Consumer Financial Services Newsletter

Leadership Message

Dear CFSC Members:
The Consumer Financial Services Committee ("CFSC") has a multitude of resources and programs that are available to all of its members, including in-house counsel. As an in-house attorney, the top 5 reasons that I think the CFSC is extremely beneficial to in-house counsel are as follows.

#5 - Leadership Opportunities

The CFSC provides numerous leadership opportunities to serve as a Chair or Vice-Chair of one of the 32 substantive or administrative CFSC subcommittees, special committees, or task forces, depending on where your personal interests lie. As a CFSC leader, you can organize CLE programs, comment on legislative and regulatory matters, develop pro bono projects, or write a scholarly legal article for the annual consumer financial services survey of current issues for The Business Lawyer. These CFSC leadership positions can also lead to leadership positions within the ABA Business Law Section, which several of our CFSC colleagues have held, including Lynne Barr, Roland Brandel, Terry Franzen, Don Lampe, Jeff Langer, Jackie Parker, and me.

#4 - Network with the Best and Brightest Minds in the Business

Where do you get the opportunity to network with and pick the brains of the leading consumer financial services lawyers in the country other than at the three CFSC meetings each year? There is also the opportunity to discuss the unique challenges and practice issues facing in-house counsel and exchange ideas with other in-house counsel at the In-house Counsel Roundtable meetings and calls (see the related article, Spotlight on the In-House Counsel Roundtable.)

#3 - Excellent and Timely CLE

The CFSC’s meeting programs and CLE are developed by experts throughout the country and are an incredible opportunity for learning. You will hear discussion of the most important consumer financial services topics of the day from industry attorneys, regulators, consumer advocates, and academics for a 360-degree perspective. In-house CFSC members who cannot attend a meeting in person have free access to all written program materials from the CFSC meetings though the CFSC website found at http://apps.americanbar.org/dch/committee.cfm?com=CL230000.

#2 - Meet New People and Make New Friends

Meeting Promos/Postcards

Springtime in DC

The CFSC Spring Meeting is just weeks away!
The CFSC meeting, which is part of the larger Business Law Section Spring Meeting in Washington, DC, will kick-off with the "Beer and Basics" program on Wednesday, April 3, from 4-6 pm, followed by our welcome reception at 6:30. From there, we will continue with a full schedule of excellent programs on timely topics, beginning at 8:00 am April 4 and ending at noon on April 6.

Don’t miss out on the Committee Dinner Thursday evening, April 4, at Sequoia, situated in Washington Harbour, with a gorgeous view of the Potomac River, starting with a cocktail reception at 7.00 pm, with dinner to follow at 8:00 pm. Dinner tickets are available through the Spring Meeting registration page.

The cherry blossoms should still be in bloom. What better time is there to spend time in DC? We hope to see you there!

Golf Tournament Recap
By Yasamine Christopherson, Nelson Mullins Riley & Scarborough LLP

About two dozen members of the Consumer Financial Services Committee took a break from CLEs to hit the links at the LaPlaya Golf Club in Naples, Florida. Golfers competed in teams for best overall score and individually for longest-drive and closest-to-the-pin prizes. Fortunately, the scoring format was kind to the occasional golfer. Teams were allowed to take their best drive and play the hole out from there.

Congratulations go to Catherine Lane, who won the prizes for both the longest drive and closest to the pin for the ladies. The men’s prizes went to Jeff MacHarg for longest drive and Brian Munro for closest to the pin for the men—congratulations to Jeff and Brian, as well. Of course, it wouldn’t be a lawyer’s golf tournament without something to argue over. The team of Manny Alvarez, Ronald Rubin, and Ernest Williams were the official winners. However, the Alvarez/Rubin/Williams team was fortunate that they were not disqualified from the tournament. It’s all about. Many thanks to Hudson Cook for sponsoring the golf tournament.
In addition to developing career opportunities, I have made many, many good friends through the CFSC. The CFSC meetings are a collegial environment to meet new acquaintances, catch up with old friends and colleagues, and expand your network.

## #1 - Break out of the Silo of Your Law Department and Your Company

The CFSC provides exposure to the entire spectrum of consumer financial services and can provide advance warning of legal issues and litigation risks that may also be applicable to your company's business activities. Networking with other attorneys can provide insights relevant to your career development. Even if your company does not pay for you to attend CFSC meetings, they are a valuable investment in yourself and your professional development.

Julie R. Caggiano  
Vice-Chair  
Consumer Financial Services Committee  
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### CFSC Constituents

#### Spotlight on the In-House Counsel Roundtable  
**By Grace Powers, Bank of America**

This article will spotlight the newly revitalized In-House Counsel Roundtable. The In-House Counsel Roundtable has been in existence within the ABA Business Law Section’s Consumer Financial Services Committee ("CFSC") for a number of years. However, under the capable leadership of Subcommittee Chair, Karen A. Morausi and Vice-Chairs, Julie R. Caggiano and Danielle Reyes, there's been a renewed focus on the interests and needs of in-house counsel constituents within the CFSC.

The In-House Counsel Roundtable ("Roundtable") is open to all lawyers practicing as in-house counsel in the area of consumer financial services law. This special subcommittee within the CFSC focuses on providing a forum for in-house counsel to discuss issues facing them within this practice area. This forum for in-house counsel is especially important given today's increased supervisory oversight and regulation for companies in the consumer finance arena.

The benefits of in-house counsel participating in the Roundtable include participation in a Roundtable members-only listserv and the opportunity to call in or attend closed membership meetings for in-house counsel members in order to have frank, open discussions on topics of interest to in-house counsel. Additionally, the Roundtable surveys its members to suggest future programming ideas of specific interest to in-house counsel, such as the recent programs during the Winter CFSC Naples meetings in January 2013 on preparing for Consumer Financial Protection Bureau (CFPB) exams and learning the nuts and bolts of ACH transactions. The Winter CFSC meeting also included a special break out session titled, "Compliance in Practice: In-House Counsel's Chance to Ask What the CFPB Really Wants" moderated by Roundtable member, Trish Obara, which gave in-house counsel the opportunity to ask questions of representatives of the CFPB. Finally, in-house counselors have the opportunity to offer presentations to the Roundtable members-only listserv and the CFSC at its annual winter meeting.

### Subcommittee Spotlight

#### Federal and State Trade Practices Subcommittee  
**By Steven Furry, Ice Miller LLP**

The Federal and State Trade Practices Subcommittee is led by Chair Eric Moglinicki (Partner, Wilmer Cutler Pickerling Hale and Door, LLP) and Vice-Chair Katherine Armstrong (FTC Division of Privacy and Identity Protection). Under their leadership, the Subcommittee focuses on the regulatory and enforcement activities of the Federal Trade Commission, prudential regulators and, increasingly, the Consumer Financial Protection Bureau ("CFPB"). Regulation and enforcement activities cover a broad spectrum of consumer protection laws, including credit reporting, credit information and disclosure, privacy, fair lending, debt collection practices, and UDAP (unfair, deceptive, or abusive acts or practices).

UDAAP/UDAAP was a particular focus of the CFPB and regulators in 2012, with three consent orders issued against credit card companies American Express, Discover, and Capital One. The Subcommittee presented on those topics at the Winter 2013 Committee meeting, including presentation by a senior counsel at the CFPB. In 2013, the Subcommittee will continue to monitor law enforcement and other regulatory actions that impact the consumer financial services industry. The Subcommittee will again be presenting at the ABA Business Law Section’s Spring 2013 Meeting in Washington, D.C. and looks forward to meeting new faces.

#### Truth in Lending Subcommittee  
**By Marci VanAdestine, Whyte Hirschboeck Dudek S.C.**

The Truth in Lending Subcommittee of the Consumer Financial Services Committee (CFSC), which is co-chaired by Cathy Brennan of Hudson Cook and Jeffrey Naimon of Buckley Sandler and vice-chaired by Stephanie Cohen of PNC Mortgage, focuses primarily on the all major developments in the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z. These developments include court decisions impacting the interpretation of the law, as well as proposed and published rules promulgated by its regulator, the Consumer Financial Protection Bureau (CFPB). TILA is an important part of the consumer financial services world - although its purpose, when codified in the 1960s, was to merely ensure disclosure of important information to consumers, it has developed into one of the most intricate and detailed consumer protections laws. Therefore, the subcommittee works to spotlight important and timely issues for CFSC members arising from the law.

Over the next year, it is the subcommittee’s plan to stay abreast of new developments in the law and ensure that CFSC members are...
representatives of the CFPB. Finally, in-house counsel members have a valuable opportunity to network with other in-house counsel members to exchange ideas and share opportunities within their respective companies during events such as In-House Counsel happy hours.

If you are an in-house counsel interested in learning more about the Roundtable, please check out the Roundtable subcommittee page at http://apps.americanbar.org/dch/committee.cfm?com=CL230103. You can also contact the Roundtable leadership, Chair Karen A Morauski, and Vice Chairs Julie R Caggiano, and Danielle Reyes.

Ralph J. Rohner: A "Balanced Observer" and Participant in the Development of Consumer Finance Law
By Rachel F. Marin, Maurice & Needleman, P.C.

Ralph J. Rohner is known for his contributions to the development and analysis of consumer financial services law. He served as staff counsel to the U.S. Senate Banking Committee and Federal Reserve Board, where he worked on consumer finance legislation, including amendments to the Truth in Lending Act. He was also dean and law professor at the Columbus School of Law at Catholic University and authored case books on consumer financial services law. In addition to working with the federal government and in academia, Rohner also worked on behalf of financial institutions and describes himself as "a perfectly balanced observer of the process."

Born in New Jersey, but raised in Baltimore, Maryland, Rohner remembers growing up in Baltimore as "terrific," and he remains a fan of the local football and baseball teams. He still lives in the area with his wife. Rohner was a natural born leader and has been drawn to leadership roles because "that is where the action is." If a particular organization sounded interesting or exciting, he would find a way to participate. For Rohner, the "reward" of participating in activities was to obtain more leadership opportunities. For example, he thought that if he served as the assistant treasurer of an organization, then he would have the chance to attend the organization's executive officer's meetings. Rohner sought out many leadership roles starting at a young age, through activities such as the school newspaper and yearbook, his college fraternity, serving as editor and chief of the Law Review, and as a moot court champion.

The CFPB is aware of them. The subcommittee expects there to be many new developments. For example, the Dodd-Frank Act (DFA) mandated that the CFPB issue certain TILA rules, such as the provision of periodic statements and requirements for prompt payment crediting for mortgage loans (which were just issued and become effective next year). The CFPB also recently published "Ability to Repay" rules as required by the DFA, and is now, however, considering making certain exceptions to these rules. These are merely examples of the changes taking place. Be sure to stay tuned!
prepare for exams and enforcement actions by CFPB. Further, the panelists addressed lessons learned, who was involved, etc.

Under Dodd Frank, the CFPB has the authority to conduct examinations of banks with assets over $10B, etc. The CFPB's approach to these examinations is quite aligned with that of the other federal banking regulators. The following are some consistent CFPB examination themes from the perspective of US financial services' in-house compliance risk management professionals (*banks*). Read More...

**Getting Mobile: Offering Financial Services through the Mobile Channel**

*By Mercedes Kelley Tunstall, Ballard Spahr LLP*

Innovation in financial products and services has been focused on the mobile channel for the last couple of years and shows no signs of slowing down. This article talks about the state of the mobile market for financial products and services (warning: the shelf life of that portion of this article will be less than twelve months) and then walks through the top legal considerations associated with the mobile channel. Read More...
Ralph J. Rohner: A “Balanced Observer” and Participant in the Development of Consumer Finance Law
By Rachel Marin

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In 1964 Rohner became a law school professor at Catholic University’s Columbus School of Law, soon after graduating from the law school. The Dean of the law school assigned Rohner to teach commercial law classes, at a time when the Uniform Commercial Code (“UCC”) was “still young.” He remembers himself as a “young teacher, struggling to keep [his] head above water, when out of the blue Congress enacted an exciting sounding law called [the] Truth in Lending [Act].” Although he had no background in consumer finance, Rohner knew he had to incorporate this new law into his teaching, and he invested time to learn about the Act. He quickly realized that he needed to immerse himself in the portfolio of related statutes; he found the issues, marketing practices, and “reactive” legal responses by the federal and state governments to be fascinating. While he always stayed connected to the law school, he soon became intertwined in the development and understanding of consumer finance law through work with the government and with industry associations.

In 1967, he wrote a letter to the Federal Trade Commission regarding an unsolicited credit card that a company sent to his brother-in-law. He heard nothing back until he received a phone call in 1969 from Senator William Proxmire’s staff asking Rohner to testify on a proposed bill that prohibited the distribution of unsolicited credit cards. The Senator wanted Rohner to testify on behalf of consumers. For a moment, Rohner wondered to himself, “What do I really know about law or policy on the issue?” But he pushed forward and put together a statement for the record, and prepared a three
minute speech. Rohner had found it “fun” to testify and given that the members of the Senate committee who he appeared before were gracious and friendly, he was hooked. And he was amazed that evening to discover he was the lead item on the evening news! Rohner modestly postured that there was “so little going on there was nothing else to put in the lead slot.” Although Rohner down-plays his role, Senator Proxmire’s Bill was enacted with Rohner’s help, and it remains good law today. Rohner notes that Proxmire went on from his position as chair of a small subcommittee on consumer credit to become chairman of the powerful Senate Banking Committee. A young Delaware Senator, Joe Biden, took his place as chair of the subcommittee on consumer credit.

In 1975 and 1976, Rohner took advantage of his year-and-a-half sabbatical leave from the university and went on to Capitol Hill in Washington, D.C. where he served as staff counsel to the Consumer Affairs Subcommittee of the U.S. Senate Banking Committee. He worked on the Consumer Leasing Act, Electronic Fund Transfer Act, amendments to the Equal Credit Opportunity Act, and the Fair Credit Billing Act, which was an amendment to the Truth in Lending Act. Rohner was surprised how much there was to learn about the legislative process. Just recently, Rohner’s wife curiously asked him if he ever was invited to the White House during the course of his work in Washington. He neglected to tell her that he had been with President Ford in the Rose Garden for the signing of an amendment of the Equal Credit Opportunity Act. Unfortunately, the photographer ran out of film that day so Rohner has no picture with the President.

After Rohner spent time on Capitol Hill, in the late 1970s he became a consultant to the Federal Reserve Board, and he worked on the original version of the commentary on the Truth in Lending Act. At that time, Congress ended the pattern of individual staff members of the Federal Reserve Board writing letters to provide clarification on certain issues. Replacing that practice, Congress created a commentary to accompany the regulation, similar to the comments in the UCC. Rohner wrote the first draft of the commentary on his electric typewriter. The commentary was “massaged, polished and cleaned up” and became enacted in 1980 as the Truth in Lending Simplification and Reform Act.

In addition to his work for the federal government, for many years Rohner was counsel to the Consumer Bankers Association (“CBA”), an association for large banks. With his accumulated expertise in consumer financial services law, he was the CBA’s “extra hired gun.” Rohner drafted position papers and prepared the CBA members to present testimony on the Hill and in front of various federal agencies.

Throughout the majority of his career, Rohner continued to work as a law school professor. He spent 48 years as a teaching faculty member and he continues to do development work for the law school. When asked how he would describe his teaching experience, Rohner replied, “Oh boy. How many hours do you have?” He taught for so many years because he considers teaching to be the “greatest job on the face of the Earth, especially teaching young adults in law school.” Rohner attributes his love for teaching to the interesting, even “fascinating,” material and to the faculty members, colleagues, and students who were “just wonderful, bright ambitious, imaginative
people.” And, he adds, “Once in a while you can see an impact that you have made on a young person’s life or career choice.”

Rohner’s contributions went beyond law practice and teaching. In 1987 he became Dean of Columbus Law School at Catholic University. He and his team successfully raised millions of dollars to finance the construction of a new law school building, which was completed in 1994. Rohner enjoys the process of fundraising, especially building relationships with successful alumni and university friends. Rohner is no less an expert at cajoling, gently twisting arms, hosting dinners, and working hard to close the deal.

Rohner has spent many years participating in professional organizations, including the American Bar Association’s Consumer Financial Services Committee (“CFSC”), the Conference on Consumer Finance Law, and the CBA Lawyers Committee. Similar to the rewards he sought in high school, Rohner said that one of the “greatest” aspects of working in consumer financial services law is the chance to go to the meetings and get to know many of the “terrific” lawyers. Rohner noted that the CFSC is comprised of “the best consumer lawyers in the country.” He is amazed that a committee that used to gather around a “card table” now has more than 200 people attending its meetings.

Writing has been a big part of Rohner’s career. Although he has produced dozens of publications, he is well known for his work as editor and co-author of a treatise on the Truth in Lending Act. Rohner recalls that he started writing as a hobby in high school, where he wrote essays for his high school literary magazine. Although Rohner humbly commented that there is “no missing repository of Shakespearian text,” that experience was the start of his work on mastering the art of writing. He says that writing forces one to be “intellectually honest;” the reader will sense when the author does not have a mastery of the subject. “One way to know and understand is to research and write,” he advises.

Rohner likes to credit his many mentors. Homer Kripke, a law school professor and long-time practitioner who lived in northern New Jersey, was one in particular. Kripke wrote the first case book on consumer finance law, and he was one of first law professors in the country to teach a course specifically focused on consumer finance. Rohner got to know him well through CFSC meetings. Kripke was “always most gracious and helpful” to Rohner, and when Rohner suggested that Kripke update his case book, which had become outdated since enactment of the Truth in Lending Act, Rohner was excited that Kripke asked him (and another co-author) to write an updated version. Other mentors who have influenced Rohner’s career include Barkley Clark, Roland Brandel, and Bill O’Conner, who themselves have made great contributions to the field of consumer finance law.

In addition to his mentors and colleagues, Rohner’s family has helped him over the years in many ways, including just by “being there.” Rohner and his wife have four grown children, and not a single one had the urge to be a lawyer. His children pursued the following professions: electrical engineer, school librarian, television camera-man,
and financial advisor. He is very proud of them and that they are “all working for a living.”

Rohner has been presented with lifetime achievement awards by the American College of Consumer Financial Services Lawyers, and also by his law school. Rohner co-founded and served as President of the American College of Consumer Financial Services Lawyers, which was created to bring together the most experienced and distinguished consumer financial services lawyers. Rohner was extremely flattered by his lifetime achievement awards, and joked that while he is grateful for them, he is hesitant at the prospect of retirement because his career “has been [his] life.” Rohner says that successful leadership requires that one get along with people and is able to motivate them to do the things you would like them to do. He attributes his success to the fact that he never hesitates to try new things.
At the 2013 winter meeting of the Consumer Financial Services Committee, the Compliance Management, Fair Access to Housing and Federal and State Trade Practices Subcommittees presented a program on Preparing for Consumer Financial Protection Bureau (“CFPB”) Exams and Enforcement. Presenters included attorneys and representatives from the CFPB, FDIC, Buckley Sandler, Wilmer Hale and Promontory. The panelists discussed what to expect and how to prepare for exams and enforcement actions by CFPB. Further, the panelists addressed lessons learned, who was involved, etc.

Under Dodd Frank, the CFPB has the authority to conduct examinations of banks with assets over $10B, etc. The CFPB’s approach to these examinations is quite aligned with that of the other federal banking regulators. The following are some consistent CFPB examination themes from the perspective of US financial services' in-house compliance risk management professionals ("banks").

1. **Fully explain the bank's core businesses, products & services, operations and strategic focus.** While the banks expressed that the CFPB examiners are extremely bright and capable, the learning curve for the examiners is achieving a complete understanding of the bank. Many banks have experienced a lot of turnover with their CFPB teams. Consequently, providing the examiners with important information about the bank is crucial to beginning the examination process. It goes without saying that consistent communication is very important during any examination. Before or on Day One of the examination, give a presentation to the CFPB with bank lines of business representatives as well as risk personnel.

2. **Be prepared to interact with CFPB enforcement attorneys during the examination of the bank.** There appears to be an internal CFPB reconsideration of including these attorneys as part of the examination team. However, in the meantime, the banks' compliance teams should coordinate with the appropriate in-house counsel as the dynamic of the examination changes with these enforcement attorneys.

3. **There may be a question of local CFPB examiner authority to make decisions versus the home office (DC) team's authority.** Banks have expressed concern with their local examiners lack of authority to make a decision if a problem or issue occurs during the examination. In these instances, the bank must provide complete responses to the local team and be patient.
4. **Routinely ask for examination status updates.** Depending upon the length of the examination, the bank should ask for status updates on at least a weekly basis. In many cases, the CFPB’s examination is more thorough than ever before and with the review, new issues emerge. In order to manage the review, frequent updates are important.

5. **Maintain a strong relationship with the in-house auditors and not just during the CFPB examination.** Bank compliance teams note that there are increasing similarities between findings during the internal audit process and during the CFPB examination. Further, the CFPB team confers with the internal audit team about these findings. The compliance teams should ensure that they are aware of these discussions, questions, etc.
Innovation in financial products and services has been focused on the mobile channel for the last couple of years and shows no signs of slowing down. This article talks about the state of the mobile market for financial products and services (warning: the shelf life of that portion of this article will be less than twelve months) and then walks through the top legal considerations associated with the mobile channel.

State of the Market: Mobile Banking

The “granddaddy” of the mobile market for financial services is mobile banking – which means that customers manage existing financial accounts from a mobile device. Mobile banking has been around for at least ten years and today consists of three types: text banking; mobile banking using a mobile browser; and mobile banking using a mobile app. Mobile banking requires the customer to already have an existing account with the financial institution and also requires the customer to already have an online banking account established.¹

When customers manage their accounts through text banking, the customer will typically register their mobile device during an online banking session and agree to allow account information to be sent to them via text message.² Then, the customer may proactively text the financial institution, asking for specific information about the account. The financial institution then sends a responsive text to the customer’s registered mobile device containing the requested information. Text banking functionality is typically very limited – customers may ask for balance information or information on the last three purchases or similar types of basic information. The main reasons for this limited functionality are because texts are not secure, it is difficult, if not impossible, to authenticate a customer via text, and texts can be easily spoofed.

Mobile banking using a mobile browser means that the customer accesses account information by entering an address into the browser program on their mobile device. The page that the customer accesses via the mobile browser is often optimized for the mobile screen and may also be limited in functionality, compared to when customers access their accounts through a computer browser.³ When the mobile banking page is accessed, customers

¹ Some financial institutions are working on allowing customers to access mobile banking without first establishing an online banking account. However, legal considerations have made it difficult to safely and consistently allow customers to do this -- such as concerns related to disclosing on a mobile device and authenticating the customer.

² Customers may also set up text “alerts” that cause a text to be sent automatically to a customer whenever a specified event occurs (e.g., the available balance drops below a preset level, a password is change, or a payment is due).

³ It is sometimes possible for a customer to bypass the mobile banking pages that are optimized for the mobile screen and to access the full online banking experience through their mobile browser.
authenticate using their online banking credentials, usually through the same authentication scheme that the financial institution uses for online banking.

Mobile banking using a mobile app is very similar to mobile banking using a mobile browser. However, the mobile “app” is small piece of software that is downloaded from an app marketplace such as Apple’s App Store or Google Play and that resides permanently on the customer’s mobile device. The mobile app experience is also optimized for the mobile screen, and for this reason may also be limited in functionality compared to the full online banking experience. Some financial institutions now have tablet-specific mobile banking apps that take advantage of the larger screens on tablets and allow for richer functionality. Mobile banking apps often have some advantages over mobile banking via mobile browser – customers may choose to accelerate the authentication process by saving portions of the sign-on process directly to the mobile device and customers may utilize the GPS functionality of the mobile device to find close-by locations of ATMs and the financial institution itself. Mobile banking apps also tend to provide a more stable and faster experience to the user.

State of the Market: Mobile Payments

Mobile payments occur when the consumer uses a mobile device in some way to make a payment to a third-party (mobile wallets are discussed in-depth, below). Most mobile payments today are made by a customer using their mobile device to text or email information to an established service that the customer has already linked to their deposit account. The service typically causes the payment to occur via expedited ACH so that the transaction is completed sooner than the at-least three days that it takes for an ACH transaction to clear. For this reason, mobile payments tend to occur in low dollar amounts and low frequency.

There are several commercial offerings in the mobile payment space – some banks have developed mobile payment platforms (e.g., ClearXchange); some third parties offer mobile payment platforms that banks choose to utilize through their own services (e.g., PopMoney and Dwolla); and there are some mobile payment platform providers that offer the mobile payment services directly to consumers (e.g., Bump). Although there are limitations to the efficiency of mobile payments caused by safety and soundness risk considerations and anti-money laundering concerns, mobile payments in the United States are increasing and are predicted to increase exponentially in the next several years.

State of the Market: Mobile Wallets

Mobile wallets are apps downloaded to a mobile device that allow consumers to add payment cards virtually to the mobile wallet app and then consumers can use the mobile device at that point-of-sale to transact – replacing the need to swipe a card at the point-of-sale. Mobile wallets can either be open or closed. Open mobile wallets allow consumers to add payment cards from various issuers and financial institutions into the same mobile wallet app. Closed mobile wallets limit consumers to adding payment cards from a single issuer, financial institution or tied to a single retailer. Mobile wallets are still in their infancy commercially in the United States.
Mobile wallets also cause the transaction to occur at the point-of-sale in a couple of different ways. Some mobile wallets depend upon the mobile device having a near field communication (NFC) chip that allows the customer's mobile device to communicate with a reader at the point-of-sale that is tied to the same credit and debit processing equipment used for plastic transactions. The customer simply waves the mobile device over the reader, and the payment is made. Other mobile wallets utilize codes that can be scanned from the mobile device at the point-of-sale and the payment information is transmitted to the point-of-sale from where it is stored in the cloud. And still other mobile wallets allow customers to pay directly through the cloud, while they are standing with the salesperson who has a handheld receipt printer or while they are waiting in line for their receipt.4

In the mobile wallet space, there is a lot of discussion about NFC adoption in the United States and there are debates about whether the technology will ever be commercially viable. The reason that there are these concerns is because the majority of U.S. consumers who have a smartphone (and only 59% of U.S. consumers have a smartphone) do not have a smartphone that contains an NFC chip.5 However, most mobile device manufacturers are including NFC chips in the newest models (including Apple, reportedly) and many large Fortune 100 companies, including telecommunications companies, large banks and companies like Google, Visa and MasterCard have invested substantial amounts in NFC-based mobile wallets.

The primary reasons for this fixation upon NFC are due to the possibility of universal acceptance of NFC compared to the other means of accepting mobile wallets6 and due to the security NFC offers to payments made using a mobile wallet on a mobile device. For purposes of this article, the security that the NFC chip offers is the most relevant reason. Basically, the NFC chip functions using a simple technology called radio frequency identification (RFID) that has low power requirements to work and that has a very limited range in which it can transmit information – some 10 centimeters, at a maximum. As such, it is almost impossible for the transaction at the point-of-sale to be “sniffed” by an evildoer, and unlike a plastic card, the transaction can occur without displaying the full account number of the payment device the consumer uses at the point-of-sale. Further, since the NFC transaction does not rely upon information stored in the cloud, the transaction avoids problems associated with account information being stored in the cloud.7

There are limitations that affect NFC-based mobile wallets – the account information for the payment devices is stored on a secure element within the mobile device that requires

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4 NFC-based mobile wallets tend to be open mobile wallets, whereas the other types of mobile wallets tend to be closed mobile wallets.
5 It is possible to retrofit smartphones with NFC chips – the NFC chip can be included in a sleeve that fits over the smartphone or can be built into a memory card that is inserted into the existing memory card slot of the smartphone.
6 In other words, NFC is a standard that can be implemented by unaffiliated parties acting independently from each other.
7 There are hybrid mobile wallets that use NFC at the point-of-sale to effectuate the payment, but that store some or all of the account information in the cloud. Such mobile wallets then do end up having the same concerns as cloud-based mobile wallets have from a security perspective.
encryption to keep account information secure, which can slow down the transaction process. Additionally, the secure element has a limited amount of physical space that is allocated to functions of the mobile device other than the mobile wallet, which means that the number of payment devices that can be added to the NFC-based mobile wallet can be limited.

One of the criticisms regarding the commercial viability of mobile wallets is focused upon cynicism about the value that mobile wallets bring to the consumer and whether consumers are really going to be interested in getting rid of their plastic cards. The answer to this criticism is that mobile wallets potentially offer consumers much more value than just giving them another way to transact at the point-of-sale. Mobile wallets allow consumers to add not just payment devices, but also loyalty cards, rewards programs and coupons to their mobile device. Although not yet commercially available, the vision for mobile wallets is along the lines of the following scenario. A consumer goes to make a purchase at a drugstore with their NFC-based mobile wallet. The consumer is able to choose any payment device they have, regardless of the issuer, as well as their loyalty card and any applicable coupons, and in one wave of the mobile device at the point-of-sale reader, the transaction is completed. The consumer did not have to pull out two pieces of plastic and scrounge around for the piece of paper or register tape constituting the coupon in order to save money and get points towards their next purchase – it all happened in one elegant wave. This is the true value of mobile wallets to the consumer.8

Legal Considerations in the Mobile Space

How consumers use mobile devices is still evolving and growing. The functionalities available through the mobile channel are ever-expanding, ever-changing and rapidly growing. The law - always plodding heavily behind technological innovation -- is very much in its infancy with respect to the mobile space. In this situation, the best way to discuss legal considerations is to conduct an analysis of the unfair or deceptive acts or practices (UDAP) challenges that are raised by the new technology in question.9

For purposes of this article, we will discuss three specific areas of legal concerns in the mobile space. First, in the mobile space, the small screen of many mobile devices presents concerns that consumers may not be able to read and understand legal disclosures, much less legal agreements, and may thereby be misled or deceived regarding the service they are using through the mobile device or the transaction that they are effectuating. Second, many mobile devices have the ability to track consumer location and apps on the mobile devices could unfairly use that information to intrude on consumer privacy. Finally, the Federal Trade

8 There are also many benefits for all parties involved in the transaction, including the retailer, the issuer, and the mobile wallet operator in terms of being able to obtain much richer transaction information from the mobile wallet user that will eventually allow them to understand consumer behavior and transaction trends much better.
9 The prohibitions against UDAAP (or UDAP) are found in Title X, Section 1023 of Dodd-Frank and Section 5 of the FTC Act.
Commission and the California Attorney General recently have released reports discussing other aspects of privacy and data security impacted by mobile devices.\textsuperscript{10}

\textbf{Disclosing Property on a Mobile Device}

Disclosure on a mobile device is tricky. The small screens that vary in size according to mobile device manufacturer and mobile device platform create a tension with the amount of interactivity that is possible with a mobile device. We have dealt with limited space for disclosures in the past – radio advertisements certainly have limits on disclosure length, for example. But the mobile device is a powerful pocket-sized computer that allows consumers to interact with it, transact with it and use it in a million other ways, every day. This means that the traditional approach for dealing with limited space for disclosure – limiting the types and numbers of claims made in the body of the advertisement so that the disclosures are also limited – is not a practical solution in the mobile space.

As such, the marketplace is still struggling to find the best way to provide all of the legal disclosures that apply to the transactions and interactions consumers conduct on their mobile devices. Nevertheless, taking the time to develop mobile-optimized web pages and mobile apps is very worthwhile. Underscoring this point, the Consumer Financial Protection Bureau (CFPB) has started a trial disclosure program that allows financial institutions to try out new disclosure schemes and receive amnesty from UDAAP concerns or technical violations of the consumer regulations during the trial period.\textsuperscript{11} So far, the CFPB has approved trials of some innovative mobile disclosures through the program. We may see some reports from them as early as late 2013.

When designing a disclosure for a mobile screen, there are several methods of presenting the disclosure to consider. The disclosure can be placed onto one long scrolling screen. Or, the disclosure can be broken across several screens, accessed by swiping through the screens. Or, the disclosure can be presented in a layered format. The first layer presents just the headlines of the document, which are clickable to reveal the second layer – a short summary of the applicable section. Then, if the customer clicks again (but the customer is not required to do so) the entire section is revealed in the third layer. And, note that providing consumers with the option to email the disclosure to themselves is a best practice for multi-screen disclosures. Pop-up and mouseover windows – disclosure methods that can be effective online – do not work well in the mobile space.

Choosing the correct method of disclosure on the mobile device really depends upon the length and importance of the disclosures in question and whether the consumer needs to affirmatively consent to the disclosures. In financial services, there are additional considerations regarding how to display correct font sizes for certain disclosures and how to ensure that the disclosures are offered at the right time.


\textsuperscript{11} For the policy, see http://files.consumerfinance.gov/f/201212_cfpb_trial_disclosures.pdf.
Location Tracking

Tracking the location of users is at once the vision of Big Brother that sends chills of one kind down the spines of privacy advocates and the vision of nirvana that sends chills of another kind down the spines of marketers. Location information has powerful implications and needs to be addressed responsibly by business, and especially by financial institutions.

Most smartphones and tablets have built-in GPS capabilities. Each of the major operating platforms – Android, iOS, Windows and Blackberry – have general settings that allow users to turn off GPS capabilities for the entire device. Additionally, the operating platforms will notify users when the user first accesses a mobile app that the mobile app accesses GPS capabilities. However, that notification provides no detail about how the mobile app will use location, or about how the consumer can control the tracking of their location.

When a financial institution has a mobile app that uses location information, it is important to be very careful about providing specific information about the use of location information as well as controls for the collection of location information so that the financial institution can avoid a UDAP problem.

A UDAP concern generally does not arise when the user of the mobile app can reasonably be expected to understand how location information is used. For example, a mobile app that includes an ATM locator and that only uses location information in that context, most likely can rely upon the generic notice of GPS capabilities that the operating platform shows the user when the mobile app is first accessed. However, if the mobile app uses location information in a way that would not be obvious or expected by the user, then it is recommended to build into the mobile app screens that will explain how location information will be used and give consumers the option to choose not to have their location information collected or used.

Mobile Privacy

The Federal Trade Commission and the California Attorney General have recently published reports focused on mobile privacy. The FTC’s “Mobile Privacy Disclosures” staff report, released on February 1, 2013, followed the California AG’s “Privacy on the Go” report issued in January 2013.¹²

Both reports demonstrate that any company that has a mobile app tied to its brand, products, or services must know how data is used by the mobile app and then ensure that its privacy policy accurately reflects that usage. In financial services, where privacy is a serious matter, it is important that financial institutions take responsibility for ensuring that their mobile apps conform with the privacy best practices described in these reports, and not delegate privacy concerns to third parties or rely upon representations from mobile app developers without double-checking how the app works.

¹² See note 10 for links.
The California AG report takes a very practical approach to designing a mobile app that ensures users are informed about how their privacy may be affected. The AG recommends starting with a comprehensive analysis that identifies each piece of data collected by the app that contains personally identifiable information (including unique device identified, mobile phone number, and geolocation) and, for each piece, considers the following questions:

- Is the data type necessary for the app’s basic function?
- Is the data type necessary for business reasons?
- How will the data be used?
- Will the data be stored on the device?
- If the data will be stored in servers, how long will it be retained?
- Will the data be shared with third parties (including advertising networks and analytics companies)?
- How will such third parties use the data?
- Within the company, who will have access to the data?
- Will the app access other parts of the mobile device? If so, can users control such access by modifying permissions?

This information will make it possible to write an accurate and transparent privacy policy, and to evaluate when it may be necessary to provide the “just-in-time” notices discussed below.

The California AG and the FTC recommend that an app’s privacy policy be available to the consumer before the app is downloaded (i.e., via a link in the mobile app marketplace). In addition, the privacy policy should be readily accessible from within the app and optimized for the mobile screen.

Both reports indicate that if an app will collect, use, or share sensitive information, concise “just-in-time” disclosures about such collection, use, or sharing should be provided to the consumer. These disclosures are intended to supplement an app’s overall privacy policy and should always be consistent with that policy. Both reports recommend that such disclosures be provided when the app is accessing information or functionalities such as text messages, call logs, and contacts, or the mobile device’s camera, dialer, or microphone.

Further, if an app uses personally identifiable information in a way that would surprise the consumer, a “just-in-time” disclosure should also be given. For example, in the situation where a consumer may be surprised that an ATM locator app is also using his or her location to identify discounts at nearby retailers, a “just-in-time” disclosure about such use should be used.

A “just-in-time” disclosure is intended to serve as a decision point for consumers. This means that it should give consumers the immediate opportunity to decide whether to allow their information to be collected, used, or shared by the app in a particular way, before such collection, use, or sharing occurs. If the data is necessary to the app’s basic function, the disclosure should also allow the consumer to discontinue the app’s use.
Conclusion

The legal considerations in the mobile space discussed here are by no means exhaustive. The best approach to take when evaluating a new mobile offering is to understand how the technological aspects of the mobile offering work, what are the different types of functionality that the consumer will be able to do with the mobile offering, what information the mobile offering will collect about the consumer, and what disclosures will be necessary. Also keep in mind that this article depicts a point-in-time in the early stages of development of the mobile channel and that the whole mobile space is highly changeable and may very well look very different twelve months from now.