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Developments in the Law Affecting Electronic Payments and Financial Services

By Sarah Jane Hughes* and Stephen T. Middlebrook**

I. INTRODUCTION

Electronic payments and financial services have continued to prompt significant regulatory and enforcement-agency attention since our 2014 contribution to the Survey of the Law of Cyberspace.¹ For this year's survey, we have chosen to focus on developments affecting providers of services related to bitcoin and other cryptocurrencies, prepaid cards including payroll cards, and other e-payments products, services, and providers in Parts II, III, and IV of this survey, respectively. Part V mentions other developments that readers will want to follow in the coming year.

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1. Sarah Jane Hughes & Stephen T. Middlebrook, *Are These Game Changers? Developments in the Law Affecting Virtual Currencies, Prepaid Payroll Cards, Online Tribal Lending, and Payday Lenders*, 70 Bus. Law. 261 (2014) [hereinafter 2014 Survey].

II. DEVELOPMENTS AFFECTING PROVIDERS OF BITCOIN AND OTHER CRYPTOCURRENCIES

A. STATE REGULATION AND LICENSING OF VIRTUAL CURRENCY SERVICE PROVIDERS

On June 3, 2015, New York State's Department of Financial Services (DFS) announced final regulations for the BitLicense,² including prudential regulation of "virtual currency,"³ "virtual currency business activity,"⁴ and certain consumer protections.⁵ The BitLicense is the first virtual currency-specific state prudential regulation. In addition, other states, in particular North Carolina⁶ and California,⁷ signaled their intentions to regulate providers of virtual currencies.

In May 2015, the DFS also issued a trust company license for itBit to operate as the itBit Trust Company.⁸ The charter allows the company to serve as a custodian for customers' assets, including bitcoin and U.S. dollars, but not to operate as a bank.⁹ We believe that this is the first such license, not only in New York State but also in any jurisdiction in the United States.

B. BITCOIN PARTICIPANTS PROSECUTED AS UNLICENSED MONEY TRANSMITTERS

The most notorious criminal action related to bitcoin that took place in the last year was the conviction of Ross Ulbricht, creator and operator of Silk Road, the infamous dark web marketplace for drugs and other illegal items, which exclusively used the virtual currency for payments.¹⁰ Ulbricht was found guilty of nar-

2. Regulation of the Conduct of Virtual Currency Businesses, 37 N.Y. Reg. 7 (June 24, 2015) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 23, pt. 200), available at <http://docs.dos.ny.gov/info/register/2015/june24/pdf/rulemaking.pdf>. The regulations were proposed in July 2014. Regulation of the Conduct of Virtual Currency Businesses, 36 N.Y. Reg. 14 (proposed July 23, 2014), available at <http://docs.dos.ny.gov/info/register/2014/july23/pdf/rulemaking.pdf>.

3. N.Y. COMP. CODES R. & REGS. tit. 23, § 200.2(p) (2015).

4. *Id.* § 200.2(q).

5. *Id.* §§ 200.7–200.19.

6. H.R. 289, 2015–2016 Sess. (N.C. 2015) (defining "money transmission" to include "maintaining control of virtual currency on behalf of others" and allowing licensees to hold as "permissible investments" "[v]irtual currency owned by the licensee, but only to the extent of outstanding transmission obligations received by the licensee in like-kind virtual currency"), available at <http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H289v1.pdf>. For analysis of this bill, see *North Carolina Bill Defines Bitcoin as "Permissible Investment,"* COINFOX.COM (May 22, 2015), <http://www.coinfox.info/news/2085-north-carolina-bill-defines-bitcoin-as-permissible-investment>.

7. A.B. 1326, 2015–2016 Reg. Sess. (Cal. 2015) (last amended June 1, 2015), available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1326 (extending licensing requirements to persons or entities developing virtual currency network software or providing data storage or cybersecurity services for licensed businesses).

8. See *Questions from the Community: itBit's Trust Charter*, ITBIT.COM (May 18, 2015, 1:30 PM), www.itbit.com/blog/questions-from-the-community-itbits-trust-charter (providing a chart comparing the operational differences between the trust company charter, the BitLicense, and a traditional money transmitter license).

9. *Id.*

10. See Benjamin Weiser, *Ross Ulbricht, Creator of Silk Road Website, Is Sentenced to Life in Prison*, N.Y. TIMES (May 30, 2015), <http://www.nytimes.com/2015/05/30/nyregion/ross-ulbricht-creator-of->

cotics trafficking, computer hacking, and money laundering and was given a life sentence.¹¹

In a related matter, Robert M. Faiella and Charlie Shrem, both of whom provided bitcoin exchange services to Silk Road users, were prosecuted for operating an unlicensed money transmitter in violation of 18 U.S.C. § 1960.¹² The government alleged that Faiella, also known as “BTCKing,” ran an underground bitcoin exchange that sold over \$1 million worth of the virtual currency to Silk Road users to facilitate the purchase of illegal drugs.¹³ Section 1960 makes it a federal crime to operate a money transmitter without the appropriate license.¹⁴ Faiella moved to dismiss the counts related to section 1960 on the grounds that bitcoin does not qualify as “money” and that exchanging dollars for bitcoin does not constitute money transmission under the statute.¹⁵ The court rejected his argument, focusing on the “ordinary meanings” of the words and electing not to view them as legal terms of art.¹⁶ The court held that bitcoin functions as “money” or “funds” and noted that the Financial Crimes Enforcement Network had issued guidance stating that exchanging virtual currency for legal tender could constitute money transmission under its regulations.¹⁷ Finally, the court rejected Faiella’s argument that the application of § 1960 to a bitcoin exchange was a novel application of the statute that would violate the rule of lenity.¹⁸

In what appears to be a similar case, John D. Powell was indicted in Illinois for operating an unlicensed money transmitting business in violation of state law and § 1960.¹⁹ He pleaded guilty and was sentenced to four years in prison.²⁰ Although the pleadings do not set forth the underlying facts, a press release

[silk-road-website-is-sentenced-to-life-in-prison.html](#). For a description of how bitcoin was used on Silk Road, see *United States v. Ulbricht*, 31 F. Supp. 3d 540, 546–47 (S.D.N.Y. 2014).

11. Indictment, *United States v. Ulbricht*, No. 14-CR-068 (S.D.N.Y. Feb. 4, 2014), available at <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/US%20v.%20Ross%20Ulbricht%20Indictment.pdf>; Press Release, Fed. Bureau of Investigation, Ross Ulbricht, aka Dread Pirate Roberts, Sentenced in Manhattan Federal Court to Life in Prison (May 29, 2015), <https://www.fbi.gov/newyork/press-releases/2015/ross-ulbricht-aka-dread-pirate-roberts-sentenced-in-manhattan-federal-court-to-life-in-prison>.

12. Sealed Complaint, *United States v. Faiella*, No. 14-MAG-0164 (S.D.N.Y. Jan. 24, 2013), available at http://www.wired.com/images_blogs/threatlevel/2014/01/Faiella-Robert-M.-and-Charlie-Shrem-Complaint.pdf.

13. Press Release, U.S. Dep’t of Justice, Manhattan U.S. Attorney Announces Charges Against Bitcoin Exchangers, Including CEO of Bitcoin Exchange Company, for Scheme to Sell and Launder over \$1 Million in Bitcoins Related to Silk Road Drug Trafficking (Jan. 27, 2014), <http://www.justice.gov/usao/nys/pressreleases/january14/SchremFaiellaChargesPR.php>.

14. 18 U.S.C. § 1960(a) (2012) (“Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.”).

15. *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014).

16. *Id.* at 545 n.2.

17. *Id.* at 546.

18. *Id.* at 547.

19. Indictment, *United States v. Powell*, No. 14-cr-10037 (C.D. Ill. June 11, 2014), available at <https://www.scribd.com/doc/249786589/show-temp-pdf>.

20. *United States v. Powell*, No. 14-cr-10037 (C.D. Ill. June 11, 2014) (judgment), available at <http://qnta.net/wp-content/uploads/2014/12/judgement.pdf>.

from the U.S. Attorney's Office indicates that Powell was prosecuted for operating a bitcoin exchange that "allowed individuals increased anonymity by exchanging cash anonymously for bitcoin."²¹

In addition, the State of Florida is prosecuting Pascal Reid and Michel Abner Espinoza for selling bitcoin in transactions that were arranged through a website that assists buyers and sellers of the virtual currency in arranging face-to-face transfers.²² The prosecution appears to be the first application of state law to prosecute the buying and selling of virtual currency.

Although § 1960 was used as early as 2007 to prosecute virtual currency pioneer e-gold, Ltd.,²³ the multiple prosecutions of bitcoin participants in the last year suggest that criminal enforcement under this statute will play a significant role in the government's response to bitcoin.

C. RIPPLE LABS SETTLES CHARGES BROUGHT BY FINCEN

In the first civil enforcement action against a virtual currency exchange,²⁴ the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) and the U.S. Department of Justice assessed a \$700,000 civil penalty against Ripple Labs, Inc. and its wholly owned subsidiary, XRPII, LLC (formerly known as XRP Fund II, LLC). Charges included willful violations of the Bank Secrecy Act²⁵ in connection with money services business transactions, including the sale of virtual currencies, without registering as a "money services business" (MSB) with FinCEN. Charges also included failure to implement and maintain an anti-money laundering compliance program as required for MSBs.²⁶ FinCEN described violations "[f]rom at least March 6, 2013, through April 29, 2013," related to Ripple Labs' sales of a convertible virtual currency known as "XRP."²⁷ Readers might conclude that because this period bridges the March 18, 2013, issuance of FinCEN's currency guidance,²⁸ the action was unfair to Ripple

21. Press Release, U.S. Dep't of Justice, McClean County Man to Serve Four Years in Prison for Operating Unlicensed Internet Bitcoin Exchange (Dec. 9, 2014), http://www.justice.gov/usao/ilc/press/2014/12december/20141209_powell.html.

22. Susannah Nesmith, *Bitcoin Charges Called Improper Because Currency Not Real*, BLOOMBERG BUS. (Feb. 28, 2014, 12:01 AM EST), <http://www.bloomberg.com/news/articles/2014-02-27/bitcoin-charges-improper-under-florida-law-lawyer-says>; see also Brian Krebs, *Florida Targets High-Dollar Bitcoin Exchangers*, KREBS ON SECURITY (Feb. 7, 2014, 12:48 PM), <http://krebsonsecurity.com/tag/pascal-reid/>.

23. For a more detailed analysis of the prosecution of e-gold, see Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 822–28 (2014).

24. Press Release, FinCEN Fines Ripple Labs Inc. in First Civil Enforcement Action Against a Virtual Currency Exchanger (May 5, 2015), http://www.fincen.gov/news_room/nr/pdf/20150505.pdf. Attachment A to the press release sets out the basis for FinCEN's civil penalty assessment. See *id.* (Statement of Facts and Violations) [hereinafter Ripple Statement of Facts and Violations]. Attachment A is available at http://www.fincen.gov/news_room/nr/pdf/Ripple_Facts.pdf.

25. 31 U.S.C. § 5318 (2012).

26. See Ripple Statement of Facts and Violations, *supra* note 24, at paras. 26–28.

27. *Id.* at para. 17.

28. Fin. Crimes Enforcement Network, U.S. Dep't of the Treasury, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, FIN-2013-G001 (2013),

Labs. FinCEN, however, cited Ripple Labs' prior history of describing itself as "a currency exchange service providing on-line, real-time currency trading and cash management"²⁹ and its failure in the period (prior to March 18, 2013) to be registered as an MSB.³⁰ XRP II is charged with selling virtual currency to third-party entities and operating without an MSB registration from "on or about August 4, 2013," to September 4, 2013, when it registered as an MSB;³¹ willful failure to implement an effective anti-money laundering program;³² and failure to report suspicious transactions.³³

III. DEVELOPMENTS AFFECTING PREPAID CARDS

A. THE CFPB AND DEPARTMENT OF EDUCATION PROPOSE NEW PREPAID CARD REGULATIONS

On December 23, 2014, the Consumer Financial Protection Bureau (CFPB) proposed amendments to both Regulation E, which implements the Electronic Fund Transfer Act, and Regulation Z, which implements the Truth in Lending Act, to create "comprehensive consumer protections for prepaid financial products."³⁴ The proposed rule's scope is significantly broader than the Advance Notice of Proposed Rulemaking published in 2012, which focused on extending the existing payroll card provisions of Regulation E to general purpose reloadable (GPR) prepaid cards.³⁵ The 2014 proposal begins by expanding the definition of "prepaid account" to include not just payroll, government benefit, and GPR cards, but also products that can be used for person-to-person and person-to-business payments, including mobile wallets.³⁶ The CFPB acknowledges that the proposal may also apply to virtual currency products.³⁷ Under the proposal, these payment products would have to comply with Regulation E's requirements related to disclosures, error resolution, and limitations on liability.

The proposed rule would create a new and expanded set of disclosure requirements for prepaid products. In addition to the full disclosure of all terms, fees, and conditions that Regulation E already requires, the proposal would require additional short-form and long-form disclosures, which generally must be deliv-

available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf (clarifying the coverage of regulations that implement the federal Bank Secrecy Act to persons engaged, among other things, in the receipt, distribution, exchange, and transmittal of virtual currencies).

29. Ripple Statement of Facts and Violations, *supra* note 24, at para. 16 (citing Motion for Preliminary Injunction, Ripple Labs, Inc. v. Lacroe Enters., LLC, No. 13-cv-5974-RS/KAW (N.D. Cal. Dec. 27, 2013) (emphasis added by FinCEN)).

30. Ripple Statement of Facts and Violations, *supra* note 24, at para. 18.

31. *Id.* at paras. 22–24.

32. *Id.* at para. 26.

33. *Id.* at paras. 11, 28.

34. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102, 77102 (proposed Dec. 23, 2014) (to be codified at 12 C.F.R. pts. 1005 & 1026) [hereinafter CFPB Proposed Rule].

35. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30923 (May 24, 2012).

36. CFPB Proposed Rule, 79 Fed. Reg. at 77125–33.

37. *Id.* at 77133.

ered before a consumer acquires an account.³⁸ The short form must disclose seven specific fees, regardless of whether they are actually charged, plus the three fees most commonly incurred by users in the prior twelve months.³⁹ The long form must disclose all fees, the conditions under which each fee may be imposed or waived, and third-party fees to the extent they are known.⁴⁰ In addition to providing copies of disclosures to consumers, prepaid providers must also post their account agreements to their own public websites and submit copies to the CFPB to be included in a website maintained by the Bureau.⁴¹ Providers would be required to update submissions to the CFPB quarterly.⁴²

Currently, Regulation E provides for an alternative to monthly statements for payroll card programs that make account balances available by telephone, provide sixty days of transaction history electronically, and provide cardholders with written histories upon request.⁴³ The proposed rule would continue this alternative but would expand the electronic transaction history requirement from sixty days to eighteen months.⁴⁴

The CFPB's proposed rule also would extend significant portions of Regulation Z to prepaid products that offer overdraft protection to consumers.⁴⁵ The proposal would treat overdraft protection on prepaid products as an open-end credit plan and fees associated with overdraft transactions as finance charges.⁴⁶ Consequently, providers of prepaid products offering overdraft services would be required to evaluate a consumer's creditworthiness, give additional disclosures, and be subject to certain limitations on fees.⁴⁷

The U.S. Department of Education (DoE) also released a proposed rule that would place new restrictions on prepaid cards that receive funds under Title IV of the Higher Education Act.⁴⁸ The DoE's rule would require schools to offer students a choice in how to receive a credit balance of Title IV funds and would require their consent before issuing them a card.⁴⁹ Campus card programs would have to provide certain levels of ATM access and fees would be limited.⁵⁰ In addition, the rule prohibits card fees for the first thirty days after the account receives a Title IV disbursement.⁵¹ In addition, the DoE reserved the right to establish its own card program for paying credit balances to students.⁵²

38. *Id.* at 77146–75.

39. *Id.* at 77156–64.

40. *Id.* at 77168–69.

41. *Id.* at 77191–203.

42. *Id.* at 77191.

43. 12 C.F.R. § 1005.18(b) (2015).

44. CFPB Proposed Rule, 79 Fed. Reg. at 77176.

45. *Id.* at 77204–55.

46. *Id.* at 77204–06.

47. *Id.* at 77209–46.

48. Program Integrity and Improvement, 80 Fed. Reg. 28484 (proposed May 18, 2015) (to be codified at 34 C.F.R. pt. 668).

49. *Id.* at 28500–04.

50. *Id.* at 28505–09.

51. *Id.* at 28506.

52. *Id.* at 28488.

B. PAYROLL CARD LITIGATION MOVES FORWARD

In last year's survey, we noted that several lawsuits had been filed against employers asserting that their payroll card programs did not comport with applicable law.⁵³ One of those cases was a class action filed against a fast-food restaurant owner in Pennsylvania who was accused of requiring employees to accept their wages on a payroll card. That case has been certified as a class action under a different name.⁵⁴ The court also denied the defendant's motion for summary judgment, finding as a matter of law that a payroll card did not meet the state-law requirement that employees be paid "in lawful money of the United States or check."⁵⁵ The court held that the statute required payment in cash ("lawful money") or a check and that a payroll card, which could be used to obtain cash, was not cash itself.⁵⁶ A different provision of state law authorized payment by direct deposit, but that option requires consent by the employee and thus was not available in this situation.⁵⁷ Noting that the decision addressed an issue of first impression in the state, the court suggested that an appellate court would benefit from a formal opinion on the subject from the Pennsylvania Department of Labor.⁵⁸

C. DEVELOPMENTS RELATED TO FEDERAL AND STATE BENEFIT PAYMENTS

The past year saw several legal developments related to state and federal benefit payments made by prepaid cards. On October 17, 2014, the President issued an executive order intended to improve the security of consumer financial information in public and private transactions.⁵⁹ It directs federal agencies to move to more secure payment methods, including the use of "chip and PIN," a reference to the Europay, Mastercard, and Visa (EMV) smartcard technology.⁶⁰ In particular, it directs the U.S. Treasury Department to begin replacing existing federal benefit cards, including the popular Direct Express card, with versions providing enhanced security.⁶¹

53. 2014 Survey, *supra* note 1, at 266.

54. *Siciliano v. Mueller*, No. 2013-07010 (Ct. Common Pleas, Luzerne Cty., Pa., May 14, 2015), available at <http://hr.cch.com/ELD/SicilianoMueller.pdf>.

55. *Siciliano v. Mueller*, No. 2013-07010, slip op. at 2 (Ct. Common Pleas, Luzerne Cty., Pa., May 29, 2015).

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.* at 5.

59. Exec. Order No. 13681, 79 Fed. Reg. 63491 (Oct. 23, 2014).

60. *Id.* (suggesting that federal agencies consult the voluntary consensus standards and specifications, as appropriate, consistent with the National Technology Transfer and Advancement Act of 1995 and Office of Management and Budget Circular A-119). EMV takes its name from the three companies that created the payment standard: Europay, Mastercard, and Visa. *About EMV*, EMVCO, www.emvco.com/about_emv.aspx (last visited May 31, 2015). For more information on the adoption of EMV technology in the United States, see Mark Scott, *Preparing for Chip-and-PIN Cards in the United States*, N.Y. TIMES BITS (Dec. 2, 2014), <http://bits.blogs.nytimes.com/2014/12/02/preparing-for-chip-and-pin-cards-in-the-united-states/>.

61. Exec. Order No. 13681, 79 Fed. Reg. at 63491.

The Kansas legislature passed a law placing significant restrictions on the use of Temporary Assistance for Needy Families benefits that are delivered by pre-paid benefit cards.⁶² Under the new law, the cards cannot be used at liquor stores, casinos, jewelry stores, tattoo parlors, body piercing parlors, nail salons, spas, lingerie shops, video arcades, movie theaters, swimming pools, aboard cruise ships, or outside the state of Kansas.⁶³ The cards can no longer be used to purchase a number of goods and services, including cigarettes, lottery tickets, and tickets to concerts, sporting events, and other entertainment events.⁶⁴ In addition, the new law limits cash withdrawals from ATMs to \$25 per transaction and limits transactions to one per day.⁶⁵ The new measure has been criticized as attacking the poor. The ATM restrictions have been called vindictive, given that they will require benefits recipients to make more ATM withdrawals, each of which incurs an additional fee.⁶⁶

IV. ENFORCEMENT ACTIONS AND OTHER DEVELOPMENTS AFFECTING E-PAYMENTS OR FINANCIAL SERVICES PROVIDERS

A. FEDERAL ENFORCEMENT ACTIONS AGAINST PAYPAL IN 2015

PayPal, Inc. settled enforcement actions with the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the CFPB in the first half of 2015. On March 25, 2015, the OFAC announced a settlement with PayPal related to 486 apparent violations of the Weapons of Mass Destruction Proliferators Sanctions Regulations⁶⁷ and other U.S. economic sanctions regulations.⁶⁸ The settlement agreement, which requires PayPal to pay a \$7,658,300 penalty,⁶⁹ recites that, during a period lasting into 2013, PayPal failed to employ adequate screening technology and procedures to identify targets of these sanctions regulations and the transactions that PayPal processed on their behalf.⁷⁰ The OFAC described PayPal's WMD violations as "egregious,"⁷¹ which, in our view, explains the high penalty in this settlement compared to the roughly \$7,000 in value handled by PayPal.

62. H.B. 2258, § 9(b)(14), 2015 Leg. Sess. (Kan. 2015) (to be codified at KAN. STAT. ANN. § 39-709).

63. *Id.*

64. *Id.*

65. *Id.*

66. Max Ehrenfreund, *Kansas Has Found the Ultimate Way to Punish the Poor*, WASH. POST WONK-BLOG (May 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/21/kansas-has-found-the-ultimate-way-to-punish-the-poor/>.

67. Office of Foreign Assets Control, U.S. Dep't of the Treasury, Settlement Agreement with PayPal, Inc., at para. 12 (Mar. 25, 2015), available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20150325_paypal_settlement.pdf (citing violations of 31 C.F.R. § 544.201).

68. *Id.* at paras. 8–9 (Iranian Transactions and Sanctions Regulations, 31 C.F.R. §§ 560.204, 560.206), para. 7 (Cuban Assets Control Regulations, 31 C.F.R. § 515.201), para. 10 (Sudanese Sanctions Regulations, 31 C.F.R. § 538.205), para. 11 (Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.201).

69. *Id.* at para. 20(a)(ii).

70. *Id.* at para. 4.

71. *Id.* at para. 15.

On May 19, 2015, PayPal, Inc. and Bill Me Later, Inc. settled a CFPB action alleging unfair, deceptive, and abusive acts or practices in violation of the Consumer Financial Protection Act of 2010 in connection with a credit product called PayPal Credit.⁷² The CFPB charged that defendants *unfairly* (a) enrolled consumers in PayPal Credit without their knowledge or consent, including automatically enrolling some consumers who were opening regular PayPal accounts, and enrolling those who canceled the application process or closed out of the application window before completing the enrollment process; (b) caused consumers to pay for purchases with PayPal Credit even when the consumers chose a different payment method; (c) failed to process consumers' payments promptly or at all; and (d) mishandled billing disputes and caused consumers to incur late fees and interest charges.⁷³ The defendants also *deceptively* advertised and failed to honor and apply promotional offers,⁷⁴ and they engaged in *abusive* deferred-interest acts or practices.⁷⁵ Under the stipulated final judgment and order filed on May 19, 2015, PayPal and Bill Me Later will pay \$15 million in consumer redress and a \$10 million civil penalty.⁷⁶ They also will undertake disclosure and account-management practices responsibilities.⁷⁷

B. FIVE MORE "MOBILE CRAMMING" ACTIONS BROUGHT BY THE FTC, FCC, AND STATE AGS—AND, LAST BUT NOT LEAST, THE CFPB

Since mid-2014, five wireless providers have agreed to pay significant sums in consumer refunds and civil penalties in actions brought by federal and state agencies for billing unauthorized third-party providers' charges, a practice known as "mobile cramming."⁷⁸ AT&T's October 2014 settlement with the FTC and other agencies requires payment of \$105 million in consumer refunds and penalties.⁷⁹ According to the FTC, AT&T's customer service department had

72. Complaint, Consumer Fin. Prot. Bureau v. PayPal, Inc., No. 1:15-cv-01426 (D. Md. May 19, 2015), available at http://files.consumerfinance.gov/f/201505_cfpb_complaint-paypal.pdf. Bill Me Later, Inc. is a wholly owned subsidiary of PayPal. *Id.* at para. 8.

73. *Id.* at para. 40 (untimely payments processing causing late fees and interest charges to accrue), para. 41 (online payment platform problems causing late fees and interest charges to accrue), para. 42 (mishandling billing disputes), para. 43 (charging late fees and interest on disputed balances and failing to correct errors or make refunds).

74. *Id.* at paras. 66–69.

75. *Id.* at paras. 70–75.

76. Stipulated Final Judgment and Order at paras. 23–26, 29, Consumer Fin. Prot. Bureau v. PayPal, Inc., No. 1:15-cv-01426 (D. Md. May 19, 2015), available at http://files.consumerfinance.gov/f/201505_cfpb_consent-order-paypal.pdf.

77. *Id.* at paras. 17–22.

78. See Press Release, Fed. Trade Comm'n, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case> (explaining the term "mobile cramming" as "unlawful" billing for "unauthorized third-party charges" and describing the unauthorized charges on AT&T bills as for ringtones and text messages containing "love tips, horoscopes, and 'fun facts'").

79. *Id.* The total represents \$80 million in consumer refunds, \$20 million in penalties to the fifty states and the District of Columbia, and a \$5 million penalty to the Federal Communications Commission.

received more than 1.3 million calls about unauthorized charges.⁸⁰ On December 19, 2014, T-Mobile USA, Inc. settled similar charges, agreeing to pay at least \$90 million.⁸¹ T-Mobile received as much as 35–40 percent of each charge. Up to 40 percent of its consumer customers had sought refunds, a red flag that charges were not authorized.⁸² In October 2014, the FTC also settled with Acquinity Interactive, LLC for violations including mobile cramming.⁸³

The CFPB and other agencies settled an action against Verizon and Sprint in May 2015. Together, the two companies agreed to pay \$120 million in refunds to consumers and \$38 million in fines to settle charges of mobile cramming.⁸⁴ The alleged violations were long-lived—in Sprint’s case lasting from 2004 to 2013.⁸⁵

C. MORE E-PAYMENTS AND “OPERATION CHOKE POINT” ACTIONS

Actions related to Operation Choke Point, first reported in our 2014 survey,⁸⁶ have continued.⁸⁷ In an action originally filed in 2012,⁸⁸ the FTC obtained summary judgment against several of the defendants, including Universal Processing Services of Wisconsin, LLC (UPS),⁸⁹ for assisting and facilitating violations of the Telemarketing Sales Rule.⁹⁰ On May 19, 2015, the court approved a stipulated permanent injunction and monetary relief as to defendant UPS.⁹¹ The court’s order prohibits payment processing for certain restricted clients and requires screening of prospective clients.⁹² The order also requires ongoing monitoring

80. *Id.*

81. See Press Release, Fed. Trade Comm’n, T-Mobile to Pay at Least \$90 Million, Including Full Consumer Refunds to Settle Mobile Cramming Case (Dec. 19, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>.

82. *Id.*

83. See Press Release, Fed. Trade Comm’n, Defendants in Massive Spam Text Message, Robocalling and Mobile Cramming Scheme to Pay \$10 Million to Settle FTC Charges (Oct. 22, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/defendants-massive-spam-text-message-robocalling-mobile-cramming>.

84. Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action to Obtain \$120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming (May 12, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/>.

85. Complaint at para. 1, *Consumer Fin. Prot. Bureau v. Sprint Corp.*, No. 14-cv-09931 (S.D.N.Y. Dec. 17, 2014), available at http://www.consumerfinance.gov/l/201412_cfpb_cfpb-v-sprint-complaint.pdf.

86. 2014 Survey, *supra* note 1, at 267–69.

87. For a pithy description of other efforts aimed at Operation Choke Point, see Mark Chesnut, *The Effort to Strangle Operation Choke Point*, AMERICA’S 1ST FREEDOM (June 11, 2015), <http://www.americas1stfreedom.org/articles/2015/6/11/the-effort-to-strangle-operation-choke-point>.

88. *FTC v. WV Universal Mgmt., LLC*, No. 6:12-cv-1618-Orl-22KRS (M.D. Fla. Oct. 29, 2012), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121101treasure-successmpt.pdf>.

89. *FTC v. HES Merch. Servs. Co.*, No. 6:12-cv-1618-Orl-22KRS (M.D. Fla. Nov. 18, 2014) (order), available at <https://www.ftc.gov/system/files/documents/cases/141018universalorder.pdf>.

90. 16 C.F.R. pt. 310 (2011).

91. *FTC v. WV Universal Mgmt., LLC*, No. 6:12-cv-1618-Orl-22-KRS (M.D. Fla. May 19, 2015) (permanent injunction as to Universal Processing Services of Wisconsin, LLC), available at <https://www.ftc.gov/system/files/documents/cases/150520universalmanagementinjunction.pdf>.

92. *Id.* at 6–8.

of clients and the commencement of investigations in cases of elevated return rates or chargeback rates.⁹³

Since the DOJ's first action under Operation Choke Point against Four Oaks Fincorp, Inc.,⁹⁴ the DOJ has settled with two other banks—Plaza Bank⁹⁵ and CommerceWest Bank.⁹⁶ In addition, since late July 2014, the Federal Deposit Insurance Corporation (FDIC) issued two additional financial institution letters pertaining to insured banks' relationships with third parties, including payments processors and others.⁹⁷

In addition to efforts made in 2014 to halt Operation Choke Point,⁹⁸ in 2015, members of both houses of Congress introduced the Firearms Manufacturers and Dealers Protection Act.⁹⁹ The bill prohibits expenditures by the FDIC, DOJ, and other federal agencies that “discourage the provision or continuation of credit or the processing of payments by financial institutions for dealers and manufacturers of firearms and ammunition.”¹⁰⁰ As it did in May 2014,¹⁰¹ the U.S. House of Representatives again passed an amendment to prohibit spending on Operation Choke Point.¹⁰² Unless the U.S. Senate concurs, the funding amendment will have only symbolic value, and Operation Choke Point is likely to continue.

93. *Id.* at 9–10.

94. See 2014 Survey, *supra* note 1, at 268.

95. Consent Decree for Permanent Injunction and Civil Penalty, *United States v. Plaza Bank*, No. CV-15-00394 (C.D. Cal. Mar. 12, 2015) (civil penalties of \$1.225 million to U.S. Treasury and U.S. Postal Inspection Service), available at <http://www.justice.gov/file/348831/download>. For additional discussion of this enforcement action, see Alan Zibel, *Operation Choke Point: Plaza Bank Becomes Third to Settle*, WALL ST. J. (Mar. 12, 2015, 5:24 PM EST), <http://blogs.wsj.com/moneybeat/2015/03/12/operation-choke-point-plaza-bank-becomes-third-to-settle/> (describing knowing facilitation by bank of consumer frauds by merchants after efforts by chief compliance officer of bank were “brushed aside” by bank’s COO, who was a part owner of a payments processing firm involved in the practices alleged).

96. Consent Decree for Permanent Injunction and Civil Money Penalty, *United States v. CommerceWest Bank*, No. CV-15-00379 (C.D. Cal. Mar. 10, 2015), available at <http://www.justice.gov/file/347431/download>. The bank agreed to pay \$4.9 million in civil and criminal penalties. Press Release, U.S. Dept’t of Justice, *CommerceWest Bank Admits Bank Secrecy Act Violation and Reaches \$4.9 Million Settlement with Justice Department* (Mar. 10, 2015), <http://www.justice.gov/opa/pr/commercwest-bank-admits-bank-secrecy-act-violation-and-reaches-49-million-settlement-justice>.

97. Fed. Deposit Ins. Corp., Statement on Providing Banking Services, FIL-5-2015 (Jan. 28, 2015), available at <https://www.fdic.gov/news/news/financial/2015/fil15005.pdf>; Fed. Deposit Ins. Corp., FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors, FIL-41-2014 (July 28, 2014), available at <https://www.fdic.gov/news/news/financial/2014/fil14041.pdf>.

98. See 2014 Survey, *supra* note 1, at 268–69.

99. S. 477, 114th Cong. (2015) (introduced Feb. 12, 2015); H.R. 1413, 114th Cong. (2015) (introduced Mar. 17, 2015).

100. S. 477, § 3; H.R. 1413, § 3.

101. See 2014 Survey, *supra* note 1, at 269 & n.64.

102. See 161 CONG. REC. H3805–07 (daily ed. June 3, 2015) (approving the Luetkemeyer Amendment to defund Operation Choke Point).

V. DEVELOPMENTS TO WATCH

In the coming year, federal developments to watch include (1) recent litigation challenging state statutes banning the imposition of surcharges on credit card transactions,¹⁰³ (2) the CFPB's 2015 framework for small-business review of payday and other small-value loans,¹⁰⁴ and (3) likely more enforcement actions under U.S. BSA/AML regulations.¹⁰⁵ There are two European Union developments to watch: the EU's regulation on interchange fees, which becomes effective starting in June 2015,¹⁰⁶ and the July 2014 European Banking Authority Opinion on Virtual Currencies.¹⁰⁷ Finally, readers will want to follow efforts by both the Conference of State Bank Supervisors and the Uniform Law Commission to create uniform prudential regulatory schemes for virtual currency providers.¹⁰⁸

103. *E.g.*, *Italian Colors Rest. v. Harris*, No. 2:14 Civ. 00604, 2015 WL 1405507 (E.D. Cal. Mar. 25, 2015), *appeal docketed*, No. 15-15873 (9th Cir. Apr. 30, 2015); *Rowell v. Abbott*, No. 1:14 Civ. 190 (W.D. Tex. Feb. 4, 2015), *appeal docketed*, No. 15-50168 (5th Cir. Mar. 3, 2015); *Dana's R.R. Supply v. Bondi*, No. 4:14-cv-00134-RH-CAS (N.D. Fla. Sept. 2, 2014), *appeal docketed*, No. 14-14426 (11th Cir. Sept. 30, 2014). As this survey went to final editing, the U.S. Court of Appeals for the Second Circuit issued its opinion vacating the district court's judgment and remanding for dismissal of plaintiffs' claims in *Expressions Hair Design, LLC v. Schneiderman* that New York State's credit-card surcharge ban was unconstitutional. Nos. 13-4533, 13-4537, 2015 WL 5692296, at *6 (2d Cir. Sept. 29, 2015). Judge Rakoff's 2013 decision had held the statute unconstitutional for vagueness under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and as an impermissible regulation of speech under the First Amendment, 975 F. Supp. 2d 430, 444 (S.D.N.Y. 2013).

104. See CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKINGS FOR PAYDAY, VEHICLE TITLE, AND SIMILAR LOANS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (Mar. 26, 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf. This outline contains a useful summary of the requirements of the consultation process prescribed in the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 609(b). *Id.* at 5–6.

105. See, e.g., Kate O'Keefe, *U.S. Fines Pacific Island Casino Operator \$75 Million for Anti-Money-Laundering Violations*, WALL ST. J. (June 5, 2015), <http://www.wsj.com/articles/u-s-fines-pacific-island-casino-operator-75-million-for-anti-money-laundering-violations-1433412878> (describing largest civil fine issued against a casino, Tinian Dynasty Hotel & Casino, Northern Mariana Islands, for “willful and egregious” violations of anti-money laundering rules back to 2008”); Rachel Louise Ensign & Julie Steinberg, *Treasury Scrutinizes Credit Unions*, WALL ST. J. (June 2, 2015), <http://www.wsj.com/articles/treasury-scrutinizes-credit-unions-1433286795>.

106. Regulation (EU) 2015/751 of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, art. 18, 2015 O.J. (L 123) 1.

107. EBA Opinion on “Virtual Currencies,” EBA/Op/2014/08 (July 4, 2014), available at <https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf>.

108. FINAL STUDY COMMITTEE ON ALTERNATIVE AND MOBILE PAYMENT SYSTEMS REPORT (Dec. 19, 2014), available at <http://www.uniformlaws.org/shared/docs/Alternative%20and%20Mobile%20Payments/AMPS%20Final%20Study%20Committee%20Report%2012-19-14.pdf>. The report focuses on policy areas such as consumer protection, market stability, and law enforcement goals and also makes recommendations on covered activities, policy implementation, and possible exclusions. *Id.* at 2–3. Note that both authors were involved in the Uniform Law Commission Study Committee.