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Pay at Your Own Risk? How to Make Every Way to Pay Safe for Mobile Payments

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Consumers today have a bewildering number of choices when it comes to paying for goods and services. They can pay via cash, checks, credit cards, debit cards linked to bank accounts, general-use prepaid cards, gift cards, and mobile phones. Many of these payment methods — particularly prepaid cards and payments via mobile phone — are recent phenomena and do not fit cleanly into the existing legal categories used in consumer protection laws.

As mobile phones have become more ubiquitous, the marketplace has produced many ways to pay using these devices, including charges directly to mobile phone accounts. As these technologies and practices have developed, however, U.S. laws have failed to catch up. This article recommends a few simple steps to harmonize existing laws and to ensure that all consumers making mobile payments have guaranteed consumer protections:

- At the federal level, ensure that Regulation E is properly enforced to protect consumers who link mobile payments to prepaid phone deposits. Clarify Regulation E to explicitly include prepaid phone deposits under the definition of “account,” and wireless carriers holding deposits under the definition of “financial institution”;
- At the federal level, ensure that consumers who charge mobile payments to phone bills have the same mandatory protections against unauthorized transactions and billing errors as consumers who use credit cards. Clarify Regulation Z to explicitly include wireless carriers under the definition of “card issuer”;
- At the federal level, provide chargeback rights for payments linked to bank debit cards, prepaid cards and prepaid phone deposits. Amend Regulation E to include a right to reverse disputed transactions where the

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goods and services are not as delivered or agreed upon, similar to the rights now provided to credit card or charge card users under the Fair Credit Billing Act;

- *At the state level, protect all consumers who make "noncommunications-related" mobile payments linked to prepaid phone deposits or phone bills by passing legislation or adopting regulations that establish mandatory protections against unauthorized transactions, with a right of recredit, and a right to reverse disputed transactions where the goods or services are not as delivered or agreed upon. These protections are already the law in California.*

Until the law is changed to provide mandatory protections for all ways to pay by mobile phone, wireless carriers can provide the same protections by contract that California residents already receive by law, as discussed below.

De nos jours, le consommateur jouit d'un nombre ahurissant de choix quand vient le temps d'effectuer ses paiements relativement à la fourniture de biens et de services. Il peut payer en argent, par chèque, par carte de crédit, par carte de débit liée à un compte bancaire, par carte prépayée à usage général, par carte-cadeau et par téléphone mobile. Bon nombre de ces modes de paiement, plus particulièrement les cartes prépayées et les paiements effectués à l'aide d'un téléphone mobile, sont récents et il n'est pas évident qu'ils entrent dans les catégories juridiques prévues par les lois sur la protection du consommateur.

Compte tenu de l'omniprésence des téléphones mobiles, de nombreux modes de paiement qui font appel à ces appareils ont vu le jour. Ainsi il est possible de porter des frais directement à des dépôts effectués d'avance ou à des factures pour usage du téléphone. Le recours à ces technologies et à ces pratiques a pris de l'ampleur mais les lois américaines relatives à ces pratiques ont pris du retard. Les auteurs de l'article proposent quelques moyens simples pour harmoniser les lois existantes et faire en sorte que ceux qui effectuent des paiements mobiles puissent se prévaloir de la protection offerte par les lois sur la protection du consommateur :

- *au niveau fédéral, veiller à ce que le règlement intitulé Regulation E soit dûment appliqué au consommateur qui porte des charges à des dépôts effectués d'avance pour usage du téléphone. Clarifier le règlement intitulé Regulation E pour y inclure explicitement les dépôts effectués d'avance pour usage du téléphone à la définition du terme « compte » (« account ») et les entreprises de services sans fil qui détiennent ces dépôts à la définition du terme « institution financière » (« financial institution »);*
- *au niveau fédéral, veiller à ce que le consommateur qui porte des charges à des factures pour usage du téléphone bénéficie des mêmes protections obligatoires contre les opérations non autorisées et les erreurs de facturation que le consommateur utilisant une carte de crédit. Clarifier le règlement intitulé Regulation Z pour y inclure explicitement les*

entreprises de services sans fil à la définition du terme « émetteur de carte » (« card issuer »);

- *au niveau fédéral, offrir un droit de rétrofacturation pour les paiements liés à des cartes de débit bancaires, à des cartes prépayées et à des dépôts effectués d'avance pour usage du téléphone. Modifier le règlement intitulé Regulation E pour y inclure le droit d'obtenir l'annulation de montants débités contestés lorsque les biens et les services ne sont pas tels qu'il avait été prévu ou convenu, droit semblable à celui actuellement offert aux utilisateurs de cartes de crédit ou cartes de débit en vertu de la loi américaine intitulée Fair Credit Billing Act;*
- *au niveau des états, offrir une protection à tous les consommateurs qui portent des charges non liées aux communications à des dépôts effectués d'avance ou à des factures pour usage du téléphone ou en adoptant des lois et des règlements prévoyant des protections obligatoires contre les opérations non autorisées, avec droit de remboursement, ou droit d'obtenir l'annulation de montants débités contestés lorsque les biens et les services ne sont pas tels qu'il avait été prévu ou convenu. Ces protections sont déjà en vigueur en Californie.*

Dans l'attente de modifications législatives afin d'accorder des protections obligatoires pour l'ensemble des modes de paiement effectués dans le cadre de la téléphonie mobile, les entreprises de services sans fil pourraient accorder par voie contractuelle les mêmes protections que celles dont les résidents de la Californie bénéficient déjà en vertu de la loi.

1. INTRODUCTION

“Mobile payments” allow consumers to buy products or transfer money with a quick text message or application downloaded to the phone. These new ways to pay are being marketed at an increasing pace in the U.S., although they have been popular in other countries for several years.¹

The level of protections that apply to a mobile payment can vary depending on the underlying payment method a consumer links to the phone. Until U.S. payments law is updated to provide consumers the same protections regardless of the payment methods used, consumers may be paying at their own risk when they use mobile payments technology. Nonetheless, there are a few simple fixes that the Consumer Financial Protection Bureau (CFPB) and states can make to close the gaps, particularly for mobile payments charges to phone bills and against prepaid phone deposits, to better protect consumers who pay by mobile phone.

The need to fill the gaps in current regulations is becoming more pressing, because mobile phones are now ubiquitous and mobile payments are rising in popularity. Mobile payments in the U.S. are expected to reach \$214 billion in gross

¹ The U.S. State Department reported in 2008 that mobile payments were already proliferating in Latin America, South Asia, and Africa, in part because consumers on those continents are more likely to have cell phones than bank accounts. See Press Release, US Dep't of State, Mobile Payments — A Growing Threat (March 2008) (summarizing report on potential for money laundering and other criminal activity using mobile payments technology).

dollar volume by 2015, up from \$16 billion in 2010, according to Aite Group LLC.² Mobile payments technologies employing contactless readers, for example, provide convenience both to the consumer and the merchant at the point of sale. The consumer can wave a smartphone at the cash register and make an instant payment. The merchant can serve customers quickly and keep lines moving.³ Some merchants are also interested in the technology because mobile payment service providers may charge the merchant lower fees than traditional credit- and debit-card networks at the point of sale.⁴

Mobile payments have also received substantial international attention because they are helping consumers in developing countries gain access to financial services. *American Banker* has reported that 5 billion consumers worldwide have mobile phones, while only 1.5 billion have access to financial services.⁵ In Haiti, one of the world's poorest countries, 85 percent of the population has mobile phones but very few Haitians hold bank accounts.⁶ In Kenya, Safaricom's M-PESA service gives Kenyan consumers the ability to manage transactions entirely through the use of mobile phones.⁷ M-PESA consumers can deposit or withdraw cash and send money through a network of M-PESA agents and ATM machines, and they can buy goods and services with their mobile phones.⁸

Yet despite the benefits, mobile payments come with risks. Although consumers may not be aware, mobile payments are subject to a fragmented legal landscape in the U.S. Existing legal categories have not evolved along with technology. Mobile payments, like prepaid cards, simply did not exist when consumer financial protection laws were first enacted. At present, the level of consumer protections against unauthorized transactions and other errors varies depending on whether a consumer links a payment to a credit card, debit card or bank account, prepaid card,

² Andrew Johnson, "In Mobile Payments, Lack of Interoperability Threatens Adoption" *American Banker* (9 December 2010), online: American Banker <http://www.americanbanker.com/issues/175_235/lack-of-interoperability-1029690-1.html>.

³ See e.g., Kate Fitzgerald, "Starbucks in National Push for Mobile Payments" *American Banker* (6 December 2010), online: American Banker <http://www.americanbanker.com/issues/175_232/starbucks-mobile-payments-1029437-1.html>. Starbucks' use of mobile payments technology at the point of sale is part of the company's effort to move customers through checkout more quickly. *Ibid.*

⁴ For example, Bling, a mobile payments service that uses contactless readers at the point of sale, charges a 1.5 percent transaction fee, about half the amount of the usual credit card fee on the merchant. Jefferson Graham, "Customers pay by swiping smartphones, not credit cards" *USA Today* (1 December 2010), online: *USA Today* <http://www.usatoday.com/tech/news/2010-12-01-mobilepayments01_ST_N.htm>.

⁵ Andrea McKenna, "Worlds of Difference in 'Mobile Money' Strategy" *American Banker* (19 November 2010), online: American Banker <http://www.americanbanker.com/issues/175_223/mobile-money-strategy-from-haiti-1028902-1.html>.

⁶ *Ibid.*

⁷ See Safaricom, *M-PESA*, online: Safaricom <<http://www.safaricom.co.ke/index.php?id=250>>.

⁸ *Supra*, n. 7.

prepaid phone deposit, or phone bill.⁹ Charges to a prepaid phone deposit or a phone bill are especially problematic, because they do not fit neatly into existing legal categories. Mobile payments companies in the U.S. are developing services that link mobile payments directly to the consumer's phone account.¹⁰ At present, these transactions are typically for small-dollar text donations or ringtone downloads, but some companies are exploring the possibility of paying for other goods and services with prepaid phone deposits and phone bills.¹¹

Furthermore, millions of U.S. consumers are "unbanked" or "underbanked"; the Federal Deposit Insurance Corporation (FDIC) reported in December 2009 that 25.6 percent of U.S. households, about 30 million, rely on non-banks for some or all of their financial services needs.¹² The FDIC estimates that roughly 17 million adults do not have any type of bank account, and that roughly 43 million adults use some kind of alternative financial services in addition to bank accounts.¹³ Low-income households and households of color in particular are more likely to be unbanked or underbanked.¹⁴ The potential appeal of mobile payments to these households makes it particularly important that mobile payments be given the same guaranteed consumer protections as bank account-linked debit cards and credit cards. U.S. law must be updated to ensure that unbanked and underbanked consumers using mobile payments are not relegated to risky, second-class financial services as platforms develop to link mobile payments to prepaid phone deposits or to phone bills.

The range of ways to pay by mobile phone, and the varying consumer protections that apply to each, create the potential for a great deal of confusion when a consumer is faced with a transaction gone wrong. Consumers need a clear process, a right to get their money back, and a clear time frame for recredit of a disputed

⁹ See 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" (2008) 83 Chicago-Kent L Rev. 769 at 772-73 (discussing variation in protections among different payments methods).

¹⁰ See e.g., *About BOKU* (2010), online: BOKU <<http://www.boku.com/about/>>; Mobile Accord, Inc., *The Mobile Accord / mGive Story* (2011), online: mGive <<http://www.mgive.com/AboutUs.aspx>> [mGive]; *The Zong Story* (basic service charges to phone bill), online: Zong <<http://www.zong.com/mobile-payments>>.

¹¹ See Andrew Johnson, "Plan to Make the iPhone a Payment Tool May Accelerate" *American Banker* (4 November 2010), online: American Banker <http://www.americanbanker.com/issues/175_212/iphone-payment-tool-plan-1028195-1.html> (quoting Paul Grill, First Annapolis Consulting, who commented on "potential convergence between the mobile and the e-commerce space," in which more types of goods are billed to phone account).

¹² Federal Deposit Insurance Corporation, "FDIC National Survey of Unbanked and Underbanked Households" (December 2009) at 11, online: Federal Deposit Insurance Corporation <http://www.fdic.gov/householdsurvey/Full_Report.pdf>. The FDIC defined "underbanked" as those who used "at least one alternative financial service," such as a payday loan, non-bank money order, or pawn shop in the previous year, or who had obtained a refund anticipation loan in the previous five years. *Ibid.*, at 147.

¹³ *Supra*, n. 12 at 10.

¹⁴ *Supra*, n. 12 at 10-11.

payment. Low- and moderate-income consumers cannot afford to lose precious funds to theft or errors, including merchant disputes. This article discusses the current mobile payments market and explains how existing laws and regulations must be updated to meet consumers' needs. A few simple solutions will guarantee baseline consumer protections for all users of mobile payments. A few additional product features will also enhance consumer protections.¹⁵

2. HISTORY AND RISE OF MOBILE PAYMENTS

Mobile payments began to surface around 1997, when Nokia allowed users to pay for soft drinks in Finnish vending machines by using "short message service" (SMS) text messages.¹⁶ However, mobile payments did not gain popularity in the U.S. until recently, as smartphones and mobile pay applications began to enter the marketplace.¹⁷

SMS text services still exist for mobile payments — particularly for small dollar-amount donations. For example, within 48 hours after a devastating earthquake hit Haiti on January 12, 2010, the American Red Cross received more than \$5 million in \$10 text donations.¹⁸ The four major wireless carriers handled these donations and charged them to users' phone bills.¹⁹ One mobile payments company, mGive, processes text donations for charities and charges them to consumers' phone bills.²⁰ Another mobile payments company, Obopay, uses SMS technology to authorize payments for goods and services as well as money transfers between individuals and allows consumers to link to the payment method of their choice.²¹

More recently, mobile payments have proliferated through the use of applications that let consumers buy products using their phones. Some of these applications have little to do with the phone itself. For example, Bling Nation uses stickers with near-field communications (NFC) chips that the consumer places on the

¹⁵ This paper will not discuss data-privacy issues, although they are an important aspect of mobile payments. For more information on data privacy and mobile payments, see generally Junseong An, "Mobile Killer Applications in South Korea & Recommendations for US Policymakers" (2003) 29 *Brooklyn J Int'l L* 239 at 242–44, 259–61 (discussing mobile payments and mobile privacy, respectively); Jongho Kim, "Ubiquitous Money and Walking Banks: Environment, Technology, and Competition in Mobile Banking" (2008) 8 *Rich J Global L & Bus* 37 (discussing privacy issues in mobile payments and mobile banking).

¹⁶ Neal Leavitt, "Payment Applications Make E-Commerce Mobile" *IEEE Spectrum* (December 2010) 19.

¹⁷ *Supra*, n. 16 at 20 (quoting Nick Holland, analyst for Yankee Group).

¹⁸ The Associated Press, "Haiti Text donations to Red Cross pass \$5M" (14 January 2010).

¹⁹ Tobie Stanger and Anthony Giorgianni, "Haiti relief update: What to know about text donations" *ConsumerReports.org* (14 January 2010), online: [ConsumerReports.org <http://blogs.consumerreports.org/money/2010/01/update-donating-haiti-relief-red-cross-text-donations-better-business-bureau-wise-giving-alliance.html>](http://blogs.consumerreports.org/money/2010/01/update-donating-haiti-relief-red-cross-text-donations-better-business-bureau-wise-giving-alliance.html).

²⁰ *mGive*, *supra*, n. 10.

²¹ See Obopay, "How it Works", online: Obopay <https://www.obopay.com/corporate/en_US/getpaidHowitworks.shtml>.

phone.²² Bling Nation recently partnered with PayPal to become part of PayPal's iPhone application.²³ Bling Nation provides consumers with an NFC sticker they can put on the phone and wave at a Bling reader at the point of sale. The NFC sticker initiates a payment to whichever payment method the consumer uses for PayPal purchases.²⁴ PayPal also has its own, separate application. Consumers can download the application onto a smartphone and go through the checkout process just as a consumer would do online.²⁵ The purchase is funded by the method that the consumer uses for PayPal purchases. Other systems use the phone hardware as a payment access device. For example, in late 2010, three major wireless carriers announced "Isis," a joint venture to create a mobile payments system using NFC chips embedded in mobile phones to enable consumers to wave their phones at the point of sale and link to the payment methods of their choosing.²⁶

Other mobile payments applications link to a retailer's gift card. For example, Starbucks has an application for the iPhone and for the Blackberry that allows consumers to enter their Starbucks gift card information and create a barcode to display on the phone to wave at a scanner near the cash register.²⁷ Target also uses scan enabled bar code technology — consumers can enter their Target gift card information into the Target.com mobile site from their phones, create a barcode on the phone, and wave it at the point of sale in Target stores.²⁸

When everything works properly, it may not matter to the consumer which payment method is used to make a payment with a mobile phone. But when a thief waves the device, the wrong amount is billed, or goods are not delivered as promised, it can matter a lot which method is used. The payment method the consumer chooses can determine whether, and to what extent, the consumer has a right to receive his or her money back.

3. THE LEGAL FRAMEWORK FOR MOBILE PAYMENTS

Currently, U.S. mobile payments are subject to a fragmented legal landscape. The level of available consumer protections depends on the underlying payment method linked to the mobile phone. The mobile payments market includes options for linking to: (A) credit cards, debit cards or bank accounts, gift cards, and prepaid cards; and (B) phone bills or debits against prepaid deposits made to the phone company. The method a consumer chooses determines to what extent, if at all, the

²² Daniel Wolfe, "Bling Nation's Presence Grows with PayPal App" *American Banker* (27 October 2010), online: American Banker <http://www.americanbanker.com/issues/175_206/bling-nations-presence-1027698-1.html>.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*, (referring to "Mobile Express Checkout" feature).

²⁶ See Peter Pachal, "U.S. Carriers Create Pay-by-Phone System, For Real This Time" *PC Magazine* (16 November 2010), online: PCMag.com <<http://www.pcmag.com/article2/0,2817,2372834,00.asp>>.

²⁷ Fitzgerald, *supra*, n. 3. The application will soon be available for Android phones. *Ibid.*

²⁸ Target, *Target's Mobile Technology Converts GiftCards to Virtual Barcodes* (8 February 2010), online: Target <http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20100208005115&newsLang=en>.

consumer will have legal protections against unauthorized transactions and billing errors, or the right to reverse a charge in case of a good-faith dispute with a merchant.

Furthermore, it is unclear what protections a consumer will receive if the payment is linked to a prepaid deposit to the wireless carrier, or to a phone bill that the consumer pays at the end of the billing cycle. Interstate and international telephone services are regulated by the Federal Communications Commission (FCC), but the FCC has not issued regulations on mobile payments (“non-telephone services”) linked to a prepaid deposit or phone bill.²⁹ Whether a state’s law or public utility agency rules provide its residents with consumer protections for mobile payments charges on phone bills will vary from state to state.

(a) Payments Linked to Credit, Debit, or Prepaid/Gift Cards

If a consumer makes a purchase via mobile phone and the charge goes to the consumer’s credit card account, all the protections that apply to credit card transactions will apply to that purchase. Federal regulations protect consumers from charges that the consumer did not authorize, whether or not the credit card itself was used in the transaction.³⁰ Consumer liability is limited to no more than \$50 for unauthorized credit card charges³¹ resulting from a lost or stolen credit card, which in mobile payments can be the phone itself, a chip in the phone or a sticker on the phone.³² If a billing error appears on a consumer’s periodic statement, there is no

²⁹ The FCC’s authority to write rules protecting consumers against billing errors extends to “telephone-billed purchases,” defined as “any purchase that is completed solely as a consequence of the completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller.” 15 USC §5724(1) (2006 & Supp. IV). At best, it is unclear whether payments by text message are covered. The FCC’s consumer resources page on “cramming” directs consumers to contact the FCC with complaints regarding interstate or international telephone services but advises contacting the Federal Trade Commission instead if consumers find “non-telephone” service charges. See Federal Communication Commission, *Unauthorized, Deceptive or Misleading Charges Placed on Your Telephone Bill* (1 July 2008), online: Federal Communications Commission <<http://www.fcc.gov/cib/consumerfacts/cramming.html>>.

³⁰ See 15 USC §1666(b) (2006 & Supp. IV); 12 CFR §226.13(a) (2010) (defining “billing error” to include unauthorized transactions and transactions that are the subject of a good faith dispute with a merchant about acceptability or delivery of goods and services).

³¹ 15 USC §1643(a)(1)(B) (2006 & Supp. IV). Issuers often voluntarily waive this liability. Liability will be less than \$50 if there fewer than \$50 in unauthorized charges occur before the consumer reports the loss or theft, and there is no liability if the card issuer fails to meet certain conditions: card acceptance, means to identify who is authorized to use the card, and notice of liability limits have been provided. 12 CFR §§226.12(b)(2)(i)–(iii).

³² Regulation Z’s official staff interpretations state that “credit card” includes a “card or device that can be activated upon receipt to access credit.” Regulation Z, Official Staff Interpretations, 12 CFR §226, Subpart G (clarifying definition of “credit card,” 12 CFR §226.2(a)(15)). If a mobile phone is set up to access the credit account and then lost or

liability as long as the consumer reports the error within 60 days.³³ With credit card transactions, consumers also have the right to reverse a charge if the goods or services were not delivered as agreed or not accepted by the consumer or his or her designee.³⁴ Usually this will be for nondelivery, defect, or delivery of the wrong item. This is commonly called a “chargeback” right.

Mobile payments linked to a debit card or bank account have less complete protections. Federal law confers a right to prompt recredit of funds for unauthorized transactions but no chargeback rights for disputes about delivery, defect, or acceptance of goods and services. If the “access device,” in this case the phone, is lost or stolen, the consumer’s liability for unauthorized transactions is limited by statute to \$50, provided that the consumer reports the unauthorized event within two business days.³⁵ If the consumer makes a later report of a lost or stolen phone, liability can reach \$500 or more.³⁶ If an unauthorized transaction appears on the consumer’s bank statement and the phone was not lost or stolen, the consumer has no liability if the error is reported within 60 days.³⁷ This time period may be extended for extenuating circumstances.³⁸ Another crucial protection is a specific statutory time period to get the money back.³⁹ Consumers have the right to be recredited missing funds from unauthorized transactions within 10 business days.⁴⁰ However, unlike credit card payments, consumers who link a payment to a debit card or bank account do not have legal chargeback rights if they have a good faith dispute with a

stolen, the consumer should be liable for no more than \$50 in unauthorized transactions.

33 12 CFR §226.13(b)(1).

34 12 CFR §§226.13(a)(3), (d)(1).

35 12 CFR §205.6(b)(2). “Access device” is defined as “a card, code, or other means of access to a consumer’s account . . . that may be used by the consumer to initiate electronic fund transfers.” 12 CFR §205.2(a)(1). Therefore, a lost or stolen mobile phone will be a lost or stolen “access device” for the purposes of Regulation E.

36 12 CFR §205.6(b)(2). If the consumer reports a lost or stolen access device after two business days, liability is capped at the lesser of: \$500 or “[t]he amount of unauthorized transfers that occur after the close of two business days and before notice to the institution, provided the institution establishes that these transfers would not have occurred had the consumer notified the institution within that two-day period.” *Ibid.*

37 12 CFR §205.6(b)(3).

38 12 CFR §205.6(b)(4).

39 See 15 USC §§1693f(a)–(c) (2006 & Supp. IV). The financial institution must conclude the investigation of a reported error within 45 days after receiving notice from the consumer. 12 CFR §1693f(c).

40 If a consumer reports an error, the consumer’s bank must recredit the disputed amount within the lesser of: (1) 10 business days, or (2) one business day after the bank determines that there was an error. 15 USC §§1693f(b)–(c); 12 CFR §206.11(c)(1)(i). Consumers Union recommends shortening this period to five days. See Gail Hillebrand & Pamela Banks, “Protecting Our Wallets: Consumers Union Recommends Priority Areas for the Consumer Financial Protection Bureau’s First Year” (5 October 2010), online: Defend Your Dollars.org <<http://www.defendyourdollars.org/pdf/Recommended-Priorities-for-the-CFPB.pdf>>.

merchant about the delivery or acceptability of goods and services.⁴¹

If a consumer links mobile payments to a general-use prepaid card, protections may be missing. Prepaid cards can be used just like bank account-linked debit cards but are different because the consumer “loads” funds onto the card and the funds sit in a pooled bank account managed by the issuer.⁴² Prepaid cards currently fall through the definitional cracks in the federal regulation that applies to bank account-linked debit cards, meaning that there is no mandatory limit on consumer liability for unauthorized transactions, and no mandatory right of recredit for missing funds so that consumers can get their money back while disputing an unauthorized transaction.⁴³ Prepaid cards may have some protections by contract, but these protections are voluntary and can be rescinded at any time.⁴⁴

Mobile payments linked to gift cards, such as the Target and Starbucks applications, pose similar risks. Like general-use prepaid cards, bank-issued (network-branded) gift cards are linked to funds sitting in pooled accounts not currently covered by the regulation that applies to bank account-linked debit cards.⁴⁵ The same is true of single-retailer gift cards, where the funds may simply be mixed with the retailer’s own funds. Consumers who use mobile payments applications tied to gift cards could lose all their gift card funds if the phone is lost or stolen and a thief uses it to purchase goods with the funds linked to the application. Furthermore, some researchers have expressed concern that a thief could take a photo of the barcode on the screen of a consumer’s phone and use it to make purchases, thereby

⁴¹ Visa and MasterCard have voluntary policies that provide some chargeback rights for debit transactions processed over their networks, but such rights are subject to change as new networks develop. See MasterCard chargeback reason codes 4855 (merchandise not received), 4859 (service not rendered), and 4853 (defective/not as described). Mastercard International Inc., “Chargeback Guide” at §3.9 (16 April 2010), online: MasterCard <http://www.mastercard.com/us/merchant/pdf/TB_CB_Manual.pdf>. See also VISA chargeback reason codes 30 (services/merchandise not received) and 53 (not as described or defective). Visa, “Visa International Operating Instructions” at 754–57 (15 October 2010), online: <<http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf>>.

⁴² For information on prepaid cards, see Michelle Jun “Prepaid Cards: Second-Tier Bank Account Substitutes” (September 2010), online: Defend Your Dollars.org <<http://www.defendyourdollars.org/pdf/2010PrepaidWP.pdf>>.

⁴³ Regulation E’s official staff interpretations appear to exempt funds in pooled accounts from the definition of “accounts” covered by the regulation. See Official Staff Interpretation of 12 CFR §205.2(b)(3); 12 CFR §205, Supplement I. This is an accident of history, because prepaid cards are a recent phenomenon.

⁴⁴ Visa and MasterCard networks also offer “zero liability” protections, but these are voluntary and have significant loopholes. Visa, *Zero Liability*, online: Visa <http://usa.visa.com/personal/security/visa_security_program/zero_liability.html> (does not cover ATM or PIN transactions); MasterCard, *Zero Liability*, online: MasterCard <<http://www.mastercard.com/us/personal/en/cardholderservices/zeroliability.html>> (does not cover ATM or PIN transactions; only covers two unauthorized events per 12 months).

⁴⁵ Regulation E only provides gift card users with protection against expiration dates and inactivity fees. See 12 CFR §205.20.

increasing the risk that funds will be stolen.⁴⁶

(b) Payments Linked to the Consumer's Prepaid Deposit or Phone Bill

Mobile payments linked to a consumer's prepaid phone deposit or phone bill raise the question of whether these types of mobile payments have any consumer protections. As discussed above, FCC Truth in Billing regulations do not cover mobile payments.⁴⁷ However, mobile phones are protected devices when linked to credit cards, or when linked to debit cards or bank accounts.⁴⁸ The question is, are *mobile phone accounts* covered by the laws that cover either credit cards or debit cards and bank accounts?

The plain language of the *Electronic Fund Transfer Act* (EFTA),⁴⁹ which governs debit transactions, suggests that a mobile payment linked to a prepaid phone deposit should be covered by EFTA. Likewise, the plain language of the *Truth in Lending Act* (TILA)⁵⁰ suggests that a mobile payment linked to a phone bill the consumer pays at the end of a billing cycle should be covered by the subpart of TILA known as the *Fair Credit Billing Act*.⁵¹ Although Regulation E does not explicitly refer to mobile payments, prepaid phone deposits already fall under its definition of "account." And although Regulation Z does not explicitly refer to mobile payments, wireless carriers appear to fall under its definition of "card issuer."

Even if mobile payments linked to prepaid phone deposits or phone bills are not explicitly covered by these regulations, the CFPB has the authority under EFTA and TILA to clarify existing regulations to include mobile payments under both. The CFPB could, by rule, ensure for the future that debits against a prepaid phone deposit clearly fall under Regulation E, and that charges to a phone bill clearly fall under the *Fair Credit Billing Act* sections of Regulation Z.⁵²

(i) Are Prepaid Phone Deposits Covered by EFTA/Regulation E?

EFTA governs electronic transfers to and from consumer accounts.⁵³ "Accounts" are defined to include "asset accounts . . . established primarily for per-

⁴⁶ See Rimma Kats, "How to compromise the Starbucks Rewards Card app in 90 seconds," *Mobile Commerce Daily* (9 February 2011), online: Mobile Commerce Daily <<http://www.mobilecommercedaily.com/2011/02/09/how-to-compromise-the-starbucks-rewards-card-app-in-90-seconds>>.

⁴⁷ See *supra*, n. 29.

⁴⁸ See staff interpretation of "credit card," *supra*, n. 32; official interpretation of "access device," *supra*, n. 35.

⁴⁹ 15 USC §§1693–1693r (2006 & Supp. IV).

⁵⁰ 15 USC §§1601–1667f (2006 & Supp. IV).

⁵¹ 15 USC §§1666–1666j (2006 & Supp. IV).

⁵² *Dodd-Frank Consumer Financial Protection Act of 2010*, Pub L No. 111-203, 124 Stat 1376. Title X of the Act establishes the CFPB and transfers to the CFPB the authority to write rules under consumer financial laws, including EFTA and TILA. See §§1002(12) and (14) and 1022(a), 124 Stat 1376 at 1957, 1980.

⁵³ 15 USC §1693a(6).

sonal, family, or household purposes.”⁵⁴ The statute does not contain a definition of “asset account,” so this is left to be determined by regulation.⁵⁵ When a consumer submits a prepaid deposit to a wireless carrier, the carrier holds the deposit for the purpose of funding the consumer’s future transactions. If the prepaid funds are to be used to pay for consumer goods and services, then the consumer’s *phone account* should be considered a consumer *asset account*.

It might appear at first that the phone company holding a deposit would not be a “financial institution,” which is part of the definition of “accounts” under Regulation E. Regulation E defines “accounts” to include checking, savings, and “other consumer asset accounts . . . held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.”⁵⁶ This definition is narrower than the EFTA definition, because it explicitly links the account to a “financial institution.” However, the term “financial institution” is broadly defined to include “a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer.”⁵⁷ Wireless carriers arguably fit into the catch-all as a “person that directly or indirectly holds an account.”

Because the prepaid phone deposit is used for personal, household, or family purposes, and the wireless carrier holding the deposit falls under the definition of a financial institution for the purpose of Regulation E, prepaid phone deposits appear to be *already* covered by EFTA and Regulation E. Unlike holders of prepaid cards, whose funds sit in a third-party pooled account, consumers who make prepaid phone deposits have an “account” in their own name — the phone account. As a result, electronic fund transactions drawing on prepaid phone deposits should have the same EFTA protections that electronic fund transactions drawing on bank account deposits receive. The CFPB thus may enforce Regulation E’s provisions against wireless carriers that do not comply with its requirements.

(ii) *Wireless Carriers and the “Business of Banking”*

A separate but related question is whether a wireless carrier is engaged in the business of *banking* by taking prepaid phone deposits. This can matter greatly if the wireless carrier goes out of business while holding onto consumers’ funds because consumers could lose their money if the prepaid deposits are not protected by deposit insurance.⁵⁸ Federal law recognizes an expansive list of activities constituting the “business of banking.” The *National Bank Act* does not provide an explicit definition but lists the taking and holding of deposits as an activity necessary for the

⁵⁴ 15 USC §1693a(2).

⁵⁵ *Ibid.*

⁵⁶ 12 CFR §205.2(b)(1).

⁵⁷ 12 CFR §205.2(i).

⁵⁸ The Federal Deposit Insurance Corporation insures funds at certain depository institutions in case the institution fails. See 12 USC §1813(c)(2) (2006 & Supp. IV); §1817(i) (2006 & Supp. IV). “Insured depository institutions” include banks and savings associations. 12 USC §1813(c)(2).

business of banking.⁵⁹ A wireless carrier that holds prepaid deposits for consumers to use to pay for phone services and mobile payments is arguably engaged in the “business of banking” and should be required to obtain a banking charter. This would ensure that consumers’ prepaid phone deposits have the same consumer protections as deposits sitting in a checking account if the entity holding the deposit goes under.

Whether wireless carriers must obtain a banking charter is primarily an issue for other banking regulators, although the CFPB might write a rule determining it “unfair” to engage in the business of banking without a license.

(iii) *What the CFPB Should Do*

Starting July 2011, the CFPB has the authority under EFTA to amend Regulation E.⁶⁰ Prepaid phone deposits are already covered by Regulation E, as discussed above. However, the CFPB could provide useful guidance to the industry by making explicit that prepaid phone deposits are “accounts” and that wireless carriers holding those deposits are “financial institutions” subject to Regulation E. This would ensure that consumers who deposit money to wireless carriers in order to make mobile payments have the same consumer protections against unauthorized transactions as consumers who link mobile payments to debit cards or bank accounts. Providing mobile payments linked to prepaid deposits with explicit Regulation E coverage would also be consistent with the plain language of EFTA.

Even if the CFPB clarifies Regulation E to explicitly provide these protections, consumers who link mobile payments to prepaid deposits will still lack “chargeback” rights — the right to reverse a charge based upon a good faith dispute with a merchant about the delivery of acceptability of goods and services. Consumers who link mobile payments to debit cards or bank accounts or to prepaid cards also lack these protections. As a result, mobile payments linked to prepaid deposits, debit cards or bank accounts, or prepaid cards still have inferior protections compared to mobile payments linked to credit cards.

(iv) *Are Phone Bills Covered by TILA/Regulation Z?*

TILA governs consumer credit, including credit card accounts.⁶¹ Regulation Z, which implements TILA, defines credit as “the right to defer payment of debt or to incur debt and defer its payment.”⁶² Consumers who sign up for contract plans with wireless carriers use their phones and defer payment until the end of a billing

⁵⁹ 12 USC §24 (banks shall have the power to exercise “all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes”). The Supreme Court has held that this list of incidental powers is exemplary, rather than exhaustive. See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 US 251 at 259 (1995).

⁶⁰ The effective CFPB transfer date is July 21, 2011. See *Designated Transfer Date*, 75 Fed Reg 57252 (2010).

⁶¹ See 15 USC §§1602- 1603.

⁶² 12 CFR §226.2(a)(14).

cycle, much like a credit card account. Therefore, a mobile phone plan fits with the plain language definition of "credit."

Regulation Z defines "open-end credit" as credit that is extended by a "creditor" under a plan in which the creditor expects repeated transactions and can impose a finance charge on an outstanding balance, and where the amount of credit extended to the consumer is made available to the extent that the consumer repays it.⁶³

At first glance it appears that a wireless carrier would not be a "creditor." "Creditor" is defined as a person who extends "credit that is subject to a finance charge or is payable by written agreement in four or more installments."⁶⁴ Although a consumer who pays late on a phone bill may be subject to a late fee, late fees are not considered "finance charges" under Regulation Z.⁶⁵ Furthermore, consumers typically have to pay phone bills in full at the end of the billing cycle and cannot repay in instalments.

However, the term "creditor" has a broader definition in some sections of Regulation Z. "Card issuers" are included under the definition of "creditor" for the provisions that give consumers the right to dispute billing errors in open-end credit plans.⁶⁶ This means that the wireless carrier, if it meets the definition of a "card issuer" extending open-end credit, would be subject to Regulation Z's provisions regarding billing errors, including chargeback rights.⁶⁷ All "card issuers" must comply with the provisions that give consumers the right to dispute unauthorized transactions.⁶⁸ This means that the wireless carrier, if it is a "card issuer," would also be subject to Regulation Z's requirements regarding unauthorized transactions.

The question of whether a wireless carrier is a "card issuer" turns on whether the mobile phone, when used to charge payments to a phone bill, is a type of "credit card" linked to open-end credit. Regulation Z defines "card issuer" as "any person who issues a credit card," whether or not the credit is payable in instalments or subject to finance charges.⁶⁹ Credit cards are typically linked to open-end credit plans where the consumer may repay the balance in instalments. However, Regulation Z also covers "charge cards." "Charge cards" are defined as open-end credit "for which no periodic rate is used to calculate a finance charge."⁷⁰ Regulation Z's official staff commentary explains that charge cards are distinct from other credit cards because "charge cards are cards used in connection with an account on which outstanding balances cannot be carried from one billing cycle to another and are

⁶³ 12 CFR §226.2(a)(20)(i)-(iii).

⁶⁴ 12 CFR §226.2(a)(17).

⁶⁵ 12 CFR §226.4(c)(2) (excluding charges for "actual unanticipated late payment").

⁶⁶ 12 CFR §226.2(a)(17)(iii) (any card issuer that extends open-end credit or credit "not subject to a finance charge and . . . not payable . . . in more than four installments" is a "creditor" for the purposes of Subpart B, which includes protections against unauthorized transactions and billing errors).

⁶⁷ 12 CFR §§226.13(a)(3), (d)(1).

⁶⁸ Regulation Z places the responsibility on all "card issuers," not just "creditors," to resolve disputes involving unauthorized transactions. 12 CFR §§226.12(b), (c), (e).

⁶⁹ 12 CFR §226.2(a)(7).

⁷⁰ 12 CFR §226.2(a)(15)(iii).

payable when a periodic statement is received.”⁷¹ It also states that Regulation Z’s protections generally apply to charge cards just as they do to other credit cards, with only a few exceptions.⁷²

In light of the above, mobile phones linked to a phone bill appear to be “charge cards” linked to an open-end credit plan, and the wireless carrier appears to be a “card issuer.” Because charge cards receive the same protections that other credit cards receive regarding unauthorized transactions and billing errors, including chargeback rights, mobile payments charged to a phone bill should receive the same consumer protections as if the consumer charged the mobile payment to a traditional credit card account.⁷³

(v) *What the CFPB Should Do*

The existing provisions of Regulation Z implementing the *Fair Credit Billing Act* could not have anticipated the more recent development of mobile payments. However, clarifying the regulations to explicitly include mobile payments linked to phone bills would be consistent with TILA because TILA provides consumer protections against unauthorized transactions and billing errors to all “credit card” transactions, where “credit card” is defined broadly as “any card, plate, coupon book or other credit device existing for the purpose of obtaining . . . credit.”⁷⁴ As discussed above, Regulation Z provides that a charge card is a type of credit card.

The CFPB should clarify that wireless carriers who permit mobile payments to phone bills are “card issuers” for the purpose of Regulation Z. This would ensure that consumers who charge mobile payments to their phone bills have the same consumer protections as consumers linking their mobile payments to credit cards.

4. SOLUTIONS TO BETTER PROTECT CONSUMERS AND FOSTER NEW MOBILE PAYMENTS TECHNOLOGY

Until payments law is harmonized to protect all consumers no matter how they pay, including by mobile phone, federal and state policymakers can make a few simple fixes to ensure that consumers at least have legal protections against unauthorized transactions and clear ways to dispute charges.

(a) The CFPB Can Clarify Existing Regulations to Give Consumers a Right to Recredit of Stolen Funds and a Right to Reverse Charges Stemming from a Merchant Dispute

Starting July 2011, the CFPB can address gaps in consumer protections for ways to pay by clarifying existing regulations. The Federal Reserve Board, which previously held rulemaking authority under EFTA and TILA, has failed to address

⁷¹ Official Staff Interpretation of 12 CFR §226.2(a)(15), Supplement I.

⁷² *Ibid.* Charge cards are distinguished from credit cards in 12 CFR §§226.5, 226.7, 226.8, and 226.28. These sections do not pertain to unauthorized transactions or billing errors.

⁷³ *Ibid.*

⁷⁴ 15 USC §1602(k).

these gaps despite consumer advocates' repeated efforts.⁷⁵

The CFPB should specify that a consumer's prepaid deposit accessed by a card, code, or device is an "account," and that the wireless carrier holding the deposit is a "financial institution" under Regulation E.⁷⁶ This would provide consumers with the same protections that consumers with bank account-linked debit cards already receive: limited liability for unauthorized transactions resulting from a lost/stolen phone (\$50 if reported within two business days, \$500 or more thereafter); no liability for unauthorized transactions not involving a lost or stolen phone, if reported within 60 days; and the right to be recredited the amount of an unauthorized transaction within 10 business days of disputing that transaction, unless the financial institution determines within that time that an error did not occur.⁷⁷

The CFPB should also clarify that a wireless carrier is a "card issuer," so mobile payments placed on a pay-later plan are explicitly covered by the provisions of Regulation Z that give consumers the right to dispute unauthorized transactions and billing errors. This would provide consumers with the same protections credit cardholders receive: absolute \$50 limit on liability for unauthorized transactions; the right to dispute an unauthorized charge and a charge for the wrong amount; and chargeback rights in case of a good faith dispute with a merchant over "goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction."⁷⁸

Furthermore, the CFPB can use its rulemaking authority under EFTA and TILA to extend chargeback rights to all ways to pay. Currently, only credit cardholders have the right to reverse a charge with the issuer when goods or services are not delivered as agreed or are not accepted by the consumer.⁷⁹ It is poor public policy to tie the best consumer protections to borrowing money with credit cards, especially when many consumers either carry a revolving balance — the cost of which arguably undercuts the benefit of chargeback protections — or simply do not have credit cards at all.⁸⁰

⁷⁵ See *e.g.*, Letter from Consumers Union et al. to Federal Reserve Board (28 October 2004) (supporting extension of Regulation E protection to payroll cards but cautioning that all prepaid cards holding consumers' household funds should have Regulation E protections); Letter from Consumers Union et al. to Federal Reserve Board (14 February 2006).

⁷⁶ This would resolve both the pooled account loophole for prepaid cards and any ambiguity about the coverage of prepaid deposits to phone accounts.

⁷⁷ See 15 USC §1693f(d) (financial institution need not recredit consumer's account if it determines within 10 business days that error did not occur).

⁷⁸ 15 USC §1666(b)(3).

⁷⁹ 15 USC §1666.

⁸⁰ A 2010 *Consumer Reports* survey showed that 37 percent of U.S. households do not hold a credit card. Of the 63 percent of U.S. households that held at least one credit card, 42 percent reported carrying a balance. The results show that only 26 percent of U.S. households hold a credit card without also carrying a balance. Just more than one quarter of U.S. households, then, have access to the credit card chargeback remedy without paying an interest charge on the purchase. Consumer Reports National Research Center, "Credit Card Survey" (2010) (on file with authors).

(b) States Should Adopt Rules on Unauthorized Charges to a Phone Bill Similar to the California Rule

Until the CFPB takes action to explicitly provide strong consumer protections to mobile payments linked to prepaid phone deposits or phone bills, states can adopt rules to protect their residents against all unauthorized or disputed transactions on their phone accounts, including mobile payments. States should look to California, which has taken a substantial first step in protecting consumers who have noncommunications-related charges on their phone bills. On October 28, 2010, the California Public Utilities Commission (CPUC) issued a new rule that gives consumers better protections against unauthorized charges on their phone bills — also known as “cramming.”⁸¹ The rule defines “unauthorized charges” broadly, providing the right to reverse charges for goods and services that the consumer did not “agree” to purchase.⁸² As a result, the rule gives consumers rights similar to chargeback for credit cards.⁸³ This new rule is a very important step forward, as more consumers are buying third-party products and services with their mobile phones and receiving the charges on their phone bills.

Under the CPUC rule, phone companies must give California consumers notice and a chance to opt out of allowing third parties (e.g., a ringtone download store or charitable organization) to put charges on the phone bill.⁸⁴ Even if a consumer does allow third-party charges, the consumer is not responsible for unauthorized charges, defined as “[a]ny charge placed upon a Subscriber’s telephone bill for a service or goods that the Subscriber did not agree to purchase, including any charges that resulted from false, misleading, or deceptive representations.”⁸⁵ If the consumer disputes a charge, it is presumed unauthorized — the phone company has to prove otherwise before it can hold the consumer responsible for the disputed charge.⁸⁶ While an investigation is pending, the consumer does not have to pay the charge.⁸⁷ If it has already been paid, the carrier must either verify the transaction or recredit the consumer’s account within 30 days.⁸⁸

The rule does have a downside, however, because it defines “Subscriber” to include the person who holds the phone account *or* another person who is in “law-

⁸¹ California Public Utilities Commission, *Order Instituting Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities* (28 October 2010), online: California Public Utilities Commission <http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/125959.htm> [CPUC Order].

⁸² *Ibid.*, at §§2.6, 3, 7.

⁸³ See 15 USC §1666.

⁸⁴ CPUC Order at §5.

⁸⁵ *Ibid.*, at §2.6.

⁸⁶ *Ibid.*, at §3. A call dialed from a mobile phone is considered evidence of authorization; however, this presumption only applies to “direct dialed telephone services.” Thus, it would not apply to mobile payments. *Ibid.*

⁸⁷ *Ibid.*, at §7.

⁸⁸ *Ibid.*, at §8.

ful possession” of the phone and is authorized to make charges with the phone.⁸⁹ It is unclear what would happen if, for example, a consumer lends a mobile phone to a family member to make a call, and the family member makes mobile payments that the consumer does not want on the phone bill.

State legislatures and public utilities agencies can follow California’s lead by providing consumers with the following protections:

- No liability for unauthorized transactions placed to prepaid deposits or phone bills, where “unauthorized” is defined broadly to include disputed transactions involving the acceptability or delivery of goods and services, or charges for the wrong amount;
- A right to reverse the charge with the wireless carrier and withhold payment while an investigation is pending; and
- A right to prompt recredit if the disputed transaction has already been paid.

California’s approach is a useful model for federal reform. The CFPB can use its rulemaking authority under EFTA and TILA to provide the same protections against unauthorized transactions, a right of recredit, and chargeback rights to all consumers who pay by cell phone, regardless of whether they have a prepaid phone plan or a pay-later phone plan.

In addition, the CFPB can use its rulemaking authority to declare it an “unfair” practice not to provide these protections.⁹⁰ The CFPB has jurisdiction over “covered persons” providing consumer financial products or services, including payments services.⁹¹ The CFPB has rulemaking and enforcement authority to prevent such covered persons from engaging in unfair, deceptive, and abusive practices.⁹² Wireless carriers that provide payments services, such as mobile payments charged to prepaid deposits and phone bills, should be covered persons subject to CFPB’s rulemaking and enforcement authority.

5. PRODUCT FEATURES TO ENHANCE CONSUMER PROTECTIONS

In addition to the essential regulatory changes recommended here, wireless carriers and mobile payments service providers could offer product features that enhance consumer protections against unauthorized transactions and other disputed charges. These features would better protect consumers regardless of how the consumer links the payment.

Product features:

- PIN protections on the mobile payments service to prevent a thief or unauthorized user from making charges with the phone;

⁸⁹ *Ibid.*, at §2.7.

⁹⁰ Section 1031 of the Dodd-Frank Act gives the CFPB authority to write rules regarding unfair, deceptive, or abusive acts or practices. Pub L No 111-203, 124 Stat 1376, 2005-06 (2010).

⁹¹ *Ibid.*, at §1002(15)(A)(vii), 124 Stat 1376 at 1957-58.

⁹² *Ibid.*, at §1031(a), 124 Stat 1376 at 2005.

- Daily amount limits and transaction limits to prevent a thief or unauthorized user from making several or large dollar-amount charges;
- Safe, thoroughly-tested payments technology for initiating mobile payments to prevent fraud and identity theft;⁹³

Contract features:

- Short, simple wireless contracts with clear error-resolution procedures so that consumers know how, when, and where to complain if they find unauthorized transactions or errors in their phone accounts. The major wireless carriers currently provide few protections by contract;⁹⁴
- At minimum, all the rights and protections currently provided by California's new CPUC rule; and
- At minimum, all the rights and protections currently provided to consumers who pay by debit or credit card.

Providing baseline legal protections as well as these product features would enable consumers to choose mobile payments services based on price and convenience without having to worry about whether the underlying payment method may leave their money at risk.

⁹³ See Kats, *supra*, n. 46.

⁹⁴ See *e.g.*, Verizon Wireless, *Customer Agreement*, online: Verizon Wireless <http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp> (offering chargeback rights for lost or stolen phones but not for billing errors but silent on mobile payments charges); AT&T, *Wireless Customer Agreement*, online: AT&T <<http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp>> (holds consumers responsible for all charges; chargeback may apply for lost or stolen phone but not for billing errors); T-Mobile USA, Inc., *T-Mobile Terms and Conditions*, online: T-Mobile <http://www.t-mobile.com/Templates/Popup.aspx?WT.z_unav=fr__TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true> (no chargeback rights).