



**United States House of Representatives Financial Services Committee**

**Task Force on Financial Technology**

**Is Cash Still King? Reviewing the Rise of Mobile Payments**

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## Introduction

Chairman Lynch and Ranking Member Emmer and Members of the Financial Technology Task Force, thank you for the invitation to appear today. I am Christina Tetreault, senior policy counsel on Consumer Reports' financial services policy team. Consumer Reports is an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Reports works for pro-consumer policies in the areas of financial services and marketplace practices, antitrust and competition policy, privacy and data security, food and product safety, telecommunications and technology, travel, and other consumer issues in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

Consumer Reports (CR) has a long history of working to improve payments protections for consumers. In 2008, the then-leader of CR's financial services policy team, Gail Hillebrand, published a comprehensive overview of and proposed solutions for "the mess" in payments law that she saw would be exacerbated by the rise of mobile.<sup>1</sup> In 2011, CR published its first report on mobile payments, Michelle Jun's *Mobile Pay or Mobile Mess: Closing the Gap Between Mobile Payment Systems and Consumer Protections*.<sup>2</sup> From 2015 - 2018, CR staff served on the steering committees of the Federal Reserve's Faster and Secure Payments Task Forces, working with industry, retailers, regulators and other consumer groups to ensure safer payments modernization. In 2018, Consumer Reports rated peer-to-peer payment services, including Apple, Square's Cash app and Venmo.<sup>3</sup> With the launch of CR's Digital Lab in 2019, Consumer Reports continues to make digital privacy and security, including for financial services, an essential part of our work for a fair, just and safe marketplace. I appreciate the opportunity to share our expertise here today, and thank the Committee for calling attention to the consumer implications of the rise of mobile payments.

Consumer problems with mobile payments reflect problems in payments and the digital ecosystem: current law irrationally applies different consumer protections to different payment methods, and electronic payments have inherent privacy and security issues. These issues are intensified by the mobile environment. Congress can fix these problems by creating uniform payments protections for all payment types, and establishing a strong federal floor of privacy protections with curbs on data collection and sharing, empowered watchdogs to ensure compliance, and real consequences for those companies that fail to meet their obligations.

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<sup>1</sup> Gail Hillebrand, *Before the Grand Rethinking: Five Things to Do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, <https://advocacy.consumerreports.org/wp-content/uploads/2013/04/WhereisMyMoney08.pdf>. The specific reference to mobile is at 786.

<sup>2</sup> <https://advocacy.consumerreports.org/wp-content/uploads/2013/02/Mobile-Pay-or-Mobile-Mess.pdf>

<sup>3</sup> <https://www.consumerreports.org/digital-payments/mobile-p2p-payment-services-review/>

## I. Mobile is a platform, not a payment type.

**A mobile payment is a payment made from a mobile device using an app or a wallet, and funded by a linked funding mechanism.**

Mobile payments allow consumers to make purchases or transfer money with a few taps on a mobile device. The most common method for making a mobile payment in the United States is to use a mobile payments application, either one that is downloaded to a mobile device, such as Venmo, or one that is integrated into the mobile device's operating system, such as Apple Pay. Mobile payments include payments made at the point of sale, online and in apps, and person-to-person money transfers. To make an online or in-app payment, the user simply taps a few commands on their mobile device. At the point of sale, a user may tap their phone to pay, or flash a QR code that is read by the register. Less common are mobile payments via text message, which are charged to the payee's mobile carrier bill. For example, during the 2019 fires in Sonoma County, people could text REDCROSS to 90999 to make a \$10 donation; the \$10 appeared on the donor's phone bill.<sup>4</sup> With the exception of direct-to-carrier billing, users must link a funding source to the app to fund the payment. Funding sources include credit, debit, gift or prepaid cards, or a bank account. After a wallet is funded, some services allow users to transact with stored value, funds held in the user's digital account by the service provider.

While the user interfaces of mobile wallets and payment apps make it appear that money moves instantly, it does not. Beneath the modern veneer of mobile payments is technology older than the oldest Millennials. Money moving as a result of a mobile payment ultimately moves the same way money moves with a bank transfer or payment card: along rails built in the early 1970s.<sup>5</sup> Cryptocurrency, rarely used for consumer payments,<sup>6</sup> relies on new technology to move money, as does The Clearing House's Real Time Payments (RTP) rail. However, these technologies are quite different. Private cryptocurrencies, as discussed in more detail below, create more consumer problems than they solve, and raise questions about applicable law. RTP moves money at the speed of information, but RTP payments are still electronic funds transfers, and are, as leadership from The Clearing House has said, covered by existing payments law.<sup>7</sup> Regardless of the underlying technology, however, mobile is a platform, not a new payment type.

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<sup>4</sup> <https://abc7news.com/5659200/>

<sup>5</sup> Behind the scenes, mobile payments move money on the Automated Clearing House, launched in 1974, (<https://www.nacha.org/content/history-nacha-and-ach-network>) and the card networks. These are also from the early 70s. See for example, Visa, <https://usa.visa.com/dam/VCOM/download/corporate/media/visanet-technology/visa-net-booklet.pdf>

<sup>6</sup>

<https://www.reuters.com/article/us-crypto-currencies-payments-analysis/bitcoin-for-payments-a-distant-dream-as-usage-dries-up-idUSKCN1NP1D8>

<sup>7</sup> The Clearing House, RTP, Increasing Payment Efficiency, Weil, Gotshal & Manges Roundtable, at slide 9, [https://ccl.yale.edu/sites/default/files/files/Hunter\\_Rob\\_Presentation.pdf](https://ccl.yale.edu/sites/default/files/files/Hunter_Rob_Presentation.pdf)

## II. Mobile payments expose the contradictions and inconsistencies in payments law.

### Consumer protections for mobile payments follow the underlying payment type.

What types of protections a mobile payment has depends on what the underlying funding mechanism is.<sup>8</sup> In most mobile payment applications, users can draw on a host of payment types to make purchases. With the exception of direct-to-carrier billing, these payments look pretty much the same to consumers. However, they each provide different levels of protection to consumers.

The type of consumer protections a payment type has depends on the laws and regulations that apply to it. Mobile payments linked to credit cards have the strongest protections. Mobile payments funded by debit cards or bank accounts are second best. Mobile payments linked to gift cards have few protections, and payments charged to a mobile phone bill fewer still.<sup>9</sup> The most pronounced differences among payments protections are the caps on liability for errors and fraud, and the right to withhold payment when there is a dispute.

### Payment protections by payment type:

**Credit cards:**<sup>10</sup> Consumer liability for unauthorized credit card charges resulting from a lost or stolen credit card, which in mobile payments can include the phone itself, a chip in the phone or a sticker on the phone, is limited to \$50. If a billing error appears on a consumer's credit card statement, there is no liability as long as the consumer reports the error within 60 days. Credit cards also have a chargeback right, the right to reverse a charge if the goods or services were not delivered as agreed, including non-delivery, defect, or delivery of the wrong item.

**Debit cards (includes stored value and funds drawn from a linked bank account):**<sup>11</sup> This includes a growing set of products, from debit cards to services such as Venmo and Paypal that store value for consumers. For these products, consumer liability for unauthorized transactions is limited to \$50 if the consumer notifies the financial institution within two business days after learning of the loss or theft of the access device. If the consumer fails to notify the financial institution within two business days after learning of the loss or theft of the access device but notifies the bank within 60 days, liability can be up to \$500. If notice to the issuer exceeds 60 days, losses may be unlimited. Consumers have the right to be re-credited missing funds from unauthorized

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<sup>8</sup> Michelle Jun, *Mobile Pay or Mobile Mess*,

<https://advocacy.consumerreports.org/wp-content/uploads/2013/02/Mobile-Pay-or-Mobile-Mess.pdf>.

<sup>9</sup> For a thorough discussion of direct to carrier billing, see Michelle Jun, *Mobile Pay or Mobile Mess*, <https://advocacy.consumerreports.org/wp-content/uploads/2013/02/Mobile-Pay-or-Mobile-Mess.pdf>. As noted by Professor Mark Budnitz in *The Legal Framework of Mobile Payments: Gaps, Ambiguities and Overlaps*, the FCC took steps to address the issue of "cramming," unauthorized charges added to mobile carrier bills, after the publication of *Mobile Pay or Mobile Mess*, but large gaps remain: [https://www.pewtrusts.org/-/media/assets/2016/02/legal\\_framework\\_of\\_mobile\\_payments\\_white\\_paper.pdf](https://www.pewtrusts.org/-/media/assets/2016/02/legal_framework_of_mobile_payments_white_paper.pdf) at 35 and 42.

<sup>10</sup> Rules governing credit cards are found in the implementing Regulation Z, Truth in Lending, 12 CFR Part 1026.

<sup>11</sup> Rules governing these transactions are found in the implementing Regulation E governing electronic funds transfers 12 CFR Part 1005.

transactions within 10 business days. Debit cards and stored value do not have a chargeback right.

**Gift cards:**<sup>12</sup> Consumers have no legal protections that limit liability in the case of unauthorized transactions or other errors for gift cards. Consumers who link mobile payments to gift cards will not likely be able to recover lost funds in the event of fraud or error.

**Direct to carrier billing:** Consumers whose mobile payments are charged to their phone bills have unclear legal protections. Interstate and international telephone services are regulated by the Federal Communications Commission (FCC). FCC truth-in-billing requirements are meant to ensure that a consumer's bill contains necessary information in a fashion that consumers can understand.<sup>13</sup> The rules prohibit carriers from putting unauthorized charges on consumers' bills, but they do not contain clear liability limits, rights of recredit or chargeback rights. There may be some protections for consumers in state laws or public utility agency rules, but these vary from state-to-state.

### **Consumers do not understand their rights and obligations when using mobile payments, and may find they have trouble resolving mobile payments problems.**

While mobile payment providers may think of themselves as a mere "trusted intermediary" to whom consumers entrust their payment credentials,<sup>14</sup> consumers don't think of these companies that way. Users in CR's 2017 focus groups of peer-to-peer (P2P) services told CR that the company with whom they interacted—Facebook, Square, PayPal, etc.—would help fix any problems and make them whole. CR research found this is not necessarily the case.<sup>15</sup> Research by Pew found that consumers find mobile payments problems unusually difficult to resolve.<sup>16</sup> CR's research shows that providers make help relatively difficult to find in the wallet or app,<sup>17</sup> and few make telephone contact numbers publicly available.<sup>18</sup> These practices are out of alignment with the consumer expectation expressed in CR's focus groups.

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<sup>12</sup> Rules governing gift cards are contained in Regulation E, and are found at 12 CFR § 1005.20

<sup>13</sup> 47 CFR Y §64.2400-2401, Truth-in-Billing Requirements for Common Carriers. For a more complete discussion see Budnitz, The Legal Framework of Mobile Payments: Gaps, Ambiguities and Overlaps, [https://www.pewtrusts.org/-/media/assets/2016/02/legal\\_framework\\_of\\_mobile\\_payments\\_white\\_paper.pdf](https://www.pewtrusts.org/-/media/assets/2016/02/legal_framework_of_mobile_payments_white_paper.pdf) 42.

<sup>14</sup> *PayPal v Consumer Financial Protection Bureau* complaint at 14.

<sup>15</sup> Why Apple Pay Is the Highest-Rated Mobile P2P Payment Service, <https://www.consumerreports.org/digital-payments/mobile-p2p-payment-services-review/>.

<sup>16</sup> Pew, Are Americans Embracing Mobile Payments? Survey of consumer experiences finds greater trust in credit, debit cards, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/are-americans-embracing-mobile-payments>.

<sup>17</sup> Consumer Reports, Peer-to-Peer Payments Are Generally Safe, But Consumers Must Be Aware of Risks, <https://www.consumerreports.org/digital-payments/peer-to-peer-payments-are-generally-safe-but-consumers-must-be-aware-of-risks/>.

<sup>18</sup> Social media is filled with pleas from consumers that are some variation on, "Can't I just call you to resolve this?" See for example, <https://twitter.com/VictorMavika/status/1218295784405266432?s=20> and <https://twitter.com/Kittieb3/status/1217931828071366657?s=20>.

The gap between consumer expectations and provider practices would not be worrying if problems were extremely rare, but they are not. There are numerous media reports of consumers being scammed into sending money via mobile payment apps, only to discover too late that these transactions have essentially the same level of protections as cash.<sup>19</sup> The law covering electronic funds transfers considers a transfer “authorized” by the account holder even if the account holder was induced to send those funds by fraud.<sup>20</sup> We have called on the Consumer Financial Protection Bureau to extend legal protections to fraud victims.<sup>21</sup> The need for consumers to have a right to be made whole in these instances will only become more urgent as faster payments become more common.

CR’s research also shows that P2P users sometimes mistakenly send money to the wrong person, and, as noted above, service providers often tell users that they are on their own to get it back.<sup>22</sup> We think that in instances of misdirected payments, service providers have a legal responsibility to assist users transacting with stored value. The rules covering electronic funds transfers, found in Regulation E, include a definition of error: “An incorrect electronic fund transfer to or from the consumer’s account.”<sup>23</sup> While we believe that Regulation E is clear on this point already and that no regulatory changes are needed, we have called on the Consumer Financial Protection Bureau to clarify procedures to remove any uncertainty.<sup>24</sup>

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<sup>19</sup> These scams vary, and occur with many different payment apps. See for example, Consumer Reports, Peer-to-Peer Payments Are Generally Safe, But Consumers Must Be Aware of Risks, , <https://www.consumerreports.org/scams-fraud/how-to-protect-yourself-from-p2p-payment-scams/>; Venmo texting scam: Here’s what you need to know about the new con, <https://www.foxbusiness.com/technology/venmo-texting-scam-what-to-know>; Scammers are targeting Cash App users hoping for free money, <https://www.zdnet.com/article/scammers-are-targeting-cash-app-users-hoping-for-free-money/>; How cyber crooks target bank accounts via payment apps like PayPal, <https://www.freep.com/story/money/personal-finance/susan-tompson/2019/05/08/payment-apps-scams-venmo-paypal/3661254002/>; Instant fraud: Consumers see funds disappear in Zelle account scam The digital payment service embedded in banking apps has made it easier for thieves to access funds in personal checking and savings accounts, experts say, <https://www.nbcnews.com/business/consumer/instant-fraud-consumers-see-funds-disappear-zelle-account-scam-n1015736>.

<sup>20</sup> 12 CFR 1005.2(m) “Unauthorized electronic fund transfer” means an electronic fund transfer from a consumer’s account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit.”

<sup>21</sup> Consumer Reports comment on the Consumer Financial Protection Bureau’s Inherited Regulations and Inherited Rulemaking Authorities, <https://www.regulations.gov/document?D=CFPB-2018-0012-0039>.

<sup>22</sup> Consumer Reports, Peer-to-Peer Payments Are Generally Safe, But Consumers Must Be Aware of Risks, <https://www.consumerreports.org/digital-payments/peer-to-peer-payments-are-generally-safe-but-consumers-must-be-aware-of-risks/>

<sup>23</sup> 12 CFR § 1005.11(a)(1)(ii)

<sup>24</sup> Consumer Reports comment on the Consumer Financial Protection Bureau’s Inherited Regulations and Inherited Rulemaking Authorities, <https://www.regulations.gov/document?D=CFPB-2018-0012-0039>.



## **Consumers worry about mobile payments security, and mobile payments providers could do more to secure user accounts.**

Consumers worry about the security of mobile payments, according to Pew research.<sup>25</sup> There is reason for concern. Both the Consumer Financial Protection Bureau and the Federal Trade Commission have sued mobile payments providers over security practices.<sup>26</sup> Additionally, CR research shows providers can and should do more to keep users safe. In particular, they could design their apps to “default” to the highest security settings, meaning users would have to actively choose to opt out. In our 2018 research, several payment apps, including Venmo, Square's Cash App, and Facebook Payments in Messenger, failed to require a password, PIN, or fingerprint for repeat access to the app or to initiate a transaction when their default security settings are in place.<sup>27</sup> Media reports appear with some regularity in which scammers ask to borrow a person's phone then use the victim's payment apps to transfer significant sums out.<sup>28</sup> If access or transfers required user authentication every time, scammers could not do this.

## **Many Americans remain adverse to mobile payments.**

American adoption of mobile payments has lagged behind that of other countries and analysts' expectations.<sup>29</sup> That may in part be because Americans still love cash: cash is the most frequently used payment instrument, representing 30 percent of all transactions and 55 percent of transactions under \$10.<sup>30</sup> As compared to mobile, consumers prefer card payments, and are skeptical of mobile payments safety and security, a skepticism that crosses generations.<sup>31</sup> So

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<sup>25</sup> Pew, Are Americans Embracing Mobile Payments? Survey of consumer experiences finds greater trust in credit, debit cards, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/are-americans-embracing-mobile-payments>

<sup>26</sup> PayPal Settles FTC Charges that Venmo Failed to Disclose Information to Consumers About the Ability to Transfer Funds and Privacy Settings; Violated Gramm-Leach-Bliley Act, <https://www.ftc.gov/news-events/press-releases/2018/02/paypal-settles-ftc-charges-venmo-failed-disclose-information> and CFPB Takes Action Against Dwolla for Misrepresenting Data Security Practices <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-dwolla-for-misrepresenting-data-security-practices/>

<sup>27</sup> Consumer Reports, Peer-to-Peer Payments Are Generally Safe, But Consumers Must Be Aware of Risks, <https://www.consumerreports.org/digital-payments/peer-to-peer-payments-are-generally-safe-but-consumers-must-be-aware-of-risks/>

<sup>28</sup> See eg. Criminals are asking to use your phone, then sending cash to themselves, police say, <https://www.wcnc.com/article/news/crime/criminals-are-asking-to-use-your-phone-then-sending-cash-to-themselves-police-say/275-603972444>

<sup>29</sup> The Economist explains Why Americans are warming to mobile payments, They are finally being weaned off their cheque books, <https://www.economist.com/the-economist-explains/2018/06/26/why-americans-are-warming-to-mobile-payments>

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<https://www.frbsf.org/cash/publications/fed-notes/2018/november/2018-findings-from-the-diary-of-consumer-payment-choice/>

<sup>31</sup> Pew, Are Americans Embracing Mobile Payments? Survey of consumer experiences finds greater trust in credit, debit cards, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/are-americans-embracing-mobile-payments>

while seemingly every year is going to be “the year of mobile payments,”<sup>32</sup> 2020 is probably not going to be that year.

## **PayPal’s lawsuit to overturn the CFPB Prepaid Rule threatens mobile payment protections.**

Current protections for mobile payments made with stored value, imperfect as they are, are threatened by the PayPal lawsuit seeking to invalidate the Consumer Financial Protection Bureau’s Prepaid rule. The rule essentially extends the protections that apply to bank account transfers and debit card transactions to stored value.<sup>33</sup> Before the prepaid rule, consumers had to rely on what few protections state money transmitter laws have to cover their use of prepaid accounts.<sup>34</sup> These laws lack the error resolution rights<sup>35</sup> and right of recredit that apply to prepaid cards now that they are covered by the prepaid rule.

PayPal’s lawsuit argues that the prepaid rule was meant to apply to physical general purpose reloadable prepaid cards and not to digital wallets. This misunderstands prepaid’s history, and the history of the rule. Prepaid is not and never was simply a plastic card. Early prepaid users adopted prepaid accounts to shop online or otherwise where cash is not accepted.<sup>36</sup> Prepaid users were among the first to send money person-to-person via text. And as an example of how the rule was never meant simply to apply to plastic cards, CR sought to have it extended to cryptocurrency wallets.<sup>37</sup>

A lot of money will be at risk if the rule goes away. Today, Venmo has 40 million users. These consumers are responsible for more than \$100 billion in transactions.<sup>38</sup> Even if only a small fraction of that is stored value, consumer funds in Venmo are likely in the billions. And Venmo is but one example of a digital account covered by the prepaid rule. Millions of Bluebird, Walmart

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<sup>32</sup> Tony Danova, Mobile Is Poised To Upend The Payments Industry [2013] <https://www.businessinsider.com/the-mobile-payments-moment-2013-12>; Ryan Rommann, Cash Is Trash: The Future of Mobile Payment [2014], <https://www.forbes.com/sites/teconomy/2014/01/23/cash-is-trash-the-future-of-mobile-payment/#1997b6a61596>; Alix Murphy, The Year Of Mobile Payments [2015], <https://techcrunch.com/2015/04/19/the-year-of-mobile-payments/>.

<sup>33</sup> The Consumer Financial Protection Bureau, Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/rules-concerning-prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/>

<sup>34</sup> Pew Issue Brief, Imperfect Protection, Using Money Transmitter Laws to Insure Prepaid Cards, [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2013/pewprepaidmoneytransmitterpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2013/pewprepaidmoneytransmitterpdf.pdf).

<sup>35</sup> Professor Mark E. Budnitz, The Legal Framework of Mobile Payments, Gaps, ambiguities, and overlap, at 14 and 33, [https://www.pewtrusts.org/~media/assets/2016/02/legal\\_framework\\_of\\_mobile\\_payments\\_white\\_paper.pdf](https://www.pewtrusts.org/~media/assets/2016/02/legal_framework_of_mobile_payments_white_paper.pdf).

<sup>36</sup> Pew, Why Americans Use Prepaid Cards, [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2014/prepaidcardssurveyreportpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardssurveyreportpdf.pdf) at 13.

<sup>37</sup> <https://advocacy.consumerreports.org/wp-content/uploads/2015/03/signed-final-CU-CFPB-proposed-prepaid-rules-comment.pdf>

<sup>38</sup> <https://www.cnbc.com/2019/04/25/venmo-discloses-huge-digital-user-base-but-no-plan-to-profit-from-it.html>



Money Card and Serve accounts - all virtually indistinguishable from online bank accounts under the prepaid rule - will lack protections if the prepaid rule is invalidated.

### **III. Mobile payments multiply privacy concerns inherent in non-cash payments.**

#### **Mobile payments' providers privacy practices are wanting.**

Mobile payments cannot be made anonymously.<sup>39</sup> Electronic payments require the involvement of multiple parties and therefore have many eyes on them. For example, a credit card payment implicates at minimum a merchant, two banks and a payments processor.<sup>40</sup> The number of eyes grows when a mobile device, telecom or internet service provider, and third party app are in the mix. Some data collection is necessary and appropriate, but often digital financial data collection far exceeds this baseline.

Mobile payments services are often touted as “free.” Users are not the customers of these services, they are the product. Mobile payment providers justify all-encompassing surveillance of users in the name of “analytics” or “product improvement.” Providers also reserve broad rights to use your data for unrelated purposes, including targeted advertising, and share user data outside what a user would reasonably expect. The potential for users' information to be weaponized against them is particularly acute when payments are combined with platforms such as Facebook, Uber and Amazon.

Privacy is a fundamental human right. As CR's Director of Consumer Privacy and Technology Policy Justin Brookman has written, surveillance is a privacy harm, and consumers have a privacy interest in controlling commercial collection of their personal information.<sup>41</sup> Consumers must have options to avoid the always watching eyes of their bank, credit card company or payments provider. That means cash use should continue to be an option for consumers. And it also means there needs to be meaningful curbs on data collection and sharing. People should be able to shop without our every move being tracked, recorded, and shared.

Providers can do more to give consumers control over information collected about them. Consumers deserve easy, standardized tools that give them control over their information and allow them to stop companies from using their data for extraneous purposes. These best practices and more are outlined in The Digital Standard, an open-source digital privacy and security standard, which companies should adopt.<sup>42</sup> Wherever possible, consumers should be able to make choices about multiple companies at once. CR supports and is working on efforts to make these types of controls the industry standard in financial services.<sup>43</sup> However, consumers shouldn't bear the entire burden of protecting their privacy through settings and controls. Laws are necessary to ensure that the cost of access to financial services is not constant surveillance.

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<sup>39</sup> Cryptocurrency enthusiasts argue otherwise, but that is not a topic I'm addressing here.

<sup>40</sup> Susan Herbst-Murphy, Clearing and Settlement of Interbank Card Transactions: A MasterCard Tutorial for Federal Reserve Payments Analysts, at 22, <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2013/D-2013-October-Clearing-Settlement.pdf>.

<sup>41</sup> Justin Brookman & G.S. Hans, *Why Collection Matters: Surveillance as a De Facto Privacy Harm*, FUTURE OF PRIVACY FORUM BIG DATA & PRIVACY WORKSHOP PAPER COLLECTION (2013), <https://fpf.org/wp-content/uploads/Brookman-Why-Collection-Matters.pdf>.

<sup>42</sup> <https://www.thedigitalstandard.org/>

<sup>43</sup> CR recently joined the Financial Data Exchange, <https://financialdataexchange.org/>.

#### **IV. Cryptocurrency in its current forms creates more consumer problems while solving none.**

Many claims have been made about how mobile financial services, and mobile payments in particular, increase financial inclusion. The entire Libra project, for example, is justified by Facebook with the dubious claim that it will “empower billions of people.”<sup>44</sup> The reality is that the reasons consumers are outside the financial mainstream in the United States are largely structural.<sup>45</sup> Nothing about cryptocurrency fixes this, nor will any app or digital wallet.

Unbanked consumers - people without checking or savings accounts, are less likely than banked consumers to use mobile payments,<sup>46</sup> and are far more cash reliant than other Americans.<sup>47</sup> The reasons consumers rely on cash are many, but unbanked consumers cite not having enough money to keep in account as a primary reason they are unbanked.<sup>48</sup> Unbanked consumers are more likely to suspend or cancel their cell phone plans because of the cost of maintaining coverage, therefore making regular use of mobile financial services is nearly impossible for unbanked consumers.<sup>49</sup>

If the legal mess in traditional payments, as described above, is bad, the legal mess in cryptocurrency is worse. Right now and in the absence of action from either Congress or Consumer Financial Protection Bureau, the few consumer protections that cryptocurrency users have are mostly found in state money transmitter laws. As noted above, these state laws lack the types of payments protection found in federal law. To date, the Consumer Financial Protection Bureau has declined to opine on whether Reg E applies to cryptocurrency wallets. Similarly, there is no federal deposit insurance for cryptocurrency. Cryptocurrency scams and fraud are rampant, and hacking of wallets and exchanges, where virtual currencies are stored, is common.<sup>50</sup> These products and services should not be tested on consumers with the least

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<sup>44</sup> <https://libra.org/en-US/white-paper/#introduction>

<sup>45</sup> Unbanked Americans, when asked cite the costs associated with banking, and - first and foremost - not having enough money to keep in account as the main reasons for not having a bank account. <https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf> at 4.

<sup>46</sup> Pew, What Do Consumers Without Bank Accounts Think About Mobile Payments? <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/06/what-do-consumers-without-bank-accounts-think-about-mobile-payments>

<sup>47</sup> Federal Deposit Insurance Corporation, 2017 FDIC National Survey of Unbanked and Underbanked Households Executive Summary, at 12, <https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf>.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> Pew, What Do Consumers Without Bank Accounts Think About Mobile Payments? <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/06/what-do-consumers-without-bank-accounts-think-about-mobile-payments>

<sup>50</sup> Olivia Solon, Bitcoin, titcoin, ponzi: jokes and scams fuel a cryptocurrency gold rush, *The Guardian* (Feb. 2, 2018), <https://www.theguardian.com/technology/2018/feb/02/bitcoin-bananacoin-prodeum-cryptocurrencies>; Shane Shifflett and Coulter Jones, Buyer Beware: Hundreds of Bitcoin Wannabes Show Hallmarks of Fraud, *A Wall Street Journal analysis of 1,450 cryptocurrency offerings reveals rampant plagiarism, identity theft and promises of improbable returns*, (May 17, 2018), <https://www.wsj.com/articles/buyer-beware-hundreds-of-bitcoin-wannabes-show-hallmarks-of-fraud-1526573115>; Kate Rooney, \$1.1 billion in cryptocurrency has been stolen this year, and it was apparently easy to do, *CNBC* (June 7, 2018), <https://www.cnbc.com/2018/06/07/1-point-1b-in-cryptocurrency-was-stolen-this-year-and-it-was-easy-to-d>

cushion in their financial lives. The best way to ensure consumer access to faster and safer electronic payments is to support the Federal Reserve's proposal to build the FedNow faster payments system, not by empowering new fangled, untested, unregulated corporate schemes.

## V. Recommendations

### **Congress should create a strong federal floor of consumer payments protections.**

Congress can make every way safe to pay with a few updates to existing laws, as CR's Gail Hillebrand advised in 2008.<sup>51</sup> It remains the case that there is little that consumers can do on their own to ensure their safety,<sup>52</sup> a situation compounded by the mobile environment in which consumers have little understanding of their rights and obligations. Congress can ensure that all payment types have the same baseline protections for consumers.

Congress should amend the Electronic Fund Transfer Act (EFTA) to provide equal, strong loss caps and a guaranteed recredit time periods after unauthorized use for all non-cash, non-check payments. Congress should also update the EFTA to provide a chargeback right for all non-cash, non-check payment types. Congress should also extend the chargeback right in the Fair Credit Billing Act to cover direct-to-carrier billing. These changes would go a long way to ensuring that mobile payments have a strong baseline of protections.

### **Congress should pass strong privacy legislation, including curbs on data collection.**

The Gramm-Leach-Bliley Act (GLBA) makes a distinction between financial and other types of data. When the name of your first pet can be the key to account access, and money can be sent using only a phone number, the line between sensitive financial data and everything else is either already meaningless or well on its way to becoming so.

The Gramm-Leach-Bliley Act should not be mistaken for a privacy law. GLBA requires financial services providers to explain their information-sharing practices to their customers and to protect sensitive data.<sup>53</sup> The disclosures required by GLBA, which are intended to give consumers the opportunity to opt-out of the sharing of nonpublic personal information with third parties and to outline the company's data use practices, are so confusing that consumers are unlikely to exercise their rights. Moreover, GLBA does nothing to curb data collection in excess of what is reasonably necessary. Its incentives to protect consumer data from unauthorized disclosure remain inadequate. Still, banks and financial services providers seek and get broad exemptions from state privacy laws by claiming that GLBA protects consumer privacy.<sup>54</sup> The GLBA regime does no such thing and it is time for Congress to act.

Every person by dint of their humanity has a right to privacy. As noted above, CR urges providers to adopt the tools and practices in the Digital Standard. But legal action is also

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<sup>51</sup> Gail Hillebrand, *Before the Grand Rethinking: Five Things to Do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, <https://consumersunion.org/pdf/WhereisMyMoney08.pdf>

<sup>52</sup> *Id.*

<sup>53</sup> Pub. L. 106-102

<sup>54</sup> For a discussion of the gaps and ambiguities in the California Consumer Privacy Act created by the GLBA exemption, see *The 2018 California Consumer Privacy Act: Understanding Its Implications and Ambiguities*, [https://www.frbsf.org/banking/files/Fintech-Edge-Special-Report\\_CCPA.pdf](https://www.frbsf.org/banking/files/Fintech-Edge-Special-Report_CCPA.pdf) at 5.

needed. Consumer Reports urges Congress to adopt national privacy legislation that creates a strong floor of protections for consumers and requires data minimization, clear information about data practices, strong data security practices. A national privacy law should provide consumers with easy access to their information, and strong enforcement tools to ensure accountability.

## **Conclusion**

Consumers remain skeptical of mobile payments. This skepticism is not unfounded, given the documented legal mess in payments, and the gaps in privacy and security attendant to mobile payments. Mobile payments problems reflect the fact that current law applies different consumer protections to different payment methods, even though those payment methods are more or less the same. Privacy and data security concerns about mobile payments are issues that transcend payments. Congress can help fix these problems by creating uniform payments protections for all payment types, and establishing a strong federal floor of privacy protections with strong curbs on data collection and sharing, empowered watchdogs to ensure compliance, and real consequences for those companies that fail to meet their obligations.