

Client Update

The CFPB Eyes Mobile Financial Services

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Last month, the Consumer Financial Protection Bureau (the “CFPB” or “Bureau”) released a report regarding the use of mobile financial services (“MFS”) by underserved populations (the “Mobile Report” or “Report”).¹ The Mobile Report compiles public responses to its 2014 Request for Information (“RFI”)² on MFS, defined by the CFPB in this Report as financial services and products accessed through mobile devices such as phones or tablets.

In the Mobile Report, the CFPB explores how underserved populations – including low-income, unbanked, underbanked and/or economically vulnerable consumers – are engaging with MFS. In particular, the Mobile Report focuses on four areas: (i) the types of MFS available to underserved populations, and the scope of consumer interaction with MFS; (ii) opportunities for MFS to expand and reach these consumers; (iii) challenges and risks associated with MFS, particularly in relation to these consumers; and (iv) recommendations for further study and discussion. Although the Mobile Report states that it is “not intended to identify areas in which the Bureau may or will take regulatory, supervisory, or enforcement action,”³ FinTech companies and other providers of consumer financial products or services would do well to pay attention to the

¹ CONSUMER FINANCIAL PROTECTION BUREAU, MOBILE FINANCIAL SERVICES (Nov. 2015), available at http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

² CONSUMER FINANCIAL PROTECTION BUREAU, REQUEST FOR INFORMATION REGARDING THE USE OF MOBILE FINANCIAL SERVICES BY CONSUMERS AND ITS POTENTIAL FOR IMPROVING THE FINANCIAL LIVES OF ECONOMICALLY VULNERABLE CUSTOMERS (Jun. 2014), available at http://files.consumerfinance.gov/f/201406_cfpb_request-for-information_mobile.pdf.

³ Mobile Report, *supra* note 1, at 4, available at http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

Mobile Report findings as they will likely inform the Bureau's strategies in these areas.⁴

We describe the key findings of the Mobile Report below.

I. MFS AND UNDERSERVED CONSUMERS

In the RFI, the CFPB defined MFS as covering mobile banking and mobile financial management services. It specifically did not address mobile point of sale payments, except with respect to mobile payment products that are targeted specifically for low-income and underserved consumers. A number of commenters sought clarification about the governing standard for determining what constitutes MFS to avoid confusion and ensure that the discussions around public policy take place in the context of commonly understood terms and scope.

In the Mobile Report, the CFPB appears to adopt the suggestion by commenters that MFS should not be considered a discrete set of products and services, but rather a channel through which consumers can access financial services and products through many devices. Nonetheless, the Mobile Report highlights certain MFS areas of particular interest to the CFPB, including mobile banking, personal financial management tools, text messaging, mobile applications, prepaid products, mobile payments, mobile carrier billing, and mobile p2p.

Although noting that questions remain as to the scope of MFS, the Mobile Report focuses on the challenges facing potentially disruptive technology. In particular, commenters focused on digital financial literacy as a major barrier to the potential benefits in MFS. The Mobile Report stresses that while improving access to these products may be an important step, it is not an end in itself. As one commenter stressed, "mobile banking does not make people smarter or supply individual financial acumen. Improving financial literacy remains a priority even in a mobile world."⁵

The Mobile Report notes that though more consumers have access to MFS on data-driven devices like smartphones, the increase in smartphone ownership has not directly transformed into a similar explosion in MFS usage.⁶ In particular,

⁴ See, e.g., Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77101, 77121 (Dec. 23, 2014) (noting that among its payments-related actions, the Bureau was in the process of reviewing comments to the RFI).

⁵ Mobile Report, *supra* note 1, at 52.

⁶ *Id.* at 15-16.

consumers with incomes below \$15,000 per year remain chronically underbanked, despite the rise in smartphone ownership. Even among those underserved consumers who do manage their finances within the traditional banking system, the Mobile Report observes that large proportions prefer to bring their money to a branch office.⁷ The Mobile Report opines that this may be a result of the character of the deposits (much higher percent of cash versus check or card transactions), to the immediacy that a physical bank provides. Notwithstanding these facts, the Mobile Report notes that underserved consumers had higher rates of mobile banking and mobile bill pay than among all consumers suggesting that MFS may be an important means to integrate the underserved into the mainstream financial marketplace.⁸

II. OPPORTUNITIES FOR MFS TO EXPAND

The Mobile Report highlights a few important areas for MFS-aligned firms to consider when designing products and services: (i) the speed of mobile check deposit (and Mobile Remote Deposit Capture (“MRDC”) technology); (ii) the safety of consumer data in every respect (discussed further below); (iii) determining if, and by how much, MFS could lower consumer and financial institution costs; and (iv) expanding financial services education generally and digital literacy more specifically to ensure that consumers know how to safely navigate the technology necessary to conduct their financial transactions and achieve their financial goals.

Of particular note is the discussion surrounding the opportunity to design products that focus on the specific issues facing underserved consumers. The Mobile Report suggests that innovative products focusing on reducing the delay in access to funds could better provide unbanked low-income consumers with financial products to fit their needs because it may have the potential to save time and reduce costs for those households that use nonbank check cashing services. Specifically, underserved consumers tend to both need access to their funds faster than a normal check deposit may allow, and also tend to hold a larger portion of their finances in cash.⁹ The Mobile Report suggests that if MFS could be expanded to address the delay in access to cash it could fill a real need

⁷ *Id.* at 72-73.

⁸ *Id.* at 19-20.

⁹ *Id.* at 22.

for underserved customers, a more secure (and less expensive) mechanism to access cash.¹⁰

Given that the Bureau shares joint rulemaking authority with the Board of Governors of the Federal Reserve (the “Federal Reserve”) with respect to the consumer related provisions of the Expedited Funds Availability Act/Regulation CC, it will be interesting to see if the CFPB proposes any new disclosures on MRDC funds availability and/or encourages the Federal Reserve to make clear the manner in which Regulation CC funds availability rules apply to such deposits.

The Mobile Report, however, acknowledges that expediting funds availability could pose new challenges to financial institutions in combatting fraud.¹¹ As discussed further below, fraud, which exists at every end of the chain of distribution, is the central reason that checks take time to process and related funds take long to clear. Although the Report does not offer any solutions on this front, it suggests that the CFPB is thinking carefully of how to balance this business reality with consumers’ desire for fast access to funds.

III. RISK AREAS FOR CONSUMERS

The Report outlines a number of risk areas for consumers engaging in MFS channels including: (i) data and transaction security, including the risk of data breaches and identity theft; (ii) privacy concerns, including the unauthorized sharing or tracking of consumer information for marketing and other purposes; and (iii) the risks of discrimination based on financial information.

The cybersecurity risk is ever-present in MFS channels, and the Mobile Report describes the risks generated by lost or stolen mobile devices, differences in operating systems, and denial of service attacks which may be particularly problematic for underserved consumers given their limited resources, which make them less able to absorb financial losses or interruptions that may result from security-related problems. The Report notes that real and perceived privacy and security concerns remain a significant barrier to adoption of MFS, and suggests that MFS products must develop cutting-edge security features to

¹⁰ *Id.*

¹¹ *Id.* at 22-23.

protect consumers from identity theft or other kinds of financial fraud in order to address these concerns.¹²

The Mobile Report observes that consumers are increasingly concerned about the lack of privacy of their data when using MFS products and services. The Report cites commentary from the Federal Trade Commission which notes the high number of companies involved in the mobile payments system and the large volume of data collected.¹³ Moreover, the Mobile Report features several suggestions by commenters that current disclosures may be insufficient for consumers to make informed decisions and that the current disclosure requirements should be adapted to mobile technology in ways that enhance understanding about the product such as its costs and fees.¹⁴

The Mobile Report also highlights the CFPB's concern about possible discrimination by financial institutions in their use of these online financial profiles created using big data. In particular, the Report focuses on comments expressing concern that the explosion of consumer financial data, both from MFS-type services and social media, could lead financial institutions to make credit decisions that would result in a sort of "virtual redlining," in violation of the Equal Credit Opportunity Act ("ECOA").¹⁵ For example, financial institutions could use financial profiles created through aggregation of data created, in part, by MFS services to make decisions on how and when to extend credit. Whether deliberate or inadvertent, financial institutions could wind up restricting their lending to certain groups or classes of people in violation of ECOA. Finally, the Mobile Report outlines the CFPB's concern about potential violations of the Fair Credit Reporting Act which mandates that consumers be notified when firms report certain information to credit ratings agencies, and, in turn, when firms use certain information to make decisions about a consumer's credit profile.¹⁶

We would expect the CFPB to focus on these risk areas as it evaluates whether supervision of this market is appropriate through a larger participant rule¹⁷ or

¹² *Id.* at 59.

¹³ *Id.* at 60.

¹⁴ *Id.*

¹⁵ *Id.* at 61.

¹⁶ *Id.*

¹⁷ The Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the CFPB to supervise nonbanks that are larger participants of markets for consumer financial products or services as the CFPB defines by rule. 12 U.S.C. 5514(a)(1)(B), (a)(2).

whether additional regulation or guidance is needed to clarify providers' responsibilities.

IV. SUGGESTED AREAS FOR FURTHER RESEARCH

The Mobile Report outlines a number of areas for further study. In particular, commenters suggested a need for additional research on the role of big data analytics in financial services and for increased dialogue about cybersecurity practices across all mobile platforms.¹⁸ Additionally, commenters called for further research into the best mechanisms for teaching financial literacy and for extending financial products to consumers who may not have access to the traditional financial system.¹⁹ One commenter suggested that the CFPB develop a consumer security toolkit which would help consumers protect information on their mobile device from all the different risks associated with the mobile platform.²⁰ One tech industry commenter also encouraged the CFPB to require financial firms to develop a "tokenization" policy, which would further encrypt communications between the financial institution and the MFS product.²¹

Additional commenters suggested that the CFPB do more research on specific populations and how they use mobile and access financial services, including information around language and culture, to help identify ways to remove barriers to access. In addition to the groups identified within the Mobile Report, commenters suggested more information should be sought on rural consumers, people with disabilities, consumers with limited English proficiency, recent immigrants, underserved or opportunity youth (*i.e.*, youth between the ages of 16 and 24 who are neither enrolled in school nor participating in the labor market), and those residing in traditionally underserved communities.

V. CONCLUSION

Ultimately, the Mobile Report stresses that MFS, while intriguing in its myriad possibilities and applications, will not function as a gateway for underserved consumers without an emphasis on financial products that fit their unique circumstances. The Report concludes that in order for MFS to help consumers access financial services and products and achieve costs savings, "there needs to be broader digital financial literacy, more confidence that appropriate consumer

¹⁸ *Id.* at 77.

¹⁹ *Id.* at 78-79.

²⁰ *Id.* at 79.

²¹ *Id.* at 80.

protections are in place and greater comfort with the technology, including around security and other potential risks associated with this data driven ecosystem.”²² We would expect that the CFPB will take a closer look at these areas as it seeks to “make markets for consumer financial products and services work for Americans.”²³

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Please do not hesitate to contact us with any questions.

²² *Id.* at 82.

²³ CFPB, *Everyone Has a Story*, available at <http://www.consumerfinance.gov/everyone-has-a-story/>.