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2018

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# Two Steps Forward, One Step Back: Developments in the Law Affecting Electronic Payments and Financial Services

By Stephen T. Middlebrook,\* Sarah Jane Hughes,\*\* and Tom Kierner\*\*\*

## I. INTRODUCTION

Our past surveys have observed that frequent changes in the rules surrounding electronic payments—spurred by both regulation and enforcement actions—create uncertainty and make forward progress difficult for many providers. This survey year is no exception: regulators have taken “two steps forward, one step back” on a number of fronts. This survey reports on (1) the proposal by the Office of the Comptroller of the Currency (“OCC”) regarding “fintech” charters, which states have challenged in actions still pending; (2) changes to Regulation CC regarding remote check deposit and disputes over altered or forged checks; (3) the Supreme Court’s decision in *Expression Hair Designs*, which may create the potential for challenges to required regulatory disclosures; (4) a modification by the Internal Revenue Service (“IRS”) of its demand for Bitcoin user information from a virtual currency exchange, after facing court challenges and congressional inquiries; (5) new payroll card regulations in Connecticut, Pennsylvania, and New York—with the New York rule being invalidated by another state agency, throwing the whole controversy into the state courts; (6) recent enforcement actions by the Consumer Financial Protection Bureau (“CFPB”) and Federal Trade Commission (“FTC”) regarding unfair and deceptive acts and practices; and (7) the CFPB’s “final rule” regarding prepaid accounts. Like the proverbial frog trying

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to escape from a well, business lawyers who follow these issues must learn to deal with constant movement, albeit in multiple directions.

## II. A “FINTECH” NATIONAL BANK CHARTER? THE OCC LAYS CLAIM AND THE STATES FIGHT BACK

In December 2016, the OCC announced plans to grant “special purpose” national bank charters to “fintech” (short for “financial technology”) companies.<sup>1</sup> The OCC cited the National Bank Act<sup>2</sup> and the Home Owners’ Loan Act<sup>3</sup> for authority to charter fintech companies.<sup>4</sup> The proposal would allow these charter holders to conduct: (1) only “fiduciary activities or . . . any other activities within the business of banking,” or (2) non-fiduciary activities if the applicant would also conduct at least one of the following banking functions: “receiving deposits, paying checks, or lending money.”<sup>5</sup>

In the past, the OCC has chartered various types of “special purpose national banks,” including “trust banks” and “credit card banks.”<sup>6</sup> Fintech banks would be “subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks.”<sup>7</sup> If the fintech banks take deposits, then FDIC-related limits on activities would apply.

Most fintech national banks would need to be members of the Federal Reserve, unless located in territories and insular possessions of the United States,<sup>8</sup> making these “offshore” locations highly attractive. Fintechs also may be governed by the Bank Holding Company Act.<sup>9</sup>

The special allure of fintech national charters lies in National Bank Act preemption of state supervision and licensure.<sup>10</sup> That Act also grants national banks nationwide use of their “home state” interest rates.<sup>11</sup>

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1. OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 2 (2016) [hereinafter 2016 FINTECH CHARTER PROPOSAL], <https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>; see OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE 3 (2016), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf> (noting that “innovations are taking place outside of the banking industry, often in unregulated or lightly regulated fintech companies”).

2. 12 U.S.C. §§ 1–216d (2012).

3. *Id.* §§ 1461–1470.

4. 2016 FINTECH CHARTER PROPOSAL, *supra* note 1, at 3.

5. *Id.* at 3 & n.4 (citing 12 C.F.R. §§ 5.20(e)(1), (3), 160.30).

6. *Id.* at 3 & n.5.

7. *Id.* at 5.

8. *Id.* at 6–7 & n.17 (citing 12 U.S.C. § 222).

9. *Id.* at 7 & n.20 (citing 12 U.S.C. § 1841).

10. 12 U.S.C. § 484 (2012).

11. *Id.* § 85; see also Office of the Comptroller of the Currency, Interpretive Ltr. No. 822, at 14 (Mar. 1988), <https://www.occ.gov/static/interpretations-and-precedents/mar98/int822.pdf> (stating that “an interstate national bank may charge interest permitted by the laws of its home state unless the loan is made—that is, the loan is approved, credit is extended and funds are disbursed—in a branch or branches of the bank in a single host state”).

In 2017, the Conference of State Bank Supervisors (“CSBS”) and the New York State Department of Financial Services (“DFS”) separately challenged the OCC’s plans in court. On April 26, 2017, CSBS filed its complaint for declaratory and injunctive relief against the OCC.<sup>12</sup> The CSBS alleged that the OCC’s plans are contrary to the National Bank Act and the Administrative Procedure Act,<sup>13</sup> fail to engage in required public notice and comment,<sup>14</sup> and exceed the OCC’s authority by proposing to charter entities not “engage[d] in the business of banking, including receiving deposits.”<sup>15</sup> CSBS also charged that the OCC’s proposal fails to specify which federal banking laws apply to each charter granted “through private operating agreements individualized to the business model of each applicant” and allows deals negotiated in secret.<sup>16</sup> Finally, the CSBS maintained that none of the three express statutory categories for special-purpose charters benefit fintech companies.<sup>17</sup>

The DFS’s complaint<sup>18</sup> called the OCC’s plan “lawless, ill-conceived, and destabilizing of financial markets that are properly and most effectively regulated by New York State,”<sup>19</sup> and argued that the plan creates “serious threats to the well-being of New York consumers and businesses alike.”<sup>20</sup>

The proposal is either among the biggest developments of this year, or one that could fizzle out. Will state challenges prompt the OCC to change its plan? Will Congress step in? Will court challenges end the plan?

### III. NEW REGULATION CC PROVISIONS ON REMOTE CHECK DEPOSIT AND RETURN AND A PROPOSED PRESUMPTION FOR RESOLVING DISPUTES OVER ALTERED OR FORGED CHECKS

On May 31, 2017, the Federal Reserve Board (“Board”) announced significant amendments to Regulation CC,<sup>21</sup> and it proposed new provisions dealing with risk allocations for counterfeit or altered checks, including a new presumption of alteration (not forgery) of substitute or electronic checks in specified circumstances.<sup>22</sup>

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12. Complaint for Declaratory and Injunctive Relief, Conference of State Bank Supervisors v. OCC, No. 1:17-cv-00763 (D.D.C. Apr. 26, 2017).

13. *Id.* at para. 7.

14. *Id.* at para. 8.

15. *Id.* at para. 40 (citing Nat’l State Bank v. Smith, No. 76-1479 (D.N.J. Sept. 16, 1977), *rev’d on other grounds*, 591 F.2d 223 (3d Cir. 1979)).

16. *Id.* at para. 9.

17. *Id.* at paras. 42, 43, 45 (citing 12 U.S.C. §§ 27(a), (b), 1841(c)(2)(D), (F)).

18. Complaint for Declaratory and Injunctive Relief, Vullo v. OCC, No. 1:17-cv-03574 (S.D.N.Y. May 12, 2017).

19. *Id.* at para. 2.

20. *Id.* at para. 3.

21. Press Release, Fed. Reserve Bd., Federal Reserve Board Announces Final Amendments to Regulation CC and Requests Public Comments on an Additional Proposed Amendment (May 31, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20170531a.htm>.

22. Availability of Funds and Collection of Checks, 82 Fed. Reg. 25539 (proposed June 2, 2017) (to be codified at 12 C.F.R. pt. 229) [hereinafter Proposed Amendment].

The final amendments, published in the Federal Register on June 15, 2017,<sup>23</sup> bring electronically created items under Regulation CC, including items that never existed in paper form,<sup>24</sup> modify indemnities for remotely deposited checks,<sup>25</sup> and create new indemnities and warranties related to electronic collection of checks to enable a consistent warranty chain regardless of the paper or electronic form of the check.<sup>26</sup> The final amendments also modify expeditious return and notice of nonpayment requirements to create stronger incentives for electronic presentment and return of checks.<sup>27</sup> These amendments become effective July 1, 2018.<sup>28</sup>

The proposed evidentiary rules, published for comment in the Federal Register on June 2, 2017,<sup>29</sup> introduce into 12 C.F.R. § 229.38 a rebuttable presumption of alteration over forgery; production of an original check that can be examined by all parties to a dispute nullifies the new presumption.<sup>30</sup> The proposed Official Commentary explains how the proposed rules would operate.<sup>31</sup> The Commentary explains the effect that electronic check collection, check truncation, and creation of substitute checks has on the burdens the U.C.C. assigns.<sup>32</sup> The proposal would resolve a split of opinion between United States Courts of Appeal on whether a “paid, but fraudulent, check should be presumed to be altered or forged in the absence of evidence (such as the original check).”<sup>33</sup>

The proposed presumption would apply to disputes arising under federal or state law.<sup>34</sup> Regulation CC has preemptive effect over inconsistent state law,<sup>35</sup> such as the risk allocations set forth in U.C.C. Articles 3 and 4,<sup>36</sup> including their reliance on the decision in *Price v. Neal*.<sup>37</sup> Presumably, this applies to disputes *between banks* because Regulation CC’s Subpart C (Collection of Checks) generally describes duties of banks, not duties of non-banks.<sup>38</sup>

Contrary to our theme, the final and proposed amendments are likely to be viewed by banks and their counsel as two steps forward and no steps back.

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23. Availability of Funds and Collection of Checks, 82 Fed. Reg. 27552 (June 15, 2017) (to be codified at 12 C.F.R. pt. 229).

24. *Id.* at 27579 (to be codified at 12 C.F.R. § 229.2(hhh)).

25. *Id.* at 27582 (to be codified at 12 C.F.R. § 229.34(f), (g)).

26. *Id.* (to be codified at 12 C.F.R. § 229.34(i)); *id.* at 27594 (to be codified at 12 C.F.R. pt. 229, app. E, cmt. XX(J)).

27. *Id.* at 27579–80 (to be codified at 12 C.F.R. §§ 229.30, 229.31).

28. *Id.* at 27552.

29. Proposed Amendment, *supra* note 22, at 25539.

30. *Id.* at 25541 (to be codified at 12 C.F.R. § 229.38(i)).

31. *Id.* at 25542 (to be codified at 12 C.F.R. pt. 229, app. E, cmt. XXIV(I)).

32. *Id.* (to be codified at 12 C.F.R. pt. 229, app. E, cmt. XXIV(I)).

33. *Id.* at 25540 & n.7 (citing *Chevy Chase Bank, F.S.B. v. Wachovia Bank, N.A.*, 208 F. App’x 232, 235 (4th Cir. 2006); *Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619, 622 (7th Cir. 2006)).

34. *Id.* at 25540.

35. 12 U.S.C. §§ 4007, 5012 (2012); 12 C.F.R. §§ 229.41, 229.59 (2017).

36. *E.g.*, U.C.C. §§ 3-407, 3-416, 3-417, 4-207, 4-208 (2011).

37. *Price v. Neal* (1762) 97 Eng. Rep. 871, 871–72.

38. 12 C.F.R. §§ 229.30–229.43 (2017).

#### IV. NEW YORK CREDIT CARD SURCHARGE STATUTE HELD UNCONSTITUTIONAL AS REGULATION OF SPEECH, NOT CONDUCT

In *Expressions Hair Design v. Schneiderman*, the U.S. Supreme Court ruled that a New York state law allowing discounts for cash but prohibiting surcharges for use of a credit card was a regulation of speech, not of conduct, observing that the provision “regulat[ed] the communication of prices rather than prices themselves.”<sup>39</sup> The Court remanded to the U.S. Court of Appeals for the Second Circuit to determine whether the statute unconstitutionally limits commercial speech.<sup>40</sup> The Court also denied certiorari to a successful challenge of Florida’s no-surcharge statute,<sup>41</sup> and it remanded a challenge to Texas’ statute to the U.S. Court of Appeals for the Fifth Circuit for further consideration in light of *Expressions Hair Design*.<sup>42</sup> These developments signal the Court’s openness to potential First Amendment challenges to regulations impacting commercial speech, including the pervasive and extremely detailed disclosure requirements that regulators frequently impose on electronic financial products and services. We believe this is an area of jurisprudence that payments lawyers should monitor.

#### V. IRS ISSUES AND MODIFIES “JOHN DOE” SUMMONS TO BITCOIN EXCHANGE

On November 17, 2016, the IRS asked a federal court to issue a so-called “John Doe” summons to Coinbase, Inc., a leading bitcoin exchange and wallet service, seeking a broad array of information on every one of the company’s U.S. customers who engaged in a virtual currency transaction during the years 2013–2015.<sup>43</sup> Under the agency’s prior guidance, virtual currencies are treated as property for tax purposes, meaning that, if, between the time one acquires virtual currency and the time one uses it to buy something, its value increases or decreases, then the holder has a reportable capital gain or loss.<sup>44</sup> An IRS agent declared that the government was aware of taxpayers who did not report capital gains on their holdings of bitcoin or used the virtual currency to repatriate for-

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39. 137 S. Ct. 1144, 1151 (2017).

40. *Id.* at 1152.

41. *Dana’s R.R. Supply v. Att’y Gen.*, 807 F.3d 1235 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 1452 (2017).

42. *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016), *cert. granted, vacated & remanded*, 137 S. Ct. 1431 (2017).

43. *Ex Parte* Petition for Leave to Serve “John Doe” Summons, *In re* Tax Liabs. of John Does, No. 3:16-cv-06658-JSC (N.D. Cal. Nov. 17, 2016), <https://www.plainsite.org/dockets/330oss6rw/california-northern-district-court/v-united-states-of-america/>; see Jacob Gershman, *IRS Crackdown on Bitcoin Exchange Fuels Privacy Worries*, WALL ST. J. (Mar. 27, 2017, 10:00 AM), <https://www.wsj.com/articles/irs-crackdown-on-bitcoin-exchange-fuels-privacy-worries-1490623200>.

44. Internal Revenue Service, IRS Notice 2014-21 (Mar. 25, 2014), <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>. Note that the IRS is seeking information from Coinbase regarding transactions that took place a year before the guidance was issued.

foreign income to the United States.<sup>45</sup> The petition, however, contained no allegations that specific Coinbase customers had engaged in tax evasion.

Coinbase users moved to intervene in the IRS proceedings and to quash the summons.<sup>46</sup> In addition, members of Congress expressed concern over the breadth of the information request, noting that it could cover 500,000 active Coinbase users.<sup>47</sup> The IRS narrowed the scope of its information request to Coinbase to customers with transactions in an amount equivalent to, or more than, \$20,000.<sup>48</sup> It remains to be seen whether these concessions will satisfy Coinbase, its users, or Congress.

## VI. STATES ADD TO COMPLEXITY OF REGULATION OF PAYROLL CARDS

In the past year, New York, Pennsylvania, and Connecticut have each added, through either regulation or statute, to the complicated patchwork of state-by-state requirements facing employers that offer payroll cards as a method of receiving wages.

### A. NEW YORK DEVELOPMENTS

On September 7, 2016, the New York Department of Labor (“DOL”) adopted regulations that sought to govern the use of payroll debit cards as payment of wages.<sup>49</sup> Those regulations imposed specific notice and consent requirements, created a mandatory waiting period between obtaining consent and placing wages on payroll cards, prohibited assessment of certain fees, and required cer-

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45. Declaration of Senior Revenue Agent David Utzke in Support of *Ex Parte* Petition for Leave to Serve “John Doe” Summons at paras. 30–33, 56, *In re Tax Liabs. of John Does*, No. 3:16-cv-06658-JSC (N.D. Cal. Nov. 17, 2016), <https://www.plainsite.org/dockets/330oss6rw/california-northern-district-court/v-united-states-of-america/>.

46. Motion to Intervene, to Quash Summons, or for Protective Order, *United States v. Coinbase, Inc.*, No. 3:17-cv-01431-JSC (N.D. Cal. May 15, 2017), [https://www.scribd.com/document/348550422/Motion](https://www.scribd.com/document/348550422/Motion; see Kelly Phillips Erb, Anonymous Coinbase Users Seek to Intervene in IRS Efforts to Access Bitcoin Info, FORBES (May 16, 2017, 8:07 AM), https://www.forbes.com/sites/kellyphillipserb/2017/05/16/anonymous-coinbase-users-seek-to-intervene-in-irs-efforts-to-access-bitcoin-info/#5e2ca247dbbc); see Kelly Phillips Erb, *Anonymous Coinbase Users Seek to Intervene in IRS Efforts to Access Bitcoin Info*, FORBES (May 16, 2017, 8:07 AM), <https://www.forbes.com/sites/kellyphillipserb/2017/05/16/anonymous-coinbase-users-seek-to-intervene-in-irs-efforts-to-access-bitcoin-info/#5e2ca247dbbc>.

47. Letter from Sen. Orrin G. Hatch, Chairman, Sen. Comm. on Fin. et al. to John Koskinen, IRS Comm’r (May 17, 2017), <https://waysandmeans.house.gov/wp-content/uploads/2017/05/2017.05.17-Coinbase-Letter-Hatch-Brady-Buchanan.pdf>; see Letter from Reps. Jared Polis & David Schweikert to John Koskinen, IRS Comm’r (June 2, 2017), [https://polis.house.gov/uploadedfiles/060217\\_itr\\_irs\\_digital\\_currency.pdf](https://polis.house.gov/uploadedfiles/060217_itr_irs_digital_currency.pdf); Kelly Phillips Erb, *Congress Questions IRS on Efforts to Access Coinbase Customer Data*, FORBES (May 19, 2017, 2:50 PM), <https://www.forbes.com/sites/kellyphillipserb/2017/05/19/congress-questions-irs-on-efforts-to-access-coinbase-customer-data/#4013bb0b2276>.

48. United States’ Notice of Narrowed Summons Requests for Enforcement, *United States v. Coinbase, Inc.*, No. 3:17-cv-01431-JSC (N.D. Cal. July 6, 2017), [https://www.scribd.com/document/353401929/Notice](https://www.scribd.com/document/353401929/Notice; see Stan Higgins, $20,000: IRS to Exempt Casual Bitcoin Buyers from Coinbase Data Request, COINDESK (July 10, 2017, 4:30 PM), https://www.coindesk.com/20000-irs-exempt-casual-bitcoin-buyers-coinbase-data-request/); see Stan Higgins, *\$20,000: IRS to Exempt Casual Bitcoin Buyers from Coinbase Data Request*, COINDESK (July 10, 2017, 4:30 PM), <https://www.coindesk.com/20000-irs-exempt-casual-bitcoin-buyers-coinbase-data-request/>; Jeff John Roberts, *IRS Says It Will Limit Bitcoin Audits—But Only a Bit*, FORTUNE (July 6, 2017), <http://fortune.com/2017/07/06/coinbase-irs-summons/>.

49. Methods of Payment of Wages, 38 N.Y. Reg. LAB-21-15-00009-A (Sept. 7, 2016) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 12, pt. 192), *invalidated by Glob. Cash Card, Inc. v. Comm’r of Labor*, No. PR 16-120 (N.Y. Indus. Bd. of App. Feb. 16, 2017), <http://industrialappeals.ny.gov/decisions/pdf/pr-16-120.pdf>.

tain wage access methods. Global Cash Card, Inc., a payroll card vendor, petitioned the Industrial Board of Appeals for review of the DOL regulations, and on February 16, 2017—a mere nineteen days prior to the proposed effective date—the Board invalidated and revoked the regulations.<sup>50</sup> The DOL filed an appeal,<sup>51</sup> which is currently pending in state court.

Six days after the DOL rule was invalidated, the New York State Workers' Compensation Board released a proposed rule<sup>52</sup> that included language regulating the use of debit cards for the payment of family leave benefits. Later modified on May 24, 2017, the revised rule, while pared down, contained some provisions similar to the invalidated DOL rule, including requirements that employers (1) list locations where the employee can access benefits at no charge, and (2) provide certain disclosures in both English and the employee's native language.<sup>53</sup> The revised version was adopted on July 10, 2017.<sup>54</sup> Because of the evolving nature of both the DOL's litigation and the revised family leave rule, it is unclear what obligations New York employers have with respect to the issuance of wages and benefits via debit cards.

## B. PENNSYLVANIA DEVELOPMENTS

In light of the uncertainty created by the *Siciliano v. Mueller*<sup>55</sup> decision as to whether payroll cards are a legal method of wage payment, on November 4, 2016, Pennsylvania Governor Tom Wolf signed into law a bill that amended the state's electronic funds transfer law,<sup>56</sup> specifically authorizing the payment of wages via payroll cards. Along with resolving the ambiguity following *Siciliano*, the law imposed several requirements on employers who provided wages through payroll cards. Specifically, the use of payroll cards is permitted if (1) the use of a payroll card is voluntary,<sup>57</sup> (2) the employer complies with advance notice requirements concerning the employee's options and fees,<sup>58</sup> (3) the payroll card program allows for certain free access to wages and free ability to check the balance,<sup>59</sup> and (4) there are no fees for application of the payroll

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50. Glob. Cash Card, Inc. v. Comm'r of Labor, No. PR 16-120 (N.Y. Indus. Bd. of App. Feb. 16, 2017), <http://industrialappeals.ny.gov/decisions/pdf/pr-16-120.pdf>.

51. Reardon v. Glob. Cash Card, Inc., No. 02643-17 (N.Y. Sup. Ct. Apr. 17, 2017).

52. Paid Family Leave, 39 N.Y. Reg. WCB-08-17-00010-P (Feb. 22, 2017) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 12, pts. 355, 360, 361, 376, 380).

53. Paid Family Leave, 39 N.Y. Reg. WCB-08-17-00010-RP (May 24, 2017) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 12, pts. 355, 360, 361, 376, 380).

54. N.Y. COMP. CODES R. & REGS. tit. 12, § 380-5.6 (2017).

55. *Siciliano v. Mueller*, 149 A.3d 863 (Pa. Super. Ct. 2016) (finding for the plaintiff on other grounds, and leaving unanswered the question of whether payroll debit cards may be an appropriate method of wage payment); see also Sarah Jane Hughes & Stephen T. Middlebrook, *Developments in the Law Affecting Electronic Payments and Financial Services*, 71 BUS. LAW. 361, 367 (2015) (discussing *Siciliano*).

56. 7 PA. STAT. & CONS. STAT. ANN. §§ 6121–6124 (West 2017).

57. *Id.* § 6122.1(3).

58. *Id.* § 6122.1(4).

59. *Id.* § 6122.1(5), (6).



card, the loading of wages, the issuance of the card, point-of-sale transactions, or inactivity for the first twelve months of nonuse.<sup>60</sup>

### C. CONNECTICUT DEVELOPMENTS

The Connecticut General Assembly passed a law that, effective October 1, 2016, specifically permits the payment of wages through payroll cards.<sup>61</sup> Like the Pennsylvania law, use of a payroll card is permitted only if (1) the enrollment in the program is voluntary,<sup>62</sup> (2) the employer satisfies stringent notification requirements,<sup>63</sup> and (3) the program complies with certain fee prohibitions<sup>64</sup> and wage access requirements.<sup>65</sup>

Payment and employment lawyers would be well-advised to continue to pay attention to payroll card developments on the state level in order to assist their clients in navigating the evolving complexity—especially when their clients operate in multiple jurisdictions.

## VII. CFPB AND FTC EXPAND SCOPE OF UNFAIR AND DECEPTIVE ACTS OR PRACTICES

### A. CFPB ENFORCEMENT ACTION AGAINST MONEYTREE

The CFPB entered into a consent order on December 16, 2016, with Moneytree, Inc., a company that provides check-cashing services, small-dollar loans, and prepaid-card products, regarding what the CFPB viewed to be deceptive acts.<sup>66</sup> For a little over a month in early 2015, Moneytree ran online advertisements offering to cash consumers' tax refund checks for a 1.99 percent fee. In approximately half of those ads, the percent sign was inadvertently left off the number.<sup>67</sup> The CFPB found that, because consumers might assume that "1.99" without a percent sign meant checks could be cashed for a flat fee of \$1.99, Moneytree had engaged in a deceptive act.<sup>68</sup> In a separate incident, Moneytree sent a group of 490 consumers who had unsecured installment loans the wrong form collection letter—accidentally using a model meant for automobile loans that included an incorrect statement that failure to pay could result in the recipient's automobile being repossessed.<sup>69</sup> When Moneytree discovered the error, it

60. *Id.* § 6122.1(7).

61. CONN. GEN. STAT. § 31-71k (2017).

62. *Id.* § 31-71k(b)(2).

63. *Id.* § 31-71k(c).

64. *Id.* § 31-71k(f)(1).

65. *Id.* § 31-71k(d).

66. Consent Order, *In re Moneytree, Inc.*, No. 2016-CFPB-0028 (C.F.P.B. Dec. 16, 2016) [hereinafter *Moneytree Consent Order*], [http://files.consumerfinance.gov/f/documents/201612\\_cfpb\\_Moneytree-consentorder.pdf](http://files.consumerfinance.gov/f/documents/201612_cfpb_Moneytree-consentorder.pdf); see Jim Brunner, *Payday Lender Moneytree Hit with \$500,000 in Fines and Refunds*, SEATTLE TIMES (Dec. 21, 2016, 6:04 PM), <http://www.seattletimes.com/business/local-business/payday-lender-moneytree-hit-with-500000-in-fines-and-refunds/>.

67. *Moneytree Consent Order*, *supra* note 66, at 4.

68. *Id.* at 4–5.

69. *Id.* at 6.

sent out corrective letters.<sup>70</sup> Nonetheless, CFPB viewed the mix-up as a deceptive act. In a third incident, Moneytree made changes to a payment plan agreement and inadvertently deleted language authorizing it to initiate electronic funds transfers on behalf of the consumer. The mistake was caught and corrected in a week.<sup>71</sup> For these three infractions, CFPB ordered Moneytree to set aside \$255,000 to refund all fees over \$1.99 paid by impacted tax refund check cashing customers and to refund all loan payments made by recipients of the incorrect collection letter.<sup>72</sup> In addition, CFPB assessed a \$250,000 civil money penalty.<sup>73</sup>

## B. CFPB ENFORCEMENT ACTION AGAINST UNIRUSH AND MASTERCARD

On February 1, 2017, the CFPB entered into a consent order with UniRush, LLC (“UniRush”) and Mastercard International, Inc. (“Mastercard”) regarding what CFPB deemed to be unfair practices.<sup>74</sup> The enforcement action stemmed from UniRush’s October 2015 conversion of its RushCard prepaid card portfolio to Mastercard’s processing platform, which resulted in a service outage during which some cardholders were unable to access their funds.<sup>75</sup> Four class action lawsuits were filed in response to the disruption,<sup>76</sup> all of which were resolved in September 2016 for an amount estimated at over \$20 million.<sup>77</sup>

The CFPB asserted that both UniRush and Mastercard had engaged in unfair practices related to the conversion. While the system changes had been planned for over a year and the parties had engaged in multiple mock conversions, the CFPB found that the processor’s test environment did not accurately simulate the production system, causing problems during the conversion.<sup>78</sup> In addition, configuration errors, mistakes in technical manuals provided to UniRush, and improperly declined transactions resulted in more problems for cardholders.<sup>79</sup>

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70. *Id.* at 7.

71. *Id.* at 7–8.

72. *Id.* at 11–12.

73. *Id.* at 14.

74. Consent Order, *In re* UniRush LLC, No. 2017-CFPB-0010 (C.F.P.B. Feb. 1, 2017) [hereinafter UniRush Consent Order], [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201702\\_cfpb\\_UniRush-Mastercard-consent-order.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201702_cfpb_UniRush-Mastercard-consent-order.pdf).

75. *Id.* at 2–3; see Liz Moyer & Jessica Silver-Greenberg, *RushCard Breakdown Affects Thousands of Prepaid Debit Card Users*, N.Y. TIMES (Oct. 20, 2015), <http://nyti.ms/1KnnjHj>.

76. Complaint, *Jones v. UniRush, LLC*, No. 5:15-cv-05996 (E.D. Pa. Nov. 5, 2015); Complaint, *Peterkin v. UniRush, LLC*, No. 1:15-cv-08573 (S.D.N.Y. Nov. 2, 2015); Complaint, *Huff v. UniRush, LLC*, No. 2:15-cv-02253 (E.D. Cal. Oct. 30, 2015); Complaint, *Fuentes v. UniRush, LLC*, No. 1:15-cv-08372 (S.D.N.Y. Oct. 23, 2015).

77. *Fuentes v. UniRush, LLC*, No. 1:15-cv-08372 (S.D.N.Y. Sept. 12, 2016), [http://www.rushsettlement.com/pdf/Rush\\_Card\\_Order\\_Granted\\_Final\\_Approval.pdf](http://www.rushsettlement.com/pdf/Rush_Card_Order_Granted_Final_Approval.pdf) (approving Stipulation of Agreement and Settlement and Release, *Fuentes v. UniRush, LLC*, No. 1:15-cv-08372 (S.D.N.Y. May 11, 2016), [http://www.rushsettlement.com/pdf/Rush\\_Card\\_Settlement\\_Agreement.pdf](http://www.rushsettlement.com/pdf/Rush_Card_Settlement_Agreement.pdf)); see Jonnelle Marte, *RushCard Agrees to Pay \$20.5 Million to Customers Who Were Locked Out of Accounts*, WASH. POST (May 12, 2016), <https://www.washingtonpost.com/news/get-there/wp/2016/05/12/rushcard-agrees-to-pay-20-5-million-to-customers-who-were-locked-out-of-accounts>.

78. UniRush Consent Order, *supra* note 74, at 6–7.

79. *Id.* at 7–9.

CFPB faulted UniRush for not being able to handle the extreme increase in customer service calls—calls that spiked to 600 percent higher than projected—leaving consumers on hold or unable to get through at all.<sup>80</sup> The CFPB also deemed other actions, including turning certain product features off to prevent fraud and using new funds loaded to cards to offset negative balances, to be unfair.<sup>81</sup> Under the consent order, the parties agreed to pay \$10 million in additional consumer redress beyond payments made to settle the class actions, pay a civil money penalty of \$3 million, and to implement new testing and incident response programs.<sup>82</sup>

### C. FTC ENFORCEMENT ACTION AGAINST NETSPEND

In November 2016, the FTC filed a complaint<sup>83</sup> against NetSpend Corporation, alleging three counts of deceptive marketing practices stemming from representations that consumers (1) will have immediate access to funds,<sup>84</sup> (2) are guaranteed approval,<sup>85</sup> and (3) will receive provisional credit for account errors in certain circumstances.<sup>86</sup>

The FTC faulted NetSpend because customer accounts were not approved and funds were not immediately accessible when the company was unable to verify the customer's identity as is required by the company's anti-money laundering policy.<sup>87</sup> In other instances, cards were blocked for a protracted period of time. While the FTC does not identify why the cards were blocked, NetSpend discloses in its Cardholder Agreement that it may block cards for various reasons including fraudulent, suspicious, or criminal activity; activity that violates the Cardholder Agreement; or in response to the card being reported lost or stolen<sup>88</sup>—all reasons that, in addition to being disclosed, are either required under applicable regulations or consistent with industry practice. Finally, the FTC found that, in tens of thousands of instances, NetSpend did not comply with the advertised timelines and procedures for account disputes—timelines and procedures that were in line with those prescribed in Regulation E.<sup>89</sup>

In April 2017, NetSpend settled with the FTC, agreeing to certain advertising standards and to provide no less than \$53 million to affected consumers.<sup>90</sup> Of

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80. *Id.* at 10.

81. *Id.* at 11–12.

82. *Id.* at 14–27.

83. Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. NetSpend Corp.*, No. 1:16-CV-4203-AT (N.D. Ga. Nov. 10, 2016) [hereinafter *NetSpend Complaint*], [https://www.ftc.gov/system/files/documents/cases/netspend\\_unsealed\\_complaint\\_filed.pdf](https://www.ftc.gov/system/files/documents/cases/netspend_unsealed_complaint_filed.pdf).

84. *Id.* at 24.

85. *Id.* at 24–25.

86. *Id.* at 25–26.

87. *See id.* at 16–17.

88. *Cardholder Agreement*, NETSPEND 19 (Aug. 17, 2015), [https://www.netspend.com/account/terms/030201\\_1-0.pdf](https://www.netspend.com/account/terms/030201_1-0.pdf).

89. *See* 12 C.F.R. § 205.11 (2017); *NetSpend Complaint*, *supra* note 83, at 13–16, 22–23.

90. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. NetSpend Corp.*, No. 1:16-CV-4203-AT (N.D. Ga. Apr. 10, 2017), [https://www.ftc.gov/system/files/documents/cases/netspend\\_final\\_order\\_-\\_entered.pdf](https://www.ftc.gov/system/files/documents/cases/netspend_final_order_-_entered.pdf).

the ordered monetary relief, \$40 million represented funds held on deposit on behalf of consumers who had opened, but not activated, card accounts. The remaining \$13 million reflected fees charged by NetSpend when those accounts were not yet activated.<sup>91</sup> In addition to this action signaling that the FTC will continue to regulate claims of unfair and deceptive practices that overlap with the jurisdiction of the CFPB, payments lawyers are reminded that regulatory and legal obligations will not provide a safe harbor from assertions of deceptive marketing.

### VIII. CFPB ISSUES A “FINAL” PREPAID ACCOUNT RULE AND IMMEDIATELY PROPOSES AMENDMENTS

On October 5, 2016, capping a four-year process, the CFPB released its highly anticipated Final Rule on Prepaid Accounts (“Rule”), spanning 454 pages in the Federal Register.<sup>92</sup> Initially set to become effective on October 1, 2017, the Rule’s effective date has been pushed back six months until April 1, 2018,<sup>93</sup> while it revisits two substantive issues.<sup>94</sup> Additionally, the CFPB has sought comments on whether the Rule should be further delayed while it considers additional modifications.<sup>95</sup> As a result, the total scope of the Rule’s impact and its timeline are unclear.

The Rule expands the scope of products covered by Regulation E by including “prepaid account” under Regulation E’s definition of “account.”<sup>96</sup> Included in the definition of prepaid accounts are (i) payroll card accounts, (ii) government benefit accounts, (iii) accounts that are marketed as prepaid and operate as an open-loop account or are usable at automated teller machines, and (iv) accounts whose primary function is to conduct transactions as an open-loop account, or at automated teller machines, or to conduct person-to-person transfers. A key implication of this broad definition is that Regulation E’s limited liability

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91. *Id.* at 7–8.

92. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 83934 (Nov. 22, 2016) (to be codified at 12 C.F.R. pts. 1005 & 1026) [hereinafter Prepaid Rule].

93. *Id.* at 83934 (originally providing for an effective date of October 1, 2017, but excluding 12 C.F.R. § 1005.19(b), the effective date of which was delayed until October 1, 2018); Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); Delay of Effective Date, 82 Fed. Reg. 18975 (Apr. 25, 2017) (delaying effective date until April 1, 2018, but otherwise retaining the delayed effective date of October 1, 2018, for 12 C.F.R. § 1005.19(b)).

94. Amendments to Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 Fed. Reg. 29630 (proposed June 29, 2017) (to be codified at 12 C.F.R. pts. 1005 & 1026) (seeking comments on error resolution and limitations of liability for unverified accounts and the application of the rule’s credit-related provisions to digital wallets that are capable of storing funds).

95. *Id.* at 29633.

96. Prepaid Rule, *supra* note 92, at 84325 (to be codified at 12 C.F.R. § 1005.2(b)).

and error resolution requirements will apply to all prepaid accounts,<sup>97</sup> and provisional credit requirements will apply for all verified prepaid accounts.

The Rule aims to increase transparency by imposing new disclosure requirements and mandating submission of consumer agreements to the CFPB and public posting of the same. It creates a uniform pre-acquisition disclosure regime for prepaid accounts, requiring both long-form and short-form disclosures.<sup>98</sup> The Rule mandates the disclosure of both static fees and incidence-based fees, and it specifies much of the minutiae including disclosure placement and font size, color, and type.<sup>99</sup> The long-form and short-form disclosures, as well as the consumer agreements, must be submitted to the CFPB and posted online.<sup>100</sup>

Prepaid account providers generally must provide periodic statements that display all financial transactions and information on fees assessed for the prior month and for calendar year to date.<sup>101</sup> However, providers do not have to issue periodic statements if they provide account balance information via telephone and the transaction and fee information electronically for the prior twelve months and prior twenty-four months upon request.<sup>102</sup> Finally, the Rule amends Regulation E and Regulation Z to regulate overdraft credit features that are offered in conjunction with prepaid accounts.<sup>103</sup>

## IX. (ALMOST) CONCLUSIONS

The developments covered in this year's survey document the herky-jerky, advance and retreat, constantly evolving nature of the regulation of electronic payments. Given that regulators have left unresolved so many questions related to electronic check collection, virtual currency, and prepaid products, we do not anticipate that this area of the law will see less ambiguity in the coming years. The struggle between state and federal entities for regulatory dominance over the emerging world of fintech providers will likely provide great fodder for surveys articles of the future.

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97. It is unclear whether the CFPB will apply Regulation E's error resolution protections on unverified accounts. This is one of the two substantive issues on which the CFPB has recently sought additional comments from industry.

98. Prepaid Rule, *supra* note 92, at 84328–36 (to be codified at 12 C.F.R. § 1005.18); *id.* at 84338–45 (to be codified at 12 C.F.R. pt. 1005, app. A); *id.* at 84350–61 (to be codified at 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)).

99. *See id.* at 84359–60 (to be codified at 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)(7)).

100. *Id.* at 84336 (to be codified at 12 C.F.R. § 1005.19); *id.* at 84365–68 (to be codified at 12 C.F.R. pt. 1005, supp. I, cmt. 19).

101. *Id.* at 84334 (to be codified at 12 C.F.R. § 1005.18(c)); *id.* at 84361 (to be codified at 12 C.F.R. pt. 1005, supp. I, cmt. 18(c)).

102. *Id.* at 84334 (to be codified at 12 C.F.R. § 1005.18(c)(1)).

103. *Id.* at 83935–36; *see id.* at 84370 (to be codified at 12 C.F.R. § 1026.61).