforce state laws as they pertained to a litany of particular types of financial entities.[68]

The CCFPL was first proposed in Governor Gavin Newsom's budget for the 2020–2021 fiscal year.[69] Citing "[t]he federal government's rollback of the CFPB" that left "Californians vulnerable to predatory businesses and . . . companies without the clarity they need to innovate," the increased budget and legislation were proposed to

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62. *See id.*

63. *See id.*

64. Arthur E. Wilmarth Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 896, 954 (2011).

65. *See id.* at 897–98, 950.

66. *See Department of Financial Protection and Innovation History*, *supra* note 2. The first California finance regulator was a three-person "Board of Bank Commissioners" formed in 1878. *Id.* In 1913, an additional regulator with broader authority called the State Corporation Department was formed. *See id*. Successors to each of these regulators eventually merged to become the Department of Business Oversight in 2013. *See id.*

67. *Id.*

68. *See* CAL. FIN. CODE § 300 (2022). Included among the types of covered entities were "finance lenders and brokers" and "capital access companies." *Id.*

69. GAVIN NEWSOM, GOVERNOR'S BUDGET SUMMARY 13 (2020), http://www.ebudget.ca.gov/2020-21/pdf/BudgetSummary/FullBudgetSummary.pdf [https://perma.cc/5SUQ-M537].

expand the DBO's authority in order to "protect consumers and foster the responsible development of new financial products" and supervise "unlicensed financial services providers [including] . . . financial technology (fintech) companies, among others."[70] The CCFPL was eventually passed on August 31, 2020 and went into effect on January 1, 2021.[71]

A review of recent developments in U.S. financial regulation helps contextualize Governor Newsom's proposal and the resultant California legislation. During Donald Trump's presidential campaign, he said repeatedly that he would scale back or repeal Dodd-Frank.[72] In early 2017, Trump issued Executive Order 13772, which set out seven "Core Principles" for financial regulation under Trump's administration and ordered federal financial regulators to submit reports evaluating whether the present regulatory scheme promoted those principles.[73] In response to Executive Order 13772, the U.S. Department of the Treasury issued a series of reports, including one that specifically addressed "[n]onbank financial institutions, financial technology, and financial innovation."[74]

The Treasury Department's report advocated an "agile approach to regulation" that would "promote innovation" and expressed a commitment to "work[] with federal and state financial regulators to establish . . . in essence, a regulatory sandbox."[75] In tune with that commitment, the CFPB formally proposed a "disclosure sandbox" system for fintech companies and other purveyors of consumer financial

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70. *Id.* at 173–74.

71. *AB-1864 Financial Institutions: History*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB1864 [https://perma.cc/G97B-T4E7]; *California DFPI Shares Progress on Implementing Consumer Financial Protection Law*, ACA INT'L (Mar. 29, 2022, 11:15 AM), https://www.acainternational.org/news/california-dfpi-shares-progress-on-implementing-consumer-financial-protection-law/ [https://perma.cc/7YFW-HEBC].

72. Donna Borak & Henry Williams, *Clinton vs. Trump: Where They Stand on Wall Street*, WALL ST. J. (Oct. 25, 2016), http://graphics.wsj.com/elections/2016/where-do-clinton-and-trump-stand-on-wall-street/ [https://perma.cc/Q3CA-D72D].

73. *See* Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 3, 2017). Among those "Core Principles" was an exhortation to "make regulation efficient, effective, and appropriately tailored." *Id.*

74. STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES 4 (2018), https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf [https://perma.cc/293N-6L5G].

75. *Id.* at 13–14. Regulatory sandboxes, arguably a form of "light touch" regulation, are discussed in more detail later in this Note. *See infra* Section III.C.1.

products in September of 2018.[76] Regulatory sandboxes are arguably a form of "light touch" regulation and have their detractors and supporters.[77] Undergirding these developments was the perception that Trump's administration was gung ho on hamstringing the CFPB's regulatory power, a view supported by the fact that Trump initially appointed Mick Mulvaney, a congressman who once referred to the CFPB as a "sick sad joke," as its acting director.[78] While a discussion of whether the portents of this appointment came to pass is beyond the scope of this Note, the CCFPL was likely intended to insulate the state from political vagaries at the federal level.[79] At the time of writing, only California and New York have standalone financial consumer protection regulators, although three other states have similar entities housed in their attorney generals' offices.[80]

The CCFPL changed the DBO's name to the Department of Financial Protection and Innovation (DFPI)—but the changes to the regulator were more than cosmetic.[81] While the current Financial Code

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76. *CFPB Office of Innovation Proposes "Disclosure Sandbox" for Companies to Test New Ways to Inform Consumers*, CFPB (Feb. 7, 2019), https://www.consumerfinance.gov/about-us/blog/cfpb-office-innovation-proposes-disclosure-sandbox-companies-test-new-ways-inform-consumers/ [https://perma.cc/KCX7-45X4].

77. *See infra* Section III.C.1.

78. *See* Chris Arnold, *Trump Administration Plans to Defang Consumer Protection Watchdog*, NPR (Feb. 12, 2018, 5:11 AM), https://www.npr.org/2018/02/12/584980698/trump-administration-to-defang-consumer-protection-watchdog/ [https://perma.cc/Q2MY-NJST]; Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/9292-RN2X]. In June 2018, the White House announced the nomination of former Office of Management and Budget official Kathy Kraninger to the CFPB directorship, who was "seen as a politically safe choice who would continue to ease the CFPB's policing of the financial services industry." Sylvan Lane, *Trump to Nominate Budget Official as Next Consumer Bureau Chief*, THE HILL (June 16, 2018, 5:25 PM), https://thehill.com/policy/finance/392640-trump-to-nominate-budget-official-as-next-consumer-bureau-chief/ [https://perma.cc/32LE-ZY2F]. Despite this aura of deregulation, some commentators looking back at the CFPB's enforcement actions during Trump's tenure found that the bureau pursued its consumer protection agenda quite vigorously. *See* J.H. Jennifer Lee, *Trump-Era CFPB Retrospective: Debunking the Myths and Looking Ahead to Biden*, ARENTFOX SCHIFF (Jan. 29, 2021), https://www.arentfox.com/perspectives/cfs-counsel/trump-era-cfpb-retrospective-debunking-the-myths-and-looking-ahead-biden [https://perma.cc/XQ9U-29ED]. On the other hand, in a speech delivered in 2019 to the California Assembly Committee on Banking and Finance, the Obama-era director of the CFPB described the federal government as "abdicating its role" as a protector of consumers in the financial services market. Richard Cordray, *Consumer Financial Protection Budget Proposal in California*, 72 ME. L. REV. 235, 240 (2020).

79. *See* Kate Berry, *Can California's Mini-CFPB Pick Up Slack Left by Federal Agency?*, AM. BANKER (Jan. 10, 2020, 3:27 PM), https://www.americanbanker.com/news/can-californias-mini-cfpb-pick-up-slack-left-by-federal-agency [https://perma.cc/QPU3-68MS].

80. *See* AM. FIN. SERVS. ASS'N, STATE MINI CFPBS (2020), https://afsaonline.org/wp-content/uploads/2020/10/Mini-CFPBs-Fact-Sheet.pdf [https://perma.cc/DZP3-UXGN].

81. Assemb. B. 1864, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

sections as amended give the DFPI oversight over the same long list of entities that were in the DBO's purview, that list now includes the more flexible term of "persons offering or providing consumer financial products or services in this state."[82] The CCFPL gives the DFPI fairly broad authority to determine what constitutes a "consumer financial product or service," and therefore a covered person,[83] which observers predicted might lead to enforcement against fintech companies engaging in unfair, deceptive, or abusive acts or practices ("UDAAP").[84] Since the DFPI can be characterized as a "mini-CFPB," these predictions made perfect sense: the CFPB has UDAAP rulemaking and enforcement authority.[85] And, as the *Consumer Compliance Outlook* put it, "fintech is not immune to the consumer protection risks that exist in brick-and-mortar financial services."[86] The commentators' predictions turned out correct: in May of 2021, for example, the DFPI forbade a fintech called Chime from advertising itself as a bank.[87] In July 2021, the CFPB, for its part, also exercised

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82. *See* CAL. FIN. CODE § 300 (2022). The CCFPL also added Property Assessed Clean Energy (PACE) program providers to the list. *See id.*; *PACE (Property Assessed Clean Energy): What Homeowners Need to Know*, DFPI (Mar. 25, 2022), https://dfpi.ca.gov/pace-program-administrators/pace/ [https://perma.cc/6PGM-L5SV].

83. *See* CAL. FIN. CODE § 90005(e)(1) (2022) (defining a "consumer financial product or service" as any "financial product or service . . . delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes"); *id.* § 90005(k)(12)(A)–(B) (including within the definition of a "financial product or service" any "financial product or service" defined by the DFPI through regulation if the DFPI finds that the product or service is provided with an intent to evade consumer financial laws or is of a kind "[p]ermissible for a bank or for a financial holding company to offer or provide" and "has, or likely will have, a material impact on consumers," with some exceptions). The Code also makes clear that a "covered person" means any person offering or providing a consumer financial product or service in California. *Id.* § 90005(f)(1). "Person," of course, is defined to include most classes of business entities, in addition to individuals. *See id.* § 90005(m) (2022).

84. *See* Rich Zukowsky, *Don't Say We Didn't Warn You–A Summary of California's Revamped Consumer Financial Protection Penalties*, DAVIS WRIGHT TREMAINE LLP (Jan. 15, 2021), https://www.dwt.com/blogs/financial-services-law-advisor/2021/01/ccfpl-violation-penalties [https://perma.cc/4U5A-XM7F]; Molly M. White, *The New California Consumer Financial Protection Law*, MCGUIREWOODS (Sept. 17, 2020), https://www.consumerfinsights.com/2020/09/the-new-california-consumer-financial-protection-law [https://perma.cc/5T9R-2JXA].

85. *See Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) Examination Procedures*, CFPB (Mar. 16, 2022), https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures [https://perma.cc/U9V3-S7BV].

86. CAROL A. EVANS ET AL., KEEPING FINTECH FAIR: THINKING ABOUT FAIR LENDING AND UDAP RISKS, CONSUMER COMPLIANCE OUTLOOK, No. 2, 2017, at 1, 8, https://www.consumercomplianceoutlook.org/assets/2017/second-issue/ccoi22017.pdf [https://perma.cc/PW5X-6HVF].

87. *See* Lydia Beyoud, *California Prohibits Fintech Chime from Calling Itself a Bank*, BLOOMBERG L. (May 5, 2021, 1:52 PM), https://news.bloomberglaw.com/banking-law/california-prohibits-fintech-chime-from-calling-itself-a-bank [https://perma.cc/8VQ4-XG57]. While Chime

its ability to circumscribe fintech companies by issuing a consent order to GreenSky LLC.[88] GreenSky provided software technology to retailers of various kinds to originate loans for the retailers' customers at points of sale—and between 2014 and 2019, GreenSky received at least 6,000 consumer complaints for unauthorized loans.[89] In general, the DFPI has actively enforced the CCFPL, collecting nearly $1 million in restitution for consumers and launching over one hundred investigations "under its expanded authority" in the CCFPL's first year of effectiveness.[90]

The broad definition of covered persons adds teeth to another one of the CCFPL's additions to the Financial Code. Section 90009(a)(1) permits the DFPI to create registration requirements for covered persons, including payment of registration fees.[91] In addition to supporting the logistics of oversight, the CCFPL's registration regime creates a funding mechanism for the DFPI that operates quite differently from the CFPB's funding system.[92] The CFPB is funded by earnings of the Federal Reserve System,[93] but the DFPI (which does not have access to a similarly extensive pool of funds) collects fees from individual registrants.[94] On November 17, 2021, the DFPI proposed its first registration requirements for "four industries that provide . . . financial products and services to California consumers."[95] The financial products and services targeted for registration were debt settlement services, student debt relief services, education financing, and wage-

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offers most of the services that you would expect to receive from a bank, it is technically a technology company that has partnered with banks. *See* Lisa Rowan, *Chime Review*, FORBES (July 22, 2022), https://www.forbes.com/advisor/banking/chime-review [https://perma.cc/M6EA-E6GD]; *supra* Section II.B.

88. *See* GreenSky, LLC, CFPB No. 2021-CFPB-0004 (2021), https://files.consumerfinance.gov/f/documents/cfpb_greensky-llc_consent-order_2021-07.pdf [https://perma.cc/36K5-GVQ9].

89. *See id.* at 8–9, 11.

90. *DFPI Marks Success in Implementation of the California Consumer Financial Protection Law*, DFPI (Mar. 23, 2022), https://dfpi.ca.gov/2022/03/23/dfpi-marks-success-in-implementation-of-the-california-consumer-financial-protection-law [https://perma.cc/HA35-NM3F].

91. CAL. FIN CODE § 90009(a)(1) (2022). Although the latter paragraph is worded permissively, section 90009.5 mandates the promulgation of registration rules within a specified timeframe. *Id.* § 90009.5(a).

92. *See* CHERYL R. COOPER & DAVID H. CARPENTER, CONG. RSCH. SERV., IF100031, INTRODUCTION TO FINANCIAL SERVICES: THE BUREAU OF CONSUMER FINANCIAL PROTECTION (CFPB) 1 (2022).

93. *Id.*

94. *Id.*

95. *See* Invitation by Dept. Fin. Protection and Innovation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21) (Nov. 17, 2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf [https://perma.cc/XPM3-A56A].

based advances.[96] While none of these categories were identified by name as a technology product in the DFPI's invitations for comments, each product or service has seen play in the fintech sphere.[97]

While the foregoing makes explicit that the CCFPL has and will increase consumer protection supervision over fintech activities in California,[98] the DFPI simultaneously includes "promoting innovation" as one of the goals in its mission statement.[99] This mission is supported by the text of the law itself. In its statement of findings and purpose, the CCFPL proclaims that "[t]echnological innovation offers great promise to the more effective and efficient provision of consumer financial products and services" while simultaneously "pos[ing] risks to consumers and challenges to law enforcement."[100] To that end, the law empowers the DFPI to promote "nondiscriminatory consumer-protective innovation."[101] The CCFPL affects this empowerment by requiring the DFPI to establish a "Financial Technology Innovation Office"[102] and permitting the DFPI's commissioner to "develop and implement initiatives to promote innovation, competition, and consumer access within financial services."[103] The DFPI accordingly created the OFTI, which is currently helmed by deputy commissioner Christina Tetreault and advised by senior counsel Adam Wright.[104]

96. *Id.*

97. *See id.*; LAUREN SAUNDERS, NAT'L CONSUMER L. CTR., FINTECH AND CONSUMER PROTECTION 6, 12, 16 (2019), https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf [https://perma.cc/XA7M-9ZWB]. Of these products or services, early wage access appears the most "innovative" in terms of novelty—although they share some similarities to the traditional payday loan concept. *See* Alexis Christensen, Note, *Early Wage Access Products: Twenty-First Century Innovations or Harbingers of Debt?*, 27 GEO. J. POVERTY L. & POL'Y 429, 430–31, 435–36 (2020).

98. Note as well that the DFPI's website now includes a complaint and consumer alert portal for cryptocurrency and other digital assets. *Crypto Assets*, DFPI (Aug. 26, 2022, 11:36 AM), https://dfpi.ca.gov/2021/10/22/crypto-assets/ [https://perma.cc/6PKD-HVRM].

99. *See* DFPI, STRATEGIC PLAN 2020–2023 (2021), https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/StrategicPlan_Overview.pdf [https://perma.cc/K9BJ-7378].

100. CAL. FIN. CODE § 90000(a)(3) (2022).

101. *Id.* § 90000(b)(4) (2022).

102. *Id.* § 90006(d)(1) (2022).

103. *Id.* § 90006(d)(4) (2022).

104. *See Office of Financial Technology Innovation*, DFPI (Aug. 25, 2022, 4:34 PM), https://dfpi.ca.gov/office-of-financial-technology-innovation [https://perma.cc/7VEZ-RATK]. Christina Tetreault is an attorney, former manager of financial policy for Consumer Reports, and member of the Federal Deposit Insurance Corporation's (FDIC) economic inclusion advisory committee. *See Member Biography: Christina Tetreault*, FDIC (June 22, 2022), https://www.fdic.gov/about/advisory-committees/economic-inclusion/bio-member/tetreault.html [https://perma.cc/HUV4-G5L4]. Adam Wright previously served as an enforcement attorney for the DFPI. Ballard CFS Grp., *Adam Wright Joins CA DFPI's Office of Financial Technology Innovation; Meetings Available During*

It should come as no surprise that California is concerned with protecting technological innovation and innovation-centric startups. The California Governor's Office of Business and Economic Development's website touts that the state is home to the most "tech business establishments" in the country.[105] Although some sources rate California poorly in terms of friendliness to entrepreneurs and small businesses, it was recently found to have the "nation's highest percentage of people starting businesses and the best one-year survival rate."[106] However, commentators have called for California to renew its commitment to innovation-led growth[107] and have expressed concerns that California risks losing its innovative edge as the cost of doing business in the state increases.[108]

So, how will and should the DFPI under the CCFPL balance these potentially opposing goals of consumer protection and spurring "innovation"? This is the main question this Note addresses.[109] Moreover, can it do so without being "captured" by the entities it regulates?[110] For its part, the DFPI has identified a number of actions in its 2020–2023 strategic plan to support its overall goals regarding innovation.[111] These actions focus primarily on developing staff expertise and awareness of emerging financial technologies through both research and "engagement with innovators, investors and other stakeholders."[112] Of course, one way to resolve the tension between protecting consumers and spurring innovation/job growth is to avoid framing innovation promotion as a distinct mandate altogether, and instead pledge to promote only the type of innovation that benefits consumers.

Weekly Office Hours, BALLARD SPAHR LLP (Sept. 20, 2021), https://www.consumerfinancemonitor.com/2021/09/20/adam-wright-joins-ca-dfpis-office-of-financial-technology-innovation-meetings-available-during-weekly-office-hours/ [https://perma.cc/FWW5-ZT54].

105. *High Tech*, CAL. GOVERNOR'S OFF. OF BUS. & ECON. DEV., https://business.ca.gov/industries/high-tech/ [https://perma.cc/B9RJ-MKRJ].

106. Leigh Buchanan, *California's Startup Economy: An Abundance of Attractions and Drawbacks*, INC. MAG. (Feb. 19, 2020), https://www.inc.com/rebecca-deczynski/ui-global-brands-urban-hydration-psyche-vontoba-terry.html [https://perma.cc/A6FL-NVUW].

107. Guest Commentary, *Renew California's Commitment to Its Innovation Economy*, CALMATTERS (Dec. 14, 2021), https://calmatters.org/commentary/2021/11/renew-californias-commitment-to-its-innovation-economy/ [https://perma.cc/ZYB3-7T79].

108. Joel Kotkin & Marshall Toplansky, *Why California Risks Losing Its Edge in Innovation*, NORTH BAY BUS. J. (Jan. 14, 2022), https://www.northbaybusinessjournal.com/article/opinion/why-california-risks-losing-its-edge-in-innovation [https://perma.cc/Z82T-A859].

109. *See infra* Part III.

110. *See infra* Section III.A.

111. *See* DFPI, *supra* note 99, at 2.

112. *See id.*; DFPI, *supra* note 104.

This is precisely what both the CCFPL and the DFPI have done. While the CCFPL permits the DFPI's commissioner to generally promote innovation,[113] it makes clear that the goal of the law is to promote only "nondiscriminatory consumer-protective innovation."[114] The DFPI and its fintech office identify the objective as "foster[ing] *responsible* innovation."[115] Since California is the most populous state with the largest economy, its efforts in this regard will likely have ripples nationally, if not internationally.[116] But what is "responsible innovation" and what does fostering it look like?

D. Innovating Responsibly

The word "innovation," crowned in a 2013 *The Atlantic* article as "the king of buzzwords," has not always had the same generally positive connotations that it has today.[117] That article cites the work of Canadian historian Benoît Godin, who recounts in his research that, in the religious and sociopolitical context of Seventeenth-Century Europe, the words "innovation" or "innovator" were closer in meaning to "heresy" or "heretic," acting as "a pejorative designation: a derogatory label applied to opponents and enemies [that] . . . reflected . . . the reaction to nonconformists of deviants."[118] The word first gained traction in the business context as meaning "bringing new products to market" after an economist in 1939 used "innovation" with that meaning, but its use did not become ubiquitous until after 9/11.[119] One author who criticizes the abuse of "innovation" as a meaningless filler word, argues that if one *must* use the word today, it should mean

113. *See* CAL. FIN. CODE § 90006(d)(4).

114. *See id.* § 90000(b)(4).

115. *See* DFPI, *supra* note 99, at 2 (emphasis added).

116. *See* Cordray, *supra* note 78 (identifying California as a natural leader in the realm of consumer protection); FDIC, *supra* note 104 (describing Deputy Commissioner Tetreault as "charged with creating a national model for fostering responsible innovation").

117. *See* Emma Green, *Innovation: The History of a Buzzword*, THE ATLANTIC (June 20, 2013), https://www.theatlantic.com/business/archive/2013/06/innovation-the-history-of-a-buzzword/277067 [https://perma.cc/4D9D-K5GG].

118. *See id.*; Benoît Godin, *'Meddle Not with Them That Are Given to Change': Innovation as Evil* 29–30 (Project on the Intell. Hist. of Innovation, Working Paper No. 6, 2010), http://www.csiic.ca/PDF/IntellectualNo6.pdf [https://perma.cc/LN5Z-NB8Z].

119. Jill Lepore, *The Disruption Machine*, NEW YORKER (June 16, 2014), https://www.newyorker.com/magazine/2014/06/23/the-disruption-machine [https://perma.cc/ARK3-9QWG]. Lepore critically describes the contemporary idea of innovation as "the idea of progress stripped of the aspirations of the Enlightenment, scrubbed clean of the horrors of the twentieth century, and relieved of its critics." *See id.*

"significant positive change."[120] This point of view underscores the positive connotations the word has in contemporary corporate culture, which in turn may go to explain—at least in part—the emphasis the California legislature has placed on safeguarding innovation in its policy decisions.[121] As for *Merriam-Webster*, the dictionary takes a decidedly neutral tone in its entry on the word, defining "innovation" as merely "a new idea, device, or method" or the act or process of introducing such new ideas, devices, or methods.[122] As such, any one individual's penchant or aversion to novelty may color that individual's feelings about the word "innovation." While public relations officials may certainly imply positivity when using the word, it is most true to the experience of history to recognize that innovations can be positive, negative, or somewhere in between, so far as their effect on society at large is concerned.[123]

Academics, largely from the field of science policy in the United Kingdom and Europe, have defined the phrase "responsible innovation" in different ways.[124] Absent a universally agreed-upon meaning for the phrase, I will add my own interpretation to the mix that draws on the foregoing discussion. Innovation—like the neologism "fintech"—has a meaning that is inherently tied to newness. While some urge that contemporary use of the word "innovation" should

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120. *See* Scott Berkun, *The Best Definition of Innovation*, SCOTT BERKUN (Apr. 3, 2013), https://scottberkun.com/2013/the-best-definition-of-innovation/ [https://perma.cc/P8QG-G4D9].

121. *See* discussion *supra* Section II.C.

122. *See Definition of Innovation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/innovation [https://perma.cc/D93M-FMWC]. As it happens, Noah Webster reportedly warned in the 1828 version of his dictionary, "It is often dangerous to innovate on the customs of a nation." *See* Lepore, *supra* note 119.

123. *See, e.g.*, Roman Twerenbold, *The Good, the Bad and the Innovative: Understanding the Darker Side of Innovation for Development*, UNITED NATIONS RSCH. INST. SOC. DEV. (Mar. 2, 2017), https://www.unrisd.org/en/library/blog-posts/the-good-the-bad-and-the-innovative-understanding-the-darker-side-of-innovation-for-development [https://perma.cc/ULM5-MVDT] (recognizing "the darker side to innovation").

124. *See* Jonathan Hawkins, *What Does "Responsible Innovation" Mean?*, IEEE SPECTRUM (June 24, 2015), https://spectrum.ieee.org/what-does-responsible-innovation-mean [https://perma.cc/LB4N-YS7J] ("One of the most commonly cited definitions of Responsible Innovation comes from Rene von Schomberg, team leader of science policy at the European Commission: 'Responsible Research and Innovation is a transparent, interactive process by which societal actors and innovators become mutually responsive to each other with a view to the (ethical) acceptability, sustainability and societal desirability of the innovation process and its marketable products (in order to allow a proper embedding of scientific and technological advances in our society).' Another broader and simpler definition comes from Jack Stilgoe, Richard Owen and Phil MacNaghten: 'Responsible innovation means taking care of the future through collective stewardship of science and innovation in the present.'").

include a connotation of "significant positive change,"[125] the word's dictionary definition is neutral.[126] Simply put, this is because the fact that something is new does not mean it is necessarily good, or even better than what came before. The modifier "responsible" has less to do with whether a new technology, process, or idea is objectively or subjectively "good" or "better," but more to do with *how* that technology, process, or idea was developed. Responsible innovation means developing new technologies, processes, or ideas while anticipating and proactively addressing potential and actual effects on all possible stakeholders, both during and after development.

In my definition of responsible innovation, I suggest that the responsible innovator seriously contemplates *all* potential stakeholders. For an innovative product, these stakeholders might include the consumers that buy the product, the individuals that manufacture the product, the shareholders of the corporation that sells the product, and anyone else ultimately affected by it. For a product with an environmental impact, for example, this set of stakeholders could come (at risk of hyperbole) to include the Earth's entire population.

Clearly then, engaging in truly responsible innovation is no easy task. When there are so many potential effects and stakeholders, experts and specialists can play a facilitation role in the responsible innovation process. For its part, the DFPI lists the goal of strengthening consumer protection first in its 2020–2023 strategic plan.[127] One way to think about its role in fostering responsible innovation, then, is to see it as a specialist on a particular stakeholder class—that is, consumers of financial products. This angle reframes the question at the core of this Note, namely, whether the DFPI can take on a kind of business-consulting role without undermining its role as a regulatory enforcer, the financial cop on the beat. The following part digs deeper into this question.

125. *See* Berkun, *supra* note 120.
126. *See* discussion *supra* Section II.C.
127. *See* DFPI, *supra* note 99, at 1–2.

III. ANALYSIS

A. *Conflicting Regulatory Mandates and the Risk of Regulatory Capture*

If a regulator is tasked with both promoting and regulating a particular industry, it has an internal conflict that will be implicated in all of the decisions it makes. In theory, this conflict might be resolved frequently in favor of promotion because the regulator's existence and importance depends on the health of the industry it regulates.[128] Further, the balkanized financial regulatory system creates an incentive for different regulators (particularly at the state level) to "race-to-the-bottom" in order to create the most business-friendly environment.[129] It is clear that the CCFPL was drafted with the intention of increasing consumer protection, but its secondary goal of promoting innovation implies a regulator-as-promoter role as well.[130]

While this Note has proceeded so far from the premise that the CCPFL attempts to resolve a dilemma between fostering innovation and protecting consumers, Professors Yadav and Brummer have characterized the relevant problem in financial regulation as a "trilemma."[131] The vertices of the trilemma are (1) financial innovation, (2) market integrity, and (3) rules simplicity.[132] As defined by these scholars, the goal of "market integrity" includes both consumer protection goals and market stability (or "safety and soundness") goals.[133] The "trilemma" stems from the hypothesis that only two of these three goals can be achieved by a regulator at any given time.[134] Under this framework, there is no intrinsic difficulty in promoting financial innovation and protecting consumers at the same time, such that one objective will have to give way to the other. Instead, Yadav and Brummer would argue that promoting these two goals will ultimately be at

128. Larry D. Wall & Robert A. Eisenbeis, *Financial Regulatory Structure and the Resolution of Conflicting Goals*, 17 J. FIN. SERVS. RSCH. 232 (2000).

129. Elizabeth F. Brown, *E Pluribus Unum—Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIA. BUS. L. REV. 1, 52–53 (2005).

130. CAL. FIN. CODE § 90000(b)(4).

131. Brummer & Yadav, *supra* note 16, at 248–49.

132. *Id.* at 248.

133. *See id.* at 244–45. Other commentators—I think credibly—have viewed consumer protection and safety and soundness as distinct goals. *See* Derek Thompson, *Safety and Soundness vs. Consumer Protection*, THE ATLANTIC (Mar. 2, 2010), https://www.theatlantic.com/business/archive/2010/03/safety-and-soundness-vs-consumer-protection/36941/ [https://perma.cc/UZ7U-P3CE].

134. Brummer & Yadav, *supra* note 16, at 248.

the expense of rules simplicity—the objectives of consumer protection and innovation promotion can only be achieved "through a complex matrix of rules and exemptions, raising compliance costs and disproportionately impacting smaller firms and upstarts."[135]

This is not to suggest, however, that the tradeoffs inherent in the trilemma cannot be dealt with at all. Nor do I agree entirely with the premise that promoting innovation and protecting consumers in financial services is not a true dilemma that requires some kind of resolution. While I argue here that the CCFPL attempts to resolve the dilemma between fostering innovation and protecting consumers by creating a mandate of "fostering *responsible* innovation," its design also addresses the "rules simplicity" problem in its creation of the OFTI. Discussed more below, the OFTI is an "innovation hub" that can help innovative startups comply with the complex regulatory regime in California.[136] Focusing on the interests of regulated firms, however, naturally raises concerns of regulatory capture.[137]

The specter of capture looms large in the financial services arena: for example, some scholars have suggested that extensive special interest lobbying in the banking sector played a part in building up the risk that led to the 2008 crisis.[138] Part of the problem is the complexity of some aspects of modern financial services, which can make regulators dependent on industry insiders for information on how to resolve certain issues.[139] In addition, commentators have pointed out that when a legislature gives a regulator conflicting mandates, it opens the regulator up to added industry pressure.[140] One tactic that can reduce this risk is to give the regulator a clear primary duty.[141] To that end, it

135. *See id.* at 249.

136. *See supra* Section III.C; Brummer & Yadav, *supra* note 16, at 295 ("Sandboxes and innovation hubs can promote rules simplicity and financial innovation.").

137. Regulatory capture occurs when regulated firms "capture" the regulatory process for "their own narrow interests." Frédéric Boehm, *Regulatory Capture Revisited—Lessons from Economics of Corruption* 3 (Internet Ctr. for Corruption Rsch., Working Paper, Contribution No. 22, 2007), http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf [https://perma.cc/PNW2-BTGB].

138. Deniz O. Igan & Thomas Lambert, *Bank Lobbying: Regulatory Capture and Beyond* 18 (Int'l Monetary Fund Working Paper, Paper No. 2019/171, 2019).

139. Mark Calabria, *Preventing Regulatory Capture*, REGUL. REV. (June 23, 2016), https://www.theregreview.org/2016/06/23/calabria-preventing-regulatory-capture/ [https://perma.cc/J6BG-KTJC].

140. STEFANO PAGLIARI, MAKING GOOD FINANCIAL REGULATION: TOWARDS A POLICY RESPONSE TO REGULATORY CAPTURE 29–30 (2012), https://openaccess.city.ac.uk/id/eprint/12314/1/How%20Can%20We%20Mitigate.pdf [https://perma.cc/TYC6-F9ED].

141. *Id.*

is significant that the California legislature phrased its expansion of the DFPI's authority in the CCFPL as follows:

> It is the intent of the Legislature to enact the California Consumer Financial Protection Law to strengthen consumer protections by expanding the ability of the Department of Financial Protection and Innovation to improve accountability and transparency in the California financial system, provide consumer financial education, and protect consumers from abusive financial practices, while prioritizing the prevention of unethical businesses from harming the most vulnerable populations . . . .[142]

Although the legislature also found that "innovation offers great promise to the more effective and efficient provision of consumer financial products and services,"[143] it notably omitted a mandate to promote innovation from its statement of legislative intent. On a more concrete and practical level, the risk of regulatory capture may appear heightened when a regulator hires individuals who formerly worked for the private entities the regulator oversees.[144] The DFPI appears to be conscious of this concern because the current OFTI head comes not from a fintech company, but rather Consumer Reports,[145] an independent nonprofit that provides product reviews for consumers.[146] Further, Consumer Reports specifically lobbies regulators for added consumer protection in the financial services sector.[147]

Little about the DFPI's specific innovation measures indicate that capturing has taken place. While the DFPI recently took a "collaborative" approach in signing memoranda of understanding with a number fintech companies providing earned wage access services,[148] the

142. CAL. FIN. CODE § 90000(a)(4) (2022).

143. *Id.* § 90000(a)(3) (2022).

144. *See* PAGLIARI, *supra* note 140, at 14.

145. FDIC, *supra* note 104.

146. *See About Us*, CONSUMER REPS., https://www.consumerreports.org/cro/about-us/what-we-do/index.htm [https://perma.cc/8SMK-ACTJ].

147. *See Financial Fairness*, CONSUMER REPS., https://www.consumerreports.org/cro/about-us/what-we-do/financial-fairness/index.htm [https://perma.cc/JEG2-E4XF].

148. Aarthi Swaminathan, *California Consumer Agency Strikes Data-Sharing Deal with Fintech Companies*, YAHOO! FIN. (Jan. 28, 2021), https://finance.yahoo.com/news/california-consumer-agency-dfpi-data-sharing-114543324.html [https://perma.cc/WQB5-PR7K]. Earned wage access products provide ways for employees to access their paycheck before their scheduled payday. *Earned Wage Access 2022: Impact on Retention and Hiring*, DAILYPAY (July 10, 2022), https://www.dailypay.com/resource-center/blog/what-is-earned-wage-access/ [https://perma.cc/R8NM-9Z2B].

agreements place strong disclosure requirements on these companies.[149] Further, the OFTI has no rulemaking authority of its own.[150] Although it presumably will communicate with the rulemaking divisions of the DFPI, this lack of authority helps deter some of the "regulator-as-promoter" concerns. Important too is the fact that in addition to "identify[ing] emerging trends [and] highlight[ing] new strategic opportunities," the OFTI is tasked with helping to "foresee potential risks."[151] While the OFTI might relay concerns that tech entrepreneurs have to the rulemaking and enforcement portions of the DFPI, it also can use its research functions to point out specific hazards posed by fintech. Also, in exercising its research function on its own, the OFTI can lessen the risk that complexity in the regulated products and services will open the door to regulatory capture.[152] While fostering innovation and protecting consumers may be conflicting regulatory goals in practice, the OFTI (and DFPI by extension) linguistically aligns those goals by fostering *responsible* innovation.

B. Risk and Benefits

Before applying the idea of responsible innovation to the fintech context, it is necessary to address how fintech products and services create domain-specific risks and benefits for consumers. The following discussion is cabined to the benefits and risks that directly arise out of the consumer's interaction with a particular product or service itself.[153] Since "fintech" is an inherently nebulous and dynamic classification,[154] the analysis here will be keyed to a few of the broader categories of fintech mentioned earlier in the Note.[155]

149. *The DFPI Signs MOUs Believed to Be Among the Nation's First with Earned Wage Access Companies*, DFPI (Jan. 27, 2021), https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/ [https://perma.cc/B9JK-L7U7].

150. *See* DFPI, *supra* note 104.

151. *Id.*

152. *See* Calabria, *supra* note 139.

153. A bird's-eye view of the fintech landscape, which is beyond the scope of this Note, might also include a discussion of cryptocurrency's effect on the environment, for example. *See* John Bogna, *What Is the Environmental Impact of Cryptocurrency?*, PC MAG. (Jan. 8, 2022), https://www.pcmag.com/how-to/what-is-the-environmental-impact-of-cryptocurrency [https://perma.cc/3F22-8SXZ].

154. *See* discussion *supra* Section II.A.

155. *See id*. *See generally* SAUNDERS, *supra* note 97 (providing an overview of consumer protection concerns raised by a wide variety of fintech products and services).

1. Alternative Lending: Fintech-Bank Partnerships

One key example that has attracted the scrutiny of scholars and consumer activists alike is the fintech-bank partnership model.[156] In the typical arrangement, a nonbank fintech[157] enters into a contractual relationship with a state-chartered bank.[158] While the fintech company collects the consumer's loan application and uses software to underwrite and credit score, it is the *bank* partner that makes the loan itself.[159] Although some politicians have seen these partnerships as offering an opportunity to strengthen small community banks, the "heart of these partnerships" is "avoiding [state] usury laws."[160] Fintech firms leverage the Supreme Court-endorsed regime of "interest rate exportation," which permits banks to charge the highest interest rate permitted by the state that chartered them, regardless of where their customer is located.[161] This practice betrays the marketing campaigns of many fintech companies, which often imply that the fintech has "the borrowers' best interest at heart."[162] Expanding consumer access to credit has been touted as a key benefit of fintech lending.[163] Under the fintech-bank partnership model, however, any potential consumer

156. *See* Odinet, *supra* note 54, at 1798; Lauren Saunders & Marisabel Torres, *Letter re: Proposed Rulemaking Under the California Consumer Financial Protection Law: Earned Wage Access*, CTR. RESPONSIBLE LENDING (Mar. 15, 2021), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf [https://perma.cc/92RD-QHWH].

157. "Nonbank financial companies (NBFCs), also known as nonbank financial institutions (NBFIs), are financial institutions that offer various banking services but do not have a banking license. Generally, these institutions are not allowed to take traditional demand deposits—readily available funds, such as those in checking or savings accounts—from the public." James Chen, *Nonbank Financial Companies (NBFCs)*, INVESTOPEDIA (Apr. 4, 2022), https://www.investopedia.com/terms/n/nbfcs.asp [https://perma.cc/9XXW-L29F].

158. *See* Odinet, *supra* note 54, at 1759.

159. *Id.*

160. *Id.* at 1766, 1776.

161. *Id.* at 1777–78 (citing Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314–18 (1978)).

162. *Id.* at 1790. Fintech marketing techniques may mislead in subtler, more technologically sophisticated ways as well. *See* Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 141–42 (2021) (describing PayPal's alleged exploitation of perceptual quirks to trick consumers into making credit, instead of debit, transactions).

163. Scott M. Pearson, *Fed Study Finds Expanded Credit Access Resulting from Fintech Lending*, BALLARD SPAHR LLP (Aug. 8, 2017), https://www.consumerfinancemonitor.com/2017/08/08/fed-study-finds-expanded-credit-access-resulting-from-fintech-lending/ [https://perma.cc/M29T-K8PK]. A survey of multiple empirical studies concluded that fintech solutions indeed provide increased access in the consumer loan and small business loan market; however, it reported mixed results with regard to increasing access for consumers with credit challenges and the unbanked. *See* Vincent Di Lorenzo, *Fintech Lending: A Study of Expectations Versus Market Outcomes*, 38 REV. BANKING & FIN L. 725, 758–59 (2019).

access benefits arising from innovation in credit-scoring and underwriting become seriously undermined by the circumvention of state anti-usury protections.

The DFPI's ability to police predatory fintech-bank partnerships might have been significantly curtailed if the Trump-era Office of the Comptroller of the Currency's (OCC) bright-line "true lender rule" remained in effect.[164] This rule, however, was repealed in the summer of 2021, leaving state law to determine who the "true lender" is in a given case.[165] As a result, the DFPI might use its broadened oversight under the CCFPL to regulate fintech companies that evade California interest limits.[166]

In addition to usury law evasions, fintech lending platforms that use algorithmic underwriting risk engaging in forms of digital redlining.[167] A 2019 study found that although fintech lenders discriminate with less frequency against Latinx/African-American borrowers than their traditional counterparts, the fintechs' use of data analytics did not prevent discriminatory pricing.[168] In 2017, the Federal Reserve also pointed out specific fair lending risks that fintech companies pose, even when the companies theoretically appear poised to expand access to credit.[169] Since the DFPI receives complaints under California's

164. *See* Craig J. Saperstein et al., *Congress Moves to Repeal OCC's "True Lender" Rule*, PILLSBURY (May 20, 2021), https://www.pillsburylaw.com/en/news-and-insights/cra-true-lender-rule.html [https://perma.cc/9LFJ-FZGB] ("Under the [OCC's true lender] rule, a national bank would be considered the lender when it '(1) is named as the lender in the loan agreement, or (2) funds the loan.'" (quoting *Office of the Comptroller of the Currency Issues True Lender Rule*, OFF. OF THE COMPTROLLER OF THE CURRENCY (Oct. 27, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-139.html [https://perma.cc/2D2K-BTVH])).

165. *See Actions Overview: S.J.Res.15—117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-joint-resolution/15/actions [https://perma.cc/KG6P-CPKW].

166. *See* Ballard CFS Grp., *California DFPI Announces Consent Order with Auto Title Loan Servicer That Was Subject of "True Lender" Investigation*, BALLARD SPAHR LLP (Dec. 21, 2021), https://www.consumerfinancemonitor.com/2021/12/21/california-dfpi-announces-consent-order-with-auto-title-loan-servicer-that-was-subject-of-true-lender-investigation/ [https://perma.cc/X8ZR-MZM9]. As previously discussed, the DFPI has already forbidden one notable fintech company from advertising itself as a bank. *See* Beyoud, *supra* note 87.

167. "Digital redlining is the creation and maintenance of technology practices that further entrench discriminatory practices against already marginalized groups." *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the Task Force on Fin. Tech. of the Comm. on Fin. Servs.*, 116th Cong. 69 (2019) (statement of Christopher Gilliard, Professor of English, Macomb Community College, and Digital Pedagogy Lab Advisor).

168. Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era*, 143 J. FIN. ECON. at 30 (2022).

169. *See* EVANS ET AL., *supra* note 86.

Fair Lending Law, it may be presented with opportunities to address some of these risks in the alternative lending area as well.[170]

2. Digital Payments: Privacy and Security

Advances in digital payments technology promise generally to reduce transaction costs and increase speed.[171] This added convenience however comes with potential risks to consumers, including concerns regarding data privacy and cybersecurity, which have particular salience when individuals' money is involved.[172] When it comes to data privacy, the DFPI in theory could assert its rulemaking authority under the California Consumer Privacy Act.[173] As for cybersecurity, it seems that the DFPI may defer its authority to the federal government in this area. In a July 2021 bulletin, the department noted the threat that cyber-attacks pose to financial institutions in general, but largely referred to federal guidance on the issue.[174] For their part, the federal financial regulators have issued a number of regulations and directives regarding cybersecurity in 2021.[175] Given that the DFPI seeks to establish itself as "a premier financial regulator" and develop a "national model for consumer protection,"[176] it would not be surprising if the department eventually took a similar approach to New York's Superintendent of Financial Services, which in 2017 promulgated regulations establishing cybersecurity requirements for financial services companies.[177]

170. *See Frequently Asked Questions*, DFPI (Sept. 27, 2021), https://dfpi.ca.gov/frequently-asked-questions/ [https://perma.cc/ZJ9F-69CF].

171. Leora Klapper, *How Digital Payments Can Benefit Entrepreneurs*, IZA WORLD OF LAB., https://wol.iza.org/articles/how-digital-payments-can-benefit-entrepreneurs/long [https://perma.cc/RF83-QKMT].

172. Sumathi Bala, *Rise in Online Payments Spurs Questions over Cybersecurity and Privacy*, CNBC (July 1, 2021), https://www.cnbc.com/2021/07/01/new-digital-payments-spur-questions-over-consumer-privacy-security-.html [https://perma.cc/9U8C-H7R2].

173. Libbie Canter et al., *Privacy Oversight and the California Department of Financial Protection and Innovation*, COVINGTON (Nov. 6, 2020), https://www.covfinancialservices.com/2020/11/privacy-oversight-and-the-california-department-of-financial-protection-and-innovation [https://perma.cc/DE74-GHA6].

174. *Monthly Bulletin – July 2021*, DFPI (Sept. 16, 2021), https://dfpi.ca.gov/2021/07/13/july-2021-monthly-bulletin/ [https://perma.cc/Y3TN-P52E].

175. Shardul Desai, *The Impact of Cybersecurity Regulations on the Financial Services Industry in 2022*, JDSUPRA (Jan. 13, 2022), https://www.jdsupra.com/legalnews/the-impact-of-cybersecurity-regulations-5908741[https://perma.cc/X6X5-4EBS].

176. *See Stronger Financial Protections on the Way for California Consumers*, DFPI (Sept. 25, 2020), https://dfpi.ca.gov/2020/09/25/stronger-financial-protections-on-the-way-for-california-consumers/ [https://perma.cc/WR2G-VMQE].

177. *Cybersecurity Resource Center*, N.Y. STATE DEP'T OF FIN. SERVS., https://www.dfs.ny.gov/industry_guidance/cybersecurity [https://perma.cc/NZ6M-7J82].

3. Distributed Ledger Technology: Cryptocurrency

Fans of cryptocurrency breathlessly sing its praises.[178] While there is little doubt that the technology underlying cryptocurrency is incredibly powerful and potentially quite useful across multiple domains,[179] it has also been a breeding ground for consumer fraud.[180] In its first year with CCFPL authority, the DFPI focused mainly on publishing warnings about fraudulent crypto brokers based on complaints from California consumers, but there have been more developments in 2022.[181] As it stands, cryptocurrency exchange platforms are not typically subject to licensing under California's money transmitter law—although that could certainly change if new rules or regulations are adopted.[182] While not all states subject virtual currency to money transmission licensing requirements, quite a few do.[183] Many of these fit virtual currency into their existing money transmission schemes, while New York has adopted a unique "BitLicense" system that applies only to virtual currency.[184] At the opposite end of the spectrum, Utah specifically excludes "blockchain tokens" from its definition of "money transmission."[185]

Money transmission regulations have their origins in much older technologies, such as Western Union.[186] Does the average consumer

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178. *See* Brian Nibley, *12 Benefits of Cryptocurrency in* 2022, SOFI (Dec. 20, 2021), https://www.sofi.com/learn/content/benefits-of-crypto/ [https://perma.cc/4S4X-TPGX] (listing benefits of owning crypto as "easy transactions," "incredible security," "outsized returns," and "a more inclusive financial system," among others).

179. *See* Pam Baker, *Today's Blockchain Use Cases and Industry Applications*, TECHTARGET (June 1, 2021), https://www.techtarget.com/searchcio/feature/Todays-blockchain-use-cases-and-industry-applications [https://perma.cc/MNF7-AVZQ]. One particularly interesting potential use case for blockchain is its potential to underpin a digital bill of lading, which could revolutionize the mechanics of international business transactions. *See* Mark L. Shope, *The Bill of Lading on the Blockchain: An Analysis of Its Compatibility with International Rules on Commercial Transactions*, 22 MINN. J.L. SCI. & TECH. 163, 202 (2021).

180. *Cryptocurrency Fraud*, AARP (Jan. 19, 2022), https://www.aarp.org/money/scams-fraud/info-2019/cryptocurrency.html [https://perma.cc/ZS7H-ATPA] ("Cryptocurrency fraud has taken a quantum leap in recent years.").

181. DFPI, *supra* note 98.

182. *See, e.g.*, *Cryptocurrency Exchange Not Subject to Licensing Under the MTA*, DFPI (Mar. 10, 2021), https://dfpi.ca.gov/2021/09/07/cryptocurrency-exchange-not-subject-to-licensing-under-the-mta/ [https://perma.cc/HME3-MUHB] (redacted interpretive opinion).

183. *See Cryptocurrency Laws and Regulations by State*, BLOOMBERG L. (May 26, 2022), https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state [https://perma.cc/5CGP-3NH6].

184. *See id.*

185. *See* Utah Code Ann. § 7-25-102 (West 2022).

186. *See* ANDREW P. SCOTT, CONG. RSCH. SERV., R46486, TELEGRAPHS, STEAMSHIPS, AND VIRTUAL CURRENCY: AN ANALYSIS OF MONEY TRANSMITTER REGULATION 2 (2020), https://sgp.fas.org/crs/misc/R46486.pdf [https://perma.cc/FTX5-D9DD].

think of Bitcoin or other cryptocurrencies as just another form of "money," however? The framing of a recent Pew Research study is revealing on this point: it found that 16 percent of Americans say they have "invested in, traded or used cryptocurrency."[187] Note that the question was not solely about *use*, as one would ask with regard to a traditional fiat currency. On that same "token," a survey by the consulting firm McKinsey found that 43 percent of its respondents who have owned cryptocurrencies did so "as an investment."[188] Although many may still see the most prominent cryptocurrency (Bitcoin) as an investment opportunity, the Securities and Exchange Commission has not defined it as a security.[189] That said, the SEC claimed in a 2020 lawsuit that another cryptocurrency, XRP or "Ripple," is in fact a security—and there is ongoing litigation on this point that has yet to be resolved at the time of writing.[190] The outcome of this lawsuit could potentially embolden the DFPI to bring a variety of cryptocurrencies or related asset classes under the aegis of California's Corporate Securities Law.[191]

More recently, the DFPI has brought a variety of enforcement actions against companies that offer "crypto-interest accounts."[192] These accounts "allow[] customers to lend crypto assets to the company and, in exchange, receive interest paid in crypto assets."[193] Some of these companies in the summer of 2022 prevented customers from withdrawing from their accounts due to "market conditions," and the DFPI found that some of these crypto-interest accounts counted as

187. Andrew Perrin, *16% of Americans Say They Have Ever Invested in, Traded or Used Cryptocurrency*, PEW RSCH. CTR. (Nov. 11, 2021), https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/ [https://perma.cc/TSV8-ZFTR].

188. Vaibhav Goel et al., *New Trends in U.S. Consumer Digital Payments*, MCKINSEY & CO. (Oct. 26, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/new-trends-in-us-consumer-digital-payments [https://perma.cc/8XUL-WVH2].

189. Jeff Novel, *Is Crypto a Currency or Security? Litigation Involving the SEC May Provide Guidance*, MONDAQ (Nov. 9, 2021), https://www.mondaq.com/unitedstates/fin-tech/1129220/is-crypto-a-currency-or-security-litigation-involving-the-sec-may-provide-guidance [https://perma.cc/M2WD-LR33].

190. Eleanor Terret & Charles Gasparino, *SEC vs. Ripple Case Could Establish Limit on Agency's Future Involvement in Crypto Regulation: Sources*, FOX BUS. (Sept. 20, 2021), https://www.foxbusiness.com/markets/sec-vs-ripple-case-crypto-regulation [https://perma.cc/BW5R-4KEC].

191. *About the Corporate Securities Law of 1968*, DFPI (Oct. 7, 2019, 3:03 PM), https://dfpi.ca.gov/about-the-corporate-securities-law-of-1968/ [https://perma.cc/U9DU-XRPE].

192. *DFPI Is Actively Investigating Multiple Companies Offering "Crypto-Interest Accounts*," DFPI (July 13, 2022, 9:18 AM), https://dfpi.ca.gov/2022/07/12/dfpi-is-actively-investigating-multiple-companies-offering-crypto-interest-accounts/ [https://perma.cc/S37N-5XGU].

193. *Id.*

unregistered securities in violation of California law.[194] The foregoing subsections illustrate both the heightened risk involved with some types of "innovative" fintech products, and the DFPI's focus (both potential and actual) on policing such products where consumers are harmed.

C. Innovation-Centered Regulation

Commentators have suggested that cryptocurrency, fintech-bank partnerships, and digital payments can promote financial inclusion.[195] The World Bank has reported that the global unbanked population fell by 35 percent over the course of the 2010s, a trend "primarily boosted by the increase in mobile money accounts."[196] Being unbanked or underbanked does not mean one does not have access to financial services, however. The problem is that alternative services traditionally have tended to be of the risky and fee-heavy variety, including "payday loans, check cashing services, money orders, and pawn shop loans."[197] An Obama-era White House blog post identified fintech products, by contrast, as potentially "safe and affordable"[198]—although the discussion above should make us at least somewhat skeptical of that view. Nonetheless, this rosy-hued view of fintech has led to a variety of approaches that seek to regulate the industry without stifling innovation.

194. *Id.*

195. *See* Mary Jackson, *Bank-Fintech Partnerships Drive Financial Inclusion for Non-Prime Borrowers*, FORBES (Mar. 10, 2020, 8:15 AM), https://www.forbes.com/sites/forbesfinancecouncil/2020/03/10/bank-fintech-partnerships-drive-financial-inclusion-for-non-prime-borrowers/ [https://perma.cc/2XNC-BVYU]; SONJA KELLY ET AL., CTR. FOR FIN. INCLUSION, INST. OF INT'L FIN., HOW FINANCIAL INSTITUTIONS AND FINTECH ARE PARTNERING FOR INCLUSION: LESSONS FROM THE FRONTLINES 22-35 (2017), https://www.iif.com/portals/0/Files/private/partnerships_report_0.pdf [https://perma.cc/XV3K-Q7PM]. "Financial inclusion refers to efforts to make financial products and services accessible and affordable to all individuals and businesses, regardless of their personal net worth or company size." Mitchell Grant, *Financial Inclusion*, INVESTOPEDIA (Dec. 26, 2020), https://www.investopedia.com/terms/f/financial-inclusion.asp [https://perma.cc/AS96-EVUE].

196. Sharmista Appaya, *On Fintech and Financial Inclusion*, WORLD BANK BLOGS (Oct. 26, 2021), https://blogs.worldbank.org/psd/fintech-and-financial-inclusion [https://perma.cc/24WB-LYE5].

197. Emily Guy Birken, *The Costs of Being Unbanked or Underbanked*, FORBES (July 28, 2020, 12:03 AM), https://www.forbes.com/advisor/banking/costs-of-being-unbanked-or-underbanked/ [https://perma.cc/L5W4-3SN8].

198. Jason Furman, *Financial Inclusion in the United States*, WHITE HOUSE (June 10, 2016, 8:00 AM), https://obamawhitehouse.archives.gov/blog/2016/06/10/financial-inclusion-united-states [https://perma.cc/ES3M-M9YX].

1. Sandboxes

While research is inconclusive as to whether fintech innovation in general will make good on the promise of increased financial inclusion,[199] its general potential "to connect billions of unbanked and underserved consumers to . . . financial systems" remains.[200] However, the tools that connect individuals to the financial system—fintech or otherwise—are not without their dangers.[201] Thus, there is an inherent tension in fintech between the need for regulatory oversight and the desire for new and better products that can achieve societally beneficial ends. Government regulation does not necessarily hinder innovation, but it certainly has the potential to.[202] With respect to fintech, many jurisdictions across the world address this concern by creating "regulatory sandboxes."[203]

A regulatory sandbox has been defined by the UN Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA) as "a regulatory approach, typically summarized in writing and published, that allows live, time-bound testing of innovations under a regulator's oversight."[204] Sandboxes exempt entities from regulatory requirements for a period of time if they meet certain entry standards specified by the regulator.[205] While some have celebrated sandboxes—at least well-implemented ones—consumer advocate groups have routinely opposed them.[206] One early summary of the bill

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199. *See generally* Ratna Sahay et al., Int'l Monetary Fund, *The Promise of Fintech: Financial Inclusion in the Post COVID-19 Era* (Departmental Paper No. 2020/009, July 1, 2020) (finding that "digital finance" in its early stages is increasing financial inclusion, but that these same technologies could actually decrease inclusion in addition to presenting financial stability risks).

200. Julapa Jagtiani & Kose John, *Fintech: The Impact on Consumers and Regulatory Responses*, J. ECON. & BUS., 2018, at 5.

201. *See* discussion *supra* Section II.A.

202. ORG. FOR ECON. COOP. & DEV., REGULATORY REFORM AND INNOVATION 12 (1997), https://www.oecd.org/sti/inno/2102514.pdf [https://perma.cc/R74A-SSCS] ("Regulations have . . . spawned the creation of new industries and products . . . . However, regulations can also erect barriers to the development of new, improved products and production processes.").

203. Sharmista Appaya & Ivo Jenik, *Running a Sandbox May Cost Over $1M, Survey Shows*, CGAP (Aug. 1, 2019), https://www.cgap.org/blog/running-sandbox-may-cost-over-1m-survey-shows [https://perma.cc/JD37-X5CJ].

204. IVO JENIK, UNSGSA'S FINTECH SUB-GROUP ON REGULATORY SANDBOXES, BRIEFING ON REGULATORY SANDBOXES 1 (2020), https://www.unsgsa.org/sites/default/files/resources-files/2020-09/Fintech_Briefing_Paper_Regulatory_Sandboxes.pdf [https://perma.cc/2PJQ-GK3C].

205. *See* Ross P. Buckley et al., *Building Fintech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond*, 61 WASH. U. J.L. & POL'Y 55, 58 (2020).

206. Dan Quan, *A Few Thoughts on Regulatory Sandboxes*, STAN. PACS CTR. ON PHIL. & CIV. SOC'Y, https://pacscenter.stanford.edu/a-few-thoughts-on-regulatory-sandboxes/ [https://perma.cc/P2F9-9359].

that became the CCFPL rightly pointed out the unlikelihood that the DFPI would create a fintech sandbox, given that the California attorney general, along with 22 others, opposed the CFPB's sandbox.[207] Critics of sandboxes argue that the testing systems they provide do not adequately reveal the systemic risks posed by the tested product or service.[208]

2. Innovation Hubs

A different approach utilizes what have been variously called "innovation hubs" or "innovation offices."[209] The UNSGSA defines regulatory innovation hubs by their main function of "engag[ing] with, and provid[ing] regulatory clarification to, financial services providers that seek to offer innovative products and services."[210] These hubs have the potential to benefit both entrepreneurs and their customers. Specifically, innovation hubs may reduce some barriers to entry for market entrants that are uncertain about regulatory compliance, while helping to "advise innovators about consumer protection requirements, which promotes compliant innovation."[211] A 2016 case study from the Netherlands that applied the responsible innovation framework to a particular subset of fintech startups concluded that a structured, self-initiated approach to responsible innovation tended to be undesirably resource intensive from the start-ups' perspective.[212]

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207. *Special Alert: Trailer Bill Would Enact California Consumer Financial Protection Law*, BUCKLEY (Feb. 25, 2020), https://buckleyfirm.com/sites/default/files/Buckley-Special-Alert-Trailer-bill-would-enact-California-Consumer-Financial-Protection-Law.pdf [https://perma.cc/5ACE-JN23]. Buckley's "Special Alert" commented that "[w]hile the DFPI's name and authority . . . references innovation, it is unclear how it will pursue oversight of fintech companies in a way that promotes innovation." *Id.* This Note attempts to clarify that concern.

208. Jemima Kelly, Opinion, *A "Fintech Sandbox" Might Sound Like a Harmless Idea. It's Not.*, FIN. TIMES (Dec. 4, 2018), https://www.ft.com/content/3d551ae2-9691-3dd8-901f-c22c22667e3b [https://perma.cc/7S5F-R82Y].

209. *See* Buckley et al., *supra* note 205, at 58; UNSGSA FINTECH WORKING GRP. & CCAF, EARLY LESSONS ON REGULATORY INNOVATIONS TO ENABLE INCLUSIVE FINTECH: INNOVATION OFFICES, REGULATORY SANDBOXES, AND REGTECH 7 (2019), https://www.unsgsa.org/sites/default/files/resources-files/2020-09/UNSGSA_Report_2019_Final-compressed.pdf [https://perma.cc/3HWK-DQWP]. Regulatory innovation offices should be distinguished from government innovation offices, which focus on internal research and development. *See generally* RACHEL BURSTEIN & ALISSA BLACK, IBM CTR. FOR THE BUS. OF GOV'T, A GUIDE FOR MAKING INNOVATION OFFICES WORK (2014) (describing the state of government innovation offices as of 2014 and providing recommendations). Due to this potential source of ambiguity, this Note opts for the "innovation hub" term.

210. UNSGSA FINTECH WORKING GRP. & CCAF, *supra* note 209, at 19.

211. *Id.* at 22.

212. FC Waagmeester, Responsible Innovation in Platform-based FinTech Start-ups: An Explorative Case Study 58 (Aug. 2016) (M.S. thesis, University of Technology Delft),

Innovation hubs, then, may help provide some of that structure that entrepreneurs are less willing to set up on their own. Overall, the UNSGSA concluded in 2019 that innovation offices "may offer a better starting point" for regulators than sandboxes to resolve regulatory questions that startups may have, in part by being less resource intensive.[213] And unlike sandboxes, these hubs do not permit market entrants to operate regulation-free for any period of time.

Innovation hubs have gained great traction in Europe, where nearly every jurisdiction has established one.[214] What all have in common is some accessible point of contact that allows a firm to contact the hub.[215] For startups, the hubs naturally provide the benefit of enhanced understanding of the regulatory scheme.[216] For regulators, the information-gathering facilitated by innovation hubs can help inform policy making and tailor regulations to allow for beneficial innovations.[217] Consumers stand to benefit as well if the hubs ensure the introduction of new and safer products.[218] Unlike sandboxes, however, innovation hubs do not "deliver the same certainty as to regulatory lenience."[219] While this might be a benefit to consumers, it may decrease the incentives for business participation, thus undermining some of the hub's goals.[220] Further, innovation hubs do not attract the same attention that sandboxes do, which might be due to the overwhelming hype and interest around sandboxes.[221] However, if the hub develops a track record of helping entrepreneurs market their products and come into compliance, it will likely attract firms and gain the information it needs to promote its overall goal of fostering responsible innovation.[222]

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https://repository.tudelft.nl/islandora/object/uuid:d82d4d08-fd56-40c4-9762-f32bde78e18a/datastream/OBJ/download [https://perma.cc/9G6G-M982].

213. UNITED NATIONS SEC'Y-GEN.'S SPECIAL ADVOC. FOR INCLUSIVE FIN. FOR DEV., ANNUAL REPORT TO THE SECRETARY-GENERAL 23 (2019), https://www.unsgsa.org/publications/2019-annual-report-secretary-general [https://perma.cc/S6EM-955E]. Buckley et al. also argued that innovation hubs are "in many cases . . . likely to be more effective [than sandboxes] in building a fintech ecosystem." Buckley et al., *supra* note 205, at 58.

214. RADOSTINA PARENTI, REGULATORY SANDBOXES AND INNOVATION HUBS FOR FINTECH 19 (2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf [https://perma.cc/6AEJ-ATA4].

215. See *id* at 62.

216. *Id.* at 22.

217. *Id.* at 24.

218. *Id.*

219. Buckley et al., *supra* note 205, at 77.

220. *Id.*

221. *Id.* at 78.

222. *See id.* at 77.

As stated earlier, the CCFPL authorized the creation of the OFTI.[223] The OFTI's stated functions are to engage in conversations with both fintech innovators and consumers, while also conducting relevant research into emerging products and services.[224] It has already established a regular virtual office hours slot that only requires a name and email address to register.[225] As such, the OFTI clearly functions as an innovation hub.[226] It is this component of the DFPI that will enable it to do more than act as a state-level consumer watchdog—it may foster responsible innovation.

Innovation hubs such as the OFTI are poised, if utilized properly, to help companies engage in responsible financial innovation. The UNSGSA, while taking a global approach to addressing financial inclusion, specifically pointed out that "[t]he high cost of regulatory uncertainty is highlighted in the U.S." due to its "regulatory complexity."[227] While the CFPB has its own "Office of Competition and Innovation,"[228] the fragmented nature of the U.S. financial regulatory system provides a strong rationale for setting up innovation offices at the state level, particularly in large financial markets like California.[229]

IV. RECOMMENDATIONS

The DFPI has a stated goal of fostering responsible innovation.[230] I define responsible innovation as "developing new technologies, processes, or ideas while anticipating and proactively addressing potential and actual effects on all possible stakeholders, both during and after development."[231] We can break this definition down into several key components. After it reiterates the neutral definition of innovation, it references the concept of anticipation. A reference to proactivity follows, which implies an intentional approach to evaluating and modifying the innovation process. Next, we read the inclusive phrase "all possible stakeholders." The definition ends with an acknowledgment that the responsible innovation process continues both throughout

223. *See supra* notes 102–104 and accompanying text.
224. *See* DFPI, *supra* note 104.
225. *Id*.
226. *See* UNSGSA FINTECH WORKING GRP. & CCAF, *supra* note 209, at 19.
227. *Id.* at 22.
228. *Competition and Innovation at CFPB*, CFPB, https://www.consumerfinance.gov/rules-policy/competition-innovation/ [https://perma.cc/ZDF9-MNLT].
229. *See supra* Section II.C.
230. *See* DFPI, *supra* note 99.
231. *See supra* Section II.D.

development and after the new idea, process, or technology is released to the world at large.

These components consecutively align with the proposed four dimensions of responsible innovation that a group of U.K. scientific policy researchers developed in 2013—namely anticipation, reflexivity, inclusion, and responsiveness.[232] The following recommendations are grounded in that framework. I also proceed from the premise that the DFPI's innovation hub and other similar units from different jurisdictions should see themselves as responsible innovators. This is because they can develop new ideas as relatively novel entities in the regulatory space, and also because an innovation hub can model responsible behavior for the businesses that interact with it.

A. Anticipation

Anticipation is built into the OFTI's stated research function.[233] By becoming informed on emerging risks, the office can help entrepreneurs prevent such risks before they materialize.[234] While entrepreneurs have the most accurate and detailed information about the products they bring to market, they may not always be interested in anticipating the worst-case scenario, like if it turns out the platform they develop is particularly susceptible to fraud. Through conducting research and collaborating with the enforcement subunits of the DFPI, the OFTI can assist entrepreneurs in identifying risks.[235] What will be key is the communication of the OFTI's findings with the public at large. While the OFTI has already begun operating office hours on a weekly basis for "innovators, advocates, and anyone interested in responsible financial innovation in California,"[236] it should also publish annual reports summarizing its findings. The CCFPL does mandate the DFPI to annually report on "[t]he activities of the Financial Technology Innovation Office," among other things, but that is the extent of its obligation.[237] To be especially effective, these reports should detail new products and services that have improved consumer welfare and successfully mitigated risk, while cautioning against innovations

232. *See* Jack Stilgoe et al., *Developing a Framework for Responsible Innovation*, 42 RSCH. POL'Y 1568 (2013); Hawkins, *supra* note 124.

233. *See* DFPI, *supra* note 104 ("We conduct research to identify emerging trends, highlight new strategic opportunities, and to help foresee potential risks.").

234. *Id.*

235. *Id.*

236. *Id.*

237. CAL. FIN. CODE § 90018(b)(2) (2022).

that end up doing more harm than good. Annual reporting of its research findings will hold the OFTI accountable to the pursuit of its stated objectives.

B. Reflexivity

Reflexivity, in the sense of being reflective, is an attribute that both the OFTI and the startups it interfaces with will need to develop to be successful. It is tied to the idea of proactivity because introspective, honest evaluation is a necessary precursor to taking preventive or remedial action. As for the startups, a certain willingness to engage in self-reflection and critique might also be a prerequisite for them to engage in conversations with a regulator at all. Unlike sandbox entry, a conversation with the OFTI does not function as a kind of stamp-of-approval.[238] If an entrepreneur sees the DFPI as mainly hampering its ability to do cost-effective business in the state, it may have little willingness to speak with the OFTI—particularly because the OFTI does not have the ability to shift the regulatory scheme itself or create special allowances for particular businesses.[239] However, the DFPI has set a tone that it is willing to collaborate with fintech businesses to determine the overall best course of action for all stakeholders.[240]

Nevertheless, the OFTI upon reflection will also need to recognize that tech companies may increasingly see California as being "bad for business" due to its complex regulatory scheme.[241] The office can attempt to alleviate those concerns by acting as an intermediary between the regulator and the regulated, but it must also be open for feedback from stakeholders on the business side to be truly helpful. In the same regard, the OFTI could encourage mutually beneficial collaborations between fintech companies and the DFPI itself, similar to what the CFPB did in 2017 with Project Catalyst. In Project Catalyst, the CFPB partnered with a fintech company, Credit Karma, to conduct research into financial well-being.[242] The key will be ensuring that any

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238. *See* Giulio Cornelli et al., *Inside the Regulatory Sandbox: Effects on Fintech Funding* 4 (Bank for Int'l Settlements, Working Paper, Paper No. 901, 2020), https://www.bis.org/publ/work901.pdf [https://perma.cc/Z242-VSQN].

239. *See* DFPI, *supra* note 104 ("Q: Does OFTI make rules? [A:] We don't.").

240. *See* Swaminathan, *supra* note 148.

241. Fareeha Rehman, *Companies Are Rapidly Leaving California in 2021, Stanford Researchers Find*, KRON4 (Sept. 1, 2021, 1:09 PM), https://www.kron4.com/news/california/companies-are-rapidly-leaving-california-in-2021-stanford-researchers-find/ [https://perma.cc/FU35-LP8U].

242. *See* Genevieve Melford & Dan Quan, *Project Catalyst Collaboration to Improve Understanding of Financial Well-Being*, CFPB (Sept. 18, 2017), https://www.consumerfinance.gov/

such collaborations are grounded in providing tangible benefits and protections for consumers, and not just serving the business and regulator's interests.

C. Inclusion

As for inclusion, the OFTI has a well-adapted model by providing an open door policy to all different kinds of stakeholders in the fintech conversation.[243] While some innovation offices have gatekeeping eligibility criteria,[244] the OFTI will engage with any interested party on a first-come, first-served basis.[245] Although the weekly office hours are limited to twenty-minute slots—hardly enough time to engage in a meaningful conversation about regulatory compliance—the OFTI website makes clear that longer meetings can be scheduled at a firm, advocate, or consumer's election.[246]

Of course, this high level of inclusivity will only make a difference if stakeholders are actually aware of the service that the OFTI provides. To that end, at the time of writing, the OFTI has participated in a webinar hosted by a national law firm,[247] and will likely participate in similar informative events as the global fintech market continues to grow.[248] These efforts seem to have been geared toward business and entrepreneurs, rather than consumers. Returning to the Project Catalyst example, that project allowed the CFPB to increase its exposure to consumers while giving Credit Karma a significant public relations opportunity.[249] The OFTI and DFPI should consider a similar, California-tailored approach to ensure that consumers know of the protections and services they provide as regulators.

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about-us/blog/project-catalyst-collaboration-improve-understanding-financial-well-being/ [https://perma.cc/NP5S-ABDY].

243. *See* DFPI, *supra* note 104.

244. *See* UNSGSA FINTECH WORKING GRP. & CCAF, *supra* note 209, at 20–21.

245. *See* DFPI, *supra* note 104.

246. *Id.*

247. *See "FinTech Innovation at California's Newest Financial Regulator," Davis Wright Tremaine Webinar*, DAVIS WRIGHT TREMAINE LLP (Oct. 10, 2021), https://www.dwt.com/insights/2021/10/ofti [https://perma.cc/8LBR-GH7L].

248. *See Global FinTech Market Report 2021: Market Was Valued at $7301.78 Billion in 2020 - Forecast to 2026*, YAHOO! FIN. (Oct. 13, 2021), https://finance.yahoo.com/news/global-fintech-market-report-2021-130300659.html [https://perma.cc/3GWX-RGDM].

249. *See* Melford & Quan, *supra* note 242.

D. Responsiveness

Responsiveness is similar in key respects to reflexivity, in that both attributes address an institution or entity's capacity to change and adapt. As a new unit within the DFPI, the OFTI is not burdened with the years of established protocol and norms that may hinder development and progress in legacy organizations. Further, as a unit dedicated in part to research, it is obligated to keep its finger on the pulse of technological developments—and should respond accordingly in the advice it gives to various stakeholders.

To build on its inherent capacity for responsiveness, the OFTI should identify key empirical metrics that it can use to measure its effectiveness as a mediator between stakeholders. These might consist of comparative annual statistics, including the number of California jobs created in the fintech sector, the number of consumer complaints directed at fintech providers in the state, and the number of office hours attended by various participants. These metrics could be compared and shared with the public via the annual report mandated by section 90018 of the California Financial Code.

Finally, although the OFTI cannot set rules and regulations itself, it should relay the concerns of stakeholders to the rulemaking divisions of the DFPI, as it is favorably situated to have candid conversations with startups.[250] However, the OFTI should tread lightly in this area because of the risk of regulatory capture. In its engagement with market participants, it runs the risk of becoming overly sympathetic to firms at the expense of consumers. To that end, the OFTI should continue filling its staff with individuals with an established prior commitment to consumer protection.

V. CONCLUSION

There is an inherent tension between government regulation and innovation. Some lament that regulations stifle innovation and might even lead to the death knell of entire industries.[251] However, in the financial system at least, innovation is a "fundamentally neutral"

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250. Beyond being highly inclusive, the OFTI can relate to startups since it has a startup environment itself. *See* Benjamin Pimentel, *California Wants to Regulate Crypto. Meet the Woman in Charge.*, PROTOCOL (June 22, 2021), https://www.protocol.com/fintech/california-ofti-christina-tetreault [https://perma.cc/2PFK-JFK5].

251. *See* Derek Khanna, *Regulations Stifle Innovation*, THE HILL (Sept. 15, 2015, 1:00 PM), https://thehill.com/blogs/congress-blog/technology/253625-regulations-stifle-innovation [https://perma.cc/ZDG5-PKSG].

force.[252] In passing the CCFPL, the California legislature recognized the importance of innovation in financial services, while understanding that innovation is not beneficial per se.[253]

To drive only nondiscriminatory innovation that benefits consumers, California has opted for the "innovation hub" approach.[254] As compared to sandboxes, this technique has seen much more approval from consumer advocates.[255] Ultimately, California's approach resolves the dilemma between consumer protection and fostering innovation in favor of the former, which is appropriate for a regulatory entity. Striking the balance too far in favor of innovation opens the door to regulatory capture, and in the financial services context, history shows that unbridled innovation can precipitate crises.

The OFTI's efforts can serve as a model for other jurisdictions that want to signal receptiveness to innovation but see regulatory sandboxes as undermining important consumer protection goals. If the OFTI is successful, it could also serve as a model for innovation hubs serving other highly regulated industries in California that may be improved by technological innovation, such as health care and legal services.[256]

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252. *How Can Regulators Promote Financial Innovation While Also Protecting Consumers?*, PEW (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/reports/2018/08/02/how-can-regulators-promote-financial-innovation-while-also-protecting-consumers [https://perma.cc/M56G-5U7Q].

253. *See* discussion *supra* Section III.A.

254. *See supra* note 99.

255. *See supra* Section III.C.2.

256. As for legal services, however, the State Bar of California is taking a sandbox approach. *See Closing the Justice Gap Working Group*, STATE BAR CAL., https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group [https://perma.cc/NH8G-486H].