

## ARTICLES

# STORED VALUE CARDS AND THE CONSUMER: THE NEED FOR REGULATION

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## INTRODUCTION

Consumers who use stored value cards ("SVC") currently lack basic information and even minimal legal protections.<sup>1</sup> Because of the relatively small monetary amounts involved in SVC commerce for each consumer, transaction costs make it infeasible to develop legal rules through case-by-case litigation. Uniform legal standards are, nevertheless, necessary because of consumer confusion and problems that may arise causing monetary loss to consumers using SVCs. Despite the recent vintage of the SVC industry, major problems already have occurred. The Mafia has stolen more than \$50 million from consumers and phone companies through the fraudulent sales of SVCs,<sup>2</sup> and several issuers of SVCs have gone out of business after selling tens of thousands of worthless SVCs.<sup>3</sup> Further, even if SVC issues are decided by the courts, it is unlikely that uniform legal rules could be established absent a national legal framework. The same would be true if, in the absence of federal direction, individual states enacted statutes to protect their citizens. Congress therefore should enact an SVC statute to provide a legal framework for SVC systems and require disclosures needed for consumers to make informed choices when deciding whether to use SVCs. Such a statute would ensure the integrity not only of SVCs, but also of other payment systems. In addition, because SVCs are used nationally, both consumers and industry would benefit from uniform rules.

Thus far, rather than take action, Congress has decided not to decide. In the 104th Congress, legislators prohibited regulation of SVC systems for the immediate future<sup>4</sup> and ordered the Federal Reserve Board to conduct a study of whether there is a need for

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1. See Celia Viggo Wexler, *OCC Lists Smart Card Risks, Urges Consumer Disclosures*, AM. BANKER, Sept. 11, 1996, at 4 (describing FDIC recommendation that banks expand SVC consumer disclosure).

2. See Selwyn Raab, *Officials Say Mob Is Shifting Crimes to New Industries*, N.Y. TIMES, Feb. 10, 1997, at A1.

3. See Gautum Naik, *Sorry, Your Prepaid Phone Card Has Been Deactivated*, WALL ST. J., July 16, 1996, at B1; Noreen Seebacher, *Communications: Prepaid Calling Cards May Not Be Smartest Way to Stay in Touch*, DET. NEWS, Nov. 14, 1996, at F5. See generally MCI's Top 10 Tips on How to Avoid Prepaid Telephone Card Scams, BUS. WIRE, Feb. 10, 1997.

4. See Omnibus Appropriations Act, 1997, Pub. L. No. 104-208, § 2601(c), 1996 U.S.C.A.N. (110 Stat.) 3009-1363, 3009-1363 to 1364 (1996).

regulation.<sup>5</sup> Although many in the industry are urging the government not to impose rules so that SVC systems can develop in a competitive marketplace free of legal restrictions,<sup>6</sup> regulation likely would have the effect of promoting SVCs. The numerous types of SVC systems, as well as consumer confusion about these systems, would be somewhat diminished by standardized disclosure requirements and rules similar to those applied to other types of payment devices because consumer concern about the reliability of SVCs would be ameliorated by the knowledge that a legal safety net exists. At the same time, regulation should be designed in a manner that will not impede further technological and marketing innovation. This can be accomplished by avoiding, to the extent it is consistent with providing consumers minimal protection, detailed regulation that has the effect of dictating the architecture of SVC systems.

Part I of this Article briefly describes different SVC systems, explaining the tremendous variety of formats and showing how this variety will lead to consumer confusion. This problem is especially disturbing because the cards are being marketed in a manner that may make them attractive to consumers who have the fewest resources to educate themselves about the risks and disadvantages of using SVCs. Current advertising for SVCs indicates market forces probably will not provide the information consumers need to make informed decisions about SVCs.

Part II discusses the legal issues that may have an impact on consumers. Many of these issues have been addressed in statutes and regulations governing credit and debit cards. The government must decide whether to adopt similar rules for SVCs. This Article examines recent pronouncements by the Board of Governors of the Federal Reserve System ("FRB" and "Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Comptroller of the Currency ("OCC"). Other issues are unique to SVC technology and call for new rules. Part III contains a proposal for a legal framework to govern SVCs.

## I. STORED VALUE CARDS: GREAT VARIETY RESULTS IN CONSUMER CONFUSION

Stored value cards are being marketed in a wide variety of formats. Some types of cards contain features that make them unlike other

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5. See Omnibus Appropriations Act § 2601(c), 1996 U.S.C.A.N. at 3009-1364.

6. See Ira H. Parker, *Fed's Stored Value Proposal Is a Blow for Card Industry*, AM. BANKER, Apr. 17, 1996, at 3 (detailing concern that regulation will hurt SVC growth); Celia Viggo Wexler, *Postpone Regulating Stored Value Cards, Bankers Urge Fed*, AM. BANKER, Sept. 20, 1996, at 3 (describing bank opposition to SVC regulation).

payment devices.<sup>7</sup> Others, however, operate in ways that are similar to their cousin, the debit card.<sup>8</sup> The plethora of architectural designs is likely to confuse even sophisticated consumers. This confusion makes regulation crucial to preserve the integrity of SVCs and payment systems in general, to ensure that consumers have the information necessary to decide whether to use SVCs, and to guarantee at least minimal consumer protection.

Some SVCs can be used only for a single purpose; they can be used to purchase goods or services from only one vendor. Examples include fare cards<sup>9</sup> used by many metropolitan transit systems and phone cards<sup>10</sup> that can be used in pay phones. Other SVCs are multi-purpose cards that can be used to purchase goods or services from more than one vendor.<sup>11</sup> Examples include the cards issued at the 1996 Olympics in Atlanta that could be used as fare cards and to buy items at stores in Olympic venues. After the Olympics, the cards could be used at businesses such as Texaco, Domino's Pizza, Baskin Robbins, and Blimpie.<sup>12</sup> Banks issue some cards,<sup>13</sup> and nonfinancial institutions issue others.<sup>14</sup> Still others are issued by banks in conjunction with Visa.<sup>15</sup>

These cards usually include the names of both the bank and the company associated with credit cards.<sup>16</sup> Some of the cards issued by banks access the customer's deposit account at that bank.<sup>17</sup> Others sold by banks can be bought at the bank by anyone who pays in

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7. See *infra* notes 8-25 and accompanying text (discussing various features that distinguish SVCs from traditional credit and debit cards).

8. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,698 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996); see also *infra* note 38 and accompanying text (noting that FDIC believes one type of SVC to be similar to debit cards).

9. See 61 Fed. Reg. at 19,698; see also David Goldberg, *MARTA Plans Test of Cash Card*, ATLANTA J. & CONST., Oct. 24, 1995, at A1 (discussing Atlanta's intention to introduce SVCs into transit system).

10. See 61 Fed. Reg. at 19,698; see also Angela G. King, *Prepaid Phone Cards' Popularity Rises*, ATLANTA J. & CONST., Aug. 25, 1996, at H6 (describing growth of prepaid phone card industry).

11. See 61 Fed. Reg. at 19,698.

12. See Advertisement, ATLANTA J. & CONST., Sept. 18, 1996, at E5.

13. See 61 Fed. Reg. at 19,698.

14. See *id.*; see also Valerie Block, *Phone Alliance May Rival Banks in Electronic Cash*, AM. BANKER, Oct. 23, 1996, at 10 [hereinafter Block, *Phone Alliance*] (discussing phone companies' attempt to challenge bank domination of SVC industry); Valerie Block, *Amex Testing Its First Smart Card, with American Airlines*, AM. BANKER, Oct. 17, 1996, at 17 [hereinafter Block, *Amex Testing*] (detailing plans to expand SVC use at airports); King, *supra* note 10, at H6 (describing growth of prepaid phone card industry).

15. See Patti Bond, *Cash Cards Off to a Slow Start*, ATLANTA J. & CONST., Aug. 2, 1996, at D1 (noting credit card industry's interest in SVCs); see also Parker, *supra* note 6, at 3 (describing Visa's version of stored value card).

16. See Advertisement for First Union Visa Cash Card, ATLANTA J. & CONST., Aug. 22, 1996, at C1.

17. See 61 Fed. Reg. at 19,698.

advance, and are not linked to funds in the purchaser's deposit account.<sup>18</sup> Some cards are "reloadable"—the cardholder can transfer additional value to the SVC continually;<sup>19</sup> others are disposable, and cannot be reloaded.<sup>20</sup> Reloadable cards can be replenished at automated teller machines ("ATM"),<sup>21</sup> specially designed telephones,<sup>22</sup> or personal computers.<sup>23</sup> Although some cards can be used only as SVCs, others also can be used as ATM, debit, and/or credit cards.<sup>24</sup> Under one SVC system, consumers are not confined to transferring value from themselves to merchants from whom they are buying goods or services; they can transfer value from themselves to another private individual as a gift, a loan, or even to purchase goods at a neighbor's garage sale.<sup>25</sup>

The results of a survey detailing consumer understanding of SVCs suggest that this diversity will confuse SVC users.<sup>26</sup> Consumers in Atlanta were questioned about the SVC marketed prior to and during the Olympics.<sup>27</sup> Only one type of SVC was offered: a multipurpose card sold by banks. The card was advertised heavily in Atlanta newspapers for two months.<sup>28</sup> Although seventy percent of those questioned were aware of the cards, eighty percent were confused about how they worked, and only twelve percent understood how the cards differed from other payment devices.<sup>29</sup> It is reasonable to assume that consumer confusion would be even greater if consumers were exposed to several different types of SVCs.

Despite the tremendous diversity of SVC systems, different types of SVCs look very much alike and appear similar to other types of payment devices. They are made of the same type of material and are

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18. See *id.* at 19,698-99; Advertisement for First Union Visa Cash Card, ATLANTA J. & CONST., Apr. 14, 1996, at B5.

19. See 61 Fed. Reg. at 19,698.

20. See *id.*

21. See *id.*; Kelly Greene, *NationsBank Puts Lock on Venue Cash*, ATLANTA BUS. CHRON., May 17, 1996, at 1.

22. See 61 Fed. Reg. at 19,698; Deidre Sullivan, *Smart Cards May Load "Cash" at Home, Form & Function: Where Does the ATM Go from Here?*, AM. BANKER SUPP., Nov. 27, 1995, at 10A (detailing European system that allows cash access by phone).

23. See *Prepaid Cards Could Dry Up Source of Treasury Income*, AM. BANKER, Apr. 18, 1995, at 7.

24. See 61 Fed. Reg. at 19,698.

25. See *id.*; Jeffrey Kutler & Valerie Block, *Mondex Gains U.S. Foothold with Smart Card Test at Wells*, AM. BANKER, Aug. 3, 1995, at 15 (describing various uses for SVC). See generally David B. Lipkin, *Stored Value Systems*, in COMMERCIAL BANKING IN THE ELECTRONIC AGE 11 (American Bar Ass'n ed., 1996).

26. See Chris Roush & Matt Kemper, *Cash Card Awareness*, ATLANTA J. & CONST., July 27, 1996, at B2.

27. See *id.*

28. See *id.*

29. See *id.*

exactly the same size as credit, debit, and ATM cards. This is necessary because many SVCs also serve as other types of payment devices. Consumers often must insert these cards into card readers, ATMs, and other equipment that are designed to accommodate only cards of a certain size. SVCs issued by or in conjunction with Visa bear the Visa logo. This similarity of function and appearance adds to the potential for consumer confusion.

Despite looking alike on the surface, the architecture of various SVC systems differ substantially. Moreover, under proposed amendments to Regulation E published by the FRB,<sup>30</sup> the availability of federal protection for consumers depends on the type of architecture their SVC employs.<sup>31</sup> Some SVCs operate "on-line." This means that "when the card is used at an ATM or POS [point of sale] terminal, the transaction is authorized by means of on-line communication with the data facility, where the transaction data are stored . . . the balance information is maintained in the data facility."<sup>32</sup> The Federal Reserve has characterized these SVCs as "the functional equivalent of using a debit card to access a traditional deposit account."<sup>33</sup> Other SVC systems operate off-line, with information concerning the balance of funds available recorded both on the card and at a central data facility.<sup>34</sup> In other off-line systems, the balance of funds data is contained only on the card; there is no central database.<sup>35</sup>

It is important to note that even if consumers understood the distinct ways in which SVCs operated, they would have to inquire further to determine which architecture was employed in the design of any particular card they use; there is nothing on the face of the cards themselves to inform the consumer.<sup>36</sup> Consumers who go to a bank to buy SVCs may be able to obtain this information from a bank employee. It is unclear, however, how a consumer could obtain this information if buying an SVC from a vending machine, an ATM, or a convenience store. Moreover, consumers will not incur the transaction costs of making this determination unless they realize it is relevant.

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30. See 61 Fed. Reg. at 19,696.

31. See *id.* at 19,698.

32. *Id.* at 19,699.

33. *Id.*; see also Valerie Block, *Bank of Hawaii Cash Card Targets Japanese Visitors*, AM. BANKER, Oct. 16, 1996, at 16 (stating that prepaid cash card operates like bank debit card).

34. See 61 Fed. Reg. at 19,699.

35. See *id.*

36. Copies of the information printed on the cards issued by First Union, Wachovia, and NationsBank are on file with *The American University Law Review*.

The proposed amendment to Regulation E would not provide consumers with the information they need to determine what type of card they have nor would it inform them of the risks they take in using various cards because of their different architectures. Regulation E addresses only a limited range of issues.<sup>37</sup> Thus, even consumers who know how SVCs work and who understand how various types of SVC systems are treated under Regulation E may not understand what legal characteristics, including risks and protections, the cards may embody.

In accord with the FRB, the FDIC has acknowledged that one type of SVC is "similar to [a] debit card[]." <sup>38</sup> This raises the question of whether other types of SVCs are similar to something else. In requesting comments on SVC technology, the FDIC has noted SVCs' "similarity to cashier's checks, money orders, and traveler's checks."<sup>39</sup> Each of these three types of payment devices has special characteristics and significantly different legal consequences,<sup>40</sup> depending on whether the state whose law applies has adopted the revised Article 3 and amended Article 4 of the Uniform Commercial Code ("U.C.C.").<sup>41</sup> Moreover, some states have imposed additional non-U.C.C. requirements on businesses that sell travelers' checks and money orders.<sup>42</sup> Thus, even sophisticated, well-informed consumers will be confused and ignorant of basic rights and responsibilities associated with SVCs unless extensive consumer disclosure and education occurs.

Currently, the manner in which SVCs are marketed fosters consumer confusion. One advertisement that has appeared several times in Atlanta proclaims in large boldface type: "Cash is Good. This is Better." The text then states: "It's a prepaid cash card you'll be able to use just like cash—only it's better! It's fast, accurate and convenient. It eliminates waiting for approval in the checkout line . . . entering a PIN number . . . signing receipts . . . carrying loose

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37. See 12 C.F.R. pt. 205 (1996) (addressing issuance, liability for unauthorized transfers, disclosure, and procedures for resolving errors). Under the proposed amendment to Regulation E, most of the Regulation E provisions that apply to these issues will be made inapplicable to most types of SVCs. See *infra* notes 122-83 and accompanying text.

38. FDIC General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 40,490 n.1 (1996).

39. Stored Value Cards and Other Electronic Payment Systems, 61 Fed. Reg. 40,494, 40,496 (1996).

40. See U.C.C. § 3-104 cmt. 4 (1995).

41. See FRED H. MILLER & ALVIN C. HARRELL, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* 1-10 to 1-11 (2d ed. 1992).

42. See *infra* notes 279-82 and accompanying text (identifying state statutes that require businesses to obtain licenses and make disclosures to customers).

coins or not having exact change."<sup>43</sup> The advertisement seeks to gain consumer acceptance of SVCs as a cash substitute. Yet, after asserting SVC's superiority to cash, the advertisement supports its claim through illustrations that have nothing to do with paying with cash. Rather, the ad suggests a distinction between SVCs and checks, which need approval, and debit cards, which require the user to enter a PIN.

Although it is true, as the ad states, that SVCs have the advantage over cash of eliminating loose coins or the need for exact change at facilities that accept SVCs, the system is not necessarily better than cash. For example, unlike payment by check and credit card, a third party gets the "float," not the consumer.<sup>44</sup> Additionally, some cards carry an expiration date, and the issuer keeps the value if the card is not used by that date.<sup>45</sup> The SVC offered by NationsBank during the Olympics, for example, provided that any unused balance would be donated to an Olympic charity chosen by the bank.<sup>46</sup> It is reasonable to expect that as is the case with traveler's checks, consumers will not use all of the value on their cards, forfeiting that value to the card issuers. This forfeiture is especially likely in situations like the Olympics, in which issuers market the cards as collector's items.<sup>47</sup> Even without a special event, however, some consumers will purchase SVCs for reasons other than redeeming their stored value. Telephone cards in Israel, for example, have become desirable pieces to collect.<sup>48</sup>

Unlike cash, consumers pay a fee to use some SVCs and risk absorbing the costs of malfunctions.<sup>49</sup> Although merchants accept-

43. Advertisement, ATLANTA J. & CONST., June 25, 1996, at A7.

44. See Valerie Block, *Blockbuster Running Test of a Stored Value Card*, AM. BANKER, Sept. 1, 1995, at 11; Mickey Higginbotham, *Banks Scramble to Sign up Lucrative Cash Card Accounts*, ATLANTA J. & CONST., Nov. 17, 1995, at H2.

45. See Block, *supra* note 44, at 11.

46. The agreement (on file with *The American University Law Review*) further provides that "NationsBank will transfer such funds promptly after expiration on your behalf, subject to a fee of up to \$5.00 per Card."

47. Wachovia, for example, advertises that its Visa Cash Card dedicated to the Olympic athlete is "destined to become a collector's item." A copy of the brochure describing the card is on file with *The American University Law Review*.

48. See Judy Siegel, *Telecard Collectors to Convene*, JERUSALEM POST, Jan. 2, 1995, at 2 (noting that collectors appraised one of first cards issued in country at \$3000). See generally MCI to Provide Prepaid Phone Cards and Services to Wal-Mart Stores, Inc., M2 PRESSWIRE, Oct. 25, 1996; NationsBank Sets up Card Collector Service, AM. BANKER, Nov. 27, 1996, at 11.

49. See Ellen Stark, *Here's What You Should Know Before Making Electronic Payments*, BUFF. NEWS, Jan. 27, 1997, at C2 (cautioning consumers that card issuers may not be required to replace malfunctioning SVCs); see also Block, *supra* note 33, at 16 (noting that Cash Card charges consumers \$19 fee); Valerie Block, *Canadian Banks to Test Belgian Stored Value System in Ontario College Town*, AM. BANKER, June 28, 1996, at 10 [hereinafter Block, *Canadian Banks*] (describing annual fee range of \$6 to \$12); Valerie Block, *Smart Cards off to a Bumpy Start*, Critics Say, AM.



ing SVCs save money by lowering their risk of cash miscounting and the costs of storage and delivery, merchants pay a fee every time SVCs are used in their stores.<sup>50</sup> If this fee exceeds savings from the decreased need for cash, merchants likely will pass this cost along to all consumers. In addition, a defect in the card may deprive consumers of the value they pay for the cards. The president of Echelon Industries estimates that one of every thousand smart cards does not work properly.<sup>51</sup> Computer scientists at Bell Communications Research have reported that a flaw in many types of cards used in Europe makes it possible to produce counterfeit cards.<sup>52</sup>

SVCs also present consumers with the risk of invasions of privacy<sup>53</sup> that are not present when cash is used. Moreover, if the issuer becomes insolvent as have several issuers of prepaid phone cards, sellers of goods and services will stop honoring SVCs, and consumers may not be able to collect the value remaining on the card even if the issuer is a bank whose deposits generally are FDIC insured.<sup>54</sup> In addition, merchants who have not been paid by the issuer may demand payment from consumers for purchases made with the SVC.<sup>55</sup> Consumers who accede to this demand will pay twice unless they can collect from the issuer. Finally, when consumers pay with cash, they easily can count how much money they have left. With most SVCs, the consumer must go to a store with a card reader to learn how much value remains on the card.

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BANKER, Jan. 17, 1996, at 14 (noting that consumers must pay for cards). *But see* James B. Arndorfer, *Prepaid Telephone Cards Aren't Exactly Ringing Bells at the Country's Groups*, AM. BANKER, Aug. 14, 1995, at 13 (detailing practice of many credit unions giving consumers free cards for promotional purposes).

50. See Higginbotham, *supra* note 44, at H2; Mickey Higginbotham, *Smart Cards: Bank Delivers on Domino's Cashless Goal*, ATLANTA J., Nov. 15, 1995, at E2 (explaining that First Union Bank charges one percent plus two cents for each transaction).

51. See Valerie Block, *Bridge Sought Between Transit, Smart Cards*, AM. BANKER, July 25, 1995, at 19.

52. See John Markoff, *Potential Flaw in Cash Card Security Seen*, N.Y. TIMES, Sept. 26, 1996, at D1.

53. See Steven A. Bercu, *Smart Card Technologies: Novel Privacy Concerns and the Legal Response*, 10 J. PROPRIETARY RTS. 2,3 (1995); Bill McConnell, *No Need Yet to Regulate Electronic Cash, Fed's Vice Chairman Tells Banking Panel*, AM. BANKER, Oct. 12, 1995, at 1, 2.

54. FDIC insurance applies only to funds that remain credited to the consumer's account "until claims on such funds are made by payees." FDIC General Counsel's Opinion No. 8; *Stored Value Cards*, 61 Fed. Reg. 40,490, 40,492 (1996). Several issuers of pre-paid phone cards have gone out of business after selling tens of thousands of worthless SVCs. See Carol Angrisani, *Group Reports Several Chains Got Nonworking Phone Cards*, SUPERMARKET NEWS, Apr. 22, 1996, at 92; Judy Corcoran, *Wrong Numbers: Prepaid Phone Card Industry Offering Limited Returns to Retailers*, SUPERMARKET NEWS, July 15, 1996, at 47; Gautum Naik, *Sorry, Your Prepaid Phone Card Has Been Deactivated*, WALL ST. J., July 16, 1996 at B1; Noreen Seebacher, *Prepaid Calling Cards May Not Be Smartest Way to Stay in Touch*, DET. NEWS, Nov. 14, 1996, at F5.

55. See 61 Fed. Reg. at 40,492.

Some SVC advertisements stop short of claiming that SVCs are better than cash, instead touting them as equal to cash, but more convenient. Some cards are advertised as "Visa Cash"<sup>56</sup> or the "Cash Card."<sup>57</sup> The president of one of the banks promoting SVCs in Atlanta stated, "It's the same as cash, only you won't have to fish for change or smooth out wrinkles in a dollar bill to get a candy bar."<sup>58</sup> SVCs, however, are not the same as cash. In addition to potential problems with fees, malfunctions, privacy, and solvency, SVCs are not legal tender.<sup>59</sup>

The manner in which SVCs are being marketed indicates that less sophisticated consumers are among the targeted groups. For example, SVCs have become the first non-cash payment systems encountered by many freshmen who enroll in a growing number of universities that have implemented smart card applications.<sup>60</sup> In addition, many SVCs are available to people who do not have bank accounts.<sup>61</sup> This may make SVCs attractive to low-income consumers, who often are unbanked.<sup>62</sup> Many SVC plans offer cards in small denominations, such as those not exceeding \$100. These low denomination cards make SVCs affordable to consumers with modest incomes. Finally, SVCs are being marketed for the purchase of goods and services, such as mass transit fares.<sup>63</sup> These services commonly are used by those with lower incomes.

Even well-informed and more sophisticated consumers can be confused by SVCs. This should be a significant factor in the

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56. Advertisement, ATLANTA J. & CONST., Sept. 18, 1996, at E5.

57. Advertisement, ATLANTA J. & CONST., Aug. 8, 1996, at E1.

58. Rodney Ho, *First Union Plans Launch of "Smart Cards" for Purchases*, ATLANTA J., Mar. 21, 1995, at D1 (quoting David Carroll, President, First Union Bank of Georgia).

59. See 61 Fed. Reg. at 40,490 n.2 (explaining that information loaded on SVCs is not legal tender but constitutes right to be paid sum of money).

60. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,698 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996); see also Block, *Canadian Banks*, *supra* note 49, at 10; Valerie Block, *Huntington Joins Sallie Mae in Smart Card Venture*, AM. BANKER, Apr. 26, 1996, at 11; Beth Piskora, *Texas Students Using Diebold's Combined Debit-ID Card*, AM. BANKER, Mar. 27, 1995; Jeremy Quittner, *B of A Card Lets Students Open Doors, Accounts*, AM. BANKER, Aug. 7, 1996, at 14.

61. See, e.g., First Union advertisement, ATLANTA J. & CONST., Apr. 14, 1996, at B5.

62. See Glenn B. Canner & Ellen Maland, *Basic Banking*, 73 FED. RESERVE BULL. 255, 257 (1987). See generally EDWARD L. RUBIN & ROBERT COOTER, *THE PAYMENT SYSTEM: CASES, MATERIALS AND ISSUES* 228-42 (2d ed. 1994). The National Consumer Law Center filed comments on the FRB's proposed amendments to Regulation E that stressed the potential importance of stored value cards to low-income consumers. See Comments of the National Consumer Law Center on the Proposed Amendments to Regulation E (Sept. 5, 1996) (on file with *The American University Law Review*). Phone SVCs have been popular with lowest income consumers, with consumers in ethnic neighborhoods with many individuals from foreign countries, and with individuals who do not have regular phone service. Corcoran, *supra* note 54, at 47; Noreen Seebacher, *Callers Beware: Some Firms' Prepaid Phone Cards in Trouble*, DET. NEWS, Apr. 10, 1996, at J4.

63. See Higginbotham, *supra* note 44, at H2.

formation of public policy. Public confidence in payment systems used by banks is essential to the soundness of the banking system.<sup>64</sup> John S. Reed, the Chairman of Citicorp, stated that successful electronic banking "is not a question of economics or efficiency. It is a question of trust. The consumer will have to trust you."<sup>65</sup> Reflecting on the presentations and discussions made at a September 1996 conference on electronic money, Comptroller of the Currency Eugene A. Ludwig said, "Perhaps the most significant [theme] is the importance of trust . . . . [E]veryone agreed trust is the key to developing a robust e-money system."<sup>66</sup> It is doubtful that consumers will have confidence in a system about which there is such fundamental ignorance and confusion. Laws requiring minimal disclosure can ameliorate this problem, but they are not a panacea.<sup>67</sup> The FDIC relates the need for regulation directly to reasonable consumer expectations.<sup>68</sup> Due to the diversity of SVC systems, however, it may be difficult to gauge consumer expectations. Moreover, consumers reasonably may believe SVCs carry the same protections as credit or debit cards.<sup>69</sup> This misconception indicates the need for uniform regulation, to the extent possible, regardless of the architecture of the various SVC systems.<sup>70</sup>

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64. See *Stored Value Cards and other Payment Systems*, 61 Fed. Reg. 40,494, 40,496 (1996). "As a result of the potential widespread use of such [stored value] systems, it may be that the FDIC should determine that public confidence in these payment systems is critical to the safety and soundness of the banking system, such that deposit insurance is warranted." *Id.*

65. Jeffrey Kutler, *Reed: Tech Revolution Won't Occur Overnight*, AM. BANKER, Sept. 20, 1996, at 1-2.

66. Eugene A. Ludwig, *Comptroller: Trust, Reliability Essential to Electronic Money*, AM. BANKER, Sept. 27, 1996, at 4.

67. The FDIC "staff would expect the relationship between a stored value card customer and the institution to be clearly and conspicuously stated." 61 Fed. Reg. at 40,496. In addition, the FDIC expects issuers to disclose, when applicable, that funds in the card are not insured by the FDIC. See *id.* For discussion of the problems attendant to implementing disclosures, see *infra* notes 122-37 and accompanying text.

68. See 61 Fed. Reg. at 40,496. "The failure to provide deposit insurance in an instance where protection is reasonably expected by a consumer could, in the event of failure of an issuer, result in a loss of public confidence in these developing payment mechanisms." *Id.* The FDIC should take into consideration whether reasonable consumers "may be more likely to believe that a reloadable card gives rise to an insured deposit." *Id.*

69. SVCs look similar to credit and debit cards. Furthermore, some SVCs are functionally similar to debit cards and, in some systems, occupy the same card as credit and debit cards.

70. See *supra* notes 31-36 and accompanying text (discussing architecture of various SVC systems).

## II. LEGAL ISSUES

### A. *Application of Regulation E*

#### 1. *The FRB's broad assertion of authority*

Regulation E, promulgated pursuant to the Electronic Fund Transfers Act ("EFTA"), addresses many of the legal issues that arise when consumers use SVCs.<sup>71</sup> In May 1996, the FRB published proposed amendments to Regulation E to accommodate SVC systems.<sup>72</sup> In October 1996, as part of an appropriations package, Congress ordered the FRB to conduct a study to determine whether the EFTA could be applied to such systems without having an adverse impact on the cost, development, and operation of SVCs.<sup>73</sup> The Act required the Board to issue a report to Congress within six months of its effective date.<sup>74</sup> The legislation postpones the effective date of any final Board amendments to regulate SVCs under the EFTA.<sup>75</sup> This period lasts until the later of: (1) three months after the FRB submits its report; or (2) nine months after enactment.<sup>76</sup> Despite the postponement of any final rule, it is informative to examine the FRB proposal, as it illustrates the problematic nature of SVC systems resulting from their diversity of architecture and their similarity to other types of payment devices.

The proposed amendments seek to address a wide range of SVC systems. This is significant because they require the FRB to interpret the EFTA in a broad fashion. This reflects the FRB's acknowledgment that SVCs will form an important payment system and its determination to play a crucial role in this emerging system. The EFTA defines the term "account" as "a demand deposit, savings deposit, or other asset account."<sup>77</sup> This does not seem to apply to SVCs issued by nonfinancial institutions, or to SVCs that consumers can purchase over-the-counter from financial institutions at which they

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71. Such issues include initial disclosure to the consumer of the terms and liabilities associated with SVCs, the necessity of providing periodic statements and receipts, and the procedures available for resolving claims of error.

72. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,700-01 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996).

73. See Omnibus Appropriations Act, 1997, Pub. L. No. 104-208, § 2601, 1996 U.S.C.A.N. (110 Stat.) 3009-1363, 3009-1364 (1996).

74. See *id.*

75. See *id.*

76. See *id.*

77. Electronic Fund Transfers Act of 1978 § 903, 15 U.S.C. § 1693(a)(2) (1994).

have no account. This is important because a substantial number of systems are operated by nonbanks.<sup>78</sup> Thus, if the FRB lacked the authority to regulate SVCs issued by nonbanks, it could not effectively regulate SVC commerce. Moreover, banks are selling SVCs to consumers who have no account relationship with them.<sup>79</sup>

The EFTA provides, however, that the FRB can issue regulations covering electronic fund transfers ("EFT") services provided by persons other than financial institutions.<sup>80</sup> Pursuant to this provision, the FRB has asserted its authority to apply the EFTA to money market accounts and to other securities accounts held by broker-dealers, as well as to accounts held by the government to distribute government benefits.<sup>81</sup>

The EFTA also contains a catch-all provision allowing the FRB to issue regulations that "contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions . . . as in the judgment of the Board are necessary or proper to effectuate the purposes [of the EFTA]."<sup>82</sup> Finally, the FRB could point to language in the legislative history indicating Congress' intent for the EFTA to have broad coverage.<sup>83</sup> Most significantly for consumers, the Senate Banking Committee stated that the EFTA defined "financial institution" and "account" broadly "so as to assure that all persons who offer equivalent EFT services involving any type of asset account are subject to the same standards and consumers owning such accounts are assured of *uniform protection*."<sup>84</sup>

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78. See Block, *Phone Alliance*, *supra* note 14, at 10 (describing alliance of phone companies that utilize SVC cards); Block, *Amex Testing*, *supra* note 14, at 17 (discussing possibility of electronic airline ticketing); Scott D. Smith, *Fed Exec: Regulation Unlikely for Nonbank Payment Firms*, AM. BANKER, May 28, 1996, at 2 (discussing payment systems in which service provider is not responsible for deposits). Alton Gilbert, Vice President of the Federal Reserve Bank in St. Louis, predicted that "eventually 20% of payment services could take place outside the banking industry." *Id.*

79. See *supra* text accompanying note 18.

80. See 15 U.S.C. § 1693b(d) (providing that FRB "shall" regulate electronic fund transfer services offered by non-financial institutions as necessary to protect consumers).

81. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,699 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996) (stating that EFTA definition of asset accounts, which FRB has authority to regulate, includes money-market mutual funds, other broker-dealer held securities accounts, and government-established electronic benefit transfer programs).

82. 15 U.S.C. § 1693b(c); see also *Mourning v. Family Publications Serv.*, 411 U.S. 356, 371 (1973) (finding that FRB possessed broad rule-making authority under Truth in Lending Act, 15 U.S.C. § 1604, to prevent merchant evasion of reporting requirements through concealment of credit charges, although specific remedial measure was not authorized explicitly under statute). See generally Expedited Funds Availability Act § 611, 12 U.S.C. § 4010(f) (1994) ("The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with *any aspect of the payment system* . . .") (emphasis added).

83. See 61 Fed. Reg. at 19,699 (discussing Senate Banking Committee's endorsement of liberal interpretation of EFTA).

84. *Id.* (emphasis added).

## 2. *The FRB's categorization of stored value systems in its proposed rule*

To understand the proposed rule for SVCs, it is necessary to understand how the FRB has characterized SVC systems. Like Julius Caesar in Gaul, the FRB has divided all SVCs into three parts for purposes of the proposed rule.<sup>85</sup> The FRB calls one system "on-line." In this system, "data about individual card balances and transactions . . . are collected and maintained at centralized locations; and the value associated with a card is limited to an amount that the consumer chooses, not a fluctuating balance in the consumer's checking or savings account."<sup>86</sup> As the FRB acknowledges, "in some respects" this system "resembles off-line accountable stored value systems, and in others resembles traditional deposit accounts accessed by debit cards."<sup>87</sup> Although operating on-line, "[t]he balance of funds available to the consumer is not recorded on the card itself, as in off-line stored value systems."<sup>88</sup> With regard to certain system features, this type of SVC "is the functional equivalent of a deposit account accessed by a debit card."<sup>89</sup> The proposed rule generally subjects this SVC system to Regulation E.<sup>90</sup>

A second system is called "off-line accountable." The FRB describes the system as follows:

The systems operate off-line; there is no authorization of transactions by communication with a database . . . . Transaction data are periodically transmitted to and maintained by a data facility. As in the case of the traditional consumer deposit account accessed by a debit card, in these stored value card systems a consumer has the right to draw upon funds held by an institution.<sup>91</sup>

The Board concluded that these off-line accountable cards function in a way that "strongly parallels" that of a deposit account.<sup>92</sup> The proposed rule, however, does not apply significant parts of Regulation E.<sup>93</sup>

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85. See *id.* (delineating SVC systems as either "off-line accountable stored value systems," "off-line unaccountable stored value systems," or "on-line stored value systems").

86. *Id.* at 19,702.

87. *Id.*

88. *Id.*

89. *Id.* The FRB found that on-line SVCs are the functional equivalent of a deposit account accessed by a debit card because in both "the transaction is authorized by means of on-line communication with a financial institution or central data facility." *Id.*

90. See *id.* at 19,703 (proposing exemption of on-line SVC from Regulation E if SVC is limited to \$100).

91. *Id.* at 19,699.

92. See *id.*

93. See *id.* at 19,699-700 (explaining provisions of Regulation E that are not applicable to off-line accountable systems).

The third system is characterized as "off-line unaccountable."<sup>94</sup> The FRB states:

[T]he record of value is maintained only on the card itself, and not in a central database. Transaction data for debits to the card's "stored value" are recorded on the card . . . . Given the lack of a centrally maintained, ongoing record of individual card balances or of transaction data in these systems, it is more difficult to conclude that an "account" exists for purposes of Regulation E.<sup>95</sup>

At the present time, most of these types of SVC systems are sold for small amounts and are used for only one type of purchase. Common examples of off-line unaccountable cards are fare cards and cards sold at photocopy stores.<sup>96</sup> As the Board acknowledged, however, nothing in this system's architecture would prevent it from handling large amounts or from being used as a multiple purpose card system.<sup>97</sup> The Board concluded that multiple purpose, large denomination, off-line unaccountable cards are "comparable to traditional debit cards . . . in terms of potential uses by consumers."<sup>98</sup>

There are several notable aspects to the FRB's discussion of the three systems. For example, the Board admits that in various respects, all three systems resemble the "traditional debit cards" that were Congress' principal concern when it enacted the EFTA, and for which Regulation E specifically was drafted.<sup>99</sup> Because of this similarity, reasonable consumers likely would expect Regulation E to apply regardless of which type of SVC they purchase. The proposed amendment, however, excludes many SVCs from coverage under Regulation E based on features in SVC systems<sup>100</sup> that are completely unknown, and probably unknowable, to consumers.<sup>101</sup>

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94. *See id.* at 19,699.

95. *Id.*

96. *See id.* at 19,701.

97. *See id.*

98. *Id.*

99. *See id.*

100. These differentiated features include determinations of whether a system is off-line or on-line, and if off-line, whether it is accountable or unaccountable.

101. *See Parker, supra* note 6, at 3 (arguing that consumers find no meaningful distinction between accountable and unaccountable cards). The American Bankers Association submitted a letter in response to the FRB's request for comments in which it stated: "[C]onsumers will be oblivious to the operational distinctions; regulatory protections and disclosures that vary substantially according to the card's architecture rather than their function will cause consumer confusion. The focus should be on how the card is used, not on its technological attributes." Letter from Nessa Eileen Feddis, Senior Federal Counsel, American Bankers Ass'n, to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System 5 (Sept. 6, 1996) (on file with *The American University Law Review*).

As the FDIC has stated, public trust in a payment system is essential.<sup>102</sup> The public cannot trust a system that it does not understand. The public also cannot rely on regulations based on system characteristics about which they have no knowledge. Because they lack knowledge about the various SVC systems, consumers will make decisions based on their expectations. But the similarity of SVCs to debit cards likely will cause consumers to assume that the law affords the same legal protections to SVC users as it does to debit card users.<sup>103</sup> When problems occur, those consumers who are not using on-line cards will learn they have little or no protection. As a result, their trust will evaporate and even may lead to distrust of other similar payment systems.<sup>104</sup>

Given this confusion-laden situation, there are four possible solutions regarding consumer use of SVCs. First, consumers might use SVCs even though they do not know the risks to which they might be exposed, or may have false expectations regarding those risks. These consumers likely will be those who are ignorant of the risks, those who confine their SVC purchases to low denomination cards and occasional use, and risk seekers. Such a limited market would stifle development of SVCs and might make them unprofitable.

Second, the government could rely on industry to educate consumers. The advertising campaign in Atlanta, however, demonstrates that this reliance would be unwarranted.<sup>105</sup> Industry cannot be expected to spend money to point out the risks and drawbacks of SVCs. Additionally, consumers cannot realistically be expected to rely on industry to demonstrate the advantages and disadvantages of SVCs in comparison to other types of payment devices.

Third, the government could rely on private initiatives. Under this scenario, some consumers may incur the transaction costs to educate themselves about SVCs. In addition, the media may educate consumers about SVCs, and consumer organizations may be willing to allocate scarce resources to this effort. It seems unwise, however, to rest the public trust on such a slim reed. This is true particularly because relying on non-governmental sources makes it impossible to

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102. See *Stored Value Cards and Other Electronic Payment Systems*, 61 Fed. Reg. 40,494, 40,496 (1996) (discussing whether FDIC should insure SVCs to maintain public confidence).

103. See *id.*

104. See *id.*

105. See *supra* text accompanying notes 26, 43-47, 56.



ensure that consumers are provided accurate, uniform, and consistent information.<sup>106</sup>

Fourth, the government could mandate disclosures and basic protections to help ensure public trust in SVCs specifically and electronic payment systems generally.

Another significant feature of the Board's discussion of these systems is its suggestion of alternative ways to classify SVCs. One option would be to distinguish cards based on whether they have a single use, such as a fare card, or multiple uses.<sup>107</sup> The advantage of making Regulation E coverage depend on this factor is the ease with which industry and consumers could understand such a classification. This type of differentiation also would be easy for the FRB to administer. The Board, however, did not adopt this option in its proposed rule.<sup>108</sup> It may have rejected this choice because it wanted to bring single purpose cards that can carry substantial amounts of value into the confines of Regulation E. The Board also may have believed that it had found another way to accomplish the same objective.

The proposed rule exempts from coverage all SVCs that cannot carry more than \$100 at one time.<sup>109</sup> This includes both on-line and off-line cards, as well as most single purpose and many multiple purpose cards.<sup>110</sup> The FRB justified this exemption by claiming that \$100 is "a relatively small amount of funds," and stated that because the amount at risk is "sufficiently minimal," "application of even modified Regulation E protections appears unnecessary."<sup>111</sup> It characterized the \$100 amount as "de minimis."<sup>112</sup>

Despite the FRB's superior access to economic information, the FRB presented no data in its request for comment to support its assertion.<sup>113</sup> On its face, the FRB claim appears unwarranted. One hundred dollars presumably is a great deal of money for a person who is unemployed, or earning minimum wage and working part-time, or even full-time. The Board apparently ignored those who live from paycheck to paycheck. A loss of \$100 can mean the inability to pay

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106. See *Electronic Fund Transfers*, 61 Fed. Reg. 19,696, 19,700 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996) (discussing ways in which SVC providers may target and bring possible harm to consumers).

107. See *id.* at 19,702.

108. See *id.* (proposing that Regulation E exclude offline unaccountable systems from regulation).

109. See *id.* at 19,701.

110. See *id.*

111. *Id.*

112. See *id.*

113. See *id.*

the rent or pay a mechanic to repair a rundown vehicle that a consumer needs to get to work. One hundred dollars is not de minimis to a college student on a limited budget who has incurred large loans.<sup>114</sup> Perhaps the explanation is that the Board assumed these segments of the consumer population would not purchase SVCs. This assumption is unwarranted; the cards are targeted at persons who are in these demographic groups.<sup>115</sup> Increasing rates of credit delinquency and personal bankruptcy indicate that many consumers are having difficulty making ends meet.<sup>116</sup> One hundred dollars appears to be more de minimis to the industry marketing the cards than to the consumers using them.

The rationale behind the \$100 exemption is flawed because reloadable cards would be included in the exemption.<sup>117</sup> Under the proposed regulation, online and offline accountable cards that are capable of carrying \$101 would be subject to regulation requiring basic disclosures, but the same types of cards that could be reloaded constantly, although carrying no more than \$100 at a time, would be completely exempt. It is not apparent why the person who uses a reloadable card to transfer thousands of dollars has less need for disclosure than the consumer who purchases a \$101 disposable card. Instead, it would seem that the need for basic information concerning rights, obligations, and risk of loss would be the same for either consumer.

Moreover, consumers may purchase several cards, none carrying more than \$100, but in total representing many hundreds or thousands of dollars in value.<sup>118</sup> This tendency may provide an incentive for the industry to market only \$100 cards as a means of avoiding regulation. Traditional marketing factors and consumer choice, not industry attempts to avoid regulation, should determine the types of SVCs used.

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114. Cf. Antoinette Coulton, *Easy Credit for Students Teaching Hard Lessons*, AM. BANKER, Oct. 17, 1996, at 16 (noting that rising education and living costs have forced students to rely on credit cards, but more student cardholders are paying late or not at all).

115. See *supra* notes 58-63 and accompanying text.

116. See Hope Viner Samborn, *Going for Broke: Soaring Bankruptcies Prompt Calls for New Repayment Plan*, A.B.A. J., Sept. 1996, at 16; see also Saul Hansell, *Bankruptcies Surging as Economy Hums*, N.Y. TIMES, Aug. 25, 1996, § 1, at 2.

117. The \$100 exemption covers SVCs that are capable of holding a maximum of \$100 "at a given time." 61 Fed. Reg. at 19,701. The exemption therefore applies to cards that can hold no more than \$100 at any one time but that can be reloaded.

118. See *Stored Value Cards and Other Electronic Payment Systems*, 61 Fed. Reg. 40,494, 40,496-97 (1996) (stating that FDIC will consider fact that consumers may hold multiple cards of \$100 value in deciding whether to treat such cards as deposits).

The proposed SVC rule, in addition to exempting cards that can carry no more than \$100, would completely exempt offline unaccountable cards.<sup>119</sup> The Board appears to be unsure whether it has the authority to regulate these cards. In its request for comment on the proposed SVC rule, the FRB states: "Given this lack of a centrally maintained, ongoing record of individual card balances or of transaction data in these systems, it is more difficult to conclude that an 'account' exists for purposes of Regulation E."<sup>120</sup> Elsewhere in the comment, however, the Board encourages feedback as to whether it should include limited coverage of this system.<sup>121</sup> Consumers have no feasible way of knowing if a card is off-line unaccountable and also are unaware of any reason to discover if it is. Moreover, in important respects these cards resemble debit cards that are governed by Regulation E. For these reasons, as well as for those discussed in Part II.D, exempting off-line unaccountable cards completely is bad policy. If the FRB lacks legal authority to regulate off-line unaccountable cards because there is no "account" within the definition of the EFTA, the Board should seek a legislative amendment to the EFTA to broaden the definition to include this system.

### 3. *Regulation E provisions to protect consumers*

#### a. *Initial disclosures*

Congress recognized that EFT transactions have "unique characteristics."<sup>122</sup> Because EFT is a new way for consumers to handle their money, Congress felt that it was vital for consumers to be informed of the essential elements of EFT transactions, as well as of their rights and obligations.<sup>123</sup> Both the EFTA and Regulation E, therefore, require issuers to make various initial disclosures of terms and conditions of the EFT service. These disclosures include: (1) the consumer's liability for unauthorized transfers; (2) any charges for services; (3) the consumer's right to receive documentation such as receipts at ATMs and periodic statements; (4) the consumer's right to stop payment of preauthorized transfers; (5) the circumstances under which the financial institution will disclose information about the consumer's account to third parties; and (6) information about

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119. See 61 Fed. Reg. at 19,701.

120. *Id.*

121. See *id.* at 19,702.

122. Electronic Fund Transfers Act of 1978 § 902(a), 15 U.S.C. § 1693(a) (1994).

123. See *id.*

the institution's error resolution procedures, including the telephone number and address to which the consumer should report errors.<sup>124</sup> These disclosures ensure that consumers will have the basic information they require in order to decide whether to transfer their money via EFT. They also will allow the consumer to understand better his rights and obligations, as well as how to protect himself when problems arise.

The EFTA scheme is consistent with other federal consumer protection legislation mandating disclosure, such as the Magnuson-Moss Warranty Act,<sup>125</sup> the Truth in Lending Act,<sup>126</sup> and the Truth in Savings Act.<sup>127</sup> The FRB's proposed SVC rule, however, exempts from these initial disclosure requirements all transactions involving SVCs that are categorized as "off-line unaccountable."<sup>128</sup> The proposed SVC rule also exempts those SVCs that are capable of carrying \$100 or less in value,<sup>129</sup> regardless of whether they can be reloaded continually. Despite these exemptions, certain disclosures still would be required for on-line and off-line accountable systems.<sup>130</sup> Because consumers of all types of SVCs would benefit from disclosure of basic information, the Board should not exempt any type of SVC from initial disclosure.

The Board's conclusions on whether to require initial disclosures are based on a rather rough cost-benefit analysis: "Providing initial disclosures probably would not impose significant compliance costs. The disclosures can be given along with the card or with other account-opening material in a preprinted format; they need not be individually customized for each account."<sup>131</sup> The Board, however, points to no evidence that the costs of initial disclosure to issuers of off-line unaccountable cards would be higher than the insignificant costs to issuers of the types of cards that would be subject to the regulation. The FRB's justification, apparently, is that most current off-line unaccountable cards are sold in small amounts and for a single purpose.<sup>132</sup> As the Board acknowledges, however, there is

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124. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.7 (1996).

125. 15 U.S.C. §§ 2301-2312.

126. *Id.* §§ 1601-1920.

127. 12 U.S.C. §§ 4301-4313.

128. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,701 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996).

129. See *id.*

130. See *id.* at 19,700. Required disclosures would include consumer liability for unauthorized transactions, the types of transfers available, transaction charges, and error resolution procedures available, if any. See *id.*

131. *Id.*

132. See *id.* at 19,701.

nothing to prevent issuers from selling large amount, multi-purpose off-line unaccountable cards.<sup>133</sup> Moreover, the FRB itself suggests that exempting a category of SVC from regulation may provide issuers with the incentive to market that type of card rather than one subject to regulation.<sup>134</sup>

At the very least, consumers need to know some basic information: the amount of any user fees; whether the issuer may change the terms and conditions of the cards subsequent to consumer purchase; any expiration date; consumer liability for lost, stolen, or malfunctioning cards; how the consumer can ascertain the balance remaining in the card; and whether and in what manner unused value can be redeemed. In addition, the cards should inform the consumer of whom to call and where to go with questions or to seek assistance. This will not necessarily be obvious; the cards issued in Atlanta, for example, contain both the name "Visa" and the name of the bank where they were purchased.<sup>135</sup>

The FRB's request for comment suggests that disclosures could be included in material provided to consumers when they open an account or even "along with the card."<sup>136</sup> Presumably, "along with the card" includes printing disclosures directly on the card. The Wachovia card, for example, includes limited disclosures on the back of the card.<sup>137</sup> To best achieve its purpose, disclosure should be required at the time the consumer purchases the card; disclosures made only when the consumer opens an account should not be allowed. This is because consumers who opened accounts in 1996 will not retain or remember disclosures given at that time when they buy another card in 1998. Consumers using reloadable cards would be best served by disclosures printed on the card itself. They are unlikely to retain disclosures given at the time the card is purchased for the many months or years they continue to reload and use the card. It may be infeasible, however, to include all mandated disclosures as well as other information the issuer wants to include on the card or in printed material made available at the time of sale. An alternative would be to require the card to contain a telephone number and address from which the consumer could receive the disclosures.

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133. See *id.*

134. See *id.* at 19,702.

135. See *supra* text accompanying notes 13-15.

136. See 61 Fed. Reg. at 19,700.

137. The card (copy on file with *The American University Law Review*) contains the following disclosures: "Card value cannot be refunded or credited in the event the card is lost or stolen. If you have any questions, including where to use your card, please call 1-800-922-4684."

*b. Notice of change of terms*

Regulation E requires financial institutions to mail or deliver to the consumer written notice of any change in the terms or conditions covered by the initial disclosure requirement "if the change would result in increased fees or charges, increased liability for the consumer, fewer types of available electronic fund transfers, or stricter limitations on the frequency or dollar amounts of transfers."<sup>138</sup> The notice must be mailed or delivered at least twenty-one days before the change is implemented.<sup>139</sup> This required disclosure enables consumers to decide whether to continue to use the EFT service affected by the changes.

The proposed revision would not require financial institutions to inform the consumer of changes in terms under any SVC system.<sup>140</sup> The revision would allow provisions such as the one in the NationsBank SVC agreement, which provides: "This agreement is subject to amendment by NationsBank at any time without prior notice . . . ."<sup>141</sup> This revision would allow issuers to impose an earlier expiration date on a card or to increase the fees imposed without notice. Consumers buying SVCs thus would have no way of knowing the true cost or the conditions of use for these cards. The unfairness of the proposed revision in not requiring notice of a change in terms is acknowledged in the request for comment which admits that it would be unreasonable for issuers not to inform consumers of an increase in fees.<sup>142</sup> The proposed exemptions from disclosure are especially onerous because they allow issuers to keep consumers ignorant of the fact that they will not be notified of any changes in terms.

The better rule would be to prohibit issuers from changing terms unless they provide notice. This would present issuers with formidable obstacles if the issuer did not obtain the consumer's address. As the request for comment acknowledges, however, most cards are likely to be used within a short time, before any changes would take effect.<sup>143</sup> The request reasons that no notice should be required because typically no changes would occur during the short time in which the card is used.<sup>144</sup> Consistent with the EFTA, however, the

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138. Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.8 (1996).

139. *See id.*

140. *See* 61 Fed. Reg. at 19,700.

141. A copy of the NationsBank agreement is on file with *The American University Law Review*.

142. *See* 61 Fed. Reg. at 19,700.

143. *See id.*

144. *See id.*

fact that such changes rarely occur should weigh in favor of mandating notice. Issuers would not face an undue burden under such a requirement because they seldom change the terms during this brief period. If the issuer really believes that it may need to change terms while the consumer has the card, it should take the precaution of obtaining the consumer's address. In the case of freely transferable cards, the issuer should be required to notify only the initial purchaser of the card of changes in terms. Similarly, notice would be unnecessary when changes in terms are not contemplated. If, in fact, consumers are likely to use cards within relatively brief periods, then an issuer's need to alter terms presumably will be minimal. Accordingly, the "burden" of making such a disclosure can be avoided simply by removing the capability for making subsequent modifications.

Prohibiting issuers from changing terms unless they notify consumers of the changes leads to a sensible allocation of cost between the issuer and the consumer.<sup>145</sup> The issuer saves paperwork costs by not having to keep records of purchasers, and the consumer shares in those savings by the assurance that, once purchased, the terms under which the card is used cannot be made more onerous. A rule that permits issuers to change terms without notice, by contrast, would confer all of the benefits of the reduced record-keeping on the issuer, while imposing all of the costs of the issuer's decision not to keep such records on the consumer.

*c. Receipts and periodic statements*

Regulation E requires financial institutions to make written receipts available at electronic terminals.<sup>146</sup> The receipts must contain information that includes the amount of transfer and the date and type of transfer.<sup>147</sup> In addition, the institution must mail the consumer a periodic statement on at least a monthly basis.<sup>148</sup> Congress apparently believed that consumers needed written documents reflecting transfers in order to keep accurate records and to have some evidence of activity affecting their accounts. This is because the transfers contemplated by the EFTA may remove money from the consumer's account at a financial institution. Such a written accounting "allow[s] consumers to verify account activity and to detect

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145. The author is indebted to James Brown, Center for Consumer Affairs, University of Wisconsin-Milwaukee, for this insight.

146. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.9 (1996).

147. See *id.*

148. See *id.*

unauthorized transactions and error, so that they can be reported and resolved."<sup>149</sup>

As the Board notes in its request for comment, it would be difficult and costly to require receipts and periodic statements in off-line systems.<sup>150</sup> In addition, to the extent consumers use the cards for routine transactions and inexpensive purchases, they likely do not need or want receipts or periodic statements. For example, it probably is not necessary to require receipts for consumers buying fare cards from vending machines. The Board, therefore, exempts all off-line systems from this Regulation E requirement.<sup>151</sup> On-line cards also are exempt if the cards carry \$100 or less.<sup>152</sup>

Although the FRB's general approach is reasonable, its proposal should be modified to require issuers to provide written documentation in limited circumstances. In on-line and off-line accountable systems, consumers should be able to request account balances and histories for a limited period of time prior to each transaction. These balances and histories should be available on at least a monthly basis without charge.<sup>153</sup> The request for comment proposes this approach as an alternative, but only for on-line systems.<sup>154</sup> Further, it offers cost as the sole reason not to apply this option to off-line accountable systems.<sup>155</sup> The request acknowledges, however, that most consumers never will request balances or histories because they promptly will exhaust the value of the card.<sup>156</sup> This reasoning does not justify the failure of the FRB to require issuers to supply this information on request; rather, it provides the rationale for requiring it. For instance, the information will not be costly because consumers seldom would ask for it. In the rare case in which a consumer makes a request, presumably, he or she truly needs this information and should be able to obtain it.<sup>157</sup>

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149. 61 Fed. Reg. at 19,700.

150. *See id.* at 19,700-01.

151. *See id.* at 19,701.

152. *See id.*

153. If the Board, nevertheless, permits a fee to be imposed for this information, the law should require disclosure of the amount of the fee and provide that any such fee be reasonable.

154. *See* 61 Fed. Reg. at 19,702.

155. *See id.* at 19,700.

156. *See id.* at 19,702.

157. At the very least, if the Board decides not to require account balances and histories on request and the issuer chooses not to provide consumers the right to receive such statements, the initial disclosure should so inform the consumer.



*d. Limitations on consumer liability for unauthorized transfers*

Regulation E establishes maximum limits on a consumer's liability for unauthorized transfers.<sup>158</sup> Liability is limited to \$50 if the consumer reports a loss or theft within two days of learning about it.<sup>159</sup> The consumer's liability is limited to \$500 if he or she reports the loss after two days and if the financial institution establishes that the unauthorized transfer would not have occurred had the consumer reported in a timely manner.<sup>160</sup> If the consumer fails to report theft or loss within sixty days of transmittal of a periodic statement that includes the unauthorized transfer, the consumer is liable for up to the full amount of that transfer.<sup>161</sup> This three-tiered scheme is less protective of consumers than the \$50 limit of liability that currently exists for credit cards.<sup>162</sup> For both electronic fund transfers and credit cards, the limits apply regardless of whether the consumer was careless and whether that negligence contributed to the unauthorized transfer.<sup>163</sup>

Congress' limitation of consumer liability reflects its acknowledgment that credit and debit cards are inherently risky payment devices. Indeed, criminals have proven marvelously inventive in devising innovative ways to steal using the account numbers and PINs from the cards without actually stealing the cards.<sup>164</sup> Limiting liability enhances consumer trust in the integrity of these payment systems despite their risks. Yet, exposing consumers to some liability provides an incentive for them to take precautions to prevent unauthorized use and to report it promptly to issuers when it does occur.<sup>165</sup>

The proposed SVC rule would apply the Regulation E limits only to on-line cards worth more than \$100.<sup>166</sup> The Board noted that because other systems are off-line, the issuers and merchants could

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158. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.6 (1996).

159. See *id.*

160. See *id.*

161. See *id.*

162. See Truth in Lending (Regulation Z), *id.* § 226.12 (setting forth conditions of credit card holder liability for unauthorized use).

163. See FRB Commentary to Regulation E, *id.* pt. 205, Supp. II, Question 6-6.5.

164. See DONALD I. BAKER & ROLAND E. BRANDEL, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* 6-14 to 6-16 (rev. ed. 1996) (observing that through process known as skimming, experts can decipher and transfer PIN recorded on original card to counterfeit card and then access funds using counterfeit card); see also *Ognibene v. Citibank, N.A.*, 446 N.Y.S.2d 845, 847 (Small Cl. Ct. 1981) (explaining scam in which PINs were stolen and used to withdraw money from ATMs).

165. See BAKER & BRANDEL, *supra* note 164, at 12-40 (observing that "some incentive had to be produced to induce the cardholder to assume responsibility for safeguarding his or her card and providing notice if the card was stolen").

166. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,703 (1996).

neither easily and inexpensively block unauthorized transfers<sup>167</sup> nor identify the consumer who paid for the card because such cards do not include a PIN.<sup>168</sup>

In addition, the Board justified removing Regulation E's protection from off-line and \$100-and-under on-line cards by assuming that consumers will carry less value on SVCs than is at risk on a debit card that accesses a bank account.<sup>169</sup>

The proposed rule goes too far. Because all types of SVCs contain features resembling debit cards, consumers reasonably may expect the Regulation E liability limits to apply. If these limits do not apply, consumers must be informed of that important fact. Yet, under the proposed rule, only users of off-line accountable cards would be informed of their full liability.<sup>170</sup> Issuers of \$100-and-under cards and off-line unaccountable cards would not be required to inform consumers of their full liability.<sup>171</sup> As discussed above, the differences between off-line unaccountable cards and other SVCs are invisible to consumers. Consumers today already may be confused about the differences between the liability limits for credit cards and debit cards.<sup>172</sup> The proposed rule exacerbates the confusion by applying the debit card limits to some types of SVCs, but not to others, and to some on-line SVCs, but not to others. A better rule would require informing all consumers of SVCs of the extent of their liability.

In addition, consumers using on-line cards that carry \$100 or less should have the same protection as others using on-line cards. As discussed above, \$100 is not *de minimis* to many consumers.<sup>173</sup> Further, the \$100 exemption as applied to SVCs is not consistent with any of the dollar amounts applied to any other payment device. The \$100 exemption results in a needlessly confusing liability scheme that only the boldest of consumers would dare try to figure out. To wit:

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167. See *id.* at 19,701 ("[T]here is an almost certain likelihood that lost or stolen cards could and would be used.").

168. See *id.*

169. See *id.*

170. See *id.*

171. Users of on-line SVCs, in contrast, would have the protection of the EFTA limits on liability. See *id.* at 19,699.

172. Even more confusing are the liability limits for cards that may be used as both a credit card and a debit card. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.6 (1996) (demonstrating complexity of regulation governing consumer liability for transfers not authorized properly); see also BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS 15-25 (rev. ed. 1995) (describing confusion regarding debit and credit cards).

173. See *supra* text accompanying notes 113-18 (explaining flaws in assumption that \$100 constitutes *de minimis* amount).

the liability maximum for credit cards is \$50;<sup>174</sup> for debit cards, it is \$50, \$500, or unlimited;<sup>175</sup> for on-line SVCs worth more than \$100, it is the same as for debit cards.<sup>176</sup> For on-line SVCs worth \$100 or less, there is no limit and no right to be informed of this fact.<sup>177</sup> For users of off-line accountable SVCs, there is no limit, but there is the right to be informed of that fact.<sup>178</sup> Users of off-line unaccountable cards, however, not only have unlimited liability, but they also lack the right to be informed that they have no liability limit.<sup>179</sup>

*e. Error resolution procedures*

Regulation E outlines detailed procedures that financial institutions must use for error resolution, including informing consumers of the availability of error resolution services,<sup>180</sup> procedures, and timetables for investigating errors, the extent of the required investigation, and procedures that must be followed after the investigation is completed.<sup>181</sup> For example, if the institution has not completed its investigation within ten days, it must provisionally recredit the consumer's account in the amount of the error and complete the investigation within forty-five days.<sup>182</sup>

The proposed SVC rule would require procedures only for on-line cards worth more than \$100.<sup>183</sup> For the reasons discussed previously, the \$100 exemption is not justified. Furthermore, at least a limited procedure should be required for off-line accountable and off-line unaccountable cards if the error is within the control of one of the non-consumer parties to the transaction. For example, the card may have a defective chip or the machine into which the card was inserted may have damaged the card. The consumer is entitled at least to know the name, address, and telephone number of a responsible party to whom the consumer can complain if something goes wrong. Especially in the case of multi-purpose cards, consumers will have no idea to whom they can go for assistance. Without minimum error

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174. See Truth in Lending (Regulation Z), 12 C.F.R. § 226.12.

175. See Electronic Fund Transfers (Regulation E), *id.* § 205.6.

176. See 61 Fed. Reg. at 19,701.

177. See *id.*

178. See *id.*

179. See *id.* at 19,699 (noting lack of right to be informed).

180. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.7(a)(10) (providing for notice to consumers of error resolution service).

181. See *id.* § 205.11(d) (describing procedures financial institutions must undertake after completing investigation, including providing written explanation to consumers).

182. See *id.* § 205.11(c)(2)(i) (providing for provisional crediting).

183. See 61 Fed. Reg. at 19,701. But see *supra* text accompanying notes 171-79 (maintaining that \$100 exemption is not justified and detailing problems in setting \$100 threshold for protection).

resolution procedures and corresponding accountability, the integrity of SVCs as a payment mechanism will be compromised severely.

*B. FDIC Insurance Coverage and other FDIC Concerns*

*1. The opinion of the general counsel*

The General Counsel of the FDIC has issued an opinion on the question of "whether the funds underlying stored value cards constitute deposits under the FDIA [Federal Deposit Insurance Act]."<sup>184</sup> The opinion concluded that FDIC deposit insurance extends only to SVC systems in which the funds underlying the value reflected in the card remain in the account until the value is transferred to a third party, such as a merchant, who then collects the funds from the consumer's bank.<sup>185</sup> The General Counsel acknowledged that its staff did not know of any current system meeting that description, but understood it was possible to develop such a system.<sup>186</sup> The General Counsel reached this conclusion through a detailed analysis of the section of the FDIA that defines the term "deposit."<sup>187</sup> It is notable that, in order to apply the FDIA to SVCs, the General Counsel characterized SVC systems in a manner entirely different than the FRB's approach.<sup>188</sup> This reflects the difficulty of conceptualizing SVC systems and of constructing a regulatory framework suitable to SVCs.

Of perhaps greater significance than the opinion itself are the similarities the General Counsel found between SVCs and other payment devices, the General Counsel's listing of other issues about which the FDIC is concerned, and the agency's expectations regarding the disclosures that SVCs should contain. In the course of determining whether SVC funds come within the FDIA's definition of "deposit," the General Counsel noted the similarity of SVCs to other payment devices, including certain travelers' checks,<sup>189</sup> money orders, and cashier's checks.<sup>190</sup> This demonstrates the legitimate confusion consumers may harbor regarding their rights and obliga-

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184. FDIC General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 40,491 n.6 (1996).

185. See *id.* at 40,494.

186. See *id.* at 40,490 n.4.

187. See *id.* at 40,491-93 (analyzing term "deposit" as defined by 12 U.S.C. § 1813(l) (1994)).

188. The FDIC General Counsel categorized SVC systems as "Bank Primary-Reserve Systems," "Bank Secondary-Advance Systems," and "Bank Secondary-Pre-Acquisition Systems." *Id.* at 40,490.

189. See *id.* at 40,491.

190. See *id.* at 40,493.

tions when using SVCs. Moreover, the General Counsel stated that although SVCs have been "touted as substitutes for cash," that is one type of payment device to which SVCs are not similar.<sup>191</sup> Presumably, the General Counsel's reference was to the advertisements and other promotional materials the SVC industry has distributed.<sup>192</sup> As the General Counsel's statement implies, touting SVCs as a cash substitute is misleading and further increases consumer confusion.<sup>193</sup>

In addition to addressing the issue of FDIC deposit insurance coverage, the General Counsel noted that there were several other questions "which are of great importance to the FDIC and which the FDIC will continue to monitor as appropriate. Such issues include, but are not limited to, consumer disclosure matters, systemic risk, security, electronic funds transfer matters, reserve requirements, counterfeiting, monetary policy, and money laundering."<sup>194</sup> Several of these matters, which the FDIC has indicated it considers to be of great importance, already are within the purview of other agencies. For example, the FRB regulates electronic fund transfers and consumer disclosure through Regulation E and is involved directly in setting monetary policy and reserve requirements. The Treasury Department handles matters relating to counterfeiting and money laundering.<sup>195</sup> SVC technology thus raises issues in which major federal agencies are involved, demonstrating its potential significance to the payment system as a whole.

Ultimately, the General Counsel's opinion was confined to the sole question of whether FDIC deposit insurance covered SVCs, and the General Counsel construed the FDIA extremely narrowly. Nevertheless, the General Counsel included a strong suggestion that financial institutions voluntarily inform consumers when FDIC deposit insurance does not protect their use of SVCs.<sup>196</sup>

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191. See *id.* at 40,490. The FDIC General Counsel noted that SVCs "do not have the finality of cash," *id.*, and are not "legal tender," *id.* at 40,490 n.2.

192. See *supra* text accompanying notes 43-70 (discussing certain misleading marketing strategies used to promote SVCs).

193. See 61 Fed. Reg. at 40,490 (noting that actual process by which SVCs function "may not be apparent to the consumer"); *supra* text accompanying notes 43-70 (noting potential for consumer confusion).

194. 61 Fed. Reg. at 40,491 n.6.

195. See Matt Schulz, *Treasury: Include Smart Cards in Laundering Rules*, AM. BANKER, June 27, 1996, at 13 (noting that Deputy Treasury Secretary Lawrence H. Summers argues that "the United States and other countries must adapt their anti-laundering rules to account for these new products").

196. See 61 Fed. Reg. at 40,494 ("[T]he FDIC would expect that institutions clearly and conspicuously disclose to their customers the insured or non-insured status of their stored value products, as appropriate.").

## 2. *The request for comment*

On the same day the General Counsel's Opinion was published in the Federal Register, the FDIC also published a Request for Comment on deposit insurance coverage for SVCs.<sup>197</sup> The FDIC explained that in addition to the statutory authority on which the General Counsel relied in its opinion, the FDIC could require deposit insurance on SVC systems under a provision that authorizes such action if the FDIC finds "that some or all stored value card obligations of a depository institution are deposit liabilities by general usage."<sup>198</sup> The FDIC explained that although it had no present intention to issue regulations on this matter, it desired comment from the public because it may consider regulating on the basis of "general usage" in the future.<sup>199</sup> The FDIC indicated that its concerns stretch well beyond stored value cards, stating that the SVC policy analysis "would in general apply to a variety of electronic payment system issues, including concerns raised by Internet banking and the use of electronic cash."<sup>200</sup>

Although the FRB's discussion of its proposed SVC regulations focused on whether the possible benefits of regulating SVCs outweigh the cost of regulation to industry,<sup>201</sup> the FDIC request points to the potential that "a significant portion of the payment system could be represented by stored value systems."<sup>202</sup> It therefore is incumbent on the FDIC to determine whether deposit insurance coverage is necessary to ensure public confidence in SVCs. This is a decisive assessment because "public confidence in these payment systems is critical to the safety and soundness of the banking system."<sup>203</sup> The FDIC believes that ascertaining consumer expectations is highly relevant to examining public confidence in SVCs.<sup>204</sup> Such expectations are of particular importance in considering the features of various SVC systems. For example, although the FDIC staff believes

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197. See Stored Value Cards and Other Electronic Payment Systems, 61 Fed. Reg. 40,494 (1996).

198. *Id.* at 40,495. The FDIC based its authority for such action on 12 U.S.C. § 1813(l)(5) (1994).

199. See 61 Fed. Reg. at 40,494.

200. *Id.*

201. See Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,699 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 6, 1996) (discussing "the compliance burdens to financial institutions and the benefits to consumers").

202. 61 Fed. Reg. at 40,496.

203. *Id.*

204. See *id.* (discussing interrelationship between "public confidence" and "the expectations of depository institution customers").

that whether a card is disposable or reloadable is not relevant to whether an SVC is a deposit within the definition of the FDIA, it may well be relevant to consumer expectations.<sup>205</sup>

One of the difficulties in regulating SVCs arises from the fact that unregulated non-financial institutions, as well as financial institutions, offer SVCs. Although the FRB has the power to regulate institutions not generally under its authority,<sup>206</sup> the FDIC does not. Therefore, the FDIC is concerned that if it requires broad coverage of deposit insurance, depository institution issuers may be at a competitive disadvantage because other businesses will not have the added disadvantage of insuring the funds in SVCs.<sup>207</sup> Conversely, the FDIC also believes that consumers may prefer to purchase SVCs from firms that offer the protection of insurance.

Presumably, consumers who purchase SVCs in large denominations would be the ones most attracted to insurance. If, however, the public learns that issuers of uninsured SVCs are going out of business and failing to honor their SVCs consumers of even small denomination cards may decide to purchase SVCs from depository institutions. Consumers also may prefer to buy SVCs from depository institutions because they believe the cards are insured, even if the FDIC decides not to require banks to insure most types of cards.

The FRB's proposed amendment to Regulation E exempts SVCs in denominations of \$100 and less.<sup>208</sup> The FDIC's Request for Comment, however, contains a statement questioning that decision. The FDIC points out that although SVCs currently are being issued in amounts totaling no more than \$100 or \$200, "nothing prevent[s] consumers from obtaining many stored value cards. Moreover, issuers may soon allow cards to be loaded . . . in larger denominations."<sup>209</sup> The FDIC believes this factor may justify requiring insurance coverage.<sup>210</sup>

Finally, the FDIC's Request for Comment repeats the expectation of the FDIC's General Counsel that depository institutions will make disclosures to consumers.<sup>211</sup> The documents, however, require two

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205. *See id.*

206. *See supra* note 80 and accompanying text (noting that EFTA gives FRB power to regulate nonbank institutions that provide electronic fund accounts).

207. *See* 61 Fed. Reg. at 40,496.

208. *See supra* text accompanying notes 109-12 (noting that Federal Reserve Board chose to exempt stored value cards with values less than \$100).

209. 61 Fed. Reg. at 40,496-97.

210. *See id.* at 40,497.

211. *See id.* at 40,496 ("[T]he [FDIC] would expect that the relationship between a stored value card customer and the institution to be clearly and conspicuously stated on the disclosures and agreements accompanying the card.").

different types of disclosure. The General Counsel expects institutions to "clearly and conspicuously disclose . . . the insured or non-insured status of their stored value products, as appropriate."<sup>212</sup> In contrast, the FDIC Request for Comment states that "the staff would expect the relationship between a stored value card customer and the institution to be clearly and conspicuously stated on the disclosures and agreements accompanying the card."<sup>213</sup> Presumably, the FDIC is referring to the legal relationship between the consumer and the issuer. This relationship, however, is complex and depends on whether the stored value customer has a deposit account with the institution selling the card. The agreement between the parties, which probably is contained in a bank's brochure, governs the relationship under this language. In addition, depending upon the type of account the customer has, if any,<sup>214</sup> the legal relationship may be governed, among other things, by the U.C.C., Regulation E, and the regulations of federal and state regulatory agencies.

The FDIC, however, may have a far more restrictive view of the type of disclosure required. The Request for Comment states that the staff understands that issuers intend to "inform customers that the card is to be treated like cash, and that if lost or stolen, it will not be replaced."<sup>215</sup> Given the vagueness of this statement, the FDIC should explain what it intends with regard to its expectation that issuers will disclose the relationship between the issuer and the consumer.

The FDIC staff states that if an institution's SVCs are not covered by insurance, "such disclosures and agreements should provide that the card does not constitute an account or deposit with the institution and that the funds underlying the card are not insured by the FDIC."<sup>216</sup> If read literally, this language would require disclosure only if the cards are not insured. The FDIC General Counsel agrees that institutions that sell uninsured cards should make this disclosure, but also expects institutions that do provide insurance to inform consumers of their insurance coverage.<sup>217</sup> The General Counsel's formulation would better serve to inform consumers and should be adopted by the FDIC.

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212. FDIC General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 40,494 (1996).

213. 61 Fed. Reg. at 40,496.

214. See *supra* notes 18-25 and accompanying text.

215. 61 Fed. Reg. at 40,496.

216. *Id.*

217. See 61 Fed. Reg. at 40,494.



Although the General Counsel expects clear and conspicuous disclosure, it does not indicate where the disclosure should be made. The staff expects information to be placed both in disclosure statements and agreements. The FDIC's Request for Comment suggests disclosures could be included in material provided to consumers when they open their accounts or "along with the card."<sup>218</sup> The FRB does not require its disclosures to be "clear and conspicuous." Issuers need clear and consistent guidance in order to reduce the burden of regulation. Consumers need uniform and consistent disclosures so they can have essential information and compare features of various SVCs.

### C. *The OCC Bulletin*

The Comptroller of the Currency has issued an "OCC Bulletin" to the national banks it regulates to provide them with information that will assist them "in fulfilling their responsibility to identify and manage risks as they become involved in stored value systems."<sup>219</sup> In addition, the Bulletin "raises basic consumer awareness issues."<sup>220</sup>

The OCC's description of SVCs, like those of the FRB and FDIC, notes the similarity between some SVC systems and debit cards. The OCC acknowledges that "[t]he distinction between debit and stored value cards . . . can be fuzzy."<sup>221</sup> In contrast to the other agencies, however, the OCC compares other systems to "electronic cash," a term other agencies do not use.<sup>222</sup> The OCC defines electronic cash as the transfer of value from SVCs using an ATM, personal computer, telephone, television cable connection, or POS terminal.<sup>223</sup>

The OCC's description of the various roles banks can play in SVC systems illustrates why consumers will be confused about their legal relationship with banks involved in SVC commerce. A bank may be an investor in SVC systems, an issuer of SVCs,<sup>224</sup> a distributing bank,<sup>225</sup> a transaction authorizing bank,<sup>226</sup> a redeeming bank,<sup>227</sup>

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218. Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,700 (1996) (to be codified at 12 C.F.R. pt.205) (proposed May 2, 1996).

219. OCC Bulletin 96-48, available in LEXIS, BANKNG Library, ALLOCC File, (Sept. 10, 1996) [hereinafter OCC Bulletin].

220. *Id.*

221. *Id.* at 2.

222. *See id.* at 1. To compare the terms used by the FRB and the FDIC, see *supra* notes 85-95, 188 and accompanying text.

223. *See id.* at 2.

224. *See id.* at 4.

225. *See id.* at 5.

226. *See id.* at 6. A transaction authorizing bank is needed in those SVC systems in which merchants must obtain authorization before accepting SVCs.

227. *See id.* at 7.

a clearing and settling bank, or a transaction archiving bank.<sup>228</sup> The OCC Bulletin outlines the risks to banks when they assume these various roles.

Because SVCs resemble credit and debit cards but function differently and expose consumers to different risks, the OCC has instructed banks "to take appropriate steps to adequately inform consumers of their rights and responsibilities when using stored value cards."<sup>229</sup> Banks are "encourage[d] to consider basic disclosures needed" for SVCs.<sup>230</sup> The Bulletin then provides a list of factors contributing to the need for disclosure, which it purports is not exhaustive. The list contains numerous items, including: (1) how the card is used; (2) where and how consumers can increase the card's value; (3) whether the value on the card earns any type of return; (4) facts related to redemption; (5) disclosure of fees; (6) the name of the issuer and whether the issuer is obligated to redeem value; (7) whether there is protection if the card is lost or stolen; (8) whether value on the card is insured; (9) where liability lies if the transaction is not "properly consummated"; (10) what happens if the card is abandoned or expires; (11) how disputes can be resolved; (12) and how information may be disclosed to third parties.<sup>231</sup>

Unlike the proposed FRB amendment to Regulation E,<sup>232</sup> the OCC Bulletin list applies to all types of stored value cards.<sup>233</sup> It also differs from the proposed Regulation E amendment in that it does not suggest when, where, or how the disclosures should be made. In contrast to the FDIC Request for Comment,<sup>234</sup> the OCC Bulletin does not require any disclosures to be "clear and conspicuous," but indicates that banks should inform consumers of whether value is insured.<sup>235</sup> Contrary to the proposed FRB amendment, it encourages banks to follow the EFTA's requirements regarding disclosure of information to third parties regardless of the type of SVC the bank sells. The list also makes an important contribution to the discussion

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228. See *id.* at 8. A transaction archiving bank keeps records of transactions using SVCs.

229. *Id.* at 9.

230. *Id.* at 10.

231. See *id.*

232. See *supra* text accompanying notes 109-12 (noting that FRB chose to regulate only stored value cards that cannot carry more than \$100 at one time).

233. See OCC Bulletin, *supra* note 219, at 10.

234. See *supra* text accompanying notes 211-13 (noting that FDIC Request for Comment in part agrees with opinion of General Counsel that whether stored value card is insured should be disclosed).

235. See OCC Bulletin, *supra* note 219, at 10. The FDIC Request for Comment would require disclosure only if the value is not insured. See *supra* text accompanying note 216 (noting that FDIC Request for Comment is less stringent regarding insurance disclosure but still does not require disclosure if no insurance is provided).

of consumer interests that may need protection by including items not mentioned in the FDIC and FRB statements, such as abandoned and expired cards. Despite its greater comprehensiveness, the OCC Bulletin's list is less protective of consumers than the proposed FRB amendments because it does not *require* banks to do anything; it merely *encourages* them to provide consumers with basic information. According to the Bulletin, banks are required only to "take appropriate steps to adequately inform consumers."<sup>236</sup>

### D. The Legal Vacuum

Several crucial issues confronting consumers using SVCs are not governed by any law.<sup>237</sup> It is important that the government enact laws to fill this vacuum to ensure the integrity of the SVC payment system and public confidence in SVCs. The Business Law Section of the American Bar Association established a task force "to consider the commercial law that may govern these new electronic retail payments media, and to see whether some tried and true principles of our commercial law may provide useful building blocks that will facilitate development."<sup>238</sup> Although the Task Force had not approved the Discussion Draft at the time of this writing, the Draft provides valuable insights into those issues that are not addressed in the federal regulatory law discussed thus far.

The potentially misleading nature of advertisements heralding SVCs as a cash substitute<sup>239</sup> is suggested by the opinion of the FDIC General Counsel who noted that the value on the SVC is not legal tender.<sup>240</sup> The Discussion Draft agrees, describes the difference between "money" and legal tender, and concludes that SVCs are neither. Rather, SVCs merely represent evidence of a claim.<sup>241</sup> The value in the card is "no more than a representation of someone's

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236. OCC Bulletin, *supra* note 219, at 9.

237. See *The Future of Money: Hearings Before the Subcomm. on Domestic and Int'l Monetary Policy of the House Comm. on Banking & Fin. Servs.*, 104th Cong. 6 (1995) (statement of Alan S. Blinder, Vice Chairman, Board of Governors of the Federal Reserve System) [hereinafter *Hearings on the Future of Money*] (discussing lack of legal protections and regulations for consumers in stored value card market).

238. A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated With Stored Value Cards and Electronic Money (Third Discussion Draft July 31, 1996), at 2-3 [hereinafter Task Force].

239. See *supra* text accompanying note 43 (discussing one marketing strategy utilized in Atlanta).

240. See FDIC General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 40,490 n.2 (1996).

241. See Task Force, *supra* note 238, at 30-31. The FDIC General Counsel concurs, characterizing the information in SVCs as "more in the nature of a right to be paid a sum of money." 61 Fed. Reg. at 40,490 n.2.

promise to pay."<sup>242</sup> It is an "intangible claim."<sup>243</sup> Consequently, "[f]rom a legal perspective, it is not useful and perhaps misleading to characterize this as a transfer of money."<sup>244</sup>

The Discussion Draft describes various ways in which consumers will be confused or ignorant of basic information about the parties to the SVC transaction, the role each party plays, and the rights and obligations that attach to SVC transactions.<sup>245</sup> For example, consumers may believe the advertising that gives the mistaken impression that SVCs are a cash substitute and therefore operate like money or even like legal tender, when in actuality they are nothing more than an "IOU."<sup>246</sup> Consumers therefore may not realize how crucial it is to know the creditworthiness of the issuer, the person responsible for paying the obligation represented by the value on the card.<sup>247</sup> If the entity obligated to pay refuses to do so, or is unable to do so because of insolvency, merchants will refuse to honor SVCs, and consumers will be left holding worthless cards.

Even if the consumer understands that it is important to buy cards from a reputable and financially strong obligor,<sup>248</sup> the consumer may have a difficult time ascertaining the identity of the obligor. The company selling the card to the consumer may not be the same entity as the issuer.<sup>249</sup> The names of several companies may be on the card with no one company identified as the issuer or obligor.<sup>250</sup> It therefore is important for each card to contain the name of the entity responsible for paying the claim represented by the value in the card. Laws also are needed to ensure the financial soundness of issuers.<sup>251</sup>

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242. Task Force, *supra* note 238, at 38.

243. *Id.* at 41.

244. *Id.*

245. See generally Task Force, *supra* note 238. For example, the Discussion Draft points out the problems consumers might have in determining the obligor of the SVC. See *id.* at 46-48.

246. See *id.* at 38 (finding that value in SVCs is nothing more than promise to pay).

247. See *id.* at 46-48 (discussing difficulty and importance in determining who is obligor of SVC). "In the commercial world, a party that extends credit is usually willing to do so only because that party has sufficiently detailed knowledge about the debtor to conclude that when the debt is due it will be paid." *Id.* at 19. Several prepaid phone card companies have gone out of business after selling tens of thousands of worthless SVCs. See *supra* note 54.

248. See Task Force, *supra* note 238, at 46-48 (discussing importance of determining who is obligor of SVC). "The identification of the issuer is critical because it is the only way for potential users of the products to measure the credit risk associated with the new payment products; as stated earlier, the obligation is only as valuable as the issuer is credit worthy." *Id.* at 46.

249. See *id.* at 47 (finding that issuer of SVC may not be same entity as provider of stored obligation or reader making SVC transferrable).

250. See *id.* (finding that issuer's name may be one of many names on SVC).

251. See *supra* text accompanying note 237 (discussing legal vacuum confronting consumers on several crucial issues).

The FRB's proposed amendment to Regulation E would require companies that issue certain types of SVCs to make some of the disclosures Regulation E mandates.<sup>252</sup> The regulation specifies how and when these disclosures can be made.<sup>253</sup> Many SVCs, however, are not subject to any disclosure requirements under this proposal.<sup>254</sup> Furthermore, the agreement between the issuer and the consumer likely will contain many items that are not subject to Regulation E disclosure requirements.<sup>255</sup> Except for general standards of good faith and unconscionability and unfair and deceptive practices statutes, an issuer is free to contract with the consumer in any manner it wishes. As a result, the issuer may disclose only those matters specifically required by law and add the following statement: Use of this stored value card is "governed by the terms and conditions of Issuer/Customer Agreement, a written copy of which is available by contacting Issuer."<sup>256</sup> The SVC that First Union issues has the following printed on the card: "Use and acceptance of this Card will indicate your agreement to the First Union VISA Cash Card terms & conditions that govern its use."<sup>257</sup> The NationsBank SVC contains the following written statement: "This card is subject to the terms of the applicable Cash Card agreement."<sup>258</sup> NationsBank also provides purchasers with a brochure that contains, *inter alia*, an agreement.<sup>259</sup> Lack of a uniform statute governing the manner of making the agreement available to the consumer fosters disparate methods of application and can foster consumer ignorance. Important terms, such as whether the consumer has a right to redeem unused value, and if so, how to redeem that value may be buried in an agreement in the possession of the issuer. It may not be clear to the consumer who the issuer is, much less how to obtain the agreement from the issuer.

The disclosures discussed above are those made to the consumer initially, prior to or at the point of sale. Regulation E also requires written notice of a change in terms and requires that the notice be mailed or delivered at least twenty-one days before it becomes

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252. See *supra* text accompanying notes 31-37 (explaining structural flaws in proposed amendment to Regulation E by FRB).

253. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.7 (1996).

254. See *supra* Part II.A.3 (explaining Regulation E and its provisions applicable to SVCs).

255. For example, matters such as redeemability and expiration of the cards may be included in the agreement.

256. Task Force, *supra* note 238, at 57.

257. A copy of the First Union SVC is on file with *The American University Law Review*.

258. A copy of the NationsBank SVC is on file with *The American University Law Review*.

259. A copy of the agreement is on file with *The American University Law Review*.

effective.<sup>260</sup> Failure to require that all types of SVCs comply with Regulation E could allow issuers to change important terms, such as the expiration date, without notice to consumers.<sup>261</sup> The NationsBank SVC agreement provides: "This agreement is subject to amendment by NationsBank at any time without prior notice . . . ." <sup>262</sup>

While the FRB's proposed amendment to Regulation E, the FDIC's Request for Comment, and the OCC Bulletin would require or encourage certain disclosures, these agencies refrain from mandating minimum standards for the agreements between the parties except in very limited situations. An example of those limited situations are the narrowly defined SVC transactions to which the FRB proposes to apply Regulation E in full. As to those transactions, issuers would be required to impose limits on the consumer's liability for unauthorized transfers.<sup>263</sup> In the vast majority of SVC transactions, except for whatever protection issuers may have to provide in order to market a competitive product and subject to general legal standards such as good faith and unconscionability, issuers are free to impose restrictions and obligations on consumers, and to grant themselves protection from obligation and responsibility. For example, the NationsBank agreement provides: "We may assess fees for certain services in connection with the Card."<sup>264</sup> The nature of those services is not described, nor is the amount of the fees. The consumer may not redeem unused value remaining after the expiration date. Instead, the unused balances will be donated to a charity chosen by NationsBank.

Clear legal rules are necessary to establish the contours of finality and discharge.<sup>265</sup> The issue is whether the transfer of value from the consumer's card to the seller is regarded as final, thus discharging

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260. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.8(a)(1) (1996).

261. In some types of SVCs, the issuer has no information about the identity of the consumer purchasing the card. One regulatory response is to exempt those types of cards from Regulation E; another response is to prohibit post-contract changes in terms unless the issuer notifies the initial purchaser. If an issuer chooses to sell cards to persons whose identities and addresses it does not obtain, that issuer forgoes the ability to change the terms of use of the card. This response should not pose a significant burden on issuers of disposable cards, as these cards generally are issued in small denominations and the value can be expected to be exhausted within a short period of time. It is unlikely, therefore, that a reputable issuer would need to change the terms within the period of use.

262. A copy of the agreement is on file with *The American University Law Review*.

263. See 12 C.F.R. § 205.6.

264. A copy of the agreement is on file with *The American University Law Review*.

265. See generally *Hearings on the Future of Money*, *supra* note 237, at 4-8 (statement of Alan S. Blinder, Vice Chairman, Board of Governors of the Federal Reserve System).

any obligation that the consumer had.<sup>266</sup> If there is no finality at that point, problems may arise if the issuer becomes insolvent and cannot honor its obligation to the seller.<sup>267</sup> For example, the seller may approach the consumer, demanding that the consumer pay again, forcing the consumer to seek payment from the insolvent issuer for having to pay the seller twice.

It is unreasonable to assume that consumers using SVCs will assess the risk that the issuer might not pay the seller. Consumers likely have no idea how sellers receive value when payment is made with an SVC. Even if the consumer is aware that the issuer pays the seller, the consumer often will not be able to determine who the issuer is.<sup>268</sup> Even if the consumer is able to determine the identity of the issuer, the transaction costs of ascertaining whether the issuer was in danger of insolvency or for some other reason might not honor its obligation to the seller would be too great to justify making such an inquiry. Likely, most consumers reasonably expect that payment using an SVC is final at the point of sale and discharges their obligation to the seller. In order to ensure public trust and confidence in the payment system, consumers need legal rules which provide that SVC payment is regarded as final. If payment at the point of sale is not final and does not result in discharge, the law should require issuers to notify consumers of that fact.

Rules also are needed to provide consumers with an error resolution procedure and with legal remedies when there is technological or equipment failure. Examples of such failure include defective SVCs and defective card readers.<sup>269</sup> Defects in these could result in erroneously erasing the entire value from the chip in the card. The law should require issuers to inform consumers of the identity of the party to whom they can report this problem, and deadlines should be set to ensure that consumers are not deprived of value for unduly long periods of time when there is no dispute over the legitimacy of their claim.<sup>270</sup> The law also should specify the type of relief to which consumers are entitled when they suffer loss due to technological or equipment failure.

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266. See Task Force, *supra* note 238, at 75-76 (discussing hypothetical regarding discharging of obligations pursuant to transfer of value from consumer to seller).

267. See *id.* at 75 (stating importance of addressing problems faced when insolvent issuer cannot honor its obligation to consumer).

268. See *supra* text accompanying note 16 (explaining how names of both bank and company associated with credit card may be found on SVC).

269. See Task Force, *supra* note 238, at 91.

270. Regulation E establishes a detailed error resolution procedure, see 12 C.F.R. § 205.11 (1996), but the FRB's proposed amendment to Regulation E would exempt most SVCs from this procedure. See *supra* text accompanying note 91 (discussing "off-line accountable" SVC).

## IV. A PROPOSED LEGAL FRAMEWORK FOR STORED VALUE CARDS

The federal government should enact laws to provide a legal framework for SVC transactions that guarantees consumers a minimum standard of protection. Because of the complexity and variety of SVC systems, laws governing basic issues are necessary in order for consumers to have crucial information and to safeguard the money they pay for SVCs. Without information, consumers cannot assess accurately the benefits and disadvantages of using SVCs rather than other systems. Furthermore, because of the similarity of SVCs to other payment systems, consumers may have reasonable but erroneous expectations with regard to their rights and obligations if they do not receive adequate disclosures. Without a legal safety net, whatever trust and confidence consumers may have in SVCs initially may evaporate quickly when a major problem occurs and is widely publicized. For example, if a major issuer becomes insolvent, consumers may stop using SVCs and find themselves holding worthless cards. Consequently, regulation is not merely a way to ensure consumer education and protection, it also is a way to promote consumer acceptance of SVCs. At the same time, it is important not to over-regulate SVCs. The device still is in its early stages of development, and regulation should not stifle or unduly influence the direction of further development of this product. Moreover, the complexity and diversity of SVC systems make detailed regulation problematic.

Federal agencies should regulate SVCs pursuant to congressional legislation. Uniformity is vital; otherwise, consumer rights and disclosure may vary from state to state. Such variation would result in consumer confusion and would impose a tremendous burden on issuers. Drafting a uniform state law such as the U.C.C. likely would take many years,<sup>271</sup> and individual states could adopt nonuniform amendments. Nonuniform state law also presents choice of law issues; the parties involved in the SVC transaction often will be in different states.<sup>272</sup> Thus, even if consumers educate themselves about their rights and obligations under their state's laws, when a dispute arises,

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271. The process that culminated in the revision of Articles 3 and 4 of the U.C.C., the portions of the U.C.C. that govern payment systems, began in 1974 and was not completed until 1990. See Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 407 (1991).

272. Cf. Task Force, *supra* note 238, at 121 (using hypothetical involving different states in SVC transaction to underscore choice of law issues). See generally Peter Wallsten, *PSC Calls Phone Debit Cards into Question*, ST. PETERSBURG TIMES, Sept. 3, 1996, at 1B (reporting that Florida Public Service Commission proposes regulating phone SVCs).



they could find themselves subject to the law of a jurisdiction with which they are not familiar.

The nation already has federal statutes governing comparable payment systems such as electronic fund transfers and agencies experienced in drafting regulations pursuant to those laws. Federal law has the advantage of uniformity. In addition, it is far easier to change the law on the federal level rather than to seek changes in every state. Therefore, if future technological developments or unforeseen consumer or industry problems necessitate amendments to the statute, these amendments can be made more quickly and in a uniform manner. Often, changes can be effectuated through amending regulations rather than through statutory change, a process more expeditious than congressional action.

Federal SVC legislation should govern nonbanks as well as banks. One could argue that it would promote consumer interests not to impose regulation on nonbanks. Presumably, unregulated nonbanks that do not agree voluntarily to protect consumers using their cards would be able to pass on to consumers their lower costs by offering, among other things, favorable terms such as low or no fees for purchasing the cards, low cost methods for redeeming unused value, and coupons each time value is reloaded onto the cards. Arguably, consumers should be able to choose between those unregulated nonbanks and regulated banks that may not be able to offer the same low-cost terms as nonbanks, but that can promote their product by emphasizing the consumer protection accompanying their cards.<sup>273</sup>

Similar concerns have faced lawmakers with regard to every other industry offering payment services. Overwhelmingly, the response has been to provide a safety net by guaranteeing users of those services basic protection. Examples include U.C.C. rules and standards for checks,<sup>274</sup> the Expedited Funds Availability Act ensuring customers prompt access to their funds on deposit,<sup>275</sup> the Electronic Fund

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273. See *Stored Value Cards and Other Electronic Payment Systems*, 61 Fed. Reg. 40,494, 40,496 (1996) (stating that consumers may be willing to pay higher price for FDIC insured cards; thus, banks that must provide such insurance might not be at competitive disadvantage in vying for customers against nonbanks). The American Bankers Association recommends that only regulated depository institutions should be allowed to issue third-party SVCs. By limiting the recommendation to third-party SVCs, they intend to exclude from this restriction two-party cards such as many types of fare and phone cards. *American Bankers Ass'n Payments System Task Force, THE ROLE OF BANKS IN THE PAYMENTS SYSTEM OF THE FUTURE* 18 (1996). The Hong Kong Monetary has established guidelines for non-bank SVC issuers. *Guidelines Set for Stored Value Cards*, S. CHINA MORNING POST, Dec. 18, 1996, at 4.

274. See U.C.C. arts. 3 & 4 (1990).

275. 12 U.S.C. §§ 4001-4010 (1994).

Transfers Act,<sup>276</sup> and the credit card provisions of the Truth in Lending Act.<sup>277</sup> With regard to products that both banks and nonbanks offer, the legislation governing credit cards and electronic fund transfers applies to both types of institutions.<sup>278</sup> In addition, states have enacted statutes governing individuals in the business of money transmission, requiring licensing,<sup>279</sup> protecting customers in the event the business fails,<sup>280</sup> requiring disclosures,<sup>281</sup> and restricting investments.<sup>282</sup> These statutes regulate nonbanks selling products such as money orders and travelers' checks.

Regulating nonbanks as well as banks ensures the integrity of the total payment system. Without universal regulation, the danger is that consumers will fail to distinguish between those institutions that are regulated, and those that are not. Consequently, they may lose their trust and confidence in all institutions providing payment transfer services. Because of the similarity between SVC systems and other types of payment devices, the public's loss of confidence may not be confined to businesses that sell SVCs. Rather, the loss of confidence may extend to all businesses that sell payment devices of any kind. In addition to the loss of trust and confidence, failure to regulate nonbanks poses the risk of major nonbank businesses becoming insolvent or refusing to honor their obligations for other reasons, resulting in serious monetary loss to consumers using and businesses accepting SVCs. That loss might have consequential detrimental effects that could reverberate throughout the economy.

The federal statute and regulations should use Regulation E as their model, but should go further to fill in the fundamental gaps in the law. To the extent the definition of "account" in the EFTA is too narrow to extend to all SVC systems, it should be broadened.<sup>283</sup> The FRB's proposal to extend full Regulation E coverage to most "on-line" SVC systems should be implemented. The proposal is misguided, however, in urging that cards capable of holding \$100 or less

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276. 15 U.S.C. §§ 1693-93 (1994).

277. *Id.* §§ 1601-1920.

278. The Truth in Lending Act defines "card issuer" as "any person who issues a credit card." *Id.* § 1602(n). The Electronic Funds Transfer Act defines "financial institution" to include "any other person who, directly or indirectly, holds an account belonging to a consumer." *Id.* § 1693(a)(8).

279. *See, e.g.*, N.Y. BANKING LAW arts. XIII-B & XIII-C (McKinney 1971 & Supp. 1996).

280. *See, e.g.*, COLO. REV. STAT. § 12-55-109(5) (1991).

281. *See, e.g.*, CAL. FIN. CODE § 33525 (West 1996) (requiring disclosure that travelers' checks are not covered by government insurance).

282. *See, e.g.*, COLO. REV. STAT. § 12-55-109(5).

283. *See* Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,699 (1996) (to be codified at 12 C.F.R. pt. 205) (proposed May 2, 1996) (stating that FRB is not certain that definition of "account" covers off-line unaccountable systems).

value be completely exempt.<sup>284</sup> Issuers of those cards at least should be subject to disclosure requirements.<sup>285</sup> In addition, "off-line unaccountable" cards should be subject at a minimum to disclosure requirements. Consumers are ignorant of the fact that some systems are "off-line unaccountable" and some are "off-line accountable." From the perspective of reasonable consumer expectations, it makes no sense to subject one system to disclosure requirements, as the proposal recommends, but to deprive purchasers of those under the other system of basic information.

The regulatory agencies that have issued statements concerning SVCs suggest the contents of the disclosures. Under the FRB's proposal, consumers would be entitled to disclosure of their liability for unauthorized transactions, the types of transfers available, transaction charges, and error resolution procedures available.<sup>286</sup> The FDIC urges depository institutions to "clearly and conspicuously" state "the relationship between the stored value card customer and the institution," and to disclose, when applicable, that the funds underlying the card are not considered a deposit and are not FDIC insured.<sup>287</sup> The OCC has a long list of topics banks should consider disclosing, including: how to use the card; where and how to reload the card; whether the funds in the card earn interest; where, how, and when the card can be redeemed; fees charged; the name of the issuer and its obligation to redeem; who has liability if a transaction is not properly consummated; what happens if the card is abandoned or expires; how disputes can be resolved; and whether information about SVC transactions will be disclosed to others.<sup>288</sup> Consumers need all the information on the OCC list.

In addition, the consumer should receive the following information: the name, address, and phone number of the party who assumes responsibility for paying the claim represented by the value stored in the card and for resolving whatever type of problem or complaint the

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284. See *supra* text accompanying notes 113-18 (explaining flaws in \$100 exemption).

285. See *supra* text and accompanying notes 171-79 (asserting that holders of SVCs worth \$100 or less should be informed of their liability). If lawmakers insist on completely exempting low-value cards, the exception should be limited to disposable cards, that is, cards that cannot be reloaded. In addition, a \$100 exemption does not relate to any amount with which consumers are familiar. A \$50 limit at least relates to the \$50 maximum of a consumer's liability when a credit card is lost or stolen and corresponds to the initial liability limit for lost or stolen debit cards. Consequently, consumers may understand in a somewhat vague and general way that there is a relationship between \$50 and risk.

286. See 61 Fed. Reg. at 19,700.

287. Stored Value Cards and Other Electronic Payment Systems, 61 Fed. Reg. 40,494, 40,496 (1996).

288. See OCC Bulletin, *supra* note 219, at 10.

consumer has;<sup>289</sup> the presence or absence of insurance or some other fund in case of insolvency; whether the issuer is a government or a private entity; whether the issuer is a bank or a nonbank;<sup>290</sup> whether payment for goods and services discharges the consumer's obligation or exposes the consumer to a claim by the seller if the issuer fails to honor its obligation to the seller;<sup>291</sup> whether the issuer can change the terms and conditions of use of the card without notice to the consumer; clear disclosure of the expiration date;<sup>292</sup> and whether the consumer is liable for a malfunctioning card.

Obviously, not all of these disclosures can be printed on the card. Through regulation, issuers should be instructed as to which disclosures must be printed on the card and which can be contained in separate brochures or other documents. Certain disclosures are vital and should be printed on the card. These include the name, address, and telephone number of the party or parties who are responsible for handling any consumer complaints or problems, and the consumer's liability for lost, stolen, or malfunctioning cards. The regulation also should specify when the disclosures must be made. Disclosure at the time the consumer purchases the card would be most meaningful. The SVC statute should require that if the issuer does not provide a copy of the full agreement at the time of purchase, the consumer must be provided with an address or phone number through which the consumer can obtain a copy of the agreement free of charge.

In drafting the Truth in Lending Act, Congress recognized that to fulfill the statute's purpose of promoting the "informed use of credit,"<sup>293</sup> it was necessary to impose requirements on the advertising of credit terms.<sup>294</sup> Congress should consider whether there is a need for specific legislation to ensure that SVCs are not advertised in a misleading manner. Although it is important for an SVC law not to prohibit advertising claims that amount to no more than "puffing," it also is crucial that SVCs not be advertised in a manner that suggests

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289. The *OCC Bulletin* merely suggests disclosing the name of the issuer. If different companies are assuming responsibility for different types of problems, the names, addresses, and telephone numbers of each should be disclosed. *See id.*

290. The FDIC Request for Comment and the *OCC Bulletin* are addressed only to banks and FDIC insurance. *See generally* 61 Fed. Reg. at 40,494; *OCC Bulletin*, *supra* note 219.

291. At a minimum, if payment does not result in discharge, that fact should be disclosed.

292. The *OCC Bulletin* suggests disclosure only of what happens if the card expires. *See OCC Bulletin*, *supra* note 219, at 10.

293. 15 U.S.C. § 1601(a) (1994).

294. *See id.* §§ 1661-1665b.

they have the essential features of cash: SVCs are not legal tender; SVCs are not money; SVCs merely represent a claim.<sup>295</sup>

Disclosure is necessary, but it is not sufficient because consumers also need laws that require all SVC systems to provide a minimum level of protection and integrity.<sup>296</sup> Certain practices should be mandated to prevent SVC systems from operating in an unfair manner. Issuers should not be allowed to change the terms and conditions absent notice to the card purchaser. In on-line and off-line accountable systems, consumers should be entitled to receive upon request their account balances and a transaction history of at least two months free or at a nominal charge. Few consumers ever would need this accounting, but if SVCs holding substantial sums become available, in rare instances a consumer might have a critical need for this history. Issuers of SVCs also should be required to establish a limited form of error resolution procedure. For example, if a consumer purchases a defective card, the issuer should have a mechanism through which the consumer can file a complaint. The issuer should be required to investigate and to inform the consumer of the results of the investigation and of its response to the complaint within a specified period of time.

SVC legislation should provide that consumer payment using SVCs is final and discharges the consumer's obligation to the person to whom value has been transferred. The merchant, the issuer, and others should be able to provide for allocation of risk among themselves by contract or system rules free of regulation. Final payment and discharge rules protecting consumers comport with reasonable consumer expectations. Sellers whom the obligor has not paid should not be able to approach the consumer, forcing the consumer to pay twice or replevying goods the consumer purchased.

Congress should consider the need to enact legislation that would ensure the financial soundness of those responsible to pay SVC claims or should establish an insurance fund to protect consumers when that responsible party is insolvent. At present, SVC consumers enjoy limited protection. The FDIC General Counsel has interpreted the FDIA to require insurance coverage of a limited category of SVC transactions.<sup>297</sup> State and federal regulatory agencies monitor

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295. See Task Force, *supra* note 238, at 30-31; see also *supra* text accompanying notes 239-44 (discussing misleading nature of characterizing SVC as money transfer).

296. See generally Griffith L. Garwood et al., *Consumer Disclosure in the 1990s*, 9 GA. ST. U. L. REV. 777 (1993) (discussing lessons learned from disclosure patterns and determining future trends for disclosure requirements).

297. See FDIC General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 49,491 (1996).

financial institutions to make sure they are complying with rules to ensure their safety and soundness, and some states have insurance funds to protect consumers who buy from money transmitters.<sup>298</sup> Failure to provide national safeguards to protect SVC consumers in the event of the failure of a major SVC provider may result in substantial monetary loss and may destroy the public's confidence in SVCs and perhaps in electronic payment systems in general.

The SVC statute should provide consumers with a private right of action and attorneys fees for violation of the minimal requirements that the proposed statute would impose. Other federal laws governing consumer payment systems contain these features.<sup>299</sup> Without these provisions, the transaction costs of litigating violations of the law preclude most actions. Consequently, the law would be an empty threat in most cases except when a viable class action might be possible. In addition, the statute should provide that it is unlawful to deprive consumers of their right of action through pre-dispute arbitration agreements.<sup>300</sup>

The requirements and other provisions proposed here are not a radical departure from current practice. For the most part, they merely subject companies transmitting monetary value through SVCs to the same type of rules and standards to which those companies already are subject. In fact, many states impose far more onerous requirements upon money transmission companies that sell money orders and travelers' checks.<sup>301</sup>

### CONCLUSION

The stored value card is a product that promises an attractive and convenient alternative to other types of payment devices for consumers in certain situations. The card is a logical step in the perhaps ineluctable march toward a completely electronic money system. Consumers, however, are confused about the nature of the cards and about their rights and obligations when they use the cards. This is understandable because of the different architectures of various cards and their similarities to and differences from other electronic payment systems. Moreover, the cards contain many features and

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298. See, e.g., N.Y. BANKING LAW art. XIII-C (McKinney 1996).

299. See, e.g., Truth in Lending, 15 U.S.C. § 1640 (1994); Electronic Fund Transfers, *id.* § 1693m; Magnuson-Moss Warranty Act, *id.* § 2310(d).

300. See generally Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 268 (1995) (discussing arbitration contracts currently used).

301. See *supra* text accompanying notes 279-82 (listing various state restrictions on companies that sell money orders and travelers' checks).

risks that make the informed use of the cards essential. To ensure the integrity of this payment system, clear legal rules are necessary to fill the present vacuum, and a minimal level of protection is vital to protect consumers and preserve public confidence. For these reasons, federal legislation is necessary.

