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Developments in the Laws Affecting Electronic Payments and Financial Services

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Developments in the Laws Affecting Electronic Payments and Financial Services

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

I. INTRODUCTION

This survey year offered developments too numerous to cover, as often is the case. We debated which developments to include and decided to showcase different types of products and services, different providers, and different regulators.

Part II views issues related to stimulus payments arising from the COVID-19 pandemic. Part III reports on litigation over whether retailers must offer gift cards printed in Braille. Part IV looks at recent actions of the Federal Trade Commission (“FTC”) related to payment processors and others. Part V describes amendments to the “remittance” regulation promulgated by the Consumer Financial Protection Bureau (“CFPB”). Part VI focuses on regulatory responses and enforcement actions aimed at cryptocurrencies and their providers. Part VII provides some conclusions and thoughts on what the coming year may bring.

II. CARES ACT PROVIDES STIMULUS PAYMENTS TO 159 MILLION AMERICANS

A. CARES ACT SPEEDS STIMULUS PAYMENTS BY MODIFYING LAWS REGARDING FEDERAL DISBURSEMENTS

In response to the COVID-19 pandemic, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act was enacted on March 27, 2020, to provide, among a large number of relief programs, direct economic stimulus payments to millions of Americans.¹ The Act directed the Secretary of the Treasury to make the payments “as rapidly as possible,” but in no case later than December 31, 2020,² and included several provisions modifying the rules under which the

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1. Pub. L. No. 116-136, § 2201, 134 Stat. 281, 335 (2020) (to be codified at 26 U.S.C. § 6428).

2. 26 U.S.C. § 6428(f)(3)(A) (West, Westlaw through Pub. L. No. 116-158).

U.S. Department of the Treasury normally makes payments. First, the Act authorizes Treasury to make the stimulus payments electronically to any account to which the payee had authorized delivery of a federal tax refund on or after January 1, 2018.³ This allows Treasury to use account information supplied in 2018 or 2019, rather than having to collect payment data from recipients. For individuals who did not file a tax return in the prior two years, the Act allows Treasury to make the stimulus payment using account information collected for Social Security and Railroad Retirement payments.⁴ Finally, the Act authorizes disbursing officials to modify payment information provided by the certifying official if the change “facilitate[s] the accurate and efficient delivery of [the] payment.”⁵ This authorization allows disbursing officials to modify the payment information they received—a practice normally forbidden—to update it with newer payment information from the Internal Revenue Service, Social Security Administration, or Railroad Retirement Board.

In part because of these special provisions, Treasury was able to begin delivering stimulus payments, dubbed Economic Impact Payments (“EIPs”), within three weeks of enactment of the CARES Act.⁶ Treasury provided an online application that taxpayers may use to track their EIPs and update their electronic payment information.⁷ In May, Treasury announced that approximately four million EIPs would be distributed by prepaid debit cards mailed to recipients.⁸ Overall, in just two months, Treasury distributed 159 million EIPs worth more than \$267 billion.⁹ Of those payments, 120 million were made by direct deposit, 35 million by paper check, and 4 million by prepaid debit card.¹⁰

B. CFPB ISSUES REGULATORY GUIDANCE FOR PANDEMIC RELIEF PAYMENTS

In support of governmental efforts to help individuals harmed by COVID-19, the CFPB issued an interpretive rule that concluded that, under certain conditions, pandemic relief payments from state or federal entities were not “government benefits” for purposes of the Electronic Fund Transfer Act (“EFTA”) and its

3. *Id.* § 6428(f)(3)(B).

4. *Id.* § 6428(f)(5)(B).

5. *Id.* § 6428(f)(3)(C).

6. Press Release, U.S. Dep’t of the Treasury, Over 80 Million Americans Will Receive Economic Impact Payments in Their Bank Accounts This Week (Apr. 13, 2020), <https://home.treasury.gov/news/press-releases/sm975>.

7. Press Release, U.S. Dep’t of the Treasury, “Get My Payment” Web App Launched for Americans to Submit Direct Deposit Information and Track Payments (Apr. 15, 2020), <https://home.treasury.gov/news/press-releases/sm978>.

8. Press Release, U.S. Dep’t of the Treasury, Treasury Is Delivering Millions of Economic Impact Payments by Prepaid Debit Card (May 18, 2020), <https://home.treasury.gov/news/press-releases/sm1012>.

9. Press Release, U.S. Dep’t of the Treasury, Treasury, IRS Announce Delivery of 159 Million Economic Impact Payments (June 3, 2020), <https://home.treasury.gov/news/press-releases/sm1025>.

10. *Id.*

implementing rules, Regulation E,¹¹ and thus were not subject to the prohibition on compulsory use found in EFTA.¹² To be exempt from EFTA, the relief payments must be made to consumers in response to COVID-19, not be a part of an already established government benefit program, be made on a one-time or limited basis, and be distributed without a general requirement that consumers apply to an agency in order to receive the funds.¹³

C. STATES PROTECT STIMULUS PAYMENTS FROM GARNISHMENT

Nothing in the CARES Act protects EIP funds from garnishment or attachment to cover debts owed to third parties. As a result, banks and other creditors have seized some of the EIP funds from recipients' bank accounts.¹⁴ In response to these actions, the Indiana Supreme Court used its emergency rulemaking authority to issue an order prohibiting state courts from issuing new orders placing a hold on or attaching funds derived from stimulus payments, except to pay child support.¹⁵ In a number of other states, governors issued executive orders under their emergency pandemic powers to prohibit garnishments and certain other debt collection practices.¹⁶ We anticipate additional regulatory activity to protect stimulus payments from garnishment and attachment.

III. LAWSUITS CLAIMING THE ADA REQUIRES RETAILERS TO ISSUE GIFT CARDS IN BRAILLE FAIL

Starting in October 2019, several hundred nearly identical lawsuits were filed in federal court in New York against retailers, claiming that their failure to issue gift cards in Braille was a violation of Title III of the Americans with Disabilities

11. The EFTA and Regulation E prohibit any person from requiring a recipient of government benefits to establish an account at a particular financial institution. See 15 U.S.C. § 1693k(2) (2018); 12 C.F.R. § 1005.10(e)(2) (2020).

12. Treatment of Pandemic Relief Payments Under Regulation E and Application of the Compulsory Use Prohibition, 85 Fed. Reg. 23217 (Apr. 27, 2020).

13. *Id.* at 23218.

14. Emily Flitter & Alan Rappeport, *Some Banks Keep Customers' Stimulus Checks If Accounts Are Overdrawn*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/04/16/business/stimulus-paychecks-garnish-banks.html>; Sarah Hansen, *Stimulus Checks Are Coming Next Week. Could Private Debt Collectors Grab Them?*, FORBES (Apr. 10, 2020, 2:33 PM), <https://www.forbes.com/sites/sarahhansen/2020/04/10/stimulus-checks-are-coming-next-week-could-private-debt-collectors-grab-them/#568a72cf1f57>.

15. Order at 2, *In re* Petition to the Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments from Attachment or Garnishment from Creditors, No. 20S-MS-258 (Ind. Apr. 20, 2020), <https://www.in.gov/judiciary/files/order-other-2020-20S-MS-258a.pdf>.

16. See, e.g., Exec. Order No. 2020-25 (Ill. Apr. 14, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-25.aspx>; Exec. Order No. 20-18 (Or. Apr. 17, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-18.pdf; Exec. Order No. 20-49 (Wash. Apr. 14, 2020), <https://www.governor.wa.gov/sites/default/files/20-49%20-%20COVID-19%20Garnishment%20%28tmp%29.pdf>.

Act (“ADA”).¹⁷ In the first of these cases to reach decision, *Dominguez v. Banana Republic, LLC*, Judge Gregory H. Woods of the U.S. District Court for the Southern District of New York granted the defendant’s motion to dismiss.¹⁸ Judge Woods found that the plaintiff lacked standing to bring suit because he failed to plead the requisite “intent to return” to the retailer necessary to establish an injury-in-fact.¹⁹ The court also held that a gift card is a “good” and, under the ADA, a retailer has no obligation to stock specialty goods; therefore, a retailer has no obligation to provide Braille-embossed or otherwise accessible gift cards.²⁰ The court also concluded that the reach of Title III of the ADA was limited to a “place of public accommodation” and a gift card is not a place of public accommodation.²¹ Finally, the court held that, by not providing Braille-embossed gift cards, the retailer did not deny plaintiff an auxiliary aid or service in violation of the ADA.²² For these reasons, the court dismissed the case.

Subsequent to his *Banana Republic* decision, Judge Woods dismissed a number of nearly identical lawsuits filed against other retailers.²³ Other judges in the Southern District of New York—including Judge Lorna G. Schofield,²⁴ Judge Ronnie Abrams,²⁵ and Judge Mary Kay Vyskocil²⁶—have adopted Judge Wood’s reasoning and dismissed nearly identical Braille gift card cases. Numerous additional cases are still active in the Southern District of New York and other courts. Plaintiffs in several of these matters have filed appeals, so lawyers for retailers and gift card providers should continue to monitor these cases for developments.

17. Christopher Zara, *Disney Store Is the Latest Retailer Hit with an ADA Lawsuit over Braille Gift Cards*, *FastCo* (Nov. 1, 2019), <https://www.fastcompany.com/90425629/disney-store-is-the-latest-retailer-hit-with-an-ada-lawsuit-over-braille-gift-cards>; Mike Pomranz, *Lawsuits Target Restaurants for Failing to Offer Braille Gift Cards*, *FOOD & WINE* (Nov. 20, 2019), <https://www.foodandwine.com/news/braille-gift-cards-restaurants-lawsuit>.

18. No. 1:19-cv-10171-GHW, 2020 WL 1950496, at *1 (S.D.N.Y. Apr. 23, 2020), *appeal docketed*, No. 20-1559 (2d Cir. May 13, 2020).

19. *Id.* at *4 (quoting *Bernstein v. City of N.Y.*, 621 F. App’x 56, 59 (2d Cir. 2015)).

20. *Id.* at *5–7 (citing 42 U.S.C. § 12182 (2018); 28 C.F.R. § 36.307 (2020)).

21. *Id.* at *7–9 (quoting 42 U.S.C. § 12182 (2018)).

22. *Id.* at *10–11 (citing 42 U.S.C. §§ 12103, 12182 (2018); 28 C.F.R. § 36.303 (2020)).

23. See, e.g., *Calcano v. Swarovski N. Am. Ltd.*, No. 1:19-cv-10536-GHW, 2020 U.S. Dist. LEXIS 73039 (S.D.N.Y. Apr. 24, 2020); *Mendez v. AnnTaylor, Inc.*, No. 1:19-cv-10625-GHW, 2020 U.S. Dist. LEXIS 73043 (S.D.N.Y. Apr. 24, 2020); *Dominguez v. CKE Rests. Holdings, Inc.*, No. 1:19-cv-10816-GHW, 2020 U.S. Dist. LEXIS 73047 (S.D.N.Y. Apr. 24, 2020); *Murphy v. Kohl’s Dep’t Stores, Inc.*, No. 1:19-cv-09921-GHW, 2020 U.S. Dist. LEXIS 73054 (S.D.N.Y. Apr. 24, 2020), *appeal docketed*, No. 20-1608 (2d Cir. May 20, 2020).

24. See, e.g., *Dominguez v. Taco Bell Corp.*, No. 19-CIV-10172 (LGS), 2020 U.S. Dist. LEXIS 105811 (S.D.N.Y. June 17, 2020); *Murphy v. Little Caesar Enters., Inc.*, No. 19-CIV-10329 (LGS), 2020 U.S. Dist. LEXIS 106951 (S.D.N.Y. June 18, 2020); *Lopez v. Williams-Sonoma Stores, Inc.*, No. 19-CIV-11770 (LGS), 2020 U.S. Dist. LEXIS 107462 (S.D.N.Y. June 18, 2020); *Calcano v. Alamo Drafthouse Cinemas, LLC*, No. 19-CIV-11386 (LGS), 2020 U.S. Dist. LEXIS 107512 (S.D.N.Y. June 18, 2020).

25. See, e.g., *Thorne v. Boston Mkt. Corp.*, No. 19-CV-9932 (RA), 2020 U.S. Dist. LEXIS 116668 (S.D.N.Y. June 29, 2020), *appeal docketed*, No. 20-2453 (2d Cir. Aug. 3, 2020); *Tucker v. Whole Foods Mkt. Grp., Inc.*, No. 19-CV-9842 (RA), 2020 U.S. Dist. LEXIS 116114 (S.D.N.Y. June 29, 2020).

26. *Dominguez v. Grand Lux Cafe LLC*, No. 19-cv-10345 (MKV), 2020 U.S. Dist. LEXIS 109679 (S.D.N.Y. June 22, 2020).

IV. FTC ACTIONS AFFECTING E-PAYMENTS PROVIDERS AND FINANCIAL SERVICES

A. FTC AND THE STATE OF OHIO TEAM UP TO SHUT DOWN ROGUE PAYMENT PROCESSOR

The FTC and the Ohio Attorney General settled claims with payment processors Madera Merchant Services and B&P Enterprises for violations of the FTC Act, the Telemarketing Sales Rule, and the Ohio Consumer Sales Practices Act.²⁷ The claims arose from what the FTC described as the companies' and their owners' role in helping unscrupulous merchants scam consumers out of millions of dollars.²⁸

For more than a decade, the defendants operated a payment processing scheme that used remotely created checks ("RCCs") to withdraw money from consumer accounts on behalf of third-party merchants. An RCC is "a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn."²⁹ RCCs are created using the consumer's bank account information and can be printed and manually deposited or processed electronically. Because checks are generally subject to less oversight and consumer protections than payments made via the credit- and debit-card networks or the Automated Clearing House network, they are a preferred payment method for unscrupulous merchants. While it is legal to create RCCs for many types of transactions, doing so for goods or services sold through telemarketing is illegal.³⁰

The plaintiffs alleged that the defendants processed consumer payments for merchants while knowing, or consciously avoiding knowing, that some of their largest merchants were scamming consumers and were selling their services via telemarketing.³¹ The defendants kept the scheme afloat by engaging in a Whac-A-Mole enterprise of opening account after account with dozens of financial institutions.³² When financial institutions eventually closed the defendants' accounts after discovering suspicious activity, the defendants would apply for new accounts, concealing or misrepresenting the nature of their business.³³

27. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Madera Merch. Servs., LLC*, No. 3:19-CV-195 (W.D. Tex. June 4, 2020) [hereinafter *Madera Order*], https://www.ftc.gov/system/files/documents/cases/39_madera_stipulated_final_order_entered_6-4-2020_002.pdf (citing 15 U.S.C. §§ 45, 6101–6108 (2018); 16 C.F.R. pt. 310 (2020)); OHIO REV. CODE ANN. § 1345.01–.13 (West, Westlaw through File 45 of the 133d Gen. Assemb.)).

28. Press Release, Fed. Trade Comm'n, *Rogue Payment Processor that Helped Perpetuate Multiple Scams Is Banned from the Payment Processing Business Under FTC Settlement* (June 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/rogue-payment-processor-helped-perpetuate-multiple-scams-banned>.

29. 12 C.F.R. § 229.2(ff) (2020).

30. 16 C.F.R. § 310.4(a)(9) (2020).

31. Complaint for Permanent Injunction and Other Equitable Relief at 17, *FTC v. Madera Merch. Servs., LLC*, No. 3:19-CV-195 (W.D. Tex. July 18, 2019), https://www.ftc.gov/system/files/documents/cases/madera_complaint_for_permanent_injunction_and_other_equitable_relief.pdf.

32. *Id.* at 15–16.

33. *Id.* at 13–16.

Ultimately, the defendants stipulated to an order permanently enjoining them from engaging in the business of payment processing and subjecting them to a monetary judgment of \$8.646 million, the majority of which was suspended due to an inability to pay.³⁴

During the past year, the FTC has pursued several other actions against payment processors that serve as intermediaries to bad actors.³⁵ Although those defendants likely knew their clients' intentions, this is a good reminder for payment intermediaries to have robust compliance programs, lest they end up on the wrong end of an angry regulator.

B. FTC SETTLES CLAIMS REGARDING WEBSITE'S "UNBIASED" RANKINGS

The FTC settled claims against LendEDU and three of its officers for deceptive business practices related to a website they operated.³⁶ The respondents promoted the LendEDU website as an unbiased resource for consumers in search of loans and insurance. The website published rate tables, rankings, star ratings, and reviews of lenders and insurers, claiming that the rankings and ratings were "unbiased" and uninfluenced by compensation paid by the companies under review.³⁷

According to the FTC, and contrary to the company's representations, LendEDU was really operating a pay-to-play site where lenders and insurers could climb the rankings and increase their star ratings by paying LendEDU more money.³⁸ The FTC also claimed that the company posted fake consumer reviews of its own service on a third-party consumer review website to bolster its reputation: a Russian nesting doll of deception. The FTC determined that about 90 percent of the reviews were written by LendEDU employees, agents, and even its outside counsel.³⁹

LendEDU agreed to a monetary payment of \$350,000 and certain conduct provisions, including a prohibition on making future misrepresentations and a requirement to clearly and conspicuously disclose material connections in

34. Madera Order, *supra* note 27, at 5–6.

35. See Stipulated Final Order for Permanent Injunction and Monetary Judgment, *FTC v. AlliedWallet, Inc.*, No. 2:19-CV-4355-SVW-E (C.D. Cal. July 3, 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_final_order_re_rountree_7-8-19.pdf; Stipulated Final Judgment, Order for Compensatory Contempt Relief, and Supplemental Order for Permanent Injunction and Other Equitable Relief, *FTC v. Interbill, Ltd.*, No. CV-S-06-01644-JCM-PAL (D. Nev. Apr. 10, 2019), https://www.ftc.gov/system/files/documents/cases/interbill_final_order_as_to_tom_wells.pdf; [Proposed] Stipulated Order for Permanent Injunction and Monetary Relief, *FTC v. Qualpay, Inc.*, No. 6:20-cv-00945 (M.D. Fla. June 1, 2020), https://www.ftc.gov/system/files/documents/cases/qualpay_proposed_consent_judgment.pdf.

36. Decision and Order, *In re Shop Tutors, Inc.*, No. C-4719 (F.T.C. May 21, 2020) [hereinafter LendEDU Order], https://www.ftc.gov/system/files/documents/cases/c-4719_182_3180_lendedu_decision_and_order.pdf. Shop Tutors, Inc. does business as LendEDU. *Id.* at 1–2.

37. Complaint at 2, 15, *In re Shop Tutors, Inc.*, No. C-4719 (F.T.C. May 21, 2020), https://www.ftc.gov/system/files/documents/cases/c-4719_182_3180_lendedu_complaint.pdf.

38. *Id.* at 9–12.

39. *Id.* at 12–14.

close proximity to a representation, the absence of which would render the representation deceptive.⁴⁰

The LendEDU settlement provides a valuable reminder for companies that claim to provide neutral ratings to do just that. Interestingly, we have not seen enforcement actions by any of the financial regulators against any of the lenders or insurers that were participating in LendEDU's pay-to-play scheme. The FTC's legal theory against LendEDU also applies to the lenders and insurers that paid LendEDU for higher ratings and rankings, and, even if federal regulators currently lack the appetite for enforcement against those lenders and insurers, a new administration may display greater hunger.

C. FTC AND PEER-TO-PEER LENDER EACH CLAIM MINOR VICTORIES WHILE LITIGATION CONTINUES

In a prior survey, we advised FinTech lawyers—and their less tech-y colleagues—to follow the developments in the FTC's case against Lending Club.⁴¹ In 2018, the FTC brought suit against Lending Club, a peer-to-peer lending platform that connects borrowers and lenders, alleging the following three counts of unfair or deceptive business practices in violation of the FTC Act and one violation of Regulation P:

- The deceptive business practice of advertising that it did not assess hidden fees (while assessing an origination fee that was disclosed in a pop-up bubble);
- The deceptive business practice of telling prospective borrowers that they had been approved for a loan prior to the loan application receiving back-end approval;
- The unfair business practice of making numerous unauthorized withdrawals from borrowers' bank accounts; and
- The violation of Regulation P for failing to deliver Lending Club's privacy policy to prospective borrowers.⁴²

Litigation of this action has continued, and each party can claim limited victories in a recent court order. The FTC prevailed on summary judgment for its second deception count: that Lending Club told prospective borrowers that their loans were approved prior to actual final approval.⁴³ Lending Club failed to raise a genuine issue of material fact, and it was clear to the court that Lending Club's

40. LendEDU Order, *supra* note 36, at 4–5.

41. Stephen T. Middlebrook, Sarah Jane Hughes & Tom Kierner, *Developments in the Law Affecting Electronic Payments and Financial Services*, 74 *BUS. LAW.* 267, 275 (2018).

42. First Amended Complaint at 26–28, *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. Oct. 22, 2018), https://www.ftc.gov/system/files/documents/cases/lendingclub_corporation_first_amended_complaint.pdf (citing 15 U.S.C. § 45 (2018); 12 C.F.R. § 1016.9 (2020)).

43. *FTC v. LendingClub Corp.*, No. 3:18-cv-02454, 2020 WL 2838827, at *17–21 (N.D. Cal. June 1, 2020).

communications to prospective borrowers were likely to mislead a reasonable consumer. Lending Club prevailed on summary judgment on the Regulation P count. Because the FTC sought only injunctive relief and Lending Club had already amended its disclosure process to come into compliance with the law, the court dismissed the count as moot.⁴⁴

The bulk of the litigation, however, will proceed. The more interesting of the two remaining counts is the FTC's claim that Lending Club deceptively advertised that it did not assess hidden fees, while assessing origination fees that were disclosed in a pop-up bubble. What makes this claim particularly interesting is that Lending Club worked with the CFPB prior to making the loan application flow available to the public. Lending Club claims that the CFPB performed a "page-by-page" review of the loan application flow and did not flag an issue as to the disclosure of the origination fee.⁴⁵ Because one of the CFPB's statutory objectives is to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices,"⁴⁶ Lending Club's position, that its disclosure practices were not deceptive if the CFPB approved of them, seems persuasive. After all, the CFPB is in a better position than the FTC to know what is unfair or deceptive in the context of consumer financial services. When two agencies have overlapping regulatory authority (as the FTC and CFPB do, in certain instances) and the doctrines of unfairness and deception are as amorphous as they are, there are bound to be instances where one agency thinks a practice is deceptive, while the other agency thinks the same practice is lawful.

V. CFPB REMITTANCE RULE AMENDMENTS

Effective July 21, 2020, the CFPB amended its "remittance transfers" regulation.⁴⁷ The regulation will provide relief to certain low-volume providers by changing the safe harbor in the definition of "remittance transfer" from 100 to 500 transfers annually. Providers increasing their volume to more than 500 remittance transfers "in the normal course of business" will have six months to "begin complying with" Subpart B of Regulation E.⁴⁸ Providers expecting declines in remittance transfers to fewer than 500 per calendar year will be allowed to cease compliance.⁴⁹ Also, provisions on allowable cost estimates will allow insured institutions that made 1,000 or fewer transfers to the destination country in the prior calendar year to disclose estimated exchange rates if the designated recipient will receive funds in the country's local currency and three additional

44. *Id.* at *22–24.

45. *Id.* at *9.

46. 12 U.S.C. § 5511(b)(2) (2018).

47. Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E), 85 Fed. Reg. 34870 (June 5, 2020) (to be codified at 12 C.F.R. pt. 1005). The term "remittance transfer" refers to "consumer-to-consumer transfers of small amounts of money" often made by consumers in the United States to recipients outside the United States, or to consumer-to-business transfers of larger amounts to "pay bills, tuition, or other expenses." *Id.* at 34871.

48. *Id.* at 34904 (to be codified at 12 C.F.R. § 1005.30(f)(2)(ii)).

49. *Id.* (to be codified at 12 C.F.R. § 1005.30(f)(2)(iii)).

criteria are met.⁵⁰ Similarly, insured institutions that made 500 or fewer transfers to the designated institution recipient may disclose estimated third-party fees at the destination if four additional conditions are met.⁵¹

VI. A ROUGH YEAR FOR VIRTUAL ASSETS AND PROVIDERS

A. SETTLEMENT OF CLASS ACTION LAWSUIT AGAINST CHASE BANK OVER CREDIT CARD CHARGES FOR CRYPTOCURRENCY PURCHASES

Last year's survey mentioned class actions lawsuits filed against Chase Bank, Bank of America, and State Farm Bank that alleged the financial institutions had illegally imposed cash-advance fees on purchases of cryptocurrency.⁵² In the litigation against Chase Bank, the court granted preliminary approval to a proposed settlement.⁵³ Under the settlement agreement approved by the court, Chase would pay \$2,500,000, which would cover attorneys' fees and settlement costs, and provide for a cash payment to each of the 62,000 class members who choose to participate.⁵⁴ Whether the other defendants in this trio of cases will settle or continue on to trial remains unknown at this juncture.

B. FATF AND FINCEN EXPAND REGULATIONS APPLYING TO "VIRTUAL ASSET SERVICE PROVIDERS"

The June 2019 *Guidance for Risk-Based Approach: Virtual Assets and Virtual Asset Service Providers*, issued by the Financial Action Task Force ("FATF"), called for a June 2020 review of how FATF-member nations have implemented regulations requiring records of customers and transactions sufficient to comply with FATF's anti-money-laundering and counter-terrorist financing provisions.⁵⁵ The FATF's *Guidance* defined two new terms—"virtual asset" and "virtual asset service provider."⁵⁶ The term "virtual asset" subsumed key elements

50. *Id.* (to be codified at 12 C.F.R. § 1005.32(b)(4)).

51. *Id.* (to be codified at 12 C.F.R. § 1005.32(b)(5)).

52. Tom Kierner, Stephen T. Middlebrook & Sarah Jane Hughes, *Developments in the Laws Affecting Electronic Payments and Financial Services*, 75 BUS. LAW. 1695, 1702–03 (2019).

53. Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, *Tucker v. Chase Bank USA, N.A.*, No. 18-cv-03155-KPF (S.D.N.Y. June 9, 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.491751/gov.uscourts.nysd.491751.66.0.pdf>.

54. *Id.*; see Settlement Agreement and Release at 6, *Tucker v. Chase Bank USA, N.A.*, No. 18-cv-03155-KPF (S.D.N.Y. May 26, 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.491751/gov.uscourts.nysd.491751.61.1.pdf>.

55. See FIN. ACTION TASK FORCE, GUIDANCE FOR A RISK-BASED APPROACH: VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS 28, 55–56 (June 2019) [hereinafter FATF GUIDANCE], <http://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf> (discussing Recommendation 15); *Public Statement on Virtual Assets and Related Providers*, FIN. ACTION TASK FORCE (June 21, 2019), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-statement-virtual-assets.html> (same).

56. FATF GUIDANCE, *supra* note 55, at 13–14.

of FATF's 2014 definition of the term "virtual currency" to include currency and non-currency assets that are digitally represented.⁵⁷

A U.S. Treasury official later explained that "virtual asset service providers" under FATF's definition of that term were governed by FinCEN's "money service business" registration and recordkeeping guidance published in 2011⁵⁸ and in 2013.⁵⁹ The official also stressed that FinCEN's 1996 Travel Rule⁶⁰ governs "virtual asset service providers."⁶¹ The same official subsequently stressed the need for compliance with the Travel Rule.⁶²

C. THE SEC ENFORCES THE 1933 ACT'S REGISTRATION REQUIREMENTS AGAINST SAFTs AND THE SALE OF POST-SAFT TOKENS TO THE PUBLIC

In 2019, the Securities and Exchange Commission ("SEC") filed enforcement actions under the Securities Act of 1933 ("1933 Act")⁶³ against Telegram Group, Inc. ("Telegram")⁶⁴ and Kik Interactive Inc. ("Kik").⁶⁵ Both complaints charged that defendants failed to register offerings and that their initial offerings promising later token distributions were not exempt from registration under the 1933 Act.

We focus on Telegram, which had raised \$1.7 billion from 175 initial investors in 2018.⁶⁶ Telegram offered those investors Simple Agreements for Future Tokens ("SAFT"), whereby initial investors deliver money to promoters, who

57. Compare *id.* at 13 (defining "virtual assets"), with FIN. ACTION TASK FORCE, VIRTUAL CURRENCY: KEY DEFINITIONS AND POTENTIAL AML/CFT RISKS 4 (June 2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (defining "virtual currency").

58. Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43585, 43596–97 (July 21, 2011) (to be codified at 31 C.F.R. §§ 1010.100(ff), 1022.380 (defining "money service business" and imposing registration requirements on any such business)).

59. U.S. Dep't of the Treasury, Fin. Crimes Enf't Network, FIN-2013-G001: Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (Mar. 18, 2013), <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf> (stating that an administrator or exchanger of virtual currency is a "money service business").

60. 31 C.F.R. § 1010.410(f) (2020) (setting threshold for reporting at \$3,000).

61. Kenneth A. Blanco, FinCEN Dir., Address at Chainalysis Blockchain Symposium (Nov. 15, 2019), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-chainalysis-blockchain-symposium>.

62. Kenneth A. Blanco, FinCEN Dir., Address at the Consensus Blockchain Conference (May 13, 2020), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-consensus-blockchain> (stating that "recordkeeping violations are the most commonly cited violation by [FinCEN] examiners against money service businesses . . . engaged in virtual currency transmission").

63. 15 U.S.C. § 77e(a), (c) (2018) (prohibiting the offer of any security before a registration statement is filed, as well as the sale or delivery of any security before the registration statement is effective).

64. Complaint, SEC v. Telegram Grp. Inc., No. 19-cv-9439 (PKC) (S.D.N.Y. Oct. 11, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-212.pdf>.

65. Complaint, SEC v. Kik Interactive Inc., No. 19-cv-5244 (S.D.N.Y. June 6, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-87.pdf>. The SEC alleged that Kik raised \$100 million in a sale of one trillion tokens called "Kins" without registering with the SEC or being exempt from registration. *Id.* at para. 1.

66. SEC v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020).

then use that money to develop functional networks and functional tokens, which tokens are then delivered to the initial investors, who may then resell the tokens to the public.⁶⁷ The proponents of SAFT acknowledged that SAFT's first phase involves an "investment contract," and thus a "security," but they believe that their design offers the crypto industry a framework for token sales that complies with the federal securities laws.⁶⁸ The Complaint focused on the post-SAFT token deliveries and prospective sales by original investors to the public. Telegram had not registered the SAFT-phase offering or the impending sales of tokens—a new cryptocurrency called Grams.

Telegram argued that SAFTs are exempt from registration under SEC Regulation D⁶⁹ because the initial investors were accredited.⁷⁰ Telegram also claimed that public purchasers of post-SAFT tokens from the SAFT-phase initial investors would not be purchasing "securities."⁷¹

On March 24, 2020, a federal district court issued a preliminary injunction against Telegram's failure to register its offering.⁷² The court applied the multi-prong *Howey* "investment contract" test⁷³ to Telegram's 2018 SAFT sales, purchase agreements, and the series of "contracts and understandings," including plans for post-SAFT deliveries of Grams to initial investors, and concluded they were "part of a larger scheme" under *Howey*.⁷⁴ The court found that the SEC had established a substantial likelihood of success on the merits that Telegram was violating the 1933 Act.⁷⁵

Following the court's decision, Telegram announced that it would not proceed to deliver Grams promised to the SAFT-phase investors and that Telegram would end its involvement with Grams.⁷⁶

On September 30, 2020, in *SEC v. Kik Interactive Inc.*, the court—finding that the *Telegram* opinion was "instructive"—granted summary judgment to the SEC on the allegation that Kik offered and sold securities without a registration statement or an exemption from registration.⁷⁷

67. See JUAN BATIZ-BENET, JESSE CLAYBURGH & MARCO SANTORI, *THE SAFT PROJECT: TOWARD A COMPLIANT TOKEN SALE FRAMEWORK* (Oct. 2, 2017) [hereinafter SAFT WHITE PAPER], <https://saftproject.com/static/SAFT-Project-Whitepaper.pdf>; Marko Vidrih, *Simple Agreement for Future Tokens (SAFT)—Explained*, MEDIUM (Feb. 11, 2019), <https://medium.com/the-capital/simple-agreement-fir-future-tokens-saft-explained-a72d23cddf77>.

68. SAFT WHITE PAPER, *supra* note 67, at 1–2; see 15 U.S.C. § 77b(a)(1) (2018) (defining "security" to include "investment contract").

69. 17 C.F.R. pt. 230 (2020).

70. *Id.* § 230.501(a).

71. See *Telegram*, 448 F. Supp. 3d at 367.

72. See *id.* at 358, 382.

73. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946).

74. *Telegram*, 448 F. Supp. 3d at 358–59, 367.

75. *Id.* at 381–82.

76. Omar Faridi, *Telegram Has Officially Abandoned Its TON Blockchain and Gram Tokens Project Due to Lengthy Court Battle with US SEC*, CROWDFUNDER INSIDER (May 13, 2020, 9:35 AM), <https://www.crowdfunderinsider.com/2020/05/161396-telegram-has-officially-abandoned-its-ton-blockchain-and-gram-tokens-project-due-to-lengthy-court-battle-with-us-sec/>.

77. *SEC v. Kik Interactive Inc.*, No. 19-cv-5244 (AKH), 2020 WL 5819770, at *1, *5 (S.D.N.Y. Sept. 30, 2020).

D. SEC WARNS INVESTORS ABOUT INITIAL EXCHANGE OFFERINGS OF DIGITAL ASSETS

In January 2020, the SEC issued an Investor Alert on Initial Exchange Offerings (“IEOs”).⁷⁸ IEOs are offered directly through online trading platforms and purport to give investor-purchasers immediate vehicles for trading the sponsored digital assets.⁷⁹ The SEC has designated as “red flags” an offeror’s failure to discuss the applicability of U.S. securities laws or its claim that the IEO is not governed by U.S. laws because the platform is located abroad.⁸⁰ The SEC stated its position that IEOs may violate U.S. securities laws and may lack the protections associated with registered or exempt securities offerings.⁸¹ The Alert leaves no doubt: “There is no such thing as an SEC-approved IEO.”⁸²

VII. CONCLUSION

Looking to the coming year, we foresee that the COVID-19 pandemic will have some effects on financial services, such as increased use of electronic payments, payroll failures, business and consumer bankruptcies, mortgage foreclosures, and garnishments. Some repercussions of the pandemic, however, may not be so obvious. A case in point is the shortage of coins, which is beginning to affect retailers, especially grocery stores and quick-service restaurants.⁸³

Separate from the pandemic, we also expect threats to providers of e-payments and financial services to continue to increase. For example, the FBI has identified “business email compromise” (“BEC”) as the number one financial threat at this time.⁸⁴ BEC involves the capture of business credentials that enable the perpetrator to transmit wire transfer instructions that bleed funds from the unsuspecting business.⁸⁵

Cryptocurrencies are likely to see innovations and regulatory pressures. Facebook is working on regulatory approvals for its Libra currency,⁸⁶ PayPal is

78. *Initial Exchange Offerings (IEOs)—Investor Alert*, U.S. SEC. & EXCHANGE COMMISSION (Jan. 14, 2020), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_initialexchangeofferings.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See Taylor Pettaway, *H-E-B Asks Customers for Help Amid National Coin Shortage*, HOUS. CHRON. (July 13, 2020), <https://www.houstonchronicle.com/coronavirus/article/National-coin-shortages-are-impacting-San-Antonio-15403851.php>.

84. See FED. BUREAU OF INVESTIGATION, INTERNET CRIME REPORT 3, 9, 20 (2019), https://pdf.ic3.gov/2019_IC3Report.pdf.

85. *Id.* at 9.

86. See *Libra Details Revealed in EC Regulatory Response: No Direct Redemption, Not Keen on E-Money Classification*, LEDGER INSIGHTS, <https://ledgerinsights.com/libra-ec-response-redemption-e-money-regulations/> (last visited Oct. 1, 2020).

working on its own cryptocurrency,⁸⁷ and central-bank digital currencies appear to be gaining traction.

With so many prospective innovations and ensuing regulatory jousts likely to accompany new providers, products, and services, readers will need to stay alert and be resourceful.

87. *Paypal Confirms Developing Cryptocurrency/Digital Asset Capabilities*, LEDGER INSIGHTS, <https://www.ledgerinsights.com/paypal-confirms-developing-cryptocurrency-digital-asset-capabilities/> (last visited Oct. 1, 2020).

