



Playing Legal Catch-Up with the Changing Payments Landscape



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Ana is Assistant General Counsel & Counsel the Federal Reserve Bank of Atlanta. Ana supports the U.S. retail payment services, and FedGlobal, a Cross-Border Payments service. She has principal responsibility for the Federal Reserve's check and ACH Operating Circulars, and FedGlobal's Gateway Operator Agreements and partnerships.



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Overview

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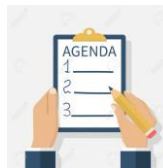
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Today's agenda

- General history of payments and overview of the primary laws that govern payments
- The pace of existing payment options relative to the pace of existing and future technology, and other policy considerations
- How might the coalescence of these changes impact your business?
- Risk vs. Reward
- Where are the legal gaps in the payments landscape? And how do we weather the storm?



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A History of Payments

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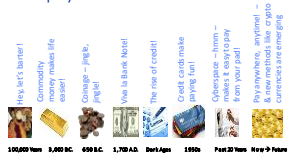
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### The evolution of payments



And it continues...

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### History of the Federal Reserve's role in the U.S. payment system

- 1907**  
Many banks and clearinghouses refuse to clear checks drawn on certain other banks, leading to the failure of otherwise solvent banks.
- 1913**  
Congress creates the Federal Reserve System, giving it the authority to establish a nationwide check-clearing system to eliminate system inefficiencies and inequities.
- 1918**  
The Reserve Banks establish Fedwire, the world's first wire transfer system.
- 1974**  
The Reserve Banks begin operating their automated clearinghouse service.
- 1980**  
The Monetary Control Act reaffirms the Federal Reserve's role in providing payment services.
- 2003**  
The Check Clearing for the 21st Century Act.
- 2010**  
The Dodd-Frank Wall Street Reform and Consumer Protection Act.

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### Checks and e-checks, a history

Ca. 1700 - a "check" was a paper instrument containing an unconditional order to pay a fixed amount of money on demand
1700-1900's - evolution of the law of negotiable instruments
1960s - MICR, a automated check processing
1970s - Rise of the ACH; EFTA and Regulation E
1980s - MICR presentment; 1987 - Regulation CC; 1990 - UCC
2000 - check-to-ACH "conversion" and image exchanges
2004 - substitute checks
2005 - remotely created checks; Regulation CC amendments
2007 - BOC; Check ACH Coalition ideas
2018 - Regulation CC and I
2019 - Operating Circular 3 and 4, conforming updates to reflect amendments to Regulation CC, I

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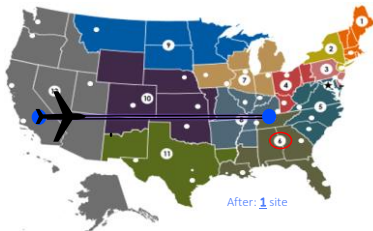
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### Life before Check 21 innovation and after

Before: 45 processing sites; multiple planes, trucks



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### Poll Question

- 1) During the pandemic, what happened to check volume?
- A: increased
  - B: decreased
  - C: remained static

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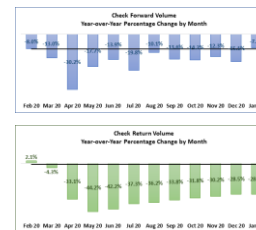
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Payment Types

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Horizontal lines for notes



Mature payment types

- ↑ Card
- ↑ ACH
- ↓ Checks
- ↓ Cash
- Wire

So, what's NEW?



"Many alternative payment methods and services, such as smartphone and internet-based services, ultimately involve payments processed through the general-purpose card networks or the ACH system."

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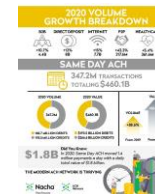
Horizontal lines for notes



Faster payments initiatives are accelerating in the U.S.

... and usage seems to be exceeding projections.

- Zelle experienced year-over-year growth of 62% in value and 58% in transaction volumes in 2020 (Early Warning)
- Federal Reserve's FedNow™ Service, planned to launch 2023



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Horizontal lines for notes



### Faster payment initiatives are happening globally



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## Payments Laws

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### Primary payments laws



- State
- Uniform Commercial Code
  - Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections (checks)
    - **not** money or securities
  - Article 4A, Funds Transfers: (wires, commercial electronic credit transactions)
    - **not** transactions covered by Reg E, consumer remittance transfers, or debit transactions

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### Primary payments laws



- Federal
  - Electronic Fund Transfer Act (EFTA), implemented by Reg. E
  - Reg. J – legal framework for banks to collect checks/items and settle balances through Federal Reserve System
  - Expedited Funds Availability Act and Check Clearing for the 21st Century Act (Check 21 Act), implemented by Regulation CC.
  - Operating Circulars of the Federal Reserve Banks – each FRB issues an identical circular; supplement Reg J and provide more specific terms and conditions.

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### Established payment types = established legal framework

Payment Laws/Regs by Payment Type*				
Checks	Wires	ACH	Other P2P	Other B2B
UCC 3, 4	UCC 4A	UCC 4A		UCC 4A
Reg J, CC	Reg J, E	Reg E	Reg E	
OC 3	OC 6	OC 4		

\*This is not a comprehensive listing; other laws and regulations apply depending on payment type.



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### Electronically created item (samples)



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### What am I?

- Check?
- E-Check?
- ECI?
- RCC?



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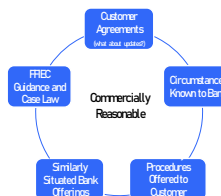
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### Security procedures for funds transfers: what is commercially reasonable?

- UCC was implemented in 1992
- Under Article 4A of the UCC, an Unauthorized Funds Transfer is enforceable against a Customer if:
  - The Transfer was verified pursuant to an agreed upon security procedure
  - The Security Procedure was Commercially Reasonable
  - The Financial Institution accepted the Transfer in (a) good faith and (b) in compliance with the Security Procedure
- What was reasonable in 1992 may not be in 2021!



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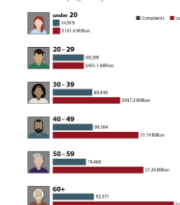
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### Internet Payment Fraud Continues to Increase...



2021 Victims by Age Group\*\*



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### Primary payments laws

- Money Laundering
  - Bank Secrecy Act, administered by FinCEN
  - Patriot Act
- Money Transmission
  - State licensing and examination regime (outdated, lack flexibility, duplicative; conflicting interpretations and definitions)
    - Applicability to virtual currency may be unclear
    - Alternatives: multistate agreement, OCC fintech charter, bank sponsorship
  - Federal: money-services businesses must register with FinCEN
    - Includes virtual currency



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### Anti-Money Laundering Act of 2020



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### Poll Question

What is the largest denomination of currency that was ever printed?

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Source: PMG Certificate Services.com. \$100,000 US Gold Certificate Specimen, PMG Grading and Authentication

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# Privacy and Data Security



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## Privacy and data security

- Gramm-Leach-Bliley Act: requires financial institutions to explain information-sharing practices to customers and safeguard sensitive data
  - Safeguards Rule: protect consumer information
  - Privacy of Consumer Financial Information Rule: explain information sharing and offer opt-out
- HIPAA: requires protection and confidential handling of protected health information by healthcare entities and their service providers
- FFIEC Guidance: Risk management framework for FIs offering Internet-based services
  - Authentication methodologies; complex authentication preferred
  - Customer verification techniques: positive, logical, and negative
  - Layered security program: 1) detect and respond to suspicious activity, 2) control of administrative functions



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### Privacy and data security

- New regulatory trend: new rights (know what info is collected and where used, access information, right to be forgotten, rights to equal service regardless of opt-out), active informed permission
- GDPR: privacy is primary, security is secondary
- CCPA
- Developments
  - State: multiple states have enacted or considering new privacy legislation
  - Fed: Comprehensive Federal privacy bill proposed (TPDCA)




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### Data Privacy/Security: Recent and Proposed Changes

#### Revisions to Nacha Rules:

- Supplementing Fraud Detection Standards for WEB Debits (March 19, 2021)
- Supplementing Data Security Requirements (June 30, 2021)



#### Advanced Notice of Proposed Rule Making (NPRMs):

- Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers
- Limiting Fintech/Data Aggregator Access to Consumer Data

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### Other Emerging Issues and Recent Developments

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### CFPB Updates

- **Recent Supervisory Highlights**
  - o Reg. E compliance remains in-focus
  - o Economic Impact Payments / Unemployment Insurance Benefits – failure to implement protections for consumer access to full amount of payments/benefits
- **Rescission of Policy Statement Regarding Abusive Acts and Practices**




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### Who should regulate Fintechs? And how much?



- CFPB v. OCC
  - CFPB 2021 Task Force Report recommends Congress authorize CFPB to issue charters/licenses to FinTechs, **or** “clarify” authority of OCC
  - OCC responds that it should have **sole** chartering authority
- OCC Charter issues
  - Status of fintech/payment charters; access to Fed accounts/services
  - Is deposit taking or deposit insurance a requirement?
  - Cryptocurrency, safety/soundness & oversight concerns
- Industrial Loan Companies (ILCs) – conflict of interest/privacy concerns?

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### Financial Inclusion and the Underbanked

- Pandemic and rise of digital banking have highlighted issues
  - Mobile devices required
  - Shadow banking
  - Stimulus payment delivery
- Solutions?
  - Alternative disbursement mechanisms, but shift away from cash
  - Basic or limited use accounts
    - Banks, fintechs or USPS?
  - Digital central currency




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### Emerging issues and recent developments

- Hemp/Marijuana – SAFE Banking Act
- Earned Wage Access companies
- Reg CC changes: to encourage transition to fully-electronic check payment system
- Consumer/Small Business Issues
- Payment Rail Jumping
- Checks, Electronic Checks and ECIs
- Central Bank Digital Currency



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