MOVING MONEY IN A REAL ESTATE TRANSACTION

RTP AND PSP OFFERINGS EXPAND CAPABILITIES

ALLIANT
NATIONAL
TITLE INSURANCE COMPANY

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Understanding the nature of new payment technologies and their interaction with the law is essential in determining how and when they can be used safely and legally in conjunction with a real estate transaction.

INTRODUCTION

When purchasing real property, the buyer typically provides an earnest money deposit. The earnest money deposit goes into the agent's escrow account – or trust account, if the settlement provider is an attorney – and the funds sit there for a number of days until needed.

The buyer will then bring the cash to close to the settlement agent. Cash to close is the balance of the funds needed to purchase the property. The buyer typically does not want to transfer the cash to close until absolutely necessary. This means that a premium is placed upon being able to transfer funds fast.

Technological advances in finance (fintech) during the 21st century have enabled the faster movement of money and created more convenient (and touchless) methods of transmission. In fact, fintech has advanced far more rapidly than the consumer protection laws and regulations that were created to protect the parties in a real estate transaction.

New technology such as real-time payments (RTP) and payment service providers (PSPs) have entered the market over the past decade. Understanding this technology and its interaction with the law is essential in determining whether RTP and PSPs can be used in conjunction with a real estate transaction. It's a complicated analysis because not only do the laws differ from state to state, but the technology both among and within each of these financial mediums and platforms also differs. Moreover, there are practical issues, such as their cost; whether they meet industry requirements for assurance of privacy and information and data security; and whether the technical functionality will work for businesses and consumers.

This article provides an overview of the newer options available for transferring funds and the unique concerns for the title and settlement industries to consider in determining whether to use them.

None of the information provided within is legal, financial, or technical advice. Consult with the appropriate professional, and your title insurer before undertaking the use of the modern financial technologies that are the subject of this article.

UNITED STATES PAYMENT RAILS HISTORY

To understand the progress that has been made in our financial system and fintech, it is important to briefly review the past and what payment options have historically been used to consummate real estate transactions in the United States. Until 2017, there were three payment systems – or payment rails – upon which all financial transactions rode in order to complete the clearing and settlement process:

- Check image exchanges.
  - » Check-imaging clearing house services (such as those provided by The Clearing House Image Exchange Network).
  - » Taking up to several days for funds to be available to a payee.
  - » Subject to reversal/recall of funds (such as for insufficient funds or fraud).
- Wire transfer services:[1] An electronic payment service used to move money between accounts.
  - » Wire transfer services are provided by 1) The Clearing House Interbank Payments System (CHIPS), and 2) the Federal Reserve's Fedwire.
  - » Used for U.S. domestic and international payments.
  - » Typically settles in one to two banking days.
  - » Not subject to reversal/recall/claw-back; permanent upon initiation; with the assurance that good funds will be received.
  - » Daily transfer limits may apply (although, the allowed amounts are usually high value, as the cost of wire transfers are relatively expensive, typically $0 – $35 for domestic wires, and $35 – $50 for International wires).[2]
- The Automated Clearing House (ACH):[3] An electronic network for financial transactions, processing large batches of credit and debit transactions.
  - » ACH operations are provided by The Clearing House's Electronic Payments Network (EPN), and by the Federal Reserve's *FedACH*.
  - » Used for U.S. domestic payments only.
  - » Traditionally taking up to three days to settle, but now same-day ACH is available (albeit at an additional cost for the swifter clearing and settlement).
    - Note that the ACH same-day faster settlement is **not** the same as RTP's instant settlement.[4] Also, depending upon the time of day that it is initiated, same-day ACH may actually settle on the next business day.
  - » Subject to reversal/recall of funds within a specified time, for specified reasons pursuant to the Electronic Funds Transfer Act (EFTA), *15 U.S.C. 1693 et. seq.*, and Regulation E; *12 CFR 205.1 – 20*; and *12 CFR 1005.1 – .36*.[5]
    - Applies only to transfers of funds involving accounts "established primarily for personal, family or household purposes." *15 U.S.C. 1693a(2)*.
    - A consumer has up to 60 days to dispute a charge after the financial institution submits the periodic (e.g., monthly) statement. 12 CFR 1005.6. The burden of proof is then shifted to the financial institution to show that the transaction was authorized. 15 U.S.C. 1693g.
    - State law cannot overcome these federal consumer protections; these consumer rights cannot even be waived by contract.

1. *For an illustration of the process of how the wire transfer works as conducted by The Clearing House Interbank Payments System (CHIPS), see CHIPS diagram.*
2. *Cost data obtained from Bankrate, "How much are wire transfer fees?" by Matthew Goldberg, November 4, 2021.*
3. *For an illustration of the process of how ACH works, see The Clearing House's diagram.*
4. *See Payments Journal, "The Distinction Between Faster Payments and Real-Time Payments," August 18, 2020.*
5. *See 12 CFR 1005.1 et seq.; Regulation E, Federal Reserve Consumer Compliance Handbook (November 2013); FDIC Financial Institution Letters fil19009b re EFTA (February 2019). Credit cards with capability to use auto pay (with "capability to initiate EFTs is added to an accepted credit card" – Regulation E) are also subject to EFTA and Regulation E, but note that wire transfers are specifically excluded from the consumer protections afforded by EFTA and its Regulation E.*

THE MOVEMENT OF MONEY: PLAYING GAMES AND RUNNING A TAB

Playing Push and Pull Games

The movement of money is much like a game where you can win by one of two methods: either by pushing your opponent to where you want him or her to be, or by pulling your opponent into the winner's circle. Each method – pushing or pulling – has its own set of characteristics and game rules. To use a push, you must have direct access to lay your hands upon your opponent. When you cannot push your opponent, you can still pull him or her with a rope – like in tug of war. This analogy represents the way that money moves.

The last (or latest) payment system is RTP, which is discussed in detail further on. Within the context of the various payment rails and how they move, RTP operates whereby the funds are pushed by the owner/payor/holder to the intended recipient or payee. Note that wire transfers operate similarly, with a push by the owner/payor/holder. ACH, on the other hand, can operate as either a credit push by the owner/payor/holder, or as a debit pull by someone else. When funds are pushed by the owner, there is much less risk of misdirection and fraudulent intervention than when pulled by someone else. Therefore, greater legal consumer protections are needed – and provided – for the ACH pull rather than for the RTP and wire transfer pushes.

The greater legal consumer protections for ACH transactions are set forth in the *Electronic Funds Transfer Act* (EFTA), discussed previously, and make the funds recallable[6] and therefore unable to qualify as good funds under some state good funds laws.[7] RTP, although subject to the EFTA, is not reversible as between the sender and receiver,[8] while wire transfers are specifically excluded from the coverage of the EFTA. The typical characteristics of good funds laws are that the funds used in real estate transactions must be ***final*** (cleared and settled) and ***irreversible***. Both RTP and wire transfers have the characteristics of being final and irreversible, but wire transfers have been around for a long time and have been the main payment rail used in real estate transactions for the past several decades. In other words, wire transfers were contemplated at the time that most (if not all) of the existing good funds laws were drafted, whereas RTP had not yet even been conceived.

Running a Tab, or Paying Up Immediately?

The speed at which money moves is also determined by whether it utilizes a net settlement or a gross settlement system. A net settlement system[9] is akin to a patron running a tab at a bar, ordering a few drinks, having the bartender track what was ordered and the cost, and then settling up at the end of the night to pay one bill covering all that was consumed. A gross settlement system is akin to the patron at the bar paying the bartender each time they order a drink; hence, there is no need to settle up at the end of the evening. Obviously, a net settlement system is significantly slower than a gross settlement system because it requires waiting for the defined period of time (e.g., until the end of the night and all drinks have been consumed in our bar scenario) before settlement is made.

RTP operates based on a gross settlement system that is available 24/7/365 days of the year. Wire transfers likewise operate on a gross settlement system, but the settlement must occur during the operating hours of the transacting financial institutions (FIs). The Clearing House Payment Company LLC's Request for Business Review Letter to the Department of Justice – Antitrust Division, October 11, 2016, submitted by attorney Richard Taffet of Morgan Lewis, published at 2016 DOJBRL Lexis 2, pages 17-18, describes wire transfers as follows:

> They are expensive, generally limited to high-value transactions, and accommodate only limited messaging capability. Although faster than most other current methods, they typically settle in real-time only during system operating hours, and in some cases the availability of funds to a payee and confirmation to a payer that a transaction was completed may be delayed.

So, can RTP compete with wire transfers today as a preferred vehicle for funding real estate transactions? We will explore the possible answer to that question in the remainder of this article, including the legal and technical obstacles to using RTP.

6. *ACH has 85 possible return reason codes; see "ACH return codes: reasons and meanings," last edited April 2022, by Chris Hooper, published on GoCardless.*
7. *Good funds laws may vary, and while some may exclude ACH as good funds for the period of time that it is subject to recall, others may simply prohibit or exclude ACH entirely, without placing a limit on the time for its acceptability.*
8. *While RTP functionality may include the ability to request the recipient to return the funds, the return of funds is not obligatory between the sender and recipient under the EFTA.*
9. *See Wikipedia's definition of "Net Settlement" for a more technical explanation of the difference between net settlement and gross settlement.*

REAL TIME PAYMENTS (RTP), THE NEWEST UNITED STATES PAYMENT RAIL FOR BOTH PERSONAL AND COMMERCIAL USERS

What is RTP?

In 2017, after an expanse of more than 40 years following the roll-out of the Automated Clearing House (ACH) payments system in 1972, RTP was introduced as a fourth payment rail[10] for domestic payments. The basic characteristics of RTP are:

- It settles in real-time (immediately, or nearly immediately – within seconds), 24/7/52 hours/days/weeks of the year.
- It can be used by consumers, businesses, and government who have accounts at participating financial institutions.
  - » See *RTP Use Case: Escrow Deposits and the "Request for Payment" Functionality* further on.
- It is not subject to reversal/recall;[11] it is permanent upon initiation.
  - » As stated in TCH's Frequently Asked Questions:
    Why are RTP Network Payments Irrevocable?
    The irrevocability of a payment sent over the RTP network enables immediate, final settlement to the payee, which is the key element of real-time payments.

The Clearing House and How RTP Works

The Clearing House (TCH), a consortium of member financial institutions, provides authorized participating FIs with the ability to conduct RTP operations. "These transactions are ubiquitous – all federally insured depository institutions can be RTP participants today, regardless of their size."[12] TCH has a list of participating FIs posted on its webpage, RTP Network.

All participating FIs are required to be ***receiving*** participants, whereas they are not required to be ***sending*** participants; the ability to send funds via RTP is optional and has additional requirements. Participant FIs who want the ability to send funds via RTP for their account holders are required to put up a specified amount of collateral based upon their transactional deposit range; the amount of collateral put up determines how much money can potentially be sent by the FI. The RTP system will reject any amount sent in excess of the amount of the participating FI's collateral held by TCH.[13] However, if the amount to be sent is ***not*** in excess of the collateral, and all other requirements are met, then an amount equal to the payment is reserved (by the TCH-RTP system) out of the FI's collateral. It is by this mechanism that the funds sent via RTP are absolutely irrevocable (which means that there is no risk of return for insufficient funds, as there is with ACH) since the payments get debited and credited instantaneously from the collateral balance held by TCH. The funds are pushed into the receiver's demand deposit account (DDA).

A DDA is simply a different term for a checking account, where you are generally able to withdraw your money without advance notice, although there are some exceptions. The counterpart to a DDA is a negotiable order of withdrawal (NOW) account where the FI – such as a credit union – may require seven days written notice prior to withdrawal.

10. See Dan Akivis's article "The State of Faster Payments in the U.S." for a timeline depicting the introduction of Fedwire, ACH, and TCH's RTP, published on July 19, 2021.

11. A "Request for Return" button on the RTP application interface can be pressed by the originator/payor if the funds were mistakenly sent, but it would be up to the receiver's discretion whether or not to return the funds.

12. Judy Mok's article "Hot Topic: The Fed's Proposed Entry into Real-Time Payments Through the FedNow Service," published on the American Bar Association website, December 5, 2019.

13. Since April of 2022, TCH has increased its RTP transfer limit for participants to $1M, although those participating banks can (and do) set lower limits.

TCH describes the RTP payment message flow as follows:[14]

> RTP payments are executed through a sequence of message transmissions as outlined in Figure 2. A payment starts with a Payer sending a payment instruction via a channel application (such as an online or mobile banking application) provided by the Payer's FI who is a participant in the RTP System. The Payer's FI creates an RTP Instruction Message (the payment) from the Payer's instructions which is sent to the RTP System for format validation and routing to the Payee's FI.
>
> The RTP Instruction Message is then forwarded by the RTP System to the Payee's FI. This type of Instruction Message relays a payment instruction to the Payee's FI, which must also be a RTP Participant. The Payee's FI acknowledges receipt of the payment and agrees to provide immediate funds availability to the Payee by creating and sending an "accept" RTP Response Message back to the RTP System, which then routes the Response Message to the Payer's FI. The Payer's FI then informs the Payer of the successful completion of the payment via their channel application.

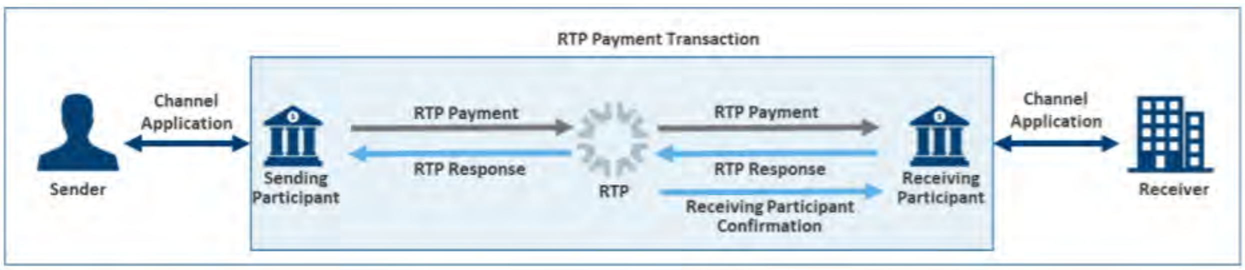

Figure 2. The RTP System's end-to-end Message flow. This example shows a Payment Message flow. Source: TCH[15]

FedNow

The Federal Reserve announced in March 2023 that it will commence its own version of RTP, which it refers to as a Real-Time Gross Settlement (RTGS) system, in July 2023. The Federal Reserve system, called FedNow,[16] will operate the RTGS system, thereby increasing accessibility for even more financial institutions to participate than those who have joined in providing RTS through The Clearing House.

The American Bar Association's Hot Topic: The Fed's Proposed Entry into Real-Time Payments Through the FedNow Service article by Judy Mok, Dec. 5, 2019, compares TCH's RTP to the Federal Reserve's FedNow:

> FedNow shares many similarities with the existing RTP network, in part because both solutions were designed to reflect the recommendations of the Federal Reserve's Faster Payments Task Force. For example, things such as permitted participants, transaction limits, operating hours, transfer types, and finality of transfers are very similar between the two networks.
>
> There will be some differences as well, and as of right now, it appears that FedNow participants will be permitted to use their master accounts, with the funds in those accounts earning interest and counting toward reserve requirements. RTP network participants, on the other hand, prefund amounts into a joint account that does not earn interest or count toward reserve requirements. The pre-funding required of RTP network participants may also have the effect of removing liquidity from their master accounts.

14. *The Clearing House Customer Documentation, Introduction to the RTP System (Version 1.0, October 2022), Figure 2, Page 11.*
15. *Id.*
16. *From the FedNow homepage, there are a wealth of resources available to explain what the system will provide, as well as an option to sign up for informative emails.*

RTP Use Case: Escrow Deposits and the Request for Payment Functionality

Business account holders, such as a title agency, can apply online with their participating FIs to use RTP. Note that while the RTP network has expanded its Request for Payment (RfP) availability – with RfP being the ability to directly request a payment from a customer and receive an instant payment response – the RTP Rules Interpretation Permissible Uses for Request for Payment Messages, effective July 24, 2023, has stated the permissible uses for RfP (see pages 1-3) which do not include escrow deposits.

RTP Use Case: Escrow Disbursements

A title/settlement agent typically uses his or her escrow/trust account to pay the seller, lienholders, loan servicers, revenue agencies/entities due taxes, and other third parties (e.g., real estate agents' commissions). Of these particular use cases, an agent or attorney who has an RTP-enabled escrow/trust account should exercise caution in using RTP to make a payoff because many loan servicers have automated systems that will not immediately recognize and accept an RTP payment; in those instances, there is the potential for the RTP payment to get delayed in the system, thereby resulting in late fees and penalties.[17] A consumer payment via RTP would be the least likely to incur any issue, provided that the receiver FI holding the consumer's account is an RTP-participating FI.

Benefits of RTP

The benefits to commercial users and their customers are as follows:

- RTP allows for the real time transfer of meta data – i.e., the digital remittance data – which provides ease in matching incoming and outgoing funds, thereby making escrow account reconciliation easier.
- With the transmission of funds and data, together, receipt of payment can be confirmed immediately.
- RTP enables the immediate transfer of funds from buyer to escrow agent at the closing table, which in turn means that closings are not bound to take place only during open banking hours – they can be held any day of the week, at any time of the day.
- RTP is much less expensive for the sender[18] than the cost of a wire transfer, and the recipient incurs no charge by the FI.
- RTP allows the commercial user to directly refund the customer's account, thereby reducing the potential requirement to have to escheat in the future, which is a time-consuming burden that frequently occurs when it is discovered years later that a refund check was not sent to the customer's correct address or timely cashed.

In addition, RTP networks have access to Secure Token Exchange (STE), a new capability that uses random digits substituted for a customer's actual account number, which if compromised, can be deactivated making it useless to cyber criminals. Tokenization provides increased security for customer accounts, since it reduces the need for account numbers to be stored outside of their bank, such as with a fintech application, a retailer or other third party.

17. *Information obtained from webinar, "ALTA Insights: Digital Funds Best Practices," presented live on June 29, 2022, with main presenter Rick Bruhn, SVP, Head of Commercial Deposit and Payment Solutions, U.S. Bank. Recorded webinar available on YouTube at https://youtu.be/Xe9fSnuC1EU.*
18. *Dan Akivis's article, "The State of Faster Payments in the U.S." published on July 19, 2021, states that "[c]ost is capped for the banks at $0.045 per transfer. The banks then mark it up."*

RTP, the Good Funds Laws and Attorney Client-Safekeeping Rules

Returning to our discussion regarding good funds laws and how they affect our ability to use RTP in the real estate industry, we need to examine three categories of these types of laws that we've come across in the United States. Similarly, there are attorney safekeeping rules regarding client property in some states that control what kind of funds an attorney can accept and disburse upon.

The best approach to understanding how the technology, laws and Bar Rules intersect is by reviewing some examples:

Alabama – a state that doesn't have any good funds law

For Alabama attorneys,[19] *Rule of Professional Conduct 1.15(d)* requires that the funds either be collected prior to disbursement from trust, or the lawyer may disburse upon uncollected funds but only if (s)he has a "reasonable and prudent" belief that the funds will be collected promptly, and also takes the risk upon himself/herself to replace the funds within five working days after notice of non-collection.

> ***Analysis:*** *It is most likely acceptable for title/settlement agents, including Alabama attorneys, to accept funds via RTP to their escrow/trust accounts and to disburse upon them immediately. Apply best practices in handling settlement funds.*

Arkansas – a state with a general good funds laws

For title/settlement agents, A.C.A. *§ 18-12-703* requires that the funds must be received and available for immediate withdrawal "as a matter of right" prior to disbursement, although the agent can advance up to $500 to pay for incidentals regarding the transaction.

For Arkansas attorneys, the Bar Rules are silent.

> ***Analysis:*** *Since RTP provides instantaneous, final and irrevocable funds, it is most likely acceptable for title/settlement agents, including Arkansas attorneys, to accept funds via RTP to their escrow/trust accounts and to disburse upon them immediately thereafter.*[20]

Indiana – a state with very specific, prescriptive good funds laws

For title/settlement agents, Burns Ind. Code Ann. *§ 27-7-3.7-4*[21] defines good funds as either U.S. currency, wired funds, certified or cashier's checks from financial institutions chartered under a state's law, a personal check of no more than $500, and some other very specifically described forms. Burns Ind. Code Ann. *§ 27-7-3.7-7* and *§ 27-7-3.7-8* generally require that the funds in the closing agent's escrow account be good funds before disbursement.

For Indiana attorneys, the Bar Rules are silent.

> ***Analysis:*** *It is most likely NOT acceptable for title/settlement agents, including Indiana attorneys, to accept funds via RTP to their escrow/trust accounts for disbursement because the law specifically defines good funds, for such purpose, and RTP is not included within that definition.*[22]

The examples above are provided for informational purposes only. While these examples are reasonably clear to understand, there are many other state laws and attorney Bar Rules which are both complicated and a challenge to interpret. We recommend that title/settlement agents and attorneys speak to their insurers prior to requesting and accepting any funds via RTP.

19. *Note that in many states, the rules regulating attorneys have similar directives akin to good funds laws which call for the deposit of certain types of funds before disbursement is allowed. Generally, these rules are usually found under the heading of "safekeeping" funds of clients of the Rules of Professional Conduct (RPC 1.15).*
20. *No provisions found in the Bar Rules regarding acceptability of specific types of funds for deposit in trust accounts upon which [immediate] disbursement may be made.*
21. *Note that there is Indiana Engrossed House Bill 1021 (First Regular Session of the 123rd General Assembly (2023)) pending, which will amend the definition of "good funds" pursuant to IC 27-7-3.7-4 if enacted.*
22. *No provisions found in the Bar Rules regarding acceptability of specific types of funds for deposit in trust accounts upon which [immediate] disbursement may be made.*

The Law and the Industry Lag Behind the Technology

At present time, it is anticipated that there will be a movement to revisit and modernize the good funds laws (and the attorney client-safekeeping rules) to align with RTP and the modern payment methods of this century. The American Land Title Association (ALTA) has published two papers developed by its Digital Process Impact Work Group regarding principles to consider when amending these laws, and best practices to apply when title/settlement agents consider accepting digital funds from customers. To summarize the Work Group's recommendations:

- Principles to consider for amending or modernizing good funds laws include:
  - » Transactions should be considered as a bank-to-bank transfer or deposit (such as that which would not be subject to the EFTA and Regulation E).
  - » "Funds should be directly linked to and transferred from the consumer's demand deposit account," and not sourced from the consumer's credit card, PayPal, Venmo, or any other non-fiat depository/bank account.
  - » Funds should be in U.S. dollars.
  - » Funds should move directly from the consumer's depository bank account (where held as traditional fiat currency) to the escrow account.
  - » Funds transfer must be final with no ability for claw back or reversal.
- Best practices for agents in regard to digital funds transfers include basically all of the principles listed above, as well as:
  - » Security features for the transfer of funds, such as end-to-end encryption; non-storage of consumer banking credentials; using technology vendors who hold a current SAE 16 Type 2 certification; and vetting the technology vendors to ensure they have adequate insurance coverage.
  - » "Take into account the acceptance capabilities of all parties to the transaction." In other words, if any of the consumer(s) to the transaction do not have the technical capability to participate, then the method is a "no go."

PSPs can also use RTP for the benefit of their non-commercial customers when both the PSP and the customer have accounts at TCH-RTP participating FIs. More information regarding this use case is discussed below in the next section entitled, "**Modern Payment Methods for Consumers**." The ALTA Work Group's recommendations discussed earlier, pertain equally well to the other payment mechanisms discussed in this paper.

MODERN PAYMENT METHODS FOR CONSUMERS

The first quarter of the 21st century has given rise to PSPs such as PayPal, Venmo, Square's Cash App, Apple Pay, Zelle, and Google Pay, to name but a few. These non-bank money transmitters[23] are now commonly used by individuals to purchase household consumer goods; to pay for local, small business services; and to transfer funds between individuals. They are implemented via apps or graphic user interfaces on websites, and they require internet access for facilitating the electronic device. They provide a new level of convenience – with the push of a button – in a touchless environment.

How PSPs Work

There are two broad categories of PSPs: deposit holding platforms and non-deposit holding platforms. A **deposit holding platform** means that all parties to the transaction have to use the same platform and its users have an option to transfer virtual funds among themselves while they are using the same platform. For example, both the sender of the money and the recipient of the money must have a registered account with PayPal, Venmo, Cash App, or Google Pay, and they can send money to each other, which can sit in their PSP account as a virtual user balance prior to (or rather than) transferring it into their bank accounts. Contrary to the deposit holding platform, a **non-deposit holding platform** does not hold virtual user balances on the platform, but instead transfers real funds directly between the users' bank accounts. Zelle is an example of a non-deposit holding platform.[24]

Generally, PSPs mainly rely upon ACH and the credit card networks to move money. Therefore, PSPs are constrained by those payment rail systems – referring to ACH and the credit card networks – and the laws applicable to them, such as the EFTA.[25] Let's look at the typical movement of funds via a **deposit-holding platform** PSP:

- The customer registers for a PSP account and connects the PSP account to either his/her bank account, debit card or credit card.
- If the sending customer's PSP account is connected to his/her bank account, the PSP pulls the funds out of it when the customer instructs the PSP (e.g., via the PSP's app) to send money; the pull is a debit transmission by ACH (see discussion regarding *"pushes" and "pulls,"* earlier on).[26]
- Once pulled, the sending customer's funds go into the PSP's pooling account (where it holds ***all*** of its sending customers' funds) at a FI, which funds can still be recalled by the sender because they were acquired and deposited into the PSP's pooling account via an ACH pull.
  - » Remember, an ACH is subject to EFTA and Regulation E, and is reversible under the federal law for the requisite amount of time; this is a consumer protection right which cannot be waived.
- When the PSP is a **deposit holding platform**, the intended recipient customer can opt to:
  1. let the virtual funds sit in the user's PSP account until needed for his/her future use (to send to someone else who uses the same PSP and can accept the virtual funds into his/her own PSP account), or
  2. have the virtual funds transferred from the user's PSP account into his/her own bank account as real funds by an ACH pull in due course, typically taking 1-3 business days for settlement, or

23. *Sometimes referred to as "Alternative Payment Providers," (APPs), or "Peer to Peers" (P2Ps). When referred to in statutes or regulations, they are called "money transmitters."*
24. *"VENMO MONEY, (VEN)MO PROBLEMS? HOW MONEY LAUNDERING PERMEATES PEER-TO-PEER PAYMENT PLATFORMS" by Rohena Rajbhandari, 63 B.C. L. Rev. 669, February 2022, pp. 687-688 and footnote 103.*
25. *The Clearing House Payment Company LLC's Request for Business Review Letter to Department of Justice - Antitrust Division, October 11, 2016, 2016 DOJBRL LEXIS 2.*
26. *For another example of how a PSP moves money when the sending user has connected his/her bank account to the PSP rather than a DDA account, see the example provided under the heading of "How Payment Service Providers Work" on the Tokenex webpage.*

3. have the virtual funds transferred from the user's PSP account into his/her own bank account as real funds *instantaneously via RTP with a with a push by the PSP – provided that a) the PSP is authorized to send funds via RTP by the RTP-participating FI*[27] *who holds the PSP's pooled funds,* ***and*** *b) the user/receiving customer has an account at an RTP-participating FI (which is essential in order to be able to accept a transfer via RTP).*

   » Typically, when option (3), above, is available, the PSP's app or website will ask the customer if (s)he wants the funds instantly,[28] and will normally charge the user/receiving customer for this expedited service.[29]

- Since the recall of funds *from the PSP's pooling account* is still available even after the PSP has transmitted the money to the receiving customer (whether via ACH or RTP), one of two things may occur ***if the funds were to actually be recalled from the PSP***:

1. The PSP will take on the risk and absorb the loss of any funds recalled by the sending customer from the pooling account (usually we might expect this to happen when the amount is relatively small); or

2. The PSP will turn back to the receiving customer and request a return of the funds, although it may first try to resolve the issue with the sending customer before asking the receiving customer for the money back (usually we might expect this to happen when the amount is relatively large). ***Since this option may be written into the fine print of the user's agreement with the PSP, it is critical that the customer know the terms and conditions of his/her agreement with the PSP.***

While most retail customers are familiar with using PSPs by way of a proprietary app or website platform owned and operated by the particular PSP, it is noteworthy to mention that for commercial users there is yet another option wherein a business customer can use the PSP's payment Application Programming Interface (API) to connect with RTP-enabled FIs. For example, the PSP, Dwolla, provides the source code to the business customer, and the business customer's engineering personnel facilitates the installation of the code within the business's app, thereby enabling the business to act much like a PSP, itself. Other PSPs offering similar business services include Stripe, WePay and PayPal Payments Pro, to name but a few popular ones; note that each PSP has its own unique features and no two are exactly alike.

Distinguishing Zelle from Other PSPs

While Zelle is often lumped with other PSPs, it is atypical and functions very differently. It is operated by Early Warning Services, LLC, which is a fintech owned by seven of the country's largest banks.[30] Both the sending customer and recipient customer must have bank accounts at participating FIs and must be enrolled users in the Zelle Network®. By inputting a phone number or email address into a mobile app, funds will typically be received within minutes, and the recipient will be notified by Zelle about the payment.[31]

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27. *For a PSP to facilitate an RTP transfer of funds, the PSP must hold an account at a TCH-RTP participating FI and the FI must sponsor the PSP (be responsible and jointly and severally liable for any violations of the PSP); the PSP must submit an application and get approval from TCH; and the PSP must perform annual certifications of compliance with TCH's requirements for PSPs. 2016 DOJBRL LEXIS 2, The Clearing House Payment Company LLC's Request for Business Review Letter to Department of Justice - Antitrust Division, October 11, 2016, P. 13. Also see TCH's RTP System Operating Rules (June 10, 2022) for the specific procedural requirements for a PSP to be able to transmit funds via RTP. "Do you want the funds instantly?" – or words to that effect are used - rather than "Do you want the funds via RTP?"*
28. *"Do you want the funds instantly?" – or words to that effect are used - rather than "Do you want the funds via RTP?"*
29. *According to a Payments Journal article "Real-Time Payments: Everything You Need to Know" published March 23, 2021, "instant transfers routed through the TCH RTP network became available on PayPal's Venmo in August 2019," and " … in February 2021, Early Warning Services and The Clearing House announced that Zelle transactions can officially be cleared and settled over the RTP network. Bank of America and PNC Bank were the first to send Zelle payments over the RTP network." See Venmo's Help Center's Instant Bank Transfer FAQ*
30. *See Early Warning Disbursements with Zelle Product Brief for information on participating FIs and corporate disbursements with Zelle.*
31. *Zelle® Person-to-Person Payments (P2P).*

While the funds moving through the Zelle Network have traditionally been settled via ACH, on February 25, 2021, Early Warning Services, LLC, and The Clearing House announced that "Zelle transactions can now be cleared and settled over the RTP network, enabling companies to send transactions with a customer's email address or mobile number without having to collect bank account information."[32] Bank of America and PNC Bank were the first to use the new Zelle and RTP integration capability, but it is unknown [to this author] which other FIs in the Zelle Network are currently taking advantage of this opportunity.[33]

To quote an article by Kevin Eaton, *Zelle Payments Now Able to be Cleared, Settled Over RTP Network*, published in the ABA Banking Journal Feb. 25, 2021:

> With the integration of Zelle and RTP, payments are sent to the RTP network based on information from Zelle and from Early Warning Services, and that information is used to send a payment to the receiving bank and they can immediately apply and immediately have settlement for [sic]," says TCH SVP Steve Ledford, adding: "It makes it into a single stream process as opposed to a couple streams and it all happens at once so there is nothing to reconcile, nothing to tie back across two different processes."

Good for Small Amounts

The amounts exchanged via these PSPs are typically small, and they all have set limits. For example, Venmo permits an unverified personal account user to spend up to $299.99 a week, but after identity verification it is possible that the user will be allowed to send up to $60K per week. Venmo provides the following caveat on its webpage:

> Limits are subject to periodic review and may be changed based on your Venmo Account history, activity, and other factors, including but not limited to, your Venmo Mastercard Debit Card activity. Venmo retains sole discretion to apply and change limits.[34]

PayPal, the owner of Venmo, may allow a transfer of up to $60K per transaction for a verified user at a cost of 3.49% plus $0.49 for processing.[35] However, PayPal also cautions that the user might be limited to $10K per transaction.[36] Zelle is usually used for transactions of between $1K – $5K, depending upon the limit set by the participating FI; the average Zelle transaction (according to data provided through the first quarter of 2021) is approximately $270.[37]

Analysis and Considerations for the Settlement Industry

PSPs were not designed to provide funds for an all-cash real estate sale transaction, but they may still be able to provide enough funds to cover an earnest money deposit (which would typically allow the funds a sufficient period of time to clear and settle prior to disbursing) or cash to close on a refinance transaction (which is subject under federal law to a 3-day rescission period, and therefore the funds would have at least three days to clear and settle),[38] ***if all other legal, technical, and practical requirements are met***:

- Legal compliance
  - Is the PSP/money transmitter licensed?[39]
  - Which money rail (e.g., ACH, RTP) does the money transmitter use?

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32. *ABA Banking Journal, "Zelle Payments Now Able to be Cleared, Settled Over RTP Network," by Kevin Eaton, February 25, 2021.*
33. *Id.*
34. *For the most up to date and reliable information regarding Venmo's payment limits, see Venmo's website Personal Profile Bank Transfer Limits, and Personal Profile Payment Limits.*
35. *This information was obtained by the author of this article during a phone conversation with a PayPal representative on June 21, 2022.*
36. *See PayPal's Help Centre regarding Sending Money.*
37. *See Dan Akivis's article "The State of Faster Payments in the U.S.," published on July 19, 2021, for data sourced from Zelle.*
38. *A buyer's down-payment (depending upon the purchase price and the terms of the sale and loan) is not included in the list of possibilities because it would require the money transmitter to be able to provide the funds for this purpose via RTP; at this time money transmitters can only provide RTP as a push from their digital wallets to the consumer's Demand Deposit Account (DDA) (bank account).*
39. *There is a federal registration requirement, as well as state licensing requirements for most states; there may also be local licensing requirements. See Wolters Kluwer's Money transmitter business license requirements (smart chart), published August 12, 2022.*

    - And will the good funds laws and Attorney Bar Rules of the jurisdiction allow these funds to be deposited into the escrow/trust account and disbursed?
        - Are the funds delivered in real time, or how quickly will they arrive? (instantaneous vs. fast)
        - Are the funds final and irrevocable?
  » Is the customer's confidentiality and privacy maintained?
    - For example, Venmo is also a social media app that will share information about a payment (i.e., from/to/amount/for) within the customer's social network unless the correct privacy setting is turned on. Sharing this information in the context of a real estate transaction is a vulnerability that increases the risk of fraud. To learn more about Venmo's privacy settings, see its *Payment Activity & Privacy* webpage.
  » Are the payment rails used by the money transmitter subject to the EFTA such that the funds can be pulled back?
    - What would happen to the settlement agent or attorney if the funds could be pulled back and actually were pulled back? Would the attorney making the deposit be at risk of violating a Bar rule in a jurisdiction where the Bar prohibits a bounce back?
    - Similarly, in this event, if the settlement agent were to disburse upon a deposit that was recalled, what penalties would the settlement agent suffer?
    - A bounce back/recall would put the escrow agent/attorney in financial harm's way; risk of recall puts him/her in the position of being a guarantor.
    - Could there be a state UDAAP violation if this situation occurred? (e.g., if the agent were forced to essentially provide the customer with an interest free loan to cover any disbursements issued on the amount that was recalled, would this be considered a "thing of value" given as a prohibited inducement for the customer's business?)
- Technical Compliance
  » Do both sender and receiver need to register for accounts with the same PSP platform? (e.g., both sender and recipient must have PayPal; both sender and recipient must have Venmo).
  » Some escrow accounts will not accept funds from a payment app (so for those, an interim transfer/suspense account would be needed).
  » Will the funds be transferred with appropriate security protocols (e.g., multi-factor authentication, encryption) to prevent risk of interception?
- Practical Considerations
  » FDIC insurance may not cover funds held by the PSP, so recourse for a loss by a PSP may only be against the PSP (or its estate), itself.
  » Does the money transmitter carry fraud protection insurance? Does it offer any kind of guaranty against loss?
  » What are the payment processing fees? Are they reasonable? Can they be passed along to the customer? Will this be an administrative burden for the agent?
    - Will the payment processing fees automatically be pulled out of the escrowed amount? That would be a problem. Can the fees be redirected to come out of the settlement agent's or attorney's operating account?

Florida Bar Ethics Advisory Opinion 21-2 is very instructive in its discussion regarding the factors to consider when an attorney contemplates the use of a PSP. The outline above attempts to incorporate those considerations, with the most important ethical issues being confidentiality and safeguarding the funds of clients and third parties.

PSPs That Market to the Title and Settlement Industry

There are also PSPs which specifically market themselves to the settlement services industry to offer convenient ways of transmitting earnest money funds. Presumably, these PSPs take into account the unique considerations for our industry (discussed earlier). However, it is best to conduct independent vetting of the PSP to ensure that it does, indeed, satisfy the legal, technical, and practical considerations.

The list of PSPs marketing to the industry, below, is not exclusive and there may be (and probably are) others about whom this author is not aware. Furthermore, this author does not endorse any particular PSP, but offers links to a few websites so that the reader can investigate, learn more, and determine the best PSP for his/her business needs in conjunction with outside professional advice and the guidance of his/her title insurer.

- *Paymints.io*
- *Earnnest*[40]
- *Payload Keybox*
- *Bank Shot*
- *Trust Fund Payment Processing for Law Firms*
- *Zoccam*
- *Modus*
- *Escrow.com*

CONCLUSION

Growing Pains

The modern payment mechanisms discussed in this article have the potential to revolutionize and improve our industry in numerous ways, including enabling the scheduling of closings beyond banking hours, greatly speeding up the transaction, and reducing the risk of wire fraud. In order to adopt and realize the benefits that these fintech advancements have to offer, as an industry we must work on developing ***all*** components of the infrastructure (e.g., legal, practical, and technical considerations) necessary to create a sustainable, effective and secure real estate settlement banking system. As individuals, we can support our industry's efforts by making sure that we are knowledgeable, keeping abreast of ALTA's newsletters, reading relevant articles, attending informative webinars, and getting involved in work groups. Let's lean in to embrace our future.

40. *See Tall Grass Title Blog discussing how it is using Dwolla through an intermediary called "Earnnest" to capture earnest money for buyers.*

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