

Michigan Credit Union League & Affiliates
Annual Convention and Exposition
Helping Credit Unions Serve, Grow and Remain Strong #mculace

The Shifting Payments Landscape

June 5, 2014 | 9:00 a.m. – 10:15 a.m.
Erin Fonte
Shareholder
Cox Smith Matthews



COX | SMITH
ATTORNEYS

Disclaimers

- The opinions expressed in this presentation are solely those of the presenter and do not necessarily reflect the opinions of Cox Smith Matthews Incorporated.
- This presentation is an educational tool that is general in nature and for purposes of illustration only. The materials in this presentation are not exhaustive, do not constitute legal advice and should not be considered a substitute for consulting with legal counsel. Cox Smith Matthews Incorporated does not have obligation to update the information contained in this presentation.

© 2013, Cox Smith Matthews Incorporated

2

Introduction

- Mobile commerce/payments has been talked about for several years, but now merchants are increasingly serious about mobile commerce
- Huge “Dating Game” process: Merchants continue to scrutinize various offerings from banks, issuers, carriers, tech giants and even fellow merchants
- **“The market will take off once a customer can pump gas, buy groceries, dine out, pick up a prescription and go to the mall – all by paying the same way at all of these locations.”**
- **“Improving a payments system that is rife with inefficiencies that result in unnecessary costs for all participants.”**
- In 10 years, 25 and under ALL “digital natives” – will not know world without Internet or smart phones

Why Is The Payments Ecosystem Exploding?

- What is the “Payments Ecosystem”?
 - **Circulatory System of Commerce** – how we all pay for what we buy, and get paid for what we sell – processing/ clearing/ settlement
 - Rodgin Cohen (consigliere to Wall Street): even in the deepest, darkest moments of 2008 financial crisis, payments in the U.S. *worked* and money still flowed
 - “Disruption” of traditional payments that is beginning is a combination of several factors, including: rise of smartphones; Durbin Amendment aftermath; venture capital \$\$; techies who want to make payments “more efficient”



Why Is The Payments Ecosystem Exploding? (cont'd)?

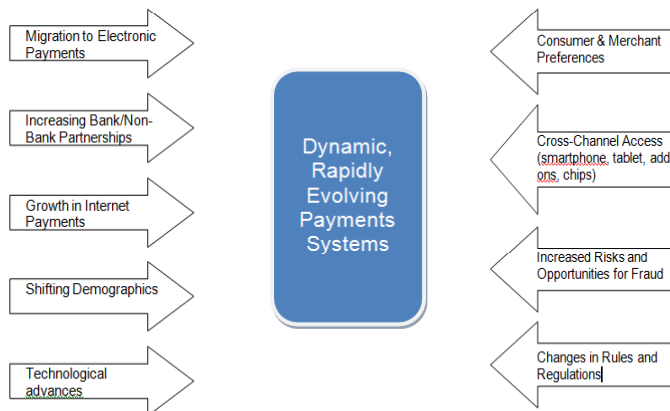
- Payments = The new darling of VC's everywhere.
 "Since the start of the economic crisis [in 2008], 239 financial services start-ups have raised almost **\$1.6 billion** in venture capital financing."*

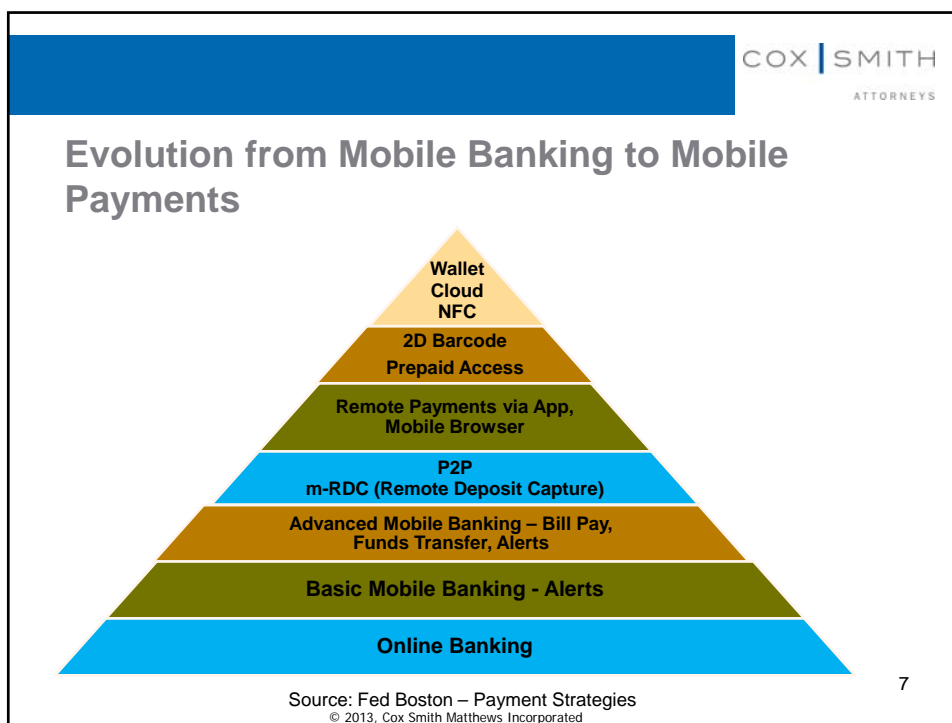
Payments Jackpot: companies placing bets for share of massive market currently dominated by long-established credit card networks, issuing/acquiring banks, and processors/ ISOs
 E.G. 168 or so different "mobile wallets"



*(MoneyTree Report, PricewaterhouseCoopers and National Venture Capital Association.) © 2013, Cox Smith Matthews Incorporated

What's Driving Changes in the U.S. Payment System?





Mobile Payment Business Models

- Bank-led model
 - Bank holds funding account
 - Existing regulatory regime and payment laws
 - Clear-to-pay
- Mobile payment service provider-led model
 - Traditional funding from FI account vs. MPSP held prepaid account
 - PayPal
- Telecom-led model
 - Bill-to-mobile
 - Haiti earthquake relief efforts – donations via SMS
 - Micropayments for digital and virtual goods
- Hybrid models? ISIS? Google? PayPal? MCX?

© 2013, Cox Smith Matthews Incorporated

9

How Do Mobile Payments Settle?

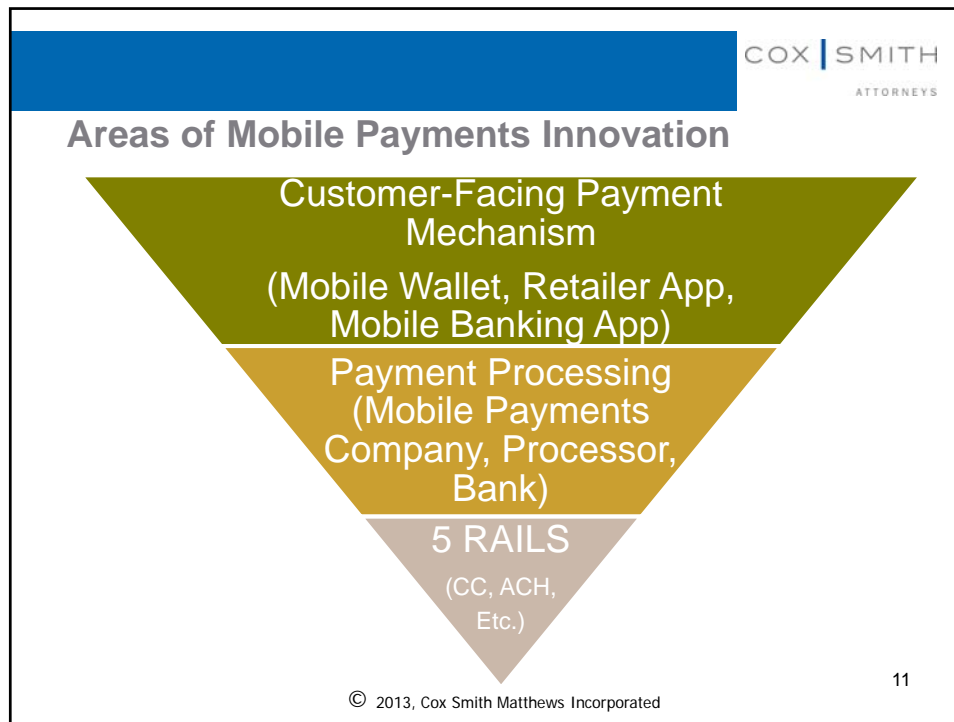
■ 5 – And ONLY 5 – Payment Channels (“payment rails”)

- Cash
- Check (paper; Check 21 “substitute check”)
- ACH (closed-system model; includes paper checks converted to ACH)
- Credit/debit/stored value cards (open-loop cards)
- Wire transfers



© 2013, Cox Smith Matthews Incorporated

10



COX | SMITH
ATTORNEYS

Legal and Regulatory Issues

- The 5 “rails” developed independently of each other.
- **Thus, separate legal/rule structures exists for each payment type, and legal rights and remedies vary depending upon the “rails” the payment travels on**
- For example:
 - Reg Z/TILA: \$50 liability limit for unauthorized transactions; chargeback rights
 - Electronic Funds Transfer Act (EFTA) and Regulation E – NOT APPLICABLE TO COMMERCIAL TRANSFERS
 - NACHA and ACH Operator Rules – e.g. 60 day window for consumer to dispute ACH payment
 - **This leads to customer and merchant confusion re: rights, disputes, chargebacks, etc.**

© 2013, Cox Smith Matthews Incorporated

12

Legal and Regulatory Issues (cont'd)

Legal/Regulatory Landscape

- Fragmented legal framework on expanded payment landscape – different consumer protections, disclosure requirements, and error resolution provisions depend on payment type
- Laws, regulations, and rule sets associated with a payment (debit card, credit card, stored value, online payment) should follow that payment through intermediary channels for clearing and settlement
- Dual banking system with national preemption for state laws creates complexity for payment service providers
- Regulatory regime for non-banks is fragmented and confusing – FCC for telecoms, state banking commissioners for MSBs.
- More nonbanks in money transfer business may tax oversight resources of state banking authorities

Legal and Regulatory Issues (cont'd)

Legal/Regulatory Landscape (cont'd)

- Federal Reserve
 - Financial and non-financial holding companies and state member banks
- Comptroller of the Currency – National banks
- FDIC – shared oversight with FED and State for state chartered financial institutions
- State banking and finance commissioners
 - State non-member banks
 - Money services businesses including money transmitters
- FTC – nonbanks?
- FCC – telecoms
- CFPB – consumer protection oversight for federal, state banks and nonbanks; Project Catalyst
- FinCEN – federal money services businesses (including stored value card providers)
- FFIEC – shared oversight for payments processing firms
- U.S. Department of Treasury: Multi-agency (24 or so) mobile payments regulatory gap analysis

Legal and Regulatory Issues (cont'd)

Mobile - Regulator Statements

- July 2012: Fed, FinCEN, and CFPB: U.S. House Financial Institutions subcommittee on Financial Institutions and Consumer Credit
- Fed made it clear that a “new interface [mobile] is not a new phenomenon” and “the application of [EFTA] and most other federal consumer laws to bank or nonbank mobile payment transactions, including the extent to which prepaid balances are covered, is subject to the rulemaking and interpretive authority of CFPB.”
- CFPB = Project Catalyst (wants to work with payments startups and FIs and working on model consumer disclosures)
- FTC has authority over GLBA and FACTA “Red Flags” for nonbank entities – FTC mobile payment study (3/8/13)
- FinCEN has authority regarding KYC/CIP and BSA/AML regarding prepaid “access”
- State money transmitter laws

Regulatory and Legal Implications

- Mobile payments are evolving quickly with new pilots and rollouts but consumer adoption still slow in U.S. – balancing market innovation with regulation
- Regulators are showing interest in mobile channel – discussions with FFIEC and CSBS – Conference of State Banking Supervisors
- Third party risk a significant concern going forward as banks realize benefits from outsourcing – increased regulatory attention on vendor oversight
- Will bill-to-mobile services extend beyond micropayments and alter regulatory paradigm?
- Will money transfer services expose telecoms and social networks to state money transmitter licensing requirements and compliance?
- Balance of incident-based vs. prudential regulation? When are self governance models sufficient?
- Is Near Field Communication (“NFC”) the problem or solution? Walmart/Apple vs. Isis/Google Wallet – **EMV Terminal Upgrade Issues Could Affect This**

Regulatory and Legal Implications (cont'd)

Mobile – Overview of Regulator Actions & Potential Actions

- Illinois/ CA – Recent Money Transmitter Law Enforcement Actions (discussed further below)
- **American Bankers Association Report:** “The Changing Face of the Payments System: A Policymaker’s Guide to Important Issues” (June 2013): 3 Key Issues
 - **Consumer Protection:** Does payment method provide consumer protection consistent with federal regulation? Are consumers’ rights clearly disclosed and easily understood.
 - **Payment System Integrity:** Does the nonbank adhere to all governmental and regulatory programs to maintain safety/soundness of payments system? If not, are they a weak link?
 - **Competitive Equity:** Is the payment provider subject to the same rules and oversight as other market participants?
- **Consumer Protection Advocates:** No distinctions in rights or remedies based on underlying payment type. Credit-card type protections for ALL mobile payment types, regardless of funding mechanism: mobile payments tied to credit, debit, bank account, prepaid/stored value, gift cards and mobile network operator accounts should get credit-card level consumer protection
 - Cf. But why is mobile different – aren’t you advocating overhauling laws and existing network rules? Why is mobile different from physical or online?

17

© 2013, Cox Smith Matthews Incorporated

Consumer Risk

- Testimony in July 2012 from Fed and FinCEN, and Statement of Record from CFPB, to U.S. House Financial Institutions subcommittee on Financial Institutions and Consumer Credit
- Fed made it clear that a “new interface [mobile] is not a new phenomenon” and “the application of [EFTA] and most other federal consumer laws to bank or nonbank mobile payment transactions, including the extent to which prepaid balances are covered, is subject to the rulemaking and interpretive authority of CFPB.”
- Also FTC has authority over GLBA and FACTA “Red Flags” for nonbank entities
- FinCEN has authority regarding KYC/CIP and BSA/AML regarding prepaid “access”
- State money transmitter laws (examples)

18

© 2013, Cox Smith Matthews Incorporated

Consumer Risk (cont'd)

- CFPB: Has authority over many applicable consumer laws, including EFTA/Reg E (and international remittance portions, too)
- CFPB: Need to meet with new market entrants and make sure market participants understand their compliance obligations under federal consumer laws – Project Catalyst
- Key Consumer Risk Issues in Mobile Payments
 - Varying consumer rights by payment channel (and how does a consumer know that)
 - BUT several basic “payment functions” that do not vary by channel (initiation/settlement/records; error resolution; who has liability for failure to complete payment)
 - Data Storage and Retrieval (documentation/record retention)
 - Privacy and Data Security
- **Central Consumer Risk Issue: Authentication (multi-factor/multi-layer)**

19

© 2013, Cox Smith Matthews Incorporated

EFTA/Regulation E

- EFTA establishes a basic framework for the rights, liabilities, and responsibilities of consumers who use “electronic fund transfers” (“EFT”) services.
- Primary objective: consumer rights and consumer protection for individuals engaged in EFTs
- EFTA’s implementing regulation is Federal Reserve Board Regulation E (“Reg E”)
- Reg E applies to any EFT that authorizes a FI to debit or credit a consumer’s account
- “FI” defines as “bank, savings association, credit union or any other person that directly or indirectly holds an account *belonging to a consumer*, or that issues an access device and agrees with a consumer to provide EFT transfer services.

20

© 2013, Cox Smith Matthews Incorporated

EFTA/Regulation E (cont'd)

- “FI” defines as “bank, savings association, credit union or any other person that directly or indirectly holds an account *belonging to a consumer*, or that issues an access device and agrees with a consumer to provide EFT transfer services.
 - **“Account”**: a consumer access account held by a financial institution and established primarily for personal, family or household purposes
 - **“Access Device”**: a card, code *or other means of access to a consumer’s account*, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers

EFTA/Regulation E (cont'd)

- Pursuant to Reg E, a mobile device used to initiate an electronic funds transfer from a consumer asset account is an “access device” under EFTA, and the issuer of the device or entity where the account resides is subject to Reg E
- Like Reg Z, Reg E generally provides for initial disclosures, requires periodic consumer credit statements, and includes new error resolution requirements
- Also like Reg Z, Reg E is now under the jurisdiction of the CFPB

EFTA/Regulation E (cont'd)

- **Foreign Remittances and Reg E** – CFPB final rule implementing Dodd Frank Act Section 1073
 - Establishes certain disclosure requirements and other protections for U.S. consumers who send money electronically to foreign countries
- **Reg E “Lite”**: 12 C.F.R. Section 205.14: Provider of an Electronic Fund Transfer Service
 - 12 C.F.R. 205.14(a) Provider of electronic fund transfer service. A person that provides an electronic fund transfer service to a consumer but that does not hold the consumer's account is subject to all requirements of this part if the person:
 - (1) Issues a debit card (**or other access device**) that the consumer can use to access the consumer's account held by a financial institution; and
 - (2) Has no agreement with the account-holding institution regarding such access.
 - **REMEMBER: “Access Device”**: a card, code **or other means of access to a consumer's account**, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers

EFTA/Regulation E (cont'd)

- **Reg E “Lite”**: 12 C.F.R. Section 205.14: Provider of an Electronic Fund Transfer Service
- In addition to the requirements generally applicable under this part [12 C.F.R. Part 205], the service provider shall comply with special rules regarding:
 - Disclosures and documentation
 - Error resolution
- **AND Account-Holding FI must:**
 - Provide a periodic statement that describes each electronic fund transfer initiated by the consumer with the access device issued by the service provider. (But not IF the service provider did not provide the necessary information)
 - Cooperate with service provider and consumer in error investigation/ resolution

EFTA/Regulation E in 2014

- CFPB Notice of Proposed Rulemaking for Reloadable Prepaid?
 - ANPR issued Issued on 5/23/12
 - Comment period closed 7/23/12
 - Over 230 Comment Letters
 - Would extend Reg E protections to general purpose reloadable prepaid cards
 - Status?
 - Implications for mobile, and indications for mobile
- Consumer Protection Advocates: Reg Z, or at a minimum Reg E, protections for mobile tied to credit card, debit card, bank account, general purpose reloadable prepaid cards, closed-loop merchant issued gift cards, and bill-to-mobile
- Is mobile payments a “tipping point” reason for overhauling current payment rails laws/protections when physical and online have not been?

TILA/Regulation Z

- If Mobile Payment involves and “extension of credit,” then TILA/Regulation Z applies
- Purpose of TILA is to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.”
- Regulation Z
 - Principal federal consumer protection regulation dealing with extensions of credit to consumers
 - Purpose is to “promote the informed use of consumer credit by requiring disclosures about its terms and cost,” but also includes substantive protections, including regulating certain credit card practices, and providing a means for fair and timely resolution of credit billing disputes.

TILA/Regulation Z (cont'd)

- Regulation Z applies to:
 - i. Consumer extensions of credit;
 - ii. By persons/entities who regularly offer/extend credit to consumers;
 - iii. Where the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
 - The credit is primarily for personal, family, or household purposes.
- Regulation Z does not focus on the payment aspect (i.e., the function that provides substantially immediate payment to sellers), but rather the credit aspect (i.e., the commitment by the consumer/purchaser to repay the issuer at some time in the future) of a transaction.

TILA/Regulation Z (cont'd)

- Regulation Z:
 - Particular focus on credit card lending
 - Defines a “credit card” as “any card, plate, coupon book, or other single credit device that may be used from time to time to obtain credit”
 - Generally, provides for initial disclosures, requires periodic consumer credit statements, and includes error resolution requirements
- A Mobile Device/Payment system that utilizes a line of credit as its funding source will likely be viewed as a “credit card” under Regulation Z, and the **issuer**, as the entity extending credit, will be deemed a “creditor” under Regulation Z

TILA/Regulation Z (cont'd)

- Special Considerations Related to Regulation Z
 - Stringent Limits on Consumer Liability (\$50 limit on unauthorized charges prior to notification to issuer)
 - Considerable Consumer Leverage for Dispute Resolution
 - Billing Error Protections
- Considerable Potential Legal/Regulatory Exposure to Issuers:
 - UDAP/UDAAP Exposure
 - Consumer Class Action Exposure
 - Exposure to TILA laws
 - CFPB involvement re: consumer protection
 - CFPB partnership with State AGs

TILA/Regulation Z (cont'd)

- **Mobile Carrier Billing** – Treatment and characterization of charges on mobile providers' billing statements
 - FCC "Truth In Billing" Requirements (and state equivalents) vs.
 - TILA/Reg Z Applicability
 - Generally, provides for initial disclosures, requires periodic consumer credit statements, and includes error resolution requirements
- TILA amendments made pursuant to the Credit Card Accountability and Responsibility and Disclosure Act of 2009 (and parallel amendments to Reg Z) imposes substantial changes to credit card industry . . . clear ramifications for future of Mobile Payments
- Consumer issues/concerns arising from cell phone cramming will likely keep Regulation Z focus in play
- **2014: Push to have Reg Z protections for all mobile payments? Issues of liability limits for unauthorized/fraud, chargeback rights, etc.**

FCC Truth In Billing Requirements

- **Mobile Carrier Billing** – FCC (and state equivalent) Truth In Billing Requirements
 - Applicability of Truth In Billing Requirements to “Direct-to-mobile” billing is unclear
 - If Truth in Billing requirements are narrowly construed to cover only “telephone-related services” then more likely TILA/Reg Z or EFTA/Reg E may apply
 - BUT, applicability of Reg Z may be constrained. Carrier/provider does not meet the definition of a “creditor.”
 - Carriers instead may be viewed as providing an alternative payment method that requires payment in full when customer receives the bill, and does not involve extending credit
 - California Law: California Public Utilities Commission 2010 Rule: chargeback rights for prepaid/post-paid mobile phone accounts
 - **2014: Push for FCC or other states to adopt similar laws?**

31

© 2013, Cox Smith Matthews Incorporated

Gift Cards/ Loyalty/ Rewards/ Coupons/ Deals

- If you can power mobile payments, you can tie all of the following to that functionality
 - Open and closed loop gift-cards
 - Loyalty programs
 - Rewards programs (and tie specifically to mobile use)
 - Coupons (insta-coupons, virtual hawkers with geo-location)
 - Daily Deals (Bank of America is into Daily Deals now)
- In the exploding payments ecosystem, you have payments companies trying to get into these related programs, and companies specializing in these related programs trying to get into payments (Groupon and BreadCrumb)
- Makes for interesting alliances and motivations

32

© 2013, Cox Smith Matthews Incorporated

Gift Cards/ Loyalty/ Rewards/ Coupons/ Deals

- **2014:** CFPB will be looking at credit card rewards program disclosures and considering the need for additional protections. Will focus on value of rewards points, complexity of program, etc.
 - Would CFPB look at mobile only rewards programs as well, whether or not tied to credit cards?
- **2014 – States:** Consumer advocates may push to amend state-level consumer protection laws for gift cards used to fund mobile payments to include liability limits for fraudulent/unauthorized transactions, chargeback rights, etc.
- **2014 - Privacy:** Will FTC (or state agencies like CA Attorney General's Office) look into rewards programs with regard to opt-in/opt-out for sharing information with unaffiliated third parties? And does it matter if the rewards program is opt-in?

Financial Institution “Third Party Vendor” Issues

- **Disintermediation: Co-Opetition = Banking the Competition**
 - Banks (typically larger banks) are “banking the competition,” and that presents nonbank customer risks and “custodial account” issues
 - Have seen this play out in stored value card issuing bank/distributor relationships where bank popped in exams for actions distributor performs
 - Typical Problems: Nonbank KYC/CIP; BSA/AML Issues; Advertising Violations/UDAP (now UDAAP) = facilitation problems
 - Bank control and bank risk underwriting re: limits on ACH; proper reserve account amounts for chargebacks, etc.
 - **2014:** For banks that are banking alternative payment providers, including mobile payment providers, look for increased scrutiny on “third party vendor” type oversight obligations:
 - See FDIC enforcement actions holding BOTH issuing bank and third party program manager liable for UDAP violations (e.g. Achieve Financial Solutions, CMP + restitution) – “institution affiliated party”
 - Easily translates to mobile “program managers”

What is “Big Data”?

- “Big Data” is basically taking detailed analytics on behavior, cross-referencing it with geo-location and social media information, and creating highly-targeted “predictive analytics”
 - “There is a war quietly brewing between Australia’s banks, and it’s not over which can offer the lowest home loan rate. Instead, financial institutions are gearing up to mine the “new oil of the digital world,” collating all of the information they have about customers to tailor products or offers to each customer.” (Australian Financial Review 11/6/12)
- Banking is a huge component of data about you and your behavior – and the payments ecosystem plays are, in large part, an attempt to mine that data
- Banks in the U.S. are attempting doing it too, as are Google, PayPal, and all the players we have discussed – take it, analyze it, repackage it – SELL IT
- Technology vendors disrupting and getting direct financial relationships
- Merchants like Walmart: “No thanks, its our data, we will do that in-house.”

What is “Big Data” (cont’d)?

- Questions about who owns the customer and their data?
- As more people use their mobile phones to make payments, transaction programs will become a central part of big data collection.
- Merchants can track bill payment habits, credit records, transaction history and more by allowing customers to use apps to complete transactions.
- It’s not about the payment, it is about the DATA

What is “Big Data” (cont’d)?

- **And government wants “Big Data” too...**
- In remarks to The Clearing House Annual Conference 11/21/13 – 11/22/13, CFPB Director Cordray spoke about the need to protect consumers “who find unexpected debits on their bank statements, or are victimized by third parties who may take inappropriate advantage of the efficiency and trust on which [the electronic payment] systems are built.”
- CFPB was interested in working with The Clearing House to improve the Bureau’s understanding “of how enhanced computer analytics and communications could be used to map patterns in the payment systems”
- Patterns could enable the CFPB to “identify outliers that are unusually frequent sources of irregular or failed claims for payment.”
- CFPB wants to “be better able to identify and enforce the law against illegitimate firms that are otherwise able to reduce their own costs by hitching a free ride on the payments system” and place itself in “a better position to consider changes in law or practice that may be needed. “

Legal and Privacy Issues re: Big Data/Ads

- **Payments:** well-established practices and contracts with entities like merchant acquirers, payments processors, etc., will not be in play with start-ups – LOTS of good due diligence on the front end
- Not currently clear what the legal obligations of non-FI payments companies are, but any good company will address: payment flow, including authorization, settlement, chargeback/dispute resolution, documentation and investigation
- On the “commerce” side (loyalty/rewards/coupons/offers), must be extremely careful that Marketing (or IT) does not run off and sign up with a service that automatically violates your Privacy Policy. Harmonization is key. And beware geo-location functions that you add on via a third-party vendor – may need to update your Privacy Policy.
- **2014:** Regulators may raise issue of what transaction data is subject to privacy laws, and if so, whether a consumer can simply “opt-in” to use of transaction data – by bank? By merchant? By third parties for marketing? By third parties for “behavioral profile”? (New “behavioral” credit scores?)

Federal Trade Commission

- **Mobile Privacy**
 - February 2013: “Mobile Privacy Disclosures: Building Trust Through Transparency” includes recommendations for:
 - Mobile platforms
 - App developers
 - Ad networks/third parties
 - Highlights NTIA work: “The National Telecommunications and Information Agency, within the U.S. Department of Commerce, is working with other stakeholders to develop a code of conduct on mobile application transparency. To the extent that strong privacy codes are developed, the FTC will view adherence to such codes favorably in connection with its law enforcement work.”
 - NTIA Short Form Notice Code of Conduct (July 25, 2013)
http://www.ntia.doc.gov/files/ntia/publications/july_25_code_draft.pdf
 - FTC: Mobile App Developers: Start with Security (Feb 2013)

39


© 2013, Cox Smith Matthews Incorporated

Federal Trade Commission

- **Mobile Payments**
 - **March 2013:** Paper, Plastic...or Mobile? (an FTC workshop on mobile payments – FTC Staff Report)
 - Legal Landscape and Resolution of Disputes (clear policies needed)
 - Special Concerns Regarding Mobile Carrier Billing (cramming)
 - Consumer Data Security Concerns in Mobile Payments (keeping FI data secure)
 - Privacy (“consolidation of consumers’ personal information in the mobile payment process” and “much larger cache of personal information stored on the consumer’s mobile device”)
 - “Although the industry is still young, FTC staff encourages those developing mobile payment products and services to create them with financial, security, and privacy protections in mind.”
 - “The FTC will **continue to monitor mobile payment options**, and to evaluate whether consumers have adequate protections and the information they need to make informed choices about these new and innovative services.”
- **2014: Will “monitoring” turn into rulemaking and/or enforcement actions?**

40

© 2013, Cox Smith Matthews Incorporated




CFPB

- **Project Catalyst:** Mission is to support innovators in creating consumer-friendly financial products and services.
 - Engage with the innovator community
 - Participate in initiatives that inform CFPB policy work
 - Stay on top of emerging trends to remain a forward-looking organization
 - Pitch a Pilot
 - Run a Disclosure Trial
 - Use CFPB Data
 - **2014: Will CFPB be presented with a product they deem inherently unfair or deceptive – what is the limit of what can be “fixed” or not?**
- **Mobile Payments Convening (9/12/13)**
 - Invitation-only event bringing together mobile payments players, traditional payments players, trade associations, and consumer advocates to learn more about current mobile payments landscape
 - CFPB obviously tracking mobile payments space more than just Project Catalyst initiative

© 2013, Cox Smith Matthews Incorporated

41



Challenges of State Money Transmission Laws

Mobile – Regulator Actions & Potential Actions

- **Illinois** – Cease & Desist letters to Square, NetSpend and others for alleged failure to obtain money transmitter licenses under Illinois Transmitters of Money Act – unclear even if the entity itself does not hold funds at all? (stored value component issues)
- **California** - Department of Financial Institutions – Cease & Desist to Bitcoin Foundation for allegedly engaging in money transmission without a license/authorization:
 - You are violating CA law for failure to register with CD DFI
 - You are violating federal law for failing to register with FinCEN as an MSB
 - No explanation of what exact conduct constitutes “money transmission”
- **Florida** - Square fined \$507K in July 2013 by Florida’s Office of Financial Regulation for “operating a payment service without a money transmission license”
 - “Specifically, the Office finds that Applicant’s existing payment processing services (including Square Register) and stored value/prepaid access card services required a license under Florida law”

© 2013, Cox Smith Matthews Incorporated

42

Challenges of State Money Transmission Laws

Mobile – Regulator Actions & Potential Actions (cont'd)

- Perils of needing to adhere to state-specific laws that may not be harmonized with each other.
- Money transmitter licenses are issued by state, with slight differences in each state.
- Application process and bonding requirements are time consuming and onerous, often with minimum company capital requirements that a lot of startups cannot meet
- Bonding amounts vary considerably from state-to-state
- By the same token, state regulators want to protect consumers and to make sure that a company engaging in mobile payments that include money transmission are economically viable and do not shut down without completing transactions
- Plain language of MT statutes can be broadly interpreted to regulate the receipt of money or monetary value for the purpose of transmitting it to another place or location *by any means*.
- Without clear guidance, some companies opt to get licensed just to play it safe (Amazon, FaceBook, Google)

Challenges of State Money Transmission Laws

Mobile – Regulator Actions & Potential Actions (cont'd)

- **2014:** May see an uptick in the debate around state MT laws and call from mobile payments industry to modernize state MT laws to accommodate new technology and the realities of a mobile payments while still respecting the statutory purpose of consumer protection where appropriate
 - Would involve a host of state regulators agreeing that changes are needed
 - Could involve reforms to the Uniform Money Services Act enacted by the National Conference of Commissioners of Uniform State Laws (NCCUSL) (only adopted by Alaska, Arkansas, Iowa, Puerto Rico, Texas, U.S. Virgin Islands, Vermont, Washington)
 - Interstate licensing reciprocity?
 - Tying bonding amount to percentage of funds transmitted?
 - New cottage industry for licensed MTs sponsoring in new companies as “agents”?

COX | SMITH
ATTORNEYS

Need for Regulatory Coordination

U.S. Mobile Payments

© 2013, Cox Smith Matthews Incorporated Source: Fed Boston – Payment Strategies

45

COX | SMITH
ATTORNEYS

Additional References

- FTC: Mobile Privacy Disclosures: Building Trust Through Transparency: <http://www.ftc.gov/opa/2013/02/mobileprivacy.shtm>
- FTC: Mobile App Developers: Start with Security (Feb 2013) <http://business.ftc.gov/documents/bus83-mobile-app-developers-start-security>
- FTC: Paper, Plastic...or Mobile? <http://www.ftc.gov/opa/2013/03/mobilepymts.shtm>
- NTIA: NTIA Short Form Notice Code of Conduct (July 25, 2013) http://www.ntia.doc.gov/files/ntia/publications/july_25_code_draft.pdf
- CFPB Project Catalyst: <http://www.consumerfinance.gov/projectcatalyst/>

© 2013, Cox Smith Matthews Incorporated

46

Additional References (cont'd)

- Marianne Crowe, Susan Pandy and Elisa Tavilla, Federal Reserve Bank of Boston, and Cynthia Jenkins, NACHA, *U.S. Mobile Payments Landscape – Two Years Later* (May 2, 2013), available at: <http://www.bos.frb.org/bankinfo/payment-strategies/publications/2013/mobile-payments-landscape-two-years-later.pdf>
- Erin F. Fonte, *Mobile Payments In the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering*, 8 WASH. J.L. TECH. & ARTS 419 (2013), <http://digital.law.washington.edu/dspace-law/handle/1773.1/1206>
- University of Washington Mobile Money Symposium 2013 (co-organized by Prof. Jane Wynn) available at <http://www.law.washington.edu/WJLTA/Issues/Default.aspx>.

47

© 2013, Cox Smith Matthews Incorporated

QUESTIONS?

Erin F. Fonté, CIPP

Shareholder

Payments and Digital Commerce

Privacy and Data Security


Cox Smith Matthews Incorporated

111 Congress Avenue, Suite 2800

Austin, Texas 78701

Direct: 512-703-6318

efonte@coxsmith.com
 @PaymentsLawyer

 Link me in: Erin Fonte

48

© 2013, Cox Smith Matthews Incorporated