

## ***XII. U.S. Real-Time Payments: Development and Policy Controversy***

### **A. Introduction**

Real-Time Payments (RTP) describe next-generation electronic payment networks through which payments are made in seconds as opposed to current, slower banking practices.<sup>1</sup> While many nations worldwide have adopted RTP, the United States has been slow to update its financial networks.<sup>2</sup> Financial institutions in the United States are now moving to adopt RTP systems, but regulation is still being developed.<sup>3</sup> In section B, this article will first explain how RTP networks function. Then, section C will discuss the potential benefits and negatives of RTP systems. In section D, this article will discuss the modern history of RTP in the United States, the emergence of the Clearing House's RTP Network, and the ongoing development of FedNow. Finally, section E will discuss the controversy over the Federal Reserve's intervention into the market for RTP systems.

### **B. What Are Real-Time Payments?**

RTP networks, called "rails," are generally "24x7x365," meaning they are always online and able to transfer.<sup>4</sup> RTP is also "open-loop," meaning that payments are directly connected to a personal account, instead of using a prepaid balance.<sup>5</sup> RTP networks use "ISO 20022," a globally accepted standardized financial messaging standard,

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<sup>1</sup> MARC LABONTE, CONG. RSCH. SERV., IN11147, REAL TIME PAYMENTS INITIATIVES, at 1 (2019) (introducing upcoming technological change in American banking systems).

<sup>2</sup> See Christian Hibbard, *What Are Real-Time Payments?*, ALACRITI (Jan. 22, 2021), [https://www.alacriti.com/what-are-real-time-payments/\[perma.cc/QLK4-NWJ7\]](https://www.alacriti.com/what-are-real-time-payments/[perma.cc/QLK4-NWJ7]) ("Current examples of RTP networks include ... UPI in India, Faster Payments in the UK, and PIX in Brazil.").

<sup>3</sup> See, e.g., Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,297 (proposed Aug. 7, 2019) (accepting and discussing comments for the eventual FedNow program).

<sup>4</sup> Hibbard, *supra* note 2 (discussing the technical terms that describe RTP systems).

<sup>5</sup> *Id.* ("RTP" refers to payment rails (platforms or networks via which payments are made) that ... [are] '[o]pen-loop'—this means the payments are connected directly to a personal account, rather than relying on a prepaid balance.").

providing richer, higher quality data than alternatives.<sup>6</sup> This data eases the resolution of errors, cuts processing delays, and provides greater security to users.<sup>7</sup> The term RTP should not be used interchangeably with the term “faster payments,” which merely describes faster versions of traditional payment rails.<sup>8</sup>

Currently, financial institutions use an automated clearinghouse (ACH) to facilitate transactions.<sup>9</sup> Essentially, a payment executed through ACH has three parts.<sup>10</sup> First, a payer starts a payment through an end-user service, like an app, which instructs the bank to make a payment.<sup>11</sup> Then, the bank sends a payment message containing payment details to the recipient’s bank through a payment system.<sup>12</sup> Finally, the payment is complete “when the two banks transfer the funds through a settlement system.”<sup>13</sup> In each transaction, these steps can end up being scattered amongst different third-party systems and providers.<sup>14</sup>

RTP networks speed up the payment process. RTP is a “push” system in that a payment is sent directly to the recipient’s account without a need to “pull” funds from the payer’s account.<sup>15</sup> Typically,

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<sup>6</sup> Kristen Jason, *ISO 20022: Why After 15 Years it’s More Important than Ever*, ALACRITI (Nov. 18, 2020), <https://www.alacriti.com/iso-20022-why-after-15-years-its-more-important-than-ever/> [perma.cc/2BSM-8B7B] (“ISO 20022 ... is estimated to be the defacto standard for high-value payment systems of all reserve currencies ...”).

<sup>7</sup> *Id.* (“[L]ess manual intervention is required, [making] compliance processes more accurate, and fraud prevention measures are improved.”).

<sup>8</sup> *Real-Time Payments: Everything You Need to Know*, PAYMENTS JOURNAL (Mar. 23, 2021), <https://www.paymentsjournal.com/real-time-payments-everything-you-need-to-know/> [perma.cc/G8RZ-42C7] (“Faster payments solutions, such as Nacha’s Same Day ACH, post and settle payments faster than traditional payment rails, but faster does not mean instantaneously”).

<sup>9</sup> Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,299 (proposed Aug. 7, 2019) (discussing the federal ACH system).

<sup>10</sup> LABONTE, *supra* note 1, at 1 (simplifying an ACH transaction to three steps).

<sup>11</sup> *Id.* (emphasizing that the payer and recipient only interact with the end-use service).

<sup>12</sup> *Id.* (describing intrabank payment messaging).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (“These parts could be divided between different systems, and different providers could compete with each other to provide each part.”).

<sup>15</sup> Judy Mok & Amy Schwartz, *The Effect of COVID-19 on Real-Time Payments*, 39 BANK. & FIN. SERV.’S POL’Y REP., Sept. 2020, at 1 (summarizing the process of an RTP transaction).

recipients receive payments within seconds of the payer's bank initiating the transaction.<sup>16</sup> Consequently, the sending bank cannot revoke a payment once authorized and submitted to the RTP network.<sup>17</sup> RTP rails also have end-to-end communication, connecting payments and payment data bilaterally instead of relying on outside forms of communication.<sup>18</sup> This is opposed to the historical practice of communication data only flowing one way from payer to payee.<sup>19</sup> Thus, RTP rails allow additional data to be contained within the transaction, instead of using third party communications which add lag time.<sup>20</sup>

Real-time systems are used all over the world, in various formats.<sup>21</sup> Most of these payment systems have been developed nationally and are often based on legacy systems, leading to a wide variety of non-standardized formats.<sup>22</sup> Current real-time systems can be characterized into three groups: "batch-based" systems, "store&forward" systems, and complete "end-to-end" systems.<sup>23</sup> In batch-based systems, banks have more interbank clearing occasions, allowing transactions to be settled in a few minutes and ensuring same-day delivery of payments.<sup>24</sup> These systems are largely built using legacy infrastructure with increased delivery speed.<sup>25</sup> In store&forward systems, transactions are placed in processing queues, with the phases of payment process occurring sequentially, but independently.<sup>26</sup> Finally,

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<sup>16</sup> *Id.* (depicting the speed at which recipients receive funds).

<sup>17</sup> *Id.* (qualifying that although the payment cannot be reversed, "there is a process to facilitate bank-to-bank communication around the return of funds.").

<sup>18</sup> Payment Journal, *supra* note 8 ("Real-time payments connect the payment with payment data together in a single transaction").

<sup>19</sup> *Id.* ("Historically, communication has flowed in one direction: from the payer to the payee.").

<sup>20</sup> *Id.* (finding that real-time payments reduce lag times caused by fragmented communications and a lack of transparency).

<sup>21</sup> See Harry Leinonen, *Fundamental competition and market practice impacts of real-time payments*, 11 J. OF PAYMENTS STRATEGY & SYSTEMS 1, 48–49 (discussing global implementations of RTP systems).

<sup>22</sup> *Id.* at 49 (finding that the global implementation of next generation payment systems varies greatly).

<sup>23</sup> *Id.* (categorizing real-time payment systems).

<sup>24</sup> *Id.* ("In batch-based systems, banks have increased interbank clearing occasions during the day so that transactions can be cleared and settled ... every minute or 15 minutes.").

<sup>25</sup> *Id.* (detailing how batch-based systems are built on top of existing infrastructure).

<sup>26</sup> *Id.* (finding these store&forward system to be generally based on a first-in-first-out principal).

in complete real-time end-to-end processing, transactional-level control is maintained by interlinked processes throughout the phases.<sup>27</sup> These fully-fledged RTP systems link processes through application programming interfaces, allowing a client to receive information on the progress of all transaction phases.<sup>28</sup> The difference between store&forward and end-to-end real-time processes is akin to the difference between email and instant messaging.<sup>29</sup>

### C. Positives and Potential Drawbacks of RTP

There are myriad benefits to using RTP systems. RTP allows for immediate payments, in addition to data exchange and transparency.<sup>30</sup> The faster payments can result in real economic benefits beyond speed and convenience; businesses and individuals can manage their money more flexibly.<sup>31</sup> RTP facilitates transparency and security by notifying the sender when funds have been delivered, allowing better transaction monitoring.<sup>32</sup> RTP can benefit many sectors in the United States. One use case for RTP is government stimulus actions. Using RTP, the government can send financial assistance nearly instantly to those in need.<sup>33</sup> By eliminating the paper checks used for tax rebates, tax processes could be streamlined, speeding tax collection and

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<sup>27</sup> *Id.* (describing end-to-end intrabank processes).

<sup>28</sup> *Id.* (“These processes are linked with what are known as application programming interfaces (APIs).”).

<sup>29</sup> *Id.* at 50 (“The difference between store&forward and end-to-end real-time processes can be illustrated by comparing e-mailing and instant messaging (‘chatting’).”).

<sup>30</sup> Mok & Schwartz, *supra* note 12, at 1. (“[R]ecipients [of RTP] typically receive payments within seconds of the sending bank initiating the transaction.”).

<sup>31</sup> Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,298 (proposed Aug. 7, 2019) (listing the benefits of RTP to the public).

<sup>32</sup> *Id.* (finding that the ability to send and receive payments instantly alleviates mismatches between the “time incoming funds are received and the time that spending needs arises,” allowing for consumers to better monitor their transactions).

<sup>33</sup> Christian Hibbard, *Why RTP, Why Now?*, ALACRITI (Feb. 22, 2021), <https://www.alacriti.com/why-rtp-why-now/> [perma.cc/57Z5-ZWCA] (finding that the most “emphatic case” for the use of “government accessible” RTP would have been the Covid-19 stimulus bill).

refunds.<sup>34</sup> Insurance companies and utilities that make regular disbursements can diminish their processing expenses through RTP, in addition to instantly transferring funds to a client's verified insurance claim.<sup>35</sup> Small businesses can benefit from RTP by closing sales and purchases in real-time, allowing funds to be used immediately.<sup>36</sup> For these businesses, receiving payments immediately may result in better management of cash flow.<sup>37</sup> Payroll can also be conducted more efficiently, and eliminate the float period between the handing out of checks and the actual deduction of funds.<sup>38</sup> Finally, lenders can also benefit from RTP by offering on the spot financing to entice prospective clients.<sup>39</sup> RTP may help individuals better manage their money, enabling some to avoid high-cost borrowing and penalties, like overdraft or late fees.<sup>40</sup>

However, RTP does have potential drawbacks. RTP is still susceptible to the fraud and scams that are perpetuated through other payment systems.<sup>41</sup> Once a payer "pushes" a transaction, the funds are out of the control of the payer and their bank.<sup>42</sup> In a fraudulent transfer, victims cannot reverse a payment, and banks have far less time to catch a fraud.<sup>43</sup> European RTP networks demonstrate that the systems are

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<sup>34</sup> *Id.* (predicting that RTP could streamline "every step of" an "arduous tax process", from collecting to refunding).

<sup>35</sup> *Id.* ("[I]nsurance disbursements [could] go out to people when they are in immediate need of assistance.").

<sup>36</sup> *Id.* (finding business have better growth trajectories when they can receive funds as soon as they close their sales).

<sup>37</sup> Actions to Support Faster Payments, 84 Fed. Reg. at 39,298. ("For a small business, the ability to receive payments immediately may result in better cash flow management.").

<sup>38</sup> Hibbard, *supra* note 33 (projecting that business funds could deduct immediately without needing to account for a float period).

<sup>39</sup> *See id.* ("A car loan provider could offer on-the-spot financing and request-for-pay.").

<sup>40</sup> Actions to Support Faster Payments, 84 Fed. Reg. at 39,298 (finding that RTP helps individuals avoid banking penalties by assisting in money management).

<sup>41</sup> Mok & Schwartz, *supra* note 15, at 2. (discussing the possible ways frauds may be perpetuated in RTP systems).

<sup>42</sup> *Id.* (framing the danger involved in "push"-only transactions).

<sup>43</sup> *Id.* ("Because RTP transaction are irrevocable, and because settlement happens in real time, victim cannot reverse a payment and the funds are usually long gone by the time the victim discovers the scam.").

susceptible to fraud and scams.<sup>44</sup> In 2018, push payment fraud increased 44 percent in the United Kingdom, and another 40 percent in the first half of 2019.<sup>45</sup> To illustrate, fraudsters often try to trick victims into sending funds to bank accounts controlled by the fraudster.<sup>46</sup> With RTP, once the payment is authorized, the funds appear in the fraudster's account in real time, allowing the fraudster to quickly transfer or withdraw the money.<sup>47</sup> Victims cannot reverse a payment because RTP transactions are irrevocable and settled in real time.<sup>48</sup>

RTP is also susceptible to account takeover scams, like other payment systems.<sup>49</sup> Fraudsters perpetrate these scams by using phishing along with other scams to acquire a victim's financial data.<sup>50</sup> This data is used to assume control of the victim's accounts, allowing the fraudster to push payments to their own account.<sup>51</sup> Account holders not actively monitoring their accounts may not even know their funds are being stolen until they are already transferred, given the speed at which RTP payments move.<sup>52</sup> RTP does have built-in fraud mitigation technology, but like all banking systems, it is not foolproof.<sup>53</sup> Victims have less time to prevent fraud, and banks have less time to screen for fraud.<sup>54</sup> Additionally, once the funds are transferred from the victims, fraudsters can quickly transfer the stolen funds through multiple accounts,

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<sup>44</sup> *See id.* ("Europe, which has had real-time payment systems for years, has shown that real-time systems are susceptible to fraud.").

<sup>45</sup> *Id.* ("In the United Kingdom, push payment fraud increased 44 percent in 2018. In 2019, it continued to climb, with a 40 percent increase in the first half of the year.").

<sup>46</sup> *Id.* (describing how fraud is perpetuating in RTP systems).

<sup>47</sup> *Id.* (emphasizing the speed at which fraud can occur in RTP).

<sup>48</sup> *Id.* (discussing the aftermath of an RTP fraud).

<sup>49</sup> *Id.* at 2. (raising the possibility of account takeover scams in American RTP systems).

<sup>50</sup> *Id.* ("[F]raudsters use phishing or other scams to mine for a victim's private financial data.").

<sup>51</sup> *Id.* (depicting the steps of an account takeover fraud).

<sup>52</sup> *Id.* (warning of rapid RTP fraud attacks).

<sup>53</sup> *Id.* ("Although RTP has built-in fraud mitigation technology, the technology is not foolproof.").

<sup>54</sup> *Id.* (discussing how fraud prevention in RTP is harder because the intense speed works against fraud mitigation tools).

stymieing efforts to trace and recover the money.<sup>55</sup> RTP in the United States will likely become a target for fraud as its usage increases.<sup>56</sup>

#### D. RTP in the United States

Support for RTP systems in the United States has been slowly building over time. In 2013, the Federal Reserve (Fed) launched the Strategies for Improving the U.S. Payment System (SIPS) initiative to foster a collaborative effort to envision improvements to the nation's payment systems.<sup>57</sup> Within this initiative, the Fed convened the Faster Payments Task Force (FPTF) to identify and evaluate approaches to implement safe, faster payments capabilities.<sup>58</sup> In 2017, the FPTF published consensus recommendations intended to help achieve a vision of ubiquitous faster payment capabilities in the United States.<sup>59</sup> The U.S. Treasury then recommended that the Fed move quickly to facilitate these RTP systems.<sup>60</sup>

Private RTP systems began launching following the Fed's recommendations.<sup>61</sup> The most significant of these systems is RTP Network. RTP Network was launched in 2017 by the Clearing House Payments Company L.L.C.<sup>62</sup> All federally registered depository institutions have access, either directly or through a third party service provider.<sup>63</sup> Presently, the RTP Network uses ISO 20022 to facilitate

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<sup>55</sup> *Id.* (“[O]nce stolen funds are in the RTP system, it is exponentially harder to recover them. Savy fraudsters can transfer stolen funds through multiple accounts in mere seconds, making it near impossible to trace and recover stolen funds.”).

<sup>56</sup> *Id.* at 3 (RTP is “gaining a foothold in the United States and ... as [it] becomes more mainstream, fraud attacks on [RTP] are likely to increase as well.”).

<sup>57</sup> Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,299 (proposed Aug. 7, 2019) (chronicling the history of federal action to update interbank payment systems).

<sup>58</sup> *Id.* (discussing the intention behind convening FPTF).

<sup>59</sup> *Id.* (describing the recommendations FPTF published).

<sup>60</sup> *Id.* (recounting that the U.S. Treasury recommended facilitation of faster payment systems, including RTP).

<sup>61</sup> *Id.* (discussing reaction to the Fed's RTP recommendations).

<sup>62</sup> Hibbard, *supra* note 4 (“Launched in 2017, RTP® Network was the first of its kind in the United States.”).

<sup>63</sup> *Id.* (explaining most financial institutions may need to use a third party service provider to gain access to the network).

communications.<sup>64</sup> In addition, the current cap for transactions in the network is \$100,000.<sup>65</sup> The Clearing House has invested \$320 million into its RTP Network and is currently campaigning to encourage businesses and banks to join and upgrade their own technology in order to use the system.<sup>66</sup> The Clearing House expects to reach ninety percent of its customer accounts by the end of 2021.<sup>67</sup>

In August 2019, the Federal Reserve Board announced FedNow, a service providing interbank clearing and settlement, enabling funds to be transferred from a sender to a receiver in near real-time any day of the year.<sup>68</sup> FedNow is planned to begin operating in 2023, alongside The Clearing House's RTP Network.<sup>69</sup> The FedNow Service will be available to all depository institutions in the United States.<sup>70</sup> Like RTP Network, FedNow will be designed with uninterrupted 24x7x365 processing.<sup>71</sup> Additionally, FedNow will use

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<sup>64</sup> Jason, *supra* note 6 (“The Clearing House RTP network was the first new central clearing and settlement system introduced that adopted ISO 20022.”).

<sup>65</sup> Hibbard, *supra* note 4 (“The current cap for an RTP® transaction is \$100,000, with lower limits sometimes set by connected institutions.”).

<sup>66</sup> Lynne Marek, *The Clearing House nudges businesses to buy into real-time system*, PAYMENTS DIVE (May 14, 2021), <https://www.paymentsdive.com/news/clearing-house-real-time-system/600184/> [perma.cc/K694-FNAZ] (“The Clearing House has invested \$320 million in creating a U.S. real-time payments network, and now it wants businesses to step up and invest in their own technology to use the system. To persuade businesses of the network's billing promise, the CEOs of 23 big banks that own The Clearing House issued a letter May 5, underscoring their commitment to completing the project.”)

<sup>67</sup> *Id.* (“The real-time system currently reaches about 60% of customer accounts, and The Clearing House expects that percentage to rise to about 90% by the end of this year.”).

<sup>68</sup> LABONTE, *supra* note 1, at 1 (“On August 5, 2019, the Fed announced plans to introduce FedNow, ‘a new interbank 24x7x365 real-time gross settlement service with integrated clearing functionality to support faster payments in the United States.’”).

<sup>69</sup> *FedNow<sup>SM</sup> Service*, BD. OF GOVERNORS OF THE FED. SYS. (Apr. 28, 2021), [https://www.federalreserve.gov/paymentsystems/fednow\\_about.htm](https://www.federalreserve.gov/paymentsystems/fednow_about.htm) [perma.cc/U5LN-NCPZ] (advertising that FedNow is expecting to launch in 2023).

<sup>70</sup> *Id.* (“The FedNow Service will be available to depository institutions in the United States.”).

<sup>71</sup> *See id.* (“FedNow Service will operate 24/7, 365 days a year, and all financial institutions eligible to hold accounts at Reserve Banks will have access.”).

ISO 20022 in its payment rails.<sup>72</sup> The Federal Reserve accounting records will report end-of-day balances for each participating depository institution.<sup>73</sup> FedNow will provide access to intraday credit under the same terms as other Federal Reserve services.<sup>74</sup> FedNow is also planned to include a liquidity management tool, enabling participants to transfer funds to each other to support liquidity needs.<sup>75</sup> Estimated to begin in 2023, FedNow will roll out in waves.<sup>76</sup> The initial release will include optional features such as fraud prevention tools, requests for payment capability, and tools that support handling of payment inquiries.<sup>77</sup> Potential fee structures and governing terms have not been announced.<sup>78</sup>

The Fed believes that operating FedNow alongside private-sector services is most likely to create a payment infrastructure with nationwide reach.<sup>79</sup> It argues that the Federal Reserve has long played a key operational role in the nation's payment systems.<sup>80</sup> Furthermore, the Fed has the "unique ability, as the nation's central bank to provide interbank settlement without introducing liquidity or credit risks."<sup>81</sup> The Fed also believes that if it did not act and create FedNow, the Clearing House's RTP Network would likely be the sole provider of RTP services.<sup>82</sup> Based on analyses and comments, the Fed believes that a monopoly on RTP will not connect the numerous smaller banks needed

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<sup>72</sup> Janson, *supra* note 6 ("The US Federal Reserve Bank has announced that it will also adopt ISO 20022 for its new FedNow payment rails.").

<sup>73</sup> FedNow<sup>SM</sup> Service, *supra* note 69 (outlining the basic services FedNow will offer to banks).

<sup>74</sup> *Id.* (describing expected credit processes).

<sup>75</sup> *Id.* ("The tool will enable participants in the FedNow Service to transfer funds to one another to support liquidity needs related to payment activity in the FedNow Service.").

<sup>76</sup> *Id.* (describing the launch process of FedNow).

<sup>77</sup> *Id.* (listing additional features of FedNow).

<sup>78</sup> *See id.* ("Other aspects of the service, such as fee structures and governing terms, will be announced prior to the launch of the service.").

<sup>79</sup> Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,300 (proposed Aug. 7, 2019) (finding that operating FedNow alongside private-sector services would provide "infrastructure" for "efficient faster payments" in the United States).

<sup>80</sup> *Id.* at 39,298 (describing the historical role of the Federal Role in the national banking system).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 39,300 (finding significant policy implications if RTP Network remains the only RTP system).

for nationwide reach.<sup>83</sup> In addition, anticompetitive behavior and monopolistic practices may result if RTP Network remains the sole provider of RTP.<sup>84</sup> Thus, the Federal Reserve believes that a federal solution is required to encourage competitive behavior and reach more widespread national adoption of RTP systems.<sup>85</sup> On January 25, 2021, the Fed announced the FedNow Pilot Program, with over 110 participants.<sup>86</sup> This pilot supports development, testing, and adoption of FedNow.<sup>87</sup> Pilot participants reflect a diverse group of organizations from all over the nation.<sup>88</sup> These participants attend two sessions each month as part of a curriculum on the FedNow Service, and also collaborate to provide feedback; later this year they will begin planning the testing phase of the program.<sup>89</sup>

### **E. Policy Disagreement Over Federal RTP Intervention**

Disagreement exists over the Fed's moves into the RTP market. The Fed justifies the creation of FedNow as covering costs in the long run, yielding clear public benefits; it also argues that private services

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<sup>83</sup> *Id.* (“Based on its analysis and comments received in response to the 2018 Notice, the Board expects that a single private-sector provider of such services is unlikely to connect to the thousands of small and midsize banks necessary to yield nationwide reach, even in the long term.”).

<sup>84</sup> *Id.* (“[A] single provider of RTGS services for faster payments without competition is likely to create undesirable outcomes for pricing, innovation, service quality, and reach.”).

<sup>85</sup> *Id.* (believing multiple RTP services will lead to lower prices, greater service quality, and national access).

<sup>86</sup> *Announcing the FedNow<sup>SM</sup> Pilot Program participants*, THE FEDERAL RESERVE, <https://www.frbservices.org/financial-services/fednow/community/news/012521-announcing-pilot-program-participants.html> [perma.cc/3N8W-JGG4] (announcing the makeup of the FedNow community).

<sup>87</sup> *Id.* (“The program will support development, testing and adoption of the FedNow Service, as well as encourage development of services and use cases that leverage FedNow functionality.”).

<sup>88</sup> *Progress Update: FedNow<sup>SM</sup> Pilot Program*, THE FEDERAL RESERVE, <https://www.frbservices.org/financial-services/fednow/blog/progress-update-fednow-pilot-program.html> [perma.cc/XS3H-UYE3] (announcing that the pilot program involves organizations of all sizes, geographical locations, and market sizes).

<sup>89</sup> *Id.* (defining the structure of the pilot program).

acting on their own cannot offer a comparable service.<sup>90</sup> Because of the likely high total cost of bringing FedNow to the market, the Fed stresses that although FedNow will pay for itself, it expects to only fully recover costs over a longer time period than the typical ten-year recovery time that the Fed uses in its programs.<sup>91</sup> However, some fear that FedNow will interfere with private sector RTP developments, and argue that it is an inefficient use of funds.<sup>92</sup> When the Federal Reserve Board voted whether to create FedNow, Vice Chairman for Supervision Randy Quarles dissented.<sup>93</sup> Vice Chairman Quarles argued that he does not see a strong justification for Federal Reserve action when private sector alternatives are innovating and creating viable systems.<sup>94</sup> Some concur, believing that FedNow is an example of government overreach, undercutting the banks that have invested in the Clearing House's system.<sup>95</sup> Others argue that without FedNow, private RTP may result in monopolistic and anticompetitive behavior, harming the financial institutions accessing the RTP network and their customers.<sup>96</sup> For example, the Independent Community Bankers of America argue that The Clearing House cannot solely own and operate the nation's payment

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<sup>90</sup> LABONTE, *supra* note 1, at 5 (emphasizing that the “clear public benefit” of FedNow in providing liquidity and operational continuity is unparalleled in the private sector because of the Fed’s infrastructure).

<sup>91</sup> Federal Reserve Actions to Support Interbank Settlement of Faster Payments, 84 Fed. Reg. 39,297, 39,313 (proposed Aug. 7, 2019) (“Given these considerations, the Board believes that the 10-year period used to evaluate cost recovery for mature services is an inappropriate standard for evaluating the long-run cost recovery of a new service similar to the FedNow Service”).

<sup>92</sup> *Id.* (considering comments which argue that private sector RTP is on course to achieve national reach).

<sup>93</sup> *Facilitating Faster Payments in the United States: Hearing on Examining the Current State and Evolution of the U.S. Payments Ecosystem and How the Current Payments System Works or Could Be Improved before the S. Comm. on Banking, Hous., and Urb. Aff.’s*, 116<sup>th</sup> Cong. 2 (2019) [hereinafter *Hearing*] (statement of Sen. Mike Crapo, Chairman, S. Comm. on Banking, Hous., and Urb. Aff.’s) (“The lone dissenter was Vice Chairman for Supervision Randy Quarles”).

<sup>94</sup> *Id.* (believing that Federal intervention will “crowd out innovation when viable private sector alternatives are available”).

<sup>95</sup> Review & Outlook, *Jay Powell’s Public Option*, WALL. ST. J., Aug. 3, 2019 at A12 (arguing that the Fed’s zero-cost capital could undercut the Clearing House).

<sup>96</sup> See, e.g. *Hearing, supra* note 93, at 8 (statement of Robert A. Steen, Chairman and CEO, Bridge Community Bank) (“Only the Fed can guarantee competition and choice”).

system, strongly supporting the decision to create FedNow.<sup>97</sup> Both houses of Congress have held hearings on RTP and FedNow.<sup>98</sup> At a Senate hearing in 2019, Robert Hunter, Executive Managing Director and Deputy General Counsel of the Clearing House, expressed concerns that FedNow may hinder the potential of RTP Network.<sup>99</sup> Hunter, and by extension The Clearing House, believes that in competing with private RTP systems, the Fed must act in a “manner that minimizes the competitive advantages that a Government system would have, both inherently and as a direct byproduct of the Fed’s role as supervisor, the supplier of liquidity to the financial system, and the central bank.”<sup>100</sup> Arguing against the Fed’s assertion of market efficiency through competition, The Clearing House believes that interoperability between FedNow and RTP Network is not achievable, which may lead to a bifurcated market, generating inefficiencies.<sup>101</sup> To achieve its high speeds, RTP Network can only be used if both the sending and receiving banks are on the network.<sup>102</sup> In essence, a payment cannot push from a FedNow user to an RTP Network user.

The Clearing House stresses that it does not seek to operate at a profit and that its objective is to provide the most effective and efficient RTP system to the benefit of the national economy.<sup>103</sup> Smaller banks do not fully trust the Clearing House’s assertions and market power.<sup>104</sup>

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<sup>97</sup> *Id.* (“The U.S. does not need another closed-loop payment system in which some financial institutions can participate and others are excluded”).

<sup>98</sup> *See id.*; *The Future of Real-Time Payments: Hearing before the Task Force on Fin. Tech. of the H. Comm. on Fin. Serv. ’s*, 116<sup>th</sup> Cong. (2019) (holding a hearing similar to the Senate hearing on RTP and FedNow).

<sup>99</sup> *Hearing, supra* note 93, at 7 (statement of Robert Hunter, Executive Managing Director and Deputy General Counsel, The Clearing House Payments Company) (“The Clearing House is concerned that the Fed’s actions may hinder The Clearing House in achieving the full potential of the RTP network”).

<sup>100</sup> *Id.*

<sup>101</sup> *Hearing, supra* note 93, at 51 (prepared statement of Robert Hunter, Executive Managing Director and Deputy General Counsel, The Clearing House Payments Company) (finding that two non-interoperable RTP systems will lead to a bifurcated market and “balkanization”).

<sup>102</sup> *Id.* (explaining that unlike traditional ACH, RTP’s transmission of the message and final payment happens immediately and simultaneously—thus, requiring the sending and receiving bank to be on the same system).

<sup>103</sup> *Id.*

<sup>104</sup> *See, e.g., Hearing, supra* note 93, at 8 (statement of Robert A. Steen, Chairman and CEO, Bridge Community Bank) (believing that the Fed and not

Robert Steen, representing the Independent Community Bankers of America, commented that The Clearing House's pledges sound like "Trust us. We won't behave like a monopoly as long as we can be a monopoly."<sup>105</sup> Steen also raises the troubling risk of a systemic failure if the U.S. is limited to one RTP system and that system was then disrupted.<sup>106</sup>

## F. Conclusion

The status of RTP networks in the United States is in a constant state of change. New technology brings new problems. The Fed and the Clearing House will need to be vigilant in preventing fraud, as banks may be ill-equipped to defend against the speed of fraud in RTP. Before FedNow begins operating, the Fed will need to provide a more concrete answer on the interoperability between the RTP rails. The Clearing House is currently touting the technological benefits and transactional efficiency gains inherent in RTP to banks and consumers.<sup>107</sup> As it expands, its use will grow as more and more banks join the network and promote it to their own customers. However, FedNow is currently in the works, gaining input from financial institutions all over the nation. Once the Federal Reserve finalizes FedNow and announces its pricing structures and operational processes, its impact will be more readily assessable. However, when FedNow goes into effect in 2023, RTP Network will likely have a solid grasp on the market. The Fed will need to work with the private sector to ensure that these networks truly are efficient and benefit the public.

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the Clearing House will be the best partner in maintaining and operating a "neutral real-time settlement network").

<sup>105</sup> *Id.* at 54.

<sup>106</sup> *Id.* at 55 (observing system risks that may result if a monopoly controls RTP in the U.S.).

<sup>107</sup> *Hearing, supra* note 93 at 52 (prepared statement of Robert Hunter, Executive Managing Director and Deputy General Counsel, The Clearing House Payments Company) ("We are working hard to bring the benefits of the RTP network to all of the banks in this country ...").

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