REGIONAL ENGLISH LANGUAGE OFFICE

U.S. Embassy Moscow

U.S. LEGAL WRITING:

SESSION 6: FINTECH LAW & VOCABULARY

U.S. Department of State

Facilitated By:

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FinTech Laws & Regulations

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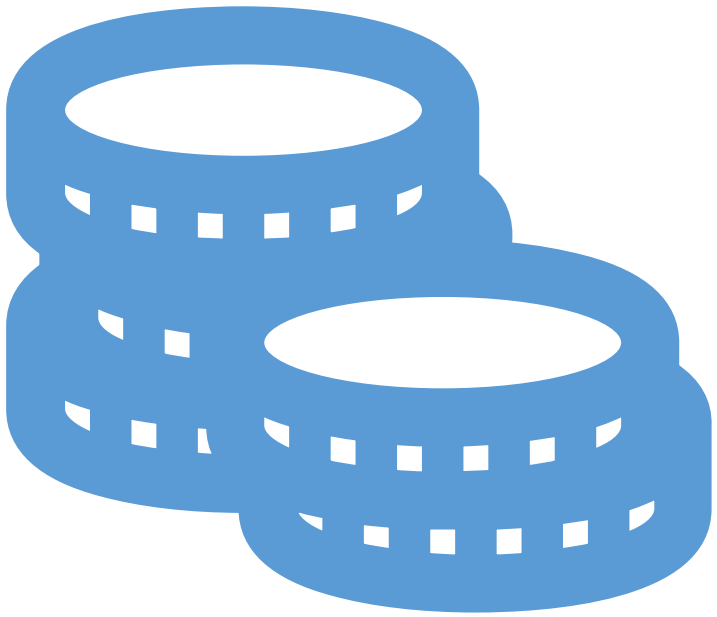
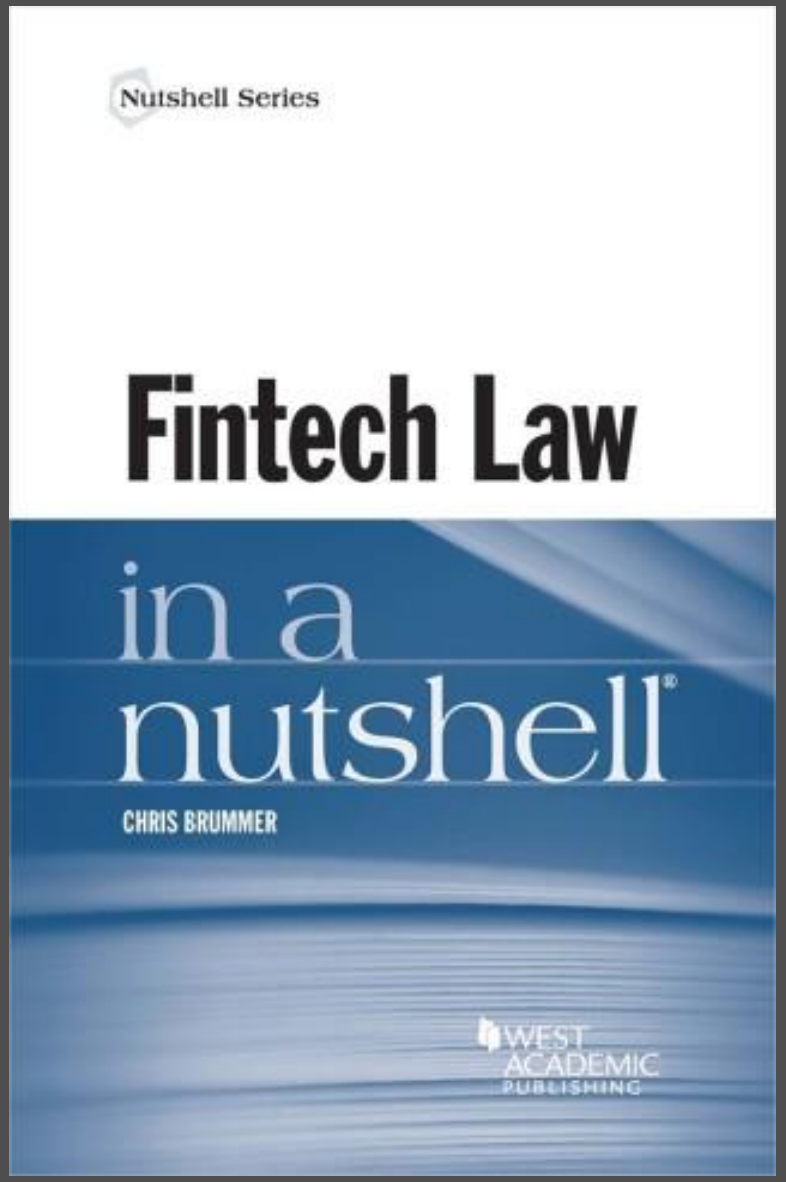


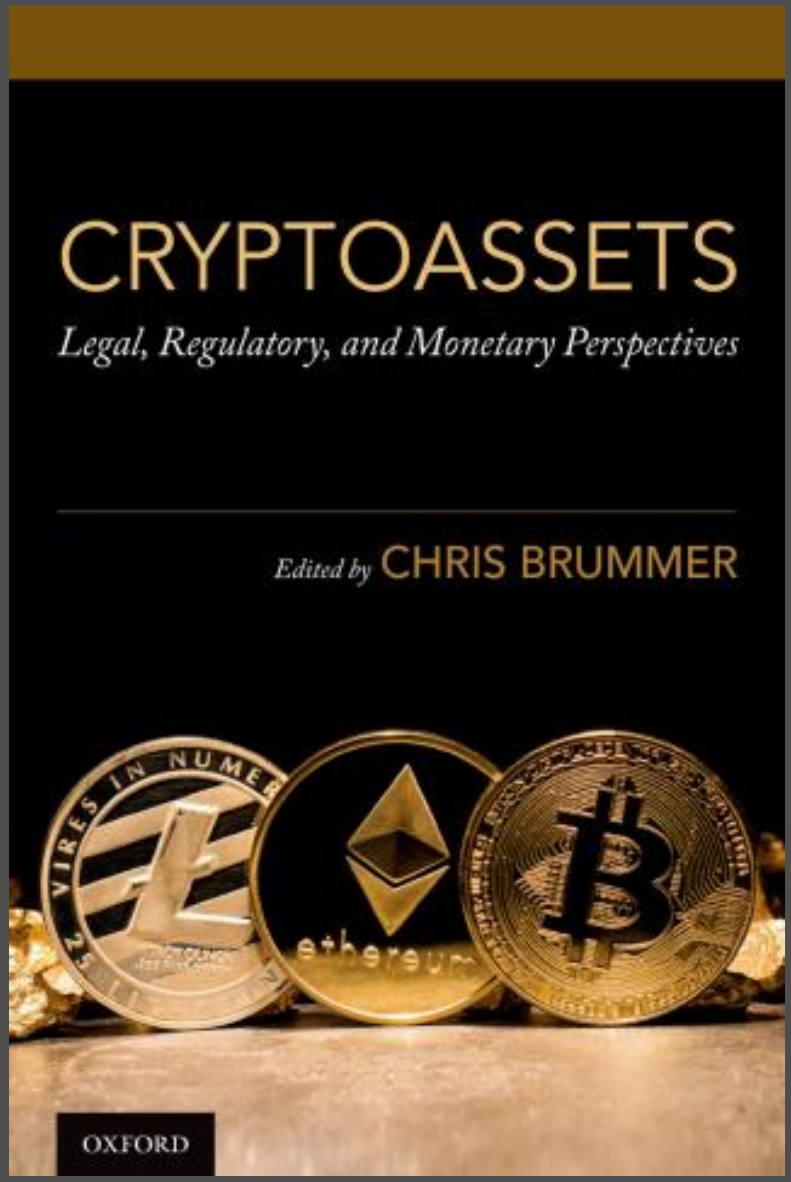
- **Non-Fungible Token**

- What is an example of NFT?

- Non-fungible tokens can digitally represent any asset, including online-only assets like digital artwork and real assets such as real estate. Other examples of the assets that NFTs can represent include in-game items like **avatars, digital and non-digital collectibles, domain names, and event tickets**.

(Sharma, 2022)





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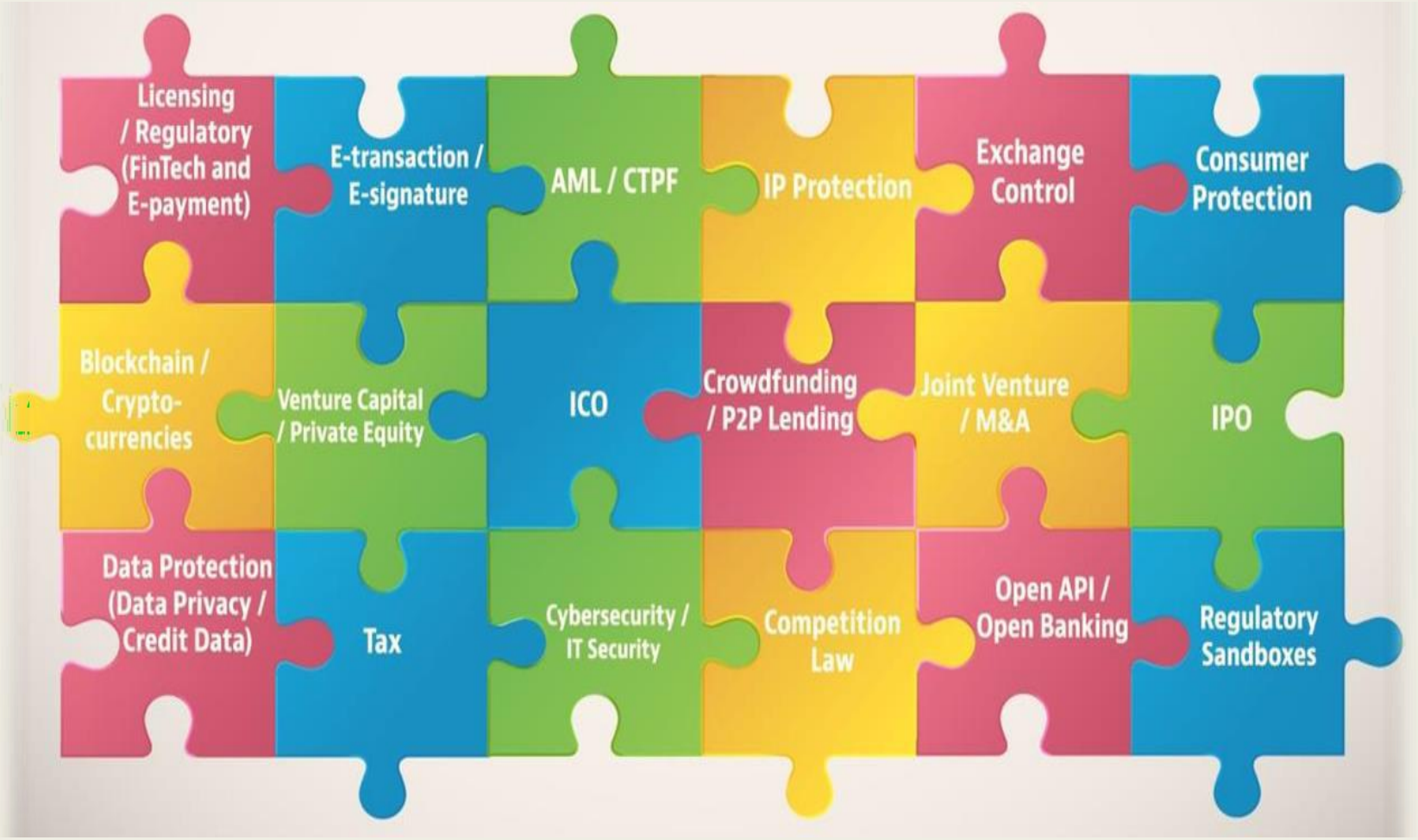
Regulating Financial Innovation

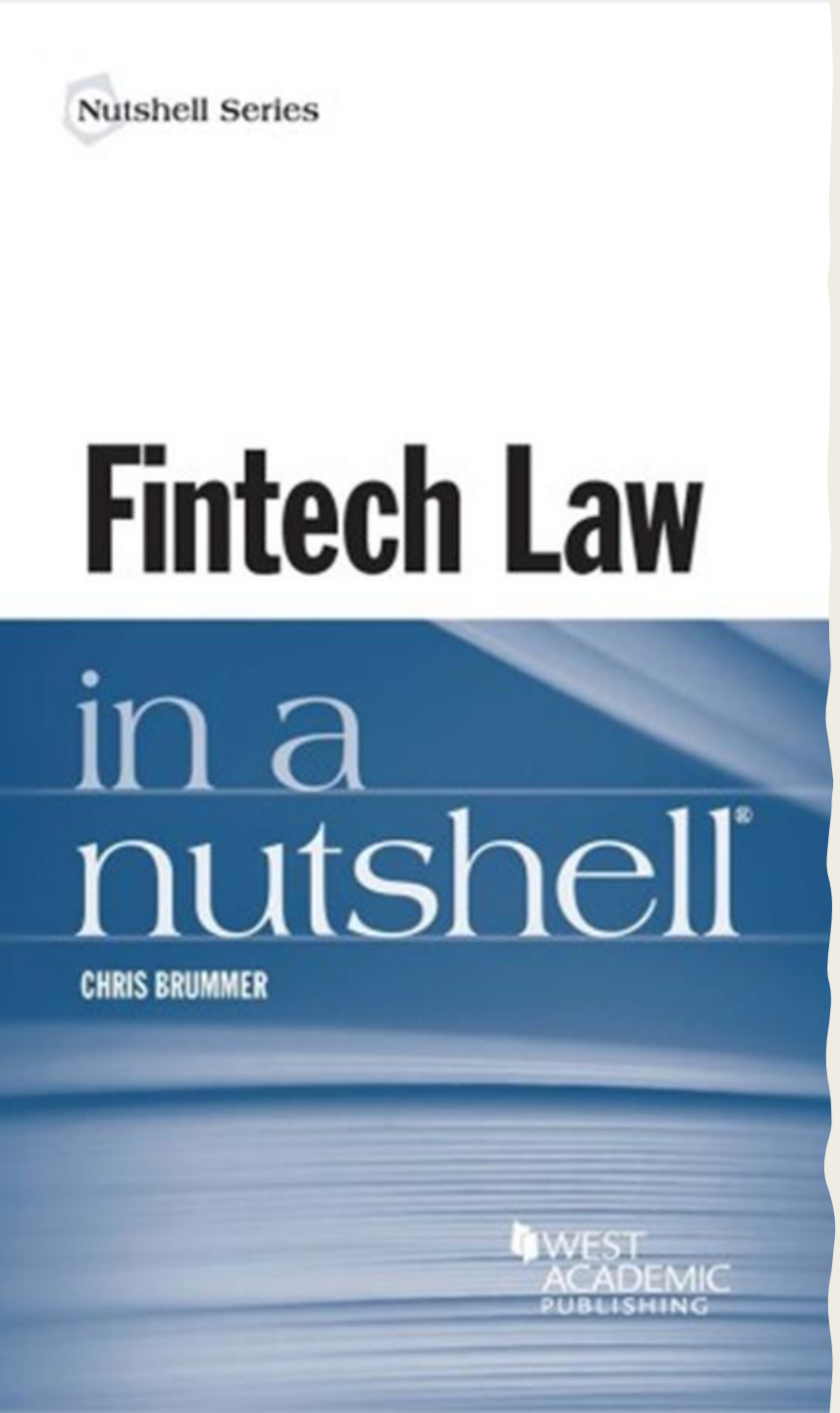
- As central banks around the world responded to the failures of once legendary financial institutions like Lehman Brothers and AIG by pumping massive amounts of money into teetering firms, many bystanders became skeptical of government-issued currencies, and the global financial system that supports it. So, one person working under the pseudonym of Satoshi Nakamoto—or persons, we really don't know since he/she/they launched the project anonymously—decided to do something about it by creating an independent, nongovernmental financial system.

- This new system would have its own currency as well, which Nakamoto called "Bitcoin," and would leverage state of the art cryptographic tools, along with a diffuse "decentralized" array of far-flung computers, to memorialize transactions.

(Brummer, 2019)

FinTech Legal Framework





1. CROWDFUNDING

- Crowdfunding refers to a range of efforts employed by entrepreneurs to finance their ventures through small contributions collected from a large number of individuals. Though the strategies are diverse and can involve very different forms of consideration for investors, what unites them is that fundraises are invariably conducted via an online platform and seek to leverage the wisdom of the “crowd” in helping to establish and even promote their projects.

Brummer, 2020, p.51

TYPES OF CROWDFUNDING

Crowdfunding is a term of art associated with three different kinds of fundraising. Some types of crowdfunding are described as “donation-based crowdfunding” because the persons providing capital are not expecting anything in return for their capital. Instead, funders either providing a gift or an interest free loan.

1. Donation-based
2. Rewards-based
3. Securities-based

(Brummer, 2019)

TYPES OF CROWDFUNDING

1. Donation-based crowdfunding has its origins in microfinance. In 1976, a young economics professor named Muhammad Yunus lent $27 to forty-two women in a nearby village in Bangladesh to finance their small business making bamboo furniture. At that time, the poor could not borrow from banks, and money lenders charged interest rates that blocked people from accessing capital. The loan was, however, fully repaid, and Yunus would develop a practice of funding and making loans, and ultimately launching the Grameen Bank—which today has over 9 million borrowers and a repayment rate of over 99 percent.

(Brummer, 2019)

TYPES OF CROWDFUNDING

2. Rewards-based crowdfunding a popular form of crowdfunding that originated in the United States. As with donation-based crowdfunding, capital-providers are not looking to maximize their wealth by demanding an equity interest in a company or interest payments on a loan. However, in the case of rewards-based crowdfunding, contributors are seeking something else in return—"rewards" often consisting of prototypes of products to discounts for purchases or sneak peaks at varying services or even video games. As such, it is usually viewed as an alternative source of financing for small- and medium-sized businesses and entrepreneurs.

(Brummer, 2019)

TYPES OF CROWDFUNDING

3. Securities-based crowdfunding: When firms engage in this kind of crowdfunding, they offer online participants an opportunity to own an equity stake in a start-up venture, as is the case with stock, or to receive interest payments from debt issued by the start-up, as in traditional bond offerings. Because the stock and bonds are understood to be securities under the Securities Act of 1933, and investors are seeking profits from their involvement, this form of crowdfunding has been designated “securities-based” crowdfunding.

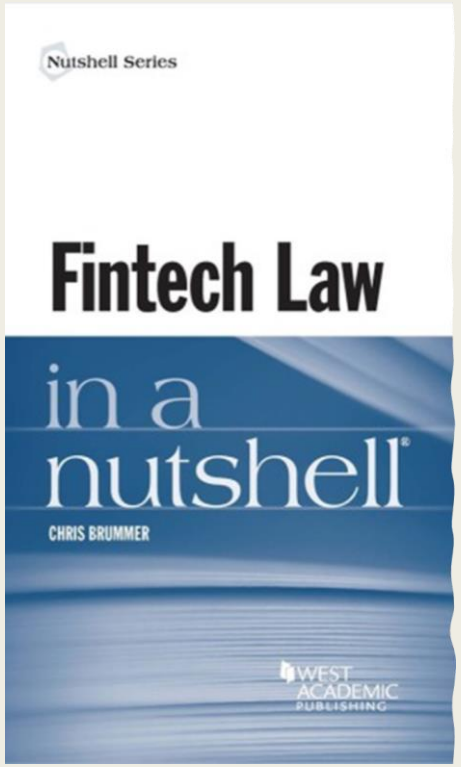
(Brummer, 2019)

REGULATION OF CROWDFUNDING

- Any transaction that raises money by selling “securities” is subject to U.S. securities laws.
- Most notably, issuers of securities must register their securities, which requires extensive documentation in a registration statement.
- Registration must typically take place prior to the marketing of a security.
- A registration statement is then subject to review by the SEC before it becomes effective and securities can be bought and sold.

(Brummer, 2019)

REGULATION OF CROWDFUNDING



Securities transactions are also embedded in a range of antifraud protections that go beyond common law obligations and duties.

Traditional donation- and rewards-based crowdfunding do not require compliance with securities laws in the United States because funders are not seeking profits.

Their ventures consequently do not involve stocks or bonds or “investment contracts,” a catch-all category of securities.

(Brummer, 2019)

2. DIGITAL ASSETS

- The term **“digital asset”** is used to describe a heterogeneous group of financial products that are digital representations of value, transferred and memorialized via cryptographic tools and resident on distributed ledgers.
- **Cryptography** refers to algorithmic techniques used to protect information by encrypting it into formats accessible to individuals only if they possess a special key.
- **Distributed ledgers**, meanwhile, are databases that store records that are confirmed through a peer-to-peer network of computers.
- A special kind of distributed ledger system, called a **blockchain**, links series of transactions together as time goes on.

(Brummer, 2019)

2. DIGITAL ASSETS

Digital assets can be used as a medium of exchange,

keys for unlocking or accessing an online service, or

consideration given to investors who invest their capital in certain digital ventures, or

all three at once.

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

Digital assets are digital representations of value that use distributed ledgers, called **blockchains**, to memorialize transfers of ownership and other transactional information.

To provide a backdrop to understanding what this means in practice, it is first important to comprehend the three most common uses of digital assets.

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

DIGITAL CURRENCIES AS “MONEY”

- Medium of Exchange (Harcourt, 2013)
- Measure of Value (Bullard, 2013)
- Standard of Deferred Payments, (Tilak, 2011)
- Store of Value (Education, 2012)

DIGITAL UTILITY TOKENS

DIGITAL SECURITY TOKENS

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

1. DIGITAL CURRENCIES AS “MONEY”
    a. Medium of Exchange (Harcourt, 2013)
    b. Measure of Value (Bullard, 2013)
    c. Standard of Deferred Payments, (Tilak, 2011)
    d. Store of Value (Education, 2012)

General characteristics of money

- **I.** **Durability** is when an item is able to withstand all the hardships and is still able to maintain to be undamaged and usable after a long term of usage. (SubraMoney, 2011)
- **II.** **Portability**, which also serves as a medium of exchange, (Money Characteristics, 2011) means that money can be movable from place to place to be used as monetary transaction to be exchanged for goods and services.
- **III.** **Divisibility** is a characteristic which means the money can be divided into small units and that it can be used in exchange for goods and services. (Money Characteristics, 2011)

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

1. DIGITAL CURRENCIES AS “MONEY”

General characteristics of money (continued)

IV. **Uniformity** means that all types of the same denomination of money must consist of purchasing power. It is a characteristic to perform the function of standard of deferred payments. (SubraMoney, 2011)

V. **Limited supply** is a characteristic which helps in storing the value of money, meaning that constraints on the amount of money in the monetary circulation ensure that values remain constant for the currency. (SubraMoney, 2011)

VI. **Acceptability** supports the function of medium of exchange. The essential quality of money is that it must act as an item being acceptable to all, without having any hesitation in the exchange for goods and services. (SubraMoney, 2011)

VII. **Non-counterfeitability** which functions as the store of value means that money cannot be easily duplicated. (Money Characteristics, 2011)

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

2. <u>DIGITAL UTILITY TOKENS</u>

Digital assets are not just used as currencies. They can also be specifically designed to access a specific service or system.

For example, a person holding a particular kind of digital asset may be able to use it to access an online cloud system that was itself specially designed so that only holders of the asset can use it—much like a person might have to use a special token in a video game parlor to play a video game. In such circumstances, the digital asset is routinely referred to as a "utility token." Notably, this particular kind of digital asset is not necessarily intended to function as an instrument for payments, even though tokens might hold value as transferrable instruments; instead, they are meant to be deployed or used in order to unlock a 'utility' for the token holder.

(Brummer, 2019)

THREE USES OF DIGITAL ASSETS

3. DIGITAL SECURITY TOKENS

Digital assets can be used as consideration for investments as **‘security tokens’** in much the same way that individuals receive stocks and bonds for investments. In these situations, a developer offers investors a token in return for providing capital that bestow rights akin to those normally associated with stocks and bonds—like dividends, voting rights or interest rate payments. As discussed in more detail below, in such circumstances, the tokens could be determined to be securities under federal securities laws and subject to all accompanying rules and regulations.

(Brummer, 2019)

DISTRIBUTED LEDGERS, BLOCKCHAINS, AND CONSENSUS MECHANISMS

- Regardless of use, digital assets invariably rely on special distributed ledger technologies, called blockchains, as operating systems.

- The term “distributed ledger” refers to a larger, overarching category of technologies that consist of databases that distribute and store records in peer-to-peer networks of computers for all network users.

(Brummer, 2019)

BLOCKCHAIN GOVERNANCE

- Blockchains, meanwhile, are a species of distributed ledgers that maintain an accepted and trusted record of transactions through a decentralized network of users. Major blockchains include the Bitcoin Blockchain and the Ethereum Blockchain.

- Importantly, blockchains do not record individual transactions one at a time. Instead, series of transactions are stored as data in blocks. Because the formation of blocks arises through computer programs, rules are necessary to show when and under what circumstances a new block can be added to a preexisting one to create a chain of blocks, or a blockchain.

(Brummer, 2019)

BLOCKCHAIN GOVERNANCE

- Forks, like any software upgrade or change to a blockchain, are made possible by a blockchain's underlying **governance**. Yet changes to a blockchain's protocol are rarely a matter of a simple vote by holders of a digital asset or the board of a company. Instead, changes to blockchain protocols are usually the result of the interaction of several actors: the developers of the blockchain's code, miners, and finally, holders of the digital asset.

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

- Digital assets are subject to a number of potential regulatory regimes and frameworks.

- The first, and most obvious, is federal securities law. In short, where digital assets are held to be investment contracts that fall within the definition of a security, the digital assets as well as individuals transacting in them can become subject to a range of registration, disclosure obligations, and antifraud regimes mandated by U.S. securities laws.

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

1. DIGITAL ASSETS AS “STOCKS” AND “BONDS”
2. DIGITAL ASSETS AS “INVESTMENT CONTRACTS”
3. ICOs (AND ICO TOKENS) AS SECURITIES
4. THE REVES TEST

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

1. DIGITAL ASSETS AS “STOCKS” AND “BONDS”

- The SEC’s oversight generally extends to all financial products enumerated under section 2(a)(1) of the 1933 Securities Act.

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

2. DIGITAL ASSETS AS “INVESTMENT CONTRACTS”

- With core concepts like “stock” and “bonds” inapplicable, the primary means by which digital assets are subject to the U.S. securities laws involves whether or not they are considered to be an “investment contract.” This is a catchall category under section 2(a)(1) of the Securities Act of 1933 with origins in blue sky laws adopted in some of the states before the federal securities laws were enacted. Notably, however, the term “investment contract” is not defined in the statute. Instead, the definition for purposes of U.S. securities law is a product of the landmark 1946 Supreme Court case, SEC v. Howey.

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

3. ICOs (AND ICO TOKENS) AS SECURITIES

Although the Howey test may have unclear applications for Ether and Ripple, its implications are more certain where individuals seek to fund their for-profit ventures by asking investors to put capital at risk in return for digital assets that represent equity-like interests or grant financial rights akin to those associated with stocks and bonds. Such ventures are routinely described as “Initial Coin Offerings.”

The SEC has asserted jurisdiction over many ICOs pursuant to Howey. In July 2017, the SEC published a high-profile analysis pursuant to section 21(a) of the Securities Exchange Act of 1934 examining whether ICOs involve, or at least could potentially involve, the issuance of securities.

(Brummer, 2019)

THE REGULATORY FRAMEWORK FOR DIGITAL ASSETS: THE SEC

4. THE REVES TEST

   Supreme Court case Reves v. Ernst & Young—decided in 1990 and which specifically tackles the issue of when certain debt instruments, or “notes,” are securities.

(Brummer, 2019)

3. ROBO-ADVISORS

- Robo-advisors—automated computer programs used to offer investment advice and related services—are changing the landscape of financial services by offering retail investors access to sophisticated data-driven investment advice. Having evolved from simple calculators to apps capable of handling highly complex issues—such as tax-loss harvesting and retirement planning—robo-advisors now manage more than $200 billion of investor funds.

(Brummer, 2019)

ROBO-ADVISORS

A STATUTORY OUTLINE

As entities that leverage digital platforms and software systems to create investment portfolios for their users, robo-advisors implicate a number of major regulatory regimes. The first is that associated with the Investment Advisers Act (Advisers Act), which applies to investment advisers in securities markets. The Advisers Act is a product of a New Deal era study conducted by the SEC that identified potential abusive practices by investment companies and trusts in the dispensation of advice.

(Brummer, 2019)

ROBO-ADVISORS

ROBO-ADVISORS AND THE INVESTMENT ADVISER ACT

1. WHAT ARE INVESTMENT ADVISERS?
2. INVESTMENT ADVISERS AS FIDUCIARIES
3. REGISTRATION PROCESS AND DISCLOSURES FOR ROBO-ADVISORS
4. CLIENT DISCLOSURES
5. ADVERTISING RESTRICTIONS
6. ANTIFRAUD OBLIGATIONS AND ENFORCEMENT
7. SUITABILITY REQUIREMENTS
8. SUITABILITY AND THE INVESTMENT COMPANY ACT
9. THE DUTY OF BEST EXECUTION
10. EFFECTIVE COMPLIANCE PROGRAMS

(Brummer, 2019)

ROBO-ADVISORS

ROBO-ADVISORS AND THE EXCHANGE ACT OF 1934

Broker-dealers are subject to rules under the Exchange Act of 1934 which can have considerable consequences for robo-advisory transactions. The scope of such rules are broad—section 3(a)(4)(A) defines a "broker" broadly as "any person engaged in the business of effecting transactions in securities for others." In order to be deemed a broker, a person or entity must be consistently in the business of effectuating securities transactions. The SEC has interpreted "effecting transactions" to include any participation "at key points in the chain of distribution," meaning structuring, marketing, or executing a securities transaction. Meanwhile, section 3(a)(5)(A) of the Exchange Act of 1934 defines a "dealer" as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." Broker-dealers are thus firms engaged in the business of trading securities for their own account or on behalf of customers.

(Brummer, 2019)

4. HIGH FREQUENCY TRADING

- **High frequency trading (HFT),** one of the most high profile and debated fintech industries, denotes a range technical operations designed to facilitate the speedy (and successive) input of buy and sell orders on stock markets. As such, it is associated with advances in information technology that have led to transformation of stock exchanges from physical, warehouse-like facilities to electronic, digital marketplaces where trades are executed by computers around the world.

- Though an integral feature of today's capital markets, HFT has been controversial since its coming of age in the early 1990s.

(Brummer, 2019)

HIGH FREQUENCY TRADING

Proponents argue that it allows individuals to respond quickly to new information. They also argue that the successive and higher volume of activity enabled by HFT enhances market liquidity and helps assure investors that there will be a ready and willing counterparty available whenever they wish to buy or sell stocks. With more trading activity, the theory goes, HFT can help reduce the difference between the highest price that a buyer is willing to pay for an asset and the lowest price that a seller is willing to accept.

(Brummer, 2019)

HIGH FREQUENCY TRADING

Opponents, on the on the other hand, contend that the benefits of HFT are overstated, and are perhaps even illusory insofar as the liquidity it creates can vanish just as quickly as it appears if and when traders choose to retreat from markets. Moreover, HFT can ignite market volatility (and enable crashes) when software trading programs act in concert with one another to bid up stocks or collectively dump them on the market. Critics also point out that HFT can make possible new ways for sophisticated actors to take advantage of slower retail investors and make trades in advance of their orders to illegally profit from them.

Regulatory responses to these risks to market integrity have evolved over time, creating a tapestry of overlapping requirements for HFT firms.

(Brummer, 2019)

HIGH FREQUENCY TRADING

Considerations:

1. THE TRADITIONAL (HUMAN) STOCK EXCHANGE INFRASTRUCTURE
2. THE ELECTRONIFICATION OF MARKETS—AND THE NEW ROLE OF SPEED
3. THE DANGERS OF SPEED, AND AUTOMATED TRADING
4. DEFINING HIGH FREQUENCY TRADING
5. HFT STRATEGIES PERTINENT TO REGULATION
6. FEDERAL RULES RELEVANT TO HFT

(Brummer, 2019)

HIGH FREQUENCY TRADING

RULES AGAINST MARKET MANIPULATION, FRAUD, AND SPOOFING

High frequency traders who run afoul of federal laws can face both civil and criminal sanctions. The SEC and CFTC file enforcement actions alleging violations of federal statutes and agency regulations. These actions can result in fines, disgorgement, injunctions, restrictions on trading activity, and publicized settlements. The DOJ initiates proceedings for criminal violations of federal securities statutes, and convicted offenders may face fines and/or imprisonment.

(Brummer, 2019)

HIGH FREQUENCY TRADING

RULES AGAINST MARKET MANIPULATION, FRAUD, AND SPOOFING

Exchange Act of 1934's Prohibition Against Deceptive Devices

The Exchange Act of 1934 is one of the primary federal statutes governing the purchase and sale of securities in the United States. The Exchange Act of 1934 created the SEC to regulate market participants by monitoring market activity, issuing rules, and enforcing violations of the rules. The SEC has acknowledged that some forms of HFT are legitimate and provide a possible benefit to the market by reducing bid-ask spreads and pricevolatility. However, certain HFT arbitrage strategies implicate antifraud and manipulation laws and have led to successful prosecutions resulting in criminal and civil penalties.

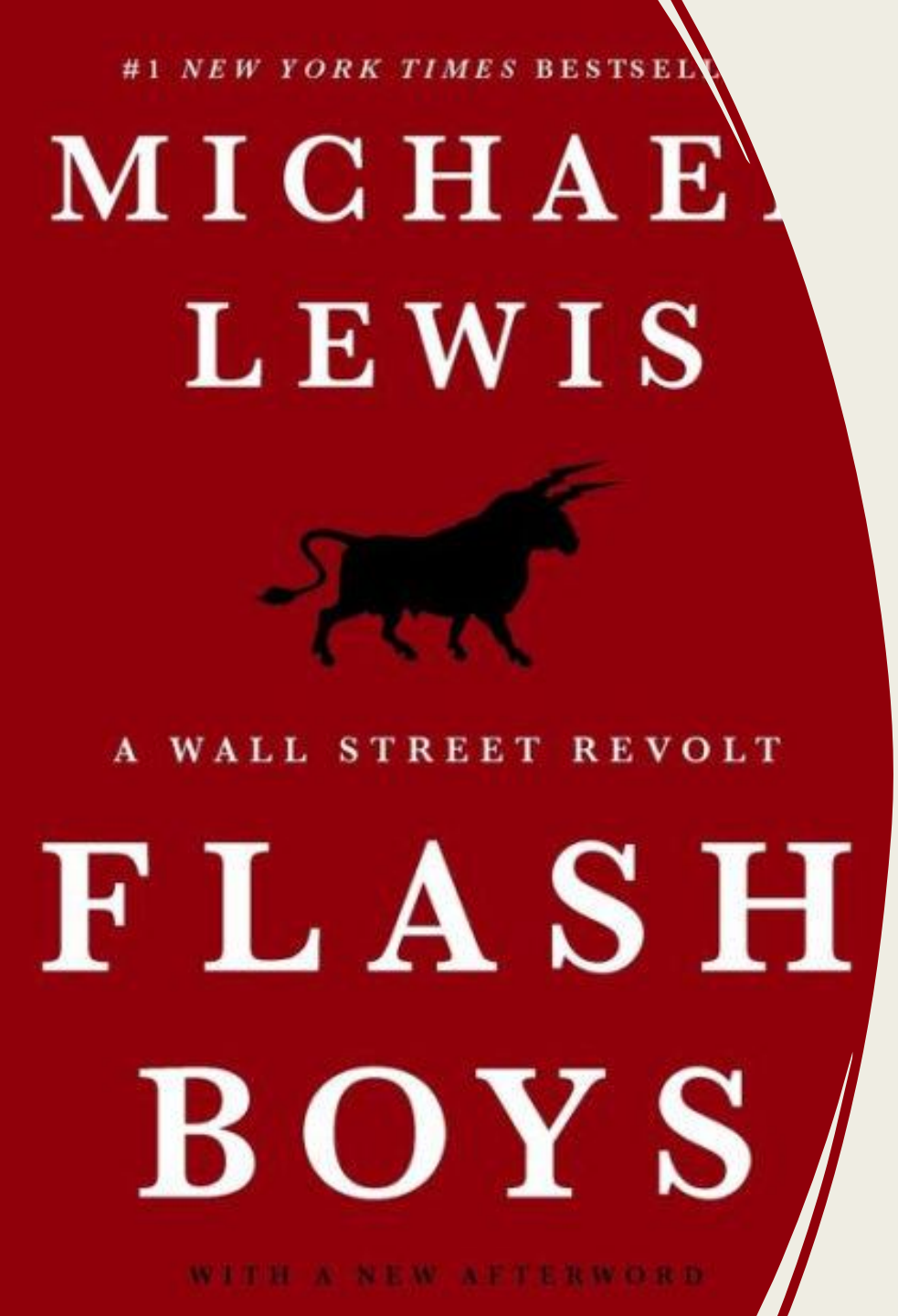
(Brummer, 2019)

HIGH FREQUENCY TRADING

MAINTAINING A LEVEL PLAYING FIELD

HFT strategies often require “low latency”—high speed executions that allow traders to profit from short-lived fluctuations in the market value of securities and similar products. Accordingly, high frequency traders have sought closer physical and virtual access to trading exchanges to reduce transmission delays and act before the broader market. In response, federal regulators have issued rules aimed at ensuring that market actors compete on a level playing field.

(Brummer, 2019)



- ***Flash Boys: A Wall Street Revolt*** is a book by the American writer Michael Lewis, published by W. W. Norton & Company on March 31, 2014. The book is a non-fiction investigation into the phenomenon of high-frequency trading (HFT) in the US financial market, with the author interviewing and collecting the experiences of several individuals working on Wall Street. Lewis concludes that HFT is used as a method to front run orders placed by investors. He goes further to suggest that broad technological changes and unethical trading practices have transformed the U.S. stock market from "the world's most public, most democratic, financial market" into a "rigged" market.

5. MARKETPLACE LENDING

- One of the most quickly evolving and important areas of fintech involves what is alternatively described as “marketplace,” “online” and “peer-to-peer” lending. In contrast to traditional loans, where individuals seeking credit apply for a loan through the local branch of a nearby commercial bank or credit union, marketplace lending platforms ultimately connect borrowers with online investors who may be non-bank lenders like asset managers, mutual and hedge funds, venture capitalists and more.

(Brummer, 2019)

MARKETPLACE LENDING

Lending activities and even credit modeling can be subject to federal and state consumer protection and securities laws, and their operations can fall within the oversight of many federal authorities including the CFPB, OCC, FDIC, SEC, and the FTC.

CONSUMER PROTECTION LAWS

Interest rates are only one narrow sliver of rules impacting marketplace platforms. Online lenders—including portfolio and marketplace platforms—must also comply with a number of laws designed to promote transparency and truthful information in the lending process and to protect consumers from unfair and abusive behavior. Below are the most important federal laws for participants in marketplace lending.

(Brummer, 2019)

MARKETPLACE LENDING

CONSUMER PROTECTION LAWS

1.Truth In Lending Act

2.Electronic Funds Transfer Act

3.Prohibitions Against Unfair, Deceptive, And Abusive Acts And Practices

4.Fair Credit Reporting Act

5.The Protection Of Applicant Information Under The Gramm- Leach-bliley Act

(Brummer, 2019)

6. MOBILE PAYMENTS

- Mobile payments represent one of the most visible forms of fintech transforming the financial marketplace. Every day shoppers routinely use their phones and other mobile devices to connect to their debit and credit cards to pay for goods in stores; consumers wire money to one another or to merchants using their watches or by logging in to their banks on their tablets; and store customers use plastic cards and digital wallets funded with cash transferred from other sources to purchase goods and services. The popularity of such transactions is growing and is poised to reach unprecedented heights, with payments volume ballooning from $75 billion in 2017 to a predicted $503 billion in the next several years.

(Brummer, 2019)

MOBILE PAYMENTS

Despite the ostensible simplicity of such transactions, the interaction of law in this space can be complex. This is because the contexts in which they are deployed can vary significantly. In some instances, mobile technologies work in conjunction with the infrastructures supporting credit cards, and in others, debit cards. They can also utilize software designed to replace card networks altogether, such that customers can load money onto digital accounts, and then use their phones to spend the money loaded onto them. Mobile devices may even operationalize their own in-house lending services. For each instance, varying federal laws may apply, along with some important state statutes for money transmitters, and key consumer protection and disclosure obligations.

(Brummer, 2019)

MOBILE PAYMENTS LAWS

A. Mobile Devices, Payment Cards, And The Law
B. The Truth In Lending Act And Regulation Z
C. The Card Act
D. Electronic Fund Transfer Act And Regulation E
E. The Prepaid Rule
F. Automated Clearing House Transactions
G. Unfair, Deceptive, Or Abusive Practices: UDAP And UDAAP
H. Fair Credit Reporting Act
I. Federal Regulations For Deposit Brokers
J. Federal Bank Secrecy Act
K. State Money Transmitter Laws

(Brummer, 2019)

7. ANTI-MONEY LAUNDERING AND COMPLIANCE

- An increasingly critical component of fintech law is the interface of fintech products and services with rules designed to deter money laundering and financing of criminal and terrorism activities. No body of law is more important than that enshrined in the Bank Secrecy Act (BSA) and its subsequent legislative amendments.

(Brummer, 2019)

ANTI-MONEY LAUNDERING AND COMPLIANCE

Bank Secrecy Act (BSA) and its subsequent legislative amendments.

Officially designated as The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970, the BSA requires that entities deemed to be “financial institutions” maintain appropriate records of covered transactions and file certain reports about potentially risky or economically significant transactions. Later amendments also require that financial institutions design and maintain programs to verify the identities of their customer bases. Collectively, such initiatives are intended to lend more transparency to financial markets, to assist in criminal investigations, and to promote national security activities.

(Brummer, 2019)

ANTI-MONEY LAUNDERING AND COMPLIANCE

Bank Secrecy Act (BSA) and its subsequent legislative amendments.

A. REPORTING REQUIREMENTS UNDER THE BANK SECRECY ACT
B. THE PATRIOT ACT
C. OFFICE OF FOREIGN ASSETS CONTROL COMPLIANCE
D. PENALTIES FOR VIOLATING THE BSA
E. THE BSA AND NON-BANK “FINANCIAL INSTITUTIONS”
F. VIRTUAL CURRENCIES AND THE BANK SECRECY ACT: THE FRAMEWORK
G. FATF GUIDELINES AND THE “TRAVEL RULE”

(Brummer, 2019)

ANTI-MONEY LAUNDERING AND COMPLIANCE

G. FATF GUIDELINES AND THE “TRAVEL RULE”

On June 21, 2019, the Financial Action Task Force (FATF), an intergovernmental standard setting body devoted to combating money laundering, released guidance designed to eventually mandate that “virtual currency service providers” comply with new reporting requirements.

The guidance, which is intended to be adopted by FATF member countries as binding domestic law, will require covered entities to pass to one another specified originator and beneficiary information whenever cryptoassets are transferred. As such, it is inspired by the BSA’s “Travel Rule,” which requires financial institutions to pass on certain information where fund transmittals are made involving more than one financial institution. 31 CFR 103.33(g).

(Brummer, 2019)

8. CYBERSECURITY

- Cybersecurity has become one of the principal challenges of financial companies, and fintech firms in particular, as an ever-increasing array of online and digital risks threaten data and information technology systems. Online banking can expose customers to hackers who can access sensitive financial information, just as digital wallets and mobile phones can open ports of entry for nefarious actors bent on stealing customer funds or using customers' credit without their knowledge. All the while, fintech firms face the invariable risk by insiders who might abuse their access to internal systems to steal and then sell information against company policy and in the absence of customer consent.

(Brummer, 2019)

CYBERSECURITY

A. DEFINING CYBERSECURITY

“Cybersecurity” is a new addition to the U.S. legal lexicon. The first time that a published U.S. court opinion even used the word was in a footnote to a 2007 Seventh Circuit opinion.2 And though there has been a steady increase in rules and regulations referencing cybersecurity, the term is undefined and deployed in a variety of different contexts, even among financial regulators and authorities.

(Brummer, 2019)

CYBERSECURITY

A. DEFINING CYBERSECURITY

Cybersecurity law is designed to respond to such cybersecurity threats—which can themselves have variable scope and depth, and as such drive varying levels of regulatory and legal responses. Individualized threats are threats that primarily impact a single firm or its customers. Most traditional data breaches fall into this category, when sensitive information of or relating to customers is leaked to an unauthorized party, such as through insufficient security controls. While the causes of these kinds of losses of confidentiality vary widely—including phishing, SQL injection (a malicious cyberattack aimed at data applications), lost unencrypted laptops—the impacts—technical, financial, and reputational—are generally limited to the firm and those customers whose data was breached.

(Brummer, 2019)

CYBERSECURITY

B. CYBERSECURITY FRAMEWORKS

Market and NGO responses to cybersecurity threats predate U.S. legislative responses, and information systems professionals and consultants have designed a number of guidelines, called “cybersecurity frameworks,” which delineate policies and procedures for managing and protecting organizational assets vulnerable to technological threats. These frameworks serve as flexible guidelines that allow for reiterative and constant revision in light of evolving market, technological, and regulatory developments. They are intended to be tools for IT professionals and managers.

(Brummer, 2019)

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B. CYBERSECURITY FRAMEWORKS

Cybersecurity frameworks are highly popular and influential sources of cybersecurity norms. The Financial Industry Regulatory Authority (FINRA) observed in a 2015 study of broker-dealers and exchanges that nearly ninety percent of firms falling under its jurisdiction use one or more of three following frameworks in developing their cybersecurity systems:

(Brummer, 2019)

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C. The Federal “Cooperative” Framework: Cybersecurity Act Of 2015
D. The Federal Trade Commission Act’s UDAP Prohibitions
E. The Dodd-frank Act’s UDAAP Prohibitions
F. Gramm-leach-bliley Act
G. FCRA And FACTA Disposal Rules
H. Identity Theft Red Flags Rules
I. Sec Guidance And Compliance Obligations
J. Contractual And Self- Regulatory Obligations
K. State Law

(Brummer, 2019)

Thank you!

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