



**COUNTRY
COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

Bahamas FINTECH

Contributing firm

Higgs & Johnson



Christel Sands-Feaste

Partner | csands-feaste@higgsjohnson.com

Alexandra T. Hall

Partner | ahall@higgsjohnson.com

Andre Hill

Associate | ahill@higgsjohnson.com

This country-specific Q&A provides an overview of fintech laws and regulations applicable in Bahamas.

For a full list of jurisdictional Q&As visit legal500.com/guides

BAHAMAS FINTECH



1. What are the sources of payments law in your jurisdiction?

The sources of payments law in the Commonwealth of The Bahamas (The Bahamas) are the Central Bank of The Bahamas Act, 2020 (CBA 2020), the Payment Systems Act, 2012 (PSA), the Payment Systems (Oversight) Regulations, 2012, the Payment Instrument (Oversight) Regulations, 2017 (PIOR), the Bahamian Dollar Digital Currency Regulations, 2021 (BDDCR), the Exchange Control Regulations Act, 1952 and the Exchange Control Regulations, 1956. From a regulatory perspective, the Central Bank of The Bahamas (Central Bank) is responsible for (i) regulating payment systems, (ii) the promotion, establishment and oversight of a safe, sound and efficient national payment system and (iii) the formulation and implementation of a national payment system policy for The Bahamas. The prior approval of the Central Bank must be obtained for any person to organize and operate a payment system and a license must be obtained from the Central Bank for any person other than a licensed bank or trust company, to issue electronic money. For this purpose, a payment system is any formal arrangement with common rules and standardized arrangements for the execution of transfer orders between participants, including a clearing house, the settlement of payments relating to securities, or for the processing, clearing, or settling of payment transactions or payment messages between (a) three or more participants or (b) two or more participants, if the arrangement between the participants is designated by the Central Bank as a payment system (section 2, PSA). "Electronic money" is defined in the PIOR as electronically stored monetary value as represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions and which is accepted as a means of payment by persons other than the issuer, and includes monetary value stored magnetically or in any other tangible or intangible device (such as a SIM card or software) (regulation 2, PIOR). In addition to the general authority in respect of payment systems, the Central Bank has the sole authority to (i) issue Bahamian Dollar Digital Currency (BDDC) (which constitutes legal tender in The Bahamas

at its face value); (ii) determine the amount of BDDC in circulation at any time and (iii) the amount of BDDC distributable by any wallet provider at any time. Any person providing wallet services in respect of BDDC must be registered with the Central Bank as a wallet services provider. For payments in foreign currency, exchange control restrictions exist in The Bahamas, which require that "residents" for Exchange Control purposes, obtain the prior approval of the Central Bank to deal in foreign currency.

2. Can payment services be provided by non-banks, and if so on what conditions?

Under the PIOR, non-banks are permitted to provide payment services but must be structured as a company incorporated under the Companies Act, 1992 (CA), and duly licensed by the Central Bank. In this context, payment services are services enabling cash deposits and withdrawals, execution of payment transactions, the provision of money transmission business, and any other services which are incidental to money transmission, including the issuance of electronic money and electronic money instruments (regulation 2, PIOR). Under the PIOR, in the absence of a separate license, registration or specific approval from the Central Bank or another relevant domestic regulatory authority, nonbanks, which are licensed as a payment institution, may not engage in any of the following activities: (a) acceptance of deposits; (b) foreign exchange transactions; (c) granting of loans; or (d) payment system operations. Such institutions must (i) issue payment instruments in Bahamian Dollars, only, (ii) not issue a payment instrument valued in excess of \$15,000 Bahamian Dollars, unless otherwise authorized by the Central Bank or allow such value to be transferred or funded using the payment instrument, (iii) not at any time commingle funds received from payment service users or through another payment service provider for the execution of payment transactions, with the funds of third parties, (iv) protect funds received from payment service users or through another payment service provider for the execution of payment transactions, from

the claims of other creditors of the institution and (v) not issue, transfer or dispose of its shares or any other securities without the prior written approval of the Central Bank.

Persons engaging in the provision of financial services, including among other things, money lending, money broking, payday and cash advances, credit extension, bill paying services, debt collection, financial leasing, custody of digital assets and wallet services providers, in or from The Bahamas must be licensed with the Securities Commission of The Bahamas as a financial services provider under the Financial and Corporate Services Providers Act, 2020.

3. What are the most popular payment methods and payment instruments in your jurisdiction?

According to selected payments systems data previously issued by the Central Bank, the most popular payment methods and payment instruments in The Bahamas are debit cards, credit cards, direct credits/credit transfers, stored value cards, and cash.

4. What is the status of open banking in your jurisdiction (i.e. access to banks' transaction data and push-payment functionality by third party service providers)? Is it mandated by law, if so to which entities, and what is state of implementation in practice?

Banking business is a regulated activity in The Bahamas that requires a license from the Central Bank. Banks are subject to common law and statutory duties of confidentiality which prohibit the disclosure of information relating to the transactions and accounts of clients without their consent, subject to certain exceptions. Such statutory obligations are imposed on banks by the Banks and Trust Companies Regulations Act, 2020 (BTCRA). Although not mandated by statute, a credit bureau was recently licensed by the Central Bank under the Credit Reporting Act, 2018. This credit bureau has designated certain credit information providers and is in the process of liaising with banking and other financial institutions in The Bahamas to obtain the relevant credit data for customers to enable, for the first time, the provision of credit data by such institutions for the purpose of generating credit reports.

5. How does the regulation of data in your jurisdiction impact on the provision of financial services to consumers and businesses?

In addition to the confidentiality obligations imposed on banks described in our response to question 4 above, the Data Protection (Privacy of Personal Information) Act, 2003 (DPA) regulates data controllers and data processors in their processing of personal data relating to individuals. For the purposes of the DPA, a 'data controller' is as a person who, either alone or with others, determines the purposes for which and the manner in which any personal data are, or are to be, processed. The DPA applies to a data controller in respect of any data only if (a) the data controller is established in The Bahamas and the data is processed in the context of that establishment; or (b) the data controller is not established in The Bahamas but uses equipment in The Bahamas for processing the data otherwise than for the purpose of transit through The Bahamas. Under the DPA, a data controller, as regards personal data kept by it, must (i) collect the data by lawful and fair means, (ii) keep the data accurate and up to date (except in the case of back-up data), (iii) keep the data only for specified and lawful purposes, (iv) ensure the data is adequate, relevant and not excessive in relation to the purpose for which it is kept, (v) not use or disclose the data in any matter incompatible with the purposes for which it is kept, (vi) not keep the data for longer than necessary and (vii) take appropriate security measures against unauthorised access to or alteration, disclosure or destruction of, the data and against their accidental loss or destruction. Under the DPA, a data controller also owes a duty of care to the data subject with respect to the collection of personal data or information intended for inclusion in such data or dealing with such data. The BTCRA and DPA provide protections and safeguards to ensure the confidentiality of information relating to the transactions and accounts of customers of financial institutions, which enhances confidence in the financial services industry. The establishment of the credit bureau referred to in our response to question 5 above, provides a framework for institutions providing credit to obtain information on consumers.

6. What are regulators in your jurisdiction doing to encourage innovation in the financial sector? Are there any initiatives such as sandboxes, or special regulatory conditions for fintechs?

In 2018, the Government of The Bahamas promoted and

declared the island of Grand Bahama as a fintech centre. However, the damage caused by Hurricane Dorian in September, 2019 and the Global COVID-19 pandemic has impacted the progress of this initiative. The Government has also passed legislation in recent years to encourage the development of technology related businesses in The Bahamas; including the Commercial Enterprises Act, 2017 (CEA), which entitles businesses proposing to engage in certain commercial enterprises in The Bahamas, including computer programming and software design and writing, to apply for expedited regulatory approvals and work visas for executives, managers or individuals with specialized skills. The Central Bank has implemented the payment system modernisation initiative to facilitate, among other things, the use of technology to achieve more inclusive, cost affordable, even access to financial services in The Bahamas. This initiative provides both incentives and the means to spur more widespread adoption of electronic payments, and to enable greater general access to financial services over digital platforms. In particular, the Central Bank has launched the Project Sand Dollar, whereby it introduced a digital version of the Bahamian dollar, known as the sand dollar. According to the Central Bank, the goal of this project is to ensure that all residents in The Bahamas have access to a 'central bank digital currency, on a modernized technology platform, with an experience and convenience – legally and otherwise – that resembles cash'. . In December, 2019, the Securities Commission of The Bahamas (SCB) launched a Financial Technology Hub, SCB FITLink. The SCB FITLink serves as the central point of contact for the SCB's engagement with the public on various issues related to fintech, such as virtual assets business, crowdfunding, distributed ledger technology, artificial intelligence and virtual initial offerings. Its duties include (i) assisting fintech innovators and incumbents with navigating through the securities regulatory landscape; (ii) researching, establishing and creating policy, rules and guidelines for fintech-related products and services; (iii) promoting investor education and other conditions that facilitate innovation and development of virtual asset businesses within The Bahamas; and (iv) consulting with domestic and/or overseas regulatory authorities regarding innovative technologies. There have been no fintech regulatory sandboxes in The Bahamas.

7. Do you foresee any imminent risks to the growth of the fintech market in your jurisdiction?

In our view, imminent risk to the growth of the fintech market include the following: Although The Bahamas has a work force that is highly educated and skilled in

traditional forms of financial services including private banking, trust services and insurance, more fintech specific experience, education and training is required. Additionally, the fact that the Bahamian dollar is not a readily convertible currency with other fiat currencies around the world and the existence of exchange control restrictions which prevent the unrestricted use of cryptocurrencies by Bahamian residents also limit the growth of the fintech sector in The Bahamas.

8. What tax incentives exist in your jurisdiction to encourage fintech investment?

There are no specific tax incentives in The Bahamas to encourage fintech investment.

9. Which areas of fintech are attracting investment in your jurisdiction, and at what level (Series A, Series B etc)?

There is no publicly available data from the SCB or otherwise, regarding the areas of fintech investment and the quantum of such investment in The Bahamas.

10. If a fintech entrepreneur was looking for a jurisdiction in which to begin operations, why would it choose yours?

The Bahamas is one of a small number of jurisdictions that has enacted legislation to enhance the regulatory framework relating to fintech. Specific examples of such regulations are the BDDCR, which regulates matters relating to the BDDC, and the Digital Assets and Registered Exchanges Act, 2020 (DARE), which regulates token offerings and digital asset businesses. Additionally, the presence of a highly skilled workforce means that fintech entrepreneurs will have the personnel necessary to assist in the establishment and operation of any company set up in the Bahamas. Further the existence of a robust anti-money laundering and the countering of terrorist financing legislative regime that meets international best practices has resulted in the Bahamas being a well-respected jurisdiction from which companies can operate and conduct business with international counterparts. Finally, the Government's commitment to streamlining the regulatory approvals required for fintech businesses wishing to establish a presence in the Bahamas gives fintech entrepreneurs an advantage over other persons wishing to enter the Bahamian economy.

11. Access to talent is often cited as a key issue for fintechs - are there any immigration rules in your jurisdiction which would help or hinder that access, whether in force now or imminently? For instance, are quotas systems/immigration caps in place in your jurisdiction and how are they determined?

Persons who are not Bahamian citizens or the holders of a certificate of permanent residence with the right to work, require a work visa from the Department of Immigration to work in The Bahamas. Before an application for a work visa can be submitted, a Certificate of Vacancy must be obtained from the Department of Labour, certifying that there are no Bahamians available to fill the position. In addition, as a condition of granting a work visa, the Department of Immigration may require that a Bahamian understudy be engaged who can be trained and benefit from the knowledge and expertise of the non-Bahamian employee. As indicated in our response to question 6 above, businesses which are designated as commercial enterprises under the CEA, may apply for expedited regulatory approvals and work visas for executives, managers or individuals with specialized skills. In addition to the Immigration restrictions outlined above, any non-Bahamians seeking to establish business operations in The Bahamas, require the approval of the National Economic Council (NEC). While certain areas of business are expressly reserved for Bahamians, foreign investment in certain areas, such as fintech, is encouraged.

12. If there are gaps in access to talent, are regulators looking to fill these and if so how? How much impact does the fintech industry have on influencing immigration policy in your jurisdiction?

We are not aware of the policy objectives of Government Agencies in The Bahamas to fill gaps in talent in the Fintech sector. However, the growth and development of the sector has been a regulatory focus for the SCB and the Central Bank. Further, the Bahamas Financial Services Board, a non-governmental advisory body that has representatives from Government and the private financial services sector, including persons who practice in the fintech space, makes recommendations to the Government on regulatory and policy changes to facilitate the improvement of the provision of financial services in The Bahamas.

13. What protections can a fintech use in your jurisdiction to protect its intellectual property?

A fintech may register its trade mark under the Trade Marks Act, 1906 (TMA). A trade mark must be registered in order for proceedings to be instituted to prevent or to recover damages for the infringement (section 42, TMA). Although proceedings cannot be brought under the TMA for infringement of an unregistered trade mark, it is possible to enforce such a trade mark by bringing a common law action under the tort of passing off. The TMA recognizes the tort of passing off (section 45, TMA). Under the Copyright Act, 2000 (CPA) works of copyright are subject to protection under the CPA if (a) on the date of first publication, one or more of the authors is a qualified person; or (b) the work is first published in The Bahamas or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or (c) the work is protected under the Berne Convention. Under the CPA a "qualified person" is (a) in the case of an individual, a person who is a citizen of, or whose habitual residence or domicile is in The Bahamas, or whose habitual residence or domicile is in a foreign nation that is a party to a copyright treaty to which The Bahamas is also a party; and (b) in the case of a body corporate, a body incorporated or established under any written law of The Bahamas or of a foreign nation that is a party to a copyright treaty to which The Bahamas is also a party (section 7, CPA). A fintech may apply for a patent for an invention under the Industrial Property Act, 1965 (IPA). Under the IPA a patentee has the sole and exclusive right to make, use, exercise and vend the invention, the subject of his patent and to authorise others so to do (section 3, IPA). Infringements of patent rights are actionable at the suit of the patentee and in any proceedings for such an infringement all such relief by way of damages, injunction, account or otherwise are available (section 19, IPA). Under the IPA a design copyright is obtainable in every original design by the person claiming to be the proprietor thereof by depositing a claim for design copyright at the Industrial Property Office section 30, IPA). A design copyright shall give no rights in any features of an article in so far as these are dictated solely by the function which the article is intended to perform or in any method or principle of construction (section 35, IPA). There is currently no statutory protection in The Bahamas for trade secrets.

14. How are cryptocurrencies treated under the regulatory framework in your jurisdiction?

The issuance, sale and trade of digital assets, including cryptocurrencies, and the conduct of digital asset business in or from The Bahamas, or to residents of The Bahamas, can only be carried out by entities which are regulated under DARE.

15. How are initial coin offerings treated in your jurisdiction? Do you foresee any change in this over the next 12-24 months?

Initial token offerings are regulated under DARE. For the purposes of that Act, (i) an “initial token offering” is an offer by an issuer for the sale of a digital token in exchange for fiat currency or another digital asset and (ii) a “digital token” includes (a) virtual currency token; (b) asset token; (c) utility token; (d) non-fungible token; and (e) any other digital representation of value designated by the SCB to be a digital token for the purposes of DARE. An issuer that intends to offer digital tokens in or from The Bahamas through an initial token offering must (i) be fit and proper; and (ii) apply for registration of the initial token offering by the Securities Commission of The Bahamas under DARE no later than forty-five (45) days before the start of the offer period. The application for registration must be in the prescribed form and be accompanied by (i) a written legal opinion for the classification of the tokens, (ii) the offering memorandum relating to the offering which complies with the requirements set out in DARE and (iii) the prescribed filing fee. The Exchange Control Regulations referred to in our response to question 1 would also apply.

We are unable to indicate whether or not there will be any change in the treatment of initial coin offerings over the next 12-14 months.

16. Are you aware of any live blockchain projects (beyond proof of concept) in your jurisdiction and if so in what areas?

Further to our response under question 6 above, on 20 October, 2020, the Central Bank rolled out the sand dollar nationally, which made the Central Bank digital currency available to the public. The sand dollar is a digital fiat currency, as opposed to a cryptocurrency and, as such, is ‘an identifiable liability of the Central Bank, equivalent in every respect to paper currency’. The value of the sand dollar is equivalent to existing fiat currency and does not derive its value from any source other than the external reserves which the Central Bank allocates toward it.

17. To what extent are you aware of artificial intelligence already being used in the financial sector in your jurisdiction, and do you think regulation will impede or encourage its further use?

We are not aware of the extent to which artificial intelligence (AI) is being used in the Bahamian financial sector. However, the introduction of regulations in this respect would encourage the use of AI by providing certainty of the regulatory framework within which the AI may be carried out.

18. Insurtech is generally thought to be developing but some way behind other areas of fintech such as payments. Is there much insurtech business in your jurisdiction and if so what form does it generally take?

We are not aware of the extent of any insurtech business in The Bahamas.

19. Are there any areas of fintech that are particularly strong in your jurisdiction?

In addition to the Central Bank’s Project Sand Dollar and the enactment of DARE, fintech is becoming more and more popular in The Bahamas with respect to digital banking and financing.

20. What is the status of collaboration vs disruption in your jurisdiction as between fintechs and incumbent financial institutions?

Despite the global disruption to in-person businesses as a result of the COVID-19 pandemic, financial institutions in The Bahamas have continued to incorporate fintech into their operating models through the increased use of digital platforms, such as online banking and digital transactions.

21. To what extent are the banks and other incumbent financial institutions in your jurisdiction carrying out their own fintech development / innovation programmes?

Further to our response to question 20 above, banks and other incumbent financial institutions in The Bahamas are progressively moving away from in-person

transactions and toward digital transactions and the use of fintech to service the needs of clients. The global pandemic has expedited the need for such fintech services.

22. Are there any strong examples of disruption through fintech in your

jurisdiction?

Crowdfunding and other fintech funding platforms, such as GoFundMe, have rapidly gained popularity in The Bahamas due to their greater availability and accessibility when compared to traditional forms of financing. The global pandemic has also encouraged the development of fintech relating to online ordering and delivery services in The Bahamas.

Contributors

Christel Sands-Feaste
Partner

csands-feaste@higgsjohnson.com



Alexandra T. Hall
Partner

ahall@higgsjohnson.com



Andre Hill
Associate

ahill@higgsjohnson.com

