

# BIG TECH AND CONSUMER PAYMENTS: THE GOOD, THE BAD, AND THE UNINTENDED CONSEQUENCES

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## I. Introduction

“Each stage of the American banking industry history demonstrates the interlinkage of finance and technology....”<sup>2</sup> Our era is no exception. The financial services industry has taken advantage of Big Tech to transform consumer payments.

This article describes some of these changes and how they have resulted in positive, negative and unintended consequences for consumers. Some Big Tech changes have resulted in changes to payments that have been good for consumers, for they have given consumers more choices and greater conveniences. But often they have also exposed them to new risks and dangers. Some new payment systems have brought with them unintended consequences no one would have predicted.<sup>3</sup> The article analyzes how the law has responded to each of these developments, pointing out the many serious legal gaps leaving consumers with no protection. The article then discusses the relationship between Big Tech and consumer payments law. Looking to the future, the article concludes with recommendations for how the law should be improved.

## II. Major changes in consumer payment devices and systems made possible by Big Tech

### A. The Automated Teller Machine

#### 1. The payment device

The modern transformation of technology-driven consumer payment services began with the introduction of low-tech Automated Teller Machines (ATMs). ATMs were first introduced in the United States by Chemical Bank in 1969.<sup>4</sup> Paul Volcker, former Chairman of the Federal Reserve opined that the ATM was “‘the most important financial innovation’ in recent history.”<sup>5</sup> As discussed below, ATMs have played an important role in making substantial changes to the delivery of financial services.

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<sup>2</sup> Braeden Hodges, *Banking-As-A-Service: Fintechs Walking the Regulatory Perimeter*, 17 BROOK. J. CORP. FIN. & COMM. L. 127, 133 (2023).

<sup>3</sup> Admittedly, there is overlap between unintended consequences and those that are good or bad. For example, some features of ATMs are good for consumers, but also are unintended consequences of using ATMs.

<sup>4</sup> Hodges, *supra* note 2, at 132.

<sup>5</sup> *Id.*

ATMs have provided consumers with substantial benefits. Originally, they were mainly a way for customers to withdraw cash.<sup>6</sup> Over time, advances in technology allowed ATMs to offer more services including the deposit of checks and the purchase of public transit tickets.<sup>7</sup> Consumers use ATMs to make transfers between accounts and obtain cash advances.<sup>8</sup> Consumers donate to charities using ATMs.<sup>9</sup> They also provide consumers with useful information such as account balances.<sup>10</sup> These services make banking very convenient for consumers who live or work near an ATM. Financial institutions have adapted to changes in the law. For example, in order to comply with the Americans With Disabilities Act, they took advantage of technology to develop ATMs that talk, so they can be used the blind.<sup>11</sup>

Many low income consumers, however, have derived no benefit from the convenience of ATMs. They are unbanked because they cannot afford to have bank accounts.<sup>12</sup> Those in rural and low-income areas who have bank accounts may not have a branch bank near where they live or work or an ATM owned by their bank.<sup>13</sup> If the consumer's bank does not have one of its own ATMs near its customers, they will have to use an ATM owned by another bank or a private company. Those businesses charge substantial fees for using their ATMs.<sup>14</sup> Banks can justify closing neighborhood branches, in part, by pointing out people increasingly do their banking at ATMs and use mobile apps and services instead of going to the bank. The closing of branches and loss of interaction with bank employees is just one aspect of a disturbing larger societal phenomenon. Increasingly, consumers have no option other than living in a digital world. That is arguably dehumanizing.<sup>15</sup> In addition, it may have a direct effect on financial institutions because losing all direct human contact may result in consumers having less trust in banks.<sup>16</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Roland E. Brandel & Lynne B. Barr, *Electronic Fund Transfers*, 40 THE BUS. LAW. 1051, 1052-1053 (1985).

<sup>8</sup> *Id.*

<sup>9</sup> Alissa Kline & Nathan Place, *Los Angeles Banks React, Give Back as Wildfires Continue*, AM. BANKER (Jan. 9, 2025) <https://www.americanbanker.com/news/los-angeles-banks-react-give-back-as-wildfires-continue> (reporting that U.S. Bank activated its ATM network so customers could to disasters).

<sup>10</sup> Brandel & Barr, *supra* note 7, at 1052.

<sup>11</sup> Kenneth Kronstadt, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 111 (2007).

<sup>12</sup> Avery E. Aulds, *Are Community Banks the Answer? An In-Depth Look at a Possible Solution to the Unbanked Problem in the United States*, 26 N.C. BANKING INST. 197, 201 (2022); *Economic Well-Being of U.S. Households in 2023*, BD. GOVERNORS FED. RSRV. SYS. 1, 35 (2024), <https://perma.cc/F6DH-ZTHT> (survey found that 14% of Black adults and 11% of Hispanic adults are unbanked compared to 4% of white adults; 23% of families earning less than \$25,000 per year are unbanked compared to 1% of families earning \$100,000 or more per year).

<sup>13</sup> Christopher R. Leslie, *Banking Deserts, Structural Racism, and Meger Law*, 108 MINN. L. REV. 695, 699 (2023) (describing a town with no full-service bank, only one downtown ATM, where a long-term outage would be “catastrophic” and citing data of the large number of “banking deserts over 1,000 where there is only one bank); Bill Lukitsch, *Wells Fargo Removes ATMs From Minnesota Speedway Stores as People Go Cashless*, MINN. STAR TRIB., Feb. 8, 2025 (reporting that Wells Fargo's removal of ATMs will result in 35% fewer ATMs for its customers).

<sup>14</sup> John Martens, *ATM Fees: Federal Government Pushed to the Forefront of ATM Surcharge Bans*, 15 LOY. CONSUMER L. REV. 301, 301 (2003).

<sup>15</sup> See generally, Jessica Grose, *Human Interaction is Now a Luxury Good*, N.Y. TIMES, SUNDAY OP., Dec. 4, 2024 1, 10.

<sup>16</sup> *Id.*

ATMs also have a darker side that reflects the unintended consequences of using ATMs. For instance, bad actors have figured out how to steal consumers' funds from ATMs through deception.<sup>17</sup> ATMs dispensing crypto facilitate crypto scams.<sup>18</sup> Casinos place ATMs next to slot machines and blackjack tables, encouraging excessive betting.<sup>19</sup> Even worse, customers using ATMs have been subject to robberies.<sup>20</sup>

Meanwhile, the future utility of ATMs is in doubt. To some extent we are heading towards a cashless country. Retailers increasingly refuse to accept cash so consumers have less need to go to ATMs.<sup>21</sup> With the arrival of Covid, many consumers preferred not to pay with cash.<sup>22</sup> Check use has dropped substantially, so there is less need to deposit them at ATMs.<sup>23</sup> In addition, consumers no longer need to go to a bank branch or ATM to deposit checks. As discussed below, they can deposit checks using their cell phones, phones made possible by Big Tech.<sup>24</sup>

Fewer ATMs and bank branches will disadvantage consumers who still need or want to make cash withdrawals from their deposit accounts. Many low-income consumers cannot pay for goods and services using a credit card because they are unable to qualify for one.<sup>25</sup> Other consumers could obtain a credit card, but prefer to use cash to protect their privacy and avoid unauthorized use from the theft or loss of a card or a cyber attack. Some consumers live or work in a high-crime neighborhood and fear their cards will be stolen. Consumers who use cash can

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<sup>17</sup> Robyn Moo-Young, *Eyeing the Future: Surviving the Criticisms of Biometric Authentication*, 5 N.C. BANKING INST. 421, 421 (2001).

<sup>18</sup> Jennnifer Leach, *Did Someone Send You to a Bitcoin ATM? It's a Scam*, FED. TRADE COMM'N (Mar. 7, 2024), <https://consumer.ftc.gov/consumer-alerts/2024/03/did-someone-send-you-bitcoin-atm-its-scam>; Matthieu Fortin, *Fighting Back*, AARP BULL. 1, 8 (March/April 2025), [https://advertise.aarp.org/uploads/misc/AB\\_MarApr\\_2025.pdf](https://advertise.aarp.org/uploads/misc/AB_MarApr_2025.pdf) (reporting on a shopkeeper who removed the crypto dispensing ATM in his store because many customers were exchanging cash for crypto pursuant to scams).

<sup>19</sup> Jordan Smith, *Governing Games of Chance*, HARV. MAG., Mar. – Apr. 2025, at 11 (reporting that Harvard researchers recommend that gambling be treated as a public health issue, and another researcher argues that the gambling industry has effectively characterized gambling as the fault of individuals rather than a consumer protection issue); *Casino ATMs*, <https://atmmachines.com/locations/casino-atms/> (last visited March 25, 2025), (explaining that customers playing slot machines or buying chips for blackjack need cash, so ATMs in casinos “are a match made in heaven”).

<sup>20</sup> According to a popular, but apparently apocryphal story, a reporter asked the notorious thief Willie Sutton why he robbed banks. He supposedly replied “Because that’s where the money is.” *Willie Sutton*, WIKIPEDIA, (Dec. 28, 2024) [https://en.wikipedia.org/wiki/Willie\\_Sutton](https://en.wikipedia.org/wiki/Willie_Sutton). Similarly, a customer at an ATM is likely withdrawing money or depositing one or more checks. Therefore, the thief knows there is a good chance that by hanging out near an ATM he or she will find a victim with cash withdrawn from an ATM or checks intended for deposit to steal. Checks are relatively easy to convert to cash. Michael J. Weber & Cynthia A. Mellon, *ATMs And Check Fraud: Who’s Watching The Store?*, 9 FIDELITY L.J.1, 1 (2003).

<sup>21</sup> Rich Zukowsky, *Cash Is Dead. Long Live Cash*, 73 CONSUMER FIN. L. Q. REP. 281, 281 (2019). *See generally*, Allison Kretovic, *Prohibiting Cashless Retailers And Protecting the Impoverished*, 37 GA. ST. U. L. REV. 105 (2021).

<sup>22</sup> Lukitsch, *supra* note 13; Danielle Kaye, *The Swipe Struggle*, ATLANTA J. CONST. at D1 (2024) (pointing out that greater use of credit and debit cards is especially costly to small merchants who must pay fees to the payment network, companies that help process the transactions, and the card-issuing bank).

<sup>23</sup> Michael E. Kanell & J. Scott Trubey, *As Banking Shifts Online, PNC Bank Plans More Branches in Metro Atlanta*, ATLANTA J. CONST. at A9 (2024).

<sup>24</sup> *See infra* notes 88-94.

<sup>25</sup> Peter J. Cline, *Expression Yourself: An Analysis of the Interaction Between The Durbin Amendments and New York Surcharge Ban Of the New York General Business Law*, 22 N.C. BANKING INST. 333, 339-40 (2018).

limit their losses by carrying a small amount of cash. If a thief steals a wallet containing a debit card and the consumer has written the PIN on the card or elsewhere in the wallet, the thief could drain all of the consumer's funds out of the account. As explained below, the law protects the consumer from unauthorized use of the consumer's debit card.<sup>26</sup> The law is not self-executing, however. Consumers have to know their rights and how to exercise those rights within certain time limits.<sup>27</sup>

On the other hand, possible widespread use of cryptocurrency may give ATMs a new lease on life. Technological developments made cryptocurrency possible. Currently, consumers deal in crypto overwhelmingly to engage in speculative trading and its value is extremely volatile. Nevertheless, some businesses accept crypto as payment for the purchase of goods and services.<sup>28</sup> Colorado accepts crypto for tax payments.<sup>29</sup> If more businesses and governments accept crypto, cryptocurrency may replace cash to a large extent. This may further reduce the need for ATMs used for cash withdrawals. But instead, consumers may use ATMs to dispense cryptocurrency for purchases.<sup>30</sup>

## 2. The applicable law

Congress' response to ATMs, debit cards, direct deposit and preauthorized bill was to enact the Electronic Funds Transfer Act (EFTA). The Consumer Financial Protection Bureau (CFPB) issued Regulation E pursuant to the EFTA. That law has not been revised to take into account the different uses to which ATMs are now used.<sup>31</sup>

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<sup>26</sup> See *infra* text accompanying note 47.

<sup>27</sup> See *infra* text accompanying note 31.

<sup>28</sup> See *infra* text accompanying note 117.

<sup>29</sup> *Crypto Currency Now Accepted For All State Tax Payments*, COLO. DEPT. OF REVENUE (Apr. 8, 2025), <https://tax.colorado.gov/cryptocurrency#:~:text=Starting%20September%201%2C%202022%2C%20the%20Colorado%20Department%20of,withholding%20tax%2C%20severance%20tax%20and%20excise%20fuel%20tax.>

<sup>30</sup> See generally Sheelah Kolhatkar, *Do You Take Bitcoin?*, THE NEW YORKER, July 31, 2023, (after paying an 8% charge as well as a "miner's fee, the consumer was able to purchase a portion of a bitcoin, but he was not able to find a store that would permit him to use it to pay for purchases).

<sup>31</sup> See Cathy Lesser Mansfield, *It Takes a Thief... and a Bank: Protecting Consumers from Fraud and Scams on P2P Payment Platforms*, 57 U. MICH. J. L. REFORM 351, 366-67 (2024) (recounting the events leading up to passage of the EFTA).

The EFTA and Reg. E require financial institutions to provide disclosures and an error resolution procedure.<sup>32</sup> In addition, the EFTA imposes liability for violating the EFTA.<sup>33</sup> These provisions spell out a broad framework for dealing with problems consumers confront when handling payments involving an ATM.

There are major areas in which the EFTA does not provide any protection for consumers however. Some gaps in the EFTA were present at the time the statute was enacted. These include the failure to protect consumer privacy and security. Some states have filled those gaps to a limited extent. For example, states have passed laws requiring that companies provide security measures to protect consumers using ATMs.<sup>34</sup> States continue to enact a wide variety of privacy laws, and some may protect consumers' privacy.<sup>35</sup>

It is uncertain whether the EFTA protects consumers when they purchase public transit tickets or other non-cash products such as crypto from an ATM. In order to be subject to the EFTA, there must be an "electronic fund transfer." That term is defined, in part, as "any transfer of funds...."<sup>36</sup> "Funds" is not defined in the EFTA or in Reg. E, the regulations issued by the CFPB pursuant to the EFTA.<sup>37</sup> Given the dearth of cases, it is impossible at this time to predict how the courts may decide this issue.<sup>38</sup>

## B. Peer-to-peer payments

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<sup>32</sup> The EFTA and Reg. E apply to "financial institutions" and certain "other person[s]." "Financial institution" is defined as "a bank, savings association credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services." 12 C.F.R. 1005.1(b); 15 U.S.C. 1693a(9). *See* Lauren K. Saunders, Margot Saunders & Carla Sanchez-Adams, *Consumer banking and payments law : bank and prepaid accounts, electronic payments, remittances, wage and benefit payments, electronic records and signatures*, NAT'L CONSUMER LAW CTR. 265-66 (7<sup>th</sup> ed. 2024) (hereafter Saunders). "Access device" is "a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers. 12 C.F.R. 1005.1(a)(1). The EFTA and Reg. E specifically cover ATMs in its definition of electronic fund transfer. 15 U.S.C. 1693a(7); 12.C.F.R. 1005.3(b)(ii). Section 905 and Reg. E require certain general disclosures. 15 U.S.C. 1693c; 12 C.F.R. § 1005.4. Section 904 provides for specific disclosures when consumers use ATMs. 15 U.S.C. 1693b(d)(3); 12 C.F.R. §§ 1005.7(b)(11), 1005.9(a). Section 909 specifies the limited circumstances under which consumers are liable for unauthorized electronic transfers. 15 U.S.C. 1693g, 12 C.F.R. § 1005.2(m), § 1005.11. Section 908 and Reg. E mandate error resolution procedures. 15 U.S.C. 1693f; 12 C.F.R. 1005.7(b)(11).

<sup>33</sup> Section 910 imposes liability on financial institutions. Elec. Fund Transfer Act, 15 U.S.C. 1693h, 1693m.

<sup>34</sup> Jennifer Juhala DeYoung, *ATM Crime: Expanding the Judicial Approach to a Bank's Liability For Third Party Crimes Against ATM Patrons*, 30 VAL. U. L. REV. 99, 113-16 (1995) (stating that the state laws deal with lighting requirements, the height of landscaping close to ATMs, and reflective mirrors).

<sup>35</sup> Meghan K. Farmer, Amanda M. Witt, Gregory P. Silberman, John M. Brigagliano & Katherine S Kubit, *Are You Ready for Eight More Privacy Laws in 2025?*, KILPATRICK (Oct. 28, 2024), <https://ktslaw.com/en/Insights/Alert/2024/10/Are-You-Ready-for-Eight-More-Privacy-Laws-in-2025>.

<sup>36</sup> 15 U.S.C. § 1693a(7) (2022).

<sup>37</sup> *See* 12 C.F.R. §§ 1005.2 (2025) (defining terms); *See also* 12 C.F.R. §§ 1005.3 (2025) (describing what the EFTA covers).

<sup>38</sup> *See infra* text accompanying notes 124-31.

## 1. The payment service

Peer-to-Peer (P2P) payment systems such as PayPal, Zelle, Venmo, CashApp, and Apple Pay are a dramatic example of the tremendous impact of Big Tech on our daily lives. Many consumers use P2P because the service makes it very convenient to transfer money from the consumer to another person or a business.<sup>39</sup> Unfortunately, it has a bad side as well. Consumers have reported many complaints about fraudsters tricking them into sending funds using P2P.<sup>40</sup> They claim that the institutions operating and owning these platforms refuse to recredit their accounts for the funds the fraudsters stole.<sup>41</sup>

The warnings financial institutions send to consumers are proof that they know P2P has been targeted by fraudsters.<sup>42</sup> For example, when consumers with bank accounts at Wells Fargo transfer payments using Zelle, they are provided disclosures that implicitly acknowledge the risks consumers take by using Zelle. For example, before even clicking on the “Send” button, Wells Fargo warns consumers: “Don’t fall for an online or marketplace deal that’s too good to be true. If a seller won’t let you see an item in person, don’t send any money.”<sup>43</sup> Before the transfer occurs, a screen tells the consumer: “Beware of marketplace scams.”<sup>44</sup>

## 2. The applicable law

P2P services operate in two distinct ways. That difference is crucial to whether or not the EFTA protects consumers. The EFTA applies only if the service stores the consumer’s funds in an account.<sup>45</sup> PayPal and Venmo are examples of this. On the other hand, Apple Pay and some other digital wallets “function purely as a pass-through vehicle to transmit payment credentials to another provider and do not process payments.”<sup>46</sup> The EFTA does not apply to those who merely pass the payment information to a company that processes the payment.

As to those P2P services governed by the EFTA, that law provides consumers a private right of action with actual damages, statutory damages, costs and attorney fees.<sup>47</sup>

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<sup>39</sup> Lisa Gill, *CR Finds Consumer Risks for Users of Apple, Cash App, Venmo, and Zelle*, CONSUMER REP. (Jan. 24, 2023), <https://www.consumerreports.org/money/digital-payments/peer-to-peer-payment-apps-comparison-a5999129619/>.

<sup>40</sup> Mansfield, *supra* note 31.

<sup>41</sup> Mansfield, *supra* note 31, at 362.

<sup>42</sup> Budnitz, *supra* note 31, at 154.

<sup>43</sup> Screenshots in the files of Loyola Consumer Law Review (visited March 27, 2025).

<sup>44</sup> *Id.* The screen continues “Protect yourself with these tips: Be suspicious of great deals If it seems too good to be true, it probably is. Double-check the details...Treat payments like cash Once you send money with Zelle, you usually can’t get it back.” The consumer must click on a button labelled “Got it” before authorizing the transfer. The next screen identifies the recipient and the amount of the transfer and states: “make sure all information is correct. Payment cannot be canceled.” (visited March 27, 2025).

<sup>45</sup> Saunders, *supra* note 32, at 267.

<sup>46</sup> *Id.*

<sup>47</sup> 15 U.S.C. § 1693m (2018).

Even if the EFTA applies, however, it provides consumers with a remedy only if the transfer is unauthorized.<sup>48</sup> In the typical P2P fraud, the consumer is deceived into authorizing the transfer; consequently, the consumer cannot take advantage of the EFTA unless there is another basis for doing so.<sup>49</sup> This illustrates how the law is unable to anticipate the protection consumers need when Big Tech makes new payment systems possible.

While consumers may find a private right of action is blocked, a government agency may decide to sue a P2P company for violating the law. A lawsuit on behalf of consumers using Zelle illustrates the ways the CFPB can use alleged violations of the EFTA and the Consumer Protection Act to protect consumers. The final outcome of the case, however, demonstrates the precariousness of relying on a government agency for protection.

After receiving hundreds of thousands of consumer complaints, in 2024 the CFPB sued Early Warning Service (EWS), the company that operates Zelle. The CFPB also sued three of the seven banks that co-own Early Warning Service, namely Wells Fargo, Bank of America, and JPMorgan Chase Bank (Chase).<sup>50</sup>

The CFPB claimed the defendants violated the Consumer Financial Protection Act (CFPA) by engaging in “unfair” acts or practices.<sup>51</sup> The CFPB’s Complaint contained the following allegations: EWS acted unfairly by failing to take timely, appropriate, and effective measures to prevent, detect, limit, and address fraud on the Zelle network by failing to take timely, appropriate, and effective measures to prevent, detect, limit, and address fraud on the Zelle network.<sup>52</sup> Bank of America acted unfairly by failing to take timely, appropriate, and effective measures to prevent, detect, limit, and address fraud on the Zelle network.<sup>53</sup> Chase acted unfairly by failing to take timely, appropriate, and effective measures to prevent, detect, limit, and address fraud on the Zelle network.<sup>54</sup> Wells Fargo acted unfairly by failing to take timely, appropriate, and effective measures to prevent, detect, limit, and address fraud on the Zelle network.<sup>55</sup> The Complaint asserted that this conduct violated the CFPA.<sup>56</sup>

The Complaint also alleged violations of the EFTA and Reg. E. It claimed Bank of America failed to follow the error-resolution requirements of EFTA and Regulation E by not treating certain transfers as incorrect and unauthorized.<sup>57</sup> Chase and Wells Fargo failed to follow the

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<sup>48</sup> 12 C.F.R. § 1005.6 (2024); *See also* Green v. Capital One, N.A., 557 F. Supp.3d 441, 447–50 (S.D.N.Y. 2021) (applying Reg. E’s provisions on unauthorized use).

<sup>49</sup> Saunders, *supra* note 32, at 320.

<sup>50</sup> Comp., Consumer Fin. Prot. Bureau v. Early Warning Serv., LLC, No. 2:24-cv-03652-SMB (D. Ariz. Dec. 20, 2024) (hereinafter *Zelle Complaint*).

<sup>51</sup> *Id.* at 78 (“Sections 1031 and 1036 of the CFPA prohibit a “covered person or service provider” from committing or engaging in any “unfair, deceptive, or abusive act or practice” in connection with “any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)”).

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

<sup>53</sup> *Id.* at 80.

<sup>54</sup> *Id.* at 81.

<sup>55</sup> *Id.* at 83.

<sup>56</sup> *Id.* ¶ 343.

<sup>57</sup> *Id.* at 84.

error-resolution requirements of EFTA and Regulation E by not treating certain transfers as incorrect and unauthorized EFTs and also by failing to reasonably investigate Notices of Error.<sup>58</sup>

It would have been revealing to learn what evidence the parties presented and how the court decided the lawsuit. That will not happen. In March, 2025, the Trump CFPB filed a notice of dismissal with prejudice, ending the case.<sup>59</sup>

In November, 2024, the CFPB issued a rule that would allow the agency to supervise larger nonbank companies that offer P2P services.<sup>60</sup> The rule applied only to companies that have more than 50 million payment transactions per year. The CFPB identified three principal areas to focus on: privacy, errors and fraud, and freezing or closing consumer accounts without notice or providing a reason. In March, 2025, the Senate approved a Joint Resolution overturning the rule.<sup>61</sup>

### C. Wire Transfers<sup>62</sup>

#### 1. The payment service

Many Americans transfer funds from their bank accounts to others using the bank's wire transfer service. When consumers do so from their online bank portals, the transfer is fast and convenient. There has been a tremendous increase in wire transfer fraud, however, especially since the beginning of the COVID-19 pandemic.<sup>63</sup>

#### 2. The applicable law

The law of wire transfers is an example of unintended legal consequences. Bank wire transfers are excluded from the EFTA.<sup>64</sup> The Prefatory Note to Article 4A clearly states that it was intended to deal with wholesale wire transfers.<sup>65</sup> That is likely because, as pointed out in the Prefatory Note, when the American Law Institute (ALI) and the Uniform Laws Commission (ULC) issued Article 4A and wrote the Prefatory Note, wire transfers were “overwhelmingly

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<sup>58</sup> *Id.* at 85; 87.

<sup>59</sup> Jon Hill, *Big Banks Escape CFPB Suit Over Zelle Fraud Claims*, LAW360 (Mar. 24, 2025), <https://www.law360.com/publicpolicy/articles/2305821>.

<sup>60</sup> Defining Larger Participants of a Market for General Use Digital Consumer Payment Applications, 89 Fed. Reg. 99582 (Dec. 10, 2024).

<sup>61</sup> Lynne Marek, *Senate votes to overturn CFPB big tech rule*, PAYMENTS DIVE (Mar. 6, 2025), <https://www.paymentsdive.com/news/senate-resolution-vote-cfpb-big-tech-payments-rule/741725/>.

<sup>62</sup> Millions of residents in the United States send international wire transfers, also called remittances, to relatives and others who live outside America. International remittances are beyond the scope of this article; *See* Saunders, *supra* note 32, at 453-66.

<sup>63</sup> Benjamin Gygi, *EFTA Coverage of Modern Consumer Wire Transfers: Consumer Financial Regulation in the Wake of Loper Bright*, 93 FORDHAM L. REV. 1469, 1475 (2025); *See also* Derek Kravitz, *Scammers Are Stealing Billions From Americans' Bank Accounts. Here's What You Need To Know*, CONSUMER REPORTS (Nov. 25, 2024), [www.consumerreports.org/money/scams-fraud/scammers-are-stealing-billions-from-americans-bank-accounts-a9798061056/](https://www.consumerreports.org/money/scams-fraud/scammers-are-stealing-billions-from-americans-bank-accounts-a9798061056/).

<sup>64</sup> 15 U.S.C. § 1693a(7)(B) (2022); 12 C.F.R. § 1005.3(c)(3) (2024).

<sup>65</sup> U.C.C. § 4A Prefatory Note (AM. L. INST. & UNIF. L. COMM'N 2020) (“[A] wholesale wire transfer ... is the primary focus of Article 4A. Payments that are covered by Article 4A are overwhelmingly between business or financial institutions).

used by businesses.<sup>66</sup> In other words, at that time few, if any, consumers were using wire transfers to send money. The situation today is very different. Consumer use of wire transfers “is becoming increasingly common.”<sup>67</sup>

Because 4A was not intended for use by consumers, it does not contain provisions to protect them. In contrast, some sections work against consumers. For example, “Except as otherwise provided in this Article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.”<sup>68</sup> That may be reasonable when the agreement is between a business and a bank. But Article 4A does not provide any meaningful rights for consumers, so the consumer is left with the agreement between the parties. The bank writes the boilerplate agreement and the consumer has no ability to alter the terms.<sup>69</sup>

Another provision that works against consumers is 4A-202. Consumers subject to wire fraud often complain to their bank that they did not authorize the transfer of funds or were defrauded into authorizing it.<sup>70</sup> Pursuant to that 4A-202, a customer is deemed to have authorized a transfer “whether or not authorized” if the bank and its customer agreed that the consumer’s payment order will be verified pursuant to a security procedure that is commercially reasonable, the bank accepted the order in “good faith,” and the bank followed that security procedure.<sup>71</sup>

Besides requiring that the security procedure be “commercially reasonable,” Article 4A imposes no specific privacy and security requirements on banks sending wire transfers.<sup>72</sup>

The UCC’s sponsors, the ALI and ULC, could have revised Article 4A to insert consumer protection once it became apparent that many consumers were using wire transfers. That has not happened.

The picture is not totally bleak for consumers, however. Some wire transfers are not exempt, such as internal transfers within the same bank.<sup>73</sup>

In addition, transfers that occur online or from an app on a cell phone occur in different stages. The EFTA may apply to some of those stages, and others may be governed by other law.<sup>74</sup> The Prefatory Note to Article 4A acknowledges this: “If any part of a funds transfer is covered by the EFTA, the entire funds transfer is excluded from Article 4A.”<sup>75</sup> When consumers transfer funds online from the bank’s portal, the funds are first transferred from the consumer’s account to the

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<sup>66</sup> *Id.*

<sup>67</sup> Saunders, *supra* note 32, at 473.

<sup>68</sup> U.C.C. § 4A-501 (AM. L. INST. & UNIF. L. COMM’N 2020).

<sup>69</sup> See generally Mark E. Budnitz, Donald F. Clifford, Michael Ferry & Margot Saunders, *Home Banking Agreements: Don’t Bank on Them*, 61 BUS. LAW. 641, 642 (2006).

<sup>70</sup> See generally Gygi, *supra* note 63, at 1471-72.

<sup>71</sup> U.C.C. § 4A-202(b); U.C.C. § 4A-201 (defining “security procedure”); U.C.C. § 4A-202(c) (outlining the requirements for a commercially reasonable security procedure); Saunders, *supra* note 32, at 466-76.

<sup>72</sup> See *Patco Const. Co., Inc. v. People’s United Bank*, 684 F.3d 197, 212-13 (1st Cir. 2012) (finding bank’s security procedure not commercially reasonable).

<sup>73</sup> Saunders, *supra* note 32, at 262, 474.

<sup>74</sup> *Id.*

<sup>75</sup> U.C.C. Prefatory Note, U.C.C. Article 4A.

bank's account in order to transfer the funds to the bank designated by the consumer.<sup>76</sup> The New York Attorney General has seized upon that fact to argue that wire transfers are covered by the EFTA.<sup>77</sup> The CFPB filed a statement of interest supporting the New York Attorney General's position.<sup>78</sup> Under the Trump administration, the CFPB moved to withdraw its Biden-era statement of interest, noting that no federal court had adopted the New York position.<sup>79</sup>

Indeed, several courts have held that the EFTA does not apply to wire transfers.<sup>80</sup>

One other avenue for consumers is to bring an action based on common law claims. Courts allow those claims if they are "consistent with UCC Article 4A...or...occur outside the funds transfer process."<sup>81</sup> Possible claims include breach of contract, breach of fiduciary duty, negligence, conversion and claims against the beneficiary bank, the bank receiving the wire transfer.<sup>82</sup>

## D. FedNow

### 1. The payment service

As discussed above, an unintended consequence of not anticipating that consumers would often use wire transfers was its failure to include any consumer protection. This gap in the law was further exacerbated when the Federal Reserve decided to establish a new bank-to-bank real time payment system, called FedNow.<sup>83</sup>

The Fed's objective in establishing FedNow was to provide a service that would enable consumers and others to transfer funds in seconds, more quickly than if they used their banks' systems to move the money.<sup>84</sup> That is important for consumers with a cash flow problem who need to pay the rent and make a car payment very soon after they receive their salaries.

### 2. The applicable law

Many types of payments using FedNow can be made in a manner that is covered by the EFTA, so consumers are protected.<sup>85</sup> But if the consumer makes a wire transfer using FedNow, the

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<sup>76</sup> Gygi, *supra* note 63, at 1472.

<sup>77</sup> Comp. at 11-16, *New York v. Citibank, N.A.*, No. 24-CV-0659, (S.D.N.Y. Jan 21, 2024); Gygi, *supra* note 63, at 1472.

<sup>78</sup> Gygi, *supra* note 63, at 1473.

<sup>79</sup> Sarah Jarvis, *CFPB pulls 'Inappropriate' Brief Supporting NY's Citi Suit*, LAW360 (March 26, 2025), <https://www.law360.com/articles/2315710/print?section=banking>.

<sup>80</sup> Gygi, *supra* note 63, at 1473.

<sup>81</sup> Saunders, *supra* note 32, at 487.

<sup>82</sup> *Id.*

<sup>83</sup> FedNow® Service, [https://www.federalreserve.gov/paymentsystems/fednow\\_about.htm](https://www.federalreserve.gov/paymentsystems/fednow_about.htm) (visited April 3, 2025).

<sup>84</sup> Saunders, *supra* note 32, at 246, 239. There is also a private system with the same purpose. The Clearinghouse operates its real time system, called RTP. *Id.* at 14. Services such as Venmo and PayPal also make funds available immediately, but they merely move funds within the company, as opposed to FedNow that moves money from one bank to another. *Id.* The Automated Clearing House system transfers direct deposit and bill payment services. It operates under rules issued by Nacha. See Nacha, [www.nacha.org](http://www.nacha.org) (visited April 3, 2025).

<sup>85</sup> Saunders, *supra* note 32, at 246.

EFTA does not ordinarily apply.<sup>86</sup> Instead, Article 4A applies; and 4A provides no consumer protection.<sup>87</sup> During the public comment period after the Fed published a proposed rule, law professors and consumer organizations urged the Fed not to adopt the rules in Article 4A to govern FedNow wire transfers, pointing out the ways in which article 4A does not protect consumers.<sup>88</sup> The Fed, however, did not follow their recommendation.

Instead, the Fed compounded the error by not revising Article 4A to protect consumers. This example shows how the unintended consequence of not considering consumers using wire transfers in drafting Article 4A had the ripple effect of depriving consumers of needed protection when taking advantage of FedNow.

#### E. Remote deposit capture – the cell phone as a financial payment service

##### 1. The payment service

Remote Deposit Capture (RDC) refers to an increasingly popular method for depositing checks. The person to whom the check is made payable, the payee, takes a picture of the check with the payee's cell phone camera, and uploads the image of the check through an app typically provided by the payee's bank.<sup>89</sup> The benefits and risks of depositing the check in this fashion can be illustrated by considering various scenarios.

Tanya buys a used car from Jim for \$3,000. She gives Jim a check for that amount drawn on her bank, Security First. In payment parlance, Tanya is the “drawer,” Jim is the “payee.

Unfortunate events may occur, however, making RDC a risky method for depositing checks. For example, suppose Jim deposits the check via his cell phone while at work and then puts the check on his desk, intending to rip it up and throw it away. But before he does so, his daughter calls to tell him that he has just become a grandfather and he should come to the hospital to meet his new-born grandson. That night Karen, who cleans the offices every night, discovers the check and deposits it into her account. Now there are two checks; the original paper check and the electronic check image.

One might wonder how Karen could deposit a check made payable to Jim. Checks are negotiable instruments, meaning they can be transferred to multiple parties, unless Jim wrote a “restrictive indorsement” on the back of the check. Consequently, there is nothing illegal for someone besides the payee to deposit the check, if that other person obtained the check in a legal manner. Of course Karen did not obtain the check legally. But thieves like her know how to “wash”

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<sup>86</sup> See Gygi *supra* note 63.

<sup>87</sup> 12 C.F.R. §§ 210.25-210.32 (2024).

<sup>88</sup> Alaska PIRG et al., to Ann E. Misback, Federal Reserve Secretary (Sept. 9, 2021) (on file with the LOY. CONSUMER L. REV.); Richard M. Alderman et al., to Ann E. Misback, Federal Reserve Secretary (September 8, 2021) (on file with the LOY. CONSUMER L. REV.); See Saunders, *supra* note 32, n. 512.

<sup>89</sup> Saunders, *supra* note 32, at 171-72.

checks, using chemicals to delete Jim's name as payee and instead inserting Karen's name. Furthermore, by washing the check amount, Karen could alter the amount of the check so it is payable for considerably more than \$3,000.

The danger for Tanya is that with the deposit of two checks, her bank account may be debited twice. And if a thief has washed the original check and raised the amount, she risks losing more than twice the \$3,000.<sup>90</sup> The danger to Jim is that Tanya's bank may be able to require Jim's bank to indemnify it, and Jim's bank may be able to pass its loss onto Jim.<sup>91</sup>

Another issue for Jim is when the \$3,000 is available for him to use. That is important because he is late paying his mortgage.

These scenarios illustrate the risks of having both an original old-fashioned paper check and a technologically created electronic image of that original. It is as if technology has enabled the creation of a two-headed monster, one head being the original check and the other being the electronic image. The irony is that the creation of that monster could have been totally avoided by the simple no-tech act of tearing up the original paper check or writing "Void" on its face.

## 2. The applicable law

The FRB's Reg. CC protects the drawer in the scenario described above. Consequently, Tanya is protected.<sup>92</sup> Jim, however, may not be so fortunate. Under some circumstances, Jim's bank can pass the loss to Jim.<sup>93</sup> That can occur if a thief deposits the original check and Jim uses RDC to deposit the check electronically, resulting in a double deposit.

The FRB's Reg. CC has rules that require Jim's bank to make the funds from deposited checks available promptly as a general matter.<sup>94</sup> Reg. CC, however, has not been updated to take into account this relatively new deposit method made possible by Big Tech. As a result, it is not clear whether Reg CC applies to RDC.<sup>95</sup>

### F. Electronic Remote Repossession

Low income consumers buy used cars, obtaining financing from subprime lenders willing to provide credit to persons lacking good credit ratings. Many lenders are willing to provide the financing because they obtain a security interest in the car. If the consumer fails to pay the full amount due on the due date, the lender is entitled to repossess the vehicle.<sup>96</sup> Although it has the

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<sup>90</sup> *Id.* at 172 (explaining that RDC facilitates thieves depositing fake and altered checks).

<sup>91</sup> *Id.*

<sup>92</sup> 12 C.F.R. § 229.34(a)(1)(ii) (2024); Saunders, *supra* note 32, at 172.

<sup>93</sup> Saunders, *supra* note 32, at 186, 172.

<sup>94</sup> *Id.* at 224.

<sup>95</sup> *Id.* at 229.

<sup>96</sup> U.C.C. § 9-609 (2022).

right to repossess when the consumer is in default, the lender is taking a risk since a vehicle is highly mobile. In order to repossess the vehicle the lender has to know where the vehicle is located and must be able to seize it when it is not moving.

Big Tech has provided lenders with tools that greatly increase the lender's ability to locate the collateral and take possession of it. Lenders install GPS systems in the vehicles that allow them to know exactly where the vehicle is.<sup>97</sup> Some lenders even use an electronic device that restricts where the vehicle can be driven, so it cannot go too far.<sup>98</sup>

In addition to using GPS to track where the vehicle is, lenders employ a far more powerful Big Tech tool. "Vehicle monitoring and collection technology" is used in "starter interrupt" systems.<sup>99</sup> The systems disable the consumer's vehicle, preventing it from restarting, allowing the lender to repossess it.<sup>100</sup> The device that disables the vehicle is called the "kill switch."<sup>101</sup> Lenders have software that informs them when consumers have missed a payment. Being in default in payment triggers the lender's right to repossess.<sup>102</sup> The kill switch is supposed to prevent the consumer from starting the vehicle. Unfortunately, sometimes the electronics malfunction and the vehicle is "disabled" while the consumer is driving the vehicle.<sup>103</sup> This obviously is a very dangerous and frightening occurrence.<sup>104</sup>

This Big Tech technology benefits consumers with sub-prime credit. Without lenders' use of it many low-income consumers would be unable to purchase vehicles they need for work, medical appointments, shopping and other essential tasks, especially in locations where public transportation is inadequate or non-existent. Professor Elvy has acknowledged other benefits of the starter interrupt services. For example, they allow consumers to quickly cure defaults, which in turn means consumers avoid the costs of repossession.<sup>105</sup> She has also discussed, however, the "alarming privacy, electronic subjugation, and cybersecurity risks" of these systems.<sup>106</sup>

Unfortunately, there is another glaring deficiency in these systems that results in many "stater interruptions" and subsequent wrongful repossessions. Often the technology indicates consumers are in default when in fact they are not. In one case alone, the CFPB found that the lender disabled thousands of cars even though the consumers did not owe the lender any money.<sup>107</sup> The

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<sup>97</sup> Carolyn Carter, REPOSSESSIONS 225 (Jonathan Sheldon & Constance G. Brigham eds., 10<sup>th</sup> ed. 2022).

<sup>98</sup> *Id.*

<sup>99</sup> Stacy-Ann Elvy, *The Vehicle Monitoring and Collection Technology Era*, 110 IOWA L. REV. 43, 45 (2024).

<sup>100</sup> *Id.*; Mario Aspen, *Prepaid Card is Linked to Auto Lending Device*, AM. BANKER, Mar. 31, 2008 (reporting on a system in which car payments are automatically deducted from consumer's prepaid card; if funds are insufficient, car cannot restart unless consumer loads additional funds onto car).

<sup>101</sup> Thad Moore, *Car Dealer's GPS Kill Switches Stranded Buyers*, ATLANTA J.CONST., 1 (2025).

<sup>102</sup> U.C.C. § 9-609(a).

<sup>103</sup> Carter, *supra* note 97, at 225, n. 382. The device may have not been properly installed or it may be defective. *Id.* at 225.

<sup>104</sup> Aspen, *supra* note 100, at 45.

<sup>105</sup> *Id.* at 47; *See* U.C.C. § 9-615(d)(2) (providing that "obligor" [person in default] is liable for any deficiency after sale of collateral).

<sup>106</sup> Aspen, *supra* note 100, at 48.

<sup>107</sup> Compl. at 4, Consumer Fin. Prot. Bureau v. USASF Servicing LLC, No. 1:23-cv-03433-VMC, (N.D. Ga. Aug. 2, 2023) (hereafter USASF Complaint); *Id.* at 11-12 (The lender also misapplied payments made by consumers); Moore, *supra* note 101, at A1.

lender admitted to the CFPB that the wrongful disablements were caused by “programming error, system miscommunication, and human error....”<sup>108</sup>

Obviously, the Big Tech system was a bad tech system. A former collections manager who worked at the lender disclosed to the CFPB that the company had received 30 to 40 complaints every day from consumers who said they could not start their vehicles despite not being behind in their payments.<sup>109</sup> He told the CFPB that company executives knew the system didn’t work but didn’t want to pay for a new one.”<sup>110</sup> He told a reporter that “he eventually came to see the improper shutoffs as ‘a ploy to get people to pay more.’”<sup>111</sup>

Wrongful vehicles disablements resulted in serious disruptions in the lives of thousands of consumers who were customers of this one lender.<sup>112</sup> There are reports of the havoc they have made in the lives of others as well.<sup>113</sup> This is an example of a company using low tech because it was cheap tech. Unfortunately for consumers, cheap tech is likely bad tech.

The law has done almost nothing to protect consumers from this technological abuse. There is no federal law governing the use of vehicle disablement. Five states have enacted laws dealing with various aspects of this lender practice.<sup>114</sup> But the states take a variety of approaches. Consequently, there is no consistency or uniformity, even among the tiny minority of states that have acted to protect consumers.

Requirements of some of the state laws, however, do provide consumers with a modicum of protection. For example, both California and New Jersey do not allow lenders to activate starter interruption unless it warns the consumer a specified number days before the consumers’ vehicles will be activated.<sup>115</sup> New Jersey defines default as ten or more days late or five or more days if payments are made weekly.<sup>116</sup> Nevada provides consumers a private right of action with statutory damages and other remedies for violation of its laws.<sup>117</sup>

## G. Crypto used for payments

### 1. The payment service

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<sup>108</sup> USASF Complaint, *supra* note 107, at 4.

<sup>109</sup> Moore, *supra* note 101, at A10.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Elvy, *supra* note 99, at 45; USASF Complaint, *supra* note 107, at 16, 17.

<sup>114</sup> Carter, *supra* note 97, at 230-31.

<sup>115</sup> CAL. CIV. CODE § 2983.37(a)(2)(A),(B) (no less than 48 hours before disablement; N.J. STAT. ANN. § 56:8-206 (72 hours before disablement).

<sup>116</sup> N.J. STAT. ANN. § 56:8-206.

<sup>117</sup> NEV. REV. STAT. § 598.9716.

Increasingly, companies accept crypto in payment for goods and services.<sup>118</sup> Consumers take several risks in storing and using crypto, however. For example, if the consumer stores the crypto in a crypto company rather than in a bank, that asset is not protected by FDIC insurance if the company fails.<sup>119</sup> Stablecoins are promoted as a way to guard against the volatility of crypto's value, but some stablecoin companies turned out not to be stable at all.<sup>120</sup> Crypto has been stolen in cyber-attacks from crypto companies and crypto wallets.<sup>121</sup> Dozens of crypto companies have filed for bankruptcy.<sup>122</sup> Crypto has been used in consumer scams.<sup>123</sup> Consumers who believe their homeowners property insurance covers crypto have found their insurance company classifies that asset as personal property, not money, and subject to policy limits for personal property.<sup>124</sup>

## 2. The applicable law

It is uncertain whether the EFTA covers crypto payment transactions. To be subject to the EFTA, a transfer must be an “electronic fund transfer.”<sup>125</sup> That term is defined, in part, as “any transfer of funds...”<sup>126</sup> However, the term “funds,” is not defined in the EFTA or in Reg. E.<sup>127</sup> In *Nero v. Uphold HQ, Inc.*, a cryptocurrency exchange argued that crypto was not “funds” under the EFTA.<sup>128</sup> The court rejected that argument, finding that “[t]he definition of ‘electronic fund transfer’ contains no constraint that would limit the EFTA's coverage to fiat currencies.”<sup>129</sup> At present there is not sufficient caselaw, including cases on the appellate level, to know if this expansive interpretation of “funds” will be widely adopted.

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<sup>118</sup> See, e.g., *800 Companies & Retailers That Accept Crypto*, [capitaloneshopping.com/research/who-accepts-crypto/](https://capitaloneshopping.com/research/who-accepts-crypto/) (listing a wide variety of online businesses including AMC Theaters, Apple, AT&T, Best Buy, Bloomingdale's, and Expedia) (visited April 1, 2025); See also *250 Companies & Stores That Accept Cryptocurrency*, [bitpay.com/directory](https://bitpay.com/directory) (visited April 1, 2025); *Spend Your Crypto Anywhere*, [crypto.com](https://crypto.com) (visited April 1, 2025); But see John Adams, *Payment Fintechs Invest in Stablecoin, but Where Are the Users?*, AM. BANKER, Oct. 21, 2024 (reporting that fintech Bridge sells business software that enables companies to accept stablecoins in payment for purchases, but because merchants are not likely to accept crypto at point-of-sale, perhaps because of the failure of the stablecoin company Diem, Bridge converts the stablecoins into regular currency when the consumer wants to pay).

<sup>119</sup> *Fact Sheet: What the Public Needs to Know About FDIC Deposit Insurance and Crypto Companies*, July 28, 2022, [fdic.gov](https://fdic.gov) (visited April 1, 2025).

<sup>120</sup> *Id.*; George Sutton, *Cryptocurrency-Cryptoscam-Why Regulation, Deposit Insurance, and Stability Matter*, 36-Feb. UTAH B. J. 18, 24 (2023) (arguing that stable companies' reserves were “nonexistent or misrepresented,” the algorithms were ineffective, and the failure of stablecoin company Luna “set off a chain reaction of failures”).

<sup>121</sup> Gregg Lamm, *Victims Say Crypto Isn't Money, Safeco Must Cover Hack*, LAW360, Jan. 3, 2025; Vicky Ge Huang & Robert McMillan, *How Crypto Hack Sent No. 2 Exchange to Brink*, WALL ST. J., March 7, 2025, at 1.

<sup>122</sup> Michael J. Hsu, *National Banks Must Continue to Exercise Caution with Cryptocurrencies*, AM. BANKER, Jan. 16, 2025, 2025 WLNR 1197623.

<sup>123</sup> Fortin, *supra* note 18

<sup>124</sup> Lamm, *supra* note 121.

<sup>125</sup> See *supra* text accompanying note 4.

<sup>126</sup> 15 U.S.C. § 1693a(7).

<sup>127</sup> See 12 C.F.R. 1005.2 (defining terms); 12 C.F.R. 1005.3 (describing what the EFTA covers).

<sup>128</sup> *Nero v. Uphold HQ, Inc.*, 688 F.Supp.3d 134 (S.D.N.Y. 2023).

<sup>129</sup> *Id.* at 142.

Even if the courts adopt this expansive definition of “funds,” in order to be subject to the EFTA, courts will also have to find crypto companies come within the EFTA’s definitions of “financial institution,” “access device” and the provision of “electronic financial services.”<sup>130</sup>

Carla Sanchez-Adams raises another issue that is crucial to whether consumers can take advantage of the EFTA’s remedy provisions. “Even if the EFTA applies in theory, it may be difficult to find an entity to hold responsible, given the purported decentralized nature of crypto-assets. Moreover, the EFTA likely does not protect consumers from fraudulently induced transactions that the consumer initiates (as opposed to unauthorized transactions.)”<sup>131</sup>

Under the present administration and Congress, it is extremely unlikely that the EFTA will be amended in a fashion that protects consumers or that there will be any legislation regulating crypto to protect them.<sup>132</sup>

## H. Artificial Intelligence<sup>133</sup>

### 1. AI’s application to payment services

Big Tech has taken advantage of Artificial Intelligence (AI) to improve the security and customer service of payment systems.<sup>134</sup> Unfortunately, online fraudsters also have taken advantage of AI.<sup>135</sup>

### 2. The applicable law

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<sup>130</sup> 12 C.F.R. §§ 1005.2(i); 12 C.F.R. §§ 1005.2(a) (Financial institution is defined, in part, in section 1005(i) as an entity that provides “electronic financial services,” but that term is not defined).

<sup>131</sup> Carla Sanchez-Adams, *Consumer Remedies for Electronic Fund Transfers Under the Electronic Fund Transfer Act*, 2024 ADVANCED CONSUMER & COM. L. 15-11, State Bar of Texas (2024), available on Westlaw.

<sup>132</sup> E.g., *President Donald J. Trump Establishes the Strategic Bitcoin Reserve and U.S. Digital Asset Stockpile*, The White House, March 6, 2025, <https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-establishes-the-strategic-bitcoin-reserve-and-u-s-digital-asset-stockpile/>; Sean Stein Smith, *3 Takeaways from the White House Crypto Summit*, FORBES, March 8, 2025, <https://www.forbes.com/sites/digital-assets/2025/03/08/3-takeaways-from-the-white-house-crypto-summit/>; Alexander Saeedy, *Trump Media Tries Push Into Finance*, WALL ST. J., Jan. 30, 2025, at A4 (reporting that Trump’s company, Trump Media & Technology planned to start a financial services company that would sell crypto). Trump has promised to make the United States the “crypto capital of the planet.” Krystal Hur, *Crypto Backers See 2025 as Year Digital Currencies Go Mainstream*, WALL ST. J., Jan. 2, 2025, at R1.

<sup>133</sup> See *infra* text accompanying notes 155-66.

<sup>134</sup> Daniel Wolfe, *Forecasting the Future of the Payments Industry*, AM. BANKER, March 18, 2025; See John Adams, *What Stripe’s New \$9 Billion Valuation Means for Payments*, AM. BANKER, Feb 27, 2025 (reporting that fintechs PayPal and Klarna are investing in AI).

<sup>135</sup> Wyatt Grantham-Phillips, *Tax Season Triggering Scammers*, ATLANTA J. CONST., March 30, 2025, at D3 (reporting that scams are more sophisticated due to generative artificial intelligence enabling ‘hyper-realistic’ phishing messages including video and audio deepfakes); Selam Gebrekidan & Joy Dong, *Online Scammers Clean Money With Ruthless Efficiency*, N.Y. TIMES, March 23, 2025, at 1, 15 (reporting that online scammers use AI to launder the money they steal from consumers).

There is no federal AI law applicable to consumer payments. It is unlikely there will be any law restricting AI for the next 4 years because President Trump opposes restrictions on the further development of AI.<sup>136</sup>

### III. Big Tech’s online contracting environment

Most of this article concerns public law such as statutes, regulations, and case law decisions applying and interpreting them. But the private law of contracts also has a significant impact on consumers using Big Tech payment systems. Big Tech has made electronic commerce and online contracting possible. These contracts create the consumer’s legal obligation to pay for the goods and services subject to the contract. In addition, the consumer often agrees to the company’s contract provisions on privacy, the arbitration of disputes and other matters affecting the consumer. The terms and conditions of these contracts are displayed on the business’ website.

In 2022, the ALI issued a Restatement of the Law of Consumer Contracts.<sup>137</sup> Its objective was to present “a comprehensive set of requirements unifying . . . common law jurisprudence.”<sup>138</sup> Unfortunately, the Restatement fails to ensure that consumers assent to standard contract terms in any meaningful fashion.

The Restatement provides that consumers adopt standard contract terms as long as there is reasonable notice of the terms and the opportunity to review the terms.<sup>139</sup> In effect, the Restatement provides that consumers agree to and are bound to the terms of a contract without much more than the click of a mouse. This approach does not protect consumers. As the Reporters acknowledge, “consumers typically lack the information, sophistication, and incentive to monitor the terms.”<sup>140</sup> Consequently, “there is concern that businesses will include terms that are unreasonably one-sided, unfair, and inefficient.”<sup>141</sup> Consumers agree to terms “[i]n a world of lengthy standard forms, which consumers are unlikely to read. . . .”<sup>142</sup> They explain that “[i]t is both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses. . . .”<sup>143</sup> Nevertheless, the Restatement’s rules fail to take into account these realities of consumer contracting.

In addition to failing to ensure meaningful assent, the Restatement formulated its rules in the context of an out-of-date online environment. Because the ALI purports to be producing a “Restatement” of the law, the Reporters based their rules on the extant caselaw. All the caselaw

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<sup>136</sup> *Fact Sheet: President Donald J. Trump Takes Action To Enhance America’s AI Leadership*, THE WHITE HOUSE (Jan. 23, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-takes-action-to-enhance-americas-ai-leadership/>.

<sup>137</sup> RESTATEMENT OF THE LAW CONSUMER CONTRACTS, TENTATIVE DRAFT NO. 2 (Am. Law Inst. 2022).

<sup>138</sup> *Id.* at 4.

<sup>139</sup> *See Id.* § 2. at 4, 29; Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute’s Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 385 (2020).

<sup>140</sup> Consumer Restatement, *supra* note 137, at 1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 3.

<sup>143</sup> *Id.* at 1.

at that time, however, involved desktop and laptop computers with consumers agreeing to terms by clicking on a mouse.<sup>144</sup> Consequently, they did not consider whether different rules might be appropriate and necessary if the consumer reviewed contract terms on the smaller screen of a tablet or mobile device.<sup>145</sup> They only reviewed cases and situations where the consumer manifested assent by clicking on a mouse.<sup>146</sup> As a result, they did not consider whether different rules would be appropriate where the consumer manifests assent by using a touchpad, tapping on a screen, or talking to a device such as Alexis or Siri.<sup>147</sup>

Meanwhile, courts are slowly developing the law by deciding individual fact-intensive cases.<sup>148</sup> But the case law is not uniform or consistent.<sup>149</sup> Furthermore, controversies decided in arbitration impede case law development by shunting many of the disputes into private services that do not publish their arbitrators' decisions.<sup>150</sup>

## I. A better relationship between technology, consumers, and the law

People have been skeptical and fearful of the impact of technology on their personal lives for many years. For example, the Luddites were textile workers in England in the 19th century who opposed the introduction of automated machinery.<sup>151</sup>

In the 1960's and 1970's there was an extensive debate about the relationship between law and technology. One school of thought believed in "Technological Messianism." Big Tech could solve all of society's problems. Consequently, the law should do nothing to impede its progress and application to society.<sup>152</sup>

Opposing them were those who believed in "Technological Determinism," that technology has a detrimental effect on society.<sup>153</sup> Furthermore, it cannot be controlled.<sup>154</sup>

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<sup>144</sup> *Id.* at 43, 48, 50, 51, 55, 57, 58.

<sup>145</sup> *ComDisclosures: How To Make Effective Disclosures In Digital Marketing*, FED. TRADE COMM'N. 8, 10, 18 (Mar. 2013) <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

<sup>146</sup> Consumer Restatement, Comment, *supra* note 137, at 25-29, 32, 33,35-38.

<sup>147</sup> See generally Mark E. Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts In Cyberspace*, 43 NOVA L. REV. 235 (2019).

<sup>148</sup> Nancy S. Kim, *New Developments In Digital and Wrap Contracts*, 76 BUS. LAW. 349 (2020-21).

<sup>149</sup> *Id.*

<sup>150</sup> W. Mark C. Weidemaier, *Toward A Theory of Precedent In Arbitration*, 51 WM. & MARY L. REV. 1895, 1904 (2010).

<sup>151</sup> Christine A. Corcos, *"I Am The Master" Some Popular Culture Images Of AI In Humanity's Courtroom*, 5 SAVANNAH L. REV. 45, 55 n. 30 (2018).

<sup>152</sup> Mark Budnitz, *The Finicky Computer, The Paperless Telex and the Fallible Swiss: Bank Technology and the Law*, 25 B. C. L. REV. 259, 261 (1984).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

In the middle were those who thought technology can be controlled, and the skillful drafting of laws can enact guardrails that protect the public, while not unduly hindering innovation and continuous development of Big Tech.<sup>155</sup>

The experts' current attention is focused mainly on the impact of AI on society and what role the law should play. The article next examines that issue because the debate about AI is likely an accurate model for looking at the relationship between the law and Big Tech as a whole.

On one side are those deeply involved in the development of AI who staunchly believe AI has enormous potential to improve society.<sup>156</sup> We should either enact no laws to restrict AI or enact laws to prevent anything that might stifle further technological development. They assert that the benefits will overwhelmingly outweigh the costs. Already, some have speculated that AI will lead to amazing advances in medicine.<sup>157</sup> President Trump agrees with that view. He says removing legal restrictions on AI is a major step in making America great again.<sup>158</sup> There is great risk in adopting that policy if its supporters are wrong.

In stark contrast, some experts strongly believe that AI will result in the destruction of humankind.<sup>159</sup> In other words, AI will bring us Hell on Earth. They are particularly alarmed by their belief that Artificial General Intelligence has the potential to exceed human intelligence.<sup>160</sup> The International Scientific Report On the Safety of Advanced AI, a report by AI experts, provides support for those who fear the worst. Their report mentions the following concerns about what general purpose AI can produce: biased decisions, scams, fake media, privacy violations, hacking, and biological attacks.<sup>161</sup> Some experts believe the likelihood of these events becoming major problems depends upon what steps governments take to limit these risks and the

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<sup>155</sup> *Id.* at 262-63.

<sup>156</sup> E.g., Berber Jin & Joanna Stern, *Anthropic CEO Sees AI Topping Human Intelligence*, WALL ST. J., (Jan. 22, 2025), at B4, <https://www.wsj.com/livecoverage/stock-market-today-dow-sp500-nasdaq-live-01-21-2025/card/anthropic-ceo-says-ai-could-surpass-human-intelligence-by-2027-9tka9tjLKLalkXX8IgKA>; Doug Turnbull, *AI helping police catch distracted drivers*, ATLANTA J. CONST., (March 2, 2025), at B3, <https://www.ajc.com/news/atlanta-news/gridlock-guy-ai-being-tested-to-nab-distracted-drivers/C7N3HP5KLZEVJJB5DOSNQV77AE/>.

<sup>157</sup> Belle Lin, *AI-Powered Databases Boost Alzheimer's Drug Discovery*, WALL ST. J. (Mar. 25, 2025), at B4, <https://www.wsj.com/articles/ai-powered-databases-boost-the-alzheimers-drug-discovery-process-b9b75180>; CRI Staff, *AI and Cancer: The Emerging Revolution*, Jan. 14, 2025, [www.cancerresearch.org/blog/january-2025/ai-cancer](http://www.cancerresearch.org/blog/january-2025/ai-cancer) (visited March 18, 2025).

<sup>158</sup> The White House, *Fact Sheet: President Donald J. Trump Takes Action To Enhance America's AI Leadership* (2025).

<sup>159</sup> Amit Katwala, *The Quantum Apocalypse Is Coming. Be Very Afraid*, WIRED (Mar. 24, 2025) <https://www.wired.com/story/q-day-apocalypse-quantum-computers-encryption/> (visited April 1, 2025); Chris Vallance, *Artificial Intelligence Could Lead to Extinction, Experts Warn*, BBC (May 30, 2023) <https://www.bbc.com/news/uk-65746524> (visited March 18, 2025); Tasos Kokkinidis, *Artificial Intelligence Will "Likely" Destroy Humans, Researchers Say*, GEEK REPORTER (Sept. 16, 2022) <https://geekreporter.com/2022/09/16/artificial-intelligence-annihilate-humankind/> (visited March 18, 2025).

<sup>160</sup> Kevin Roose, *A.I. Will Soon Be Smarter Than Humans. Let's Discuss*, N.Y. TIMES, March 16, 2025, Sunday Business, at 1. (Some states are considering legislation to regulate AI); See e.g., Caleb Groves, *Georgia Lawmakers Move to Rein in AI*, ATLANTA J. CONST., Mar. 28, 2025, at A14.

<sup>161</sup> *International Scientific Report on the Safety of Advanced AI: Interim Report*, May 17, 2024 [www.gov.uk/government/publications/international-scientific-report-on-the-safety-of-advanced-ai/international-scientific-report-on-the-safety-of-advanced-ai-interim-report#executive-summary](http://www.gov.uk/government/publications/international-scientific-report-on-the-safety-of-advanced-ai/international-scientific-report-on-the-safety-of-advanced-ai-interim-report#executive-summary) (visited April 8, 2025).

effectiveness of those steps. A major limit facing regulators is that the techniques that explain why AI models produce their results are “severely limited.”<sup>162</sup>

The Biden administration had been moving towards a policy somewhere in the middle of these starkly opposing positions.<sup>163</sup> It appears the former administration would have recommended that Congress pass laws that do not unduly restrict innovation but also include guardrails to prevent serious harm.<sup>164</sup>

It is impossible to predict the impact of AI in the future, but we already know there have been many serious problems:

Big Tech has greatly improved the ability of criminals to perpetrate payment fraud on consumers.<sup>165</sup>

Big Tech has resulted in a loss of customer service jobs. That means consumers who have been defrauded or deceived will have less human contact when they need help.<sup>166</sup>

The current administration is unlikely to choose the path of reasonable regulation.<sup>167</sup>

As discussed above, experts and policymakers are seriously divided on whether AI is beneficial to society and should be regulated. A similar division can be anticipated over whether Big Tech-enabled consumer payments should be regulated.

Even if we reject the notion that Big Tech will bring horrible consequences some may contend that legislation is inappropriate. They assume consumers make rational choices. They believe any regulation will stifle innovation and impose more costs on consumers in the form of less convenience and higher costs than any benefits that may result.<sup>168</sup> They look to consumer information and education as the best solution. Better informed consumers will know how to

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<sup>162</sup> *Id.*

<sup>163</sup> Exec. Order No. 14110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

<sup>164</sup> *Id.*

<sup>165</sup> Chris Morris, *AI Scams Reach New Threat Levels*, AARP BULLETIN (Mar. 10, 2015) [https://advertise.aarp.org/uploads/misc/AB\\_MarApr\\_2025.pdf](https://advertise.aarp.org/uploads/misc/AB_MarApr_2025.pdf); Kelvin Chan, *General purpose AI Could Lead to Array of New Risks, Experts Say*, AP (Jan. 29, 2025), <https://apnews.com/article/artificial-intelligence-research-danger-risk-safeguards-7b9db4ca69a89a4dd04e05a4294a3dfd> (visited March 26, 2025); Angel Au-Yeung, *Scammers Turn to AI for Holidays*, WALL ST. J., Dec. 23, 2024, at B4.

<sup>166</sup> Bill Conerly, *AI and the Economy: Customer Service Jobs Will Be Cut, Quality Improved*, FORBES (Sep. 28, 2023) <https://www.forbes.com/sites/billconerly/2023/09/28/ai-and-the-economy-customer-service-jobs-will-be-cut-quality-improved> (Visited Mar. 26, 2025); Alexander Saeedy, *The AI Strategy On the Rise at JPMorgan*, WALL ST. J., Feb. 27, 2025, at R4 (describing JPMorgan’s use of AI to help answer customers’ questions and in the future building models in which AI approaches a question “in the same way a human being would approach it”).

<sup>167</sup> The White House, *Removing Barriers to American Leadership in Artificial Intelligence*, Jan. 23, 2025 (revoking Biden’s Executive Order 14110 that instructed government agencies to consider what take steps to take to ensure that AI development would be “safe, secure, and trustworthy”) <https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence> (visited Mar. 25, 2025).

<sup>168</sup> Alan M. White, *Behavior and Contract*, 27 L. & INEQUALITY: A J. OF THEORY & PRACTICE 135, 138-39 (2009).

avoid the scams. Financial information will enable consumers to decide which honest companies offer the best deals.<sup>169</sup>

There is a great deal of evidence that these assumptions about consumers are false. Some consumers are gullible.<sup>170</sup> Many elderly consumers are especially vulnerable.<sup>171</sup> There are many resources, both on-line and in print, from the government and non-profits, that supply useful information consumers can use to protect themselves.<sup>172</sup> Unfortunately, whether the fault of poor educational opportunities or learning deficiencies, many consumers read at a very low level.<sup>173</sup> Consequently, they will have difficulty understanding the written material that explains how they can protect themselves. Furthermore, the scammers constantly alter their strategies, so consumer education is always a step behind. As noted above, scammers, with the assistance of Big Tech, have become ever more clever and skillful.<sup>174</sup> Even the most sophisticated corporations with enormous resources and government agencies with a wealth of experience have failed to protect themselves and others from some of the least complicated and most obvious fraud.<sup>175</sup>

This article assumes that new laws are necessary, given the prevalence of known serious injury to consumers and their inability to protect themselves.<sup>176</sup> Furthermore, the best approach is to take a middle path, not stifling innovation, but providing consumers essential protection. Drafting any laws restricting Big Tech in offering new payment systems will be challenging. “Law in any form is an achievement of painful, slow invention....”<sup>177</sup>

Determining how to draft legislation between the two extremes is daunting. It is unwise to enact laws that would make it impossible for companies to offer present services in their present

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<sup>169</sup> See e.g., The Consumer Fin. Prot. Bureau, *Financial Education for Adults*, <https://www.consumerfinance.gov/consumer-tools/educator-tools/adult-financial-education/> (visited March 27, 2025).

<sup>170</sup> Donna S. Shapiro, *The Georgia Fair Business Practices Act: Business As Usual*, 9 GA. ST. U. L. REV. 453, 459 (1993) (explaining that the FTC’s standards protect gullible consumers); Richard M. Schmidt, Jr. & Robert Clifton Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1278 (1988) (discussing whether the FTC had adopted the reasonable man standard, even though it claimed it would protect the gullible).

<sup>171</sup> Elise Ceyral, *Disrupting Elder Fraud*, 66 AARP BULLETIN, no.2, Mar.10 2025, at 16 (describing formation of the National Elder Fraud Coordination Center and reporting that according to the FTC, in 2023 \$61.5 billion was stolen from consumers 60 years old and older).

<sup>172</sup> See *id.*; See generally CONSUMER ACTION, [www.consumer-action.org](http://www.consumer-action.org) (last visited Apr. 8, 2025); See also FED. TRADE COMM’N, [www.ftc.gov](http://www.ftc.gov) (last visited Apr. 8, 2025).

<sup>173</sup> Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 235-39 (2002).

<sup>174</sup> See *supra* text accompanying notes 17, 122; See generally Selam Gebrekidan & Joy Dong, *Online Scammers Clean Money With Ruthless Efficiency*, N.Y. TIMES, March 23, 2025 at 1 (discussing the role of money laundering the proceeds of online scams).

<sup>175</sup> See, e.g., Alexander Saeedy, *Was JPMorgan Conned Into A \$175 Million Acquisition?*, WALL ST. J., March 22-23, 2025, at 1 (describing how JPMorgan failed to conduct even minimal due diligence, instead made its decision to purchase an online company based on “trust”); Marcy Gordon & The Associated Press, *How Ponzi King Bernie Madoff Conned Investors and Seduced Regulators*, FORTUNE (Apr. 15, 2021), <https://fortune.com/2021/04/15/how-ponzi-king-bernie-madoff-conned-investors-and-seduced-regulators/> (describing how the SEC failed to detect Madoff’s fraud despite ten years of warnings and complaints).

<sup>176</sup> More than one law would likely be necessary since so many different types of systems and devices are involved.

<sup>177</sup> K. N. Llewellyn, *The Bramble Bush: On Our Law and its Study*, 117 Oceana Publications (3<sup>rd</sup> ed.1960).

iteration such as P2P. The new services are not inherently bad. In regard to the future, it makes no sense to enact laws that impede improving present products and developing new ones. That would not benefit consumers if the improvements and new products would make payments more convenient, safer, and/or less costly. As suggested below, it is possible to preserve Big Tech payment services while also protecting consumers who use these services.

Another issue is whether to amend current law, the EFTA and Reg. E, or enact new laws specifically designed for each particular type of payment service. Examples are separate laws for ATM transactions, P2P transfers, mobile banking, and remote deposit capture. The advantage of amending present law is that the parties owning and operating the services are familiar with complying within the framework of that law. Many consumers likely are not nearly as familiar unless they have encountered a problem and learned the law through the experience of trying to obtain relief, but for the most part, it appears the EFTA has worked reasonably well for functions such as direct deposit and debit and prepaid cards. The disadvantage is that “one size” does not necessarily “fit all” and it may be awkward and confusing to try to amend a law that covers many types of new Big Tech services.

An independent discrete law designed especially for that type of service would have the advantage of not trying to fit within a statutory scheme that never anticipated the new formats.<sup>178</sup> One disadvantage is such a law may be too narrowly drafted to account for new variations of that service, leaving those new forms unregulated. In addition, an entirely different type of service, currently unimaginable, may well be invented. Unless there is a law like the EFTA that can serve as an “umbrella” that governs the new platforms, they will be unregulated.

Without resolving this conundrum, the remainder of this section will assume independent discrete laws rather than one law to cover all payment services is the best course of action.

#### IV. Proposed New Laws To Govern Big Tech Payment Services

##### A. General Considerations

The new laws should include specific rules that are tailored to deal with presently identifiable problems. For example, the laws should provide the same relief for consumers who are tricked by fraudsters into making “authorized” transfers as the relief granted to consumers whose money is stolen in “unauthorized” transfers.<sup>179</sup>

The new laws, however, should also include general standards because businesses inevitably will discover ways to get around specific rules designed to deal with discrete issues that are covered by the rules.<sup>180</sup> Furthermore, general standards are necessary to handle new unanticipated issues

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<sup>178</sup> Mansfield, *supra* note 31, at 372 (2024) (explaining that in the 1980s the legislators and regulators could not possibly anticipate the type of fraud prevalent today).

<sup>179</sup> See *supra* text at note 185.

<sup>180</sup> See generally Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules v. Standards Revisited*, 79 OR. L. REV. 23, 30 (2000) (describing how there is not always a clear distinction between rules and standards).

that will inevitably arise with regard to current services. Lastly, rules likely will not cover problems that arise in regard to new products.

The UCC provides a somewhat useful example of a statute containing both very specific rules, but also general standards such as “good faith” and “commercial reasonableness.”<sup>181</sup> The problem with those types of standards is their generality and vagueness. They give neither businesses nor consumers the guidance they need. They leave to the courts the job of fleshing out, case-by-case, how to apply those standards. That will result in a variety of rulings resulting in a patchwork. Moreover, each case is fact-specific, so it will be uncertain how to apply the cases even to circumstances that are only somewhat different.

In light of the above, laws to govern the Big Tech payment services should include both rules and standards.

The consumer payment laws should be technology-neutral. Specifically, they should not regulate AI. Nevertheless, lawmakers should enact a separate general AI law that establishes guardrails on AI. That law will have a direct effect on consumers’ acceptance of the new payment services. That is because there has been a great deal of publicity about AI’s detrimental potential. As a result, if consumers believe AI is in control of those services, they may not want to use them, absent strong laws protecting them.<sup>182</sup> If there is a law that consumers believe provides adequate protection from AI’s possible dangers, there is a better chance they will trust the services and be willing to use them. In that way, an AI is beneficial to both consumers and businesses that develop the services.

## B. Elements of Proposed Laws To Regulate Big Tech Payment Services

The new laws should follow two principles: the laws should not unduly stifle innovation and development, while at the same time protecting consumers from serious harm. They should adopt a multi-prong approach.

First, the laws should require the disclosure of risks and dangers, as well as the most important consumer legal rights in the laws. The warnings that Zelle provides consumers are instructive.<sup>183</sup> For example, Zelle informs consumers that payments cannot be cancelled.<sup>184</sup> That disclosure

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<sup>181</sup> See U.C.C. § 1-304 (rule statement) (“[e]very contract or duty...imposes an obligation of good faith in its performance and enforcement.”); U.C.C. §1-201(b)(20) (defines good faith) (“[H]onesty in fact and the observance of reasonable standards of fair dealing.”); U.C.C. § 1-304 cmt. 1 (statement describing a major restriction in the section does not) (“[S]upport an independent cause of action...and does not create a separate duty of fairness and reasonableness that can be independently breached.”); A security procedure must be (“commercially reasonable.”) See U.C.C. § 4A-202(c); See also U.C.C. § 9-610(a) & (b) (requirement that sales of collateral after default must be (“commercially reasonable”).

<sup>182</sup> Consumers’ fears that AI could control payment services is not without basis. See generally Yoshua Bengio et. al., *International Scientific Report on the Safety of Advanced AI: Interim Report*, AI SAFETY INSTITUTE (May 17, 2024) (finding that there is a risk of “society losing control over general-purpose AI; the likelihood depending upon what steps society takes to limit those risks and the effectiveness of those steps).

<sup>183</sup> See *supra* note 43.

<sup>184</sup> *Id.*

should be supplemented with the addition of language such as: “When we say that payment cannot be cancelled, that means we may not reimburse you even if the money is not transferred in the amount or to the person you intended.” Another disclosure on Zelle transactions should include: “Only send money to people you know and trust.”

Second, the laws should include substantive legal rights that deal with specific known issues, or ones that are reasonably foreseeable. For example, as discussed above, consumers using P2P services now have no explicit protection when they “authorize” a transfer of funds as a result of being deceived by a fraudster. Professor Mansfield has proposed several ways in which the EFTA and Reg. E could be changed. One possibility is to classify such payments as coming within the definition of “authorized.”<sup>185</sup> Another is to define “error” to include those circumstances under which the transfer was induced by fraud.<sup>186</sup> Her third proposal is to provide that a fraudulent transfer be considered an “incorrect” transfer.<sup>187</sup>

Third, the laws should require certain procedures that companies are required to take. The EFTA provides a useful model.<sup>188</sup> Under that law and Reg. E, each calendar year the financial institution must mail or deliver a notice informing the consumer of its error resolution procedure.<sup>189</sup> When consumers believe an error has occurred, they may notify the institution.<sup>190</sup> There are deadlines for that notification as well as time requirements for the institution to investigate and resolve the consumer’s complaint.<sup>191</sup> If the institution needs more than ten days to determine if an error occurred, it can take another 45 days, but only if it “provisionally recredits” the consumer’s account for the amount of the alleged error while it continues its investigation.<sup>192</sup> Laws regulating new Big Tech payment systems should contain adjustments to to accommodate the new systems’ various features.

Fourth, the laws should require that companies conform to certain general standards. Given the endless variety of situations in which consumers use the many payment systems available, and the certainty that more will be developed by Big Tech in the future, general standards of conduct are essential to ensure that consumers have protection in those circumstances which do not clearly fall within the areas covered by the provisions on procedures and specific rights that arise in the situations dealt with in the law.

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<sup>185</sup> Mansfield, *supra* note 31, at 365, 375, 377.

<sup>186</sup> *Id.* at 380.

<sup>187</sup> *Id.* at 381.

<sup>188</sup> The text contains a brief summary. Reg. E’s provisions on error resolution procedures are considerably more complex.

<sup>189</sup> 12 C.F.R. 1005.8(B).

<sup>190</sup> 12 C.F.R. 1005.11(B).

<sup>191</sup> 12 C.F.R. 1005.11(B)(1)(i),

<sup>192</sup> 12 C.F.R. 1005.11(C)(2)(i).

A variety of standards should be considered, including unfair, deceptive or abusive acts or practices,<sup>193</sup> unconscionability,<sup>194</sup> commercial reasonableness,<sup>195</sup> good faith,<sup>196</sup> and “state of the art.”<sup>197</sup> Whatever standards are chosen, the laws also must provide that the standards create an independent duty, and failure to meet those standards provide consumers with an independent cause of action. This is necessary to distinguish these laws from the UCC’s treatment of good faith.<sup>198</sup>

Fourth, the laws must guarantee that consumers have a private right of action. Both the Truth in Lending Act and the EFTA provide models for that right.<sup>199</sup> The basic elements are that if consumers’ lawsuits are successful, they are entitled to actual and statutory damages, costs “together with a reasonable attorney’s fee as determined by the court.”<sup>200</sup> The provision on statutory damages is intended to encourage consumers to bring lawsuits for violations of the law even if they cannot show substantial damages, or indeed, any damages at all.<sup>201</sup> It provides a financial incentive for consumers to act as “private attorneys general.”<sup>202</sup> This is because in the typical payment transaction, the consumer does not suffer enough actual damages to justify hiring and paying a lawyer.

Without these incentives, the only way to ensure enforcement of the law is by state and federal agencies. Unfortunately, government agencies cannot be counted on to fulfill that function. The CFPB has been substantially scaled back.<sup>203</sup> Nevertheless, the laws should authorize state and federal agencies to enforce the law. Hopefully, state agencies will assume that responsibility in years when the federal agencies are dormant.

Consumers cannot depend upon state attorneys general to enforce federal consumer protection laws.<sup>204</sup> A state attorney general office has many other responsibilities, including representing the

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<sup>193</sup> 12 U.S.C. §§ 5531, 5536, 5552.

<sup>194</sup> See generally Consumer Restatement, § 5 *supra* note 137; CAROLYN L. CARTER & JONATHAN A. SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 377 - 86 (11<sup>th</sup> ed. 2025).

<sup>195</sup> See U.C.C. § 4A-202 (“commercial reasonableness” standard on security procedures for wired transfers); See also U.C.C. § 9-610(B) (“commercial reasonableness” standard on sale of collateral); See Michael Korybut, *Searching For Commercial Reasonableness Under The Revised Article 9*, 87 IOWA L. REV. 1383 (2002) (analyzing how courts have struggled to apply U.C.C. § 9-610(b)); *Patco Construction Co. Inc. v. People’s United Bank*, 684 F.3d 197, 213 (1<sup>st</sup> Cir. 2012) (finding bank’s security procedures were not commercially reasonable).

<sup>196</sup> See *infra* note 198.

<sup>197</sup> *Migden v. Chase Manhattan Bank*, 32 U.C.C. Rep. Serv. (Callaghan) 937 (N.Y. Civ. Ct. 1981); See Mark Budnitz, *The Finicky Computer, The Paperless Telex and The Fallible Swiss: Bank Technology and the Law*, XXV B.C. L. REV. 259, 280-82 (1984).

<sup>198</sup> See U.C.C. § 1-304 (providing that every contract or duty imposes an obligation of good faith); See also U.C.C. § 1-304 cmt. (stating that the section “does not support an independent cause of action for failure to perform or enforce in good faith....the doctrine of good faith...does not create a separate duty of fairness and reasonableness which can be independently breached”).

<sup>199</sup> 15 U.S.C. § 1640; 15 U.S.C. § 1693M.

<sup>200</sup> 15 U.S.C. § 1693M(A)(3).

<sup>201</sup> Sarah Bolling Mancini & Elizabeth Renuart, *Truth in Lending* 972 (11<sup>th</sup> ed. 2023).

<sup>202</sup> *Id.*

<sup>203</sup> Kate Berry, *CFPB is back to doing enforcement again...sort of*, AM. BANKER, April 7, 2025 (reporting that the CFPB dismissed at least nine cases, stopped all enforcement actions, and ceased its supervision responsibilities).

<sup>204</sup> Amy Widman & Prentiss Cox, *State Attorneys General’s Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 81, 82 (2011) (reporting authors’ survey found only a

state in lawsuits and other forums.<sup>205</sup> They lack the resources to pursue all the complaints they receive from consumers.<sup>206</sup> In most states the attorney general is an elected official.<sup>207</sup> Consequently, political decisions likely play a role in enforcement decisions.

Because consumers cannot depend on government agencies, a private right of action is crucial. But companies easily circumvent that right by inserting pre-dispute arbitration clauses into their contracts with consumers.<sup>208</sup> Pre-dispute arbitration clauses are problematic for consumers for several reasons.<sup>209</sup> For one, consumers cannot knowingly and intelligently decide whether or not they want to bring their dispute before a court or an arbitrator before they know what type of dispute they may have in the future. They may prefer one over the other depending on many factors.

For example, their dispute may involve solely a question of law that the business has clearly violated. In that situation, consumers may prefer to try their case before a judge, since an arbitrator is not required to follow the law.<sup>210</sup> In order to prove their case, consumers may need to engage in discovery to obtain essential documents. An arbitrator has far more freedom to limit discovery than a judge who is required to follow rules governing discovery.<sup>211</sup> A dispute may be a matter of proving certain facts. Consumers may prefer a trial in court before a jury if they have compelling facts, such as arguably unconscionable conduct by the business.<sup>212</sup>

On the other hand, consumers may prefer the relative speed of arbitration. If the facts favor the consumer, but the law is not clearly in the consumer's favor, the consumer may prefer an

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“modest number of cases” brought by state attorneys general to enforce federal consumer laws; about half of the federal statutes the attorneys general could take advantage of were never used).

<sup>205</sup> Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 2 (2021) (stating that “[s]tate attorneys general are the chief litigators for their states.”).

<sup>206</sup> Perry A. Craft, *State Consumer Protection Enforcement: Recent Trends and Developments*, 59 ANTITRUST L. J. 997, 1000 (1991); Chris Fox-Lent, *By the Courts, For the Bar: Judicial Exemption of Lawyers From the Scope of Consumer Protection Laws*, 37 N.Y.U. REV. L. & SOC. CHANGE 513, 547 n. 186 (2013) (stating that Georgia and Tennessee do not handle consumer complaints).

<sup>207</sup> Miller, *supra* note 205, at 3 (reporting that in 43 states the attorney general is an elected official; as of 2021, in 26 states the attorneys general were Republican and in 24 they were Democrats); *see generally* Greg Bluestein, *Carr Bets on MAGA Support in 2026 Race*, ATLANTA J. CONST., March 31, 2025, at 1 (reporting that Georgia's Attorney General previously ran as a traditional Republican, but as a current candidate for governor has filed briefs supporting Trump policies).

<sup>208</sup> David H. Seligman, et al., *Consumer and Worker Arbitration Provisions*, NAT'L CONSUMER L. CTR. § 9-14 (9th ed. 2024).

<sup>209</sup> *Id.*

<sup>210</sup> Matthew Savare, *Clauses in Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause?*, 35 SETON HALL L. REV. 597, 601 (2005) (Many arbitration clauses permit consumers to file claims in a small claims court. That may be a faster and less costly alternative than regular court or arbitration, but has its own limitations, such as limits on the amount of a judgment and limited discovery).

<sup>211</sup> Seligman, *supra* note 208, at 13.

<sup>212</sup> *Holcomb v. Citibank*, No. 01-23-0003-2786, (E.D. Mo. June 27, 2024) (finding that “TMX transmitted, and Citibank received, thirteen alerts of ‘high risk’ activity on Mrs. Holcomb’s account in a span of one hour, yet Citibank never alerted Ms. Holcomb of the suspicious activity; never froze the account; never put any security limit on the account or even investigated why the alerts were occurring in the first place”).

arbitrator that is not required to follow the law. Consumers may prefer arbitration if the fees and costs of arbitration will be lower than a proceeding in court.<sup>213</sup>

Arbitration threatens the integrity of the legal system. Cases involving consumer payment systems present a great variety of circumstances. The orderly development of the law depends on courts applying the law to the specific facts before them. Their decisions provide guidance to courts and future parties.<sup>214</sup> Arbitration decisions typically are not made public.<sup>215</sup> As noted above, arbitrators are not even required to follow the law, including statutes, regulations, and court decisions, much less consider the non-public decisions of other arbitrators.<sup>216</sup>

Consequently, a fifth element of the laws should be prohibiting pre-dispute arbitration. There will inevitably be strong opposition to that, but without it, the proposed laws would be far less effective because most cases will be heard in arbitration instead of in the courts.

Another provision in most contracts between consumers and financial institutions prohibits consumers from bringing or being part of a class action, whether the case is in arbitration or in court. That also should be prohibited.

Sixth, the laws should deal with the demise of *Chevron* deference by granting the CFPB broad and explicit authority to regulate the payment systems subject to the laws.<sup>217</sup>

## I. Conclusion

This examination of the impact of Big Tech on consumer payments began with an exploration of ATMs, the earliest example of technology's contribution to such payments. As described above, over the years the ATM was able to offer new types of services as the technology advanced. Nevertheless, the ATM's future is in doubt as there may be substantially less need for ATMs as consumers use less cash and fewer checks.<sup>218</sup> It may be premature, however, to predict the future obsolescence of the ATM. The financial services industry has shown it can use Big Tech to adapt ATMs to new developments. ATMs that dispense crypto are the latest example of this.<sup>219</sup>

The article examined several other innovations in consumer payments made possible by Big Tech, pointing out what is good for consumers as well as what is bad. It pointed out unintended consequences that resulted from lawmakers' failure to anticipate that consumers would be using wire transfers that formerly were used primarily by businesses, and that fraudsters would take advantage of every new and old payment service to steal consumers' money.

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<sup>213</sup> See generally Seligman, *supra* note 208, at 292-95.

<sup>214</sup> *Id.* at 12.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

<sup>218</sup> See *supra* text accompanying notes 22-24.

<sup>219</sup> See *supra* text accompanying note 30.

It is instructive to conclude the article by comparing ATMs to fintechs. At first this may seem surprising and inappropriate. After all, the ATM is an old financial machine, while fintechs are relatively new financial institutions. Scholars, however, have found it useful to analyze their similarities and differences. Fintechs are relatively new financial institutions that extensively apply financial payment services technology and provide new services.<sup>220</sup> Some contend that the ATM itself was a form of fintech because it “disrupt[ed] existing financial services and is fueled by innovators” and “had a material effect on the provision of financial services.”<sup>221</sup> Others reject that notion.<sup>222</sup> Some find an analogy between ATMs and fintechs. ATMs replaced tellers and branches, while fintechs replace “the third party delivery of services” by banks and other financial institutions.<sup>223</sup>

Whether or not one thinks ATMs are fintechs and the analogy with ATMs is convincing, there are certain similarities between the two. They both rely on technology. They both have been transformative.<sup>224</sup> They both provide new services that allow for more consumer independence.<sup>225</sup> Like ATMs that dispense crypto, there are gaps in the law governing fintechs since they are not regulated like traditional banks.<sup>226</sup> Fintechs can be expected to evolve, adapting to new societal conditions and consumer preferences, just as ATMs have evolved.<sup>227</sup> As with ATMs, there are both beneficial and harmful effects.<sup>228</sup> And the law will always contain gaps, exposing consumers to risks to their financial and emotional health.

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<sup>220</sup> Fintech “operates at the intersection of the financial services and technology industries.” Jordan Nimitz, *Shattering the Looking Glass: How a Section 101 Revision Could Save Fintech from Alice*, 30 FED. CIR. B.J. 55, 5659 (2020). Experts do not agree on how to define the term “fintech.” *Id.* at 59 (opining that “no comprehensive definition precisely details [fintech’s] nature and scope.”); Megan M. La Belle, *Fintech: New Battle Lines in the Patent Wars*, 42 CARDOZO L. REV. 277, 311-12 (2020) (using the Financial Stability Board’s definition of fintech).

<sup>221</sup> La Belle, *Id.* at 312.

<sup>222</sup> *Id.*

<sup>223</sup> Nimitz, *supra* note 220, at 59.

<sup>224</sup> See *supra* text accompanying note 4; Nimitz, *supra* note 220, at 56 (opining that fintechs are “revolutionizing the financial services industry”).

<sup>225</sup> *Id.* (arguing that fintechs produce “new technologies that allow consumers to independently manage their own finance without the inefficiency of using institutional intermediaries”).

<sup>226</sup> Cheng-Yun Tsang, *From Industry Sandbox to Supervisory Control Box: Rethinking the Role of Regulators in the Era of Fintech*, 2019 U. ILL. J. L. TECH & POL’Y 355, 374 (2019) (stating that some fintechs are not regulated as financial institutions).

<sup>227</sup> Christopher G. Bradley, *Fintech’s Double Edges*, 93 CHI.-KENT L. REV. 61, 62 (2018) (stating that “the development of financial technological tools is unpredictable and path-dependent, contingent both on technological developments as well as the social contexts in which tools are developed and used”).

<sup>228</sup> *Id.* at 70-78.