

FinTech Counsel's Checklists

1 Where to incorporate?

Checklist items for FinTech entrepreneurs to consider:

- a. Where do the founders (or similar entrepreneurs, key employees and business partners) want to live and work
- b. Presence of incubators, accelerators, business angels etc.
- c. Investor preferences
- d. Regulatory environment (tough or easy; special goodies for FinTech such as sandbox or other light touch regimes)
- e. (Extra-)territorial application of jurisdiction of incorporation (passport v. sandbox)
- f. Tax
- g. Employment (law and ability to find skilled personnel)
- h. General ease of doing business
- i. Government subsidies/financing for startup businesses
- j. Proximity of first-rate academic research institutions
- k. Proximity to technical infrastructure

2 How conduct regulatory analysis on a budget?

Checklist items for FinTech companies and investors to consider:

- a. Identify key jurisdictions
- b. Develop business model facts and acceptable alternatives
- c. Work on basic legal model (who is the customer, who is the supplier, who is the agent, who is the principal, who is a counterparty, what other legal/contractual relationships are needed): These are key facts for the regulator to assess your business!
- d. Check webpages of regulators for special FinTech guidance (e.g. German BaFin web form for FinTech inquiries and leaflets on 9 typical FinTech business models)
- e. Consult the Baker McKenzie FSR App available in the App Store
- f. Join a FinTech association
- g. Check whether competitors are regulated or whether the regulator intervened on a similar business (but beware: Small nuances in the facts can make a big difference!)
- h. Spend at least some money on a high level feasibility analysis before investing in a model that is subject to regulation
- i. Repeat process before expanding into another jurisdiction

3 What if your contemplated business model is regulated?

Options for FinTech companies to consider:

- a. Tweak it, e.g.,
 - i. payee agent model in the U.S.,
 - ii. limit model to specific asset classes,
 - iii. change role to technical provider
 - iv. avoid classical trigger points for regulation, e.g.
 1. dealing or advising in financial instruments,
 2. handling and holding client assets,
 3. classical bank business, such as taking deposits
 - v. concentrate on intermediation/aggregation models or on the "tech" side of FinTech
- b. Partner with licensed financial institution, e.g.
 - i. white label,
 - ii. reverse outsourcing,
 - iii. tied agent
- c. Pick jurisdiction where exceptions are available, e.g., sandbox in UK
- d. Regulatory arbitrage by incorporating a light touch jurisdiction
- e. Remember that the same legal solution may not work in all markets

4 Which other laws to consider and prioritize?

Checklist items for FinTech companies and investors to consider:

- a. Data privacy and security
- b. Intellectual property protection
- c. Fair advertising/competition
- d. Corporate law
- e. Employment
- f. Foreign law in key markets for future growth

5 How to regulate FinTech companies?

Considerations for legislatures and regulators:

- a. Start-up technology companies cannot realistically comply with traditional financial sectors laws and regulations; in the absence of exceptions or other viable options, start-up companies will either avoid the jurisdiction or break the law
- b. If domestic companies cannot legally offer new products or services within a particular jurisdiction, foreign offerings may satisfy domestic demand and enforcement and regulation becomes even more difficult
- c. If agencies do not enforce existing legislation evenly and predictably, they may distort competition and provide violators with additional defenses (unfair enforcement practices)

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