

## ARTICLES

### **New Developments in Payment Systems and Services Affecting Low-Income Consumers: Challenges and Opportunities**

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#### ABSTRACT

*The consumer financial services industry has taken advantage of digital technology to transform the way it provides services to consumers using payment systems. After describing this new digital environment, the article describes its impact on low-income consumers. It examines statutes and regulations that offer limited protection for low-income consumers as well as gaps in those laws. Next, the article discusses three approaches to protecting low-income consumers along with the benefits and limitations of each. One way low-income consumers can be protected is through enforcement of consumer protection laws by administrative agencies. A second is by enacting new statutes and regulations to fill gaps in the law. A third is for the government to establish its own financial services systems. The article then examines three proposals for new financial services systems. These proposals will fail to adequately protect low-income consumers, however, unless lawmakers require institutions providing these services to include low-income consumers in their decision-making process and to justify their actions based on low-income consumer impact assessments.*

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#### I. INTRODUCTION

The financial services industry has taken advantage of recent advances in technology to transform the services it offers consumers. New payment systems and services have been the focus of most of its efforts. These developments undoubtedly hold the potential to benefit all consumers. Unfortunately, they also pose especially large risks for low-income consumers. For, when something goes wrong, the impact on those consumers can be devastating.

This article first describes the increasingly digital nature of the environment in which low-income consumers use payment systems.<sup>1</sup> The article then describes the impact of poverty on the ability of low-income consumers to benefit from digital financial services.<sup>2</sup> Next, it examines the inadequacy of current law to protect low-income consumers.<sup>3</sup>

The article then analyzes three methods that have the potential to provide protection for low-income consumers using payment systems. These methods include agency enforcement of existing statutes, passing new statutes, and government-run consumer financial services.

First, administrative agency enforcement of statutes and regulations could help protect low-income consumers.<sup>4</sup> Current laws, however, do not account for the very profound changes that have taken place in the consumer financial services environment since those laws were enacted. The failure to update the statutes

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1. *See infra* text accompanying notes 16–41.

2. *See infra* text accompanying notes 42–57.

3. *See infra* text accompanying notes 58–79.

4. *See infra* text accompanying notes 80–103.

and regulations limits the effectiveness of agencies attempting to enforce these laws.

In addition, to a large extent agencies must base their enforcement actions on statutes and regulations that set out general standards, such as unfair, deceptive, and abusive acts and practices.<sup>5</sup> General standards, however, may not suffice because a 2022 opinion by the Supreme Court may severely hamper agency efforts to issue regulations that take recent developments into account without very specific authorization in the statutes authorizing the agency to act.<sup>6</sup> In addition, courts have struck down major statutory provisions authorizing enforcement agencies to protect consumers on constitutional grounds.<sup>7</sup>

The pervasiveness of mandatory arbitration clauses and provisions precluding consumers from participating in class actions presents another obstacle. Because these contract provisions preclude consumers from bringing lawsuits in courts, consumers must rely on administrative agencies to enforce consumer protection laws. Unfortunately, the agencies have a limited ability to effectively police the marketplace.<sup>8</sup>

Administrative agencies, nevertheless, can play an important role in responding to new financial services. For example, the Consumer Financial Protection Bureau (CFPB) is investigating peer-to-peer (P2P) payment services, such as Venmo and Zelle.<sup>9</sup> The article proposes regulations for the CFPB to consider.

A second method that could protect low-income consumers is enacting new statutes. Unfortunately, this is unlikely to occur in the near future because of the political stalemate in Congress. Congress' willingness to heed industry warnings that new laws stifle innovation contributes to its failure to pass new laws.<sup>10</sup> Moreover, it is difficult to draft new statutes that will not soon be obsolete because financial services offerings are changing rapidly in unanticipated and substantial ways.

Some states have gone ahead on their own by enacting statutes dealing with specific problems, such as rules governing privacy and requiring notice of security breaches.<sup>11</sup> But the consumer financial services industry is national in scope. State laws vary from one state to another, creating confusion for consumers and costly operational and legal difficulties for businesses.

The third method that may ensure consumer protection is government-run consumer financial services. This article considers three proposed examples of such systems. One is a Federal Reserve Board (FRB) proposal to establish a

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5. See *infra* text accompanying notes 67, 75–76. Agency attempts to apply these standards to a changed marketplace, however, have been problematic. The failure to protect online privacy is one example. See *infra* text accompanying note 87.

6. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022).

7. See *infra* text accompanying notes 85–88.

8. See *infra* text accompanying note 85–88, 99.

9. See *infra* text accompanying notes 117–141.

10. See *infra* text accompanying note 108.

11. See *infra* text accompanying notes 101, 103, 105.

“FedNow” payment service that promises “immediate” transfer of funds.<sup>12</sup> Unfortunately, the FRB’s Final Rule announcing what laws will apply to FedNow offers consumers little protection. This failure illustrates it is problematic to rely on a government agency to build a new payment system that adequately protects the public.

Another example is proposed legislation authorizing the United States Postal Service to offer financial services.<sup>13</sup> Advocates of this idea believe it can provide low-income consumers with an affordable alternative to fringe and traditional banks. Banks, however, have opposed this untested proposal.

A third example is the Biden Administration’s consideration of issuing digital currency through the central bank.<sup>14</sup> Even if implemented, digital currency will not remedy many of the other problems low-income consumers face when using payment services.

A fundamental problem with all three of these approaches is the government’s failure to specifically consider low-income consumers in its actions. Whenever the government is considering an activity that will significantly impact low-income consumers, their representatives should have a seat at the table.<sup>15</sup> They must be “in the room where it happens.” The government unit should be required to include a low-income consumer impact assessment and directly address that assessment in deciding what action to take.

## II. DIGITAL DOMINATES THE NEW ERA OF CONSUMER FINANCIAL SERVICES

In the last few years, advances in digital technology have fueled a transformation in consumer financial services. One example is the emergence of FinTechs, online financial businesses that offer payday loans and other financial services.<sup>16</sup> In the case of loans, lenders notify consumers in minutes whether they are approved for a loan instead of having consumers complete pages of paperwork and wait for days or longer.<sup>17</sup> Lenders arrange loan payments through automatic withdrawals from the borrowers’ bank accounts. Some FinTechs loan money to low-income consumers whose credit history precludes them from obtaining loans

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12. See *infra* text accompanying notes 142–60.

13. See *infra* text accompanying notes 162–74.

14. See *infra* text accompanying notes 175–96.

15. See *infra* text accompanying note 197–98.

16. LAUREN SAUNDERS, NAT’L CONSUMER L. CTR., FINTECH AND CONSUMER PROTECTION: A SNAPSHOT 10–11 (Mar. 2019), <https://www.nclc.org/resources/fintech-and-consumer-protection-a-snapshot>; Tellis Demos, *Heard on the Street: Cash App Is King For Block Stock*, WALL ST. J., Feb. 26–27, 2022, at B14 (reporting that in addition to offering digital payments and deposits, Cash App will offer new services such as tax preparation and accounts targeting teenagers). See generally CONSUMER FIN. PROT. BUREAU, THE CONVERGENCE OF PAYMENTS AND COMMERCE: IMPLICATIONS FOR CONSUMERS 2–16 (Aug. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_convergence-payments-commerce-implications-consumers\\_report\\_2022-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf) (describing new payment options and new financial services organizations such as online non-banks and apps that offer increased consumer choice in return for the consumer’s behavioral data).

17. Vincent DiLorenzo, *Fintech Lending: A Study of Expectations Versus Market Outcomes*, 389 REV. BANKING & FIN. L. 725, 733 n. 32, 745–48 (2018).

from banks.<sup>18</sup> In return, the FinTechs charge consumers exorbitant interest rates.<sup>19</sup> Critics complain that many consumers are not able to pay within a short period of time and find themselves in a debt spiral.<sup>20</sup>

Another example is P2P money transfer systems, such as Venmo and Zelle. These offer a convenient way for individuals to pay other individuals, charities, or businesses.<sup>21</sup> Consumers, however, have complained of many difficulties and unresponsive customer service when they try to resolve problems.<sup>22</sup>

PayPal is another P2P money transfer system that also provides bank-like services, such as allowing consumers to establish accounts from which money is transferred.<sup>23</sup> Consumers have complained that PayPal froze their accounts for months while PayPal supposedly investigated possible fraudulent transactions.<sup>24</sup>

Cryptocurrency (crypto) has attracted a great deal of attention as a way to pay for purchases through both traditional and new payment services. Thus far, consumers have primarily used crypto and businesses that service crypto companies as a vehicle for trading crypto. But increasingly, consumers use crypto to pay for goods and services.<sup>25</sup> Some individuals choose to

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18. *Id.* at 742. FinTechs have not been free of financial scandals. Wirecard was a payment processor that also issued physical and virtual cards. It operated in several countries, including the U.S., when it acquired Citigroup's Prepaid Card Services unit. It filed for insolvency shortly after reporting that approximately \$2.1 billion recorded as being in its accounts was missing "and likely never existed." Its executives have been prosecuted. Tom Fairless & Patricia Kowsmann, *Wirecard Ex-CEO Charged With Market Manipulation in Collapse*, WALL ST. J., Mar. 15, 2022, at B4; *Wirecard*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wirecard> (last visited Feb. 22, 2023).

19. DiLorenzo, *supra* note 17, at 752–53. Government agencies have accused FinTechs of other types of questionable practices. *See, e.g., CFPB Takes Action Against Hello Digit for Lying to Consumers About Its Automatic Savings Algorithm*, CONSUMER FIN. PROT. BUREAU (Aug. 10, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-hello-digit-for-lying-to-consumers-about-its-automated-savings-algorithm/> (alleging that FinTech used a faulty algorithm that subjected consumers to wrongful overdraft penalties)

20. *See* LAUREN SAUNDERS ET AL., NAT'L CONSUMER L. CTR., STOPPING THE PAYDAY LOAN TRAP 8–14 (June 1, 2010), <https://www.nclc.org/resources/stopping-the-payday-loan-trap/>.

21. *See infra* note 117 and accompanying text.

22. *See infra* note 119–23 and accompanying text.

23. Technically, the consumer is loaning money to PayPal and has an unsecured claim for those funds. Steven Stites & Norman I. Silber, *Merchant Authorized Consumer Cash Substitutes*, 14 VA. L. & BUS. REV. 261, 268 (2020). PayPal continues to expand its consumer financial services. It, along with Apple Pay Later, now offer "Buy now, pay later" ecommerce options. Ken Sweet, *Buy now, pay later*, ATL. J-CONST., Sept. 25, 2022, at D1, D3.

24. Max A. Cherney, *PayPal To Settle \$3.2 Million Class Action Lawsuit*, INVESTOR'S BUS. DAILY, Feb. 1, 2016, (reporting that PayPal would settle class action case alleging that PayPal freezes consumer account for 180 days, claiming it is necessary to prevent fraud, when it has no reason to believe a freeze is needed).

25. AnnaMaria Andriotis, *Crypto Is Coming To Credit Cards*, WALL ST. J., July 14, 2022, at R2 (reporting that Visa and Mastercard are "working on ways to handle the mechanics of crypto payments"); Deborah Acosta, *Crypto Mortgages Test Appetite of Home Buyers*, WALL ST. J., Apr. 6, 2022, at B6 (reporting that Miami lenders are offering home mortgages payable in crypto; others point out risks and complications); Omar Ardel-Baqui, *Musk Urges McDonald's to Take Dogecoin Payments*, WALL ST. J., Jan. 26, 2022, at B12 (reporting that Tesla will accept payment for some merchandise in dogecoin. Previously, Tesla accepted bitcoin, but no longer does because CEO Elon Musk was

be paid in cryptocurrency.<sup>26</sup>

Some view crypto as a way to offer bank-like services to low-income consumers because largely unregulated crypto companies can offer services at a lower cost than banks that must bear the expense of extensive regulation.<sup>27</sup> And therein lies the risk to low-income consumers because of consumer scams and the theft of many millions of dollars from cryptocurrency accounts by hackers.<sup>28</sup>

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concerned about the amounts of fossil-fuel required to mine bitcoin.). PayPal and Sotheby's accept cryptocurrency as payment. Zachary King & Gregory Zerzan, *The Cryptocurrency Market Is Growing, Despite Regulatory Uncertainty*, ACC DOCKET (June 9, 2021), <https://docket.acc.com/cryptocurrency-market-growing-despite-regulatory-uncertainty>. Sellers are accepting cryptocurrency as payment for luxury homes, although typically they immediately convert the cryptocurrency into United States dollars. E.B. Solomont & Katherine Clarke, *Crypto Cribs*, WALL ST. J., Jan. 28, 2022, at M1, M6–7. Some crypto firms accept deposits and make loans. At least one such company has filed for Chapter 11 bankruptcy. Soma Biswas, *The Revolt of the Crypto Investors*, WALL ST. J., Sept. 24–25, 2022, at B5 (reporting on the bankruptcy of Celsius Network, LLC). See generally Jon Hill, *Fed's Barr Cautions Banks On Efforts To 'Tokenize' Deposits*, LAW360 (Oct. 12, 2022, 9:50 PM EDT) <https://www.law360.com/articles/1539425/fed-s-barr-cautions-banks-on-efforts-to-tokenize-deposits> (reporting that the Fed Vice Chair for Supervision warned that banks “may not be able to track who is holding tokens or whether they are being used for ‘risky or illegal activities.’”); Justin Bayer, *BNY Mellon to Hold Clients' Crypto Assets*, WALL ST. J., Oct. 12, 2022, at B1, B12 (reporting that BNY Mellon, “the world’s biggest custody bank,” will “store digital currencies and allow customers to use one custody platform” for both traditional assets and the digital assets bitcoin and ether).

26. The mayors of New York City and Miami have chosen to be paid their salaries in cryptocurrency. Allison Prang, *New York Mayor to Convert First Paycheck Into Crypto*, WALL ST. J., Jan. 21, 2022, at A7.

27. Claire Williams, *FDIC to reinstate analysis of underbanked households in survey*, AM. BANKER (June 21, 2022), <https://www.americanbanker.com/news/fdic-to-reinstate-analysis-of-underbanked-households-in-survey> (reporting that use of crypto services by underbanked consumers is increasing); Hannah Lang, *Why OCC's Hsu is cautious on crypto*, AM. BANKER (Sept. 10, 2021), <https://www.americanbanker.com/news/why-occs-hsu-is-cautious-on-crypto> (reporting the Acting Comptroller of the OCC stated that 37% of the underbanked own crypto assets compared to 10% of the fully banked); Makan Delrahim, *Regulation Will Be Good for Crypto*, WALL ST. J. (Jan. 20, 2022), <https://www.wsj.com/articles/regulation-will-be-good-for-crypto-blockchain-currency-economy-stablecoins-sec-fdic-11642714529>. Senators Lummis and Gillibrand have introduced a bill that would treat certain crypto as commodities regulated by the Commodity Futures Trading Commission. The bill is opposed by critics who object to its disclosure limitations and tax “loopholes.” Paul Kiernan, *Senators Propose Cryptocurrency Bill*, WALL ST. J., June 8, 2022, at A4. See also Andrew Duehren, *Stablecoins Up First For U.S. Oversight*, WALL ST. J., Apr. 11, 2022, at A5 (reporting that both Republicans and Democrats propose to regulate stablecoins).

28. Rebecca M. Bratspies, *Cryptocurrency And The Myth Of The Trustless Transaction*, 25 MICH. TECH. L. REV. 1, 5 (2018) (“Indeed, the combination of rapidly rising cryptocurrency values, anonymity, and lack of regulation make cryptocurrency platforms ‘natural targets’ for theft. As of late 2017, Reuters estimated that 980,000 coins, worth up to \$15 billion had been stolen between 2011 and 2017. That was before the [sic] January 2018, when hackers stole \$534 million from Japanese cryptocurrency platform CoinCheck, not to mention the June 2018 hacks of Korean cryptocurrency platforms Coinrail (\$42 billion in market value loss) and Bithumb (\$30 million in coins stolen.”). Joel Poultney, *Binance-Linked Blockchain Platform Hit By \$565M Hack*, LAW360 (Oct. 7, 2022, 4:12 PM BST), <https://www.law360.com/fintech/articles/1538115/binance-linked-blockchain-platform-hit-by-565m-hack> (reporting that hackers stole \$565 million worth of cryptocurrency from a blockchain linked to a crypto exchange); Kate Berry, *Push to regulate crypto could test limits of CFPB's power*, AM. BANKER, Sept. 28, 2021 (reporting Acting Comptroller of the OCC as saying that “cryptocurrency scams are flourishing”).

Hackers launched a massive attack against at least one crypto business.<sup>29</sup> Furthermore, no laws require crypto companies to disclose information vital to consumers or investigate and correct errors that occur in transferring payments.<sup>30</sup> The volatility of the value of crypto means consumers do not know how much their cryptocurrency is worth in dollars from day to day.<sup>31</sup> More than any other income group, low-income consumers, living paycheck to paycheck or relying on government benefit payments, need to know that the funds they are transferring to their landlord for rent or lender for a car payment are worth the amount of their obligation.<sup>32</sup>

Digital technology has made it so efficient for businesses to accept payment using anything other than cash, that some now refuse to accept cash.<sup>33</sup> That poses a huge obstacle for low-income consumers. Many cannot afford to open accounts at banks, so they cannot obtain debit cards.<sup>34</sup> They have poor credit histories so they cannot qualify for credit cards.<sup>35</sup> They cannot afford smart phones and/or an internet connection, so they cannot pay with a P2P service.<sup>36</sup> While a few cities

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29. Umesh Agarwal, *Safeguarding Digital Assets in an Increasingly Intangible World*, TECHBULLION, Jan. 27, 2022. See generally David Uberti, *Hackers Target Bridges Between Blockchains for Crypto Heist*, WALL ST. J., Apr. 6, 2022, at B12 (reporting that hackers exploited software that allows users of an online game to transfer crypto across blockchains).

30. This is in sharp contrast to the law governing credit cards and electronic fund transfers. 15 U.S.C. §§ 1631, 1666, 1666c, 1666i, 1693d, 1693f (2011).

31. Vildana Hajric, *Crypto Crash Erases More Than \$1 Trillion in Market Value*, BLOOMBERG (Jan. 21, 2022), <https://www.bloomberg.com/news/articles/2022-01-21/crypto-meltdown-erases-more-than-1-trillion-in-market-value>.

32. Emily A. Shrider et al., *Income and Poverty in the United States: 2020, Report No. P60-273*, U.S. CENSUS BUREAU (Sept. 14, 2021), <https://www.census.gov/library/publications/2021/demo/p60-273.html> (reporting that according to the 2020 U.S. Census, the poverty rate is 11.4%, or 37.2 million people, the first increase after poverty had declined for the previous five years).

33. Jon Prior, *Cash is no longer king in the U.S., but will it ever go away?*, AM. BANKER, Jan. 28, 2022.

34. FED. DEPOSIT INS. CORP., HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES, 2019 FDIC SURVEY (2020), <https://www.fdic.gov/analysis/household-survey/2019report.pdf> (37.9% of unbanked households cite inability to meet minimum balance requirements or bank fees as their primary reason for not having a bank account. 48.9% of unbanked households cited inability to meet minimum balance requirements as one reason for not having a bank account). See generally Scarlett Heinbuch, *Cash Is Critical in Times of Crisis*, FED. RSRV. BANK ATL. (Mar. 7, 2022), <https://www.atlantafed.org/blogs/take-on-payments/2022/03/07/cash-in-crisis> (explaining why cash is essential when there are natural disasters, reduced availability of ATMs, and the failure of electronic systems).

35. Claire Kramer-Mills et al., *The State of Low Income America: Credit Access & Debt Payment*, FED. RSRV. BANK OF N.Y. (2020), <https://www.newyorkfed.org/medialibrary/media/press/the-state-of-low-income-america-credit-access-debt-payment> (“[B]orrowers in low income areas may not have a sufficient credit score for building their credit portfolio . . .” “Credit scores are highly correlated with income, and are important . . . for credit access[.]” “The median score of 658 in lower income [communities] suggests that many borrowers are unlikely to have access to affordable credit as those with scores above 720”).

36. Emily A. Vogels, *Digital divide persists even as Americans with lower incomes make gains in tech adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (24% of low-income households do not own a smartphone and 43% of low-income households lack home internet).

and states have required stores to accept cash, most do not.<sup>37</sup>

Amazon.com, Walmart, and other businesses offer the convenience of shopping from home, having purchases delivered to consumers' homes, and low prices. Those features could be particularly beneficial to low-income consumers. Many live in neighborhoods that are "food deserts."<sup>38</sup> It often is difficult for low-income consumers to travel beyond their neighborhoods to get to stores offering goods at fair prices because they cannot afford a car and public transportation is limited or non-existent.<sup>39</sup> Online shopping and home delivery would be especially helpful for the disabled and elderly, many of whom live on fixed incomes.<sup>40</sup> But many low-income consumers cannot afford a desktop, laptop, tablet, cell phone, or internet connection or live in an area with insufficient broadband connectivity so they cannot take advantage of online shopping.<sup>41</sup>

### III. THE IMPACT OF POVERTY ON THE ABILITY OF LOW-INCOME CONSUMERS TO BENEFIT FROM DIGITAL FINANCIAL SERVICES

Large numbers of American consumers live in poverty.<sup>42</sup> As a result, many cannot afford to take advantage of the benefits of digital financial services. The poor are on the wrong side of the "digital divide."<sup>43</sup> They are unbanked and underbanked.<sup>44</sup> They must live largely in a cash economy. While digital financial services have risks and other costs, they also have advantages unavailable to low-

37. Prior, *supra* note 33.

38. See Alana Rhone et al., *Understanding Low-Income and Low-Access Census Tracts Across the Nation: Subnational and Subpopulation Estimates of Access to Healthy Food*, U.S. DEP'T. OF AGRIC. (May 2019), <https://www.ers.usda.gov/webdocs/publications/93141/eib%202009%20summary.pdf?v=3524>.

39. Tawanna R. Dillahunt et al., *Online Grocery Delivery Services: An Opportunity to Address Food Disparities in Transportation-scarce Areas*, CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. (May 2019), <https://dl.acm.org/doi/pdf/10.1145/3290605.3300879>.

40. *Id.*

41. Vogels, *supra* note 36; Inti Pacheco & Shalini Ramachandran, *Where You Live Sets the Cost of Internet*, WALL ST. J., Dec 26, 2019, at B1 (reporting on a Wall Street Journal study of thousands of internet bills that revealed consumers living in low-income neighborhoods and rural areas pay the same amount for internet service as those who have higher incomes and who live in urban areas, but receive slower broadband speeds). Regardless of income, many consumers live in rural areas that lack online access. Mark Niesse, *Hopes to bring rural Georgia online are becoming a reality*, ATL. J-CONST., Feb. 22, 2022, at A5 (reporting that persons living in one-third of Georgia do not have online access and 507,000 homes and businesses do not have an internet connection that delivers content at sufficient speed). Businesses are offering special deals to customers who have access to computers and enter into transactions in the metaverse. Ann-Marie Alcantara, *Restaurants Look to Connect With Consumers in Metaverse*, WALL ST. J., Apr. 6, 2022, at B5.

42. See Shrider et al., *supra* note 32.

43. Rob Pegoraro, *How States are Bridging the Digital Divide*, PEW RSCH. CTR. (Sept. 9, 2021), <https://www.pewtrusts.org/en/trust/archive/summer-2021/how-states-are-bridging-the-digital-divide> (reporting that, according to the Federal Communications Commission, 14.5 million Americans lack broadband access, but a private group, Broadband Now, found the actual number was 42 million).

44. BD. OF GOVERNORS OF THE FED. RES. SYS., MONEY AND PAYMENTS: THE DOLLAR IN THE AGE OF DIGITAL TRANSFORMATION 11 (Jan. 2022), <https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf> ("[M]ore than 7 million – or over 5 percent of U.S. households – remain unbanked. Nearly 20 percent more have bank accounts, but still rely on more costly financial services such as money orders, check-cashing services, and payday loans.") [hereinafter Fed Report].



income consumers. Furthermore, as demonstrated by stores that refuse to take cash, as well as those who accept crypto, the marketplace is trending to digital services and this trend increasingly will exclude low-income consumers from that marketplace.<sup>45</sup>

There are varying degrees of poverty. While some cannot afford any digital financial services, other low-income consumers are able to afford at least basic internet connectivity.<sup>46</sup> Being able to pay for connection to the internet, however, does not guarantee access. These systems do not always function properly. Some disruptions are system-wide.<sup>47</sup> For example, the internet may stop operating altogether because of power outages caused by natural disasters or cyberattacks.<sup>48</sup> Alternatively, the payment system may malfunction due to a virus or a software defect resulting in the failure to transfer funds to one of the consumer's creditors.<sup>49</sup>

As a result, consumers may fail to receive wages or government benefits for an extended period of time. Consequently, they may not be able to pay for vital services. Even if they have the funds, they may not be able to transfer the money to their creditors in a timely manner because of a disruption in the services they use to transfer funds.

Other system failures affect individual consumers. For example, an unauthorized person may remove funds from their account because the system lacks adequate authentication requirements and satisfactory security.<sup>50</sup>

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45. See generally Federico Lupo-Pasini, *Is It a Wonderful Life? Cashless Societies and Monetary Exclusion*, 40 REV. BANKING & FIN. L. 153 (2020); see Todd C. Frankel, *Forgotten Tipped Workers like Hotel Maids and Airport Skycaps Were Already Hit Hard by a Cashless Economy. Then Came the Pandemic.*, WASH. POST (Mar. 9, 2022), <https://www.washingtonpost.com/business/2022/03/09/cashless-tipped-workers/> (reporting that low wage workers depending on cash tips receive far fewer tips now that fewer people carry cash in our increasingly cashless economy). Hotels are conducting tests of digital tipping apps that guests can use to tip employees. Dawn Gilbertson, *Hotel Tipping – With No Cash*, WALL. ST. J. Sept. 22, 2022, at A13 (stating that hotels are conducting tests of digital tipping apps that guests can use to tip employees).

46. Vogels, *supra* note 36.

47. Kendall Swenson & Robin Ghertner, *People in Low-Income Households Have Less Access to Internet Services – 2019 Update*, U.S. DEP'T. OF HEALTH & HUMAN SERVS. (2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/263601/internet-access-among-low-income-2019.pdf>. Regardless of income, many consumers live in rural areas that lack online access. Mark Niesse, *Hopes to bring rural Georgia online are becoming a reality*, ATL. J-CONST., Feb. 22, 2022, at A5 (reporting that persons living in one-third of Georgia do not have online access and 507,000 homes and businesses do not have an internet connection that delivers content at sufficient speed); see generally Dustin Volz, *Cyber Strikes Rise Against Countries Supporting Ukraine, Microsoft Says*, WALL ST. J., June 23, 2022, at A8 (reporting that since the war in Ukraine began, the U.S. has been subjected to an increase in cyberattacks by Russia).

48. See Arian Campo-Flores, *Republicans Adjust Climate Message*, WALL ST. J., Jan. 24, 2022, A5 (reporting that “[I]n the past two years, the U.S. has experienced the highest annual tallies of billion-dollar weather disasters since 1980 – when the National Oceanic and Atmospheric Administration began compiling such records – with 22 in 2020 and 20 in 2021.”).

49. See Timothy B. Lee, *Fed glitch shuts down wire transfer, direct deposits, other services*, ARS TECHNICA (Feb. 24, 2021, 4:52 PM), <https://arstechnica.com/tech-policy/2021/02/fed-outage-shuts-down-us-payment-systems-for-more-than-an-hour/>.

50. See *Authentication and Access to Financial Institution Services and Systems*, FED. FIN. INST. EXAMINATION COUNCIL (2021), <https://www.ffiec.gov/guidance/Authentication-and-Access-to-Financial-Institution-Services-and-Systems.pdf>.

If there is a failure for a payment transfer to occur in the amount and at the time required, middle-income consumers may have a sufficient financial cushion to pay their obligations while seeking to have the problem corrected.<sup>51</sup> Low-income consumers do not have that “luxury.” They live paycheck to paycheck.<sup>52</sup> They can suffer severe hardship when things go wrong. If the financial services company fails to transfer funds to their landlord, the landlord may evict the consumer, resulting in homelessness.<sup>53</sup> If the consumer does not make a timely payment to a lender, their car may be repossessed, making it impossible for them to keep their job, shop for essentials, and travel to medical appointments.<sup>54</sup> At the very least, the creditor will charge substantial late fees that the consumer can ill-afford.<sup>55</sup>

The Covid-19 pandemic has made matters even worse for low-income consumers. For instance, if the consumer does not make a payment to the lender as required and the lender repossesses the consumer’s car, in ordinary times many consumers living in urban neighborhoods could rely on public transportation systems. But because of Covid-19, many of those systems suffer from staff shortages and have greatly curtailed service, eliminating some routes altogether.<sup>56</sup> In addition, low-income consumers who are homeless face a greater risk of contracting Covid-19.<sup>57</sup> Even after Covid-19 ceases to be a problem, the disruptions it caused demonstrate the fragility of our infrastructure.

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51. See Penny Crosman, *How to Avoid Being the Next Bank Busted by a Software Glitch*, 180 AM. BANKER, no. F334 (Sept. 4, 2015).

52. See Neil Bhutta & Lisa Dettling, *Money in the Bank? Assessing Families’ Liquid Savings using the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Nov. 19, 2018), <https://www.federalreserve.gov/econres/notes/feds-notes/assessing-families-liquid-savings-using-the-survey-of-consumer-finances-20181119.html> (estimating that only 76% of families have at least \$400 in liquid savings and finding only 40% have liquid savings equivalent to at least 3 months of expenses).

53. Jamie Goldberg, *Agencies Say Oregon’s Faulty Software is Slowing Rent Assistance, Putting Renters at Risk of Eviction*, OR. LIVE (Aug. 4, 2021, 10:00 PM), <https://www.oregonlive.com/business/2021/08/agencies-say-oregons-faulty-software-is-slowing-rent-assistance-putting-renters-at-risk-of-eviction.html>; *Cyber Attack Targeted DeKalb Rental Assistance Program, Delaying Relief for Tenants, Landlords*, WSB-TV 2 (June 14, 2021, 9:19 PM), <https://www.wsbtv.com/news/local/dekalb-county/cyber-attack-targeted-dekalb-rental-assistance-program-delaying-relief-tenants-landlords/KJFXD6CTIRHMDAL5NFRXPDLPKY/>.

54. See CAROLYN CARTER, REPOSSESSIONS 5 (10th ed. 2022) (stating that “[h]elping families avoid repossession can save them from economic catastrophe.”); COMPLIANCE BULLETIN 2011-04, MITIGATING HARM FROM REPOSSESSION OF AUTOMOBILES, CONSUMER FIN. PROT. BUREAU (Apr. 2022) [https://files.consumerfinance.gov/f/documents/cfpb\\_bulletin-2022-04\\_mitigating-harm-from-repossession-of-automobiles.pdf](https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-04_mitigating-harm-from-repossession-of-automobiles.pdf) (describing conduct the CFPB observed that may violate Federal consumer law).

55. See CARTER, *supra* note 54; ELIZABETH RENUART, TRUTH IN LENDING 514 (10th ed. 2019) (explaining that the Credit Card Act, 15 U.S.C. § 1665d(a) was enacted in response to excessively high late payment fees). See generally JOHN RAO ET AL., MORTGAGE SERVICING AND LOAN MODIFICATIONS 38 (1st ed. 2019) (describing “pyramiding” late charges in which the creditor attributes the borrower’s current payment “first to outstanding late charges or [the] overdue amount and then second to the installment that is currently due.”).

56. David Wickert, *Covid-19 Continues to Strand Riders*, ATL. J.-CONST., Jan. 31, 2022, at A1.

57. See generally Melissa Perri et al., *COVID-19 and People Experiencing Homelessness: Challenges and Mitigation Strategies*, 192 CMAJ 26 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7828890/>.

## IV. THE LAW DOES NOT ADEQUATELY PROTECT CONSUMERS

The primary statute governing digital financial services companies that transfer funds is the Electronic Funds Transfer Act (“EFTA”).<sup>58</sup> The CFPB has issued Regulation E (“Reg. E”) pursuant to that Act.<sup>59</sup> The law requires many disclosures.<sup>60</sup> In addition, if the consumer alleges that an error occurred, the financial institution must investigate within specified time limits and correct any errors it identifies.<sup>61</sup> There are specific provisions regarding unauthorized transfers.<sup>62</sup> While it contains many important protections for consumers, the Act includes no provisions to ensure adequate authentication or to require privacy or security safeguards or standards.<sup>63</sup>

Congress enacted the EFTA in 1978 and has not adequately updated it since. Consequently, it does not address many issues that have arisen as a result of changed business practices, new types of payment instruments and systems, and different types of institutions transferring consumer funds. For example, the EFTA and Reg. E govern electronic fund transfers made by financial institutions. The EFTA and Reg. E define the term “financial institution.”<sup>64</sup> In addition to traditional companies that transfer funds electronically and clearly come within the definition of “financial institution,” FinTechs also transfer funds electronically. Because they differ in the services they offer, some, but not all, may be subject to the EFTA and Reg. E.<sup>65</sup>

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58. 15 U.S.C. § 1693.

59. 12 C.F.R. § 1005.1 (2012).

60. See 12 C.F.R. § 1005 (2013).

61. 12 C.F.R. § 1005.11 (2013).

62. 12 C.F.R. § 1005.6 (2013).

63. Mark E. Budnitz, *The Legal Framework of Mobile Payments: Gaps, Ambiguities and Overlap*, GA. STATE U. COLL. L. 44–45, 70–85 (Feb. 10, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841701](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841701).

64. 15 U.S.C. § 1693a(9); 12 C.F.R. § 1005.2(i) (2018).

65. According to Frequently Asked Questions issued by the Consumer Financial Protection Bureau, some FinTech companies that offer P2P services are considered “financial institutions” and are governed by the EFTA. *Electronic Fund Transfer FAQs*, CONSUMER FIN. PROT. BUREAU, [https://files.consumerfinance.gov/f/documents/cfbp\\_electronic-fund-transfers-faqs.pdf](https://files.consumerfinance.gov/f/documents/cfbp_electronic-fund-transfers-faqs.pdf) (last updated Dec. 13, 2021) [hereinafter CFPB P2P FAQs]. Certain types of P2P payments made by FinTechs are subject to the EFTA. *Id.* See also NAT’L CONSUMER L. CTR., CONSUMER BANKING AND PAYMENTS LAW, <https://library.nclc.org/book/consumer-banking-and-payments-law> (last visited Feb. 22, 2023) [hereinafter Banking Law]; Robert Denicola & Stephen Krebs, *Payments*, 77 BUS. LAW. 1273, 1273–76 (2022). The status of FinTechs is uncertain. Kate Buckley, *Should Nonbank Fintechs Have Access To The Fed’s Internal Systems?*, 39 REV. BANKING & FIN. L. 761, 769 (2020) (nonbank FinTechs are not able to obtain OCC bank charters). See generally Eric I. Goldberg et al., *CFPB Expands Examination Program to Cover Fintechs and Nonbanks of All Sizes*, 25 NO. 3 FINTECH L. REP. NL 2 (2022) (suggesting that FinTechs should document their compliance with consumer protection laws so as not to violate the CFPB’s authority to enforce laws against unfair, deceptive and abusive acts or practices); *Press Release: Broad Coalition Urges CFPB to Examine Fintech Credit Products and Fee Models*, NAT’L CONSUMER L. CTR. (Dec. 22, 2021), <https://www.nclc.org/broad-coalition-urges-cfbp-to-examine-fintech-credit-products-and-fee-models/>. Regulators have begun to scrutinize FinTechs’ compliance with applicable laws and risk management practices. Brian Graham, *Regulators are coming for fintechs and the banks that power them*, AM. BANKER, Sept. 16, 2022. Many FinTechs partner with small community banks so they can offer services that only banks can provide such as “insured deposits, access the Federal Reserve’s payment system and card rails, [and] lend effectively across

Another relevant federal statute is the Dodd-Frank Act. Persons who offer a consumer financial product or service are governed by the Act.<sup>66</sup> The Dodd-Frank Act prohibits “unfair,” “deceptive” and “abusive” acts and practices.<sup>67</sup> It authorizes the CFPB to enforce this prohibition.<sup>68</sup> The Act, however, does not authorize consumers to bring private rights of action.<sup>69</sup>

The Federal Trade Commission (FTC) also protects consumers. The FTC’s authority is derived from the Federal Trade Commission Act.<sup>70</sup> The Act prohibits “unfair or deceptive acts or practices.”<sup>71</sup> Moreover, the Act authorizes the FTC to bring actions to enforce that prohibition.<sup>72</sup> Like Dodd-Frank, however, it does not include a private right of action authorizing individual consumers to sue for violations.<sup>73</sup> Without a private right of action, consumers must rely on administrative agencies with limited authority and inadequate resources. In addition to precluding consumers from suing for violations, both statutes establish only general standards rather than provisions that specifically apply to digital financial services. Moreover, both statutes have no privacy protections or security requirements.<sup>74</sup>

state borders.” *Id.* Many FinTechs partner with only one bank. Consequently, if a FinTech suddenly is unable to partner with its bank, or the FinTech is no longer able to operate, the effect on consumers could be devastating. For that reason, regulators have increased their scrutiny of those bank partners as well. *Id.* The U.S. Treasury Department “recommends consideration of the establishment of a federal framework for nonbank payment providers that would complement existing federal requirements, including for consumer protection. . . .” THE FUTURE OF MONEY AND PAYMENTS: REPORT PURSUANT TO SECTION 4(B) OF EXECUTIVE ORDER 14067, U.S. DEP’T TREASURY 47 (Sept. 2022), <https://home.treasury.gov/system/files/136/Future-of-Money-and-Payments.pdf>.

66. 12 U.S.C. § 5481(6)(A). A “financial product or service” includes, *inter alia*, “selling, providing or issuing. . . payment instruments. . . .” 12 U.S.C. § 5481(15)(A)(v). “Payment Instrument” includes, *inter alia*, an “electronic instrument, or other instrument, payment of funds. . . .” 12 U.S.C. § 5481(18).

67. 12 U.S.C. § 5531(a).

68. 12 U.S.C. § 5564. The CFPB has issued a circular alerting financial institutions that the “misuse and abuse of personal finance data” could violate the unfair practices prohibition in the Consumer Financial Protection Act (Dodd-Frank Act). Claire Williams, *CFPB to Crack Down on Financial Firms’ Protection of Consumer Data*, AM. BANKER (Aug. 11, 2022) <https://www.americanbanker.com/news/cfpb-to-crack-down-on-financial-firms-protection-of-consumer-data>.

69. Diego A. Zambrano, *Discovery As Regulation*, 119 MICH. L. REV. 71, 139 (2020).

70. 15 U.S.C. §§ 45, 57a, 57b.

71. 15 U.S.C. § 45(a)(1).

72. 15 U.S.C. § 45(b). *But see* AMG Cap. Mgmt., LLC v. FTC, 141 S.Ct. 1341, 1344 (2021) (holding that the FTC cannot seek equitable monetary relief such as restitution or disgorgement under § 13(b) of the FTC Act).

73. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973); Zambrano, *supra* note 69; *see generally* Stephanie L. Kroeze, *The FTC Won’t Let Me Be: The Need For A Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U.L. REV. 227 (2015).

74. The FTC is considering whether it should issue regulations to protect consumers from businesses that collect, analyze and monetize “massive” amounts of information about consumers. *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, FED. TRADE COMM’N (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>. The two Republican members of the commission opposed initiating the rule-making process and a representative from the U. S. Chamber of Commerce’s Technology Engagement Center opined that it was Congress’ responsibility, not the FTC’s, to decide whether privacy rules were needed. John D. McKinnon, *FTC Launches Bid To Expand*

States have enacted “mini-FTC Acts,” which prohibit unfair and deceptive acts and practices (UDAP).<sup>75</sup> These UDAP statutes authorize state attorneys general to bring actions to enforce that prohibition but place serious barriers to consumers enforcing their rights under those laws.<sup>76</sup> As a result, consumers’ only hope for protection rests with state agencies that lack sufficient resources to protect them.

Articles 3 and 4 of the Uniform Commercial Code (UCC) govern check transactions. A fund transfer may involve a combination of an instrument that qualifies as a check under the UCC and electronic transfer. One example is when a person receives a traditional paper check, takes a photograph of it with a smart phone, and uses the phone to transfer the electronic image to a bank account in order to deposit the check.<sup>77</sup> It is not always clear what law applies to these transactions.<sup>78</sup> Furthermore, the UCC does not include the basic provisions of consumer protection statutes since it was never intended to protect consumers.<sup>79</sup> For these reasons, the UCC fails to provide adequate protection to low-income consumers.

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*Online Privacy Protections*, WALL ST. J., Aug. 12, 2022, at A5. The privacy of information that is collected by brokerage and money management firms with which consumers do business may not be secure. *See e.g.*, Dave Michaels, *Morgan Stanley Penalized \$35 million*, WALL ST. J., Sept. 21, 2022, at B14 (reporting that SEC alleged the firm failed to safeguard sensitive personal information by disposing of computer servers without confirming they did not contain such information and failing to be able to locate 42 servers). The failure of federal law to protect privacy persists despite a long history of reports highlighting the need for privacy protection. *See generally* FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (MAR. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>; *see also* PERSONAL PRIVACY IN AN INFORMATION SOCIETY, THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 8–11 (July 1977), <https://archive.epic.org/privacy/ppsc1977report/>. The threat to consumers’ privacy has continued unabated. Byron Tau & Robert McMillan, *Google Yanks Apps With Hidden Code That Harvests Data*, WALL ST. J., Apr. 7, 2022, at A1 (reporting that Google removed dozens of apps that included software that secretly collected data from users from its Google Play store). The FTC’s authority to use its powers to regulate privacy and security has been subject to court challenges. *See, e.g.*, *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1227 (11th Cir. 2018) (holding that the FTC’s cease and desist order was not sufficiently specific to be enforceable); *but see* *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 248 (3d Cir. 2015) (holding that the FTC had the authority to enforce unfair cybersecurity practices).

75. CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (10th ed. 2021).

76. *Id.* at 931, 934–35; *see infra* text accompanying notes 96–103.

77. This is known as “remote deposit capture” or RDC. *See* Duncan B. Douglass et al., *Current Developments In Bank Deposits And Payment Systems*, 73 BUS. LAW. 453, 459 (2018). *See also* *Taubman v. USAA Fed. Savings Bank*, 408 F. Supp. 3d 1053, 1054 (N.D. Cal. 2019) (plaintiffs allege bank failed to adopt and follow reasonable procedure to safeguard against fraud in its remote deposit capture service).

78. Mark E. Budnitz, *Mobile Banking: Gaps In The Law Impedes Risk Assessment*, 32 No. 5 BANKING & FIN. SERVS. POL’Y REP. 11, 15 (2013).

79. U.C.C. § 4-401, Comment 3.

V. THREE APPROACHES TO BETTER CONSUMER PROTECTION IN THE DIGITAL AGE:  
AGENCY ENFORCEMENT, NEW AND UPDATED LAWS, AND NEW GOVERNMENT SYSTEMS

Because low-income consumers face serious harm from recent developments in digital financial services, the question becomes what should be done about it. The following sections explore several options.

*A. Agency Enforcement: The Limits of Authority and Other Restrictions*

Government agency enforcement of consumer protection laws in the context of digital financial services is crucial to these laws' effectiveness because consumers have a very limited ability to enforce these laws. The statutes themselves as well as court decisions include major restrictions as noted below. In addition, few consumers can afford to retain lawyers to bring lawsuits.<sup>80</sup> Finally, mandatory pre-dispute arbitration clauses and provisions in which consumers agree not to bring or even participate in class actions are pervasive.<sup>81</sup> The electronic commerce marketplace presents many obstacles to obtaining meaningful consumer consent to these and many other terms of online contracts.<sup>82</sup>

The CFPB and the FTC have brought significant enforcement actions.<sup>83</sup> While enforcement by these agencies is necessary, it is not sufficient. As discussed above, the major federal statutes governing consumer financial transactions contain substantial limitations.<sup>84</sup> In addition, the agencies are facing challenges in court that may present formidable obstacles to their exercising

80. ROBERT J. HOBBS & STEPHEN GARDNER, *THE PRACTICE OF CONSUMER LAW* 39 (2d ed. 2006) (“[L]egal needs surveys consistently show that legal services are meeting only the tip of the iceberg of client needs – a much smaller portion than for many other areas of practice. In short, client demand for consumer law assistance is high.”). See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 5 (June 2017), <https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74> (reporting survey finding that “86% of the civil legal problems reported by low-income Americans received inadequate or no legal help.”).

81. In July 2017, the CFPB issued a Final Rule prohibiting providers of financial services from using agreements for the arbitration of future disputes to bar consumers from filing or participating in class actions. In addition, the rule required providers to submit certain records to the CFPB. 82 Fed. Reg. 33210 (July 19, 2017). On November 1, 2017, the President signed a joint resolution of Congress pursuant to the Congressional Review Act which provided that the Final Rule has no force or effect. *Final Rule Arbitration Agreements*, CFPB, <https://www.consumerfinance.gov/rules-policy/final-rules/arbitration-agreements/> (last visited Mar. 24, 2023); see generally Richard M. Alderman, *What's Really Wrong With Forced Consumer Arbitration?*, 2010 BUS. L. TODAY 1 (Nov. 22, 2010).

82. See generally Mark E. Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace*, 43 NOVA L. REV. 235 (2019).

83. FED. TRADE COMM'N, *ANNUAL HIGHLIGHTS 2020, STATS AND DATA 2020* (2020), [https://www.ftc.gov/system/files/attachments/stats-data-2020/annual\\_highlights\\_2020\\_stats\\_and\\_data\\_infographic.pdf](https://www.ftc.gov/system/files/attachments/stats-data-2020/annual_highlights_2020_stats_and_data_infographic.pdf); Jon Hill, *CFPB Enforcement Is Down, But The Lull May Not Last Long*, LAW360 (Feb. 14, 2022), <https://www.law360.com/banking/articles/1461197/cfpb-enforcement-is-down-but-the-lull-may-not-last-long> (reporting that although the number of enforcement actions and orders for fines were down considerably by the end of the first year under the Biden administration as compared to the last year under the Trump administration, the current CFPB had many ongoing investigations, and “bigger investigative targets,” is issuing “more expansive civil investigatory demands,” ramping up its examination of nonbanks and employing “novel and aggressive” legal theories. . . .”).

84. See *supra* text accompanying notes 65, 68, 74.

effective enforcement of the limited laws under their jurisdiction. For example, the Supreme Court found part of Dodd-Frank unconstitutional in *Selia Law v. CFPB*.<sup>85</sup> Other fundamental provisions are currently subject to constitutional attack.<sup>86</sup> Businesses have challenged the FTC's authority to bring actions to ensure the privacy and security of online transactions.<sup>87</sup> The Supreme Court has thrown out the FTC's authority to order restitution.<sup>88</sup> Agencies have greatly reduced their enforcement of consumer protection laws under certain administrations.<sup>89</sup>

Perhaps the most significant limitation to enforcement actions by agencies is the Supreme Court's 2022 decision in *West Virginia v. Environmental Protection Agency* which has the potential for severely curtailing agency authority to issue regulations on which enforcement is often based.<sup>90</sup> In that case, the Court applied the "major questions doctrine."<sup>91</sup> Under that doctrine, in order for an agency to have the power "to regulate a fundamental sector of the economy,"<sup>92</sup> it must

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85. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (holding that the Dodd-Frank Act's provision restricting the president's power to remove the CFPB's single Director violated the Constitution's separation of powers).

86. *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, (5th Cir. 2022) (holding that Dodd-Frank Act's provision allowing the CFPB to receive its funding from the Federal Reserve violated the Appropriations Clause and the Constitution's separation of powers); Andrew Ackerman, *Ruling Casts Shadow on Work of CFPB*, WALL ST. J., Oct. 21, 2022 (reporting that the ruling, if upheld, could question the legitimacy of current regulations and encourage challenges to any new rules the agency might issue).

87. *See e.g.*, *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1226–27 (11th Cir. 2018) (LabMD asserted the FTC lacked authority to bring an unfairness action against it for its data security practices; court held that the FTC's cease and desist order was not sufficiently specific to be enforceable); *but see FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 247–48 (3d Cir. 2015) (Wyndham claimed the unfairness doctrine does not extend to data security; court held that the FTC had the authority to enforce unfair cybersecurity practices); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1191, 1194 (10th Cir. 2009) (Accusearch contended its actions could not be considered an unfair practice by the FTC unless it violated a specific law; court held conduct could be unfair even if it is otherwise lawful). *See* Woodrow H. Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2243, 2247 (2015) (discussing the LabMD and Wyndham cases); Daniel J. Solove & Woodrow H. Hartzog, *The FTC and the New Common Law*, 114 COLUM. L. REV. 583, 611 (2014) (stating that the FTC has issued scores of complaints related to privacy, but all except one had been dropped by the FTC or settled). *See generally* John D. McKinnon, *Texas Sues Meta Over Facebook's Facial Technology*, WALL ST. J., Feb. 15, 2022 (quoting the senior counsel at the Electronic Privacy Information Center saying, "We can't count on Congress or even the [Federal Trade Commission] to be on top of every data abuse.").

88. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021) (holding that the FTC cannot seek monetary relief under § 13(b) of the FTC Act).

89. Thomas Goers, *From Banking To Data Breaches: Ensuring Financial Institution Accountability With Public And Private Oversight*, 2020 MICH. ST. L. REV. 1141, 1159 (2020) (stating that "statistical analysis" of enforcement actions taken by the CFPB and FTC demonstrates that there was much less enforcement action under President Trump than under President Obama); Mark E. Budnitz, *The FTC's Consumer Protection Program During The Miller Years: Lessons for Administrative Agency Structure and Operations*, 46 CATH. U. L. REV. 371, 391–95 (1997) (describing the decline in FTC enforcement actions under President Reagan as compared to President Carter).

90. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

91. *Id.* at 2609–10.

92. *Id.* at 2605.

have “clear congressional authorization” to do so.<sup>93</sup> The Court held that the EPA lacked the clear authority under the Clean Air Act to implement the regulation challenged by West Virginia.<sup>94</sup> It seems certain that businesses will challenge many regulations related to consumer payments. What is less certain is how the courts will apply *West Virginia v. EPA*, as the parties argue over whether an agency rule regulates “a fundamental sector of the economy.”<sup>95</sup>

State attorneys general also have brought important enforcement actions under their UDAP statutes.<sup>96</sup> State UDAP laws, however, vary greatly in their coverage.<sup>97</sup> Some statutes greatly restrict consumers’ ability to obtain adequate relief, such as prohibiting class actions.<sup>98</sup> In addition, these laws typically exclude whole industries, such as banking, that are regulated under other state law that provides less consumer protection.<sup>99</sup> Courts also have made consumer relief far more difficult than the restrictions already in the UDAP statutes.<sup>100</sup>

As is true for the federal agencies, state enforcement is necessary, but not sufficient. Both federal and state agencies face other major obstacles. They all have many other responsibilities besides enforcing laws protecting consumers using digital financial services. They also have the responsibility to enforce consumer laws regarding debt collection and consumer reporting.<sup>101</sup> The agencies have limited resources. They have other functions. For example, the FTC also enforces

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93. *Id.* at 2614.

94. *Id.* at 2615–16.

95. *Id.* (quoting 84 Fed. Reg. 32524 *Ibid.*).

96. See CARTER & SHELDON, *supra* note 75, at 931. In addition, the Dodd-Frank Act gave state attorneys general the authority to enforce the Act’s unfair, deceptive and abusive acts or practices standard and the authority to enforce rules issued by the CFPB. *Id.* at 935.

97. State statutes vary on whether the consumer must prove reliance. *Id.* at 262. Some courts within the same state disagree. *Id.* Statutes vary on whether class actions are allowed, and if they are, what the requirements are. *Id.* at 865–66.

98. *Id.* at 866.

99. *Id.* at 102–07, 114–21, 150–59. Of particular importance to payment systems, banking is one of the industries typically excluded. *Id.* at 122.

100. Mark E. Budnitz, *Buyer Beware: Georgia Consumers Can’t Rely on the Fair Business Practices Act*, 6 JOHN MARSHALL L.J. 507, 514–15 (2013).

101. See generally ROBERT J. HOBBS & APRIL KUEHNHOFF, *FAIR DEBT COLLECTION* (2018 9th ed.); CHI CHI WU, *FAIR CREDIT REPORTING*, Vol. 1 (9th ed. 2017). State attorneys general have been active in cases involving student loans. DEANNE LOONIN ET AL., *STUDENT LOAN LAW* 202 (6th ed. 2019) (consent decree judgment in which school admitted it misrepresented job placement rates and used unauthorized teachers). State attorneys general have also brought cases against mortgage servicers. HENRY J. SOMMER, *CONSUMER BANKRUPTCY LAW AND PRACTICE* 331–32 (12th ed. 2020) (settlement in which five mortgage servicers agreed to comply with Bankruptcy Rules); see 15 U.S.C. § 1640(e) (permitting state attorneys general to bring actions for violation of the federal Truth In Lending Act). See generally Eric Sturgis, *Argosy settlement gives debt relief for students*, ATL. J-CONST., Mar. 14, 2022 (reporting that several state attorneys general reached a settlement with a former for-profit university for allegedly deceptive claims and high tuition); Allison Grande, *State Attorneys General Mount Probe Into TikTok’s Interaction With Kids*, LAW360 (Mar. 2, 2022, 9:37 PM EST), <https://www.law360.com/cybersecurity-privacy/articles/1470089/state-ags-mount-probe-into-tiktok-s-interaction-with-kids> (reporting that a bipartisan coalition of state attorneys general is investigating whether TikTok is putting children at risk of mental and physical harm, violating state consumer protection laws as well as an investigation of Instagram for using techniques harming children by increasing their use of its platform).



anti-trust laws.<sup>102</sup> State attorneys general have many other duties besides filing lawsuits when they have evidence of the violation of consumer protection laws.<sup>103</sup>

### *B. Playing Catch-Up: Prospects for Enacting New Laws*

Our current statutes do not adequately protect consumers using financial services. They do not address the new payment system environment, one that is very different from the systems in place when the laws were enacted. The solution would be to enact new statutes or amend current ones. A federal law is preferable to state laws because the consumer financial services industry affects consumers in every state. In addition, since it is a national industry, in order for state laws to be an effective measure, they need to be uniform. Every state has passed the Uniform Commercial Code. That law provides a lesson for a consideration of state laws on payment systems since it regulates check transactions.<sup>104</sup> The lesson is that enacting a uniform law does not ensure uniformity; some states have enacted UCC provisions that are different from those of others.<sup>105</sup>

The simplest fix would be to amend the EFTA to include new types of institutions, such as FinTechs, and new types of processes to transfer payments, such as apps on mobile devices. Consensus likely would be difficult to achieve, however. Consumer advocates and the business community would most assuredly bring considerable political pressure, pushing for very different outcomes.

For instance, consumers would likely want to include at least the rights they currently have in the EFTA. Examples include disclosures, an error resolution procedure, as well as adequate remedies, such as a private right of action, attorney's fees, and compensatory and statutory damages.<sup>106</sup> They would insist that the EFTA define "financial institution" and "electronic fund transfer" broadly to include new types of entities such as FinTechs and new types of payment systems and instruments. They also would want restrictions on mandatory pre-dispute arbitration and allowance of class actions.<sup>107</sup> They would advocate for the EFTA

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102. 15 U.S.C. §§ 1, 2, 45(a).

103. See, e.g., CAL. CONST. art. 5, § 13 (providing that the California attorney general has direct supervision over every district attorney and sheriff and if the laws are not adequately enforced, has the powers of a district attorney); CAL. GOV'T CODE § 12511 (West 2022) (providing that the attorney general has "charge of...all legal matters in which the State is interested" except the business of the University Regents).

104. U.C.C. Art. 4.

105. For example, New York has still not enacted the revision of Article 4 that the Uniform Law Commission and the American Law Institute issued in 1990. Samuel J. M. Donnelly & Mary Ann Donnelly, *Commercial Law*, 50 SYRACUSE L. REV. 405, 405 (2000). Even states that have adopted the 1990 version have changed some of the provisions. LAUREN K. SAUNDERS ET AL., CONSUMER BANKING AND PAYMENTS LAW 96 (6th ed. 2018).

106. See 15 U.S.C. §§ 1693c, 1693d; 12 C.F.R. §§ 1005.4, 1005.7; 15 U.S.C. § 1693f; 12 C.F.R. § 1005.11; 15 U.S.C. §§ 1693h, 1693m.

107. See *supra* text accompanying note 81. In March 2022, the U.S. House of Representatives passed a bill prohibiting mandatory arbitration. Daniel Wiesner, *House passes bill to end mandatory arbitration of legal disputes*, REUTERS (Mar. 17, 2022, 6:34 PM EDT), <https://www.reuters.com/legal/transactional/house-passes-bill-end-mandatory-arbitration-legal-disputes-2022-03-17/>; see *Press Release: Brown Introduces Bill To Protect Consumers By Banning Forced Arbitration*, OFF. OF SEN.

to clearly provide that the CFPB has the authority to regulate and enforce rules that cover new financial services. To fill in serious gaps in present law, they would lobby for laws that require financial institutions to provide consumers adequate authentication measures, security, and privacy. The industry would oppose expanding and strengthening the EFTA, contending that such an amendment would be unreasonably burdensome, increasing costs to businesses and ultimately to consumers, stifling innovation and encouraging “frivolous” consumer class actions.<sup>108</sup>

If Congress were to consider new laws, one approach would be to draft statutes that focus on specific issues. An example is a law protecting the privacy of consumers engaging in financial services transactions.<sup>109</sup> This may be a politically neutral issue on which both Republicans and Democrats can agree.

Regardless of the issue addressed, Congress must decide whether to draft specific rules or general standards. Specific rules can provide a clear roadmap for the affected parties. They may quickly become obsolete, however, as technology fuels more transformative changes in payment systems. Specific rules also will be subject to the charge that they stifle innovation.<sup>110</sup> The alternative is to draft general standards. These may provide no clear guidance and be subject to attack as being too general and vague to be effective.

A third approach is to establish general standards and also include specific rules targeting well-documented abuses. Despite the difficult choices required, some statutory protection would be better than none. Regardless of the approach taken, in order for the law to protect low-income consumers adequately, statutes must include provisions that cover the new digital payment systems, require an error resolution procedure, and provide a private right of action.

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SHERROD BROWN (Mar. 7, 2022), <https://www.brown.senate.gov/newsroom/press/release/brown-introduces-bill-protect-consumers-banning-forced-arbitration> (announcing Senator Sherrod Brown’s filing of the Arbitration Fairness for Consumers Act).

108. Kenny Guitierrez, *Privacy In Wearables: Innovation, Regulation, Or Neither*, 13 HASTINGS SCI. & TECH. L.J. 21, 25 (2022) (stating that some oppose regulation of wearables because that would “stifle innovation.”); Robin Hui Huang et al., *The Development and Regulation of Mobile Payment: Chinese Experiences and Contemporary Perspectives*, 20 WASH. U. GLOBAL STUD. L. REV. 1, 5 (2021) (stating that regulating mobile payments requires balancing protection of consumer rights while avoiding onerous regulations that may “stifle innovation”); James Fallows Tierney, *Contract Design In The Shadow of Regulation*, 93 NEB. L. REV. 874, 905 (2020) (stating the American Bankers Association warned the CFPB that regulation of bank overdraft practices could “stifle innovation and consumer choice.”); Willy E. Rice, *Allegedly “Biased,” “Intimidating,” And “Incompetent” State Court Judges And The Questionable Removal Of State Law Class Actions To Purportedly “Impartial” And “Competent” Federal Courts – A Theoretical Perspective And Empirical Analysis Of Class Action Dispositions In Federal And State Courts, 1925-2011*, 3 WM. & MARY BUS. L. REV. 419, 518, 556 (2012) (reporting results of study that failed to support claims that multi-national corporations and national insurers are substantially more likely to lose class actions in state courts because of “prejudiced” state court judges who certify “frivolous” class actions).

109. Andraya Flor, *Impact of Schrems II: Next Steps For U.S. Data Privacy Law*, 96 NOTRE DAME L. REV. 2035, 2036 (2021); see John D. McKinnon, *Bipartisan Online-Privacy Efforts Gain Momentum*, WALL ST. J., June 15, 2022, at A7.

110. See Guitierrez, *supra* note 108.

A few states have taken the initiative and passed their own limited laws. For example, California enacted a privacy law.<sup>111</sup> Additionally, many states have passed laws that require notice when there is a security breach.<sup>112</sup> Congress should take a serious look at those state laws as possible models for federal legislation.

As an alternative or in addition to new federal legislation, administrative agencies should consider issuing new regulations or amending their current regulations to reflect the changes that have occurred in consumer financial services. Agencies can issue new regulations and amend current regulations much more easily and promptly than Congress can enact new statutes. An example of a regulation issued in response to a new type of payment device is the amendment to Reg. E on prepaid instruments, such as gift cards.<sup>113</sup> In addition, agencies can encourage compliance with regulations by issuing interpretations and guidance to provide companies with concrete examples of how to comply with statutes and regulations.<sup>114</sup> Moreover, agencies can employ their enforcement authority to ensure that companies comply with their regulations.<sup>115</sup> As noted above, however, the constitutionality of both the structure and some procedures of the CFPB and the FTC are the subject of court challenges. In addition, a change in administrations sometimes results in greatly reduced enforcement of regulations and a reluctance to issue new ones.<sup>116</sup>

As the following section discusses, the CFPB has begun investigating a new payment system. That project provides an opportunity to explore how an agency can exercise its regulatory authority to protect consumers transferring funds in a new payment environment.

### C. A Case Study in Regulating a New Service: Peer-To-Peer Payment Systems

The CFPB has requested comments from the public on whether and how it should regulate P2P payment systems, such as Zelle and Venmo.<sup>117</sup> What follows

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111. CAL. CIV. CODE §§ 1798.24(f), 1798.100; *see generally* Sanford P. Shatz & Paul J. Lysobey, *Update on the California Consumer Privacy Act and Other States' Actions*, 77 BUS. LAW. 539 (2022).

112. *Security Breach Notification Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

113. 12 C.F.R. § 1005.20.

114. *See, e.g.*, 12 C.F.R. § 1005, Reg. E, Appendix C to Part 1005 – Issuance of Official Interpretations; FED. TRADE COMM'N, DOT COM DISCLOSURES, INFORMATION ABOUT ONLINE ADVERTISING (May 2000), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>. In an attempt to ensure that gaps in the regulatory system are not created by new types of financial institutions, regulators have begun to scrutinize FinTechs' compliance with regulations; Goldberg et al., *supra* note 65; Graham, *supra* note 65.

115. *See* 15 U.S.C. § 1693o; 15 U.S.C. § 45.

116. *See* Goers, *supra* note 89; *see also* Budnitz, *supra* note 89.

117. *Notice and Request For Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms*, 86 Fed. Reg. 61182 (Nov. 5, 2021); *see* Peter Conti-Brown & David A. Wishnick, *Private Markets, Public Options, and the Payment System*, 37 YALE J. REGUL. 380, 393–94 (2020) (describing Venmo); Justin Moore, *II. The Federal Reserve's Role In Developing Real-Time Payment Services In the*

are recommendations for how the CFPB should regulate this new market so it takes into account the needs of low-income consumers.<sup>118</sup>

It is important that the CFPB take strong actions to protect consumers that use the system to transfer their money. Many consumers are being robbed of their funds by scammers who trick their victims into using P2P systems to transfer their funds to the fraudsters.<sup>119</sup> Reported incidents implicate several major P2P

*United States*, 40 REV. BANKING & FIN. L. 13, 18 (2020) (describing Zelle). Use of Zelle skyrocketed during the pandemic as consumers used it as a way of avoiding contact with ATMs. Banks that participate in the Zelle service are discussing whether to promote Zelle as a preferred option to Visa and Mastercard. AnnaMaria Andriotis & David Benoit, *Zelle Emerges As Rival To Cards*, WALL ST. J., Apr.7, 2022, at B1. Zelle's operator, Early Warning Services, has reportedly noted Zelle's "growing ubiquity and near-instant speed" which help "low-income consumers make their billing deadlines" and tenants make "last-minute rent payments." Kate Fitzgerald, *Rent, disbursements power Zelle's transaction growth*, AM. BANKER (Sept. 8, 2022), <https://www.americanbanker.com/payments/news/rent-disbursements-power-zelles-transaction-growth>. Those assertions might cause one to question the need for the government to establish FedNow if the private sector already provides a suitable alternative, even for low-income consumers. Zelle, however, is not yet ubiquitous. "Nearly 1,750 banks and credit unions offer Zelle. . . . But thousands of smaller banks and financial institutions accounting for about 70% of all U.S. financial institutions have not yet adopted Zelle, in part because they're concerned about costs and fraud risk." *Id.* That fraud risk includes consumers who are tricked into authorizing payments to scammers. *Id.* Current law does not explicitly protect consumers under those circumstances. *See infra* text accompanying note 123. Zelle says it will support FedNow. *Id.*; *see infra* text accompanying notes 142–60.

118. With the exception of the text accompanying note 129, the following is based largely on a comment letter submitted to the CFPB by the author in response to *Notice and Request For Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms*, 86 Fed. Reg. 61182 (Nov. 5, 2021). Some services that offer P2P services are governed by the EFTA under certain circumstances. Banking Law, *supra* note 65, at § 5.14.1.

119. *Protecting Consumers from Financial Fraud and Scams in the Pandemic Recovery Economy: Hearing before the Subcomm. on Fin. Insts. and Consumer Prot. of the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. 1 (Aug. 3, 2021) (testimony of John Breyault, National Consumers League) ("Analysts estimate that fraud rates on these [P2P] platforms are three to four times higher than for traditional payment methods such as debit and credit cards."); Ed Meirzwiniski et al., *Virtual Wallets, Real Complaints: How Digital Payment Apps Put Consumers' Cash at Risk, An Analysis of CFPB Complaints An Analysis of CFPB complaints*, PIRG FUND, (June 2021), [https://publicinterestnetwork.org/wp-content/uploads/2021/06/Virtualwallets\\_USP\\_V3.pdf](https://publicinterestnetwork.org/wp-content/uploads/2021/06/Virtualwallets_USP_V3.pdf) [hereinafter PIRG Report]. P2P scams have not abated. The following is a sampling of the many news reports of scams involving P2P services. Stacy Cowley & Lananh Nguyen, *Fraud Is Flourishing on Zelle. The Banks Say It's Not Their Problem*, N.Y. TIMES (Mar. 6, 2022) <https://www.nytimes.com/2022/03/06/business/payments-fraud-zelle-banks.html> (reporting on consumers suffering financial loss as a result of online scams and the banks that own Zelle refusing to provide consumers with relief); *Southland Crime: Scammers Target Home Glen Residents, and More*, CHICAGO TRIBUNE (Nov. 18, 2021), <https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-police-blotter-st-1013-20221011-szscqng7fbrhg2zsb75ws2n4a-story.html> (scammer posing as bank employee texted victim and fraudulently obtained payment through Zelle); *Con Edison Issues Warning to Customers About Money App Scammers*, NEWS12 BRIBX (Nov. 14, 2021), <https://bronx.news12.com/con-edison-issues-warning-to-customers-about-money-app-scammers> (utility warns that scammers posing as Con Edison employees threaten to shut off power and fraudulently obtain payment through Cash App, Venmo and Zelle; Con Ed joined over 140 electric, gas and water providers declaring Utility Scam Awareness Day); Zak Failla, *Con Ed Issues Warning For 'Immediate Payment' Scam*, ARMONK DAILY VOICE (Nov. 18, 2021), <https://dailyvoice.com/new-york/armonk/news/police-issue-warning-for-con-ed-phone-call-scam-in-westchester/728960/> (Con Ed warns that scammers posing as employees are using spoofed phone numbers to contact consumers and demand payment through P2P services or risk a power shut-off); *Manasquan Bank: How to Send Money with Zelle Safely*, BANKING NEWS FEED (Nov. 29, 2021), <https://manasquan.bank/today-manasquan/newsletter/2021/december/how-to-send-money-with-zelle-safely> (bank warns consumers of scam

services.<sup>120</sup> P2P scams result in serious harm to consumers, especially low-income consumers, who may need the stolen funds to pay for necessities.<sup>121</sup> Some fraudsters trick consumers with scams that are quite sophisticated, involving phishing, spoofed phone numbers, social media and text messaging.<sup>122</sup> Scammers prefer P2P because payments are transferred immediately and cannot be cancelled or reversed. Payment is final.<sup>123</sup>

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involving sale of event tickets in which fraudsters obtain payment through Zelle); *Nigerian National Pleads Guilty to Role in Romance Fraud Scheme*, U.S. DEP'T. JUST. NEWS (Nov. 29, 2021), <https://www.justice.gov/usao-sdww/pr/nigerian-national-pleads-guilty-role-romance-fraud-scheme>, (scammer obtains money through Zelle, among other sources, in romance fraud scheme); Nicholas Katzban, *Lyndhurst Woman Charged In Vax Cards Case*, THE RECORD (Sept. 2, 2021), <https://www.northjersey.com/story/news/coronavirus/2021/08/31/lyndhurst-nj-woman-fake-covid-vaccine-cards-instagram-antivaxmomma/5672488001/> (scammer sold 250 counterfeit vaccine cards, obtaining payment through online platforms like Zelle); Kent Babb, *On the Hunt for His Next Sports-Card Score*, WASH. POST (July 14, 2021, 9:08 AM), <https://www.washingtonpost.com/sports/2021/07/14/pandemic-sports-card-boom/>, (online buyer of collectibles falls victim to fraudulent scheme and transfers funds through Venmo).

120. See Banking Law, *supra* note 65. The Bank Policy Institute alleges that Zelle is a safe way to transfer money by comparing it to PayPal. Tara Payne, *The Data Shows that Zelle Is the Safest Way for Consumers to Move Their Money*, BUS. POL'Y INST. (Sept. 19, 2022), <https://bpi.com/the-data-shows-that-zelle-is-the-safest-way-for-consumers-to-move-their-money/> (claiming based on data from eight of the largest U.S. consumer banks that consumers complained to their banks about fraudulent or unauthorized payments made by PayPal three times more often than complaints about Zelle).

121. A Pew P2P study found that twice as many Black and Hispanic consumers reported being victims of scams as white consumers. Twenty percent of low-income consumers said they were victims of scams, compared to only about 10% of middle- and upper-income respondents. Monica Anderson, *Payment Apps Like Venmo and Cash App Bring Convenience – and Security Concerns – to Some Users*, PEW RSCH. CTR. (Sept. 8, 2022), <https://www.pewresearch.org/fact-tank/2022/09/08/payment-apps-like-venmo-and-cash-app-bring-convenience-and-security-concerns-to-some-users/>. See also Michael Finney & Renee Koury, *Chase Customer Loses Total of \$7,000 in Zelle Scam: Here's What You Need to Know*, ABC NEWS (Dec. 10, 2021), <https://abc7news.com/zelle-scam-chase-bank-refunds-bofa/11317729> (reports of several consumers losing thousands of dollars as a result of P2P scams); Stephanie Garland, *Seasonal Workers Must Be Wary of Holiday Jobs Scams*, JOPLIN GLOBE, (Nov. 22, 2021) (pursuant to phony employment offer, consumer sends \$1,000 for required equipment through Zelle); Tim Sweezy, *Beware Of This Zelle Fraud Scam That Aims To Steal Your Bank Credentials*, HOT HARDWARE, (Nov. 20, 2021, 12:43 PM) <https://hothardware.com/news/beware-of-this-zelle-fraud-scam>, (describing elaborate schemes involving funds in Zelle accounts enabling fraudster to take over consumer's bank account. "Once the scammer has control of the bank account they then proceed to...empty out all the funds of the customer.").

122. E.g., Imani Moise, *Small Banks Warn They Might Have to Drop Zelle*, WALL ST. J., Dec. 13, 2022, at B10 (reporting that scammers convert consumers' funds into cryptocurrency making it even more difficult to recover their funds); Kate Berry, *CFPB's Chopra Calls Level of P2P Fraud 'Frightening'*, AM. BANKER (Sept. 14, 2022), <https://www.americanbanker.com/news/cfpbs-chopra-calls-level-of-p2p-fraud-frightening> (quoting CFPB Director Rohit Chopra saying "The level of sophistication and technology use is really frightening...because there's not really that moment to hold or freeze or take back the money."); Chris Smith, *Hackers Are Stealing 2FA Codes with Terrifyingly Effective Voice Bots*, BOY GENIUS REP. (Nov. 7, 2021), <https://bgr.com/tech/hackers-are-stealing-2fa-codes-with-terrifyingly-effective-voice-bots/> (explaining that if hacker obtains personal data, such as victim's name, email address and phone number, the hacker can gain access to the consumer's accounts using a bot to harness "sophisticated attacks"); Sweezy, *supra* note 121 (scammer sends text message, spoofs incoming phone number, tricks consumer into providing bank website user information and generates a passcode to gain control over bank account).

123. Erin Scheithe, *Beware of Scams Related to the Coronavirus*, CONSUMER FIN. PROT. BUREAU (May 15, 2020), <https://www.consumerfinance.gov/about-us/blog/beware-coronavirus-related-scams/>

Acknowledging the risk of P2P scams, financial institutions caution consumers to use their P2P programs to transfer funds only to people they trust.<sup>124</sup> But the very essence of a P2P scam is to trick the consumer into trusting the fraudster.<sup>125</sup>

Consequently, merely warning consumers not to use P2P services if they do not trust the fraudster is useless unless financial institutions also describe the various underhanded but clever ways in which scammers gain consumers' trust.<sup>126</sup>

("... a Peer to Peer... payment app like Venmo or Zelle... transfer[s] funds immediately with little recall or retrieval capabilities and can be hard to trace, often making them the preferred choice of scammers."). The seven banks that own Early Warning Services, the company that operates Zelle, are reportedly devising a plan to standardize procedures for banks to reimburse consumers who were tricked into authorizing payments to scammers. Consumers would not be reimbursed, however, when they complain that goods or services were not received or typos caused a transfer to be made incorrectly. David Benoit & AnnaMaria Andriotis, *Banks Plan Zelle Customer Refunds*, WALL ST. J., Nov. 29, 2022, at B1. Small banks, however, may drop out of the Zelle network because reimbursing consumers may be too costly for them, given their thinner margins. Moise, *supra* note 122. Several banks in the United Kingdom have signed on to the "Contingent Reimbursement Model Code For Authorised Push Payment Scams." LEADING STANDARDS BOARD, CONTINGENT MODEL CODE FOR AUTHORISED PUSH PAYMENT SCAMS (May 28, 2019), <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2019/05/CRM-code.pdf> [hereinafter Contingent Reimbursement]. The Code provides that banks should reimburse victims of P2P scams. *Id.* Subject to specified exceptions, "when a Customer has been the victim of [a P2P] scam Firms should reimburse the Customer." *Id.* at 12.

124. PIRG Report, *supra* note 119, at 6; E-mail from Citi Cards, bank, to author (Aug. 20, 2022, 03:54 EST) (on file with author) (cautioning customers: "We've recently seen digital money movement fraud on the rise. A scammer can contact you requesting payment through a Wire Transfer or transfer via Zelle – these methods allow money to be sent quickly, and the funds are often hard to trace and recover." The e-mail then lists types of methods scammers use to trick consumers.).

125. Psychologists and others have explored the psychological basis of consumer trust in persons engaged in scams and other confidence schemes. Jessica M. Choplin et al., *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 L. & PSYCHOL. REV. 61, 71, 83, 98 (2011); Jean Braucher & Barak Orbach, *Scamming: The Misunderstood Confidence Man*, 27 YALE J.L. & HUMAN. 249, 287 (2015). Scammers use spoofed phone numbers and clever pitches to convince consumers the caller is a bank employee whom they can trust. Finney & Koury, *supra*, note 121. Behavioral economics has also provided insights into consumer behavior that scammers exploit. Farah Majidd, *The Irrationality of Credit Card Debt: Examining the Subconscious Biases of Credit Card Users*, 34 L. & PSYCHOL. REV. 165, 171 (2010) (consumers have both "inaccurate expectations that negative events will never occur in their lives," and optimistic biases); Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 U. KAN. L. REV. 629, 629 (2007) ("[P]eople... "use mental shortcuts," and "display systematic biases when they make judgments. And they occasionally take actions that conflict with their interests, both long and short term."). Scammers posing as legitimate persons take advantage of the common consumer vulnerabilities that are discussed in the above-cited articles. The Federal Trade Commission has documented the widespread practice of fraudsters impersonating others. *FTC Proposes New Rule to Combat Government and Business Impersonation Scams*, FED. TRADE COMM'N (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-proposes-new-rule-combat-government-business-impersonation-scams>. See generally Jeffrey Gettleman et al., *The Harvard Job Offer That Wasn't*, N.Y. TIMES, Dec. 19, 2021, at BU1 (reporting scam in which fraudsters impersonating officials at Harvard University made phony job offers to prominent Indian women journalists and obtained personally identifiable information including bank account numbers; motive for scam not known).

126. A Wells Fargo brochure promoting Zelle, *inter alia*, states in small print on the back of the brochure: "For your protection, Zelle should only be used for sending money to friends, family and others you trust. Neither Wells Fargo nor Zelle offers a protection program for authorized payments made with Zelle." WELLS FARGO, SEE WHAT'S NEW WITH ZELLE (2022) (copy on file with the author).

Moreover, burying the warning in a part of the website the consumer likely will not see, such as the Frequently Asked Questions (FAQ) page on the financial institution's website, greatly decreases the chances consumers will even notice the warning. Even if consumers do see a warning and appreciate the risk of sending funds using P2P, it may be only after they have already transferred funds. Consequently, it would be too late to prevent the fraudulent payment since consumers cannot reverse or cancel P2P transfers. For these reasons, warning consumers to send money only to those they trust is not providing consumers with the information they need when they need it.

To protect consumers when they are the victims of P2P scams, the CFPB should amend Reg. E to make it clear that an "error" under Reg. E includes fraudulent inducement and deceptive acts. The CFPB has the authority to do so. The EFTA provides that the CFPB "shall prescribe rules to carry out the purposes of [the EFTA]."<sup>127</sup> Moreover, the provision that specifically defines acts that constitute error provides that "an error consists of . . . any other error described in regulations of the [CFPB]."<sup>128</sup>

Amending the definition of "error" is necessary to fulfill the purpose of the EFTA: "The primary objective of this subchapter . . . is the provision of individual consumer rights."<sup>129</sup> The prevalence of P2P fraud demonstrates the necessity of defining "error" to include fraudulent inducement and deceptive acts in order to carry out the purposes of the EFTA.<sup>130</sup>

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127. 15 U.S.C. § 1693b(a)(1).

128. 15 U.S.C. § 1693f(f)(7). The CFPB appears to believe Reg. E already accomplishes this for some P2P transactions. *Electronic Fund Transfers FAQs, Error Resolution: Unauthorized EFTs 6 & 11*, CFPB, <https://www.consumerfinance.gov/compliance/compliance-resources/deposit-accounts-resources/electronic-fund-transfers/electronic-fund-transfers-faqs> (last updated June 4, 2021); see also CFPB P2P FAQs, *supra* note 65. Some members of Congress are considering amending the EFTA itself. See, e.g., *Task Force on Financial Technology: What's in Your Wallet? A Review of Recent Trends in Mobile Banking: Hearing Before the U.S. H. of Reps., Comm. on Fin. Servs.*, 117th Cong. (Apr. 28, 2022), <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114690>; A Bill to Amend the Electronic Fund Transfer Act, 117th Cong. (2d Sess. 2022), <https://docs.house.gov/meetings/BA/BA00/20220428/114690/BILLS-117pjh-ProtectingConsumersFromPaym-U1.pdf> (Discussion Draft).

129. 15 U.S.C. § 1693(b).

130. Congress established a national commission to investigate electronic fund transfers and recommend legislation. Congress was informed by those recommendations in drafting the EFTA. The commission acknowledged the importance of including an error resolution procedure. NAT'L COMM'N ON ELEC. FUND TRANSFERS, EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST 59–63 (Oct. 28, 1977). The commission also recognized that it could not anticipate all the problems that might arise, and further legislative solutions "might then be appropriate." *Id.* at 61. The courts have upheld the authority of agencies to issue consumer protection regulations as long as they are "reasonably related to the purposes of the enabling legislation." *Mourning v. Fam. Publ'ns Servs., Inc.*, 411 U.S. 356, 369 (1973) (upholding a Federal Reserve Board regulation issued pursuant to the Truth-In-Lending Act). See generally THE CLEARING HOUSE, ERROR RESOLUTION FOR P2P PAYMENT SERVICES: BEYOND THE CFPB FAQs (Sept. 2022), [https://mc-e3a82812-8e7a-44d9-956f-8910-cdn-endpoint.azureedge.net/-/media/New/TCH/Documents/Payment-Systems/TCH\\_Regulation\\_E\\_and\\_Intermediated\\_P2P\\_Transfers\\_September\\_2022.pdf](https://mc-e3a82812-8e7a-44d9-956f-8910-cdn-endpoint.azureedge.net/-/media/New/TCH/Documents/Payment-Systems/TCH_Regulation_E_and_Intermediated_P2P_Transfers_September_2022.pdf) (discussing the responsibilities under the EFTA of the various parties involved in P2P payments).

P2P scams deprive low-income consumers of funds that they may need for essential goods and services, such as rent, mortgage payments, medical services, and car payments. The impact on low-income consumers can be especially devastating since they usually do not have savings or other assets to draw upon when P2P scams rob them of their money. Despite the serious harm that often results from P2P scams, financial institutions are not responsive to consumer complaints about them.<sup>131</sup> The proposed amendment is essential because without it consumers have no remedy and financial institutions have no incentive to undertake measures to prevent transfers to the fraudsters.<sup>132</sup>

In addition to issuing an amendment to Reg. E by adding fraudulent inducement and deceptive acts to the definition of “error,” the CFPB should amend Reg. E by adding a provision to provide consumers relief when they make a mistake. Three national consumer advocacy organizations have recommended this reform.<sup>133</sup> A mere one digit typing error can result in a misdirected transfer or a transfer in the wrong amount. Low-income consumers, many of whom are disabled or elderly, may be especially vulnerable to this type of problem. If they promptly notify the appropriate parties to the transaction, they should be able to have the mistake remedied.

The CFPB should assist both financial institutions and consumers in understanding what the terms “error” and “mistake” mean under an amended Reg. E and how they apply to specific types of transactions, including P2P transfers.

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131. Sweezy, *supra* note 121 (reporting that “victims are finding little to no help from their banking institutions in recovering stolen cash”); Finney & Koury, *supra* note 121 (describing scams involving Zelle including one where Chase Bank refused to refund a customer’s funds and mentioning that Bank of America made refunds to “some victims”). See generally, *Press Release: PayPal Settles FTC Charges that Venmo Failed to Disclose Information to Consumers About the Ability to Transfer Funds and Privacy Settings*, FED. TRADE COMM’N (Feb. 27, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/02/paypal-settles-ftc-charges-venmo-failed-disclose-information-consumers-about-ability-transfer-funds> (finding that unauthorized users withdrew funds as a result of Venmo’s failure to notify users when their password or email address had been changed and that “Venmo lacked adequate customer support to respond to consumer complaints about these incidents.”) [hereinafter *PayPal Settles Charges*].

132. Anything short of amending Reg. E will be insufficient. Under the United Kingdom’s voluntary “Contingent Reimbursement Model Code For Authorised Push Payment Scams” that went into effect in 2019, ten banking groups voluntarily agreed to reimburse consumers who lost money in P2P scams. Because some banks did not agree to do so, and even among those who did agree reimbursement was “inconsistent,” in 2022 the government announced that the Payment Systems Regulator would be authorized to make reimbursement mandatory. *Government approach to authorised push payment scam reimbursement*, GOV.UK (May 10, 2022), <https://www.gov.uk/government/publications/government-approach-to-authorised-push-payment-scam-reimbursement/government-approach-to-authorised-push-payment-scam-reimbursement>.

133. NAT’L CONSUMER L. CTR., NAT’L CMTY. REINVESTMENT FUND & NAT’L CONSUMERS LEAGUE, COMMENT LETTER SUBMITTED TO THE FRB, 3–7 (Sept. 9, 2021), [https://www.nclc.org/wp-content/uploads/2022/08/Reg\\_J\\_Fed\\_Now\\_joint\\_comments-1.pdf](https://www.nclc.org/wp-content/uploads/2022/08/Reg_J_Fed_Now_joint_comments-1.pdf) [hereinafter *NCLC FedNow Comment*]. See generally Uniform Electronic Transactions Act § 10 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1999).



This should be done in its Official Interpretations and in consumer education material available to the public.<sup>134</sup>

The CFPB should issue guidance recommending warnings, and they should offer suggestions for the placement, timing and content of those warnings to prevent fraudsters from scamming consumers when using P2P services.<sup>135</sup> The guidance could suggest language that many financial institutions are using already, as discussed below.<sup>136</sup> In addition, agencies currently provide useful information on their consumer education pages, so the recommendations in the guidance should not surprise or unduly burden the financial institutions offering P2P programs.<sup>137</sup>

Furthermore, the warning should highlight how much riskier P2P is than other methods, in part because transfers occur immediately and cannot be cancelled. Wells Fargo already informs consumers of this on its Frequently Asked Questions page.<sup>138</sup> Consumers also need to know they have much less legal protection when they transfer funds using P2P services rather than other methods. Zelle acknowledges this.<sup>139</sup>

It is essential that the CFPB monitor P2P services to determine if financial institutions are complying with Reg. E. As research and individual consumer complaints demonstrate, these firms are not investigating consumer complaints of errors and generally not providing adequate customer service of any kind.<sup>140</sup> Consequently, even if the CFPB amends the definition of “error” and provides consumers the right to report fraud, deception, and mistake, consumers will not receive the protection they need, unless the CFPB ensures that financial institutions investigate all of the errors and mistakes reported by consumers, provide a provisional credit when required by Reg. E, and comply with all of the other requirements of the regulation. Monitoring compliance will incentivize financial

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134. The CFPB Official Interpretations already include a section on error resolution procedures, Official Interpretation §1005.11(11), and a section clarifying a crucial definition in Reg. E. Official Interpretation §1005.3(b)(3)(i) (defining the funds transfers covered by Reg. E.). The CFPB provides consumer education “tools” on its website. *Consumer resources*, CFPB, <https://www.consumerfinance.gov/consumer-tools/> (last visited Oct. 16, 2022).

135. The United Kingdom’s voluntary “Contingent Reimbursement Model Code For Authorized Push Payment Scams” recommends several types of warnings to help prevent P2P scams. Contingent Reimbursement, *supra* note 123, at 7–8.

136. *See infra* text accompanying note 134.

137. *See, e.g.*, Scheithe, *supra* note 123 (warning of scams in which someone the consumer doesn’t know requests payment through a P2P app like Venmo or Zelle. “These methods transfer funds immediately with little recall or retrieval capabilities and can be hard to trace. . .”).

138. *Zelle FAQs*, WELLS FARGO, [www.wellsfargo.com/help/online-banking/zelle-faqs](http://www.wellsfargo.com/help/online-banking/zelle-faqs) (last visited Feb. 23, 2023) (“Once you send money with Zelle®, you cannot cancel the payment if your recipient has already enrolled.”).

139. *Id.* (“However, because Zelle® is intended to replace instances where cash and checks are being exchanged, you do not have the same protections associated with a credit card or a debit card transaction, such as the ability to dispute purchase transactions.”).

140. *See, e.g.*, PayPal Settles Charges, *supra* note 131 (FTC announcing that unauthorized users withdrew funds as a result of Venmo’s failure to notify users when their password or email address had been changed. “Venmo lacked adequate customer support to respond to consumer complaints about these incidents.”); PIRG Report, *supra* note 119, at 2 (“Customer service for payment apps is minimal, sometimes lacking contact phone numbers or human interaction at all.”).

institutions to implement security safeguards that will enable them to identify scammers and types of scams and prevent the wrongdoing from occurring.<sup>141</sup>

## VI. IF GOVERNMENT BUILDS IT, IT MUST BUILD IT BETTER

Congress and federal agencies are considering various proposals in which the government itself would provide consumer financial services. These developments have the potential to provide significant benefits to low-income consumers. But this will happen only if those consumers have adequate representation in the forums in which they are considered. Moreover, even if all of the services presently being considered are undertaken by the government, the private sector will still provide the bulk of consumer financial services. Therefore, the recommendations made above will still be relevant.

### A. FedNow

As previously discussed, the private sector offers consumers P2P services.<sup>142</sup> Nevertheless, the Federal Reserve (the Fed) believes private systems do not transfer funds quickly enough.<sup>143</sup> Therefore, the Fed is developing its own system, which it calls “FedNow” to make transfers “immediately.”<sup>144</sup> Because the Fed has decided not to incorporate adequate consumer protection, however, consumers using the FedNow service will risk being subject to scams and other problems just as they are now with private P2P services.<sup>145</sup>

In June 2022, the Fed issued a Final Rule to govern FedNow.<sup>146</sup> In order to provide consumers with protection when they use the service, under the Rule the

141. Imtiaz Adam, *Applications of Artificial Intelligence in FinTech, InsurTech & The Future of 5G*, BBN TIMES (Nov. 10, 2021), <https://www.bbnimes.com/financial/applications-of-artificial-intelligence-in-fintech-insurtech-the-future-of-5g> (reporting that PayPal was acquiring Similty to protect its users and Stripe is using Artificial Intelligence and machine learning to detect fraud); Mike Ferlazzo, *Freeman College's Thiago Serra Receives NSF Award to Study Neural Networks*, BUCKNELL UNIV. (May 7, 2021), <https://www.bucknell.edu/news/freeman-colleges-thiago-serra-receives-nsf-award-study-neural-networks> (reporting that PayPal has developed its own neural network to detect new types of fraud). See Contingent Reimbursement, *supra* note 123, at 10 (“Firms should establish transactional data and customer analytics” to detect P2P scams.).

142. See *supra* text accompanying note 117.

143. *Service Details on Federal Reserve Actions To Support Interbank Settlement of Instant Payments*, 85 F.R. 48465, 48522–23 (Aug. 11, 2020).

144. 86 Fed. Reg. 31376 (June 11, 2021).

145. NCLC FedNow Comment, *supra* note 133, at 3–7.

146. *Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire*, 87 Fed. Reg. 34350 (June 6, 2022). The FRB has scheduled the FedNow service to begin in “mid-year 2023.” *Federal Reserve updates FedNow Service timing to mid-2023, marks beginning of full-scale pilot testing*, FED. RSRV. (Aug. 29, 2022), [www.federalreserve.gov/newsevents/pressreleases/other20220829a.htm](http://www.federalreserve.gov/newsevents/pressreleases/other20220829a.htm). See *Operating Circular No. 8, Funds Transfers Through The FedNow Service*, FED. RSRV. BANKS, [www.frbsservices.org/binaries/content/assets/crsocms/resources/rules-regulations/operating-circular-8.pdf](http://www.frbsservices.org/binaries/content/assets/crsocms/resources/rules-regulations/operating-circular-8.pdf) (effective Sept. 21, 2022) [hereinafter Circular 8]; THE FEDERAL RESERVE, FEDNOW SERVICE OPERATING PROCEDURES 39 (Sept. 2022), [www.frbsservices.org/binaries/content/assets/crsocms/resources/rules-regulations/fednow-operating-procedures.pdf](http://www.frbsservices.org/binaries/content/assets/crsocms/resources/rules-regulations/fednow-operating-procedures.pdf) (providing for an optional “negative list” “to help mitigate fraud.”).

EFTA will apply to the fund transfers.<sup>147</sup> As discussed above, however, the EFTA does not protect consumers against fraudulent inducements or mistakes.<sup>148</sup> Moreover, the EFTA does not provide a complete legal framework for the FedNow system. Acknowledging this gap, the Rule incorporates UCC Article 4A to provide supplementary legal rules to fill the gap.<sup>149</sup> Sometimes there may be situations in which both laws may apply. When that occurs, and there is an inconsistency between the two statutes, the EFTA would prevail.<sup>150</sup>

FedNow could be beneficial for low-income consumers. Because they often live paycheck to paycheck, it is important for them to receive money as soon as possible. It is also crucial that those to whom consumers send payments receive them immediately in order for consumers to avoid eviction, foreclosure, repossession or imposition of onerous fees.<sup>151</sup>

Unfortunately, the Fed's rule does not adequately protect consumers.<sup>152</sup> The organizations that proposed that the states enact Article 4A intended it to apply to wholesale wire transfers, not to payments involving consumers and small businesses. The Prefatory Note to Article 4A states: "Payments that are covered by article 4A are overwhelmingly between business or financial institutions. The dollar volume of payments made by wire transfer far exceeds the dollar volume of payments made by other means."<sup>153</sup> Article 4A does not take into consideration the vulnerabilities of consumers who have far less knowledge and sophistication, and far less bargaining power than the parties involved in typical Article 4A transactions. The drafters of Article 4A did not consider the devastating consequences of faulty transfers involving middle-class consumers, much less low-income consumers, because transfers by any type of consumer was beyond the scope of Article 4A.

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147. *Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire*, 87 Fed. Reg. 34350.

148. *See supra* text accompanying notes 130–32.

149. *Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire*, 87 Fed. Reg. 34350.

150. *Id.* at 34350, 34353.

151. *See supra* text accompanying notes 54–56. If it operates as the Fed promised, the FedNow immediate payment service will be an improvement over current electronic payments through banks. The Automated Clearinghouse system generally does not transfer a payment until the next day. Andrew Ackerman, *Fed Plans Faster Payments System in 2023*, WALL ST. J. Aug. 30, 2022, at A2. The Real-Time Payments System provides for almost immediate payments, but many smaller banks and credit unions do not participate in that system and the system does not process all payments. *Id.* The lack of a system that transfers payments immediately "has cost consumers hundreds of billions in the form of overdraft fees, check-cashing fees and late fees," according to Aaron Klein at the Brookings Institution. *Id.* In addition, because of the delay in payment transfers, consumers have taken out high-cost loans from payday lenders. *Id.*

152. The text accompanying notes 142–59 is based primarily on a comment letter drafted by the author and submitted to the FRB. Thirty-seven other professors also signed on to the comment letter. Comment Letter sent to Bd. of Governors of the Fed. Rsrv. Sys. (on file with author). Operating Circular 8 does not require specific rigorous security procedures. Circular 8, *supra* note 146, at 11–12.

153. U.C.C. Article 4A, Prefatory Note (AM. L. INST. & UNIF. L. COMM'N. 1989); *see also* Whitaker v. Wedbush Sec., Inc., 162 N.E.3d 269, 276 (Ill. 2020) (Article 4A was not intended to govern "consumer-based transactions involving 'relatively small amounts of money and a single contract.'").

A review of crucial provisions in Article 4A illustrates that it is incapable of protecting consumers. Article 4A has no requirements to ensure proper authentication standards. As the Fed itself pointed out, Article 4A permits the “receiving bank to act on the basis of the identifying number without regard to the name provided in the payment order, so long as the bank does not know the name and number referred to different parties.”<sup>154</sup> In addition, the FedNow rule does not include essential provisions to ensure adequate authentication.

Article 4A also does not require adequate security safeguards. Article 4A embodies the concept of freedom of contract and assumes an agreement between two sophisticated and experienced businesses. It provides for a bank and its customer to agree on a “security procedure.”<sup>155</sup> If the parties have agreed, and the bank follows that procedure, “a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized” as long as the procedure is “commercially reasonable.”<sup>156</sup>

This is entirely inadequate to ensure that FedNow will protect consumers. Given the prevalence of cyberattacks, even against federal government entities, consumers should expect and deserve security as good as technology can provide.<sup>157</sup> The Fed should establish security protocols as part of the FedNow infrastructure and provide relief to consumers who suffer injury as a result of a security failure. Providing strong security will help persuade low-income consumers to use the system. They often are underbanked or unbanked.<sup>158</sup> One reason for that is they do not trust traditional banks’ security.<sup>159</sup>

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154. 86 Fed. Reg. 31376, at 31379 (June 11, 2021).

155. U.C.C. Article 4A § 4A-201 (AM. L. INST. & UNIF. L. COMM’N 1989).

156. U.C.C. Article 4A § 4A-202(b) (AM. L. INST. & UNIF. COMM’N 1989). The Federal Reserve has issued an Operating Circular that, *inter alia*, conforms to U.C.C. Article 4A’s provisions on security procedures. In addition, it provides: “The FedNow Service’s security procedures will not be used to detect error in the transmission or content of a Message, including a payment order, or Message seeking to cancel or amend a payment order.” Circular 8, *supra* note 146, at 12.

157. Brendan J. Lyons, ‘Malicious Cyberattack’ Strikes New York Ethics Agency, *TIMES UNION* (Feb. 27, 2022), <https://www.timesunion.com/state/article/Malicious-cyberattack-strikes-New-York-ethics-16948621.php> (reporting that New York’s Joint Commission on Public Ethics was target of cyberattack); Stephan Dinan, *IRS Abandons Plans to Subject Web Users to Facial Recognition*, *WASH. TIMES* (Feb. 8, 2022), <https://www.washingtontimes.com/news/2022/feb/7/irs-abandons-plans-subject-website-users-facial-re/> (reporting that in 2019 the IRS said it was subject to 1.4 million cyberattacks each year); David Uberti & Dustin Volz, *Scope of Cyberattacks Expanded This Year*, *WALL ST. J.*, Dec. 23, 2021, at B1 (reporting that in 2021 there were cyberattacks affecting thousands of companies). See generally Alice Uribe et al., *Insurers Worry About Cyber-Policy Hitch*, *WALL ST. J.*, Mar. 15, 2022, at B5 (reporting that in the wake of the war in Ukraine, insurance companies are concerned their policies’ exclusion of coverage for acts of war may not exclude cyberattacks from coverage). Operating Circular 8 does not require specific rigorous security procedures. Circular 8, *supra* note 146, at 11–12.

158. Nizan Geslevich Packin & Srinivas Nippani, *Ranking Season: Combatting Commercial Banks’ Systemic Discrimination of Consumers*, 59 *AM. BUS. L.J.* 123, 146 (2022); Julia F. Hollreiser, *Closing The Racial Gap In Financial Services: Balancing Algorithmic Opportunity With Legal Limitations*, 105 *CORNELL L. REV.* 1233, 1235 (2020).

159. Fed Report, *supra* note 44, at 8, n.7; Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan*, 55 *HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV.* 63, 89 (2020). The FedNow Operating Circular provides only the barest minimum possibility of relief for consumers, requiring financial

Finally, the Fed should amend Reg. E to include fraudulent inducement and mistakes that occur when consumers use FedNow. As three national consumer advocacy groups stated in their FedNow comment letter to the Fed: “In this modern era of big data, artificial intelligence, and machine learning, we know that institutions that bear the cost of losses from fraud or errors are capable of developing sophisticated, ever-improving methods of detecting and limiting these losses.”<sup>160</sup>

### B. Banking on the U.S. Postal Service

According to a 2019 FDIC survey, 5.4% of American households were unbanked.<sup>161</sup> In addition, many are underbanked. Although the underbanked may use a few banking services, they also use fringe bankers such as payday lenders.<sup>162</sup> Consumers do not fully utilize financial services offered by banks because of the high costs, a lack of access, and their distrust of banks.<sup>163</sup> By not using banks, low-income consumers are more likely to remain poor than if they had access to low-cost bank services. If they had access to low-cost services, they could avoid dealing with high-cost check cashing stores and predatory fringe banks and would have a safe place to keep their money.

In 2020 Senator Kirsten Gillibrand filed a bill in Congress to establish postal banking.<sup>164</sup> That legislation would permit the U.S. Postal Service (“USPS”) to offer a full range of banking services. The USPS already has taken the first tentative steps toward achieving postal banking. In 2021, it began a pilot program in four cities. Post offices there started offering the following services: “Check cashing, bill paying, ATM access, expanded and improved money orders and

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institutions to “use reasonable efforts to . . . investigate inquiries from its customers about “errors, unauthorized transfers, or rejections. . . .” and assist other participants in their investigations. Circular 8, *supra* note 146, at 37.

160. NCLC FedNow Comment, *supra* note 133, at 13.

161. FDIC Press Release, FDIC Survey Shows 95 Percent of U.S. Households Were Banked in 2019, Fed. Deposit Ins. Corp. (Oct. 19, 2020), <https://www.fdic.gov/news/press-releases/2020/pr20113.html>.

162. E. Kylie Norman, *Banking At the Fed With Fedaccounts: The Demise Of Commercial Banks?*, 23 N. CARO. BANKING INST. 451, 459 (2019); Julie Tsirkin & Phil McClausland, *Can a Post Office Be a Bank? New Services Test a Progressive Priority*, NBC NEWS (Oct. 4, 2021, 1:01 PM, EDT), <https://www.nbcnews.com/politics/politics-news/return-postal-banking-postal-service-tests-new-financial-services-rcna2502>.

163. Tsirkin & McClausland, *supra* note 162. In January, 2022 the CFPB issued a request for information regarding high bank fees. *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees*, CONSUMER FIN. PROT. BUREAU (Jan. 26, 2022), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/>.

164. The Postal Banking Act, S. 4616, 116<sup>th</sup> Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4614>. See generally Lisa Rowen, *Would Postal Banking Save the Post Office?*, FORBES (Sept. 2, 2020), <https://www.forbes.com/advisor/banking/would-postal-banking-save-the-post-office/>. Another example of the federal government providing services currently performed by the private sector was President-elect Biden’s proposal that the government replace private credit reporting agencies with a government-operated public credit reporting agency. Amy Traub & Chi Chi Wu, *After 5 Decades of Private Credit Reporting, It’s Time for a Change*, HILL (Dec. 10, 2020, 2:30 PM), <https://thehill.com/opinion/finance/529675-after-5-decades-of-private-credit-reporting-its-time-for-a-change>.

expanded wire transfers.<sup>165</sup> Congress would need to pass a new law for the program to be significantly expanded.<sup>166</sup>

Postal banking is not without its critics. The vice president for congressional relations and strategy for the Independent Community Bankers of America represents small banks. His organization does not believe the USPS is up to the task, noting that “financial services have never been more complex.”<sup>167</sup>

Professor Mehrsa Baradaran is a long-time proponent of postal banking.<sup>168</sup> She contends that the USPS can offer services at a lower cost than traditional and fringe banks because of “economies of scale.”<sup>169</sup> She points out that USPS’s “existing infrastructure significantly reduces overhead costs” and it does not have to produce a profit for shareholders.<sup>170</sup> Moreover, it has long sold money orders, an important consumer financial product.<sup>171</sup> Finally, she notes that most other countries already have postal banking.<sup>172</sup> She acknowledges that lending to low-income consumers will not be easy. The USPS will “need a system of strong and accurate underwriting procedures” to distinguish “illiquid” customers from those who are insolvent. Moreover, Professor Baradaran cautions that even a postal bank may engage in “predation, mismanagement, and fraud.”<sup>173</sup> To help prevent these abuses to consumers, she believes Congress should grant the CFPB the responsibility to provide oversight.<sup>174</sup>

Postal banking has the potential to provide low-income consumers with an affordable and accessible alternative to more costly alternatives. It seems far more preferable to predatory companies to which low-income consumers often turn. Postal banking is something Congress should seriously consider.

165. Tsirkin & McClausland, *supra* note 162 (“Check cashing is the biggest change in services. . . Customers can use payroll or business checks to buy single-use gift cards worth up to \$500.”); Talib Visram, *The Post Office is Finally Going to Try Out Being a Bank*, FAST CO. (Oct. 5, 2021), <https://www.fastcompany.com/90683033/the-post-office-is-finally-going-to-try-out-being-a-bank>.

166. Tsirkin & McClausland, *supra* note 162.

167. *Id.* Critics also have attacked the USPS’s very existence. For example, former President Trump called for its privatization. It is not financially viable. A bi-partisan bill in Congress seeks to solve its financial problems and authorize the USPS to provide new services. Siobhan Hughes et al., *Postal Service Bill Took a Long Route*, WALL ST. J., Mar. 4, 2022, at A4. The current Postmaster General, Louis DeJoy, has been criticized for financial conflicts of interest. *New Documents Detail Conflicts of Interest DeJoy faced as Postmaster General*, NBC NEW YORK (Oct. 21, 2021), <https://www.nbcnewyork.com/news/national-international/new-documents-detail-conflicts-of-interest-dejoy-faced-as-postmaster-general/3341746/>. In addition, he was attacked in 2020 for the Postal Service’s slow processing of mail-in ballots. Lora Korpa, *White House ‘Deeply Troubled’ By Postmaster Louis DeJoy’s Potential Conflicts of Interest*, NEWSWEEK (Nov. 19, 2021), <https://www.newsweek.com/white-house-deeply-troubled-postmaster-louis-dejoys-potential-conflicts-interest-1651496>.

168. Mehrsa Baradaran, *How The Poor Got Cut Out Of Banking*, 62 EMORY L.J. 483, 544–47 (2013).

169. Baradaran, *supra* note 159, at 120, 127.

170. *Id.* at 120.

171. *Id.* at 123.

172. *Id.* at 122.

173. *Id.*

174. *Id.*

### C. The Fed May Take a Bite Out of Bitcoin

Most people use cryptocurrency as an investment that is bought and sold. Increasingly, however, consumers use it to pay for goods and services. For example, the mayors of New York and Miami volunteered to be paid their salaries in cryptocurrency.<sup>175</sup> Tesla accepts dogecoin as payment for some of its merchandise.<sup>176</sup> As the Fed has cautioned, however, cryptocurrencies “make consumers vulnerable to loss, theft, and fraud.”<sup>177</sup>

Cryptocurrency has an uncertain legal status. The Internal Revenue Service has declared that using cryptocurrency to pay for goods and services is a taxable event.<sup>178</sup> The Securities and Exchange Commission has found that under certain circumstances it may be a security.<sup>179</sup> The Commodity Futures Trading Commission has successfully brought actions against cryptocurrency companies that violated the

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175. See Prang, *supra* note 26. The cities of Miami and New York are participating in a program in which buyers purchase a “MiamiCoin” or “NYCCoin” from CityCoins, a non-profit organization. The cities accept funds that are allocated to them during the process of mining the coins. See Heather Gillers, *Miami Gains, Investors Lose in Crypto Effort*, WALL ST. J., Apr. 8, 2022, at B1, B4; see also *Introducing City Coins*, CITYCOINS, <https://www.citycoins.co/> (last visited Feb. 23, 2023).

176. See Ardel-Baqui, *supra* note 25.

177. See Fed Report, *supra* note 44, at 11. In a series of reports released by the White House in September 2022, the CFPB and the FTC were encouraged to “‘redouble’ efforts to monitor consumer complaints [about cryptocurrency] and to ‘enforce [laws] against unfair, deceptive or abusive practices.’” See Claire Williams, *White House Urges Regulators to ‘Redouble’ Crypto Oversight Efforts*, AM. BANKER, (Sept. 16, 2022) <https://www.americanbanker.com/news/white-house-urges-regulators-to-redouble-crypto-oversight-efforts>; Fatima Hussein, *Treasury Secretary Calls for Crypto Regulation to Reduce Risks, Fraud*, WALL ST. J., Apr., 8, 2022, at A12 (reporting on thefts of billions of dollars of crypto and Secretary Yellin’s call for regulation); David Uberti, *Launders Crypto Is the Tricky Part*, WALL ST. J., Apr. 7, 2022, at B5 (reporting on the theft of millions of dollars of crypto from players of Axie Infinity, an online game). Jerome Powell, Chairman of the Federal Reserve, stated that the central bank should subject digital financial services currently not subject to bank regulation to the same rules as those to which banks are now subject. See Nick Timiraos, *Powell Flags Risks of Cryptocurrencies*, WALL ST. J., Mar. 24, 2022, at A6. The potential widespread adoption of cryptocurrency has international implications. See generally Roger Lowenstein, *How Paper Money Saved the Union*, WALL ST. J., Mar. 5–6, 2022, at C5 (opining that “the dollar as a global standard faces threats from nations such as China and from speculative private currencies - unsupported by taxes - such as crypto.”).

178. “Cryptocurrency is a type of virtual currency. . . [T]he use of virtual currencies to pay for goods and services. . . generally has tax consequences that could result in tax liability.” *Virtual Currencies*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies> (last visited Feb. 23, 2023).

179. Dave Michaels, *SEC Fines Kardashian for Touting Crypto*, WALL ST. J., Oct. 4, 2022, at B2 (reporting that Kim Kardashian was fined \$1.26 million to settle SEC charges that she failed to disclose that she received compensation for promoting EMAX tokens, the SEC alleging that EMAX is an investment contract subject to the federal securities laws); Richard Vanderford, *SEC Says No Free Pass for Crypto*, WALL ST. J., Sept. 10–11, 2022, at B11 (reporting that SEC Chairman Gary Gensler believes “most crypto assets should be considered securities.”); Elisa Hansen, *Crypto Attys on SEC’s Treasury Markets Rule: ‘Pay Attention’*, LAW360 (Jan. 28, 2022), <https://www.law360.com/fintech/articles/1459826/crypto-attys-on-sec-s-treasury-markets-rule-pay-attention>; *Press Release, SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, SEC (Dec. 22, 2020), <https://www.sec.gov/news/press-release/2020-338> (announcing action filed against company for raising funds in an unregistered securities offering through the sale of a digital asset and distributing billions of the asset in exchange for non-cash services); see generally Paul Kiernan & Dave Michaels, *Crypto Hires Aim to Boost Washington Influence*, WALL ST. J., Mar. 14, 2022, at A4 (reporting that

Commodity Exchange Act.<sup>180</sup> Although consumers sometimes use crypto to pay for goods and services, the EFTA and Reg. E do not define or mention cryptocurrency at all.<sup>181</sup>

The Fed is taking cryptocurrency used as payment very seriously. In January 2022, the Fed issued a report in which it disclosed it was in the very beginning stage of considering whether its central bank should issue a “central bank digital currency” (CBDC). The report discussed the many possible benefits that might accrue to consumers and businesses as well as the risks.<sup>182</sup> The Fed acknowledged that “[t]hreats to existing payment services—including operational disruptions and cybersecurity risks. . . would apply to a CBDC as well.”<sup>183</sup>

Of particular interest to low-income consumers, in its request for public input, the Fed stated that “[p]romoting financial inclusion—particularly for economically vulnerable households and communities—is a high priority for the Federal Reserve.”<sup>184</sup> The Fed, however, was not sure whether its CBDC proposal would benefit low-income consumers, stating that determining the potential of expanding CBDC to lower income households requires “[f]urther study.”<sup>185</sup>

The National Consumer Law Center, however, seems certain the proposal would not benefit low-income consumers. The Center submitted a letter to the Fed saying its comments were made from the perspective of consumers, especially low-income consumers.<sup>186</sup> The Center believed “a CBDC would pose a vast number of risks and uncertainties that could negatively impact consumers.”<sup>187</sup> Among these concerns, the Center listed privacy, fraud, the cost of accounts, and uncertainty of coverage under the EFTA.<sup>188</sup>

Shortly thereafter the issue of whether the Fed’s central bank should issue a CBDC became a top priority of the Biden Administration. In March 2022, President Biden issued an Executive Order (“Order”) declaring that “the growing

cryptocurrency companies have hired many former regulators to represent them, including the former Chair of the SEC who represents Ripple in the SEC’s action against them).

180. See, e.g., *Press Release: Federal Court Orders BitMEX to Pay \$100 million for Illegally Operating a Cryptocurrency Trading Platform and Anti-Money Laundering Violations*, No. 8412-21, CFTC (Aug. 10, 2021), <https://www.cftc.gov/PressRoom/PressReleases/8412-21>.

181. The EFTA defines “electronic fund transfer,” *inter alia*, as “any transfer of funds,” 15 U.S.C. § 1693a(7), but does not define “funds.” Reg. E also defines “electronic fund transfer,” but does not define “funds.” 12 C.F.R. § 1005.3(b), (c). The Uniform Commercial Code defines “money” as “a medium of exchange currently authorized by a domestic or foreign government. U.C.C. § 1-201(24) (AM. L. INST. 1997). “The test is that of sanction of government. . . which recognizes the circulating medium as a part of the official currency of that government.” U.C.C. § 1-201, Comment 24 (AM. L. INST. 1997).

182. Fed Report, *supra* note 44, at 3, 7. See generally Christopher Mims, *Central Bank Digital Currencies Are Coming – Whether Countries Are Ready or Not*, WALL ST. J., Jan 17, 2023, at R11.

183. Fed Report, *supra* note 44, at 20.

184. *Id.* at 16.

185. *Id.* at 16.

186. Letter from Lauren Saunders, Associate Director, National Consumer Law Center, to FRB (May 20, 2022), <https://www.federalreserve.gov/files/cbdc-public-comments-9-20220624.pdf>.

187. *Id.*

188. *Id.* at 2.



development and adoption of digital assets and related innovations. . . necessitate an evolution and alignment of the United States Government approach to digital assets.”<sup>189</sup> While requiring many federal agencies to issue reports on a wide variety of concerns, the thrust was that the Administration anticipated it would ultimately move ahead and implement a system for issuing a CBDC. “My Administration places the highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC.”<sup>190</sup>

Consumer protection plays a prominent role in the Order.<sup>191</sup> The Order explains why consumers must be protected:

The increased use of digital assets . . . may increase the risks of crimes such as fraud and theft . . . privacy and data breaches, unfair and abusive acts or practices. . . . It is critical to ensure that digital assets do not pose undue risks to consumers . . . and to put in place protections as a part of efforts to expand access to safe and affordable financial services.<sup>192</sup>

The need to protect privacy is also a priority.<sup>193</sup>

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189. Exec. Order No. 14067, Executive Order on Ensuring Responsible Development of Digital Assets, 87 Fed. Reg. 14143 (Mar. 9, 2022). In 2022, both the U.S. House and Senate considered bipartisan bills to regulate crypto. See Paul Kiernan, *Bill Puts Crypto Under CFTC’s Watch*, WALL ST. J., Aug. 3, 2022, at A5 (reporting that Senators Stabenow and Boozman planned to introduce a bill giving the CFTC authority to regulate crypto, while Senators Lummis’ and Gillibrand’s bill would exempt crypto from laws governing securities, banking, and taxes; meanwhile a House committee worked on a bill that would give the Fed authority to regulate one form of crypto, stablecoins).

190. Exec. Order No. 14067, Executive Order on Ensuring Responsible Development of Digital Assets, 87 Fed. Reg. 14143. A Republican and a Democrat member of Congress urged the Fed to issue “a digital dollar, to combat steps from China and others they say could one day threaten the U.S. status as the global reserve currency.” Andrew Ackerman, *Lawmakers Press Fed for Digital Dollar*, WALL ST. J., Aug. 9, 2022, at A2. In contrast, the Fed’s January 2022 report took a neutral position and expressed no urgency in reaching a decision on whether to issue CBDCs. “The paper is not intended to advance any specific policy outcome, nor is it intended to signal that the Federal Reserve will make any imminent decisions about the appropriateness of issuing a U.S. CBDC.” Fed Report, *supra* note 44, at 1. Commenting on the president’s Executive Order, Treasury Secretary Janet Yellin predicted it would take years to develop a digital currency and Congress might need to authorize the Fed to issue it. Andrew Duehren, *Yellin: A Digital dollar Would Take Years*, WALL ST. J., Apr. 8, 2022, at A2. Fed Governor Christopher Wallace, whose term on the Fed does not end until 2030, says he is “highly skeptical” the Fed needs to issue digital money, in part because of potential “security and financial risks.” Jessica Corso, *Fed Governor ‘Skeptical Of Need For US-Backed Crypto Coin*, LAW360 (Oct. 14, 2022), <https://www.law360.com/articles/1540136/fed-governor-skeptical-of-need-for-us-backed-crypto-coin>. Pursuant to the Executive Order, the Department of the Treasury issued a Request For Comment “on any matter that commenters believe is relevant to Treasury’s development of the report on the implications of developments and adoption of digital assets and changes in financial market and payment infrastructures for United States consumers, investors, businesses, and for equitable economic growth as directed by . . . the Executive Order.” Ensuring Responsible Development of Digital Assets; Request For Comment, 87 Fed. Reg. 40881 (July 8, 2022).

191. Exec. Order No. 14067, Executive Order on Ensuring Responsible Development of Digital Assets, 87 Fed. Reg. 14143.

192. *Id.*

193. *Id.* (“Any future dollar payment system should be designed in a way that is consistent with United States priorities . . . and democratic values, including privacy protections . . .”).

The Order expresses concern for low-income consumers. For example, one of the reports required by the Order must include “the potential implications a United States CBDC might have on financial inclusion.”<sup>194</sup> One of the required reports must include “a focus . . . with an eye toward those most vulnerable to disparate impacts.”<sup>195</sup> The Order acknowledges that “[m]any Americans are underbanked and the costs of cross-border money transfers and payments are high. The United States has a strong interest in promoting responsible innovation that expands equitable access to financial services, particularly for those Americans underserved by the traditional banking system.”<sup>196</sup>

After considering the agency reports required by the Order, the Administration may decide to support measures, possibly including legislation, to authorize the central bank to issue CBDC. In addition to satisfying other concerns, the Administration may move forward with this project because CBDC would substantially benefit middle income consumers, even though it would not help low-income consumers. In that situation, the Administration should consider what other steps it could take to promote the financial inclusion of low-income consumers, since the Order clearly and repeatedly states this is a priority.

*D. Low-Income Consumers Must be Included in All Government-Sponsored Programs for New Consumer Financial Services*

As discussed above, Congress and federal agencies are considering the establishment of systems and programs that will directly impact consumers. When doing so, they should always take into account the needs of low-income consumers. Otherwise, income equality will remain elusive, and the digital divide will continue to separate those who have from those who do not. The way to ensure that agencies seriously consider the needs of low-income consumers is by building a requirement into every initiative that there must be adequate representation of those consumers and serious attention to their views.<sup>197</sup> Their representatives should have seats at the table where proposed programs are discussed by the government entities involved. The financial services industry has teams of lobbyists

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194. *Id.*

195. *Id.* Elsewhere the Order states: “The United States . . . has an interest in ensuring that the benefits of financial innovation are enjoyed equitably by all Americans and that any disparate impacts of financial innovation are mitigated. *Id.*”

196. *Id.*; see Rachel Reed, *The Crypto of the Realm*, HARV. L. BULL. 12 (Winter 2022) (reporting on predictions that CBDCs could provide low-income consumers with low cost financial services, but questioning which government agency would maintain bank accounts and provide customer service when problems arise).

197. Adequate representation should take into consideration that the low-income consumer community includes rural and urban populations, the elderly, and the disabled. See generally Stop Corporate Capture Act, H.R. 6107, 117th Cong. (2021). The bill would establish an Office of the Public Advocate to represent the public in the rulemaking process. *Id.* at § 9. The bill also provides that a person can sue any person who violates a final rule issued by an agency. *Id.* at § 10(b)(1).

and others who know how to gain access to the decision-making process.<sup>198</sup> Agencies should take measures to ensure that there is a level playing field for all stakeholders.

Furthermore, every government program involving consumer financial services should include a low-income consumer impact assessment detailing how the agency's action will affect low-income consumers. Requiring the impact assessment would force the agency to do more than pay lip service to the needs of those consumers. The assessment should describe in detail the costs and benefits of the program to low-income consumers. Costs should include crucial factors, such as security and privacy, although they may be difficult or impossible to quantify with exactitude. Even if the costs outweigh the benefits, the agency may plan to establish the program anyway. If that is the agency's decision, it should explain why it chose not to revise the program to mitigate those costs to low-income consumers so the costs would not be greater than the benefits to low-income consumers.

## VII. CONCLUSION

The consumer financial services industry has taken advantage of technological developments to transform consumer payment systems. Low-income consumers should be able to benefit from these new systems without incurring great risks. If a system does not transfer payments in an accurate, secure, and timely manner, the consequences to low-income consumers can be devastating. Consequently, low-income consumers need laws that ensure payment transfers will operate in a manner that protects and promotes their interests. Furthermore, the laws should grant consumers and enforcement agencies the tools needed to provide relief when payment transfers result in consumer harm. Current laws do not adequately protect low-income consumers. Legislators and agencies need to update statutes and regulations. In addition, lawmakers must amend statutes to clearly cover new payment services. Furthermore, agencies need specific statutory authorization and adequate resources to enforce updated laws. Otherwise, the private sector will be free to ignore the needs of low-income consumers.

Congress and federal agencies should continue to consider whether to take the initiative by establishing systems to ensure that all consumers can share the benefits of secure, accessible, and affordable financial services. Agencies should include low-income consumer representatives in their deliberations to ensure they take into account the needs of those consumers.<sup>199</sup> Finally, when an agency

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198. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 65 (2010) (recommending how consumer protection agencies can be designed to avoid being unduly influenced by pressure from interest groups).

199. See A Bill to amend title 5, United States Code, to require disclosure of conflicts of interest with respect to rulemaking, and for other purposes, H.R. 6107, 117th Cong. (2022), <https://www.congress.gov/117/bills/hr6107/BILLS-117hr6107ih.pdf> (unenacted bill that would establish an Office of The Public Advocate which would, *inter alia*, facilitate the "means by which individuals and populations

does implement a new system, it should include a low-income consumer impact assessment. By taking these measures, lawmakers and law enforcers can ensure that new developments in payment systems and services will benefit all consumers.

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that have not traditionally been invited into the rulemaking process may be better included in the rulemaking process, including by recommending and implementing new outreach plans, partnering with community-based organizations to propagate information about rules changes, and ensuring rules change information is written in clear, accessible language that is accessible in multiple languages.”).