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Sarah Jane Hughes

Indiana University Maurer School of Law, sjhughes@indiana.edu

Stephen T. Middlebrook

UniRush

Tom Kierner

UniRush

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Developments in the Law Affecting Electronic Payments and Financial Services

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

I. INTRODUCTION

Developments affecting e-payments and financial services were as varied as ever during the past year. The subjects we chose for this survey focus on emerging issues in e-payments and federal and state regulation of e-payments and e-payment providers.

II. PREPAID CARDS—FDIC GUIDANCE ON BROKERED DEPOSITS, INTER-AGENCY CIP GUIDANCE, AND MORE

Since last year's survey, there have been several developments in the prepaid area. Multiple agencies have provided guidance and issued frequently asked questions ("FAQs") that have provided answers and, in some instances, more uncertainty.

A. FDIC ISSUES FAQs ON BROKERED DEPOSITS

The Federal Deposit Insurance Corporation ("FDIC") issued guidance that brings prepaid debit cards within the scope of rules governing brokered deposits, placing new restrictions and requirements on issuers of the popular financial product.

* General Counsel of UniRush, LLC, a prepaid card provider. Prior to joining UniRush, he was General Counsel of FSV Payment Systems, Inc. and Senior Counsel at the U.S. Department of the Treasury, Financial Management Service. He is the ABA's Advisor to the Uniform Law Commission's Drafting Committee on the Regulation of Virtual Currency Businesses Act. He is co-chair of the Electronic Payments and Financial Services Subcommittee of the ABA Business Law Section's Cyberspace Law Committee. He can be reached at stm@aol.com.

** Assistant Counsel at UniRush, LLC. He can be reached at tom.kierner@rushcard.com.

*** University Scholar and Fellow in Commercial Law at the Maurer School of Law, Indiana University-Bloomington. She currently serves as the Reporter for the Uniform Law Commission's Regulation of Virtual Currency Businesses Act Drafting Committee. She can be reached at sjhughes@indiana.edu, and her SSRN number is 408848.

The views expressed in this survey are our own, as are all remaining errors.

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In November 2015, the FDIC issued a set of FAQs¹ that updates prior FAQs issued in January 2015² and responds to questions that continue to arise throughout the financial industry. In what may be seen as broadening the definition of a brokered deposit, the FDIC explicated many common scenarios that have caused confusion within the financial industry. Embracing a fact-intensive approach in determining whether a deposit is brokered, the FDIC clarified that when a third party informally refers a depositor to a financial institution, that deposit is generally not considered brokered. However, deposits that are referred through a more formal, programmatic arrangement would generally be considered brokered.

The FDIC also clarified certain exceptions to the definition of a deposit broker.³ Notably, companies that sell or distribute general purpose prepaid cards do not qualify for the primary purpose exception and, therefore, are deposit brokers because of the inseparable nature of the funds in the underlying deposit account and the prepaid card.⁴

Classifying prepaid cards as brokered deposits may be problematic for some issuers because section 29 of the Federal Deposit Insurance Act⁵ restricts depository institutions that are not well capitalized from accepting brokered deposits. If a prepaid issuer ceases to be well capitalized, it must establish an FDIC-approved supervisory plan for section 29 compliance.⁶

B. AGENCIES PROVIDE GUIDANCE ON CIP REQUIREMENTS FOR BANKS THAT ISSUE PREPAID CARDS

In March 2016, several agencies⁷ published guidance⁸ to banks that issue prepaid cards on the banks' customer identification program ("CIP") obligations as set forth in section 326 of the USA PATRIOT Act.⁹ This guidance clarified that issuing banks should determine whether the issuance of the prepaid card results in the creation of an account; if so, the bank must ascertain the identity of its customers.

If a cardholder has "(1) the ability to reload funds or (2) access to credit or overdraft features,"¹⁰ the card should be treated as an account. If the prepaid

1. Fed. Deposit Ins. Corp., Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (Nov. 13, 2015) (FIL-51-2015), <https://www.fdic.gov/news/news/financial/2015/fil15051b.pdf> [hereinafter *Brokered Deposit FAQ*].

2. Fed. Deposit Ins. Corp., Guidance on Identifying, Accepting, and Reporting Brokered Deposits, Frequently Asked Questions (Jan. 5, 2015) (FIL-2-2015), <https://www.fdic.gov/news/news/financial/2015/fil15002a.pdf>.

3. See 12 C.F.R. § 337.6(a)(5)(ii) (2016).

4. *Brokered Deposit FAQ*, *supra* note 1, at 11–12.

5. 12 U.S.C. § 1831f (2012).

6. *Brokered Deposit FAQ*, *supra* note 1, at 15.

7. The federal agencies include the Board of Governors of the Federal Reserve System, the FDIC, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Financial Crimes Enforcement Network (FinCEN).

8. Interagency Guidance to Issuing Banks on Applying Customer Identification Program Requirements to Holders of Prepaid Cards (Mar. 21, 2016), https://www.fincen.gov/statutes_regs/guidance/pdf/InterAgencyGuidance20160318.pdf [hereinafter *CIP Guidance*].

9. 31 U.S.C. § 5318(l) (2012 & Supp. II 2014).

10. *CIP Guidance*, *supra* note 8, at 4.

card cannot be reloaded by the cardholder and does not provide access to credit or overdraft features, the card should not be treated as an account.¹¹ For cards issued with these features not yet enabled but which are capable of being activated later by the cardholder, an account is only created once one of those features is activated.¹²

The agencies provide further guidance on a bank's CIP requirement in several contexts, including payroll cards, government benefit cards, and health benefit cards. Generally, they apply the proposition that whoever has access to the features that trigger an account classification is the customer for CIP purposes. For example, in the context of payroll cards, if the employer is the only party able to deposit funds to the card account, the employer should be considered the bank's customer.¹³

Finally, the agencies advise issuing banks that their contracts with third-party program managers should, at a minimum, (1) include an outline of CIP obligations, (2) preserve the issuing bank's right to access all CIP information, (3) provide for the bank's right to audit and monitor the program manager's performance, and (4) indicate that relevant regulatory bodies have the right to examine the third-party manager.¹⁴

C. FINCEN ISSUES FAQs FOR SELLERS OF PREPAID CARDS

The Financial Crimes Enforcement Network ("FinCEN") issued supplemental guidance¹⁵ on regulatory expectations for nonbank sellers of prepaid cards by addressing some FAQs. The new FinCEN guidance focused primarily on five issues.

First, it addressed an open issue related to state laws that require the refunding of de minimis card balances in cash to an individual holding a closed-loop card. For ease of administration, FinCEN clarified that a retailer operating in several states may set as its standard the highest level as required among the various states in which it does business without losing the benefit of the closed-loop prepaid access exclusion.¹⁶

Second, FinCEN addressed industry concerns by confirming that prepaid credit accessed by quick response codes or a similar technology at multiple merchants would qualify for certain closed-loop exceptions to the Prepaid Access Rule.¹⁷

Third, FinCEN clarified that "defined merchant" is not limited to a single merchant. So long as "the universe of merchants is identifiable and articulated to the purchasing public, and the partner merchants are joined for the limited purpose

11. *Id.*

12. *Id.* at 4–5.

13. *Id.* at 6.

14. *Id.* at 7.

15. Fin. Crimes Enf't Network, Frequently Asked Questions Regarding Prepaid Access (Mar. 24, 2016) (FIN-2016-G002), https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2016-G002.pdf [hereinafter *Prepaid Access FAQs*].

16. *Id.* at 1.

17. *Id.* at 2–3.

of providing a closed-loop prepaid access program, such an arrangement falls within the term ‘defined merchant.’”¹⁸

Fourth, under the existing FinCEN regulations, a person may avoid being classified as a “seller of prepaid access” by implementing policies and procedures reasonably adapted to prevent a sale of more than \$10,000 to any person during a given day.¹⁹ FinCEN clarified that retailers that wish to take advantage of this exception must “(1) develop an internal policy regarding sales of prepaid access in excess of \$10,000 to a single individual in a day; (2) articulate this policy to the appropriate personnel within the organization; and (3) monitor activity, through mechanisms appropriate to the retailer’s size and type of operating structure”²⁰

Finally, FinCEN clarified that a provider of prepaid access is required to list a seller of its products on its MSB agent list only if the seller meets the definition of a “seller of prepaid access.”²¹

III. LOCAL PRESSURES ON PAYMENT PROCESSORS: BACKPAGE FOUGHT THE LAW AND BACKPAGE (SORT OF) WON

In 2015, several years after losing²² a legal battle with craigslist,²³ Thomas Dart, the sheriff of Cook County, Illinois, sought to disrupt another online forum—Backpage.²⁴ Backpage hosts classified advertising from third-party users and includes a popular adult section that is subdivided into categories, including “escorts, body rubs, strippers and strip clubs, dom[ination] and fetish, ts (transsexual escorts), male escorts,”²⁵ and so on.

After his suit against craigslist failed in 2009, Dart adopted a new strategy. Instead of litigating against Backpage, he coerced Visa and MasterCard to cease processing payments made by purchasers of Backpage advertisements, thereby cutting off the company’s principal revenue stream. Backpage filed an action and moved for a preliminary injunction against Dart, arguing that Dart’s actions constituted unconstitutional prior restraint on speech. The district court denied the preliminary injunction, and Backpage appealed to the Seventh Circuit. In a colorful opinion penned by Judge Posner, the Seventh Circuit reversed the district court opinion and ordered the district court to issue an injunction protecting Backpage.²⁶

18. *Id.* at 3–4 (quoting 31 C.F.R. § 1010.100(kkk)).

19. 31 C.F.R. § 1010.100(ff)(7)(ii) (2016).

20. *Prepaid Access FAQs*, *supra* note 15, at 4.

21. *Id.* at 5 (citing 31 C.F.R. § 1010.100(ff)(7)).

22. Even though craigslist prevailed in the legal battle, the company removed its “adult services” section in 2010. See David Carr, *Fighting Over Online Sex Ads*, N.Y. TIMES (Oct. 30, 2011), <http://www.nytimes.com/2011/10/31/business/media/backpagecom-confronts-new-fight-over-online-sex-ads.html>.

23. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

24. BACKPAGE, <http://www.backpage.com> (last visited Oct. 3, 2016).

25. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), *cert. denied*, No. 15-1321, 2016 WL 1723950 (U.S. Oct. 3, 2016) (mem.).

26. *Id.* at 239.

The Seventh Circuit explained that had Dart been acting as a private citizen, he would have been within his rights, but it found that Dart had in fact acted as a government official. Judge Posner highlighted several factors supporting his conclusion, including the fact that Dart's letter to Visa and MasterCard "is on stationery captioned 'Office of the Sheriff,' and begins: 'As the Sheriff of Cook County.'"²⁷ Further, Dart's use of legal terminology and citations of specific legal obligations made Dart's contention that he was acting as a private individual easy to dismiss.²⁸

Dart filed a Petition for Writ of Certiorari,²⁹ arguing that his actions constituted permissible advocacy and are protected by the First Amendment. In October 2016, the U.S. Supreme Court denied the petition.³⁰

IV. DEVELOPMENTS RELATING TO VIRTUAL CURRENCIES

A. JAPAN'S GOVERNMENT DECIDES TO REGULATE VIRTUAL CURRENCIES

In May 2016, Japan's Ministry of Internal Affairs and Communications issued a cabinet order that will result in an amendment to the Business Telecommunications Law requiring virtual currency exchanges to register with the Financial Supervisory Agency.³¹

B. MORE CRIMINAL PROSECUTIONS OF BITCOIN USERS UNDER 18 U.S.C. § 1960

In last year's survey, we discussed the prosecutions of bitcoin users Faiella, Shrem, Powell, Reid, and Espinoza for operating as unlicensed money transmitters in violation of 18 U.S.C. § 1960.³² Based on the number of such prosecutions, we suggested that "criminal enforcement under this statute will play a significant role in the government's response to bitcoin."³³ Our prediction has been validated by the initiation of several new section 1960 prosecutions in the last year.

In July 2015, federal officials filed a criminal complaint against Anthony Murgio for operating an unlicensed money transmitting business in violation of section 1960, as well as for conspiracy, money laundering, and failure to file a suspicious activity report ("SAR").³⁴ The complaint alleges Murgio and his co-conspirators operated the coin.mx online virtual currency exchange in violation of federal law and knowingly facilitated "ransomware" attacks, in which a

27. *Id.* at 231.

28. *Id.* at 231–32.

29. Petition for Writ of Certiorari, *Dart v. Backpage.com, LLC*, No. 15-1321, 2016 WL 1715309 (U.S. Apr. 28, 2016).

30. *Dart v. Backpage.com, LLC*, No. 15-1321, 2016 WL 1723950 (U.S. Oct. 3, 2016) (mem.).

31. See David Meyer, *Burned by Bitcoin Scandal, Japan Is Introducing Controls*, *FORTUNE* (May 26, 2016, 5:16 AM), <http://fortune.com/2016/05/26/japan-bitcoin-exchanges/>.

32. Sarah Jane Hughes & Stephen T. Middlebrook, *Developments in the Law Affecting Electronic Payments and Financial Services*, 71 *BUS. LAW.* 361, 362–64 (2015).

33. *Id.* at 364.

34. Sealed Complaint, *United States v. Murgio*, No. 15-MAG-2508 (S.D.N.Y. July 17, 2015), <https://www.justice.gov/usao-sdny/file/632166/download>.

person is blocked from using a computer system until a sum of money, typically in bitcoin, is paid.³⁵ Victims of ransomware approached coin.mx to obtain bitcoin to pay these ransoms. The exchange provided the virtual currency but failed to file a SAR as required by law.³⁶ In addition, Murgio is accused of acquiring beneficial ownership of a small credit union in New Jersey and using the institution to facilitate access to electronic payment networks in order to further his other illegal activities.³⁷

In September 2015, Pascal Reid pled guilty to a single count of operating an unlicensed money transmitter and will serve ninety days in jail and five years of probation.³⁸ In addition, he is required to conduct twenty trainings on virtual currency and cybercrime for law enforcement.³⁹

In November 2015, federal officials charged Randall Bryan Lord and his son, Michael Aaron Lord, with several crimes, including operating an unlicensed money transmitting business in violation of section 1960.⁴⁰ The two men allegedly took dollars in exchange for bitcoin, connecting with many of their customers on the localbitcoins.com website.⁴¹ The defendants pled guilty.⁴² In another case, Richard Petix was also indicted for violating section 1960.⁴³ Petix is alleged to have made thirty-seven bitcoin transfers worth approximately \$13,000 to an undercover officer.⁴⁴ The fact that section 1960 continues to be law enforcement's default tool is problematic because the statute is being interpreted so broadly that it imperils virtual currency activity that does not involve criminal activity.⁴⁵

C. BANKRUPTCY COURT AVOIDS DECIDING WHETHER BITCOIN IS PROPERTY OR CURRENCY

A bankruptcy proceeding in California garnered significant attention in the virtual currency world when commentators thought the court was going to

35. *Id.* at 4.

36. *Id.* at 15–16.

37. *Id.* at 16–18.

38. Pete Rizzo, *Judge Orders Local Bitcoins User to Teach Police on Digital Currency*, COINDESK (Sept. 16, 2015, 8:05 PM), <http://www.coindesk.com/judge-orders-localbitcoins-user-to-educate-police-on-digital-currency/>.

39. *Id.*

40. Indictment, *United States v. Lord*, No. 5:15-cr-00240 (W.D. La. Nov. 18, 2015) (on file with *The Business Lawyer*).

41. *Id.* at 5.

42. Plea Agreement, *United States v. Lord*, No. 5:15-cr-00240-01 (W.D. La. Apr. 19, 2016) (on file with *The Business Lawyer*); Plea Agreement, *United States v. Lord*, No. 5:15-cr-00240-02 (W.D. La. Apr. 19, 2016) (on file with *The Business Lawyer*); see Stan Higgins, *Unlicensed Bitcoin Exchange Operators Plead Guilty in Louisiana*, COINDESK (Apr. 20, 2016, 8:31 PM), <http://www.coindesk.com/men-plead-guilty-running-unlicensed-bitcoin-exchange/>.

43. Superseding Indictment, *United States v. Petix*, No. 15-CR-277-A (W.D.N.Y. Mar. 9, 2016) (on file with *The Business Lawyer*).

44. Press Release, U.S. Dep't of Justice, *Three Men Indicted on District's First Bitcoin-Related Case* (Mar. 11, 2016), <https://www.justice.gov/usao-wdny/pr/three-men-indicted-district-s-first-bitcoin-related-case>.

45. See Brian Klein, *Does 18 U.S.C. § 1960 Create Felony Liability for Bitcoin Businesses?*, COIN CTR. (July 21, 2015), <https://coincenter.org/2015/07/does-18-u-s-c-%C2%A7-1960-create-felony-liability-for-bitcoin-businesses/>.

rule on the question of whether bitcoin is property or currency.⁴⁶ HashFast Technologies LLC, which was a manufacturer of specialized computers used to mine bitcoin, pre-sold equipment that it failed to deliver, resulting in allegations of fraud and attendant litigation.⁴⁷ The company filed a Chapter 11 bankruptcy proceeding, and in early 2016, the trustee asked the court to avoid and recover 3,000 bitcoin that had been paid to an individual doing marketing for HashFast.⁴⁸ At the time the bitcoin were paid out, they were worth \$363,861, but because the value of bitcoin had increased, they were worth \$1.3 million at the time of the motion's filing. The trustee asked the court to treat the bitcoin as property, which would mean that the estate could recover the bitcoin at the higher current value.⁴⁹ In the end, the judge concluded that he did not have to decide whether, for purposes of the bankruptcy rules on avoiding transactions, bitcoin is a currency or a commodity, putting that question off until the trustee prevails in setting aside the transactions at issue.⁵⁰ We are confident that this question will be addressed by this and other courts in the future.

V. FEDERAL AND STATE LAWS AFFECTING PAYMENTS PROCESSORS— A WILD YEAR FOR “DAILY FANTASY SPORTS” OPERATORS AND PAYMENTS PROCESSORS

Beginning in October 2015, there were reports that the U.S. Department of Justice and Federal Bureau of Investigation had launched investigations of daily fantasy sports (“DFS”) operators⁵¹ over possible violations of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).⁵² These reports trig-

46. See Stan Higgins, *US Bankruptcy Court Set to Weigh in on Bitcoin's Currency Status*, COINDESK (Feb. 9, 2016, 4:46 PM), <http://www.coindesk.com/bankrupt-bitcoin-mining-firm-trustee-seeks-return-of-funds-from-former-promoter/>; *California Bankruptcy Court to Decide Whether Bitcoin Is a Currency or Commodity*, ECONOTIMES (Feb. 10, 2016, 7:22 AM), <http://www.econotimes.com/California-Bankruptcy-Court-To-Decide-Whether-Bitcoin-Is-A-Currency-Or-Commodity-158333>.

47. Cyrus Farivar, *Meet HashFast, Another Bitcoin Miner Manufacturer Accused of Fraud*, ARS TECHNICA (May 6, 2014), <http://arstechnica.com/tech-policy/2014/05/meet-hashfast-another-bitcoin-miner-manufacturer-accused-of-fraud/>.

48. Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 1, *Kasolas v. Lowe (In re HashFast Techs. LLC)*, No. 14-bk-30725-DM (Bankr. N.D. Cal. Jan. 22, 2016) (on file with *The Business Lawyer*). HashFast Technologies LLC is affiliated with HashFast LLC and their bankruptcy proceedings were consolidated. See *id.*

49. *Id.*

50. *HashFast Techs. LLC v. Lowe (In re HashFast Techs. LLC)*, No. 14-bk-30725-DM (Bankr. N.D. Cal. Feb. 22, 2016) (order) (on file with *The Business Lawyer*).

51. See Matthew Futterman & Sharon Terlap, *The Deals that Made Daily Fantasy Sports Take Off*, WALL ST. J. (Oct. 17, 2015, 8:55 PM EST), <http://www.wsj.com/articles/the-deals-that-made-daily-fantasy-take-off-1445043328> (reporting on large investments made in both major DFS websites, DOJ and FBI investigations, and the order from the State of Nevada for both operators to halt gambling for Nevada residents).

52. 31 U.S.C. §§ 5361–5367 (2012); see Kenneth N. Caldwell, *The Shifting Tide in Internet Gambling—Survey of Recent Developments*, 69 BUS. LAW. 291, 292–93 (2013) (discussing the U.S. Department of Justice's 2011 opinion on uses of interstate processors to sell lottery tickets to in-state adults and the federal Wire Act). UIGEA is implemented by Regulation GG, which was jointly promulgated by the Federal Reserve Board and the Department of Treasury. 12 C.F.R. §§ 233.1–233.7 (2016) (identifying payment systems and financial transaction providers that are required to identify and block or otherwise prevent payments transactions that UIGEA governs); see *Compliance Guide to Small Entities—Regulation GG: Prohibition*

gered a long spell of focus on the legality of DFS payments processing under the UIGEA. The UIGEA prohibits persons in the business of betting or wagering from knowingly accepting payments in connection with persons participating in “unlawful Internet gambling.”⁵³ Under the UIGEA, the term “unlawful Internet gambling” includes bets or wagers that (a) involve “the use, at least in part, of the Internet” and (b) are “unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”⁵⁴ The UIGEA provides an exemption from the definition of the terms “bet or wager” for games of “knowledge and skill,” as opposed to games of chance, so long as other conditions are met.⁵⁵

Pressure on DFS operators and their payments processors intensified first when Nevada’s Gaming Control Board issued cease-and-desist orders against two large operators, DraftKings, Inc. and FanDuel, Inc.,⁵⁶ and then when New York’s Attorney General issued cease-and-desist orders against both operators, commencing actions for injunctions and other relief in November 2015.⁵⁷ If bets are not lawful where initiated, as regulators in Nevada and New York concluded, then the UIGEA prohibits operators from taking the associated payments. What transpired from then to mid-June 2016 could be described as a whirlwind of developments affecting DFS operators and, consequently, banks and other payment processors that handle the funds flowing to and from DFS operators. They ranged from attorney general opinions that declare DFS to be illegal gambling in some states⁵⁸ to efforts to legalize DFS through

on *Funding of Unlawful Internet Gambling*, 12 CFR 233, Bd. GOVERNORS FED. RESERVE SYS. <https://www.federalreserve.gov/bankinfo/reg/reggocg.htm> (last updated Aug. 2, 2013).

53. 31 U.S.C. § 5363 (2012).

54. *Id.* § 5362(10)(A).

55. *Id.* § 5362(1)(E)(ix)(II).

56. Legality of Offering Daily Fantasy Sports in Nevada, No. 2015-99, at 1 (Nev. Gaming Control Bd. Oct. 15, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10481> (issuing notice to cease and desist unlicensed activities in Nevada and explaining basis for conclusion that DFS constitutes operating a sports pool and gambling under Nevada Revised Statutes, chapter 463, which requires that offerors possess licenses issued by the Nevada Gaming Commission). For additional discussion of the ramifications of this notice, see Joe Drape, *Nevada Says It Will Treat Daily Fantasy Sports Sites as Gambling*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html> (noting that employees of DFS websites also require licensure under Nevada law).

57. Complaint, State v. DraftKings, Inc., No. 453054/2015 (N.Y. Sup. Ct. Nov. 17, 2015), http://www.ag.ny.gov/pdfs/DK_Complaint.pdf; Complaint, State v. FanDuel, Inc., No. 453056/2015 (N.Y. Sup. Ct. Nov. 17, 2015), http://www.ag.ny.gov/pdfs/FD_Complaint.pdf; Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Issues Cease-And-Desist Letters to FanDuel and DraftKings, Demanding that Companies Stop Accepting Illegal Wagers in New York State (Nov. 11, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cess-and-desist-letters-fanduel-and-draftkings-demanding>; see State v. FanDuel, Inc., No. 161681/2015, slip op. at 2 (N.Y. Sup. Ct. Dec. 11, 2015) (order granting injunctive relief to state and denying preliminary injunction to DraftKings, Inc.) (on file with *The Business Lawyer*).

58. E.g., Att’y Gen. of Tex., Opinion Letter on the Legality of Fantasy Sports Leagues Under Texas Law (Jan. 19, 2016) (RQ-0071-KP), <http://www.legalsportsreport.com/wp-content/uploads/2016/01/Texas-ag-dfs-decision.pdf> (concluding that DFS is gambling under state law); Att’y Gen. of Ill., Opinion Letter on Daily Fantasy Sports Contests as Gambling (Dec. 23, 2015) (No. 15-006), <http://illinoisattorneygeneral.gov/opinions/2015/15-006.pdf> (concluding that DFS is illegal gambling under state law).

state legislation.⁵⁹ Among the states to legalize DFS are Indiana⁶⁰ and Virginia.⁶¹ Two additional state legislatures legalized DFS gaming in June 2016. On June 10, 2016, the governor of the State of Colorado signed legislation that legalized and provided for the regulation of DFS.⁶² And in August 2016, the governor of New York signed legislation to regulate “interactive fantasy sports” and require operators to obtain licenses from the state.⁶³ Each licensee will pay a share of its gross revenues in New York, which could total as much as 15.5 percent.⁶⁴ This legislation effectively will resolve the unlawful gambling charges against DraftKings and FanDuel⁶⁵ that prompted the original cease-and-desist orders issued in late 2015.⁶⁶ The attorney general’s charges against both operators for making false advertising claims were not resolved in the agreements or legislation.⁶⁷ The legislation and prior settlements mean that DFS can restart in New York and payments processors can handle these operators so long as they are licensed entities without fear of violating the UIGEA.

VI. POTENTIAL PERSONAL LIABILITY FOR CHIEF COMPLIANCE OFFICERS (AND POTENTIALLY OTHER EMPLOYEES) FOR COMPANY COMPLIANCE FAILURES

In January 2016, the federal district court in Minnesota held that compliance officers and other individuals can be held personally liable for their employer’s

59. See *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Aug. 29, 2016) (listing enacted and pending legislation).

60. 2016 Ind. Legis. Serv. P.L. 212-2016 (S.E.A. No. 339) (West) (approved on Mar. 24, 2016).

61. 2016 Va. Legis. Serv. ch. 318 (S.B. No. 646) (West) (approved on Mar. 7, 2016).

62. 2016 Colo. Legis. Serv. ch. 358 (H.B. 16-1404) (West) (approved on June 10, 2016). For additional discussion on all recent state legislation and other developments, see Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Aug. 27, 2016), http://espn.go.com/chalk/story/_id/14799449/daily-fantasy-dfs-legalization (noting that Missouri legalized DFS in June and setting forth state-by-state summary by an expert in the Sports Management Department at Florida State University); *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, *supra* note 59.

63. 2016 N.Y. Sess. Laws ch. 237 (A.10736) (McKinney) (noting enactment of Senate Bill No. 8153, which adds article 14, entitled “Interactive Fantasy Sports,” to the Racing, Pari-Mutuel Wagering and Breeding Law).

64. *Id.* § 1407 (imposing a base tax of 15 percent of gross revenues generated in the state and an additional tax equal to 1/2 of 1 percent, not to exceed \$50,000 annually).

65. Settlement Agreement, *State v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct. Mar. 21, 2016), <http://www.ag.ny.gov/pdfs/NYAG-DraftKings-3.21.2016-Agreement-Final-Executed.pdf>; Settlement Agreement, *State v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. Mar. 21, 2016), <https://www.ag.ny.gov/pdfs/NYAG-FanDuel-3.21.2016-Agreement-Final-Executed.pdf>; see Press Release, N.Y. State Office of the Att’y Gen., Statement From A.G. Schneiderman on Agreements with FanDuel and DraftKings (Mar. 21, 2016), <http://www.ag.ny.gov/press-release/statement-ag-schneiderman-agreements-fanduel-and-draftkings>.

66. See *supra* note 57. For more analysis, see Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html>.

67. First Amended Complaint at paras. 71–97, *State v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct. Dec. 31, 2015) (on file with *The Business Lawyer*); First Amended Complaint at paras. 65–91, *State v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. Dec. 31, 2015) (on file with *The Business Lawyer*).

failure to properly implement anti-money laundering (“AML”) safeguards.⁶⁸ The case comes out of the Treasury Department’s enforcement actions against MoneyGram International Inc., which separately admitted that it had willfully violated the Bank Secrecy Act by not implementing an effective AML program and subsequently forfeited \$100 million.⁶⁹ The government also assessed a \$1 million civil penalty against MoneyGram’s chief compliance officer, alleging he had failed to implement and maintain an effective AML program and also failed to ensure that SARs were filed appropriately.⁷⁰ The court upheld the action against the chief compliance officer under the Treasury Department’s broad enforcement authority found in 31 U.S.C. § 5321(a)(1), which extends to “a partner, director, officer, or employee of a domestic financial institution.”⁷¹ Although, in this case, prosecution of an individual was tied to a specific statutory authorization, the general focus on individual responsibility is in keeping with the U.S. Department of Justice’s so-called “Yates memo,” which detailed the government’s intent to step up the investigation and prosecution of individuals for corporate wrongdoing.⁷² Given the additional scrutiny being placed on individual employees, it is likely that the parameters of corporate compliance programs, as well as the compensation and protections for compliance officers who manage them, will be subject to significant review and revision over the next year.

VII. CONCLUSION

In last year’s survey, we identified numerous aspects of electronic payments and financial services that we urged readers to follow.⁷³ For the coming year, we urge readers to pay attention to pending rulemakings and new enforcement actions at the Consumer Financial Protection Bureau as well as to reactions in the financial services world to the U.S. Supreme Court’s denial of certiorari in *Madden v. Midland Funding, LLC*;⁷⁴ probable additional developments related to the UIGEA, DFS gaming, and other Internet gambling and online gaming payment providers; and likely developments in the regulation of virtual currencies.

68. U.S. Dep’t of the Treasury v. Haider, No. 15-cv-01518 (DSD/HB), 2016 WL 107940 (D. Minn. Jan. 8, 2016); see Stephen Dockery, *Court Rules Anti-Money Laundering Law Applies to Compliance Officers*, WALL ST. J. (Jan. 13, 2016, 4:34 PM), <http://blogs.wsj.com/riskandcompliance/2016/01/13/court-rules-anti-money-laundering-law-applies-to-compliance-officers/>.

69. *Haider*, 2016 WL 107940, at *1.

70. *Id.*

71. *Id.* at 2 (quoting 31 U.S.C. § 5321(a)(1)).

72. See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice et al., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

73. Hughes & Middlebrook, *supra* note 32, at 372.

74. 136 S. Ct. 2505 (2016) (mem.).