BEFORE THE GRAND RETHINKING: FIVE THINGS TO DO TODAY WITH PAYMENTS LAW AND TEN PRINCIPLES TO GUIDE NEW PAYMENTS PRODUCTS AND NEW PAYMENTS LAW

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INTRODUCTION AND SUMMARY

Not so long ago, consumers were asked if they would like to pay by "cash, check, or credit." That choice was simple: cash for privacy and immediate payment, a check for the security of not carrying cash and the safety of not-quite immediate payment, and credit for later payment. Today, a dizzying array of payment methods and a variety of associated legal rules mean that a consumer could take longer making a truly informed decision about how to pay than in selecting the goods or services to be paid for. The appropriate policy response is to broaden certain existing consumer protections to apply to all non-cash payments. This can be done now with a simple set of amendments to several federal payments statutes. Consumers should not have to wait for a broader grand rethinking or harmonization of payments law.[1] Harmonization should not even be attempted unless the purpose and result are to harmonize to high standards of consumer protection and the harmonization drafting process can withstand industry pressure.

The essential pieces of payments law are already in place. Those pieces fail to fully protect consumers primarily because they do not apply

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1. Some have suggested that a rethinking could be facilitated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), but the NCCUSL process poses high barriers to effective consumer participation. *See* Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L.J. 631, 632, 640–41 (2001).

to all types of non-cash payments. The new technologies and the new uses of existing technological platforms do not fit neatly into the legal categories used by existing consumer protection statutes. A contributing factor in the failure of consumer protection in payments is the "hands off" approach of federal financial institution regulators, at least until after a problem becomes the subject of public outcry, law enforcement activity by another governmental entity, or the media spotlight.[2]

Five changes in existing federal consumer protection statutes or their implementing regulations will create a new baseline for consumer protection in non-cash payments. Those five changes are:

1. **Provide equal, strong loss caps and a guaranteed recredit time period after unauthorized use for all plastic and other non-cash, non-check payment devices.** Amend the Electronic Fund Transfer Act (EFTA) to reduce the consumer loss cap so that it never exceeds $50 and amend the EFTA or Regulation E to clarify that all types of plastic, including the "bank account in your pocket"[3] card for the unbanked, will receive the same consumer protections as debit cards linked to ordinary checking accounts. Unambiguous application of the EFTA would provide dispute resolution, loss caps, and a definite

2. *See, e.g.*, Letter from Barney Frank, Chairman, Comm. of Fin. Serv., & John Dingell, Chairman, Comm. on Energy and Commerce, to Ben S. Bernanke, Chairman of the Fed. Reserve Bd. et al. (May 11, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.051107.Congress.consumer.protection.pdf (stating in part: "Despite this clear authority, formal rule writing by the agencies against abusive financial practices has been nearly non-existent, and consumers continue to suffer as a result" of subprime mortgage lending); *see also* Cheyenne Hopkins, *OTS Offers Up a Definition of Deceptive*, AM. BANKER, Aug. 6, 2007, at 1. In the payments area, the Office of the Comptroller of the Currency (OCC) waited until three years after California's groundbreaking statutory restriction on retailer gift card fees before issuing its non-binding gift card circular advising national banks simply to make full disclosure of post-gift card purchase fees. *See* CAL. CIV. CODE § 1749.5 (West Supp. 2003); COMPTROLLER OF THE CURRENCY, OCC BULL. 2006-34, GIFT CARD DISCLOSURES: GUIDANCE ON DISCLOSURE AND MARKETING ISSUES 1 (2006), *available at* http://www.occ.treas.gov/ftp/bulletin/2006-34.doc. In August 2007, the Federal Trade Commission announced enforcement action to stop the unauthorized debiting of consumer's bank accounts for fees associated with the set up of bank-issued spending cards, which are marketed and sold by non-banks. *See* Press Release, Fed. Trade Comm'n, FTC Stops Prepaid Stored-Value Card Sellers From Improper Debiting (Aug. 7, 2007), *available at* http://www.ftc.gov/opa/2007/08/edebit.shtm. Banks issue these cards. Where were the bank regulators?

For additional examples of federal regulatory agency inaction on a variety of consumer issues, see *Improving Federal Consumer Protection in Financial Services—Consumer and Industry Perspectives: Hearing Before the H. Comm. on Fin. Serv.*, 110th Cong. 5–8, 32–55 (2007) [hereinafter Statement of Plunkett] (statement of Travis B. Plunkett, Legislative Director, Consumer Fed'n of Am.).

3. Stored-value debit cards are not linked to a traditional bank account. The consumer makes a prepayment, or arranges for direct deposit of wages or other funds, and then uses the card as a debit card for cash withdrawals and point-of-sale transactions. Consumer Federation of America's Jean Ann Fox has called this type of card "[t]he bank account in your pocket." Telephone Interview with Jean Ann Fox, Director of Consumer Protection, Consumer Fed'n of Am. (July 2007).

time period for recredit to all payment devices that are marketed or used as bank account substitutes or that hold funds in amounts significant to household finances.

2. **Provide equal, strong billing error rights for all plastic and competing forms of payments.** Amend the EFTA to add a chargeback right for all debit cards, including prepaid debit cards, similar to the chargeback right in the Fair Credit Billing Act (FCBA) for credit cards, and amend the FCBA to cover other new payment mechanisms that place a charge on an account bill. These two changes would provide chargeback rights for all forms of debit payments and for all payments in which the charge flows directly through to an account bill, such as a cell phone bill.

3. **Extend the EFTA right of recredit to all checks, or at least to all checks that are processed electronically in any respect.** This change could be accomplished by amending the EFTA to eliminate its exclusion for checks. The effect would be to extend the EFTA right of recredit to all checks processed in whole or in part by electronic means. At the same time, the EFTA ten business day time period should be reduced to a more sensible time period of three or five days.

4. **End the check hold problem.** Modernize check hold law by counting Saturdays toward the check hold period; doubling the $100, $400, and $5,000 thresholds; bringing non-local "on-us" checks under the shorter hold time applicable to local "on-us" checks; and reducing the fifth business day time period for non-local check holds.

5. **Eliminate practices that deprive consumers of control of their accounts or that increase the risk to consumers of using traditional deposit accounts.** These practices include the remotely created check, high to low check processing, and fees for loans to cover overdrafts under so-called "bounce protection" or "courtesy overdraft" programs. These practices increase fees, contribute to the growing feeling that consumers are losing control of their accounts, and increase the cost of participating in the traditional banking system.

Part I describes the mess consumers face in the payments marketplace. It discusses how the consumer's rights in the event of a problem depend upon both the consumer's choice of payment method and the processing choices of the merchant and the financial institutions in the payments processing chain. Part II describes a set of five immediate changes in federal law to address the major consumer problems and ambiguities in payment law. Part III offers ten principles that consumers, businesses, regulators, and legislators should use to evaluate existing and future payments methods, regulations, and laws.

I. THE MESS IN PAYMENTS

Online and offline, the methods that consumers use to pay and how those payments are processed affect the consumer's ability to get his or her money back in a timely fashion if, for example, the goods are not delivered as ordered, the payment information is stolen and misused, the payment is processed twice or for the wrong amount, or the payment order itself was never authorized by the consumer. For example, a consumer who pays by credit card for an Internet purchase has a legal right to dispute the charge if the goods do not arrive, or if the goods that do arrive are not what the consumer ordered. A consumer also can dispute an unauthorized credit card charge without paying it and without any other adverse financial consequences. By contrast, a consumer who pays by debit card or through an online payment service linked to a checking account does not have a statutory right to reverse the charge because of a problem with the delivery or the nature of the goods or services. Consumers who pay by debit card or by an Automated Clearing House (ACH) debit also face a practical problem in the event of an unauthorized charge or a charge for the wrong amount, because the funds have been removed directly from the consumer's checking account and are missing during the time that the consumer is disputing the charge—a time period which can be up to a statutory maximum of ten business days after the unauthorized charge is reported. These consumers also face a tiered system of potential losses rather than a blanket dollar cap.

Debit card consumers do have some important protections, including a loss cap, albeit with tiers, and a right to a prompt return of funds in unauthorized transactions under the EFTA. However, some cards that look like debit cards are not covered by the EFTA; for others, the coverage is at best ambiguous. Those debit-paying consumers who are covered by the EFTA are significantly better off than consumers who write an old-fashioned check, unless the merchant who receives the check chooses to convert it into an ACH payment or the check is processed electronically and the consumer's bank chooses to create and return a special type of copy of the check called a "substitute check."[4]

If a consumer pays by pushing a button or sending a text message on a cell phone, a technology which is coming fast to the U.S.,[5] which of these legal categories and sets of protection apply? Does it make any sense that the answer to that question may depend upon how the "pay by cell phone" product is set up on the back end?

A. How Lost Are We? The Payments Maze

Consumers want assurances about simple questions such as:

- Is my money safe before I spend it?
- How much could I lose if something goes wrong?
- Is my money safe while I am spending it?
- If someone else makes a mistake, will I get my money back promptly?
- If the merchant does not deliver the goods I ordered, can I stop or reverse the payment?
- Will my money disappear in fees before I have a chance to spend it?

Payments law now answers each of these questions with yes, no, and maybe, depending on what payment method is used and how the individual payment is processed after it leaves the consumer's hands. The main sources of law covering credit cards, debit cards, and checks provide different answers to these questions. For some payment products, it can be difficult to determine which category of law applies. Other types of payments are not covered by any of these available sources of law, or coverage is dependent on product characteristics that are not evident to the consumer.

4. *See infra* "How much could I lose if something goes wrong?" Part I.A.2, and "If someone else makes a mistake, will I get my money back promptly?" Part I.A.3.

5. Cell phone banking is already happening in other parts of the world. For a discussion about the issues in South Africa, see Brian Richardson, WIZZIT, Len Pienaar, First Nat'l Bank, and Andrew Lake, MTN Banking, Panel Discussion at the Finmark Forum: The Cell Phone Banking Wars—Battling for Control of the SA Mass Market (Oct. 5, 2005), *transcript available at* http://www.finmarktrust.org.za/forums/Presentations/powerpointfiles/2005/FTranscript_CellWars.pdf.

1. Question: Is my money safe before I spend it?[6]

Consumer Expectation: No one is permitted to take money out of my account or make charges with my payment device unless I authorize it, and only in the amount I authorize.

What the Law Calls It: Protection against unauthorized charges and unauthorized debits.

When You Have the Protection: Never, in the sense that payment orders and payment devices can be stolen or counterfeited. With credit cards and, to a lesser degree, with electronic debits, there are partial protections in the form of statutory rights after an unauthorized charge or an unauthorized removal of funds. Consumers face a special practical risk for any payment mechanism that authorizes a debit directly to a demand deposit account or to a debit card balance. An unauthorized debit that draws directly from an existing account or deposit can significantly disrupt household finances, even where there is a clear legal right to and timeframe for the return of the funds.

Consumers who have a credit card on which they do not carry a balance from month to month have a simple, low cost way to protect themselves from the risk of an unauthorized charge—they can pay by credit card. Unlike with an unauthorized debit to an account or other existing balance, an unauthorized credit card charge does not involve missing funds owed to the consumer. The more than half of consumers who carry a credit card balance,[7] however, must face high interest costs associated with carrying a credit card balance in order to obtain more favorable consumer protection with respect to unauthorized charges.

Consumers who pay by traditional debit card—that is, a debit card linked to an account held in a financial institution in the name of the consumer—will be protected indirectly through the right to a prompt return of

6. This article addresses the issue of safety of funds from thefts and error. As non-bank entities become increasingly important in a variety of payment mechanisms, there are also questions about whether funds are being held outside the banking system, and if so, whether those funds are at risk in the event of the financial insolvency of a non-bank holder of such funds. Even when funds are insured, if they are held in the name of the third party, there are interesting and serious questions about whether consumers seeking to recover those funds in the event of holder insolvency might find that the consumer's claims are junior to the claims of the secured creditors or of the employees of the fund-holding non-bank entity. This important concern is outside the scope of this article.

7. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 32 (2006), *available at* http://www.gao.gov/new.items/d06929.pdf.

the funds that were withdrawn in an unauthorized electronic fund transfer. This right is discussed in the next two sections, which address the amount of the potential loss, the types of debit cards that receive this protection, and the types of debit cards for which the existence of the protection is murky at best.

2. Question: How much could I lose if something goes wrong?

Consumer Expectation: When someone takes money out of my account or makes a charge with my payment device which I have not authorized, there should be a low dollar cap on the amount I can lose before I discover and report the problem.

What the Law Calls It: Consumer liability cap.

When You Have the Protection:

- Credit cards: Clear limit of $50.[8]
- Debit cards linked to an asset account: Tiered statutory limits of $50, $500, or unlimited consumer liability, under the EFTA. The time to report is two business days from discovery of the loss or theft of an access device and sixty days from appearance of the unauthorized charge on a statement, with extensions for extenuating circumstances.[9] Visa and MasterCard rules provide addi-

8. 15 U.S.C. § 1643(a)(1)(B) (2000). Issuers often voluntarily waive this liability. The liability will be less if the amount of the unauthorized charge before the consumer reports the loss or theft is less, and it will be zero if the card issuer fails to meet certain conditions: the card must be accepted, there must be a means to identify who is authorized to use the card, and notice of the liability limits must have been provided. Truth in Lending (Regulation Z), 12 C.F.R. § 226.12(b)(2)(i)–(iii) (2007).

9. The consumer is not liable for unauthorized electronic fund transfers under the EFTA unless an accepted card or other means of access was used. 15 U.S.C. § 1693g(a). Where a card or other means of access which had been accepted by the consumer is used to initiate an unauthorized electronic fund transfer, the EFTA permits the consumer to be held responsible for certain amounts if the card or other means of access provides for a means to identify the user of the card. *Id.* The loss to the consumer is capped at the lesser of the amount taken or $50. 15 U.S.C. § 1693g(a)(1)–(2). This amount can go up to $500 if the consumer does not report the loss or theft of an access device within two business days of discovery, with a longer time for extenuating circumstances, but only if the financial institution establishes that the loss would have been avoided by timely reporting. 15 U.S.C. § 1693g(a). If the consumer does not report an unauthorized fund transfer that appears on a statement provided to the consumer within sixty days (or longer for extenuating circumstances), and the financial institution establishes that the loss would not have occurred if the report had been timely, *then the consumer's potential loss is not limited by the statute*. *Id.*

tional voluntary protection, but contain very significant loopholes in coverage.[10]

- Debit to an asset account without the use of a card or other means of access previously accepted by the consumer: The EFTA provides a dual set of statutory limits: first zero, then the liability is unlimited (up to the amount in the account plus in any linked account or overdraft coverage) if the consumer does not report an unauthorized transfer that appears on a statement provided to the consumer within sixty days (or longer for extenuating circumstances) and the financial institution establishes that a subsequent loss would not have occurred if the first loss had been timely reported.[11]
- Check: The consumer's potential loss ranges from none to all. A consumer is not responsible for an unauthorized check unless that check is one of a series, in which case comparative negligence may apply.[12] However, there is no statutory requirement for prompt return of funds. A consumer may have to sue the bank or bring an arbitration action to recover funds, which is impractical for most consumer check disputes.
- Employer-arranged payroll card: The cardholder is protected the same as for a debit card linked to a traditional bank account, unless the card is issued for a one-time wage payment rather than for periodic payments.[13] If the card is branded by Visa or

10. *See infra* Part II.A.

11. 15 U.S.C. § 1693g(a).

12. The Uniform Commercial Code authorizes a bank to charge an account for items that are "properly payable." U.C.C. § 4-401(a) (2005). An unauthorized check is not properly payable, with the implication that it therefore cannot be charged to the account. The comments to section 4-401 point out that a forged check is not properly payable. *Id.* § 4-401 cmt. 1. The account holder may be stopped from asserting an unauthorized signature or an alteration under section 4-406, but only if the account holder fails to discover and notify the bank within one year, or fails to examine with reasonable promptness a statement made available to the account holder if the bank suffers a loss due to the failure to report. *Id.* §§ 4-406(f), 4-406(d)(2). If the customer failed to meet its duties but the bank was negligent in paying the item, comparative negligence principles come into play. *Id.* § 4-406(e). In general, however, under the U.C.C. the consumer will not be responsible for the first in a series of forged or unauthorized checks, and may or may not be held responsible for later ones depending on whether the consumer reasonably could have discovered and reported the problem and whether doing so would have allowed the bank to stop further losses.

13. This protection began July 1, 2007. Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,438 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205); 12 C.F.R. § 205.2(b)(2) (2008) (defining "payroll card accounts" as those to which deposits of employee compensation "are made on a recurring basis"). A similar version of the Federal Reserve Board's official staff interpretation of Regulation E was published in the Federal Register.

MasterCard, their rules provide additional voluntary protection, with significant loopholes in coverage.[14]

- Self-arranged payroll card or spending card—the "bank account in your pocket": The law needs clarification. Either there is no protection or the EFTA debit card rules apply, depending on how the funds are held and accounted for.[15] Visa or MasterCard rules may provide some voluntary protection, with significant loopholes in coverage.
- Pooled disaster assistance card; bank issued gift card; or flexible spending benefits card: The law needs clarification. Either there is no protection or the EFTA debit card rules apply, depending on how funds are held and accounted for. Visa or MasterCard rules provide some voluntary protection, with significant loopholes in coverage.
- Electronic benefit transfer card (EBT): No protection.[16]
- Gift card issued by retailer: No statutory protection against unauthorized transactions, regardless of the dollar amount on the card.[17]
- PayPal and similar methods: Whether there is statutory protection depends upon whether the PayPal or other online payment method is used to pass a charge through to a credit card, bank account, or prepaid deposit. If the charge is passed through to a credit card, the consumer can dispute before paying the bill. If the debit is passed through to a bank account, the statutory protection is the same as for other electronic debits. If debited against a prepaid deposit, including as a prepaid debit card, the consumer has no statutory rights unless the deposit is an asset account under the EFTA. Consumers who use a prepaid product

14. *See infra* Part II.A.

15. *See infra* Part II.A.

16. Electronic benefit transfer programs established or administered under state or local law to deliver needs-tested public assistance are exempt from the EFTA. 15 U.S.C. § 1693b(d)(2). For a discussion of the many important issues for lower income consumers in the use of electronic benefit transfer cards selected by government entities and required as a condition of receipt of certain government benefits by unbanked consumers, see generally JESSICA BARTHOLOW & DEBRA GARCIA, AN ADVOCATE'S GUIDE TO ELECTRONIC BENEFIT TRANSFER (EBT) IN CALIFORNIA (2002), *available at* http://www.consumersunion.org/pdf/EBT-report-1102.pdf. *See also* DEBRA GARCIA, SUMMARY OF THE CALIFORNIA DEPARTMENT OF SOCIAL SERVICES' INVITATION TO PARTNER FOR ELECTRONIC BENEFIT TRANSFER (2000), http://www.consumersunion.org/finance/ebt1wc899.htm.

17. States, however, have enacted significant protections in response to a different consumer issue in gift cards—expiration dates and dormancy fees that reduce the value of those cards. *See* Consumers Union Fin. Serv. Team, Fact Sheet on State Gift Card Protection Laws, http://www.consumersunion.org/pub/core_financial_services/003889.html (last visited Mar. 5, 2008).

may be those lower on the economic ladder who have the least ability to withstand a loss of funds. These consumers presently face the most uncertain consumer protection under federal payments law.

- Pay by cell phone: The potential for consumer losses depends on whether the cell phone is used to pass a charge through to a credit card, bank account, or the cell phone bill itself. Pass through to a credit card should provide all of the credit card protections conferred by the Fair Credit Billing Act, including the liability cap, dispute resolution, and chargeback. Pass through to a bank account will provide only the EFTA protections detailed for debits to an asset account, i.e., liability cap and dispute resolution with guaranteed timeframe for recredit, but not chargeback for failure to deliver the paid-for items as agreed. Pass through to the phone bill is not yet covered by any federal consumer protection statute. Some statutory protections apply in California for unauthorized charges on a phone bill,[18] including a cell phone bill, but only for unauthorized charges and not for disputes about the delivery or quality of goods or services.

Why is there so much uncertainty about the available legal protections, especially in some of the products based on the widespread debit card platform? The EFTA has prerequisites to the application of its protections that do not match the way some of the newer debit cards are structured. Many different types of debit cards may bear a Visa or MasterCard logo, including: 1) a debit card linked to an individual checking account, 2) a payroll card arranged by an employer and issued by a bank, 3) a self-arranged spending card that is marketed as an account substitute, 4) a flexible spending card that draws from funds owed to an employee and set aside by an employer at the employee's request, 5) a disaster assistance card that draws from a pool of funds, and 6) a bank-issued Visa gift card, perhaps for a relatively high dollar value. Only the first two of these similarly branded debit cards are plainly covered by the EFTA and Regulation E's basic protections—the cap on consumer loss and the important time period of a maximum of ten business days for the provisional recredit of funds paid in an unauthorized electronic fund transaction. Several other types of debit

18. CAL. PUB. UTIL. CODE § 2890(a) (West 2007) ("A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized"); *see also* CAL. PUB. UTIL. COMM'N, REVISED GEN. ORDER 168, MARKET RULES TO EMPOWER TELECOMMUNICATIONS CONSUMERS AND TO PREVENT FRAUD pts. 3C, E–G (2006), *available at* http://www.cpuc.ca.gov/word_pdf/GENERAL_ORDER/54500.pdf.

cards may or may not have the EFTA protection, depending on the interpretation of key terms in the EFTA such as "account." As discussed in more detail in Part II.A, the EFTA coverage for a debit card that is not tied to a bank account held in the consumer's name is not at all clear.

Bankers often say that their prepaid debit cards carry Regulation E protection, and the statutory wording of the EFTA supports such a reading. However, the wording of Regulation E is less expansive than the statute, making the coverage ambiguous at best, and potentially dependent on exactly how the funds are held. Consumers cannot be expected to even know about these nuances, much less sort out whether the back office accounting for a particular type of prepaid debit card is set up in such a way as to guarantee legal protections.

3. Question: If someone else makes a mistake, will I get my money back promptly?

Consumer Expectation: When someone takes money out of my account or makes a charge with my payment device which I have not authorized, I get my money back right away after I point it out to the payments provider.

What the Law Calls It: Right of prompt recredit.

When You Have It: Consumers do not need recredit for credit cards, since the consumer can dispute the charge before paying the bill. For electronic debits from a traditional bank account (with or without use of a debit card), the same answers detailed above for the liability cap apply. Unfortunately, for prepaid debit cards and debit cards that pull from a pooled account, the uncertainties about the existence of consumer protection described in the prior section also apply to the right of recredit. If the EFTA applies, consumers enjoy a ten business day right of recredit.[19] By the end of this time, the disputed funds must be provisionally returned to the account unless the dispute has been decided against the consumer. If the dis-

19. Under the EFTA, the ten business day time period is the outside limit for provisional return of funds, unless the dispute is finally resolved against the consumer within that time. 15 U.S.C. § 1693f(c). The statute gives the financial institution up to ten business days to either resolve the dispute or provide a provisional recredit, that is, return of disputed funds to the account. *Id.* If the dispute is resolved in the consumer's favor before the end of the ten day period, the recredit must be made within one business day. *Id.* § 1693f(b).

pute is still under investigation when the provisional recredit is made, the financial institution may take additional time, up to a total of forty-five days, to investigate. The financial institution may reverse the provisional recredit if the dispute is resolved against the consumer.[20] There is no dollar cap on the amount of the EFTA recredit, although it applies to consumer accounts only and not to business accounts.[21] The ten business day rule of the EFTA applies to debit cards and ACH payments, as well as to checks converted at the point of sale, the merchant's back office, or a receivables office. These latter three methods of changing a check into a debit are known as point-of-sale (POS) conversion, back office collection (BOC), and automated receivables conversion (ARC).[22]

Checks processed electronically by a method different than electronic check conversion do not fall under the EFTA. Legally, these checks are still checks even though they are processed electronically. Uniform Commercial Code Articles 3 and 4 apply to checks. The electronic processing aspects of these checks are governed either under bank-to-bank agreements or the Check Clearing for the 21st Century Act (Check 21). Those electronically-processed checks covered by Check 21 spark a ten business day right of recredit only if a substitute check is returned to the check-writing consumer and only up to the first $2,500 in dispute.[23] Whether this Check 21 right of recredit will apply is wholly dependent on the choices of the banks in the processing chain, including whether the consumer's bank chooses to return a paper substitute check to the consumer. Outside of the limited Check 21 right of recredit, check law sets no guaranteed time period for the recredit of disputed funds.[24]

A right of recredit with a guaranteed time period is not needed for credit cards, since the right to dispute before payment provides superior protection.[25] However, consumers who carry a balance on their credit cards will pay a steep price to get this consumer protection—interest on the item charged from the day the charge is posted.

20. *Id.* § 1693f(c).

21. *Id.* § 1693f.

22. Under a legal sleight of hand, the check is treated as an authorization for an electronic fund transfer, bringing the transaction entirely under the EFTA. Electronic Funds Transfers, 71 Fed. Reg. 1638 (Jan. 10, 2006) (codified at 12 C.F.R. pt. 205).

23. 12 U.S.C. § 5006(c)(2)(B)(i) (Supp. IV 2004). There is a different time frame (forty-five days) for amounts over $2,500. *Id.* § 5006(c)(2)(B)(ii).

24. This is a bizarre result in that checks processed electronically under bank-to-bank agreements without the use of electronic check conversion and without the return of a substitute check fall only under the law governing purely paper checks—the Uniform Commercial Code. The U.C.C. contains no guaranteed time period for recredit of disputed funds.

25. 15 U.S.C. § 1666(a)(3)(B) (2000) (setting forth the creditor's obligation to refrain from taking any action to collect the amount in dispute after report and before resolution of the dispute).

4. Question: If the merchant does not deliver the goods I ordered, can I stop or reverse the payment?

Consumer Expectation: I should be able to reverse a payment when the goods I paid for were not delivered as agreed.

What the Law Calls It: Chargeback right.

When You Have the Protection:

- Credit cards: Credit cards alone among these payment methods have this superior form of consumer protection: the ability to treat as a billing error, and thus to dispute, a charge for "goods or services not accepted by the obligor or his designee or not delivered . . . in accordance with the agreement made at the time of the transaction."[26] However, the more than half of consumers who carry a balance on their credit cards[27] will find the added consumer protection provided by the credit card much more expensive than consumers who are able to pay the balance in full for each billing cycle.
- Check: No chargeback right.
- Debit to an asset account without a card: No chargeback right.
- Debit cards linked to an asset account; employer-arranged payroll card; self-arranged payroll card or spending card; the "bank account in your pocket"; pooled disaster assistance card; flexible spending account card; and gift card issued by a bank: No statutory chargeback protection. Visa and MasterCard rules provide some voluntary protection for branded cards but contain very significant loopholes in coverage.
- Electronic benefit transfer card (EBT): No statutory protection.
- Gift card issued by retailer: No statutory protection regardless of dollar amount on the card.
- PayPal and similar methods: Protection depends on whether the PayPal or other online payment method is used to pass a charge through to a credit card, bank account, or prepaid deposit.

26. 15 U.S.C. § 1666(b)(3).
27. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 32.

Chargeback protections are available only if the charge is passed through to a credit card bill.

- Pay by cell phone: The existence of protection depends on whether the cell phone is used to pass a charge through to a credit card, bank account, or the cell phone bill itself. Chargeback protections are provided by statute only if the charge is passed through to a credit card bill.

5. Question: Will my money disappear in fees before I have a chance to spend it?

One of the interesting questions in payments is why consumers would use a mechanism not linked to a bank account when the risk of losing their money is so much higher than when using a payment approach clearly and fully covered by the protections of the Electronic Fund Transfer Act, including the crucial ten business day right of recredit. Why consumers are unbanked is a complex question involving cultural questions and family dynamics.[28] However, bank practices that trigger high account-related fees play a role in encouraging consumers to become or remain unbanked. When electronic benefit transfer was introduced in California, community advocates for low income recipients of Temporary Assistance to Needy Families repeatedly expressed concerns that direct deposit to a bank account would not be a good option for many of their clients because of high bank fees associated with errors in account management that lead to bounced checks.[29] Bounced check fees and fees for so-called "courtesy overdraft"—for paying an overdraft that the consumer did not request be paid—are a significant issue for consumers across the board, not just for low income consumers.[30]

Perhaps surprisingly, "gotcha" fees tend to be somewhat less likely in some of those newer payment mechanisms that are deficient with respect to

28. Christopher Berry, *To Bank or Not to Bank? A Survey of Low-Income Households* 10 (Harvard Univ. Joint Ctr. for Hous. Studies, Paper No. BABC 04-3, 2004), *available at* http://www.jchs.harvard.edu/publications/finance/babc/babc_04-3.pdf.

29. This is based on multiple in-person meetings attended by the author in the years 2000–2002.

30. ERIC HALPERIN & PETER SMITH, CTR. FOR RESPONSIBLE LENDING, OUT OF BALANCE 8 (2007) [hereinafter OUT OF BALANCE], *available at* http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf; ERIC HALPERIN, LISA JAMES & PETER SMITH, CTR. FOR RESPONSIBLE LENDING, DEBIT CARD DANGER (2007) [hereinafter DEBIT CARD DANGER], *available at* http://www.responsiblelending.org/pdfs/Debit-Card-Danger-Exec-Summary.pdf (indicating that the majority of courtesy overdraft fees come from POS transactions, with no notice to the consumer that a small POS would trigger a much larger fee); *see also* Statement of Plunkett, *supra* note 2, at 34.

other consumer protections. These practices may migrate to newer payment methods over time. However, concerns about gotcha fees on traditional bank accounts are part of what is driving the growth of the prepaid debit card.[31]

Consumer Expectation: I will be told when I am engaged in a transaction that is about to generate a fee, and have a chance to stop the transaction and avoid the fee. I will not be charged for services I never requested. My bank or other payment provider will not set up the processing of my account to maximize the fees I have to pay.

What the Law Calls It: There is no clear statutory prohibition on these practices, which may be why they have proliferated. Consumer advocates would call practices such as these, which are inconsistent with consumer expectations, unfair and deceptive practices.

When You Have the Protection:

- Credit cards: No effective protection against unexpected fees.[32]
- Debit cards: No protection. Courtesy overdraft fees remove about $17 billion a year from U.S. consumers, and about two-thirds of that is associated with the use of debit cards.[33]
- ACH: No protection. Similar issues as debit cards.
- Checking accounts: No protection. Processing of checks by some financial institutions in high to low check size order can maximize fees in the event of insufficient funds to cover all checks.[34] Consumers also complain about the processing of debits before same-day credits for deposits are processed. Check hold practices that keep the hold in place after the check has in fact cleared also contribute to unexpected fees for overdrafts and bounce protec-

31. Some of these cards, however, can be overdrawn and carry high overdraft fees. In a troubling development, some of these cards also offer a short term loan feature with similarities to the payday loan. *See, e.g.*, *Fishback Financial's Revel Card Targets Underbanked Consumers*, PAYMENTSNEWS, June 1, 2006, http://www.paymentsnews.com/2006/06/fishback_financ.html.

32. The issues with hidden fees in credit cards are well documented. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7; *see also* Consumers Union, Credit Card Reform, http://cu.convio.net/site/PageServer?pagename=cell_LearnMoreaboutCreditCardReform (last visited Mar. 5, 2008).

33. OUT OF BALANCE, *supra* note 30, at 2.

34. *Overdraft Protection: Fair Practices for Consumers: Hearing on H.R. 946 Before the Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Fin. Serv.*, 110th Cong. 18 (2007) [hereinafter Statement of Fox] (statement of Jean Ann Fox, Dir. of Consumer Prot., Consumer Fed'n of Am.).

tion.[35] All of these practices reduce the likelihood that the funds that consumers deposit will be there when the consumers are ready to spend them.

- Employer-arranged payroll card; flexible spending card: Whether there is protection from surprise overdraft fees depends on whether the card is set up so that it cannot be overdrawn, and whether overdraft fees are prohibited by the master contract between the employer and the card issuer.
- Self-arranged payroll card or spending card; the "bank account in your pocket": Whether there is protection from surprise overdraft fees depends on whether the card is set up so that it cannot be overdrawn, and whether overdraft fees are permitted under the form contract offered by the card issuer to the individual consumer.[36]
- Pooled disaster assistance card: Whether there is protection from surprise overdraft fees depends on whether the card is set up so that it cannot be overdrawn, which seems more likely for this type of card; it also depends on whether overdraft fees are permitted under the master contract between the card issuer and the pooled account holder or under the form contract sent by the card issuer to the cardholder. There is no statutory protection.
- Electronic benefit transfer card (EBT): EBT cards generally cannot be overdrawn and overdraft fees are not permitted. This could change if privatization moves further toward network branded cards.
- Gift card issued by bank: Protection depends on whether the card is set up so that it cannot be overdrawn, and whether overdraft

35. Posting of Kathy Mitchell to Consumer Scribbler, http://www.consumersunion.org/scribbler/money/004594.html (June 6, 2007, 15:07 PST).

36. This is one area where the WalMart Money Card, announced in Summer 2007, gets it right for consumers. This card does not provide for overdrafts and does not include an overdraft fee. Wal-Mart, Cardholder Agreement, https://www.walmartmoneycard.com (select "Cardholder Agreement," then select "Wal-Mart MoneyCard Cardholder Agreement" hyperlink) (last visited Mar. 5, 2008). This card, however, also has been criticized by the author for not providing surcharge-free and fee-free ATM cash withdrawals. Steve Painter, *WalMart Rolling Out a Different Debit Card*, ARK. DEMOCRAT GAZETTE, June 14, 2007, *available at* http://nwanews.com/adg/Business/193012/. The Treasury Department has announced the Direct Express card for recipients of social security payments. Press Release, Office of Legislation and Public Affairs, United States Dep't of the Treasury, U.S. Treasury to Launch Prepaid Cards for Unbanked Social Security, SSI Benefit Recipients (Jan. 4, 2008), *available at* http://www.fms.treas.gov/news/press/financial_agent.html. The Treasury has said that this card will not permit overdraft fees. Posting of the author to The Daily Dollar, http://www.consumersunion.org/blogs/fpn/ (Jan. 4, 2008, 12:15 EST).

fees are permitted under the form contract offered by the card issuer to the individual consumer.

- Gift card issued by retailer: Gift cards generally cannot be overdrawn and overdraft fees are not customary.
- PayPal and similar methods: As it was posted on August 16, 2007, the PayPal user agreement did not provide for overdrafts or overdraft fees.[37] If transfers are linked to a checking account, there may be overdraft issues similar to those for checks and debit cards.
- Pay by cell phone: The risk of overdrafts and overdraft fees may depend on whether the cell phone is used to pass a charge through to a credit card, a bank account, or the cell phone bill itself.

These discrepancies occur because the various payment methods fall under very different legal rules. As new ways to pay emerge, there will be additional opportunities for confusion, missed protections, and more payment methods that "fall through the cracks" in existing consumer protection structures.

B. Marketplace Failure: Why Consumers Cannot Just Select the Most Protective Payment Methods

Payments are the plumbing for commerce. Consumers should not need to know where the pipes go to get water—or to stay out of the financial hot water that may occur if a payment goes awry. The problem cannot be solved simply by expecting consumers to make better choices for three reasons: First, it is not economically rational to expect consumers to sort through the legal nuances of various payment methods, and further it may be the merchant rather than the consumer who decides what payment methods will be acceptable.[38] Second, which payments law applies can

37. PAYPAL, USER AGREEMENT FOR PAYPAL SERVICE (2007), www.paypal.com (select "Legal Agreements" hyperlink, then "User Agreement" under "Agreements for All Users").

38. Consumers may not even know that the consumer's selection of payment mechanism, the merchant's selection of a payment mechanism, or even the merchant's post-transaction processing choice may significantly change the consumer's ability to easily and quickly resolve a processing error, unauthorized use, or dispute about non-delivery. The hundreds of pages in this symposium devoted to explaining the precise nature of the differences in payment law among the various payments methods make it clear that it is difficult even for law professors to distinguish among the various legal schemes and matching rights and obligations. As smaller merchants purchase online "shopping cart" services from third-party providers, there will be situations where neither the consumer nor even the merchant insisting on a particular method of payment may know how the choice of that particular method affects

change during payment processing—after the consumer has selected the method of payment. Third, the same branding is used on a variety of legally disparate payment devices. Payment methods that look nearly identical have significantly varying legal effects depending on the back office choices of the payment provider.[39]

Check law illustrates how the choices made by others after the consumer selects the payment method affect what law applies. When the consumer writes a check, there are at least six different ways it may be processed after it leaves the consumer's hands, and those six processing methods implicate three different legal schemes, only two of which provide for a guarantee of prompt return of funds in the event the check is processed twice or for the wrong amount.[40]

A consumer cannot necessarily avoid the morass in check law by turning to plastic. Similar-looking plastic can have very different legal implications. An ordinary card bearing a Visa or MasterCard logo may fall into one of seven or more categories, with varying levels of protection and risk for the consumer: a credit card; a debit card linked to a traditional consumer deposit account; an employer-arranged payroll card; an employer-arranged flexible spending card; a self-arranged debit card that is not linked to an independent bank account held in the consumer's name, which may or may not receive periodic direct deposits of the consumer's whole paycheck;[41] a card to draw on special funds such as disaster assistance; or a bank-issued gift card.

The consumer may also hold other cards, such as retailer gift cards or phone cards, issued outside the banking system.[42] U.S. consumers also will be joining consumers elsewhere in the world in paying by pushing a button

the consumer's legal protections. Further, small merchants using methods of payment other than credit cards may not give the consumer a choice of how to pay if the transaction is to be performed online.

39. These nuances are amply illustrated by the discussion of the varying legal rules applicable to various types of plastic cards. *See supra* Part I.A.

40. Professor Budnitz has pointed out how hard it can be for consumers to determine which method was used. Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247, 271–82 (2005).

41. Katy Jacob et al., Stored Value Cards: Challenges and Opportunities for Reaching Emerging Markets 5 (2005) (unpublished working paper), *available at* http://www.newyorkfed.org/regional/svc_em.pdf. For an example of one such card, see Rush Card, The Prepaid Visa Rushcard: How it Works, https://www.rushcard.com/AddMoney.aspx (last visited Mar. 5, 2008) (inviting users to have all or part of their paychecks or government benefits deposited automatically).

42. For an excellent article on the issues concerning prepaid phone cards, see Mark E. Budnitz, Martina Rojo & Julia Marlowe, *Deceptive Claims for Prepaid Telephone Cards and the Need for Regulation*, 19 LOY. CONSUMER L. REV. 1 (2006).

on a cell phone or sending a cell text message.[43] That charge may flow through a prearranged credit card account, a prearranged bank account, or to the cell phone bill itself, with significant differences in consumer protection between those approaches.[44] Further, online payment methods involving direct links to a bank account, a prepaid deposit, or a credit arrangement without a card device may continue to develop.

II. WHAT IS TO BE DONE: FIVE FIXES TO PAYMENTS LAW FOR TODAY

A proliferating set of payments technologies are covered by a limited set of legal categories, each with different protections for and obligations upon the consumer when something goes wrong with the payment or the underlying transaction. As a result, the happenstance of what payment method is chosen and how the merchant chooses to process the payment after it leaves the consumer's hands determines whether the consumer has basic protections, such as caps for loss exposure for unauthorized use of the payment device, a right to a prompt recredit of disputed funds in the event of a processing error that leads to a double charge or a charge for the wrong amount, and a right of chargeback if the goods are not delivered as agreed.

A consumer should not have to be a payments lawyer to shop safely on the Internet. Now is the time for a baseline set of consumer protections, built from the strongest elements of current federal consumer protections in payments law. These protections do not need to wait for a broad rethinking of payments law. Instead, a few specific amendments to the federal Electronic Fund Transfer Act, the Fair Credit Billing Act, and the Expedited Funds Availability Act, combined with vigorous enforcement of anti-deception authority by federal regulators and state enforcement entities, will go far to fix and avoid the problems. The five changes are:

1. Provide equal, strong loss caps and a guaranteed recredit time period for the unauthorized use for all plastic and other non-cash, non-check payment devices.

2. Provide equal, strong billing error rights for all plastic and competing forms of payments.

43. There are persistent reports in the industry trade press that this is coming in the U.S., after use in Japan and in Europe. Steve Bills, *Citi Launches Two Trials of Mobile P-to-P Technology*, AM. BANKER, Aug. 6, 2007, at 18.

44. *See id.* Compare the right to refrain from paying a disputed credit card charge under the Fair Credit Billing Act, 15 U.S.C. § 1666 (2000), with the right to seek recredit after an unauthorized electronic fund transfer under the Electronic Fund Transfer Act, 15 U.S.C. § 1693f(c).

3. Extend the EFTA right of recredit to all checks, or at least to all checks that are processed electronically in any respect.

4. Resolve the check hold problem.

5. Eliminate practices that deprive consumers of control of their accounts and funds or that increase the risk to consumers of using traditional deposit accounts, including the remotely created check, high to low check processing and fees for loans to cover overdrafts under so-called bounce protection or courtesy overdraft programs.

A. Provide Equal, Strong Loss Caps and Recredit Rights After Unauthorized Use for All Plastic and Other Non-cash, Non-check Payment Devices

The marketplace has not provided strong, equal protections for all types of plastic. As discussed above, credit card losses are capped by statute at no more than $50, yet debit card losses can be $50, $500, or unlimited, depending on a complex statutory decision tree. Claims that the market has provided voluntary zero liability for debit cards turn out to be full of holes. In 2001, Visa told Congress that effective April 2000, it had begun to provide zero liability for unauthorized transactions for all payment cards, including both debit and credit cards.[45] Visa's website claims to provide zero liability, stating on the first main page where this promise is made: "When you use your Visa card to shop online, in a store, or anywhere, you're protected from unauthorized use of your card or account information. With Visa's Zero Liability policy, your liability for unauthorized transactions is $0—promptly notify your financial institution and you pay nothing."[46] The link, however, takes the consumer to a page containing broad protective statements with footnoted exceptions. "It's simple. Shop online and off with absolutely no risk." The pages goes on to state: "Shop safely with Visa" and "You're protected with Visa." A heading and series of bullets repeat the promise: "Zero Liability has you covered: Worry-free shopping, Ultimate security, Complete fraud protection, Owe nothing on

45. *On-line Fraud and Crime: Are Consumers Safe?: Hearing Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy & Commerce*, 107th Cong. 55 (2001) (statement of Mark MacCarthy, Senior Vice President, Pub. Policy, Visa USA, Inc.).

46. Visa, Visa Security Program, http://usa.visa.com/personal/security/visa_security_program/ (last visited Mar. 5, 2008). While the quoted material refers to protection against unauthorized use, later in the same document the policy is referred to as protecting against fraudulent transactions. Unauthorized use is a broader category than fraudulent use, since unauthorized transactions include the erroneous as well as the fraudulent.

fraudulent transactions." The promise is made again: "Visa's Zero Liability policy means 100 percent protection for you." Finally, after all of these statements, comes the qualifier: "You now have complete liability protection for all of your card *transactions that take place on the Visa system*."[47] In other words, if the thief uses a Visa debit card in a PIN transaction processed on a network other than the Visa network, none of these promises apply. PINs can be guessed, spied, hacked, and cracked. A pair of footnotes, the first of which appears early on the second page—after the page with the unqualified promise—apply even more qualifiers. Those footnotes exclude transactions at ATMs, exclude certain commercial cards, repeat the exclusion for PIN transactions not processed on the Visa network, and retain discretion for the financial institution to deny coverage of the zero liability policy if the financial institution reasonably determines that the cardholder was grossly negligent.[48]

The MasterCard "zero liability" promise is subject to a different set of exceptions. It fails to apply if there have been two or more previous instances of unauthorized use of a card reported in one year. MasterCard's policy also requires that the consumer take reasonable care to safeguard the card, and that the account be in good standing. Finally, there is no coverage if the disputed transaction occurs at an ATM.[49]

Under these voluntary policies, "zero liability" does not mean zero liability for any Visa card if a crook gets or guesses the PIN and uses the card outside the Visa network, and "zero liability" does not mean zero liability if the consumer's bank or other financial institution decides that the consumer was grossly negligent. "Zero liability" does not mean zero liability under either Visa or MasterCard's policy if the thief is able to use the stolen card at an ATM. "Zero liability" does not mean zero liability under the MasterCard policy for the third in a series of unauthorized charges

47. Visa, Zero Liability, http://usa.visa.com/personal/security/visa_security_program/zero_ liability.html (last visited Mar. 5, 2008) (emphasis added).

48. The two relevant footnotes read: "Visa's Zero Liability policy covers U.S.-issued cards only and does not apply to ATM transactions, or PIN transactions not processed by Visa, or certain commercial card transactions. Cardholder must notify issuer promptly of any unauthorized use. Consult issuer for additional details" and "Cardholders should always regularly check their monthly statements for transaction accuracy. Financial institutions may impose greater liability on the cardholder if the financial institution reasonably determines that the unauthorized transaction was caused by the gross negligence or fraudulent action of the cardholder—which may include your delay for an unreasonable time in reporting unauthorized transactions." *Id.* at nn.1 & 2.

49. MasterCard, Zero Liability, http://www.mastercard.com/us/personal/en/cardholderservices/zeroliability.html (last visited Mar. 5, 2008) (stating in part: "Zero Liability is provided under the following conditions: Your account is in good standing. You have exercised reasonable care in safeguarding your card. You have not reported two or more unauthorized events in the past 12 months.").

within one year, or for the first unauthorized charge if the consumer is in default in the account due to an overdue payment.

In addition to the rather significant holes in these policies, a voluntary policy is never as good for consumers as a statutory protection. A voluntary policy is subject to the risk of uneven application and to the discretion of employees about how and when to apply the policy, which may disadvantage consumers whose primary language is not English, who are less able to spend time on the phone with customer service due to the nature of their jobs, or who are less able to write a persuasive letter describing the problem—in many cases, the very consumers to whom prepaid debit cards are being marketed as account substitutes. Further, consumers have little recourse if they are denied the benefits of a voluntary policy. Unlike a statutory right, a voluntary policy is not generally accompanied by an enforcement mechanism.

Congress should amend the EFTA to reduce the EFTA dollar cap applicable to debit cards to the level of the credit card cap—no more than $50. This could be accomplished by deleting 15 U.S.C. § 1693g(a)(2) and the "or" at the end of § 1693g(a)(1).

Even more important than bringing the consumer loss cap for debit cards down to the level of the credit card loss cap is making sure that the EFTA loss cap and other EFTA protections apply to all types of debit cards. To provide equal, strong dispute resolution protections for all types of plastic and competing non-cash, non-check payment methods, Congress should amend the EFTA to clarify that all types of plastic and other new payment devices, including the "bank account in your pocket" prepaid debit card, receive the same consumer protections as traditional debit cards. This would provide dispute resolution, liability caps, and a definite time period for recredit to all payment devices that are marketed or used as substitutes for the traditional checking account or that hold significant household funds.

The current application of the EFTA to prepaid debit is not sufficiently clear. The EFTA right of recredit is part of its error resolution provision.[50] That provision imposes obligations on a financial institution after the consumer notifies it of an error reflected in documentation of a transfer from an account or concerning the consumer's account.[51] An "account" is defined as a "demand deposit, savings, or other asset account (other than an occasional or incidental credit balance in an open end credit plan) . . . ."[52]

50. 15 U.S.C. § 1693f(c) (2000).

51. *Id.*; *see also id.* § 1693d(a) (documentation of an electronic fund transfer).

52. *Id.* § 1693a(2).

A "financial institution" is defined to include an entity that issues an access device and agrees with a consumer to provide electronic fund transfer services.[53] This definition would seem to cover not only a bank, but also a non-bank that issues a card that consumers are encouraged to use for debit cash withdrawals, debit point-of-sale purchases, or other debit payments.[54]

Is there an "account" when the consumer prepays a bank or a non-bank for a debit card not linked to a traditional bank account? If there is no "account," then there is no coverage under the EFTA's dispute resolution provision, which includes the important right of provisional recredit within ten business days. The statute defines "account" to include "other asset account[s]."[55] Regulation E narrows the statutory language by requiring that the asset account be a "consumer asset account . . . held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes."[56] However, Regulation E does not further define a consumer asset account, nor does it address whether a consumer's deposit for the purpose of loading or reloading a prepaid debit card, such as a spending card, constitutes an asset account.

Some of the prepaid debit cards that are widely marketed are initiated by a consumer's deposit to a financial institution. Those that the consumer buys at a retailer generally still involve a bank holding the funds. It would seem that errors with respect to those cards should already be covered by the EFTA, since the consumer has made a deposit onto a card issued by a

53. 12 C.F.R. § 205.2(i) (2007). An "electronic fund transfer" is defined as an electronically initiated order, instruction, or authorization "to debit or credit a consumer's account." *Id.* § 205.3(b).

54. This plain reading, however, may be hard for a court to reach in light of the meaning of "financial institution" in other contexts (which generally refer to a "regulated financial institution" as one holding a state or federal financial institution charter). It may eventually become significant in this debate that Congress did not choose to define "financial institution" in the EFTA, and that Regulation E defines it only as an entity holding an account. A well respected expert in the field, however, Professor Linda Rusch, has advised the author that the most frequent question she receives from those attempting to determine the application of Regulation E to a particular payments provider is "who is a financial institution?" Interview with Linda Rusch, Professor of Law, Gonzaga University, in S.F., Cal. (Aug. 12, 2007). Where entities that are not financial institutions are engaged in the provision of electronic fund transfer services, the Federal Reserve Board has a clear statutory obligation to "assure that the disclosures, protections, responsibilities, and remedies" of the EFTA "are made applicable to such persons and services." 15 U.S.C. § 1693b(d). The existence of this obligation, however, does not mean that the Board has fulfilled it.

The payroll card final rule may also lend credence to the argument that any entity providing electronic fund transfers to an account is a financial institution with EFTA obligations. In order to bring payroll cards under Regulation E, the final rule amends the definition of "account," but not the definition of "financial institution." However, it sets forth the obligations with respect to a payroll account in terms of the obligations of a "financial institution." Since the definition of a payroll card account includes entities well beyond depository institutions, the definition of entities which are financial institutions with respect to payroll cards must also extend in the same way. If it did not, the expanded definition of account would have little meaning. *See* 12 C.F.R. §§ 205.2(b)(2), 205.18.

55. 15 U.S.C. § 1693a(2).

56. 12 C.F.R. § 205.2(b)(1).

financial institution. It is hard to imagine what that product is if not a consumer asset account. However, the explanatory material issued by the Board as part of its final rule expanding Regulation E to cover "payroll card accounts" seems to take both sides of this question. The material states that the new sub-definition of account to include payroll cards does not include self-arranged payroll cards, that is, spending cards where the consumer arranges for direct deposit of his or her wages. The explanatory material follows that statement with a strong implication that the self-arranged card is already covered directly by the EFTA. The Board states: "Moreover, it would be difficult for financial institutions and others to distinguish an account directly established by a consumer to receive deposits of salary (without the involvement of an employer) from a 'traditional' deposit account opened by a consumer."[57] This seems to suggest that self-arranged payroll cards would be treated like any other account instead of under the special account rule for payroll cards.

However, in the very next paragraph, the explanatory material goes on to suggest that direct deposit of wages to a general spending card does not invoke EFTA protection:

> Gift cards issued by merchants that can be used to purchase items in the merchant's store are not covered by Regulation E. The regulation also does not cover general spending cards to which a consumer *might* transfer by direct deposit some portion of the consumer's wages. Although consumers might choose to send some or all of their salary or other compensation by direct deposit into a general spending card account, the consumer also may use these products for other purposes or for limited periods of time, like gift cards or other stored-value, or prepaid, cards. Consumers would derive little benefit from receiving full Regulation E protections for cards that may only be used for limited purposes or on a short-term basis, and which may hold minimal funds, while the issuer's costs of compliance with Regulation E might be significant. In contrast, for payroll card accounts that are established through an employer, there is a greater likelihood that the account will serve as a consumer's principal transaction account and hold significant funds for an extended period of time.[58]

Because no formal bank account is set up in the consumer's name as part of the prepaid debit card opening process, there is at best some ambiguity about the EFTA coverage of these cards even when the consumer makes a large deposit on a bank-issued card or arranges periodic direct deposits to the card. Ambiguity about the EFTA protection means ambigu-

57. Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,441 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205).

58. *Id.*

ity about effective protection against loss of key household funds due to unauthorized transactions.

The existence of any federal EFTA protections is even murkier for debit-style cards where the monies to pay for card transactions are held in the name of a third party. This was the situation for millions of employees holding employer-arranged payroll cards prior to July 1, 2007, when an amendment to Regulation E expressly covering employer-arranged payroll cards for periodic payments went into effect. The question of EFTA coverage is still an important issue for other types of cards funded from a pooled account. For example, the short-lived FEMA disaster card appeared to pull from an account not held in the names of the individual cardholders; thus, consumer advocates asked the Board of Governors of the Federal Reserve to clarify coverage of the EFTA to those essential funds for disaster victims, but the Board failed to do so.[59] The Board appears to assume that all or most debit-type cards that are neither payroll cards nor linked to a traditional individual bank account involve amounts that do not deserve protection. This is factually wrong. A pooled account may hold employee set-aside funds for flexible spending, with all funds held in an account in the employer's name. A pooled account held in the name of the state may hold privately-owed, publicly-collected child support payments owed to multiple individual parents who will pull their portion of that account with a debit card. A pooled account may also hold the funds consumers leave on deposit with newer, non-bank payments providers such as Obopay or PayPal.[60]

59. Letter from Gail Hillebrand, Senior Attorney, Consumers Union et al. to Jennifer L. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Sept. 23, 2005), *available at* http://www.consumersunion.org/pub/2005/09/002702print.html.

60. There is active work at the FDIC to revise deposit insurance regulations so that consumers will more clearly be protected by federal deposit insurance in the event of the failure of a bank holding this deposit. To its credit, the FDIC has targeted its inquiry to the whole field of stored-value cards, not merely to payroll cards. Definition of "Deposit"; Stored Value Cards, 69 Fed. Reg. 20,558 (Apr. 16, 2004) (to be codified at 12 C.F.R. pt. 303). Although comments were taken, this docket remained open for future resolution in March of 2008. Deposit insurance, however, does not address the more likely risks for the consumer—that funds will go missing due to an unauthorized transfer or processing error, or that the non-bank entity in whose name the funds are held will fail. The first risk can and should be addressed by a change to the EFTA or Regulation E. The second risk calls for a close examination of when non-bank entities should be required to work with a financial institution for certain money-handling activities that go beyond state-licensed money transmission. It is also clear that the providers themselves do not have a complete understanding of the statutory and regulatory obligations. In an August 12, 2007 oral presentation to a subcommittee of the Cyberspace Committee of the Business Law Section of the American Bar Association, a representative of Obopay stated both that the product complies with Regulation E and that only electronic, and not paper, statements were offered. Obopay, Comments at the 2007 ABA Annual Meeting in San Francisco, California Before the Subcommittee on Cyberspace Law (Aug. 12, 2007). It is difficult to reconcile those two statements.

Flexible spending accounts can contain thousands of dollars per employee in hard-earned wages, which have been set aside on a pre-tax basis to pay for health care or dependant care expenses. Consumers and their employers probably both would be surprised and upset to learn that these funds may not be protected with respect to unauthorized transfers in the same way as the funds in the consumer's debit-card-linked bank account simply because the funds are pooled in an account opened by the employer. The Board stated in the explanatory material to its payroll card amendment to Regulation E that flexible spending cards for health-related expenses are not covered, although under the plain language of the amendment to the definition of account, they do appear to be covered. While it is not clear whether the Board was referring to coverage under the payroll card account definition, or coverage under Regulation E generally, it would seem that if the funds are held in a pooled account these cards would fail to meet the current definition of account, and thus lack EFTA protection unless they were to fall under the special rule for payroll cards.[61]

Consumers at the lower end of the economic spectrum are being actively solicited to choose a prepaid debit card for direct deposit of their paychecks, rather than a traditional bank account.[62] The 2007 introduction of the Wal-Mart-sponsored spending card highlights how important, and how large, this market is likely to become, particularly for lower income working families who are overrepresented in the unbanked population. In that card arrangement, the funds go to a bank. The customer agreement states that the card is "not a device that accesses money in an individual checking or savings account,"[63] but the contract for that card describes a set of error resolution timeframes that mirror the EFTA.

Consumers who are sold a prepaid card as a substitute for a bank account have no reason to know that the prepaid product may be distinctly second rate in terms of the clarity, and perhaps the existence, of the essential consumer protections of loss caps and a time to get back funds transferred out due to an error or an unauthorized transaction. The Federal Reserve Board should amend the definitions in Regulation E to clearly cover prepaid debit cards. If the Board fails to act, Congress should do so.

61. *Compare* Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,440–41 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205) (explaining the scope of the payroll account definition), *with* 12 C.F.R. § 205.2(b)(2) (covering accounts which receive periodic deposits of "wages, salary, or other employee compensation").

62. DAVID GODSTED & JOHN A. TATOM, NETWORKS FIN. INST., TARGETING THE UNBANKED—FINANCIAL LITERACY'S MAGIC BULLET? 2 (2006), http://mpra.ub.uni-muenchen.de/4266/1/MPRA_paper_4266.pdf.

63. Wal-Mart, *supra* note 36, ¶ 2.

The Board's work on payroll cards could provide a model for how to amend Regulation E to cover prepaid debit cards. The Board amended Regulation E to add a new subpart titled "payroll card account" to the regulatory definition of "account."[64] The Board could add a similar sub-definition of account to apply to all prepaid debit cards, stored-value cards, and competing non-cash, non-check payment devices. This protection should not be lost if funds designated by or for the consumer are held in a pooled account.[65] If the Board believes that there is a category of small-value cards that should be treated differently, it could exempt only those cards that are not reloadable and that cannot hold more than a set dollar amount, such as $250.

Because of the uncertainty of protection for all stored-value cards, the EFTA or Regulation E should be amended to add an additional category to the definition of account, just as payroll cards were added as a new portion of the definition. Adding prepaid stored-value cards and other forms of prepaid and stored-value accounts to Regulation E would give consumers using those products the loss cap and the ten business day right of recredit of disputed funds. The proposed addition to Regulation E is:

12 C.F.R. § 205.2 Definitions

. . . .

(b)(1) Account means:

. . . .

64. Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,449 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205); 12 C.F.R. § 205.2(b)(2).

65. On June 23, 2004, twenty-six national and local consumer, community, and labor groups asked the Federal Reserve Board to act to clearly apply EFTA consumer protections to all payroll cards and to certain other types of stored-value cards. The groups stated:

> A delay in access to funds or a loss of funds due to non-application of the protections of the Electronic Fund Transfer Act could trigger eviction, a black mark on a credit record, and hungry children. Lower income families simply do not have the assets to cushion against even a temporary interruption of funds. In the year 2000, significant numbers of U.S. households had negative or zero net worth, including 27.6% of Hispanic households, 29.1% of Black households, and 11.3% of White Non-Hispanic households. An additional 6.7%; 7.3%; and 4.7% of these households respectively had net worth ranging from $1 to $4,999, even when including equity in the family car. These families simply can't afford to be without access to their funds because of a problem with a payroll card, child support card, or unemployment benefits card.

Letter from Gail Hillebrand, Senior Attorney, Consumers Union et al., to Alan Greenspan, Chairman, Fed. Reserve Bd. (June 23, 2004), *available at* http://www.consumersunion.org/pub/core_financial_services/001205.html (citations omitted); *see also* Letter from Gail Hillebrand, Senior Attorney, Consumers Union et al., to Jennifer L. Johnson, Secretary, Bd. of Governors of the Fed. Reserve Sys. (Oct. 28, 2004), *available at* http://www.consumersunion.org/pdf/payroll1004.pdf. While the Board took action on payroll cards receiving recurring deposits of payroll funds, the degree of coverage and protection for other types of cards remain in a murky legal limbo, particularly when the funds are held in a pooled deposit in the name of a third party such as an employer (flexible spending account cards) or a government agency (government collected private child support). *See* Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,440–41 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205).

> (b)(3) The term includes a "spending account," which is an account that is directly or indirectly established by the consumer and to which prepayments on behalf of the consumer by the consumer or by others, including but not limited to loan proceeds or tax refunds, of an amount greater than $250 in any calendar year may be made or to which recurring electronic fund transfers may be made by or at the direction of the consumer, or from which electronic fund transfers may be made at the direction of the consumer. This definition applies whether the spending account is operated or managed by a retailer, third-party processor, a depository institution or any other person. This definition shall include all accounts into which funds are placed at the direction of the consumer that meet the conditions of this definition, whether or not the account is held in the name of the consumer or the name of another entity. For purposes of this definition, a spending account is an account that holds funds that are transferred into the account by the consumer or by an entity who owes those funds to the consumer, even if the funds in the account are held in a pooled fashion in the name of another.

This language is modeled closely on the amendment to Regulation E, which became effective for payroll card accounts on July 1, 2007. The last two sentences are new, to resolve the problem of the pooled account holding a consumer's funds in the name of an intermediary such as a retailer, employer (benefit funds), processor, or other middleman.

If necessary, consideration could be given to including a cross reference to the modified rules excusing paper statements for payroll cards found in 12 C.F.R. § 205.18. While this would make these accounts somewhat inferior to bank accounts, it would still provide the twin protections of the cap on potential consumer losses and the right of recredit within ten business days. The dollar threshold on card capacity would exclude the gift card that is not being sold or used for household budgeting, which has been an issue of apparent concern to the Board. Other prepaid debit cards would be covered, such as the loan proceeds card, the tax refund card, the card designed or used as a substitute for a bank account, and the child support, flexible spending, and disaster cards. The proposed definition is deliberately drawn to be broad enough to cover a card or other device or account token that low income consumers might purchase on a walk-in, cash-deposit basis for use to make outgoing electronic fund transfers.

To date, the Board has shown little appetite to protect consumers who use general spending or other higher dollar reloadable cards, even those marketed as account substitutes. Thus, Congress may have to make this important change directly by augmenting the definition of "account" in the EFTA at 15 U.S.C. § 1693a(2). The change might involve adding this definition to the EFTA: "'Account' includes all methods of holding funds that a consumer has provided, or directed to be provided, for the purpose of funding a card or other payment device similar in function to a debit card."

Any such statutory change would have to direct the Board to make a conforming change in Regulation E, which currently defines "account" more narrowly than the EFTA itself. Congress would also have to make it crystal clear that the "financial institution" precondition does not defeat application of the consumer protections.

B. Provide Equal, Strong Billing Error Rights for All Plastic and Competing Forms of Payments

Only credit cards and credit accounts payable in four installments or more are covered by the Fair Credit Billing Act. Thus, only these payment methods have the statutory right to what is commonly called chargeback. Chargeback is the right to dispute a charge based on the goods or services not being accepted by the consumer or not delivered as agreed. There is no such right of chargeback for consumer-merchant disputes for debit cards, even where the EFTA clearly applies to those debit cards.

To provide equal, strong billing error rights for all plastic and competing forms of non-cash, non-check payments, Congress should amend the EFTA to add a chargeback right for all debit cards similar to that for credit cards, and should amend the Fair Credit Billing Act to cover other new payments mechanisms which are tied to a billing account. In combination with the augmentation of the definition of "account" under the EFTA described above, these two changes will provide chargeback for all forms of debit payments and for all payments which flow directly through to an account bill, such as a cell phone bill.

Extending chargeback to debit cards for disputes where the goods or services were not accepted or were not delivered as agreed may be less controversial than it might first appear. Visa publicly claims that it already provides chargeback rights to all consumers holding Visa branded debit cards.[66] Visa told Congress in 2003: "Part of zero liability is a global merchant chargeback mechanism."[67] The Visa merchant rules, which are posted in the section of its website directed to merchants, describe the process for chargeback, including for customer disputes, without respect to whether the card was a debit or a credit card.[68]

66. Press Release, Visa, Ten Protections Every Cardholder Should Know About (Feb. 7, 2006), *available at* http://corporate.visa.com/md/nr/press609.jsp.

67. *The International Consumer Protection Act of 2003: Hearing Before the H. Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy & Commerce*, 108th Cong. 31 (2003) (statement of Mark MacCarthy, Senior Vice President, Pub. Policy, Visa USA, Inc.).

68. VISA, RULES FOR VISA MERCHANTS: CARD ACCEPTANCE AND CHARGEBACK MANAGEMENT GUIDELINES § 6 (2006) [hereinafter RULES FOR VISA MERCHANTS], http://usa.visa.com/download/merchants/rules_for_visa_merchants.pdf.

A bill was introduced in the 109th Congress to extend chargeback to debit cards.[69] The language from that bill is the recommended amendment, perhaps without referring directly to "cards" as that bill did. The recommended language, adapted from Senate Bill 3978, is:

> Section 908 of the Electronic Funds Transfer Act (15 U.S.C. § 1693f) is amended by adding at the end the following:
>
> (g) Rights of Consumers With Respect to Accepted Cards and Other Means of Access
>
> (1) In General—Subject to the limitation contained in paragraph (2), the issuer of an accepted card or other means of access to a consumer shall be subject to all claims (other than tort claims) and defenses arising out of any transaction in which the accepted card or other means of access is used as a method of payment, if
>
> (A) the consumer has made a good faith attempt to obtain satisfactory resolution of a disagreement or problem relative to the transaction from the person honoring the accepted card or other means of access;
>
> (B) the amount of the initial transaction exceeds $50; and
>
> (C) the transaction was initiated by the consumer in the same State as the mailing address previously provided by the consumer, or within 100 miles from such address, except that the limitations set forth in subparagraphs (A) and (B) with respect to the right of a consumer to assert claims and defenses against the issuer of the card or other means of access shall not be applicable to any transaction in which the person honoring the accepted card or other means of access
>
> (i) is the same person as the issuer;
>
> (ii) is controlled by the issuer;
>
> (iii) is under direct or indirect common control with the issuer;
>
> (iv) is a franchised dealer in the products or services of the issuer; or
>
> (v) has obtained the order for such transaction through a mail solicitation made by or participated in by the issuer in which the cardholder or other means of access holder is solicited to enter into such transaction by using the accepted card issued by the issuer.
>
> (2) Limitation—The amount of claims or defenses asserted by the holder of the card or other means of access under this subsection may not exceed the amount paid by the holder of the card or

69. Senate Bill 3978 was sponsored by Senator Clinton. S. 3978, 109th Cong. (2006). *See* Letter from Michael D. Calhoun, President, Ctr. for Responsible Lending et al., to Hillary Rodham Clinton, U.S. Senator (Oct. 17, 2006), *available at* http://www.consumersunion.org/pdf/debitcards1006.pdf (offering the support of various consumer groups for Senate Bill 3978).

> other means of access with respect to the subject transaction at the time at which the holder first notifies the issuer or the person honoring the accepted card or other means of access of such claim or defense.[70]

This change would add to the EFTA, for cards and other means of access to a consumer's account, the precise chargeback right already available for credit cards in the Fair Credit Billing Act. In so doing, it would give consumers who choose to use the more fiscally responsible "pay now" approach of debit cards the same protections now available only under the credit card "pay later" approach. It would ensure that this best consumer protection is not reserved only for those who pay by credit cards, and is available without high interest cost for those consumers who carry a balance on their credit cards.

The second part of the job of providing chargeback in all non-cash payments (and perhaps non-check payments, depending on whether the EFTA is amended in other respects) involves creating a statutory chargeback right for those newer forms of payment that will send a charge directly to a bill for a non-bank account, such as "pay by cell phone."

This amendment to the Fair Credit Billing Act (FCBA) would cover a payment product which places the charge on another bill:

> Make an addition either to the definitional section of the Fair Credit Billing Act or to section 161, 15 U.S.C. § 1666:
>
> For purposes of sections 161 and 162 of the Fair Credit Billing Act, 15 U.S.C. § 1666:
>
> (a) A "creditor" shall include a person who permits a charge to be placed on a bill to the consumer for later payment or for deduction against an amount previously deposited by or for the consumer, which charge is for a payment made or forwarded to a third party by the billing entity at the direction of the consumer.
>
> (b) "Extension of credit" shall include a charge placed on a bill to the consumer for later payment or for deduction against an amount previously deposited by or for the consumer, which charge is for a payment made or forwarded to a third party by the billing entity at the direction of the consumer.

70. This is the language of Senate Bill 3978 from the 109th Congress, with the references modified to address both cards and payment devices. S. 3978, 109th Cong. § 5 (2006). "Accepted card or other means of access" is a defined term in the EFTA. 15 U.S.C. § 1693a(1) (2000). The term will cover a charge to a prepaid deposit made using a device other than a card, perhaps a cell phone. Some additional definition or interpretation might be needed to ensure it also covers a charge authorized using a fingerprint or iris scan. Can the consumer accept his or her own biometrics as a means of access to a payment account? The additional important issue of whether soliciting and accepting prepaid deposits is the business of banking and can only be performed under a federal or state chartered regulated depository institution is beyond the scope of this article.

These changes would take much of the risk for consumers out of the new and emerging non-cash, non-check payment mechanisms. Taken together, the EFTA change and the FCBA change would provide access to the basic protection of loss caps and a right of prompt recredit regardless of the processing structure underlying the payment method.

C. Extend a Three-, Five-, or Ten-Day Right of Recredit to All Checks, or at Least to All Checks that Are Processed Electronically in Any Respect

The right of recredit should be extended to all checks by amending the EFTA to cover disputes concerning electronically processed checks or all checks. In addition, the ten business day time period found in EFTA § 1693f(c) should be reduced to a more sensible three or five business days.

Those checks that are processed electronically through ACH conversion are already covered by the EFTA. Other checks that are processed electronically through private agreements for electronic check presentment are not covered. This nonsensical result can be eliminated and consumers protected from the problem of delay in getting their money back after a dispute by amending the EFTA to reach all checks that are processed in whole or in part by electronic means. This can be accomplished by a simple amendment to the definition of "electronic fund transfer" in the EFTA: In the definition of "electronic fund transfer" under 15 U.S.C. § 1693a(d), delete "other than a transaction originated by check, draft, or similar paper instrument" and make no substitution. Alternatively, modify the relevant language to read: "other than a transaction originated by check, draft, or similar paper instrument and processed without the use of electronic means."

One additional amendment will reduce the waiting time for the provisional recredit below the current two weeks allowed by the ten business day rule: In 15 U.S.C. § 1693f(c), change "ten" to "three" or "five."

These simple changes will eliminate the different legal consequences consumers face depending on how others choose to process the checks that they have written.

D. End the Check Hold Problem

Congress should modernize check hold law by counting Saturdays toward the check hold period, doubling the $100, $400, and $5,000 thresholds, applying the shorter time for "on-us" checks to non-local "on-us" checks, and reducing the weeklong delay created by the fifth business day rule for non-local checks.

Consumer Federation of America's Travis Plunkett describes the check hold problem plainly: "Money flies out of bank accounts at warp speed. Deposits crawl in."[71] The permanent check hold schedule under the Expedited Funds Availability Act (EFAA) went into effect in September of 1990.[72] The Federal Reserve Board has not reduced the second and fifth business day maximum check hold times for local and non-local checks in the intervening eighteen years. During that same time, there have been incredible changes in information technology, check processing, electronic handling of money-related information, and the increasingly twenty-four/seven nature of the way consumers handle their money and the way that financial institutions interact with their customers.[73]

Check holds can significantly disrupt family finances, including causing checks to "bounce" or triggering overdraft loan fees. Bad experiences with high account fees, including those triggered by unexpectedly long check holds, can drive consumers out of the banking system or stop them from returning to it. Indeed, 13% of the unbanked report that they have applied for a bank account and have been denied.[74] The persistence of practices such as unnecessarily long check holds, which drive up the cost of holding a demand deposit account, only deepen the economic divide between the banked and the unbanked.

Four changes by Congress to the Expedited Funds Availability Act could update it and eliminate a real barrier to use of the banking system by lower balance customers. First, count Saturdays toward the check hold period. Banks process debits and credits on Saturdays, and the legal fiction that the banking system is closed on the weekends makes no sense in the modern world. Second, double the dollar thresholds, from \$100 to \$200 for next day cash withdrawals, \$400 to \$800 for the cash withdrawal threshold on the day of availability, and from \$5,000 to \$10,000 for large deposits.[75]

71. Statement of Plunkett, *supra* note 2, at 39.

72. 12 U.S.C. § 4002(b)(4).

73. For banks advertising anytime, anyplace banking, see, for example, Irwin Bank, With an Irwin Bank ATM or Check Card, You Have Anytime, Anyplace Money Access!, http://www.myirwinbank.com/ATMCard.php (last visited Mar. 6, 2008); Chambers Bank, 24 Hour Banking, http://www.chambers-bank.com/24hrservice.htm (last visited Mar. 6, 2008); First Hope Bank, Hope Online, http://www.firsthope.com/hopeonline.htm (last visited Mar. 6, 2008).

74. Berry, *supra* note 28, at 8.

75. 12 U.S.C. § 4002(a)(2)(D) (\$100 next business day availability), § 4002(b)(3)(B) (\$400 threshold on cash withdrawals on day of availability), § 4003(a)(3) (deposits in excess of \$5,000). An inflation adjustment using the Bureau of Labor Statistics public calculator, which is based on the BLS's average CPI index, would bring the amounts from the 1987 enactment year through 2007 to \$183.36, \$733.45, and \$9,168.09. *See* CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Oct. 26, 2007). The Federal Reserve Board's report to Congress acknowledges that the failure to update the \$100 cash withdrawal amount may be a hardship to low income consumers. The Fed report states:

Third, reduce the duration of the maximum allowable check hold time for non-local checks, perhaps to the third business day. The fifth business day rule is a holdover from when checks had to be flown around the country, which is increasingly no longer true.[76] Finally, Congress should eliminate the non-local hold time when the check is written on and deposited at the same financial institution. There is no sound policy reason why checks written on and deposited in the same bank should be subject to the fifth business day rule. The EFAA already provides for a shorter time period for so-called "on-us" local checks.[77] That rule should be applied equally to non-local "on-us" same-bank checks.

> To accomplish this, Congress should amend the Electronic Fund Transfer Act as follows:
>
> To 12 U.S.C. § 4001(3), add: "For purposes of this title, however, Saturday shall be treated as a business day in the calculation of any period within which funds deposited in an account at a receiving depository institution are required to be made available under this title."
>
> To 12 U.S.C. § 4002(b)(2): Strike "4" and insert "2."
>
> To 12 U.S.C. § 4003(a)(3): Strike "$5,000" in each location where it appears and insert "$10,000."
>
> To 12 U.S.C. § 4002(a)(2)(D): Strike "$100" and insert "$200." Make a conforming change in the heading of 12 U.S.C. § 4002(b)(3)(C) to strike "$100 availability" and replace with "coordination with other amount available."

> Since the EFAA was enacted, inflation has reduced substantially the real value of the cash-withdrawal limits of $100 and $400 and the large-dollar amount limit of $5,000. Increasing these limits may materially benefit consumers, particularly those with lower incomes who maintain low account balances and need quicker availability for deposited checks.

BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE CHECK CLEARING FOR THE 21ST CENTURY ACT OF 2003, at 28 (2007) (citation omitted).

76. The time periods set forth in the statute do not reveal the full impact of allowable check hold times on consumers. Second business day availability for local checks means waiting from Friday to Tuesday—a long time for a family on a tight budget. Fifth day availability means waiting a whole week—even when the check is drawn on the bank where it is deposited. The extra days provided under the safeguards exception for checks totaling $5,000 deposited on one day make consumers wait as long as eleven business days for many insurance proceeds checks, mutual fund withdrawals, home sale proceeds checks, and some other types of checks.

Here is part of what one consumer reported on the Consumers Union Daily Dollar blog about the effect of the $5,000 extra wait time rule:

> I almost lost a contract to buy property due to the hold time on a check from my investment company. After I deposited the check in my local bank, I was told that I could not access the check for 11 days. My closing was in 2 days and the seller was not willing to wait. So I had to hustle to two other local banks and withdraw money that was to draw quarterly interest in 4 more days! I lost interest on a large sum of money for one quarter, due to the bank holding my check for 11 days.

Posting of Meg Goodwin to The Daily Dollar, http://www.consumersunion.org/blogs/fpn/ (May 10, 2007, 17:54 EST).

77. 12 U.S.C. § 4002(a)(2)(E) (applying next business day availability rule only to those "on-us" checks written and deposited in the same state or the same check-processing region).

To 12 U.S.C. § 4002(b)(3)(B): Strike $400 and insert $800.

E. Eliminate Practices that Deprive Consumers of Control of Their Accounts or that Increase the Risk to Consumers of Using Traditional Deposit Accounts

The final area of needed change is to eliminate practices that deprive consumers of control of their accounts or increase the risk of using a bank account. These practices include the remotely created check, high to low check processing, and fees for loans to cover overdrafts under bounce protection or courtesy overdraft programs. To a very real extent, consumers are losing control over their checking accounts. Delayed deposits (discussed above), overdraft protection fees, processing of large checks first to maximize bounced check and overdraft fees, and financial institutions honoring unsigned checks created by a merchant (including a fraudulent telemarketer) all contribute to this phenomenon.

High fees for a service the consumer never requested—extension of short term credit to cover an overdraft—is an example of a financial institution practice that deprives consumers of control over their accounts. Here is one of the common ways this occurs: the consumer presents his or her debit card at a store or an ATM. The transaction is processed in real time without a denial or warning that there are insufficient funds in the account. Later, the consumer receives a snail mail notice that the financial institution chose to accept the debit despite insufficient funds and that the consumer has been charged a fee of $33.75,[78] perhaps with an additional per day fee, until the consumer deposits funds to cover both the overdraft and the surprisingly high fees. Several such overdraft loans can occur over a day or a few days before the initial notice arrives, creating more overdraft loans and spiraling fees. Overdraft fees have become such a large part of the consumer checking account experience that a movie about them was released in 2007.[79]

Congress could eliminate the incentive for financial institutions to use "gotcha" fees by amending the relevant federal statutes to prohibit overdraft features from all payment accounts, cards, and products, unless at

78. This was the average fee charged by the ten largest U.S. banks, according to the Consumer Federation of America. Statement of Fox, *supra* note 34, at 18. On the cost of overdraft fees to consumers, *see* Statement of Plunkett, *supra* note 2, at 39; *see also* DEBIT CARD DANGER, *supra* note 30, at 2 (citing an earlier Center for Responsible Lending study).

79. Overdrawn! The Documentary, http://www.Overdrawnmovie.net (last visited Mar. 10, 2008); *see also* Overdrawn! The Documentary Trailer, http://youtube.com/watch?v=PUXRBehEuH0 (last visited Mar. 10, 2008) (the filmmaker describes his own experience, in which he reported that $60 in purchases in one day resulted in $140 in overdraft fees).

least three conditions are met: the consumer affirmatively requests the feature, the consumer is notified before the application of the overdraft feature to any particular transaction that the transaction will result in an overdraft and the amount of the associated fee or fees, and the consumer responds to this notice that he or she still wants to go forward with the transaction and accepts the fee. House Bill 946, as introduced in the 110th Congress, provides an excellent start on this approach, as applied to overdraft fees on demand deposit accounts.

Another area where consumers have lost control of their accounts is the remotely created check. It is likely that most consumers would be very surprised to find that anyone can create an unsigned "check" drawn on the consumer's account called a remotely created check. The other person merely asserts that the consumer has authorized the check, creates the check, and sends it through the banking system. This avenue is a key method used by telemarketers to tap consumer's checking accounts. State Attorneys General have identified the so-called remotely created check, or "demand draft," as a tool frequently used to defraud consumers, and have called for its abolition.[80] Five national consumer groups joined the Attorneys General in calling for these checks to either be brought under the EFTA or be abolished.[81]

Remotely created checks are not of sufficient value or convenience today—if indeed they ever were—to outweigh the significant record of abuse. The traditional reason stated for remotely created checks is that a major bill, such as car insurance or a mortgage payment, may have to be paid in a timeframe that is too short to get a check delivered. Today, that need can be served by providing a debit card number over the phone, or by authorizing a direct ACH debit under the NACHA rules. Unlike the remotely created check, those mechanisms are plainly within the EFTA, and thus are accompanied by a clear timeframe for the return of the consumer's funds in the event of a double debit, wrong amount, or other dispute about the authorization to debit the account. Congress should outlaw the remotely created check or plainly subject it to the EFTA.

80. *See* Letter from Nat'l Ass'n. of Attorneys General, to Jennifer J. Johnson, Secretary, Bd. of Governors of the Fed. Reserve Sys. (May 3, 2005) (on file with author).

81. Comments from the Nat'l Consumer Law Ctr. et al., to the Bd. of Governors of the Fed. Reserve Sys., http://www.consumersunion.org/pdf/oralchecks.pdf (providing comments on Docket No. R-1226: Proposed Amendments to Regulation J and Regulation CC Regarding Remotely Created Checks); *see* Collection of Checks and Other Items by Federal Reserve Banks, 70 Fed. Reg. 71,218, 71,220 (Nov. 28, 2005) (discussing the comments the Board of Governors received on its proposed amendments).

Another bank practice that requires attention is high to low check processing. The Consumer Federation of America has testified in Congress that "almost three-quarters" of the nation's largest banks disclose that they either use high to low check processing or reserve the right to do so.[82] When an account balance is insufficient to cover all checks, processing the largest dollar checks first will maximize the total number of checks that cannot be paid from the current account balance, thus maximizing not-sufficient-funds (NSF) or overdraft fee revenue.[83]

Surprising fees and other new forms of abuse of existing payment mechanisms call not only for congressional action, but also for active regulatory oversight of emerging practices, rather than waiting until practices become so widespread that there is public, media, or legislative outcry about those practices.[84]

III. GOING FORWARD, ALL NEW RULES, REGULATIONS, STATUTES, AND PRODUCTS FOR NON-CASH PAYMENTS SHOULD MEET TEN BASIC PRINCIPLES[85]

1. Authorized Payments Should Be Timely Delivered

When online bill pay was new, consumers reported payment limbo. Money was deducted when the payment was arranged but did not arrive at

82. Statement of Fox, *supra* note 34, at 18.

83. *Id.*

84. In testimony directed primarily to the issue of regulatory inaction, Travis Plunkett of the Consumer Federation of America, speaking on behalf of six national consumer organizations, proposed the following reforms to start to restore control to consumers over their accounts:

> Clarify that remotely created checks are covered by the Electronic Funds Transfer Act.
>
> Ensure that the debiting of consumers' accounts by internet payday lenders is subject to all the restrictions applicable to preauthorized electronic funds transfers.
>
> Prohibit multiple attempts to "present" an electronic debit.
>
> Prohibit the practice of charging consumers a fee to revoke authorization for preauthorized electronic funds transfers.
>
> Amend the Official Staff Interpretations to clarify that consumers need not be required to inform the payee in order to stop payment on preauthorized electronic transfers.

This list appears in the Congressional testimony of Consumer Federation of America's Travis Plunkett. Statement of Plunkett, *supra* note 2, at 41.

85. These principles should be used by:

(a) Consumers and consumer organizations in recommending payment mechanisms to consider and to avoid;

(b) Businesses in deciding which payment methods to offer to or accept from their customers;

(c) Payment providers in determining whether to offer a particular form of payment;

(d) Regulators in determining whether involvement in a particular payment mechanism by their regulated entities should be encouraged, discouraged, or ruled unfair and deceptive;

(e) Legislators; and

(f) Others engaged in any future "grand rethinking" of payments law.

the desired location for a few days. The payment should be sent at the same time that it is removed from the consumer's account. Where the nature of the payment order implies or suggests immediacy, but the payment will not in fact be made immediately, the process for arranging for the payment should alert the consumer to the actual date on which the payment will be made.

2. Deposits Should be Timely Credited and Made Available

Consumers should get the benefit of increasingly electronic processing of deposits through mandated shorter check hold times and a much higher dollar threshold before extra time is added to the allowable check hold delay. Shorter statutory and regulatory timeframes are essential. In addition, a regulatory determination that it is an unfair practice to charge a fee for a bounced check or overdraft protection that would not have been necessary if previously deposited funds had been made available would go a long way to reducing the incentive for financial institutions to insist on the maximum hold time allowed by law.

Funds availability has not yet been an issue with deposits into account substitute products such as the deposits made to a prepaid debit card. However, to the extent that the funds are held at any time by a non-bank entity, state or federal oversight of solvency and business practices will be essential to ensure that the funds remain safely available until the consumer orders them spent.

3. Loss Caps, Error Resolution, and Other Dispute Resolution Should Be Simple, Fast, Include Guaranteed Timeframes for Return of Funds, Lack Costs or Other Adverse Consequences on the Consumer, and Offer Effective Remedies that Do Not Require Litigation or Threat of Litigation

The debit card loss cap should be modified to match the $50 maximum for credit cards. The ten business day time for guaranteed recredit under the EFTA should be reduced to three or five business days. In other respects, the right of recredit structure under the EFTA provides a strong baseline that should apply more broadly to all forms of non-cash payments. The right of recredit works partly because consumers can invoke a clear obligation on the part of their financial institution with a clear timeline. Very clear obligations and timelines reduce the likelihood that the consumer will have to attempt or threaten to sue in order to get action to resolve a problem. Financial institution regulators also must ensure that financial institutions cannot and do not attempt to hold the consumer responsible for fees associated with adverse account activity that would not have occurred in the absence of the disputed transaction.

4. *Conditionality via a Chargeback Right Enhances the Usability of a Payment Method, and Should Be Provided for Most Payment Methods*

Internet shopping requires payment before the goods are delivered, or even can be seen or inspected. The ability to revoke a payment after the goods arrive if they are not as ordered—or indeed if they never arrive—is an essential protection to maintain consumer confidence in Internet commerce. Consumers have come to expect this "chargeback" right for credit cards and for other forms of plastic that use branding similar to credit cards. Visa says publicly that its rules require debit card issuers to provide chargeback to Visa branded debit card holders, but the fine print says this is available only if the card is processed on the Visa network.[86] All forms of payment devices, including all forms of plastic, and all payments that are marketed to compete with plastic (such as the use of a cell phone to authorize payment) should be accompanied by chargeback rights.

Consumers generally do not expect a right of chargeback with a check, nor with cash. For other forms of payment, however, chargeback should generally be included. If the security of card information can be protected against theft, then paying by debit card rather than credit card is the more responsible choice for any household already struggling with its debt load. The more responsible payment choice should not carry inferior consumer protections, as is the case today.

86. Visa has a web page for card issuers describing the benefits of its debit cards as including "applicable chargeback rights." Visa, Visa Debit Strategy, http://visadps.com/products/visa_debit_strategy.html (last visited Mar. 10, 2008). The Visa merchant rules do not distinguish between credit cards and debit cards with respect to the processing of chargebacks for transactions made over the Visa network. RULES FOR VISA MERCHANTS, *supra* note 68. However, consumers who do not know about this provision in the rules are unlikely to learn about it from Visa. Visa's posted material for consumers does not tell consumers that they can seek a chargeback of a debit card charge for a dispute over delivery or quality of goods or services, rather than just for unauthorized charges. *See, e.g.*, Visa, Visa Check Cards, http://www.usa.visa.com/personal/cards/debit/index.html?it=searchQuicklink (last visited Mar. 10, 2008); Visa, Visa Check Cards FAQ, http://www.usa.visa.com/personal/cards/ (select "Check Card" under "Learn More About Visa Card Offerings," then select "FAQ") (last visited Mar. 10, 2008); Visa, Visa Gift Card, http://www.usa.visa.com/personal/cards/ (select "Visa Reloadable Card" under "Prepaid & Gift Cards") (last visited Mar. 10, 2008) (describing "zero liability" for unauthorized transactions, but giving no information about chargeback for reasons other than an unauthorized transaction or other form of identity theft).

5. Features Should Match Consumer Expectations—or the Issuer/Offeror Must Be Able to Demonstrate that the Target Consumers Understand How the Features Vary from Normal Consumer Expectations

The use of the Visa and MasterCard logo on debit cards has created a set of expectations associated with those cards that is not fully honored by the law. Before Visa and MasterCard debit cards were introduced, consumers already knew that credit cards came with liability caps on loss and a procedure for disputing charges based on lack of authorization or based on a billing error, including chargeback for problems when goods or services were not delivered as agreed. When a payment mechanism is introduced that has branding, physical, or functional characteristics that are likely to create consumer expectations that the product carries protections equal to a similar payments product, those consumer expectations should be met. If the product does not carry the same protections as similar-looking products in the marketplace, the issuer or offeror must effectively dispel any such expectations, and must be required to demonstrate that it has done so before putting the payment product on the market.

Federal financial institution regulators, the Federal Trade Commission, state regulators of money transmitters, and State Attorneys General should use their authority to stop unfair and deceptive practices to address the disconnect between consumer expectations and actual product features. Regulators should encourage issuers of payment methods with a high potential for confusion to reduce that confusion by providing the features that consumers will expect based on the similarity of the product to other products. If these features are not provided as part of the product, then the regulators should insist that the issuer of the payment product effectively dispel consumer expectations for features that are not provided.

6. Products, Practices, and Fee Structures Should Be Designed to Reduce "Gotchas" and Back End Fees

Payment products should be priced in such a way that the costs are known and knowable at the time the product is first purchased. Consumers can compare a simple monthly fee across products of different types. Fees that arise after purchase, or that are tied to a contingency, such as a future late payment or a future over-the-limit transaction, are much harder to compare across products or across vendors within a single product line. Fee transparency is defeated by multiple fees that are imposed after an account is opened.

Policymakers should take a careful look at all practices that trigger imposition of post-purchase fees in payments accounts and payments products, and should discourage or prohibit the use of those fees.

7. Features Carrying Risk or Triggering Fees Should Require Informed, Affirmative Opt-In, and Credit Features in Payment Methods Should Be Subject to Credit Rules and Standards

Overdraft protection is a loan that the consumer never asked for, for which the consumer may pay both a one-time fee and a per-day fee, and that the consumer often does not even know has been extended until he or she receives notice by snail mail after several days of fees have already accrued. All extensions of credit—particularly high cost ones such as overdraft protection—should include an initial opt-in to the program, an effective disclosure at the time of the loan of the true cost of the credit, and a "yes or no" process which extends the high cost credit only if the consumer affirmatively requests the credit in the particular transaction.[87]

The principle that surprising, risk-enhancing features should be left inactive until the consumer affirmatively requests those features can be illustrated in the context of paying by cell phone. Consumers on a family plan might have strong reasons not to turn on a feature that allows any family member, including a minor, to pay for something with a cell phone. Affirmative opt-in to a payment feature, a consumer-selected dollar limit for payments using the cell phone, and a transaction-specific authorization feature will help consumers both understand and control the risks posed by such a new payment method.

8. Payment Systems Should Provide Security and Privacy for Funds and Information

Funds must be secure from solvency threats and from theft. As non-bank entities become larger players in the payments network, it becomes important to know who is holding the money. If funds are held in a non-bank, oversight for solvency and clear rules for how consumers will get their money back in the event of a bankruptcy are important. Identity theft affects more than eight million Americans every year, according to the most recent study published by the Federal Trade Commission.[88] There are

87. *See also* Statement of Plunkett, *supra* note 2, at 39; DEBIT CARD DANGER, *supra* note 30, at 2 (citing an earlier Center for Responsible Lending study).

88. According to a 2007 study released by the Federal Trade Commission, 8.3 million adult U.S. residents become ID theft victims each year. SYNOVATE, FEDERAL TRADE COMMISSION—2006 IDENTITY THEFT SURVEY REPORT 4 (2007), http://www.ftc.gov/os/2007/11/SynovateFinalReportID

persistent reports of widespread failure to achieve compliance with the Payment Card Industry (PCI) Standards, the private rules that are supposed to ensure protection for credit, debit, and other payment card numbers, PINs, security codes, and related payment card information.[89] These numbers suggest that there is much more to do to make existing and emerging payment methods more secure.

The right of prompt, time-specific recredit is important partly because no security is foolproof. Reducing the risk that a payment method will be used to drain household funds is both an important product feature and an essential element to sustaining consumer confidence.

9. Consumers Should Have Access to Remedies that are Effective and Economically Rational in Light of the Amounts at Stake

Consumers need all of the following: active, effective regulatory oversight of the marketplace; aggressive, individualized response to complaints made to regulators; the threat of state attorney general enforcement of state and federal consumer protections; the ability to bring an individual case in small claims court; and the ability to bring individual and class cases in state and federal court. Shunting consumers off to mandatory arbitration may be more expensive for consumers than the court system, depending on the identity of the arbitration provider and the amount at stake. Restrictions on the use of the courts also deprives the parties of publicly-selected and publicly-funded decision makers on issues of public importance, precedent that can help to shape the market, and in some cases, class wide-relief.

10. Essential Consumer Protections Should Not Depend upon the Type of Payment Method or the Means of Processing; Access to Consumer Protections in Payments Should Not Vary by Economic Class

Today, consumers who do not carry a balance on their credit cards have access to top-of-the-line consumer protections—a right to dispute before payment for unauthorized charges, charges in the wrong amount, and charges to pay for goods or services that were not delivered as agreed.

Theft2006.pdf. Consumers Union estimates that this is more than fifteen victims per minute. Consumers Union, Financial Privacy Now Campaign: Fact Sheet about ID Theft, http://www.consumersunion.org/campaigns/financialprivacynow/2007/04/fact_sheet_about_id_theft_1.html (last visited Mar. 10, 2008); *see also* GARTNER, INC., THE TRUTH BEHIND IDENTITY THEFT NUMBERS 2 (2007); MARY T. MONAHAN, JAVELIN STRATEGY & RESEARCH, 2007 IDENTITY FRAUD SURVEY REPORT 1–2 (2007).

89. *See, e.g.*, Evan Schuman, *Visa Relaxes Retail Credit Card Security Threats*, EWEEK, Aug. 16, 2007, http://www.eweek.com/c/a/Retail/Visa-Relaxes-Retail-Credit-Card-Security-Threats/; Joseph Pereira, *How Credit-Card Data Went Out the Wireless Door*, WALL ST. J., May 4, 2007, at A1.

Consumers who carry a balance must incur interest charges on their purchases to get those same protections. Consumers who are at or near their credit limits will find access to these protections even more expensive due to over-limit fees and the potential for penalty interest rates.

Put simply, the best consumer protections should not be limited to the most affluent consumers. Extending the credit card chargeback protection to debit cards and amending the EFTA or Regulation E to ensure application of the essential EFTA protections to all debit-type payment products are essential to avoid reserving the best consumer protections only for the most economically stable consumers.

CONCLUSION

Consumers cannot afford to wait for the law to be sorted out in payments. E-commerce cannot afford a crisis of confidence in payments like the crisis of confidence in credit quality the U.S. economy suffered due to the subprime mortgage surprise. That crisis powerfully illustrates that practices that may at first appear to affect only less affluent or less sophisticated consumers can ripple across our increasingly interconnected markets, affect consumer confidence, and create widespread damage even to those providers who do not engage in questionable practices. We can avoid a crisis in payments by putting certain baseline protections in place now, within the framework of existing federal payments law.

It is time for a clear, simple set of rules in payments so that every form of non-cash payment is accompanied by simple protections such as a consumer loss cap that never exceeds $50 and a clear three- or five-day right of recredit of funds (or ten days if the current standard is used). All forms of payment beyond cash or check should also be accompanied by the right of chargeback of a payment where the goods or services were not accepted or were not delivered as agreed. The “pay first, see the goods later” nature of Internet commerce makes it critically important that consumers have strong consumer protections regardless of how they pay.