Current Developments in Bank Deposits and Payment Systems

*By Ryan S. Stinneford and D. Patrick Yoest**

Introduction

This survey summarizes several recent developments affecting bank deposits and payment systems. The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued new guidance concerning the customer due diligence rule of the Federal Financial Institutions Examination Council. The Board of Governors of the Federal Reserve System ("FRB") published proposed amendments to Regulation J to conform with previous changes to Regulation CC. Also, the American Bar Association's House of Delegates approved a model statute drafted by the Uniform Law Commission regarding virtual-currency businesses. Further, the Bureau of Consumer Financial Protection ("CFPB"), the Federal Trade Commission ("FTC"), and the Office of the Comptroller of the Currency ("OCC") entered into consent orders and took other enforcement action relating to bank deposits and payment system practices.

FinCEN Customer Due Diligence Rule

FinCEN Guidance

As discussed in the 2017 *Annual Survey*,[1] FinCEN issued a final customer due diligence rule ("Customer Due Diligence Rule")[2] in May of 2016 that required covered financial institutions[3] to establish and maintain written due diligence procedures to identify and verify the beneficial owners[4] of any legal entity cus-

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1. *See* Ryan S. Stinneford, *Current Developments in Bank Deposits and Payment Systems*, 72 Bus. Law. 521, 523–24 (2017) [hereinafter *Bank Deposits 2017*].

2. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398 (May 11, 2016) (to be codified at 31 C.F.R. § 1010.230) [hereinafter Customer Due Diligence Rule].

3. "Covered financial institutions" are banks, brokers or dealers in securities, mutual funds, and futures commission merchants and introducing brokers in commodities. 31 C.F.R. § 1010.230(f) (2018).

4. A "beneficial owner" is an individual who directly or indirectly owns 25 percent or more of a legal entity customer or an individual with significant responsibility to control, manage, or direct a legal entity customer. *Id.* § 1010.230(d).

tomer.[5] The Customer Due Diligence Rule became effective on July 11, 2016, but covered financial institutions had until May 11, 2018, to comply.[6]

Shortly before the mandatory compliance date, FinCEN issued new guidance ("2018 Guidance") concerning the Customer Due Diligence Rule.[7] The 2018 Guidance responded to numerous inquiries and clarified many of the requirements in the Customer Due Diligence Rule, including the following:

- Covered financial institutions are permitted to adopt a beneficial ownership threshold lower than 25 percent, and may require additional beneficial ownership information for legal entity customer owners below the 25 percent threshold.[8]
- The calculation of a beneficial owner's interest in a legal entity customer may require aggregation of multiple indirect interests—for example, if an individual owns 40 percent of company A, which in turn owns 50 percent of the legal entity customer, and the same individual owns 33 percent of company B, which in turn owns the other 50 percent of the legal entity customer, then she would be a beneficial owner covered by the rule because she indirectly, through her ownership interests in companies A and B, owns 36 percent of the legal entity customer.[9]
- If an existing customer is identified as a beneficial owner of a legal entity customer, the covered financial institution may rely on the existing customer's information collected and verified pursuant to the institution's customer identification program ("CIP")[10] to verify the identity of the beneficial owner, provided that the CIP information is up-to-date and accurate, and the legal entity customer's representative certifies or confirms that the previously collected and verified CIP information remains accurate at the time that the legal entity customer opens a new account.[11]

5. A "legal entity customer" is any corporation, limited liability company, general partnership, or similar entity, with certain exceptions. *Id.* § 1010.230(e).

6. 81 Fed. Reg. at 29398.

7. *See Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions, FIN-2018-G001*, FinCEN (Apr. 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf [hereinafter 2018 Guidance]. The 2018 Guidance supplemented prior guidance issued by FinCEN shortly after publication of the Customer Due Diligence Rule. *See Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions*, *FIN-2016-G003*, FinCEN (July 19, 2016), https://www.fincen.gov/sites/default/files/2016-09/FAQs_for_CDD_Final_Rule_%287_15_16%29.pdf.

8. 2018 Guidance, *supra* note 7, at 2 (Question 2).

9. *Id.* at 3 (Question 3).

10. In 2002, FinCEN, the OCC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration jointly adopted a final rule to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 and to require covered financial institutions to collect and verify customer identification information pursuant to a CIP. *See, e.g.*, 31 C.F.R. § 1020.220 (2018).

11. 2018 Guidance, *supra* note 7, at 6 (Question 7).

- A covered financial institution that opens multiple accounts for the same legal entity customer can rely on a single certification of beneficial ownership as long as the certification is accurate and up-to date, and the legal entity customer's representative certifies or confirms the accuracy of the information on file.[12]

- For automatically renewing accounts like a certificate of deposit that rolls over at maturity and that was opened before the May 11, 2018, mandatory compliance date of the Customer Due Diligence Rule, a covered financial institution must obtain certified beneficial ownership information at the time of the first renewal following the mandatory compliance date. For each subsequent renewal, the financial institution would not be required to collect the beneficial ownership information again, provided that the legal entity customer certifies or confirms that the information previously collected is accurate and up-to-date, and the institution has no knowledge of facts that would reasonably call into question the reliability of the information. If at the time of such renewal and first certification the legal entity customer agrees to notify the covered financial institution of any change in beneficial ownership information, that agreement can be considered the legal entity customer's certification or confirmation of the information at the time of renewal.[13]

- Covered financial institutions are not required to obtain or update beneficial ownership information simply because they conduct a periodic review of an account. However, if a covered financial institution has reason to believe that the legal entity customer's beneficial ownership may have changed, the institution must collect and verify beneficial ownership information at that time.[14]

- If legal entity customers share a common beneficial owner, unless there is an affirmative reason to believe otherwise, covered financial institutions may presume that the legal entity customers are operating separately and independently from each other and from the common owner, and transactions on the accounts of legal entity customers should not be aggregated with transactions on the accounts of other legal entity customers with common beneficial ownership for purposes of currency transaction reporting.[15]

FinCEN Ruling

In May 2018, FinCEN issued a ruling to relieve covered financial institutions from the obligations of the Customer Due Diligence Rule with respect to accounts

12. *Id.* at 8 (Question 10).
13. *Id.* at 9–10 (Question 12).
14. *Id.* at 10–11 (Question 14).
15. *Id.* at 21 (Question 32).

established before the May 11, 2018 mandatory compliance date that automatically roll over or renew after that date, including certificate of deposit accounts.[16] This temporary exception was originally scheduled to expire on August 9, 2018,[17] but was extended by FinCEN for an additional thirty days on August 8, 2018,[18] and then extended indefinitely on September 7, 2018.[19]

Final Amendments to Regulation J

In November 2018, the FRB approved final amendments to Regulation J, which governs the collection of checks and other items by Federal Reserve Banks.[20] As noted in last year's *Annual Survey*,[21] the FRB amended Regulation CC in 2017 to update its provisions governing the collection or return of checks to include electronically-created items.[22] The amendments to Regulation CC were intended to create a system of warranties for electronic checks and electronic returned checks, in light of the widespread adoption of these electronically-created items over paper checks.[23] The FRB amendments to Regulation J are intended to clarify provisions of Regulation J that were made ambiguous by the amended Regulation CC. The Regulation J amendments take effect on January 1, 2019.

Significantly, the Regulation CC amendments created a new indemnity for an "electronically-created item," which is now defined in Regulation CC as "an electronic image that has all the attributes of an electronic check or electronic returned check but was created electronically and not derived from a paper check."[24] Under the amended Regulation CC, a bank that transfers or presents an electronically-created item and receives settlement or other consideration for it must indemnify exchanging banks against losses caused by the fact that the electronically-created item "is not derived from a paper check" or is not authorized by the person from the whom the account is drawn, or by the fact that a subsequent bank pays for an electronically-created item that already has been paid.[25]

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16. *Beneficial Ownership Requirements for Legal Entity Customers of Certain Financial Products and Services with Automatic Rollovers or Renewals, FIN-2018-R002*, FinCEN (May 16, 2018), https://www.fincen.gov/sites/default/files/2018-05/FinCEN%20Ruling%20CD%20and%20Loan%20Rollover%20Relief_FINAL%20508-revised.pdf.

17. *Id.*

18. *Extension of Limited Exception from Beneficial Ownership Requirements for Legal Entity Customers of Certain Financial Products and Services with Rollovers and Renewals, FIN-2018-003*, FinCEN (Aug. 8, 2018), https://www.fincen.gov/sites/default/files/administrative_ruling/2018-08-08/Extension_Temp_Exceptive_Relief.pdf.

19. *Exceptive Relief from Beneficial Ownership Requirements for Legal Entity Customers of Rollovers, Renewals, Modifications, and Extensions of Certain Accounts*, *FIN-2018-R003*, FinCEN (Sept. 7, 2018), https://www.fincen.gov/sites/default/files/administrative_ruling/2018-09-07/Permanent%20Exceptive%20Relief%20Extension%20of%20Compliance%20Date%20CDs_final%20508.pdf.

20. Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, 83 Fed. Reg. 61509 (Nov. 30, 2018) (to be codified at 12 C.F.R. pt. 210) [hereinafter Regulation J Final Amendments].

21. *See Bank Deposits 2017*, *supra* note 1, at 456.

22. *See id.*

23. *See id.*

24. 12 C.F.R. § 229.2(hhh) (2018).

25. *Id.* § 229.34(g).

In the proposed amendments to Regulation J, however, the FRB noted that "[c]urrently, neither Regulation CC nor Regulation J explicitly addresses the sending of [electronically-created items]" to Federal Reserve Banks.[26] Moreover, the FRB stated that "[b]ecause they never existed in tangible form and therefore do not qualify as writings, [electronically-created items] are not 'items' as currently defined in Regulation J." Indeed, an "item" is defined in Regulation J as "an instrument or a promise or order to pay money, whether negotiable or not[.]"[27] As the FRB states, "[t]he terms 'instrument,' 'promise,' and 'order' are defined under the [Uniform Commercial Code] as requiring a writing."[28]

As a result of ambiguity posed by the amended Regulation CC, the final amendments to Regulation J amend the definition of "item" in Regulation J to exclude electronically-created items.[29] The FRB instead suggests that private parties exchanging electronically-created items could do so "by agreement using direct exchange relationships or other methods not involving the [Federal] Reserve Banks."[30] As a result, according to the FRB, this will "shift[] liability to parties better positioned to know whether an item is electronically created, "which can decide whether to prevent electronically-created items from entering the check collection system or assume their risk."[31]

Uniform Regulation of Virtual-Currency Businesses Act

The American Bar Association's House of Delegates approved a model statute for the regulation of virtual currencies on February 5, 2018.[32] The model statute, known as the Uniform Regulation of Virtual-Currency Businesses Act [Virtual-Currency Businesses Act], was drafted by the Uniform Law Commission and approved by the commission in July 2017.[33] The Virtual-Currency Businesses Act provides a statutory framework for licensing and supervision of virtual currency businesses.[34] While legislation modeled after the Virtual-Currency Businesses Act has been introduced in Connecticut, Hawaii, and Nebraska, no bill has yet been enacted.[35]

26. Regulation J Proposed Amendments, *supra* note 20, at 11432.
27. 12 C.F.R. § 210.2(i)(1)(i) (2018).
28. Regulation J Proposed Amendments, *supra* note 20, at 11432.
29. Regulation J Final Amendments, *supra* note 20, at 61518 (to be codified at 12 C.F.R. 210. 2(i)(2)).
30. *Id.* at 61517.
31. *Id.* at 61511.
32. *See* Jason Tashea, *ABA House of Delegates Approves Novel Virtual Currency Draft Legislation*, Am. Bar Ass'n J. (Feb. 9, 2018), http://www.abajournal.com/news/article/aba_house_of_delegates_approves_novel_virtual_currency_draft_legislation/.
33. Uniform Regulation of Virtual-Currency Businesses Act (Nat'l Conference of Comm'rs on Unif. State Laws 2017), http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2017AM_URVCBA_AsApproved.pdf [hereinafter Virtual-Currency Businesses Act].
34. *Id.*
35. *See Enactment State Map*, Unif. L. Commission, http://www.uniformlaws.org/Act.aspx?title=Regulation%20of%20Virtual-Currency%20Businesses%20Act. (last visited Jan. 26, 2019).

Scope of Virtual-Currency Businesses Covered

As stated in the Prefatory Note to the Virtual Currency-Businesses Act, virtual currencies are a "subset" of cryptocurrencies.[36] A cryptocurrency acts as a public ledger, often called a blockchain, by which ownership can be recorded and value can be transferred.[37] The process by which cryptocurrency is generated allows transactions to occur without third-party validation from a bank or other financial institution.[38] Virtual currencies are cryptocurrencies that, as stated in the Prefatory Note, are "media of exchange," offering "a communications technology that facilitates peer-to-peer (P2P) transactions that is the equivalent of paying cash" and that is not dependent on a bank to carry out such transactions.[39] In a "decentralized" system of virtual currency (such as Bitcoin), a group of managers known as "miners" act to verify and document transactions.[40] By contrast, a centralized virtual currency permits a single operator to issue and transfer currency.[41]

The Virtual-Currency Businesses Act applies to "virtual-currency business activity," and the Prefatory Note to the Act summarizes such activities, defined in section 102(25) of the Act, as: "the exchange of virtual currencies for cash, bank deposits, or other virtual currencies; the transfer from one customer to another person of virtual currencies; or certain custodial or fiduciary services in which the property or assets under the custodian's control or under management include property or assets recognized as 'virtual currency.'"[42] Section 102(23) of the Act defines "virtual currency" to be "a digital representation of value that: (1) is used as a medium of exchange, unit of account, or store of value; and (2) is not legal tender, whether or not denominated in legal tender."[43] Although this term distinguishes "virtual currency" as a "digital representation of value," it does not limit what type of technology may underlie such currency.[44] Indeed, the Prefatory Note for the Virtual-Currency Businesses Act notes that it "is drafted to capture as many of the possible types of virtual currency, whether issued on a centralized or decentralized basis."[45]

Section 103(b) of the Virtual-Currency Businesses Act contains a number of exclusions to the Act's scope.[46] It excludes governments, banks, and persons using virtual currency for their own behalf for personal, family, or household purposes, or for academic purposes, as well as persons "whose virtual-currency business activity with or on behalf of residents is reasonably expected to be val-

36. Virtual-Currency Businesses Act, *supra* note 33, at 4.
37. *See* Omri Marian, *A Conceptual Framework for the Regulation of Cryptocurrencies*, 82 U. Chi. L. Rev. Dialogue 53, 55 (2015).
38. *See id.* at 55–56.
39. Virtual-Currency Businesses Act, *supra* note 33, at 4.
40. *Id.*
41. *Id.*
42. *Id.* at 1.
43. *Id.* at 17.
44. *Id.*
45. *Id.* at 7.
46. *Id.* at 25–28.

ued, in the aggregate, on an annual basis at $5,000 or less[.]"[47] Additionally, affinity or rewards programs operated by merchants, and equivalent types of value in online games, are explicitly excluded from the definition of "virtual currency" and are therefore unaffected by the Act.[48]

Licensure System for Virtual-Currency Businesses

The Uniform Law Commission refers to the Virtual-Currency Businesses Act's licensure regime as a "three-tier system."[49] First, as stated above, virtual currency businesses with business activity of less than $5,000 are excluded from the Act's scope and therefore are exempt from licensure requirements.[50] Second, under section 207 of the Act, virtual-currency businesses whose volume of virtual-currency business activity does not exceed $35,000 on an annual basis may register with a state to conduct such activity without first obtaining a license.[51] This "intermediate status" is intended to allow enacting states to follow the start-up companies' activities should such companies exceed the $5,000 threshold.[52] Third, under section 202 of the Act, those businesses with aggregate virtual-currency business activity exceeding $35,000 must apply for full licensure with the state, with requirements similar to those of state money transmitter licensure statutes, such as the submission of financial statements and information about executive officers.[53]

The Virtual-Currency Businesses Act offers two approaches in section 203 that permit reciprocal licensing among different states.[54] Under Alternative A, virtual-currency businesses may file an application with the Nationwide Multistate Licensing System and Registry ("NMLS") and obtain multiple licenses through this system.[55] Under Alternative B, a state may grant a license to a virtual-currency business if it determines that another state in which the business is licensed "has in force laws regulating virtual-currency business activity which are substantially similar to, or more protective of rights of users than" the state's Virtual-Currency Businesses Act.[56] Alternative B is intended for states that do not participate in the NMLS.[57]

Exclusion of "Multi-Sig" Arrangements

The Virtual-Currency Businesses Act's application relies in large part upon the meaning of "control of virtual currency," and more specifically, the term "con-

47. *Id.* at 25–27.
48. *Id.* at 17.
49. *Id.* at 2.
50. *Id.* at 27.
51. *Id.* at 49.
52. *Id.* at 51.
53. *Id.* at 33–38.
54. *Id.* at 39–41.
55. *Id.* at 39.
56. *Id.* at 39–41.
57. *Id.* at 41.

trol."[58] Pursuant to section 102(3) of the Act, the term "control" may be defined in one of two ways.[59] First, when referring to a "transaction or relationship" involving virtual currency, "control" is defined as "power to execute unilaterally or prevent indefinitely a virtual-currency transaction."[60] Second, when referring to a person, "control" is defined as "the direct or indirect power to direct the management, operations, or policies of the person through legal or beneficial ownership of voting power in the person or under a contract, arrangement, or understanding."[61]

The Virtual-Currency Businesses Act's commentary states explicitly that the definition of "control" is intended to exclude multi-signature, or "multi-sig," arrangements.[62] In such arrangements, more than one third party may have a credential or key needed to effect transactions, and such credentials or keys may be have to be used in tandem.[63] The Act's commentary further states that it is intended to apply to activities comparable to "money transmission, issuance of virtual currencies from a centralized administration or source, exchange of virtual currency for other virtual currencies, bank credit or legal tender," as well as "custodianships similar in nature to a securities entitlement subject to Article 8 of the Uniform Commercial Code."[64] The Act, by virtue of its definition of "control," does not apply to "relationships in which the provider offers a service or product that is limited and the provider cannot transact or prevent transactions unilaterally."[65] Because multi-sig arrangements may require the use of more than one key to transfer virtual currency and such keys may be dispersed among various parties, currencies relying upon such arrangements are excluded from the Act's scope.[66]

Consumer Protection Provisions

The Virtual-Currency Businesses Act contains a number of consumer protection provisions, largely focused on the disclosure of information related to virtual currency products and services. Section 501 of the Act requires, for any state resident "who uses the licensee's or registrant's products or service," the following disclosures: a schedule of fees and charges, including the manner and timing in which such fees and/or charges are assessed; a statement of whether the product or service is covered by insurance; the irrevocability of a transfer or an exchange and any exceptions to such irrevocability; a description of liability for unauthorized transactions and an error-resolution notice; the rights to stop payment, to receive a receipt for a transfer or exchange, and to receive at least thirty days'

58. *See id.* at 17 (defining "transfer" as meaning "to assume *control of virtual currency* from or on behalf of a resident").
59. *Id.* at 14.
60. *Id.*
61. *Id.*
62. *Id.* at 21.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

notice of changes to the product/service's fee schedule or contractual terms; and that virtual currency is not legal tender.[67]

Additionally, section 502 of the Virtual-Currency Businesses Act states that a licensee or registrant maintaining control of virtual currency on behalf of others persons must maintain adequate virtual currency to satisfy the "aggregate entitlements" of such persons, and further states that a licensee or registrant may not allow virtual currency held on the behalf of another to become "subject to the claims of creditors of the licensee or registrant."[68]

Consent Orders and Enforcement Actions

TCF National Bank

As discussed in the 2018 *Annual Survey*,[69] the CFPB filed suit against TCF National Bank in a Minnesota federal court in January 2017 for allegedly deceiving consumers into consenting to overdraft fees for one-time debit card purchases and ATM withdrawals.[70] In July 2018, the parties filed a proposed stipulated final judgment and order in settlement of the suit.[71] The Stipulated Final Judgment and Order included $25 million in restitution from TCF National Bank to customers who opted in to TCF's overdraft service from 2010 through 2013 and who were charged overdraft fees,[72] and a civil money penalty of $5 million.[73] On August 1, 2018, the court dismissed the CFPB's complaint with prejudice pursuant to an order that incorporated the terms of the Stipulated Final Judgment and Order[74] and entered a judgment on August 3, 2018.[75]

PayPal, Inc.

In February 2018, the Federal Trade Commission ("FTC") entered into a proposed agreement with PayPal, Inc. to settle charges concerning PayPal's Venmo

67. *Id.* at 70–72.

68. *Id.* at 73–74.

69. *See* Duncan B. Douglass, Ryan S. Stinneford & D. Patrick Yoest, *Current Developments in Bank Deposits and Payment Systems*, 73 Bus. Law. 453, 460–61 (2018).

70. *See* Complaint, CFPB v. TCF Nat'l Bank, No. 0:17-cv-00166 (D. Minn. Jan. 19, 2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_TCF-National-Bank-complaint.pdf.

71. *See* Proposed Stipulated Final Judgment and Order, CFPB v. TCF Nat'l Bank, No. 0:17-cv-00166 (D. Minn. July 20, 2018), https://files.consumerfinance.gov/f/documents/bcfp_tcf-national-bank_proposed-stipulated-final-judgment-order_2018-07.pdf [hereinafter Stipulated Final Judgment and Order].

72. *Id.* at 6–8.

73. *Id.* at 8–9. The civil money penalty would be adjusted to account for a $3 million penalty imposed by the OCC for the same conduct in a separate order. *Id.* at 8. *See* Consent Order No. 2018-063, *In re* TCF Nat'l. Bank, OCC File No. AA-EC-2018-38, https://www.occ.gov/static/enforcement-actions/ea2018-063.pdf; Consent Order for a Civil Money Penalty No. 2018-64, *In re* TCF Nat'l. Bank, OCC File No. AA-EL-2018-39, https://www.occ.gov/static/enforcement-actions/ea2018-064.pdf.

74. CFPB v. TCF Nat'l Bank, No. 0:17-cv-00166 (D. Minn. Aug. 1, 2018) (order).

75. CFPB v. TCF Nat'l Bank, No. 0:17-cv-00166 (D. Minn. Aug. 3, 2018) (judgment in a civil case).

peer-to-peer payment service.[76] Among other allegations, the FTC claimed that PayPal misled consumers as to when funds transferred using Venmo would be available and failed to disclose the possibility that funds might be delayed or that transactions might be reversed.[77] The settlement agreement and order, approved in May 2018, requires PayPal to provide clear and conspicuous disclosures concerning the possible delay and/or reversal of payments.[78] The final order imposes no civil penalties or monetary relief.[79]

LendingClub

In April 2018, the FTC filed a complaint in the Northern District of California against LendingClub Corporation.[80] Among other charges, Count III of the FTC's complaint alleged that in "numerous instances," LendingClub initiated automated clearing house ("ACH") withdrawals of money from consumer bank accounts for loan payments without authorization, or in amounts in excess of the amounts authorized by consumers.[81] According to the complaint, these unauthorized withdrawals were the result of double withdrawals, i.e., improperly withdrawing monthly payments twice in the same month, withdrawals after payment in full of the loan, and withdrawals after consumers requested that LendingClub stop ACH withdrawals.[82] The FTC's complaint claimed that these unauthorized withdrawals constituted unfair acts or practices in violation of section 5 of the Federal Trade Commission Act.[83] The complaint sought injunctive relief to redress injury to consumers, including rescission or reformation of contracts, restitution, refund of moneys paid, and disgorgement.[84]

LendingClub posted a response to the FTC's allegation on its blog.[85] In this posting, LendingClub disputed the FTC's claim regarding the erroneous withdrawal of funds from consumer accounts on "numerous instances," noting that of 1.8 million loans and tens of millions of payment transactions during the relevant time period, fewer than 300 complaints were received concerning the alleged

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76. *See* Agreement Containing Consent Order, *In re* PayPal, Inc., FTC File No. 162-3102, Docket No. C-4651, https://www.ftc.gov/system/files/documents/cases/venmo_agreement_with_decision.pdf.

77. *See* Complaint at 2–4, *In re* PayPal, Inc., FTC File No. 162-3102, Docket No. C-4651 (May 23, 2018), https://www.ftc.gov/system/files/documents/cases/1623102_c-4651_paypal_venmo_complaint_final.pdf.

78. *See In re* PayPal, Inc., FTC File No. 162-3102, Docket No. C-4651, slip op. at 4 (May 23, 2018), https://www.ftc.gov/system/files/documents/cases/1623102-c4651_paypal_venmo_decision_and_order_final_5-24-18.pdf.

79. *Id.*

80. *See* Complaint, FTC v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018), https://www.ftc.gov/system/files/documents/cases/lending_club_complaint.pdf.

81. *Id.* at 21.

82. *Id.*

83. *Id.* at 25–26.

84. *Id.* at 27.

85. *LendingClub Responds to Federal Trade Commission Complaint*, LendingClub Blog, https://blog.lendingclub.com/lendingclub-responds-to-federal-trade-commission-complaint/ (last visited Oct. 11, 2018).

unauthorized withdrawals.[86] LendingClub also stated that its payment processing system automatically prevents withdrawals exceeding the loan balance and that double payments result from customers making redundant payments.[87] The post also stated that LendingClub granted refunds virtually every time it made an error, and reimbursed additional costs incurred by consumers as a result of such errors, such as overdraft fees.[88]

In June 2018, LendingClub moved to dismiss the FTC's complaint.[89] LendingClub's arguments with respect to dismissal of Count III asserted that the FTC failed to plead the required elements of an unfairness claim, including proximate causation, substantial injury, and the lack of consumer benefit outweighing consumer injury.[90] Following a hearing on September 13, 2018, Magistrate Judge Jaqueline Scott Corley issued an order in October 2018, granting in part and denying in part LendingClub's motion to dismiss.[91] The order found that the complaint failed to allege substantial injury for the FTC's unfairness claim based on unauthorized charges, and granted LendingClub's motion to dismiss Count III of the complaint without prejudice.[92] On October 22, 2018, the FTC filed an amended complaint which included additional allegations of substantial injury in Count III.[93]

86. *Id.*
87. *Id.*
88. *Id.*
89. *See* Motion to Dismiss, FTC v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. June 18, 2018).
90. *Id.* at 20–24.
91. *See* Defendant's Motion to Dismiss and Request for Judicial Notice, FTC v. LendingClub Corp., No 3:18-cv-02454 (N.D. Cal. Oct. 3, 2018) (order).
92. *Id.* at 21–25.
93. *See* First Amended Complaint at 22–24, FTC v. LendingClub Corp., No. 3:18-cv-02454 (N.D. Cal. Oct. 22, 2018).