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Contract, Deposit or E-Value? Reconsidering Stored Value Products For A Modernized Payments Framework

*Eniola Akindemowo**

I. INTRODUCTION

Stored value cards (“SVCs”),¹ in the form of gift cards, phone cards, and transportation cards, are everywhere. Survivors of hyped-up origins and a brief but short-lived slump they are currently one of the most dynamic and fastest growing products in the financial industry.² As the number of stored value products (“SVPs”)³ issued annually accelerates across the globe, it is becoming more and more difficult to find people who are entirely unfamiliar with SVPs.⁴

SVPs are critical to some⁵ and a convenience to others.⁶ They have

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1. Stored value cards are hereinafter referred to as SVCs.

2. *Discussion Paper: Stored Value Cards: An Alternative for the Unbanked?*, Fed. Reserve Bank of N.Y., July 2004, available at http://www.ny.frb.org/regional/stored_value_cards.html [hereinafter *Alternative for the Unbanked?*]. See also Terri Bradford, *Payment System Research Briefing: Stored-Value Cards: A Card for Every Reason*, Fed. Reserve Bank of Kan. City, June 2007, available at <http://kansascityfed.org/Publicat/PSR/Briefings/PSR-BriefingJune07.pdf>.

3. Stored value products are hereinafter referred to as SVPs. This term collectively refers to stored value cards and other stored value forms.

4. The use of SVPs is rapidly growing in developing countries. See Committee on Payment and Settlement Systems: Survey of Developments in Electronic Money and Internet and Mobile Payments, Bank for International Settlements Red Book, Mar. 2004. See also Arnold Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 COLUM. J. TRANSNAT'L L. 520, 543-52 (2006). See also Nick Hughes & Susie Lomie, *M-Pesa: Mobile Money for the Unbanked – Turning Cellphones into 24-hour Tellers in Kenya*, POLICY INNOVATIONS, Aug. 2, 2007.

5. “Unbanked” persons—persons without a bank account in their name—are an example of such people. It has not gone unnoticed that payroll and certain other SVCs have become the de facto bank account of unbanked persons. In Russia, the stunning economic revival there is attributed in part to the tax revenue the government has been able to generate by switching from cash to payroll salaries. In Mexico, SVCs have helped alleviate what used to be an inevitable payday robbery epidemic. By replacing cash salaries with payroll cards the need to transport large cash amounts and its attendant risks were eliminated. The author thanks Professors Arnie Rosenberg and Claire Wright for drawing her attention to these examples.

6. The booming growth in telephone card sales testifies to the relieved readiness of the general public to bypass the long distance and international call fees imposed by the larger telecommunications carriers, see Garrett Friedman, *The Development of the Calling Card Industry in*

become the gift of choice for many during the holiday season.⁷ The question lurking behind the dutiful expression of thanks by a disappointed giftee has changed from, "Can I take it back?" to "Can I get a refund for the card?" The variety of cards available now inspires the capricious "Of all the cards to choose from, why did I have to get the [name your issuer of choice here] gift card?" complaint. SVCs have clearly become a way of life, and it seems they are here to stay.⁸

Ascertaining the legal nature of SVPs has proved to be a challenging matter. Inquiries into the legal nature of SVPs have put the issue on center stage.⁹ Other inquiries have sidestepped this issue, suggesting pragmatic bases for the regulation of SVPs instead.¹⁰ The out-

the United States, available at <http://www.ldpost.com/telecom-articles/The-Development-of-the-Calling-Card-Industry.html>.

7. See *2007 Holiday Gift Card Survey*, PAYMENTS NEWS, Sept. 18, 2007 (projecting that holiday gift card purchases would reach an all time high of \$35 billion in 2007). See also Stephen Dubner & Steven Levitt, *The Gift-Card Economy*, N.Y. TIMES, Jan. 7, 2007, available at http://www.nytimes.com/2007/01/07/magazine/07wwln_freak.t.html?fta=y.

8. Branded and private SVCs are expected to amount to \$178 billion by 2010. See *Prepaid Cards – The State of the Industry*, PAYMENTS NEWS, July 23, 2007. The number of e-money products presently in circulation and the value they represent in the U.S., however, is low when contrasted with other payment methods. In other countries such as Germany and Singapore, the two countries with the highest number of SVPs issued in 2006 (65.91 million and 12.04 million SVPs respectively), the average number of SVPs owned per inhabitant was 2.69 and 0.8 respectively. See Committee on Payment and Settlement Systems: Statistics on Payment and Settlement Systems in Selected Countries, Bank for International Settlements Red Book, Tables 10 & 10b (Mar. 2008).

9. See General Counsel's Opinion No. 8: Stored Value Cards, 61 Fed. Reg. 40490-01 (Aug. 2, 1996) [hereinafter FDIC Opinion No. 8]. See also Definition of "Deposit", Stored Value Cards, 69 Fed. Reg. 20558-01 (Apr. 16, 2004) (codified at 12 C.F.R. § 303) [hereinafter FDIC Proposed Rule #1]. See also Proposed Rules: Electronic Fund Transfers, 61 Fed. Reg. 19696-01 (May 2, 1996) (codified at 12 C.F.R. § 205) [hereinafter FRS Proposed Rule #1]. See also Proposed Rules: Electronic Fund Transfers, 69 Fed. Reg. 55996-01 (Sept. 17, 2004) (codified at 12 C.F.R. § 205) [hereinafter FRS Proposed Rule #2]. See also Rules and Regulations: Electronic Fund Transfers, 71 Fed. Reg. 51437-01 (Aug. 2006) [hereinafter FRS Final Rule]. See also Stored Value Cards Task Force of the Business Law Section of the American Bar Association, *A Commercial Lawyer's Take on the Electronic Purse: An Analysis on Commercial Law Issues Associated with Stored-Value Cards and Electronic Money*, 52 BUS. LAW. 653 (Feb. 1997) [hereinafter SVC Report]. See also Olujoke Akindemowo, *Electronic Money Regulation: A Comparative Survey of Policy Influences in Australia, the European Union and the United States of America*, 11 J. OF LAW AND INFO. SCI. 61 (2000).

10. See FDIC, *Insurability of Funds Underlying Stored Value Cards: Notice of Proposed Rulemaking*, FIL-83-2005 (Aug. 22, 2005), available at <http://www.fdic.gov/news/news/financial/2005/fil8305.pdf> [hereinafter FDIC Proposed Rule #2]. For examples wider afield see AUSTRALIAN TREASURY, *FINANCIAL SYSTEM INQUIRY*, 402 (1997) for the wide ranging review of the Australian Financial System which led to the enactment of the Payment Systems (Regulation) Act 1998 pursuant to which the Federal Reserve Bank of Australia passed regulations - Regulation of Purchased Payment Facilities (June 15, 2000) - by which the issuance of such products was deemed "banking business". See also EUROPEAN CENTRAL BANK, *REPORT ON ELECTRONIC MONEY* (Aug. 1998), available at <http://www.ecb.int/pub/pdf/other/emoneyen.pdf> [hereinafter ECB REPORT ON E-MONEY] (one of several European inquiries that prefaced the enactment of

come of early inquiries into this matter in the U.S. was the decision to postpone broad-based regulation of SVPs until the technology had had time to mature.¹¹ This was partly based on the presumption that existing laws would adequately cover the regulation gaps.¹² Insofar as this is a continuing presumption,¹³ a closer examination of the laws commonly presumed to apply to SVPs is warranted. These “existing laws” consist of, at least, a mixed selection of rules, regulations, and principles drawn from the bank-customer relationship and from rules defining the rights and obligations of payment systems users, as in the Uniform Commercial Code. This includes soft laws defining the respective rights and obligations of card issuers and merchants,¹⁴ payment systems’ general regulatory policies, and money transmitter laws, including the Uniform Money Services Act.¹⁵ For purposes of this article, this loose grouping of payment-related rules and principles is referred to as “payments regulation and policy rules.” Contract law also provides an important, contrasting body of potentially relevant rules that must be included under “existing law.”

Subsequent inquiries have recommended that certain SVPs should be subject to deposit insurance because they incorporate or function as a deposit.¹⁶ The notion that deposit analogies are suited to SVPs has been persistent.¹⁷ This may have led to the sense that SVP transactions are executed by essentially conventional means, that payments

EU Directive 2000/46/EC, 2000 O.J. (L 275) 39 (EC)). See also EU Directive 2000/12/EC, 2000 O.J. (L 126) 1(EC), (pursuant to which the term “credit institution” was extended to include “electronic money institutions”).

11. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO THE CONGRESS ON THE APPLICATION OF THE ELECTRONIC FUND TRANSFER ACT TO ELECTRONIC STORED VALUE PRODUCTS, (1997) [hereinafter FRB SVP REPORT] available at http://www.federalreserve.gov/boarddocs/rptcongress/efta_rpt.pdf. It is for this reason that FRS Proposed Rule #1 was never finalized. FRS Proposed Rule #1, *supra* note 9. See also Akindemowo, *supra* note 9.

12. See FRB SVP REPORT, *supra* note 11, at 65. Cf. SVC Report, *supra* note 9, at 655-56, 699, 700, 727.

13. E.g., James S. Rogers, *The New Old Law of E-Money*, 58 SMU L. REV. 1253 (2005).

14. E.g., National Automated Clearing House Association (NACHA) Rules and Operating Guidelines available at <http://pubs.nacha.org/rules.html>. See also SVC Report, *supra* note 9, at 655.

15. Adopted by the National Conference of Commissioner of Uniform State Laws to provide a framework to deal with money laundering issues unique to non-depository providers of financial services. See <http://www.law.upenn.edu/bll/archives/ulc/moneyserv/UMSA2004Final.htm>.

16. For example payroll cards. See FRS Final Rule, *supra* note 9. See also FDIC Proposed Rule #1, *supra* note 9.

17. All of the proposed and final rules referred to in *supra* note 9 utilize deposit analogies, for example.

have not really changed in any significant manner, or that existing law, perhaps slightly tweaked, is applicable.¹⁸

Stored value products vary, and while research continues the quest for the optimal electronic payment model, the thrust of contemporary research has shifted from inventing novel payment technologies to the refinement, or remodeling, of existing technologies. The early vigorous competition between SVCs, digital cash,¹⁹ and micropayments, for example, has given way to a new focus on the potential of converging stored value and m-payment technology, contactless card technologies, and virtual currencies.²⁰

SVPs are sometimes presumed to be deposit-based. They may be discussed in deposit-invoking terms, and deposit related rules and policies may be presumed to apply.²¹ Though there has been some recognition of the fact that SVPs are not identical to deposit-based payments, such as debit cards, it has not been entirely clear how to categorize SVPs or how they function in legal terms.

This article contends that SVPs are technology-enabled contractual constructs rather than deposits, and that the use of deposit analogies to analyze them is generally inappropriate. Parts II and III of this article introduce how SVPs are commonly defined, categorized, and how different models work, suggesting some revisions to facilitate pinpointing presumptions that distort their legal nature. Part IV describes

18. See FRB SVP Report *supra* note 11.

19. Digital currencies remain a topic of interest. See Kerry Lynn Macintosh, *The New Money*, 14 BERKELEY TECH. L. J. 659 (1999); Julia Alpert Gladstone, *Exploring the Role of Digital Currency in the Retail Payments System*, 31 NEW ENG. L. REV. 1193 (1996-1997); Benjamin J. Cohen, *Electronic Money: New Day or False Dawn?*, REV. OF INT'L. POL. ECON. 197 (2001); Claudia Costa Stoti & Paul De Grauwe, *Electronic Money and the Optimal Size of Monetary Unions* Center for Economic Policy Research Discussion Paper No. 3391 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=317690 (May 2002); ROBERT GUTTMAN, *CYBER-CASH: THE COMING ERA OF ELECTRONIC MONEY* (2002). Cornelia Hothausen & Cyril Monnet, *Money and Payments: A Modern Perspective*, EUROPEAN CENTRAL BANK WORKING PAPER NO. 245 (July 2003); Connell Fullenkamp & Saleh M. Nsouli, *Six Puzzles in Electronic Money and Banking*, International Monetary Fund Working Paper No WP/04/19 (Feb. 2004); James C. McGrath, *Payment Cards Center Discussion Paper: Micropayments: The Final Frontier for Electronic Consumer Payments*, Fed. Reserve Bank of Phila. (June 2006).

20. E.g., *Smart Cards in the U.S.: Contactless Payment Cards*, PACKAGED FACTS (May 1, 2007), available at <http://www.packagedfacts.com/Smart-Cards-1383053/>; *Electronic Money Making Headway in Japan*, PHYSORG.COM, Oct. 10, 2005, available at <http://www.physorg.com/news7113.html>; *Electronic Money: Contactless Payment in Japan*, CELENT.COM Dec. 11, 2007, available at <http://www.celent.com/PressReleases/20071211/ContactlessJapan.asp>; *Virtual Currencies in China: Q Coins, Gold Farms, and Real Money Trades*, MARKETRESEARCH.COM, Apr. 1, 2007, available at <http://marketresearch.com>.

21. See FRB SVP Report *supra* note 11, also FDIC, *Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms*, 70 Fed. Reg. 45571, 45574 (Aug. 8, 2005) [hereinafter NONTRADITIONAL ACCESS]. See also *infra* note 93 and surrounding text.

the role and validity of deposits, account related concepts, and other features of SVPs via an evaluation of the span of an SVP transaction from the time the card is issued to the completion of a transaction. This analysis reveals three distinct modes of operation; two operation modes clearly prevent deposit-based analyses and the third overly strains it. Part V of this article details the ramifications of the fact that SVPs are more appropriately categorized as contractual devices, rather than deposits.

II. SVP MODELS

SVP transactions are superficially similar to credit card and debit card transactions. All three involve relationships between a card issuer, the cardholder, and merchant.²² All three may be marked with the brand of, and be processed through, a major card association network. Some SVP models may appear to debit cardholder accounts in a similar fashion to debit card transactions, but they are different because SVPs require a prepayment. The consequence of this is that they are neither credit transactions—as no credit facility is provided the customer—nor debit transactions, if the prepayment is not deposited in a customer account.

Three SVP systems currently popular in the U.S. are closed, payroll, and open loop, each of which are discussed below.

A. *Closed Systems*

In a closed SVP model, such as a gift card, the card issuer is also the merchant of goods or services available for sale or other exchange.²³ Backed by a financial institution or a financial subsidiary, the cards are issued by a card issuer which in this model is also the merchant of goods or services. After issue, the cards are purchased, sometimes given to a recipient as a gift, and then used by the cardholder.²⁴

B. *Payroll Systems*

Payroll cards may be issued by an employer, a financial institution (on behalf of an employer), or a card association network such as Visa or MasterCard.²⁵ The cards are distributed to employees, who use the

22. This is not the case in closed loop SVPs where the card issuer and merchant are one. See TERRI BRADFORD, MATT DAVIES & STUART WEINER, *NONBANKS IN THE PAYMENTS SYSTEMS* 70 (Fed. Reserve Bank of Kan. City 2003) [hereinafter BRADFORD].

23. See *id.* at 54-57.

24. See *id.* at 56.

25. A recent variant permits holders of remittance cards to receive their directly deposited payroll on the cards which are not directly sponsored by their employers. See, e.g., The Visa

cards for purchases at participating merchants or to withdraw funds from ATMs.²⁶

A card issuing employer may be deemed a financial institution for purposes of the Electronic Fund Transfers Act (“EFTA”).²⁷ Employers maintain detailed records of payroll payments to employees. Payroll cards issued by employers are accountable in that the underlying funds are deposited in an account in the name of, and for the benefit of, the employee.²⁸ Payroll cards may also be issued by a third party financial institution on behalf of the employer. Here underlying payments may be maintained in sub-accounts—individual accounts associated with specific employees—or payment may be made into a reserve account belonging to the employer instead. In the latter case, the SVP is sometimes described as unaccountable. The cards will be linked to the reservoir account, and to the extent that card transactions are authenticated by reference to that account, they are accountable so far as the card issuer/employer relation is concerned.²⁹ However, because the employer necessarily maintains employee payroll data, there is the potential to link card transactions with employee identities.

Significant considerations include whether that potential is realized and whether the financial institution has access to the linked information. If so, then the card is trackable as the employee’s identity is linked to the transactional history. The account does not technically belong to the cardholder but she does have certain rights over the funds deposited in that card issuer account which may effectively mean the account functions as a pseudo cardholder account.³⁰ The following facts may justify categorizing such a facility as an “accounta-

Payroll Card at http://usa.visa.com/corporate/corporate_solutions/payment/visa_payroll.html#anchor_2.

26. See BRADFORD, *supra* note 22, at 60.

27. See FRS Final Rule, *supra* note 9. This development was described by one writer as “smash[ing] a big hole in the wall separating debit and stored value cards.” See Mark E. Budnitz, *Developments in Payment Systems Law*, 10 J. OF CONSUMER AND COM L. 116, 117 (2007). See also Geva, *infra* note 32, at 701. The EFTA provides protection to consumer transactors of electronic fund transfers where an account and access device are involved. 15 U.S.C. §§ 1693-1693r (1978).

28. See BRADFORD, *supra* note 22, at 60. The employer has detailed information about how much money is payable to each employee, and also when the issuer of the card will operate the system on the basis of such knowledge.

29. Transactions would be accountable in the sense that the financial institution will be able to track transactions associated with the employer holder of the reservoir account to whom it owes account related duties. Transactions would not be accountable in the sense of transactions being associated with the identity of individual employee cardholders.

30. See text surrounding and following *infra* note 264.

ble” product:³¹ (1) payroll cards provide an account substitute;³² (2) funds are deposited by the employer in an account on behalf of the cardholder-employee; (3) the cardholder’s identity is linked to the account; and (4) the cardholder has the equivalent of account-based rights.³³

C. “Open Loop” Systems

Open loop systems, such as network branded gift cards and reloadable cards like the Visa Prepaid Reloadable Card, are not limited to a single merchant or mall. They can be spent in a wide variety of places including overseas locations. They are also known by the unfortunate misnomer “SVC credit card.”³⁴

In these systems, the card issuer is usually one of the card association networks or a network member. The card issuer may process cards in-house or contract this out to a third party processor. The card issuer and merchant contract with each other directly, or they may do so through an acquirer or agency. The card bears the card issuer’s brand, and the parties agree that the card issuer will be obliged to the merchant to settle payment obligations arising from the use of the card. The merchant is willing to accept the card because there is assurance that sufficient funds are available to support the payment obligation resulting from the transaction—as far as the merchant is concerned, the obligation to pay debts arising from use of the card belongs to the card issuers rather than the cardholders.³⁵

The card is issued, made available for public sale, and purchased by the cardholder. As the cardholder has already paid for the balance on the card by the prepayment, the cardholder does not undertake to reimburse the card issuer for payments made to merchants in settlement of the transaction payment obligation. The card issuer and card-

31. See *infra* note 50 and accompanying text.

32. See *Alternative for the Unbanked?*, *supra* note 2. See also Benjamin Geva, *Recent International Developments in the Laws of Negotiable Instruments and Payment and Settlement Systems*, 42 TEX. INT’L L. J. 685 (2007), at 699.

33. The arrangement being, for example, that the employer opens an account into which it will pay funds repayable to the employee cardholder at her demand.

34. This is a misnomer because SVCs represent a prepaid service tracked by debit flows that may or may not debit an account. Except for the very limited circumstances under which an account may become overdrawn, a credit facility is neither intended nor provided.

35. It is unlikely that the merchant would have recourse to the cardholder in the event of the cardholder’s insolvency. The prepayment undercuts any possibility of an unjust enrichment claim against the cardholder, and the very basis of the arrangement is the understanding that services will be paid for in advance by the cardholder so that transactions subsequently entered into may be paid by the card issuer on the cardholder’s behalf. See also SVC Report, *supra* note 9, at 698-700.

holder therefore agree that the cardholder may use the card, and the issuer will apply the prepayment, less fees and charges, to transactions in which the card is tendered as a means of payment.³⁶ The prepayment may be held by the issuer in an account associated with the cardholder, in a reservoir account sub-account, or it may be pooled with other payments in a reservoir account belonging to the card issuer.³⁷

A contract for the sale or other exchange of goods or services arises from the words or conduct of the cardholder and merchant at the point of sale. The cardholder tenders the SVP to initiate the release of the purchase into his possession. Though the card balance is debited at the point of sale, this may or may not translate into an immediate funds transfer in favor of the merchant.³⁸

III. CATEGORIZING SVPs

Stored value product models, some of which are still in the early stages of development, have been categorized in a variety of ways.³⁹ “Closed system”⁴⁰ cards, such as branded gift cards, transportation cards, or telephone cards, are accepted only by single merchant enti-

36. Other terms may include that the cardholder agrees to the terms by acceptance and use of the card, that the card remains the property of the card issuer, that statements and a transaction history will be maintained online, and that the card is subject to monthly fees. *E.g.*, Visa Gift Card Cardholder Agreement, available at http://www.giftcards.com/company/terms_conditions.html (last visited Jan. 20, 2009). See also *infra* note 129.

37. If the prepaid funds are kept in an account to which the SVC provides cardholder access, the card functions more as an access device than stored value per se. See Geva, *supra* note 32, at 700.

38. See Sherrie L. W. Rhine, *et al*, *Discussion Paper: Cardholder Use of General Spending Prepaid Cards: A Closer Look at the Market*, Fed. Reserve Bank of N.Y. (Jan. 2007). See also BRADFORD, *supra* note 22, at 59.

39. Systems utilizing stored value units for circulation among holders may be included under the tag “emergent” as they currently tend to be modest implementations of sophisticated conceptual models, or sophisticated models in early development. Examples include “E-Gold” issued by e-gold Ltd., a Nevis corporation and “Mondex”, owned by MasterCard. See Mondex: Frequently Asked Questions, available at <http://www.mondex.com/faq.html#5>, and see E-Gold Corporate History, available at <http://www.e-gold.com/unsecure/aboutus/html>. Establishing these systems has not been easy—charges of misleading and deceptive conduct were made against Mondex in 1997 for promoting the product as being “like cash.” See <http://www.privacyinternational.org> (follow “campaigns” hyperlink, then “Mondex Digital Cash Service” hyperlink). In 2008, e-Gold is the subject of a U.S. Department of Justice investigation into money laundering. See Press Release, U.S. Dept. of Justice, Digital Currency Business E-Gold Indicted for Money Laundering and Illegal Money Transmitting (Apr. 2007), available at <http://www.usdoj.gov/> (follow “Press Room” hyperlink, then “April 2007” hyperlink). See also Sarah Jane Hughes, Stephen Middlebrook & Broox Peterson, *Developments in the Law Concerning Stored Value Cards and Other Electronic Payments Products*, 63 Bus. Law. 237 255 (2006).

40. The closed loop/open loop distinction is also used to highlight whether SVCs are single purpose (closed loop) cards or multiple purpose (open loop) cards. See *Payment System Research Briefing: The Many Uses of Stored Value Cards*, Fed. Reserve Bank of Kan. City (Fall 2003), available at <http://www.kansascityfed.org/PUBLICAT/PSR/Newsletters/StoredValueArticle.pdf>.

ties. “Open loop” cards, such as Mastercard- and Visa-branded SVPs, are issued by one or more issuers, depend on a network, and are accepted by multiple merchants. In “semi-closed” systems, the SVC is accepted by multiple merchants but use of the card is restricted to a specific geographical region, such as university-issued student cards and mall cards.⁴¹

Distinctions are also drawn between “online” and “off-line” systems, and between “accountable” and “unaccountable” systems.⁴² Online systems incorporate real time communication with a central record-keeping entity⁴³ during transactions.⁴⁴ The central communication may be for authorizations, for the updating of data, or for other purposes. Off-line systems either completely eliminate central communication or defer central communication until a time after the transaction has been completed.⁴⁵ Systems are often described as being “accountable” when transactions are tracked by the central recordkeeping entity. In this system, a balance is maintained on the card and it is stored centrally.⁴⁶ The term “unaccountable” is usually used in those cases where transactions are not so tracked,⁴⁷ and a balance is maintained on the card only.⁴⁸ Common examples of so-called accountable payment transactions include debit and credit card transactions. These transactions are account-based and are tracked in relation to the obligation of the card issuer or cardholder to pay or repay funds.⁴⁹

The fact that transaction tracking in such cases is linked to account-based obligations may obscure the fact that transaction tracking need

41. See Mark Furletti, *Payment Cards Center Discussion Paper: Prepaid Card Markets & Regulation*, Fed. Reserve Bank of Phila. (Feb. 2004), available at http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid_022004.pdf.

42. The accountable/unaccountable distinction was popularized in legal circles by the FRS Proposed Rule #1. FRS Proposed Rule #1, *supra* note 9. The jargon that is pervasive in the electronic payments field sometimes obscures the fact that terms such as these are analytical aids rather than terms of art. The “accountable” and “unaccountable” distinction focuses on the account-like (or not) characteristics of the card, particularly highlighting whether communication with a central record keeping entity is involved. The underlying presumption is that where central records are maintained and linked to an SVP, the SVP functions as and strongly resembles a deposit account. This presumption is open to question. See *supra* note 27 and accompanying text.

43. Such as a card issuer, or a processor or financial institution acting on its behalf.

44. See FRS Proposed Rule #1, *supra* note 9.

45. *Id.*

46. *Id.*

47. *Id.* Transactions may be captured at merchant terminals and sent in aggregate form, in deferred batches, to a central entity. *Id.*

48. See FRS Proposed Rule #1, *supra* note 9.

49. For example the card issuer’s obligation to repay part or all of a deposit to the order of the deposit account cardholder (debit card transaction), or the cardholder’s obligation to reimburse the card issuer for transactions made against a credit facility (credit card transaction).

not be tied to deposit or credit account obligations. Transactions may be tracked because there is a contractual, not a depository or account-based, obligation to do so. The issuer of a prepaid card has sold a service which must be functional and efficient; it is obliged to track transactions to ensure there are no errors and the cardholder receives the full value of the service. The issuer must also provide the cardholder with effective service, which includes the ability to assess how much of the service remains outstanding for possible future transactions. The card issuer has received payment for that service. It does not undertake to provide the cardholder with credit, nor has it borrowed the funds from the cardholder. Therefore, the fact that there is central transaction tracking does not necessarily imply the existence of account-based rights⁵⁰ between the cardholder and card issuer.

Does transaction tracking mean the transaction record effectively operates as a *de facto* account? In considering this question, two further issues must be taken into account: (1) does the record function in a manner roughly equivalent to an account; and (2) if it does, does that record function for the issuer, the cardholder, or both? In most cases there is a strictly limited, if any, right to refunds for unspent balances. Card issuers actively try to avoid referring to SVPs as accounts, even where the record functions roughly as an account.⁵¹ In most cases, although the record tracks the cardholder's transactions, it is not maintained primarily for the cardholder's benefit. The record is the card issuer's property; it does not confer account-based rights upon the cardholder. The term "accountable" should thus be understood to refer to transactions based on account rights, rather than an indiscriminate synonym for centrally tracked transactions. Accountability also refers to reporting obligations owed to a party because of that party's account ownership. Traceability refers to the fact that transactions may be tracked without a deposit-based obligation to do so. Distinguishing accountability and traceability in relation to SVP thus serves a useful purpose. It clarifies the different roles card issuer and cardholder accounts play in relation to SVPs.

50. Depository account-based rights or credit facility rights. See *supra* note 49.

51. Even where referred to as an account, the use of that word may be sharply qualified. See South Dakota State Payroll Card Terms, *infra* note 129: "'Account' means a numbered account that Cardholder may access by use of the Card issued to Cardholder, and includes the record of debits and credits between Employer, Cardholder and us. . . . Interest . . . will not be paid to you for any value loaded to the Account. There is no credit card, credit line, overdraft protection, deposit account or extension of credit associated with the Account or the card. The value associated with the card is not insured. . . ."

Payment cards are commonly referred to as “access devices” because they provide access to account funds⁵² over which the cardholder possesses beneficial ownership rights⁵³ or owes repayment obligations.⁵⁴ The card enables the cardholder to access the account to exercise those rights the cardholder has in relation to the account—whether they be a claim for repayment of the balance or a request for an increase in repayment obligations.⁵⁵ An SVP transaction may involve neither type of obligation. Further, the record of transactions maintained by the card issuer—the account of transactions—will usually belong to the card issuer rather than the cardholder. The card issuer is not obliged to account to the cardholder for the card issuer’s use of the funds in any event. The card issuer maintains the account to fulfill contractual, rather than depository or banking obligations, having agreed in advance that it will provide certain services to the cardholder in exchange for a prepayment. Similarly, the card issuer provides the cardholder with updated balances⁵⁶ of the service value amounts outstanding to facilitate use of the card. The figure below contrasts a common access device—the debit card—with SVPS:

52. “Access device means a card, code, or other means of access to a consumer’s account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers.” See Reg E, 12 C.F.R. § 205.2(a)(1).

53. Such rights would exist, for example, because the cardholder or a third party previously deposited those funds for the cardholder’s benefit. See for example 10 Am Jur 2d, Banks and Financial Institutions § 647 (West Group 2008).

54. For example, the cardholder is obliged to repay credit facilities provided by a card issuer.

55. See FDIC, NONTRADITIONAL ACCESS, 45571, 45574 at *supra* note 21. See also Geva *supra* note 32.

56. The duty to provide such updates is based on contractual rather than deposit or banking principles. The transactions are tracked, not to fulfill account keeping duties, but to satisfy valid contractual expectations of the cardholder.

	POS Debit	Online Accountable	Online Trackable	Offline Accountable	Offline Untraceable
Realtime Communication With Central Agency	x	✓	✓	x	x
Deferred Communication With Central Agency	x	x	x	✓	x
Account-based Rights	✓	✓	contractual equivalents may apply	✓	x
Tracked by Central Agency	✓	✓	✓	✓	x
Record Maintained by Central Agency	✓	✓	✓	✓	x
Record Maintained on card	x	✓	updated balance	✓	✓
SVP = Access Device	✓	✓	strictly limited contractually based access	✓	x
SVP = Facilitating Device	x	x	✓	x	x
SVP = Mirroring Device	x	✓	✓	x	x
SVP = e-value	x	x	x	x	✓

Key: ✓ = applicable feature; x = inapplicable feature

FIGURE 1: CONTRASTING DEBIT CARDS WITH SVPs

Two additional terms should therefore be included in the categorization of SVPs—"trackable" and "untraceable."⁵⁷ In this article, "trackable" will be used to refer to transactions that are centrally tracked without account-based rights being held by the cardholder. "Untraceable" will refer to transactions that involve neither cardholder account-based rights nor central tracking. The balance, or units, of untraceable transactions are maintained solely within the SVP.

Depending on whether a depository relationship is involved (based on previous cardholder fund deposits), an SVP may function as one of three mutually exclusive alternatives: (1) a facilitating device; (2) a mirroring device; or (3) e-value. This proposal is displayed in Figure 2 below.

	Online	Offline
Accountability	<i>Online Accountable SVP branded, prepaid, reloadable</i>	<i>Offline Accountable SVP Mondex</i>
Traceability	<i>Online Trackable SVP Gifcards</i>	<i>Offline Untraceable SVP e-value</i>

FIGURE 2: PROPOSED REVISION OF SVP CATEGORIES

57. Cf. Geva, *supra* note 32, at 702-05.

Under the suggested categorization, online accountable SVPs are transactions that incorporate real time communication with a central record-keeping agency. They derive from account-based obligations or rights, and they are tracked by the central agency. A record of the balance is maintained centrally; it may also be maintained on the SVP. The SVP here is an access device—providing access to an underlying account. The account is in the cardholder's name, so the transaction is accountable rather than trackable. The cardholder account may be subject to such significant use restrictions that it resembles a prepayment controlled by the card issuer, albeit one which supports a service that includes cash withdrawals.⁵⁸ Network-branded, prepaid, reloadable cards *associated with an account* are an example.⁵⁹ To the extent that payroll cards function as account substitutes and permit cash withdrawals from ATMs or merchant terminals, they also fall within this category.

Off-line accountable transactions derive from account-based obligations or rights tracked by the central agency, but here communication with the central agency is deferred to a time after transactions occur. A record of the balance is maintained both centrally⁶⁰ and on the SVP, and the latter functions as an access device. Mondex is an example of this SVP category.⁶¹

Online trackable transactions, such as gift card transactions, involve real time communication with a central agency for the tracking of

58. See also *infra* note 265 and accompanying text.

59. Vision Premier Prepaid Visa Card, *infra* note 121. The terms and conditions of this card refer to transactions records as a "card account" though the card is also described there as a prepaid card: "[t]he Card is a prepaid card. The Card is not connected in any way to *any other* account." *Id.* Cf. The All-Access Visa Prepaid Card, the terms of which deny that it is an account. "The Card does not constitute a checking, savings or other bank account and is not connected in any way to any other account you may have. . . ." The All-Access Visa Prepaid Card, *infra* note 121.

60. In some models, central records are periodically updated from transaction histories maintained on the SVP. The system is set up such that the SVP must contact the central entity periodically, at which time the transactional history updating also takes place. In the Mondex model, cardholder identity is linked to the SVP by a unique sixteen digit number that highlights the cardholder's transactions in the transactional history. Transactions are not subject to central authorization at the time of making. Instead the system is a closed one based on reputedly tamper-proof security protocols. Cf. *Mondex Pilot System Broken: National Bank of New Zealand Tries to Suppress Leaked Report*, JYA.COM (Sept. 9, 1997), available at <http://jya.com/mondex-hack.htm>.

61. This model is really a hybrid in that it does not require central authorization of transactions, depending instead on the configuration of the system (closed system, strong encryption protocols) for security. The intermediation of the central entity is also limited in that peer to peer transfers are possible. Mondex is marketed as "electronic cash" and promoted as "behav[ing] exactly like cash. . . ." See *About Mondex*, MASTERCARD.NET, https://mol.mastercard.net/mol/molbe/public/login/ebusiness/smart_cards/mondex/about/index.jsp.

transactions. However, the tracking is based on contractual, rather than deposit or account-based, obligations. The SVP is not an access device because typically the cardholder does not have account-based rights.⁶² The SVP facilitates the provision of updated balances to the cardholder, but it does not ordinarily provide the cardholder with direct access to the underlying funds. Even when refund rights exist, these are usually contractually based and strictly limited. There is no general expectation that the cardholder will be entitled to claim unspent balances on demand.⁶³

Off-line untraceable transactions may incorporate deferred central communications or eliminate communication with the central entity completely.⁶⁴ This SVP category presents the capability for “true” stored value in that SVP units in this case are designed to circulate as value per se. Rather than providing a facility, a means or a process by which the payment process is ultimately to be affected, the end objective of off-line untraceable transactions is payment through the transfer of stored value units. Intended to circulate from peer to peer, responsibility for the security of the stored value units shifts from a centrally issuing entity to how tamper proof the units are. Again the SVP is not an access device. As long as units are capable of being authenticated as current and not counterfeited, there is no need for the existence of customer accounts or balances tied to the cardholder’s identity. Designing products that are sufficiently tamperproof to merit the complete elimination of an intermediary tracking agency has been quite a challenge however. The result of this and other factors⁶⁵ has been that few such SVPs are currently in operation.⁶⁶

62. It has been suggested that SVPs that function as access devices ought not to be referred to as “stored value” facilities, as rather than storing value, they provide access to a conventional account. See Geva, *supra* note 32, at 701. The categorization suggested above however pragmatically retains the general use of that term in light of its widespread use in the field. The distinction between account-based and non-account-based models is indicated instead by reference to “accountability” and “traceability.”

63. There is however the expectation that unspent balances will be recoverable, presuming there are surviving assets, if the issuer goes out of business.

64. Although there is no communication between the SVP and the central entity, transactions are captured at merchant terminals and forwarded to the central entity in deferred aggregated batches. See FRS Proposed Rule #1, *supra* note 9.

65. Other factors implicated in the present rarity of off-line untraceable SVPs include concerns that such transactions may pose systemic risks to the payments system. *E.g.*, Working Group on EU Payment Systems – Prepaid Cards: Report to the Council of the European Monetary Institute on Prepaid Cards, 3, 5, 8 (1994). ECB REPORT ON E-MONEY, *supra* note 10. Also, there is fear that they may be used to finance terrorism or in money laundering. See Press Release: 2007 National Money Laundering Strategy, U.S. Treasury (May 3, 2007), available at <http://www.treas.gov/press/releases/docs/nmls.pdf>. See Akindemowo, *supra* note 9.

66. Experimentation continues on such systems. For example Internet Cash, a currently operational system marketed as a secure prepaid system with units stored in military level security

IV. DECONSTRUCTING SVP TRANSACTIONS

When a deposit is made, the depository, if a bank, owes the depositor the obligation to repay those funds to, or to the order of, the depositor.⁶⁷ There is an obligation to keep records of the deposit showing repayments made to the depositor or to his order, and a record of the current balance of the account.⁶⁸ Thus, the account is but a record—evidence of the debt and its current balance—an accounting tool that enables the depository to keep track of its current indebtedness to the depositor.⁶⁹ It also enables the depositor to keep track of how much the depository owes him. In sum, the account is an abstract construct designed to track the mutual standing of the depositor and depository.

Where a deposit underlies an SVP but the SVP neither provides information about, nor facilitates access to, a deposit, it likely will transcend depository arrangements to circulate as e-value.⁷⁰ As information about a deposit, SVP units can be no more than a record of that deposit. The SVP is not the deposit involved in the transaction. When a balance record is maintained on the SVP and at a central location, the SVP functions as a copy of the account—recording the balance of the underlying deposit. In other words, it functions as a “mirror” of the account.⁷¹ If the deposit belongs to the cardholder and

hardware cryptographic devices. See *Security Experts*, INTERNETCASH.COM, <http://www.internetcash.com/fgo/0,1383,security01,00.html>. See also Free Digital Money an Open Source Project, available at <http://www.freedmoney.org/index/>. See also Electronic Currency, Electronic Wallet Therefor and Electronic Payment Systems Employing Them, <http://www.freepatentsonline.com/EP1727102.html>. See also Kenji Saito, *Maintaining Trust in Peer-to-Peer Barter Relationships*, SYMPOSIUM ON APPLICATIONS AND THE INTERNET WORKSHOPS (2004). See also Andreas Furche & Graham Wrightson, *Why Do Stored Value Systems Fail?*, 2 NETNOMICS 37 (Mar. 2000). See also J. CHRISTOPHER WESTLAND & THEODORE H.K. CLARKE, *GLOBAL ELECTRONIC COMMERCE: THEORY AND CASE STUDIES* (MIT Press 1999), and Committee on Payment and Settlement Systems: Statistics: Security of Electronic Money, Bank for International Settlements Red Book (1996).

67. This obligation arises from the agreement and expectation of the parties. Traditionally the banker-customer relationship comes into being when a customer opens an account by making a deposit with the bank. The opening and operation of a bank account is understood to give rise to a legal relationship with its own legal peculiarities. See *State v. Nw. Nat'l Bank*, 18 N.W.2d 569 (1945). See also *Citizen's Bank of Waynesboro v. Mobley*, 144 S.E. 119 (1928). Other depositories may or may not be subject to this prima facie obligation to repay on demand.

68. See Banking Law (MB) § 9.02. See also *Nw. Nat'l Bank*, 18 N.W.2d at 576 (holding that an account is a chose in action). For an informative account of the origins and development of accounts and deposits see BENJAMIN GEVA, *BANK COLLECTIONS AND PAYMENT TRANSACTIONS* chs. 1 & 2 (Oxford University Press, 2001).

69. *Peter Kiewit Sons', Inc. v. County of Douglas*, 111 N.W.2d 734, 738 (1961) (providing that an account is nothing more than an indebtedness owed by the bank to the depositor).

70. By facilitating a conventional payment or facilitating payment by mirroring an account.

71. See ALAN TYREE, *DIGITAL CASH*, ch.5 (Butterworths & Company, Publishers, Australia 1997).

is held by the card issuer or the card issuer's agent, the SVP units represent units of the card issuer's indebtedness because the deposit is, in a sense, a depositor's loan to the depository.⁷² The SVP mirrors and enables access to that deposit.⁷³ Where the deposit does not belong to the cardholder, the units represent card issuer contractual obligations owed to the cardholder, denominated in those units.⁷⁴ The SVP functions as a mirror only so far as the cardholder is concerned.

The transfer of SVP units by the cardholder to a merchant in the course of a transaction provides the merchant with the means (i.e., digital evidence) to demand payment from the card issuer. The primary source of the merchant's entitlement to demand payment from the issuer is the agreement, normally underlying such arrangements, that the issuer will reimburse the merchant for its cardholder's transactions.⁷⁵ The merchant's demand is validated by a promise⁷⁶ of the card issuer to the cardholder. This promise of the card issuer to the cardholder is to either authorize the provision of services by the merchant to the cardholder, or to repay on demand, an amount in the value of presented SVP units to the cardholder⁷⁷ or his order. The merchant is a third party beneficiary of that promise,⁷⁸ and by transferring those SVP units to the merchant, the cardholder begins to convey her order to the card issuer. Transfer of the units to the merchant thus enables the merchant to demand fulfillment of the repayment promise from the card issuer.⁷⁹

72. See *Citizen's Bank of Waynesboro*, 144 S.E. at 121. See also *Scannon*, 92 U.S. at 370. Cf. *State v. Corning State Sav. Bank*, 113 N.W. 500, 502 (Iowa 1907).

73. The SVP being an access device does not "store value." Technically, the use of "SVP" to describe the product is a misnomer.

74. Functioning in effect as a 'counter' device keeping track of outstanding contractual obligations owed by the issuer to the cardholder.

75. As is the case with credit card transactions. See RICHARD J. MANN, *PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS; CASES, MATERIALS AND PROBLEMS* at 125 (Aspen 2006).

76. The basis upon which most SVC prepayments are made is that a service will be provided in return for the prepayment without any right to refund for non use of the purchased services. Save in those cases where the SVC is based on a customer account from which the customer may apply debits at will, or the contract terms confer a right to demand repayment of unspent portions of the prepayment, the arrangement will not include a right to demand repayment of unspent funds.

77. That is, if the units are refundable.

78. The merchant is an intended beneficiary of the card issuer/cardholder agreement. As such a repayment right would have been a prerequisite—without which the facility would not have been agreed to by the merchant—and as the facility would thus not have been available to the cardholder without that repayment right, it is necessary to effectuate the intention of the issuer and cardholder in entering into the cardholder agreement. See *RESTATEMENT (SECOND) OF CONTRACTS* § 302.

79. It is unlikely that the merchant would have recourse against the cardholder in the event of the cardholder's insolvency. The prepayment undercuts any possibility of an unjust enrichment

A. *Prepayment: Just a Payment, Not a Deposit?*

It is suggested above that the cardholder and card issuer relationship may be premised on something other than the cardholder's fund deposits. However, rather than a deposit, the cardholder may have paid the money to purchase a service. In many cases, a pre-existing depository relationship between the cardholder and card issuer does not exist for this very reason. Prepayments are thus worthy of closer attention as an alternate explanation of SVPs.

In such cases, the cardholder pays funds in exchange for the card issuer's service. Title to those funds moves to the card issuer immediately. Unless the contract provides otherwise, the card issuer is not obligated to account for the use of those funds to the cardholder.

However, the card issuer must provide an effective service to the cardholder; this includes providing the cardholder with the ability to track how much of the service has been used and how much of it remains outstanding. Card issuers presently accomplish this by providing cardholders with limited access to the records in the form of a balance. These records are an account that is maintained to track purchases and adjust balances in response to completed transactions. The card issuer keeps such records because it is contractually obligated to ensure that the cardholder receives services in the value agreed, however it may finance or otherwise ensure the delivery of that service. The card issuer will also be aware that an easy tracking system will be more attractive to cardholders, and hence more likely to be successful, than one in which no such facility is available.⁸⁰ The fact that the tracking data renders an account of how the card issuer has disbursed the funds is an additional bonus to the cardholder in that it provides further assurance about the likely reliability of the card issuer's service.

The SVP enables the cardholder to utilize a service paid for in advance by the cardholder. The payment is reflected in the record of an account that belongs to the card issuer, though the cardholder may be permitted access for informational purposes only. The balance of that account is associated with the SVP, and that balance is incrementally reduced in response to cardholder transactions.⁸¹ This balance reduc-

claim against the cardholder, and the very basis of the arrangement is the understanding that services will be paid for in advance by the cardholder so that transactions subsequently entered into may be paid by the card issuer on the cardholder's behalf.

80. Instead of tangible goods, the cardholder embarks on the transaction with nothing other than statements about what the card issuer intends to do in the future.

81. The SVP functions as a 'counter device', tracking outstanding issuer contractual obligations owed to the cardholder.

tion amounts to a debit flow, but it is not a debit transaction in the sense that it occurs in relation to a deposit account debit card transaction. Here there is neither a decrease in any value balance belonging to the cardholder, nor any increase in the cardholder's obligations to pay. Having discharged any obligation to pay for the transaction in advance by the prepayment, the cardholder is not furnished with credit when the card issuer posts a debit to the account. In some cases the account balance may be boosted by further prepayments the cardholder makes. The balance may thus be subject both to debit and credit⁸² flows, but the cardholder does not incur debit or credit obligations as a result.

A payment is not a deposit. A deposit of funds gives the depository the right to use the depositor's money until it is called for by the depositor or another authorized person.⁸³ By contrast, a payment occurs when a debtor transfers funds to a creditor to extinguish an existing debt. A payment can only result from manifested mutual intent of the parties.⁸⁴ A promise to pay does not constitute payment.⁸⁵

Sellers exchange the SVP for payment with the cardholders. Because the SVP enables the cardholder to access future services, the payment for which it is exchanged constitutes a prepayment for future services. Among other things, the payment covers an amount charged by the card issuer for provision of the service that may be due on a periodic basis.⁸⁶ It also covers a further amount that will determine the dollar value or the purchasing power of the purchased service. In contrast to a debit or credit card agreement, a customer account need not be established and account-based rights need not be conferred.⁸⁷ Though an account may be maintained by the cardholder, that account will belong to the card issuer. It is therefore not an account that may be accessed by right by the cardholder unless the parties have specially arranged this.

82. Credit is used here to refer to an augmentation rather than a loan facility.

83. See *supra* note 67 and accompanying text.

84. *Equitable Life Assurance Soc'y v. Brandt*, 198 So. 595, 605 (Ala. 1940); *Lukenbach v. W.J. McCahan Sugar Ref. Co.*, 248 U.S. 139, 148 (1918); see also 70 C.J.S. *Payment* § 2 (2008).

85. *The Kimball*, 70 U.S. 37, 45-46 (1865).

86. Monthly service fees for example. Some administrative fees, such as dormancy fees, are prohibited in some states *e.g.*, Hawaii. See HAW. REV. STAT. § 481B-13(a) (2008).

87. This is because the exchange of funds is made with the intention of extinguishing debts the cardholder would otherwise owe the card issuer for transactions to be made in the future using the card. The cardholder neither transfers the funds to the card issuer on the understanding that they will be repaid on his order, nor does the card issuer receive the funds promising to return them in kind (deposit characteristics). See Black's Law Dictionary definition of "stored-value card" (8th ed. 2004); see also BANKING LAW, Matthew Bender & Co. (LexisNexis 2008) §§ 9.02, 9.03.

Debit flows reflected on the account may be important to the card issuer and helpful to the cardholder, but of minimal significance to the merchant. The merchant is more concerned that the card issuer honor its contractual obligations⁸⁸ to pay than it is about the method of payment.

The units, mirroring the SVP account, enable the merchant to assess the cardholder's eligibility to participate in the arrangement. An assessment of the cardholder's eligibility in terms of creditworthiness is made because there will be an interval, however brief, between authorization of the transaction by the card issuer and the receipt of funds by the merchant. Where the transactions require clearing and settlement, but either is deferred, there will be a period during which the merchant provides credit to the card issuer. This is because goods or services will have been received by the cardholder without payment by the card issuer. As a result of the agreement upon which the arrangement is established, the merchant will look to the card issuer, not the cardholder, for settlement of the transaction debt. No credit is provided to the cardholder by the merchant because the debt is incurred by the card issuer rather than the cardholder. The cardholder is immune to payment claims from the merchant.⁸⁹ The prepayment by the cardholder also means that the cardholder owes no debt to the card issuer.

In relation to the card issuer-cardholder agreement, the merchant is, at best, a third party beneficiary.⁹⁰ Through these contractual obligations, the card issuer undertakes responsibility for the dollar value of transactions completed by the cardholder with the eligible merchants. The merchant will thus be more interested in its ability to enforce that undertaking than it will be in the mechanics of the depository relationship between the cardholder and card issuer.⁹¹ Its ability to enforce the undertaking of the card issuer depends directly on its

88. This undertaking may be found in no more than the assurances of the card issuer that the technical arrangements will work and result in payment to the merchant. It is more likely, and practical, that the card issuer unequivocally assumes responsibility for paying the merchant in a card issuer-merchant agreement. Note how this duplicates the card issuer's direct promise to the merchant to do so. This will also provide an obvious incentive for merchants to participate. See *also supra* notes 76 and 79.

89. Cf. SVC Report, *supra* note 9, at 696-700.

90. The merchant is the intended third party beneficiary of the promise made by the card issuer to settle debts arising from eligible transactions with merchants in the agreement between the cardholder and card issuer. See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (1981). Of course there will also be a contract between the card issuer and merchant, by which the card issuer is obliged to reimburse the merchant.

91. The certainty that the card issuer will reimburse the merchant underlies the entire framework.

possession of SVP units. Once transferred to the merchant, the units evidence the value of the purchase which has been released to the cardholder pursuant to the card issuer and merchant's prior agreement.

The parties will have agreed that the merchant will release goods or services that are the subject of the sale to the cardholder once the merchant determines that the transaction is one authorized by their agreement. Evidence that the cardholder is entitled to make purchases in an amount that is at least equal to the price of the prospective sale transaction will satisfy the merchant. It also motivates completion of the transaction.

Because the services are to be provided in the future, the payment is really a prepayment for future services. This is a contractual arrangement, so the parties' duties arise from that contract. As a payment, there is neither a loan of funds nor any obligation to repay those funds to the cardholder.

When the SVP is used in a transaction, the transfer of units will ultimately lead to the payment of the merchant from which the goods or services were purchased. The transfer of SVP units from cardholder to merchant may have one of several consequences. The merchant's receipt of units may be deemed the equivalent of a cash payment from the card issuer, though clearing and settlement has yet to occur. Alternatively, the merchant may be required to redeem the units by forwarding them on to the card issuer. The receipt of units from the cardholder equips the merchant to request settlement of the debt through an account transfer from the card issuer to the merchant.⁹² The ultimate payment may be immediate or deferred. The transfer of units, instantaneously processed, may result in final payment to the merchant. There may, however, be a series of deferred steps that must be completed before final payment occurs. The receipt of units, recorded by the merchant's terminals and stored for deferred settlement through conventional means at the close of the processing cycle or the business day, may be another alternative.⁹³

92. The transfer would likely be rendered irreversible by the card issuer/merchant agreement, though the payment of the merchant may not be considered final until the conclusion of the day's business. This does not necessarily preclude subsequent settlement of a dispute between cardholder and merchant as irreversibility would not necessarily preclude refundability. A refund would merely require a new transfer rather than the unwinding of the previous transaction. Refunds might also be restricted in terms of to whom they might be paid. Further issues, such as whether a refund amounts, in effect, to the repayment of a deposit, could influence decisions to limit such refunds to cash or check or (conventional) account transfers.

93. See SVC Report, *supra* note 9, at 711.

The card issuer's obligations to the cardholder, as well as its transactional tracking, evoke account transfers and invite deposit analogies. The persistent influence of deposit analogies in the assessment of SVPs is thus understandable.⁹⁴ There has been a shift, however, in the manner in which deposit analogies are now being used to distinguish SVPs. The Federal Deposit Insurance Corporation (the "FDIC") recently opined that SVPs are access devices and as such are very similar to traditional payment mechanisms.⁹⁵ As a result, the FDIC suggested that the basis upon which SVPs should be assessed for regulation under the FDIC should be whether the funds underlying the SVP are ultimately deposited in a financial institution.⁹⁶

One benefit of the FDIC's suggested approach is that it maintains focus on the target—the underlying funds—regardless of their location or what the expectations of the interacting parties may be. It is also fitting that deposit-related SVPs be regarded as a regulatory priority if only because strong policies favoring the close protection of public deposits at the heart of banking law mandate this. Restrictions on 'banking business' are a common feature of banking law, as are restrictions favoring deposit-taking by licensed deposit-takers only.⁹⁷ Payment mechanisms deemed to incorporate deposits thus raise such restrictions unless they are somehow exempted.

One disadvantage of the approach is that it does not attempt to distinguish the legal nature of a stored value product. It seizes upon the fact that at some point in time, the funds underlying an SVP, whether paid over as a deposit or exchanged as a prepayment, will be deposited. The fact that the account involved may not belong to the cardholder is glossed over. This obscures the distinction between a product providing access to funds deposited by the card issuer on its

94. Not that this has been a blanket approach—the understanding that such analogies may be less apt for certain models tempered FDIC Opinion No. 8 and FRS Proposed Rule #1. See FDIC Opinion No. 8 and FRS Proposed Rule #1, *supra* note 9.

95. "To the extent that the underlying funds have been placed at a bank, a . . . 'stored value card' can serve as an access mechanism . . . and is no different . . . than a check or bank-issued traveler's check or money order. None of these mechanisms actually stores money. All of these mechanisms merely provide access to money stored at a bank." See NONTRADITIONAL ACCESS, *supra* note 21, at 45574.

96. See FDIC Proposed Rule #2, *supra* note 10; see also Press Release, FDIC, New Rule on Insurability of Funds Underlying Stored Value Cards, PR-65-2005 (July 19, 2005) and NONTRADITIONAL ACCESS, *supra* note 21, at 45577-580 (replacing FDIC Proposed Rule #2).

97. The common law right of a citizen to engage in the business of banking is subject to whichever statutes exist restricting that right. 1-2 *Banking Law*, Matthew Bender & Co. (LexisNexis 2008) § 2.02. The right must also be exercised in accordance with such regulations as the state may have made in the exercise of its police power. *Id.* In light of the careful regulation of the business of banking and deposit taking in particular, this common law right leaves few, if any, opportunities for unlicensed deposit taking in practice.

own behalf, and one that provides access to the *cardholder*. The expectations of the cardholders who made the payment in the first place are arguably not the priority; systemic safety and soundness are the main focus of the FDIC here.

The conclusion that SVPs incorporate deposits raises barriers against aspiring providers of SVP services. Aspiring entrants will be effectively precluded from participating in such activity unless they are licensed or exempted from the license requirement. The lucrative-ness of deposit-taking business,⁹⁸ coupled with the strong competition and existing policy lobbies, means that such a policy would be closely monitored. It would also motivate a preference for SVPs to simply be categorized as deposits.

1. Refunds

Where the terms of the SVP agreement provide that the prepayment or unspent balances are non refundable, it is hard to argue that the prepayment resembles a deposit. At the heart of the concept of a deposit is the obligation to repay funds on demand. Permitting refunds of a limited amount of unspent value does not necessarily remedy this.⁹⁹ Although some terms and conditions permit unspent balances to be redeemed for cash, this concession is usually subject to restrictions that distinguish the “refund right” from an ordinary duty to repay funds. Typically an SVP “refund right” arises when the unspent balance is less than five or ten dollars, for example.¹⁰⁰ This underscores the dissimilarity to a deposit.

There is also the unavoidable fact that closed SVPs and open loop models—at least those intended to facilitate purchases rather than provide an account substitute¹⁰¹—are offered and sought after as a purchasing *convenience*. The understanding of the cardholder at the time of buying the SVP is that a service for future use is being purchased. The payment is not made on terms that it will be repaid by the card issuer. Once purchased, the service is within the cardholder’s power to use or not use. Absent system malfunctions or processing mistakes, this is the responsibility of the cardholder, not the card issuer. Absent consumer preferences and an overzealous desire to pro-

98. The income to be derived from deposit taking is likely to far exceed the profits to be made from service fees. Given a choice, deposit taking is likely to be an activity preferred over the provision of SVC back-room or ancillary services.

99. See *infra* note 193 and accompanying text.

100. It may also arise where there has been an error by the card issuer, but even in those cases if the choice is between refunding cash or a re-credit to the card, the latter is the usual result.

101. As payroll cards, which permit ATM cash withdrawals, do.

tect consumers, there is no reason why money already spent on a received service should be made refundable by the card issuer. Refunds for dissatisfactory services are properly referred to the merchant from whom they were obtained.¹⁰² The dismay that has accompanied recent gift card issuer bankruptcies owes more to the fact that cardholders are potentially divested of their most significant rights.¹⁰³ Not only are the underlying funds put out of reach, the cardholder is unable to demand or enforce the supply of services already paid for from the now defunct issuer.

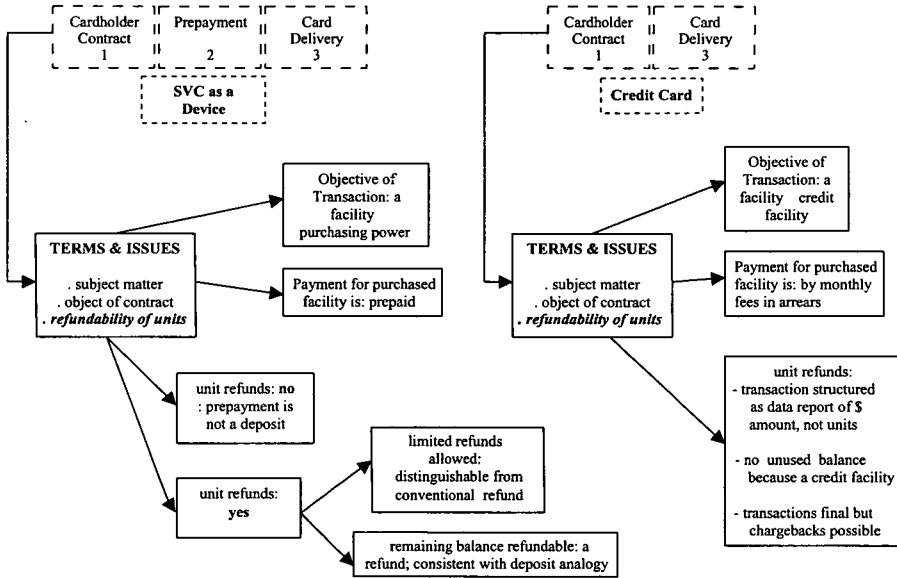


FIGURE 3: SVC AND CREDIT CARD REFUNDS CONTRASTED

2. Objectives Behind SVP Use: Payment or Service?

The process by which payment services are provided to a cardholder via stored value products may vary depending on the model. Depending on how the SVP is configured, it may facilitate, but stop short of, executing payment. In such a case, the SVP progresses through a technologically interesting, but not particularly novel, pro-

102. This makes sense logically, and is usually expressly provided in the terms and conditions. See also Ronald Mann, *Making Sense of Payments Policy in the Information Age*, 93 GEO. L.J. 633, 639-40 (2005) (stating “[r]ules related to reversibility. . . depend on the dynamics of the underlying transaction in which the payment is made. . . It is important to see that the rules make sense because of the underlying transaction and not because of anything about the payment instrument itself”).

103. See Marty Orgel, *Not Worth The Plastic They're Printed On*, MARKETWATCH.COM, Mar. 3, 2008, available at <http://www.marketwatch.com/news/>.

cess. The service concerned enables a goods exchange or the provision of services from the merchant. The SVP enables this by facilitating prerequisite steps that must, by agreement, precede ultimate payment. The main object of the SVP transaction is thus the enablement of the exchange—facilitation of the service provided by the cardholder—rather than the execution of payment. Actual payment must ultimately be accomplished through other means. The point is that the object of prospective transactions¹⁰⁴ may determine the configuration ultimately chosen for the SVP model. The configuration in turn may help distinguish a payment from a deposit.

Examined more closely, service facilitation is a plausible objective for SVP transactions. The service provided by use of the card is a convenience—a convenient method of obtaining goods or services paid for in advance. In enabling such transactions, the method incorporates real time access by the cardholder to proof that she is entitled to request goods or services of up to a certain value. By means of the SVP, the cardholder is furnished with a current statement of her prepaid value limit. That statement—the SVP balance—is available as needed by the cardholder. It bears the card issuer's imprimatur, and it is accepted as highly reliable by merchants. Having agreed beforehand with the card issuer to do so, the merchant will release the goods or services to the cardholder in exchange for the transfer of SVP units from the cardholder to the merchant.

The objective of the cardholder in purchasing an SVP may also be to immediately effect final payments, or it may be to obtain convenient access to a payment service. At the heart of the convenience of SVPs is the fact that they facilitate purchases at a time of the cardholder's choosing. The purchases will also have been paid for in advance. It could be argued that the fact that easy access to purchasing power enhances the convenience of SVPs means that the accomplishment of payment is yet another objective. In fact, the features of particular SVPs¹⁰⁵ and the expectations of the cardholder may render the desire to make a payment the primary objective behind its purchase. Both objectives may be equally important to the cardholder. Cer-

104. The main objective, or one of the main objectives, of the transaction may simply be to effect the release of desired goods or services to the cardholder. This is accomplished by the cardholder assuring the merchant, by use of the SVP, of ultimate payment by the issuer, or it may be accomplished by facilitating immediate payment of the merchant by the issuer. A distinct alternative may be the cardholder's objective to simply obtain a payment in cash.

105. Does the SVP permit cash withdrawals? Is it essentially a remittance card? Is it structured in such a way that card issuer-merchant payment elements are closely linked to card issuer-cardholder stages of the transaction?

tainly, previous use of an SVP may shape cardholder expectations and objectives in using a particular SVP model.

The model type concerned may influence which of these two objectives—convenience or payment—is primarily addressed by the transactional process. Another influence may be how directly and centrally the execution of final payment is incorporated into the transaction.¹⁰⁶ Distinctions between objectives and transaction stages thus provide a backdrop for a deeper understanding of the legal characteristics of SVP models. That said, the subtleties of SVP design are unknown to most cardholders, and it is unlikely that cardholders puzzle over which of their objectives in purchasing an SVP is primary. Cardholders choose to buy SVPs because they make convenient gifts, provide convenient spending power, or are convenient account substitutes. Systemic differences, to which cardholders are oblivious, exert little influence on their expectations and objectives in using stored value products.¹⁰⁷ It may be that payment options offered by a particular model may be of greater interest in cases where the cardholder is looking for an account substitute. This, however, will not guarantee cardholder interest in the systemic configurations underlying the options. Although cardholders are not normally concerned about the internal workings of a service, one thing is certain: there is always interest in whether the service is available and working properly. Convenience, in other words, is key.

Contract law has an important role to play in a clearer understanding of the nature of SVPs. The objectives and expectations of parties to a transaction are commonly shaped by contracts. Contract law thus provides a frame of reference through which the nature of SVPs can be explained. It is important to note that from the contractual perspective, the more commonly used SVPs are a vehicle for the provision of services rather than a repayment (of a deposit) arrangement.

A brief review of common SVP terms is included below for two reasons. It illustrates how the card issuer/cardholder relationship is typically shaped and defined. It also confirms that SVPs in practice are conceived and administered quite differently from deposit-based cardholder products.

106. Analysis of the three models under discussion reveals that they function quite differently in this regard.

107. This is in stark contrast to the relevance such differences bear on the legal nature of the global transaction.

B. *Evaluating SVP Transactions*

It has been established above that the card issuer supplies SVPs *inter alia* so that it can provide a service to cardholders for a fee.¹⁰⁸ The service it provides is a convenience, a superior form of purchasing power, for which cardholders pay by means of a prepayment. The purchasing power is superior because it is backed by a card issuer's brand, which is well-known, trusted, and preferred by merchants. This brand is preferred to whatever undertakings a customer may give in relation to a deferred payment where those promises are secured by nothing more than the customer's word. The advertising of SVPs also commonly touts the benefits of such payments over conventional deferred payment mechanisms.¹⁰⁹ Even in cases where the SVP is primarily designed for cash withdrawals, as with remittance cards, the facility is still accurately described as a service. Though the service provided in this case is a convenient means of money withdrawal rather than purchasing power, it still differs from deposit arrangements in several respects. They are also not solely dedicated to money withdrawals; they incorporate an additional purchasing power service through 'spendability' at participating merchants.

1. An Analytical Aid: A Sale Transaction

The transaction between the cardholder and merchant need not be a sale. It could be a lease or other exchange transaction. The reason for the transaction under which funds or SVP units are exchanged for a desired object or services is not as important at this point as the manner by which that transaction is effected. Because sales are both familiar and often simple transactions, a sale transaction is utilized here as an analytical aid.

108. There are other less primary reasons why the card issuer does this, i.e., to provide a means by which incidental aspects of the service may be accomplished including the generation of transaction histories to enable the card issuer to track its related indebtedness. Transactional histories also enable the cardholder to track outstanding entitlements for optimally effective use of the service, and the merchant to ascertain whether the cardholder is eligible to make purchases.

109. Such as checks, which may be subject to pre-authorization before acceptance by the merchant, credit cards which routinely require authorization, and EFTPOS in which authorization of the transaction is dependant on available funds. Being prepaid, the cardholder is confident that the transaction will go through absent any system malfunction. The idea that SVPs are to be preferred resonates strongly with some customers that are leery of credit. The fact that debit transactions, and prepaid debits at that, are involved rather than credit transactions is attractive to some. Preferring that there be no danger of becoming overdrawn, such customers regard it a 'superior' method. Recent bankruptcies of card issuing merchants such as T.J. Maxx and The Sharper Image, have however taken some of the shine off gifts cards, as it has raised questions about the priority and worth of unspent card units in such situations. *See supra* note 96.

A customer wants to buy some books. She buys an “open loop” SVP when next in her local grocery store. A few days later, while browsing in a bookshop, she finds the books she wants and buys them using the SVP. Two SVP related transactions have occurred. The first was the sale of the SVP to the customer involving the card issuer, the grocery store merchant (M_1), and the customer-now-cardholder. The second is the book purchase by the cardholder from the bookshop (M_2).

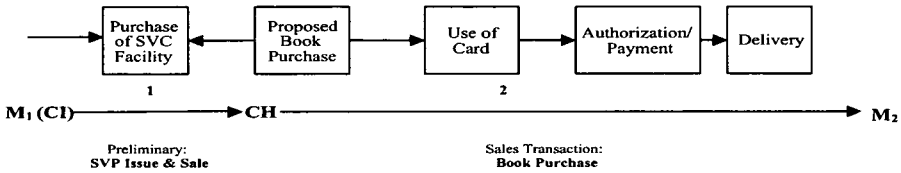


FIGURE 4: SVC TRANSACTIONAL PATH

a. The Preliminary Transaction: Issue and Sale of the SVP

The issue and sale of an SVP raises at least three questions for discussion: (1) what exactly is the subject matter of the sale; (2) on what terms is that subject matter made available by the seller/offeror; and (3) at what point does a contract for the sale of the subject matter come into being?

1. The Subject Matter of the Transaction

The transaction envisaged here is one that encompasses the issue and the ultimate sale of the SVP. The issue and sale will be treated as a single transaction for the purpose of analyzing the relationship between the card issuer and cardholder. This is because even where the card is purchased from a third party, the undertakings that the card issuer makes as issuer of the card are deemed made to ultimate purchasers of the card. As the ultimate purchaser of the SVP, the cardholder thus falls within the class of persons to whom those undertakings are made—those members of the public that come forward to accept the offer to sell displayed cards.¹¹⁰

The merchant may stock and sell SVPs, but, as in this example, M_1 is often not the issuer of the cards. By selling SVPs, the merchant acts

110. Where the card is purchased from a retailer, the retailer-merchant in making the cards available acts as the agent of the card issuer in making them available to the public for sale on the card issuer’s terms. Whether the card is purchased in person from the issuer, purchased online from the card issuer, or purchased through the agency of the retailer-merchant, there is privity of contract between the card issuer and cardholder.

as the agent of the cardholder, making them available to the wider public and receiving prepayments for onward transfer to the card issuer. It is in this capacity as agent that the merchant concludes the contract for the use of the SVP with the cardholder on behalf of the issuer.¹¹¹ To reward its agent, the card issuer may provide the merchant with cards at a discount. The resulting price margin provides a small profit to the merchant. That profit is consideration for their agreement under which the card issuer provides, and the merchant sells, SVPs to the public.

a. Goods or Services?

The primary point of purchasing an SVP is usually to obtain access to a service. The objective of the transaction is the superior purchasing power that the cardholder may access through use of the card.¹¹² This contract for the provision of a service is executed in consideration of the cardholder's prepayment. The subject matter of the transaction, at first glance, is clearly a service, making the 'sale' of the SVP a contract for the provision of a service rather than the sale of goods.¹¹³

The correctness of this analysis is borne out by at least two other factors. The physical card seems to be a minor part of the transaction, and it is usually excluded from the sale. The terms often provide, in fact, that the card remains the property of the card issuer and that the card issuer may demand the return of the card at any time.¹¹⁴ In practice, if a card is repossessed, it will have a zero balance or be replaced with another card of equivalent value. If not, the repossession would result in forfeiture to the detriment of the cardholder, and this would result in the unjust enrichment of the card issuer. This suggests that something other than the physical card is the subject matter of the sale transaction.

This transaction is, however, a hybrid transaction because it involves a physical object (the plastic stored value card) and an intangi-

111. To reward its agent, the card issuer may provide the merchant with the cards at a discount. The price margin provides a small profit to the merchant and this in turn provides consideration for their agreement under which the card issuer will provide, and the merchant sell, SVCs to the public.

112. This is illustrated also by the simplified explanation of the working of SVCs.

113. Goods are defined as "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action." U.C.C. § 2-105 (2003); *see also id.* § 2-103(k): "[g]oods' means all things that are moveable at the time of identification to a contract for sale . . . The term does not include information, the money in which the price is to be paid, investment securities . . . or choses in action."

114. "A 'sale' consists in the passing of title from seller to the buyer for a price." U.C.C. § 2-106(1) (2003). Title to the card does not pass to the cardholder in such circumstances.

ble aspect (the services to which the card provides access). The latter services may or may not be expressed in the form of software instructions.¹¹⁵ Hybrid transactions may however be categorized as transactions for the sale of goods or as transactions for the provision of services, depending on the outcome of one of two possible tests.

The predominant purpose test evaluates a transaction with a view to determining whether the subject matter is properly described as goods.¹¹⁶ The transaction is assessed to see whether its main purpose is reasonably described as being for the sale of goods. It does this by assessing whether the transaction is for the rendition of services, with goods being only incidentally involved, or whether it is a sale of goods transaction that only incidentally involves services. Where, as in the latter case, the goods aspect is deemed to predominate, it is categorized as a transaction for the sale of goods, incidentally supported by a rendering of services. In assessing this, factors such as the language of the contract, the nature of the supplier's business, the reason the parties entered into the contract, and the amounts paid are taken into account. Courts typically adopt a pragmatic approach and avoid putting excessive emphasis on form because such an emphasis may obscure the overall substance of the transaction. The fact that there is not a separate charge for the goods and services elements will not predispose courts to either conclusion.¹¹⁷

The predominant purpose test has however been criticized for being unduly mechanical. It has been opined, for example, that it has the tendency to lead to an all or nothing outcome.¹¹⁸ In other situations, where application of the test has deemed a transaction to be one for the provision of services, a different test has therefore been applied. Where courts have been of the opinion that warranties thereby excluded were intended by the legislature to apply to the instant transaction, courts have resorted to the "gravamen of the action," or gravamen test instead.¹¹⁹

Rather than seeking to classify the subject matter as being primarily goods or services, the gravamen test focuses instead on what is the

115. The fact that computer information *per se* is not ordinarily regarded as goods is reflected in the unpopular Uniform Computer Information Transactions Act: " 'goods' means all things that are movable at the time relevant to the computer information transaction. . . [t]he term does not include computer information, money. . . accounts, chattel paper, deposit accounts, or general intangibles." Unif. Computer Info. Transactions Act § 102(a)(33) (2002).

116. *Burton v. Artery Co.*, 367 A.2d 935, 946 (Md. 1977).

117. *Anthony Pools v. Sheehan*, 455 A.2d 434, 440 (Md. 1983).

118. *Id.* at 438-39.

119. *In re Trailer and Plumbing Supplies*, 578 A.2d 343, 345 (N.H.1990); *Anthony Pools v. Sheehan*, 455 A.2d 434, 441 (Md. 1983).

essential source of a dispute leading to legal action. Intended to serve as a vehicle for the satisfaction of legislative policy, it focuses on the source of the dispute. The focus is thus on whether the concerned aspects of the hybrid transaction are reasonably described as goods, or more reasonably described as services. The fact that one aspect seemingly dominates the transaction is deemed irrelevant if it can be determined that the dispute arises from the subject matter operating as goods rather than services, or vice versa.

Certain prerequisites must be satisfied before the gravamen test applies. The transaction involved must be a hybrid transaction involving consumer goods that retain their character after use. Monetary loss or personal injury must have resulted from a defect in those goods. Where this has been the case, the transaction will be deemed one for the sale of goods to which U.C.C. warranties apply. This will be so even if the predominant effect of the transaction is for the provision of services. A precondition for this approach is discernable legislative intent to accord equivalent protection to such services as for goods.¹²⁰

Applying these tests to the preliminary SVP sale transaction, the tentative conclusions above (i.e., that the sale of an SVP is for the provision of services rather than the sale of goods) is confirmed. By the predominant purpose test, the clear thrust of the transaction is to provide payment services and superior purchasing power, rather than provision of the plastic card which usually remains the property of the issuer. By this test, the transaction is not for the sale of goods.

Applying the gravamen test to this transaction will usually have a similar outcome, except in the relatively limited circumstances in which it might be deemed one for the sale of goods. The applicability criteria are capable of satisfaction. For example, stored value cards are commonly bought from a retailer agent¹²¹ for personal, family, or

120. *Id.* at 441. The reasons why the legislature may intend equal consumer protection for goods and hybrid transactions include their end assessment of whom is the appropriate party, between the issuer/merchant and consumer, to bear the loss caused by defects, the fact that there has been consumer reliance upon the soundness of the 'goods' and the fact that proof of negligence by the issuer/merchant may be unduly difficult for the consumer. Once it is ascertained by the Court that such legislative intent exists, it will be used to justify the outcome. *Id.* at 438-39.

121. The retailer agent participates here as a merchant, the other participant required in a consumer transaction. *See, e.g.*, U.C.C. § 2-103(1)(d) (2003) (providing that a "consumer contract means a contract between a merchant seller and a consumer.") A merchant is a person "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom the knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." *Id.* § 2-104(1).

household use.¹²² This satisfies the requirement that the transaction must be a consumer transaction.¹²³ The SVP may be deemed the 'goods' of the transaction simply because of its tangible form,¹²⁴ and it retains its physical form after use, another criterion. It is conceivable in such circumstances that a defect in the physical card could be the cause of injury sustained by the consumer cardholder (e.g., a defective microchip), so yet another criterion is satisfied. The circumstances under which this transaction would be categorized as goods by this test, however, are limited to the relatively few situations in which this is likely to occur based on a defect in the physical card.¹²⁵ Unless the transaction can be categorized as one for sale of goods on other grounds, the preliminary transaction in most cases will be one for the provision of services.

Regarding other grounds upon which the transaction subject matter may be appropriately categorized as goods, further thought may be given to its form and purpose. Terms sometimes provide that the SVP will remain the property of the issuer. The physical card is not subject to sale in that case, but merely loaned by the card issuer to the cardholder. The question arises whether this is an important difference in form, or merely a structural difference of little significance. When title to the card passes under the transaction, the transaction is a hybrid transaction. The intention underlying that transaction is that the provision of services to the cardholder should be effected by providing the cardholder with the means of accessing those services. The card is therefore the device by which access to the services—the primary objective of the transaction—is obtained.

Because those services cannot be accessed by any other means,¹²⁶ the card is an indispensable feature of the provision of those services and arguably not an insignificant part of the transaction. In other words, those goods are an important and integral part of the transaction though they are a factor facilitating the global purpose of the transaction. That global purpose is to provide superior purchasing power and to facilitate payments by the cardholder. Where such

122. "'Consumer' means an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family or household purposes." U.C.C. § 2-103(c) (2003).

123. See *supra* note 121.

124. See *supra* note 113.

125. Defects are much more likely to be virtual ones, such as software errors, although there may be physical defects also. For example, defective circuitry physically etched in microform upon the circuit chip, causing defective operation of the facility.

126. If the desired services can be accessed by other means, such as mere entry of a PIN into a portable terminal which in effect replaces the SVC, the analysis must shift to a consideration of whether that terminal is within the subject matter of the transaction.

goods, if sold individually, would be subject to statutory safeguards such as U.C.C. warranties,¹²⁷ the fact that they are subordinate, though integral to the global purpose of the transaction, should not exclude them from similar protection.

The fact that such warranties may be disclaimed, however, may undermine the basis of this approach.¹²⁸ It weakens the basis for the presumption that hybrid transactions should be treated similarly. This adds a purposive gloss to the gravamen test. It encourages looking beyond the form of the transaction to its global purpose to assess whether goods-related policy should be extended to hybrid transactions.

The argument may be made that the difference between arrangements in which title to the SVP passes to the cardholder and those in which it does not is significant. After all, the choice to exclude the physical card from the sale would have been deliberate, leaving only intangibles as the subject matter of the transaction. The purpose served by the card, however, is the same whether it is sold outright or merely loaned under the transaction. The purpose behind provision of the card, whether by means of sale or lease, is to equip the cardholder with an access device to utilize the services that are the purpose of the transaction. In neither situation can it be said that the primary objective of the transaction is the provision of the card. Although the cardholder could legitimately seek to purchase SVPs for no reason other than to obtain possession of them, SVPs are sought essentially for the access to services that they provide. This, at least from the perspective of the issuer, is the purpose for which SVP transactions are entered into with the cardholder.

The foregoing clarifies that the subject matter of the preliminary SVP contract may be categorized as goods, though in most cases a designation of services will be more appropriate.

127. Particularly where such warranties may not be disclaimed, such as in Maryland. *See supra* note 116.

128. Not, at least, if viewed from the perspective of the issuer. In *Anthony Pools*, the gravamen test was used to fulfill the implicit legislative intent discerned by the court that U.C.C. warranties were to be applicable to both goods, and goods included in hybrid transactions. *Anthony Pools v. Sheehan*, 455 A.2d 434, 440 (Md. 1983). In this case, the possible finding that no warranties applied to such goods was regarded as contrary to the implicit policy of the then applicable version of U.C.C. § 2-316 that, *inter alia*, rendered ineffective contractual disclaimers of consumer warranties. *Id.* at 435.

2. The Terms of the Contract

Stored value card agreements typically cover a broad range of topics,¹²⁹ similar to those addressed by deposit product terms and conditions. However, the scope and outworking of SVP terms and conditions are strikingly different.¹³⁰

a. Card Issuance and Ownership

Offers to provide the stored value card and its associated services may be limited to adults. In the event that the card is purchased by a minor, the terms may provide that use of the card constitutes a representation that the user is at least eighteen years old. Even more common are statements that the card remains the property of the card issuer and that the cardholder agrees to this. Card issuers generally reserve the right to recall, repossess, cancel or revoke the card, without notice and for no reason.

129. A wide range of terms and conditions were surveyed for this article including: the Starbucks Gift Card at https://www.starbucks.com/customer/card_terms.asp; Dell at <http://www.dell.com/content> (follow "Dell Home and Home Office" hyperlink, then follow "Electronics, Software and Accessories" hyperlink, then follow "Gift Cards" hyperlink, then follow "More Details" hyperlink, then "Terms & Conditions"); Jamba Juice Gift Card at <https://jcard.jambajuice.com/FAQ.aspx> (follow "terms of use" hyperlink at the bottom of the page); Walmart Gift Card at <http://www.walmart.com/> (follow "Gifts & Registries" then "Gift Cards," then Gift Card Terms and Conditions); Visa Gift Card at <http://www.giftcards.com> (follow "Customer Service" hyperlink, then follow "Cardholder Agreement" hyperlink); Visa Prepaid Reloadable Card at <http://usa.visa.com> (follow "Personal" hyperlink, then "Prepaid and Gift Cards" hyperlink, then follow "Visa Reloadable" hyperlink, then follow "Get a reloadable card" hyperlink, which will lead to a locator which ultimately points to a URL associated with allaccess.com); Visa Vision Reloadable Prepaid Cards at <http://www.visionprepaid.com/terms.html>; a MyMCGiftcard.com MasterCard at <http://www.mymcgiftcard.com> (follow terms and conditions hyperlink); Greendot Gift Card at <https://www.greendotonline.com> (follow "Cardholder Agreement" hyperlink at the bottom of the page); Western Union MasterCard Prepaid Reloadable card at <http://www.mastercard.com/us/gateway.html> (follow "Gift and Other Prepaid Cards" hyperlink, then follow "Get a Card" hyperlink, then select "Get a Card" associated with "Bank Freedom," follow "Cardholder Agreement" hyperlink); Western Union Prepaid Visa Card at <http://www.westernunion.com/> (select country, then select "prepaid" tab, then select "sign up now" then select "cardholder agreement"), American Express at <http://www.americanexpress.com> (follow "Personal Cards" hyperlink, then follow "Additional Products and Services" hyperlink; follow "Gift Cards" hyperlink; then "Classic" then "Cardholder Agreement" hyperlink); Wells Fargo at <https://www.wellsfargo.com/giftcard/index.jhtml> ("Gift Card Customer Agreement" hyperlink (bottom of page)); Chase at <https://www.chasegiftcard.com/> (follow "Terms and Conditions" hyperlink), and South Dakota State Payroll.

130. See *supra* note 129. See also *supra* Figure 1. Because of space restrictions, SVP term features are highlighted here instead of being directly contrasted with specific deposit product terms.

b. Available Funds

The value of funds available on the card at any given time is referred to as the 'available funds.' The initial amount of available funds is usually printed on the front of the card. The prepayment made by the cardholder reimburses the card issuer for those available funds prior to their expenditure. The prepayment however covers not only potentially available funds, but fees and charges that may apply to use of the card also. Cardholders are required to have sufficient available funds to pay for purchases, though in some cases, split tender transactions may be permitted.¹³¹

Presently, most SVPs are non-reloadable, which means the amount of available funds is fixed. However, reloadable cards that permit restricted "value loading" until the card expires are becoming more common.¹³² Because fees and charges are applicable to both types of cards, the funds actually available to spend are less than the 'available funds.' In the case of non-reloadable cards, once available funds are exhausted, the card may no longer be used and is rendered void or cancelled.¹³³

The available funds on non-reloadable cards are purely prepaid funds, and though sometimes referred to as a "prepaid gift *credit* card" or a "*debit* gift card," neither provide a line of credit,¹³⁴ nor access to a cardholder account.¹³⁵ Although reloadable cards are also prepaid, a customer account may underlie the SVP service.¹³⁶

Despite the prepaid nature of SVCs, the card may sometimes be 'overspent.'¹³⁷ Although the terms usually specify that the service is not a credit card and does not include a line of credit, this is one way in which inadvertent temporary credit may be furnished to the cardholder. The shortfall, sometimes referred to as a "shortage," creates a

131. In split tender transactions the SVC is used to pay only a portion of the price with the balance being covered by another form of payment, usually a credit card payment. *See* Chase Gift Card Terms, *supra* note 129.

132. *See, e.g.*, Visa Prepaid Reloadable Card and (Western Union) MasterCard Prepaid Reloadable Card, *supra* note 129.

133. *See, e.g.*, American Express Gift Card Cardholder Agreement, *supra* note 129.

134. Where transactions are processed off-line, there is a possibility that the card may become overdrawn because the transaction exceeds the available funds—credit is thus supplied to the extent that the card is overspent, and the cardholder is required to pay the amount overspent. Cardholders are thus required to keep track of the balance of their available funds, and if the card is overspent, a fee will apply. *See* South Dakota State Payroll Card FAQ, *supra* note 129.

135. *See, e.g.*, Wells Fargo Gift Card Agreement, *supra* note 129.

136. *See, e.g.*, Western Union MasterCard Prepaid Reloadable Card, *supra* note 129. *See also id.* (providing that the terms of the Starbucks Gift Card is a closed reloadable SVC).

137. *See, e.g.*, Dell Gift Card Terms and Conditions, *supra* note 129. Split tender transactions, permitted at the option of the merchant, may also lead to the card being overspent.

“negative balance” on the card. The cardholder is required to clear the shortage expeditiously, and a shortage or overdraft fee will usually apply.¹³⁸

c. Activation

The card may be activated upon purchase or require activation after purchase. If it requires post-purchase activation, the card is usually valueless until activated. Once activated, the funds become available for spending. Commonly, the available funds do not expire,¹³⁹ but they may be eroded by monthly or dormancy fees.¹⁴⁰

d. Registration of Card and Tracking Available Funds

The answer to the question whether SVP “available funds” are a deposit, and by analogy, the SVP an account, depends on a number of factors. These include whether a record of transactions is kept centrally, the cardholder has access to that record, and the cardholder has account-based rights—rather than merely contractual rights—to access the record and order changes to it. Although the rule by which SVPs may be deemed deposits for deposit insurance purposes is not yet established, a broad approach will likely be adopted. Under the proposed approach, payments (not deposits) which a card issuer receives from the sale of SVPs and subsequently deposits in a bank account will render those funds eligible for deposit insurance.¹⁴¹

If the cardholder has chosen not to register the SVP, the card may not even have the ‘trackability’ characteristic which might otherwise confer faint account-like characteristics upon the limited permissible cardholder access to transactional histories. Cardholders are nevertheless encouraged, and sometimes obliged, by the terms to register their gift cards because they have no remedy in the case of lost or stolen cards, should they fail to do so. When unregistered, the card issuer may have no way of tracking the funds, and if it does not, this means the available funds on that card are ‘untraceable.’ The issuer has no way of verifying whether a cardholder still had available funds on the card when it was lost or stolen, which puts the card issuer in the posi-

138. “In addition, we reserve the right to charge a Shortage fee of \$25 per transaction every time your use of the Card results in a Shortage, subject to applicable law.” *Id.*

139. The sale of SVCs with available funds subject to expiration is unlawful in states such as Minnesota, although there are exceptions to this rule—it does not apply for example to bank issued (or other financial institution issued) gift cards, certain gift cards issued by employers, or open purchase SVCs.

140. In some states dormancy and other service charges are prohibited for example in Hawaii and Louisiana respectively.

141. See FDIC Proposed Rule #2, *supra* note 10.

tion of having to decide how to remedy such a situation. The outcome would likely be that the issuer would choose not to trust the unsubstantiated word of cardholders given the significant incentive to be untruthful.

e. “Valid Thru” Dates and Card Expiry

An expiration date, where permissible, is displayed on the front or back of the SVP. The expiration date, also called the “valid thru” or “good thru” date, marks when the card becomes invalid. At that time, the card either lapses or is cancelled.

Not every state permits expiry dates. In some states, they are unlawful *per se*;¹⁴² expiration dates are valid in other states provided they were disclosed at the time of sale.¹⁴³ Occasionally, states require that expiration dates must not reduce the life of the card to less than one year, two years, five years or seven years.¹⁴⁴

Where available funds are not expended by the time of the card’s expiration date, a replacement card may be made available to the cardholder,¹⁴⁵ or in some cases, the balance of the available funds redeemed.¹⁴⁶

Occasionally, expiration of the card may also result in the expiry of unspent available funds. However, some states prohibit such an arrangement.¹⁴⁷ When available funds are subject to expiry, they are not necessarily forfeited as against the cardholder. Although no longer ‘spendable,’ the funds may be refunded to the cardholder, less applicable fees. A replacement card may be issued for the outstanding bal-

142. Sale of gift cards with expiry dates is prohibited in California. ANN. CAL. CIV. CODE § 1749.5(a)(1) (West 2009). However, it does not apply to open purchase cards for goods and services, loyalty awards, cards donated or sold below face value to employers, non-profits or charitable organizations, or cards issued for perishable food products are exempted from this prohibition. *Id.* § 1749.5(d)(1); *see also* Minnesota where bank issued cards, open purchase cards, or certain payroll cards are exempted. MINN. STAT. ANN. § 325G.53 (West 2008).

143. *See, e.g.*, 815 ILL. COMP. STAT. ANN. 505/2QQ(b) (West 2009); *see also* N.C. GEN. STAT. ANN. § 66-67.5 (West 2008).

144. In the states of South Carolina, S.C. CODE ANN. § 39-1-55(B) (2008); Ohio, OHIO REV. CODE ANN. § 1349.61(A)(1) (West 2009), Louisiana, LA. REV. STAT. ANN. 51:1423(B)(1) (2008), and Massachusetts, MASS. GEN. LAWS ch. 266, § 75C (2008) respectively (this restriction is qualified in some cases).

145. The card issuer typically reserves the right to refuse to issue a card or replacement for any reason.

146. The redemption of funds is typically subject to payment of a redemption or cancellation fee.

147. Card expiration is not permitted when there are still available funds on the card in some states. In Rhode Island for example non-expiry terms are mandatory and non-compliance enforced by a fine. In other states, such as Hawaii, expiration is permitted only if this is disclosed at the time of sale. If it is not disclosed at that time available funds must be available in perpetuity, i.e., until spent. *See supra* notes 142 and 143.

ance, or the balance “handled according to the applicable unclaimed property law.”¹⁴⁸

f. Card Usage and Access

Common card usage restrictions include the requirement that the card be used only by persons who have attained the age of majority or that usage is restricted to a specific geographical location,¹⁴⁹ to merchants generally,¹⁵⁰ or to merchants of a certain type.¹⁵¹ Alternatively, use may be excluded from certain locations¹⁵² or transactions of a certain type.¹⁵³

g. Card Issuer Undertakings and Obligations

Contract theory creates the expectation that there will be mutual agreement between the card issuer and cardholder that the card issuer will undertake to fulfill certain promises in the course of providing the service. By issuing the card, the card issuer makes this offer to the public, or to a certain segment of the public,¹⁵⁴ and when the cardholder buys the card with the intention of using it¹⁵⁵ she becomes a

148. See, e.g., Wells Fargo Terms and Conditions, *supra* note 129. This will usually mean that the unspent funds, less applicable fees will revert to the cardholder, but only if the cardholder can be identified and located. If not, the balance may revert to the state under state escheat laws – another reason why the registration of such cards is recommended in the terms and conditions. There is increasing awareness of the huge windfall unused gift cards balances may have. See, e.g., Lisa R Schoolcraft, *Unused Gift Card Deliver \$43 million to Home Depot*, ATLANTA BUS. CHRON. June 10, 2005. In some states, stored value cards are exempted from state escheat laws, or covered only if the balance on the card is below a certain dollar value. See Anita Ramasastry, *State Escheat Statutes and Possible Treatment of Stored Value, Electronic Currency and Other New Payment Mechanisms*, 57 BUS. LAW. 475 (2001). Escheat rules are rarely addressed in the terms and conditions.

149. See Dell Terms and Conditions, *supra* note 129. “The card may only be used by customers in the 50 United States and the District of Columbia to make purchases of merchandise and services from Dell.” *Id.*

150. See American Express Terms and Conditions, *supra* note 129.

151. See Visa Gift Card Terms and Conditions, *supra* note 129 (restricting use only to merchant locations where Visa is accepted). Where the card is a closed SVC it will be usable only locations owned or affiliated with the Issuer/Merchant. For example, Starbucks cards may be used only at Starbucks outlets. *Id.*

152. Such as gas stations, locations not authorized for minor use such as casinos, liquor stores or adult websites. See MasterCard Terms and Conditions, *supra* note 129.

153. For example, pay-at-the-pump gasoline purchases, cash back transactions, or “illegal” transactions. See Chase Terms and Conditions, *supra* note 129.

154. For instance, persons that are eighteen years and older. It is sometimes provided in the terms and conditions of use that the card is offered to such persons only, or that by use of the card, the user represents that they are a person of that age.

155. If it is purchased as a gift for a third party, these promises are statements about the nature and quality of the card that will reasonably induce the purchase of the card.

member of the class of persons to whom the cardholder is deemed to have made that offer.

In offering this payment service, it is reasonable to expect that the card issuer will, at a minimum, expressly promise to provide a service that gives convenient and superior buying power to the potential cardholder (the offeree). It is also reasonable to expect that in return for the prepaid amount, the card issuer will promise to provide the said service in a timely and reliable manner and to facilitate and pay for transactions involving the card. However, this exchange of promises does not typically occur. A survey of SVP terms and conditions shows that few card issuers agree, at least not expressly,¹⁵⁶ to incur liability for anything other than the provision of a bare service. The provision of that service, which is often not described, is qualified by extensive disclaimers which aim to limit, as much as possible,¹⁵⁷ any responsibility which may arise.

Most terms and conditions relating to the card issuer's responsibilities either express the issuer's obligations in negative terms¹⁵⁸ or reserve the right to do a number of things which limit the cardholder's rights or use of the card.¹⁵⁹ In some cases, there may be a statement in which the card issuer's responsibility to do something for the cardholder is assumed in exacting and carefully limited language.¹⁶⁰ In other cases, liability may be limited to only those situations where "re-

156. Implied or constructive terms and conditions may go some way towards filling in the gaps left by unspecified issues.

157. This is may be prefaced or followed by the phrase "as far as permitted/required by law. . . ." See, e.g., Greendot gift card terms (even if you have advised us of the possibility of such damages, this provision shall not be effective to the extent otherwise required by law) *supra* note 129.

158. See Visa Prepaid Reloadable Card *supra* note 129.

159. See, e.g., Greendot, *supra* note 129 ("we may refuse to issue"); American Express, *supra* note 129 ("we may change the terms" and "we may assign these Terms and Conditions"); Dell, *supra* note 129 ("We may cancel the Card at any time, without notice.").

160. See, e.g., Chase, *supra* note 129. According to the terms of the gift card, Chase provides:

We will advise you of the results of our investigation within 10 business days (20 business days if your Card was purchased less than 30 days prior to the suspected error) after we hear from you and, if we have made an error, we will correct it promptly. If we need more time to research your complaint or problem, we will provisionally recredit your Card for the amount that you think is in error pending the conclusion of our investigation. If we ask you to put your question or complaint in writing and do not receive it within 10 business days, we may not recredit your Card. Our investigation will be completed within 90 days. At the conclusion of our investigation, we will inform you of our results within three (3) business days. If we determine that there was no error, we will send you a written explanation.

quired by law” or due to bad faith.¹⁶¹ It is not unusual for the card issuer to not expressly assume responsibility. The possibility of card issuer liability for mishaps is thus left to implication, construction of the contract, or to operation of law.¹⁶² Often the only term dealing with issuer liability is concerned with the exclusion or disclaimer of such liability.¹⁶³

Although the card issuer provides a service designed to facilitate merchant payments on behalf of the cardholder, the card issuer invariably disclaims liability and the responsibility for resolution of card user/merchant disputes.¹⁶⁴

h. Representations Made By Use of Card

By activating, using, or retaining the card, the cardholder is held to have made any of a number of representations, including that he is not a minor,¹⁶⁵ that the card will not be used at certain locations or for certain purposes,¹⁶⁶ and, generally speaking, has the capacity to enter into effective contracts. The cardholder is commonly deemed to represent that transactions made by persons permitted by her to use the card—including transactions made without her knowledge—are authorized by her. By entering into the SVP agreement, the cardholder may be deemed to have warranted the accuracy of the information supplied by the cardholder to the issuer.¹⁶⁷ Mere activation of the card, or more extremely, a mere visit to the online gift card site may

161. See, e.g., My MasterCard, *supra* note 129 (“Except as required by applicable law, we shall have no liability of any kind to you for performing or failing to perform any services in connection with these terms, unless we have acted in bad faith.”).

162. See, e.g., Giftcards.com, *supra* note 129 (“In providing the Gift Card service to you, we disclaim any duty or responsibility other than those expressly set forth in these Terms and Conditions.”) However, the issuer does not expressly assume obligations in the agreement. *Id.*

163. See, e.g., *id.* (providing that, “The issuer is not liable expressly . . . [i]f through no fault of ours, you do not have enough money on the Gift Card to cover the transaction; or [i]f the transaction would exceed your Gift Cards [*sic*] available funds; or [i]f the terminal or system was not working properly; or [i]f circumstances beyond our control. . . prevent the transaction, despite reasonable precautions that we may have taken; or [i]f there are other exceptions stated in these Terms and Conditions or provided by law.”) See also Starbucks, *supra* note 129 (issuer liability is only expressly addressed in the section dealing with disclaimers and limits of liability).

164. See American Express, *supra* note 129 (the terms provide that no warrantee is given regarding goods and services or for the uninterrupted availability of the service, and that no responsibility is accepted for the refusal by a merchant of the gift card).

165. See, e.g., South Dakota State Payroll, *supra* note 129.

166. See, e.g., Giftcards.com, *supra* note 129 (providing that the card can not be used for gambling, for cash back or ATM transactions, or in connection with illegal transactions).

167. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129 (providing that, “I have read and understand that my identity will be verified when I click ‘submit’”).

be considered a manifestation of the cardholder's assent to the terms and conditions.¹⁶⁸

i. Cardholder Undertakings and Obligations

Typically, negative stipulations tend to outnumber positive ones in clauses which set out cardholder obligations; cardholder liability terms are much more extensive. Terms detailing what the card issuer will not do or what actions it can take greatly outnumber terms in which the card issuer promises to do anything on behalf of the cardholder. It is not uncommon for there to be no provisions at all in which a positive responsibility to do anything for the cardholder is adopted by the card issuer. The provisions detailing what the cardholder may not do similarly outnumber terms, if any, which authorize or confer rights upon the cardholder.

At a minimum, the terms and conditions should authorize the cardholder to use the SVP. The terms typically do so, albeit in carefully limited circumstances only. Use of the card is commonly limited to merchant outlets (and sometimes even to specific merchant outlets only).¹⁶⁹ Often, the card may not be used at ATMs or for 'cash-back' in merchant related transactions.¹⁷⁰ Cards may not be used for wire transfers, gambling, or in some cases for transactions permissible for minors.¹⁷¹

If the card is not a reloadable card, the cardholder may not use the card once the available balance is exhausted.¹⁷² If it is a reloadable card, value reloads are typically allowed only at certain intervals up to a specified total amount.¹⁷³ Usually, after the card expires, the cardholder may not assign the terms and conditions to a third party. If this

168. See, e.g., *id.*

169. See, e.g., The Barnes & Noble Gift Card Terms and Conditions, http://www.barnesandnoble.com/gc/gc_tandc.asp?PID=17843&cds2Pid=17599&linkid=1035342 (last visited Jan. 26, 2009) (limiting use of the Barnes & Noble gift card to any nationwide Barnes & Noble).

170. See, e.g., Chase, *supra* note 129 (stating that the user agrees "not to use the Card at any automatic teller machines (ATMs), [or] at merchants or financial institutions to obtain cash back").

171. See, e.g., My MasterCard, *supra* note 129 (prohibiting use at locations not approved for use by minors); see also Giftcards.com, *supra* note 129 (providing that the card can not be used for gambling, for cash back or ATM transactions, or in connection with illegal transactions).

172. The card is deemed to expire when the available balance is exhausted.

173. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129 ("[T]he maximum value load you may place on your Card when aggregated with any other Cards you have authorized is restricted.").

is permissible, it may be done only with the card issuer's written consent.¹⁷⁴

The cardholder agrees that the card will no longer be used after the balance is completely depleted, at which time the card expires. By the terms and conditions of use, the cardholder is commonly deemed to agree to additional statements detailing further card use restrictions.¹⁷⁵ The cardholder is also deemed to agree that the card will be used in limited, specified circumstances only, and to acknowledge that it does not possess stop payment rights or analogous billing dispute rights.¹⁷⁶ The terms may specify that the cardholder agrees the card will not be used for purchases in excess of the available funds balance.¹⁷⁷ The cardholder is obliged to immediately notify the card issuer if the card is lost or stolen.¹⁷⁸ She must make a good faith effort to settle all disputes with the merchant from which the goods or services were obtained.¹⁷⁹ Despite this, the cardholder commonly agrees that the card issuer is not responsible for any problems that may arise from the goods or services purchased.¹⁸⁰

j. Assignment of Rights

Generally, the limited rights of the cardholder may not be assigned or otherwise transferred to a third party by the cardholder.¹⁸¹ In such

174. See, e.g., American Express, *supra* note 129 (providing that the card issuer typically reserves the right to assign the terms and conditions to a third party at any time without notice to the cardholder).

175. See, e.g., Dell, *supra* note 129 (providing additional terms and conditions for cards distributed by Dell or through its partners for free or as a reward).

176. See, e.g., Prepaid Visa or MasterCard Gift Card Cardholder Agreement, <http://www.unitedbankofunion.com/uploads/loanapps/giftcardterms.pdf> (last visited Jan. 26, 2009) (providing that, "You cannot 'stop payment' or lodge a 'billing dispute' on such transactions").

177. See, e.g., Chase, *supra* note 129 ("You agree not to use your Card to make purchases that exceed your balance and you understand that such purchases will ordinarily be declined. . . .").

178. See, e.g., My MasterCard, *supra* note 129 (requesting immediate contact upon loss or stolen card in order to keep the cardholder's losses to a minimum).

179. See, e.g., Gift Card Redemption – Gift Card Terms and Conditions, <http://www.gctermsandconditions.com/> (last visited Jan. 26, 2009) (requiring that the cardholder "make a good faith effort to settle all disputes").

180. Under the terms of the Chase Agreement:

If you have a problem with merchandise or services purchased with a Card, that problem needs to be adjusted and resolved with the merchant at whose establishment the transaction was made. Exchange or return of merchandise purchased in whole or in part with the Card will be governed by the procedures and policies of each merchant and applicable law.

Chase, *supra* note 129.

181. See, e.g., GiftCards.com, *supra* note 129. Conversely, the right to assign the terms and conditions to a third party without reason or notice to the cardholder is usually expressly reserved by the card issuer. See, e.g., American Express, *supra* note 129.

cases where assignment or transfer to a third party is permitted, it may be done only with the written consent of the card issuer.

k. Cardholder Liability

In addition to the enumerated undertakings and obligations of the cardholder, cardholder liability may be separately detailed in further sections.¹⁸² Matters such as responsibility for unauthorized transactions, responsibility for lost or stolen cards, or error resolution are typically covered in such a section.

If the card is lost or stolen, the cardholder is responsible for immediately informing the issuer.¹⁸³ Any failure to do so negatively affects the extent to which the cardholder may be held responsible for resulting losses. If the cardholder has not previously registered the card, neither refunds nor a replacement card will be granted.¹⁸⁴ If a previously registered card with existing available funds is lost or stolen, the card issuer may issue a replacement card at its discretion.¹⁸⁵ In some cases, the card issuer may elect to implement a liability limitation framework. When promptly notified of loss or theft by the cardholder, liability for unauthorized transactions may be limited to fifty dollars.¹⁸⁶ If, on the other hand, the cardholder does not provide prompt notification and the card issuer can demonstrate they would have been able to stop the unauthorized use if promptly notified, cardholder liability may be capped at \$500.¹⁸⁷ Liability may have no cap at all in some cases.¹⁸⁸

l. Repayment, Redemption and Cash Withdrawals

The terms regulating repayment or redemption are typically reticent. The ability to redeem prepaid funds is always limited or condi-

182. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129 (providing that cardholder liability may be further expanded in additional headings dealing with unauthorized transactions, charges and other matters).

183. Immediate notification may be defined as being no later than two business days of learning of the loss or theft, or within a reasonable period that may refer to a longer period. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129.

184. See, e.g., Jersey Arts Gift Card, <http://www.jerseyarts.com/Giftcard/GCfaq.asp> (last visited Jan. 26, 2009) ("In the event that your card is lost, stolen or expired, a replacement card can be issued ONLY if you have previously registered your Gift Card.").

185. See, e.g., *id.*

186. See *supra* note 178 (allowing a two day window to meet the prompt notice requirement).

187. See, e.g., Visa Vision Reloadable Prepaid Cards, *supra* note 129.

188. This will be further conditioned by the maximum permitted available balance possible on the card. Some cards are for \$25, others are for up to \$250, while others—usually reloadable cards, may be for as much as \$2,500.

tioned in some manner.¹⁸⁹ Rather than being addressed directly, the issue may be only referred to incidentally.¹⁹⁰

In the case of non-reloadable cards, prepaid funds may be redeemed, if at all, typically after the expiry of the “valid thru” date.¹⁹¹ This is subject to a ‘cancellation fee.’¹⁹² In other cases, redemption is permitted only when the available funds fall below a minimal amount of fifteen dollars or less.¹⁹³ Generally speaking, no *per se* repayment right exists. The card issuer clearly prefers in the terms re-credits to the card or the issue of a new card in the sum concerned over refunds.¹⁹⁴ It is not always made explicit that a card is non-reloadable; the terms may merely state that the card is rendered void by a zero funds balance, without clarifying whether balances may be “topped up.”

Reloadable cards may be structured and referred to as an account.¹⁹⁵ Conversely, it may be stressed that the card is neither an account nor connected in anyway to a customer account.¹⁹⁶ Reloadable cards are issued both by financial institutions and non-financial institutions. In the latter case, repayment rights are extremely re-

189. If this were not the case, the prepaid funds/deposit analogy would be greatly strengthened to the dismay of non-bank financial institutions who are leery of being deemed ‘banks’ because of the regulatory and financial ramifications attendant on such a categorization.

190. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129 (“You may cancel or suspend your Card or this Agreement at any time. You may cancel this Agreement by calling [this number] or following the procedure set forth in the ‘Request Funds’ section. . . .”).

191. See, e.g., American Express Incentive Services, http://www.aeis.com/prod_giftCard_FAQs.html (last visited Jan. 26, 2009) (providing that, “[i]f available funds remain on the Gift Card after the ‘valid thru’ date, . . .” you may contact the Customer Service number “to redeem the available funds.”).

192. See *id.* (implementing a \$10 fee).

193. Repayment rights have been treated warily by non-financial institution issuers such as retailers because the issue has the potential to raise banking business and related policy concerns. The Retailer’s Association of Massachusetts apparently fought to keep the amount that would trigger a repayment right less than \$10 for that very reason (thus a right to a refund only if there is less than \$10 on the card). Naomi R Koster, *New Law Restricts Retailers Form Charging Gift Card Fees*, BOSTON BUS. J. Mar. 13, 2008, available at <http://boston.bizjournals.com/boston/stories/2008/03/10/daily41.html>.

194. Such as where there has been an administrative error by the card issuer resulting in an erroneous or duplicated debit to the card, or there has been an unauthorized transfer.

195. See, e.g., Visa Vision Reloadable Prepaid Cards, *supra* note 129 (“‘Card Account’ means the records we maintain to account for the value of claims associated with the Card. . . . The Card is a prepaid card. The Card is not connected in any way to any other account.”).

196. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129 (“The Card is a Prepaid Debit Card. The Card allows you to access funds you place on the Card. The Card does not constitute a checking, savings or other bank account and is not connected in any way to any other account you may have.”).

stricted, if permitted at all.¹⁹⁷ In those cases, the card is usually based on a closed transactional model.

Financial institutions issue both closed and open transaction model cards. Remittance cards are a category specifically designed to permit cash withdrawals. Functionally speaking, they bear a close resemblance to restricted access deposit accounts.¹⁹⁸ Remittance cards are issued only by financial institutions and the issuer-maintained transactional records are commonly referred to as accounts.¹⁹⁹ Western Union and Money Gram are niche leaders in terms of money remitters, although banks and other financial institutions are gradually increasing their market share.²⁰⁰ Remittance cards are structured carefully to permit limited reloads of value and they include withdrawal and spending limits.²⁰¹ Although cash withdrawals are permitted, it is usually provided that the card may not be redeemed for cash. Prepaid balances can never be completely withdrawn as cash because of the existence of activation fees, transactions fees for every transaction, additional ATM withdrawal fees, point-of-sale decline fees, and value loading fees.²⁰² Cash withdrawals may only be made at certain times subject to preset value limits.

197. The Jamba Juice gift card is an example. The Jambacard terms and conditions are among the simplest in circulation, consisting of a single paragraph. See Jambacard Terms of Use, <https://jcard.jambajuice.com/termsfuse.html> (last visited Jan. 26, 2009). On the point in discussion, it states: "Unless otherwise required or limited by law, a jambacard cannot be redeemed for cash. Treat a jambacard like cash. Register your jambacard today, because unless registered it may not be replaced. . . ." *Id.*

198. See also the discussion surrounding *infra* note 279.

199. See, e.g., Western Union Prepaid Visa Card, *supra* note 129 ("'Card account' means the records we maintain to account for the value of claims associated with the Card. . . . The Card is a prepaid card. . . . You will not receive any interest on your funds in the Card Account.").

200. Bank of America's SafeSend (money remittances to Mexico) is one of the most successful bank sponsored money remittance products in the U.S. Digital Transactions News, *Remittance Cards Will Top 1 Million in 2006, New Report Says*, DIGITAL TRANSACTIONS, Feb. 7 2005, available at <http://www.digitaltransactions.net/newsstory.cfm?newsid=499>. Wachovia also provides the Dinero Directo card for remittances to Mexico, wider Latin America and the Caribbean. See Wachovia Dinero Directo Card, http://www.wachovia.com/personal/page/0,,11_11_995_7775,00.html (last visited Jan. 26, 2009).

201. See, e.g., Western Union Prepaid Visa Card, *supra* note 129 (providing a daily ATM cumulative withdrawal limit of \$500, a daily loading limit of \$950, a monthly loading limit of \$9,500, and a daily spending limit of \$5,000). These terms also limit the number of withdrawals that may be made monthly (to ten). *Id.*

202. Some remittance cards offer a feature by which it can be used as a payroll card. See, e.g., *id.* This must be set up in advance and is subject to approval. *Id.*

m. Lost or Stolen Cards, Unauthorized Transactions and Dispute Resolution

Cardholders are required to report lost or stolen cards and any unauthorized transactions to the card issuer immediately. A uniform feature of SVP cardholder agreements, the requirement of haste in notification, also typically conditions the limits of cardholder liability where unauthorized transactions have occurred after loss or theft. The reporting of such incidents must be prompt, generally meaning notification must occur within two business days of the discovery of the loss or theft.²⁰³ If notification falls within the recommended period, the cardholder's liability may be capped rather than waived altogether.²⁰⁴ Knowledge of unauthorized transactions may be imputed, from the availability of transactions history, to the cardholder. If unauthorized transactions are not reported or discovered within sixty days of when the transaction history becomes available,²⁰⁵ the cardholder may be held responsible for the full extent of the loss. It may be further provided that the cardholder will be liable for the full loss if he or she was "grossly negligent" or engaged in a fraudulent transaction.²⁰⁶ Limitation of the cardholder's liability is not automatic. It is not unusual for any mention of cardholder liability limitations to be omitted.

n. Disputes with Merchants

The card issuer's brand on the card certifies the card issuer's involvement with the SVP. This brand assures merchants that they will receive payment for transactions entered into with the cardholder. A vital feature of the underlying arrangement between card issuer and merchant is the card issuer's guarantee to settle debts created by its cardholder's transactions with the merchant. That cardholder's agreement does not reflect this however. In cardholder agreements, the

203. See, e.g., *supra* note 176.

204. See, e.g., Western Union Prepaid Visa Card, *supra* note 129 (providing for a maximum possible loss of \$50 if reported within two business days, or up to \$500 otherwise). In the case of non-reloadable cards, this is always conditioned on the previous registration of the card. See, e.g., *supra* note 177. Once the decision has been taken to limit the cardholder's losses, the card may be re-credited with the difference between the liability cap and the actual losses (where they exceed the cap). If the card has been compromised, it will be cancelled and a replacement card with the re-credited balance issued to the cardholder at the discretion of the issuer.

205. See, e.g., Western Union Prepaid Visa Card, *supra* note 129. Transaction histories are typically posted online. A copy will usually be provided orally, or a physical copy sent by mail by the customer service department at the request of the cardholder.

206. See, e.g., Visa Vision Prepaid Reloadable, *supra* note 129. Liability arrangements capping the possible loss by the cardholder at \$50, \$500 or more, depending on how promptly reporting has taken place are a common feature of Visa branded card agreements. See *id.*; see also Western Union Prepaid Visa Card, *supra* note 129.

card issuer typically disclaims any responsibility to resolve disputes between the cardholder and merchant.²⁰⁷ The terms of the agreement usually direct the cardholder to address all requests for refunds relating to the nature or quality of purchases to the merchant.²⁰⁸ The agreement may also deem the cardholder's use of the card to be a manifestation of his or her consent to receiving merchant refunds in the form of card credits.²⁰⁹

o. Termination and Revocation

The card issuer typically reserves the right to terminate the agreement by revoking the card at any time, without reason or notice.²¹⁰ The agreement requires the cardholder to agree that he or she will not use the card to make purchases after it has been revoked.²¹¹ Consistent with the card issuer's earlier assertions of ownership, the cardholder may also be required to return the card or to destroy it at any time.²¹²

The terms may also provide that the card will terminate if the available balance becomes zero or the valid thru date expires.²¹³ In the case of reloadable cards, card issuers commonly reserve the right to do so.

p. Service Charges and Fees

Service charges and fees may be charged upfront, although it is more common for charges to be deducted on a monthly basis.²¹⁴ Some states require a condition that the application of such fees and charges be disclosed at the time of sale.²¹⁵ In other states they may be charged only once.²¹⁶ A common temporary waiver of administrative fees for periods ranging from six months to a year exists, and in some cases

207. See, e.g., American Express, *supra* note 129.

208. *Id.*

209. See MyMCgiftcard.com MasterCard, *supra* note 129.

210. See, e.g., American Express, *supra* note 129.

211. See, e.g., Wells Fargo Card, *supra* note 129.

212. See, e.g., American Express, *supra* note 129.

213. My MCGiftcard.com MasterCard, *supra* note 129.

214. See, e.g., Giftcards.com, *supra* note 129 (providing a typical term which reads: "[T]here is an administrative fee of \$2.50 per month, . . . [T]he administrative fee will automatically be deducted from the card balance on the first day of each month until the balance reaches \$0.")

215. In Maine, Nevada, South Carolina, for example.

216. In the state of Louisiana, recurring service fees may not be charged against closed system gift cards although a one-time handling fee of up to \$1 per card is permitted. LA. REV. STAT. ANN. § 51:1423B(2) (2008).

this is mandated by law.²¹⁷ Fees commonly charged include administrative or operating fees, transaction fees, re-issuance fees, expiry or cancellation fees, card replacement or renewal fees, balance transfer fees, and foreign transaction fees.

q. Other Terms and Conditions

General contractual matters are typically covered here including the amendment of terms and conditions, waivers, disclosure of information to third parties, foreign transactions, the governing law, and arbitration.²¹⁸

3. Formation of the Contract

The purchase of an SVP involves the cardholder in a contractual relationship with the card issuer. The time at which this relationship comes into being depends on the intentions of the parties. The parties' intentions in turn determine whether the contract originates from the act of displaying the SVPs in a self-service store, or from the act of picking up an SVP from such a display.

a. Card Issuance: Offer or Mere Solicitation?

Traditional contract analysis looks for the existence of an offer and reciprocal acceptance. Rebuttable presumptions, that the parties intended a bilateral exchange of promises²¹⁹ or that the contract is unilateral, are alternate possibilities of this analysis.²²⁰ Traditionally, the offeror, as master of the offer, shapes the offer, including the manner in which the offer can be accepted.²²¹ Although an offer confers power of acceptance upon the offeree, the manner of acceptance has been traditionally deemed the prerogative of the offeror.²²² The manner of acceptance was thus regarded as being outside the province of the offeree.

Contemporary contract analysis steps away from this offer/acceptance emphasis, seeking instead the manifestation of assent.²²³ Rather

217. In North Carolina for example, service fees may not be imposed for the first 12 months after activation of the card. N.C GEN STAT. § 66-67.5 (2007).

218. See, e.g., Visa Prepaid Reloadable Card, *supra* note 129.

219. RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 1:17, 4:14 (4th ed., Thomson/West 2007).

220. *Id.*

221. See *Newport Plaza Assocs., L.P. v. Durfee Attleboro Bank*, 985 F.2d 640, 645 (1st Cir. 1993). See also RESTATEMENT (SECOND) OF CONTRACTS § 30 cmt. a (1981).

222. *Id.*

223. Or failing precise identification of offer and acceptance, the conduct of the parties is assessed in terms of whether it can be deemed a manifestation of the necessary assent or consen-

than trying to categorize the parties' actions as offer or acceptance, those actions are scrutinized instead to determine if they evidence a consensus about what they sought and agreed to do. From this perspective, an offer need not envisage only one of two mutually exclusive outcomes. The indifferent offer is now considered to present another alternative. An indifferent offer is one that invites acceptance in any manner reasonable in the circumstances.²²⁴ It may be unilateral or bilateral at the option of the offeree.²²⁵

The traditional approach was narrowly focused, more structured and formulaic. The contemporary approach adopts a global perspective, focusing instead on the ultimate outcome of the parties' interaction.²²⁶ This is not to suggest that the assessment of actions in terms of whether they are offers, acceptances or something else is entirely displaced in the contemporary approach. A transaction would previously have been assessed by asking *inter alia* (a) Was an offer made? (b) What kind of acceptance did it require? (c) Was this offer accepted in the required manner? and (d) When did this acceptance occur? Now, the questions are: (a) Is it possible to discern a clear offer and acceptance? If yes, what was the offer? (b) Was there a requirement that it be accepted in a particular manner?²²⁷ (c) Was it validly accepted? and (d) If it is not possible to distinguish offer and acceptance in the circumstances, do the circumstances suggest consensus was ultimately achieved? The starting point for both approaches is to ask whether an offer was accepted. The failure to identify the actual offer and the point of time at which it was made, however, is not fatal under contemporary reasoning.²²⁸

The significance of determining whether actions constitute an offer or not, varies depending on the perspective from which one considers the issue. When preliminary review of a transaction looks to the context, or basic assessment of the contract, queries about the existence of an offer can be crucial. Ultimately, finding that an offer was not made may not be fatal in such cases;²²⁹ however, the issue may be relevant because the point in time at which an offer came into being and was accepted may determine whether a cause of action for breach

sus. See RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 22, 32. See also *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978).

224. LORD, *supra* note 219, § 4:14.

225. *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 32 cmts. a, b.

226. LORD, *supra* note 219, § 4:14.

227. If there was, it will need to be in this form—if not, it will be presumed to be an indifferent offer. See RESTATEMENT (SECOND) OF CONTRACTS § 32 cmts. a, b.

228. *Id.* § 22.

229. See *supra* note 220 and accompanying text.

exists.²³⁰ The fact that a solicitation for an offer, rather than a clear offer, initiates a transaction may also ultimately support a finding that there was no consensus.²³¹

A conclusion that the card issuer's action of issuing the card and having it displayed on the merchant's premises would constitute an offer would be a valid one. These actions would confer the power of acceptance upon the cardholder. The cardholder would thus have the power to immediately accept that offer by picking up the SVP within the merchant's premises where it is displayed for sale.²³² Both the card issuer and the cardholder would be bound by the terms of their agreement from that point onwards. This outcome may suit both parties. The cardholder is likely to want the arrangement to be binding as soon as possible. A likely reason for this would be some grievance the cardholder might have against the card issuer or merchant for which she seeks redress or the occurrence of a mishap. As mishaps have been known to occur even before the customer has had the chance to get the item to the checkout counter, the customer would want any obligation to redress such grievances to arise as soon as she has come into contact with the item for sale.

The issuer, the architect of the proposed arrangement, publishes details of that arrangement through its terms and conditions, presumably because of a willingness to abide by that arrangement. Deeming the issuer the master of an offer would not be inconsistent with this. The issuer, however, may have reasons to delay commencement of its contractual responsibility. In these instances the card issuer desires its actions to be viewed as a solicitation, even if it has no objections to the nature of the bargain that it has proposed. A card issuer subject to "know your customer" obligations²³³ for example, might prefer to keep its options open until after it has been able to verify the identity of the customer and activate²³⁴ the card through the merchant at the checkout counter.²³⁵

230. *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1348 (11th Cir. 1986).

231. Particularly if consensus is not otherwise discernable from the conduct of the parties.

232. *See Giant Food, Inc. v. Wash. Coca-Cola Bottling Co.*, 332 A.2d. 1, 8 (Md. 1975). *But cf. RESTATEMENT (SECOND) OF CONTRACTS* § 26 cmt. b.

233. In cases where an unmistakable 'account' underlies the SVC as in the case of some reloadable prepaid SVCs issued by banks "Know Your Customer" procedures are mandated by the Bank Secrecy Act, and the USA Patriot Act. 31 U.S.C. §§ 5311-5332 (2006); Pub. L. 107-56, 115 Stat. 272 (2001). *See, e.g., Visa Prepaid Reloadable Card*, *supra* note 129.

234. Activation may be done electronically and contemporaneously at the time of payment. *See BRADFORD, supra* note 22, at 55-56.

235. The terms and conditions of unaccountable cards may urge the customer to register the card ("The card must be registered to increase your chances of recovering disputed funds. . .");

b. The Prevailing Interpretation: An Offer

The prevailing interpretation in the United States is that the display of goods in a self service shop is an offer by the merchant to sell those goods to the customer.²³⁶ The merchant is considered to create a reasonable belief that an offer has been made to the customer.²³⁷ As offers are presumed to be indifferent to the mode of acceptance in the absence of an indication to the contrary,²³⁸ customers have the option of choosing how to accept. The options available to the customer have been identified as being the following: (a) to manifest promissory acceptance by picking the SVP up from its self service display with the intent to buy it; (b) to manifest promissory acceptance by taking the SVP to the checkout counter after picking it up; and (c) to accept by performance by paying for the SVP at the checkout counter.²³⁹

The fact that the cardholder can change her mind and return the item to the display²⁴⁰ without further obligation does not contradict this conclusion.²⁴¹ This is because the offer not only creates a reasonable expectation in the customer that an offer is made to sell the item to her, but also that it will be sold to her at a reasonable price. If, on picking up and examining the item, the cardholder deems the price unreasonable, a condition of acceptance—that it be reasonably priced—has not been satisfied. The merchant's offer may also be seen as a condition in that the offer is deemed to be made subject to the availability of the item, with the merchant having the right to correct incorrectly priced items.

The intention of the customer in picking up the item is crucial to how the customer's reaction to this offer will be construed. Where the item is picked up with the intention of buying it, a contract for its sale comes into being between the customer and the merchant, and title passes to the customer. If the item is picked up without the intention to purchase—for example, because the cardholder wants to think about it as he progresses to the checkout counter, the offer will not be

see TD Banknorth Visa Gift Card at www.tdbanknorth.com/giftcards/terms_conditions.html. The registration of such cards may also raise financial privacy issues.

236. *Barker v. Allied Supermarket*, 596 P.2d 870, 871 (Okla. 1979); *Fender v. Colonial Stores, Inc.*, 225 S.E.2d 691, 693-94 (Ga. Ct. App. 1976); *Giant Food*, 332 A.2d at 8. See also ARTHUR CORBIN, CORBIN ON CONTRACTS § 2.7 (Joseph M. Perillo ed., West Pub. Co. 1993) (1952).

237. See *Barker*, 596 P.2d 870; *Fender*, 225 S.E.2d 691; *Giant Food*, 332 A.2d 1.

238. LORD, *supra* note 219, at § 4:14.

239. *Barker*, 596 P.2d. at 872-73; *Fender*, 225 S.E.2d at 694.

240. Or not – she may change her mind at the checkout counter and leave it there without being obliged to go through with the transaction.

241. It merely indicates that the parties agreed the cardholder may change his mind without breach. *Giant Food*, 332 A.2d at 9. See also CORBIN, *supra* note 236, § 2.7.

accepted by the picking up of the item, and no contract comes into being at that point.²⁴² Even where the item is picked up with the requisite intent, bringing into being the contract, the customer maintains a discretionary right to cancel the contract after it has come into effect. The interval between the coming into being of the contract and its cancellation may be no longer than the time it takes for the customer to pick up the item, put it in the shopping basket, take it out of the basket, and put it back on the shelf.

c. The Goods/Services Distinction: A Tie Breaker?

The default interpretation of a self service display of items for sale is thus that it constitutes an offer.²⁴³ There is no inherent reason, objectively speaking, why this should be so.²⁴⁴ The decision to treat shelf displays as an offer arose in part from a desire to provide consumers with a remedy at a time when third party manufacturer liability for defective products was not established. As defective product liability has become a recognized remedy independent of contract law, that justification is undermined. It may be however that with SVPs, the choice of one interpretation over the other is justified by pragmatic and policy considerations.

Groceries are goods to which warranties are deemed to apply.²⁴⁵ Their display in a self service context is deemed to be an offer to sell those goods. The display of such goods is deemed a manifestation of the seller's willingness to enter into a bargain and an invitation to the buyer to manifest his or her assent to conclude the bargain.²⁴⁶

The objective of the sale of an SVP is the provision of services. The actual card is usually excluded from the sale playing only the subsidiary role of access device. The "purpose of the transaction," and the "gravamen of the action" tests support the conclusion that the preliminary transaction for the issue and sale of the SVP is one for services and not goods per se.²⁴⁷ Instead of tangible goods that a potential

242. See *McQuiston*, 796 F.2d at 1348.

243. See III.B.A(a)(3)(b).

244. Outside the self service context, an advertisement, notice or display of goods is deemed an invitation to treat. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (4th ed., Thomson/West 2007) (1990); CORBIN, *supra* note 236, §§ 2.4, 2.7. See also *Pharmaceutical Soc'y of Gr. Brit. v. Boots*, (1953) 1 Q.B.D. 401. (U.K.); RONALD ANDERSON, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE 688 (Lary Lawrence 3d ed., West Group 2002) (1981) ("It is clearly an artifice to treat the buyer's taking an item from the shelf as being an agreement to purchase the item subject to a condition subsequent.")

245. Such as warranties for merchantable quality and fitness for purpose. See U.C.C. §§ 2-314, 2-315 (2001).

246. See RESTATEMENT (SECOND) OF CONTRACTS § 24.

247. See *supra* notes 107-117 and accompanying text.

buyer can inspect,²⁴⁸ the cardholder embarks on the transaction with nothing other than statements about what the card issuer intends to do for the cardholder at some point in the future. There is nothing tangible to inspect, nothing to evaluate, other than those assurances of the card issuer.

The card issuer has however published, by means of the terms and conditions, very clear and specific statements about what it is willing, and unwilling, to do. These are not tentative statements; they are clear assertions of intention. They may be reasonably interpreted to manifest a willingness on the part of the card issuer to enter into a bargain with prospective cardholders thus satisfying contemporary criteria of an offer.²⁴⁹ The terms may also be understood to invite the assent of prospective cardholders to the bargain defined in those terms.²⁵⁰ This, coupled with the fact that a physical inspection of the card is unlikely to reveal any patent defects in the subject matter of the sale, argues for the terms and conditions being treated as assertive binding promises. By having the cards displayed for sale in the grocery store, the card issuer may be seen to have advertised a specific, defined, and pre-existing offer; the same offer that is contained in the terms and conditions. This offer promises the card issuer's willingness to provide the services detailed in the terms and conditions, and to confer possession, if not sell outright, the card as an access device to those services. The offer may thus be seen as a manifestation of the card issuer's willingness to be held to its offer to sell each card so displayed.

To be an offer however, an action must also manifest a willingness to enter into a bargain.²⁵¹ This willingness must be manifested in such a manner that another person will reasonably understand that her assent to that bargain is invited, and that it will conclude the bargain.²⁵² These criteria are satisfied by the circumstances under consideration. Terms and conditions are published by the card issuer when they accompany issued SVPs. By printing the most essential terms on the card and pointing²⁵³ potential cardholders to a fuller version of the terms and conditions, the card issuer both publishes those terms and

248. Goods can at least be visually inspected for apparent (patent) defects. This distinction is accorded some significance by U.C.C. Article 2, which indicates that a person who is not a 'merchant,' (i.e. a person to whom no warranty of merchantability ordinarily applies) is obliged, to disclose only known latent (hidden) defects. U.C.C. § 2-314 cmt. 3. Defects that are apparent, but overlooked by the buyer are the buyer's responsibility. *Id.*

249. See RESTATEMENT (SECOND) OF CONTRACTS § 24.

250. *Id.*

251. *Id.*

252. *Id.*

253. This might be done for example, by including a website address on the card or on the wrapping within which it will be enclosed.

makes promises to each ultimate cardholder. There is no argument that a prospective cardholder, contemplating the purchase of an SVP, reasonably understands the self service display of SVPs to be a manifestation of the card issuer's willingness to be held to its SVP terms and conditions. It is no stretch to conclude that the prospective cardholder reasonably understands in these circumstances that the display of SVPs in the store invites his assent to that offer, and that his assent will conclude the bargain.

The very fact that the true subject of the transaction, intangible services, are not subject to pre-inspection but rather are invited by the pre-contractual statements of the issuer, argue in favor of their being binding. It does not seem unfair to deem such statements a firm expression of the issuer's contractual intentions. Though this accords in general with pragmatic consumer protection policies,²⁵⁴ other considerations may prevail to more strongly lead to an interpretation for the issuer's preference for a different outcome.

b. The Underlying (Main) Transaction: Sale of Books

The preliminary transaction has been shown above to be a contractual arrangement for the provision of a service. This section evaluates the underlying transaction, for example, a sale of books including associated payment arrangements, to further consider whether SVPs are appropriately designated a contractual construct rather than a deposit.

The contract for the sale of the books between the cardholder and merchant originates when the cardholder picks up the books from the shelves where they are displayed, or through their mutual words or actions performed at the point of sale. By displaying the books for the customer's selection, the merchant offers the books for sale. The customer accepts this offer by picking up a book with the intention of buying it, or by taking the book to the counter and tendering payment. By proffering the SVP to the merchant, the customer will then seek to fulfill her obligation to pay for the books by use of the card. The payment segment of the book sale transaction will thus proceed by the merchant swiping the card in the point-of-sale (hereinafter "POS") terminal.

The model of SVP used most affects this stage of the sale transaction. Depending on the type of SVP used, the payment stage may involve the settlement of the contract debt by unremarkable means. It

254. This is the rationale underlying disclosure requirements under the Consumer Credit Protection Act, particularly regarding credit cards and EFTs. *See, e.g.*, Commerce and Trade, 15 U.S.C. §§ 1601, 1693 (2006).

may alternatively incorporate a process that is remarkable in how it differs from conventional means in settling the debt. There are three possible ways in which the SVP may function: (i) as an alternate means of effecting a conventional payment—a facilitating device;²⁵⁵ (ii) it may mirror an underlying account; or (iii) it may store units as intangible but valuable currency for circulation between cardholders.

1. SVP as a Facilitating Device

This model of SVP functions as a facilitating device for conventional payment. The SVP enables the cardholder to purchase goods or services while setting the stage for the merchant's reimbursement. Units are transferred at the point of sale from the SVP to the merchant's terminal.²⁵⁶ These units are then transferred from the merchant's terminal to the card issuer, or a processor agent of the issuer. The units are transferred as proof of the sales transaction and evidence that the merchant is entitled to payment per the card issuer/merchant agreement.²⁵⁷ The obligation of the card issuer to pay the merchant exactly what the units prove remains current in the meantime to be settled by a further process. A subsequent external process²⁵⁸ based on conventional means will follow to accomplish the settlement. In this scenario, the SVP fulfills the cardholder's expectations and the card issuer's obligations to the cardholder are discharged. By agreeing to provide the SVP, the card issuer assumes the payment obligation that will result from its use, and the cardholder reimburses the card issuer for this in advance. The SVP facilitates the payment of the merchant to be sure, but in a manner reminiscent of a credit card.

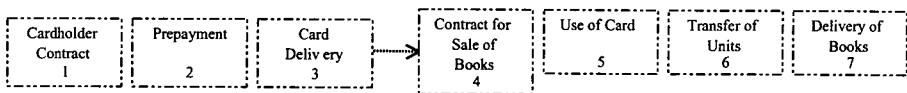


FIGURE 5: SVP AS A FACILITATING DEVICE

Like a credit card payment, the sales transaction creates a payment obligation to be settled by an arrangement under which the card issuer pays the merchant, and the cardholder reimburses the card issuer for that payment. As with credit cards, the card issuer settles its payment

255. "Conventional" payment is used in this sense to refer to an account transfer, a wire transfer, or other established payment or settlement method.

256. See *infra* Figure 9, Stage 6.

257. See BRADFORD, *supra* note 22, at 54-57.

258. In other words a distinct payment process that is independently established and not a part of the instant card issuer/merchant arrangement.

obligation to the merchant by ordinary means. The sales transaction debt ultimately settles by a flow of funds from the card issuer's account to the merchant's account. The cardholder's reimbursement of the card issuer is notable, however, because it occurs in advance of the sale transaction before any merchant related debt incurs.²⁵⁹ The card issuer receives the reimbursement from the prospective cardholder in advance in exchange for delivery of the card. The card issuer, having been reimbursed in advance, thus has full and free use of the prepaid funds. The card issuer does not hold those funds on behalf of the cardholder as a result. There is no need to account to the cardholder for those funds, and no account over which the cardholder has ownership rights over those funds comes into being.

SVC as <i>Facilitator</i>	<ul style="list-style-type: none"> ■ no cardholder account involved ■ cardholder v. merchant segment need not involve an account ■ sets up ultimate reimbursement of merchant ■ merchants reimbursement a remote, distinct stage in the process ■ merchant's reimbursement is by conventional means
SVC as <i>Mirror</i>	<ul style="list-style-type: none"> ■ Transaction reflects underlying account ■ may involve reusable card or comparatively high values ■ transaction tracking is indispensable ■ account involved may be owned by either cardholder or card issuer ■ may be prepaid or deposit transaction ■ reimbursement of merchant more integrated into process ■ reimbursement of merchant may not be by conventional means

FIGURE 6: COMPARISON OF FACILITATION V MIRRORING MODELS

2. SVP as a Mirror of an Account

This model mirrors an account into which the underlying funds have been paid. This account may belong to either the card issuer or to the cardholder. The ownership of those funds directly affects how the SVP functions. Regardless of whom the account belongs to, however, the funds are going to be debited as a result of the SVP transaction. The account balance will be adjusted accordingly, and the updated balance provided to the cardholder via the SVP.

259. See *supra* Figure 5, Stage 2.

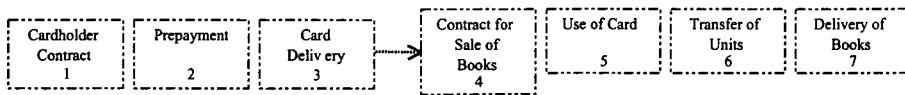


FIGURE 7: SVP AS A MIRROR

a. Ownership, Beneficial Interests and Repayment Rights

The terms upon which the customer purchases the SVP play a crucial role in determining what type of account underlies its operation. The parties involved are the cardholder, the card issuer, and a deposit taking financial institution.

The card issuer and the deposit-taking institution may be individual entities or they may be one and the same. Regardless of whether the card issuer opens the account with another distinct entity or with itself, the fact that the account is opened in the name of the card issuer is significant. Beneficial ownership of the deposit is a central issue upon which repayment rights depend. A prepayment deposited in an account belonging to the card issuer, linked directly or indirectly to the identity of the cardholder, may resemble a deposit. This is so, for example, where an unspent prepaid balance is subject to relatively unrestricted claims by the cardholder.

The repayment obligations which a financial institution owes to a card issuer are not necessarily the equivalent of the payment obligations which a depository owes to a cardholder depositor. In the former case, funds prepaid by cardholders are typically placed in an account belonging to the card issuer. The cardholder typically has no account rights in relation to that account. The financial institution typically owes the cardholder no duty to repay the deposited funds; its duties to do so are owed to the card issuer. The card issuer also typically owes the cardholder no repayment obligations. This is because the cardholder's prepayment is payment in advance for future services. The exchanged funds received by the card issuer are a payment, not a deposit. They are not ordinarily subject to repayment, and they may be spent at the absolute discretion of the card issuer.²⁶⁰ A cardholder has no account rights over a card issuer account, though the card issuer may grant the cardholder certain benefits associated with the account. The card issuer may furnish the cardholder with transactional records to enable the cardholder to track transactions. Doing so would be a contractual, rather than a depository obligation. The SVP could correspondingly be tracked, rather than made accountable.²⁶¹ Distinguish-

260. See *supra* notes 84-85 and accompanying text.

261. See *supra* Figure 2 and accompanying text.

ing between the two helps clarify the different roles and rights of the card issuer and cardholder.

Helpful questions to ask in seeking to clarify the account involved are thus: Is the cardholder the beneficial owner of the account or, at best, a third party beneficiary of it? If merely a third party beneficiary, does the cardholder possess enforceable repayment rights over the account? Against whom are such repayment rights enforceable, if they exist? If a third party beneficiary cardholder possesses directly enforceable repayment rights over an account,²⁶² it may be arguable that a type of pseudo account exists. Whether such rights, being contractual, should be enforced or given the same priority as hallowed, specialized banking rights is another matter. If the third party beneficiary cardholder possesses some rights but they are not enforceable against the depository of the account,²⁶³ those rights are sufficiently different and fall outside the description of even a pseudo account. A dividing line must be drawn, at the least, between banking law obligations of a depository to repay deposits and the contractual obligation of a party to pay an incidental third party beneficiary.

b. “Pseudo Accounts” and “Pseudo Deposits”?

Where the card issuer and depository are one and the same, the fact that the card issuer has opened an account in its own name—even if done to convenience the cardholder—does not, without more, confer account rights on the cardholder. Further inquiry must be made into whether cardholder rights over the underlying funds exist, and if so, to what extent. The understanding that exists between the card issuer and cardholder regarding the use of the funds is relevant. It is one thing to agree that the funds paid may be refunded on demand—that is the essence of a deposit. It is quite another to agree that those funds have purchased a service, even if the refunds are contemplated for unused portions or in case of defective service.

It may be that the card issuer deposits the underlying funds in an account in the cardholder’s name. Save where the account is a sub-account of a reservoir account of the card issuer, the cardholder will have *prima facie* account rights over the deposit as the apparently beneficial owner of the account. However, the cardholder’s control over those funds will likely be extremely limited. That control may in

262. This would be the case if the third party is an intended beneficiary, and that beneficiary’s rights include the right to demand repayment of the deposit that belongs to the card issuer. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

263. For example, because the cardholder is an incidental third party beneficiary with rights against the card issuer owner of the account, but not the depository financial institution.

fact be no more than the ability to effect transactions upon the account via the SVP. The card issuer, in other words, would effectively be in control of the account. Though the underlying funds are a deposit in name, they would effectively be a payment in abeyance, or a "pseudo deposit," for want of a better term, pending SVP transactions.²⁶⁴ The question arises whether the same policy considerations that apply to cardholder deposits should also apply to what is, in effect, a *de facto* prepayment?

The underlying funds may be deposited in an account belonging outright to the card issuer instead. In that case, one can infer that the title to the funds paid in advance by the cardholder has moved to the card issuer. The cardholder has purchased a service, and the funds paid for the service are the property of the card issuer to do with as it will.²⁶⁵ The funds have been paid over; they have not been deposited. The cardholder does not have the repayment rights of a depositor.

The card issuer shall owe the cardholder obligations. This may include a duty to provide the cardholder with instructions and the means to use the service effectively. By providing the cardholder with the transactional history or an updated balance of how much service value remains outstanding, the card issuer fulfills that contractual obligation. This access to transactions details may provide only updated balances to the cardholder in which case that access is purely a non-account accommodation.

In addition to the rights the cardholder may obtain as an intended third party beneficiary,²⁶⁶ the cardholder may acquire limited rights that can be exercised upon the account against the deposit in certain circumstances. The contract may give the cardholder the right to access the underlying funds in certain circumstances.²⁶⁷ This right may range from an extreme one—to be paid an unspent balance of fifteen dollars before cancelling the card—to the right to use the card only to make cash withdrawals at regular intervals, as with remittance cards.²⁶⁸ This raises the question of whether such contractual rights can be regarded as the functional equivalent of account-based rights,

264. It is conceded that it may be a fine line between ordinary account products on the market that generally permit, but restrict the frequency of withdrawals which may be made by any means, and those which broadly restrict withdrawals, limiting their frequency and the means through which they may be made (i.e., via the SVP only).

265. The card issuer of course remains liable to the merchant to reimburse it for the cardholder's purchases.

266. See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (1981) (defining third-party contractual rights).

267. See *supra* note 197 and accompanying text.

268. See *supra* note 198 and accompanying text.

such as the deposit repayment right. Might the cardholder, by such means, be deemed to have acquired what will be called a “pseudo account?”

The term “pseudo account” indicates that the facility provides the cardholder with more than balance updating, including limited rights to demand balance refunds and the ability to make cash withdrawals against the balance. The term is used instead of “account” to highlight an important distinction. In the case of pseudo accounts, the arrangements are not premised on the prior understanding that the cardholder will have a general right to repayment on demand of the balance as is the case with deposits underlying accounts. The balance of the underlying funds, tracked by a pseudo account, falls short of the core characteristic of “deposits.” The corollary to this—a deposit which is made by the cardholder, but is tightly controlled by the card issuer—is the pseudo deposit.

c. The Internal Process

Transactions are shaped by the accounts, if any, that underlie them. Reloadable cards and comparatively higher balances are typically associated with the SVP-as-mirror model. Because reloadable cards are designed to be used more than once and relatively higher sums are often involved, the tracking of transactions and the linkage of cardholder identity to transactions is a higher priority.²⁶⁹ Whether traceable or accountable, the tracking of transactions is an indispensable feature of this model.²⁷⁰

Where the funds are in a card issuer account, the transaction proceeds on the basis that the cardholder has already paid the underlying funds over to the card issuer, in other words, it is a prepaid transaction. The underlying funds are thus deposited to the card issuer’s account rather than in the cardholder’s name. The card issuer account may be a reservoir account or it may be reservoir account with cardholder sub-accounts, for example. Where the reservoir account is unlinked to sub-accounts, the SVP reflects only a fraction of the funds in

269. Reloadable cards typically require cardholder registration. *See, e.g., supra* note 129. This requirement is often attributed to the USA Patriot Act requirements in the terms and conditions. Pub. L. 107-56, 115 Stat. 272 (2001); *see, e.g.,* Western Union Visa Prepaid Card, *supra* note 129.

270. In contrast, although the tracking of cardholder transactions occurs with SVPs as a facilitating device, it is not crucial to this model. The SVP is debited when units are transferred to the merchant. As those authenticated units will be forwarded to the card issuer to debit prepaid underlying funds, the cardholder’s identity is dispensable. It is not strictly required in the ensuing process for the merchant’s reimbursement nor is the card issuer’s ability to track its outstanding obligations dependant upon it.

that account, representing only outstanding value that remains due to the cardholder. Though pooled with other SVP balances, the available funds will diminish as executed units are debited from the account. Sub-accounts linked to a reservoir account reflect in contrast not just a portion, but an entire balance reflecting only that cardholder's transaction history. As the card issuer does not owe the cardholder account-based rights, the transaction is traceable, rather than accountable.

If the underlying funds are deposited into a cardholder account, the implication is that title to the funds has not yet passed to the card issuer. The transaction, in other words, is a (cardholder) deposit-based transaction.²⁷¹ Ordinarily, this would mean that the cardholder is entitled to deal with those funds as his or her deposit. The reality, however, is that the card issuer is likely ensured that it is in effective control of those funds. The ability of the cardholder to access those funds would thus be extremely limited. Though the funds are a deposit in name, those funds in abeyance would effectively function as a prepayment. The procedure continues at the point of sale, transacting upon the cardholder deposit as merchant reimbursement is accomplished. The transaction becomes an accountable one as a customer account and deposit are involved.

The transfer of units from the merchant's terminal to the card issuer at the end of the sale transaction results in a hold or a debit being applied to the underlying account concerned.²⁷² The main objective of the unit transfer, in this case, is to post a debit to (update) the pseudo account, ultimately crediting the merchant's account. The sales transaction debt will ultimately be settled by a flow of funds from the card issuer to the merchant. This process may be more closely integrated with the sales transaction than is the case with Facilitator SVP models, and may not be by conventional means. The payment stage is effectively an internal part of the cardholder/merchant stage of the transactional chain. In SVP-as-Facilitator models, the payment step is external to the cardholder/merchant segment.

271. Both Facilitating and Mirroring SVP transactions ultimately involve the debiting of an account at some point. The issue is that the cardholder/merchant and preceding cardholder/card issuer segments of the transaction—the issue and sale segments—may or may not involve a cardholder account. This is an important point of distinction in the assessment of SVPs regarding whether cardholder risks are raised and the policies that should apply thereto.

272. See *supra* Figure 5, Stage 6.

Deposit Based	<ul style="list-style-type: none"> ■ based on CH deposit ■ CH deposit account debited ■ card is an access device ■ underlying funds belong to CH until spent ■ theoretical CH access to underlying funds ■ units spent via access device ■ cash withdrawals via access device
Stored Value Based	<ul style="list-style-type: none"> ■ underlying funds belong to CI ■ title to underlying funds passed by prepayment ■ spending power retained by CH ■ card facilitates use of prepaid spending power ■ spending power may be converted to cash withdrawal ■ Card not an access device ■ no CH access to underlying funds

Key: CH = cardholder; CI = card issuer

FIGURE 8: DEPOSIT/STORED VALUE PROCESS COMPARISON

3. SVP as e-value

Emergent systems are exploring the possibilities of peer-to-peer transfers.²⁷³ The idea behind P2P transactions depends on direct value transfers between cardholders without the need for a payment facilitating intermediary. There are different methods by which this conceivably might be accomplished. One alternative would be to partially limit the intermediary’s role and render stored value units transferable for only a limited number of times. Subsequently, central authorization, or re-issue and certification, in such cases would be necessary before further circulation of the units could occur.²⁷⁴ A more ambitious model might envisage P2P circulation occurring without the need for intermittent certification or authorization. Where the end result of such circulation transfers units to one party and that party thereby possesses units that can be transferred onward to another party as payment, the SVP will in that case have functioned not only as a store of value, but as a *form* of value.

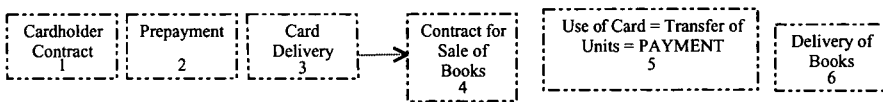


FIGURE 9: SVP AS E-VALUE

273. Hereinafter “P2P” transactions, also referred to as “person-to-person” transfers. See BRADFORD, *supra* note 22. See also David Sorkin, *Payment Methods for Consumer to Consumer Online Transactions*, 35 Akron L.R. 1, 2 (2003).

274. As with the Mondex hybrid model. See Interview with Mondex International’s John Beric available at <http://www.efc.ca/pages/media/nz-computerworld.16may97.html>.

In contrast to the facilitation and mirroring models, the SVP is not setting up a payment for execution by a subsequent process. Here, use of the card does not isolate units for onward transmission to the card issuer as an intermediary between the cardholder and merchant. The units are transferred directly to the merchant instead, and this transfer of units constitutes payment of the merchant. Visualized in terms of the book sale transaction, this represents a merger of two transactional stages and the elimination of another.²⁷⁵ There is no need for a further stage involving transactions upon an account separately maintained by an intermediary. There is also no need to move through independent processes to clear and settle the interchange between the card issuer and merchant.²⁷⁶ The elimination of intermediation from the e-value process must be replaced with an enhancement, however, the e-value SVP's features must be correspondingly tamperproof, substituting for the intermediary as certifier of authenticity.

Debit POS	Facilitating SVP Device
<ul style="list-style-type: none"> ■ POS account balance inquiry ■ authorization from CI or agent to M ■ hold or debit applied to account ■ goods/service released to CH 	<ul style="list-style-type: none"> ■ check SVC balance at POS ■ units debited from SVC transferred to M ■ purchased goods/service released to CH
Cardholder Account/Card: Debit Access	No Cardholder Account/Card: SVC
Mirroring SVP Device	e-value SVP
<ul style="list-style-type: none"> ■ check SVC balance at POS ■ units debited from SVC transferred to M ■ hold or debit applied to underlying account ■ goods/service released to CH 	<ul style="list-style-type: none"> ■ P2P balance check ■ P2P unit transfer ■ goods/service released to purchaser
Cardholder ²⁷⁷ or Card Issuer Account Card: SVC or Pseudo-Access Device	No Account Whatsoever Card: Unit Receptacle and Terminal

FIGURE 10: COMPARATIVE PROCEDURAL STAGES
OF POS & SVC MODELS

V. CONTRACTS, DEPOSITS OR E-VALUE?

The conception of the SVP as a contractual device has proved a helpful aid in the assessment of the different SVP processes here examined. It provides an apt description of the legal and functional nature of an SVP and serves most SVP configurations.

275. See *supra* Figure 9, Stage 5.

276. It is the central intermediating role of the card issuer, and its remote proximity to the cardholder-merchant exchange that necessitates the necessarily evidentiary characteristics of SVP units in facilitating and mirroring models.

277. If the account mirrored is a cardholder account, the transaction would technically be a debit transaction, or where there is severely restricted or no cardholder control over the underlying funds save by the SVP, it will be a *de facto* prepaid (stored value) transaction. See *supra* notes 262-265 and accompanying text.

In contrast, conceptualizing the SVP as a deposit is oxymoronic. Stored value transactions proceed on the basis that a prepayment has been made and deposited in an account belonging to a party other than the cardholder. The merchant is reimbursed by the card issuer arranging a transfer of funds from the underlying account to the merchant's account. The underlying funds do not usually belong to the cardholder.²⁷⁸ In cases where the underlying funds do belong to the cardholder as her deposit, the card functions essentially as an access, not a stored value, device.²⁷⁹ The sale transaction depends on an authorized debit flow rather than stored prepaid units. It is in the latter case involving an access device that deposit analogies are appropriate. E-value conceptualizations are better served by currency analogies. Examples of functional e-value systems are presently rare.

Deposit analogies are thus ill-suited to stored value transactions. The deposit concept however continues to exert pervasive influence, sometimes sublimely, over discussions of the legal nature of stored value products. One reason for this is likely the concatenation of the stop gap presumption²⁸⁰ with an awareness of the historical role of deposits. Deposit concepts have played a central role in prudential assurance and consumer protection over the years.

A. *Deposit Analogies Are of Limited Use*

The foregoing has illustrated that there are various SVP models with differing configurations. These differing models raise distinct issues.

Where an SVP is rooted in a depository relationship between the cardholder and card issuer, bank-customer type rights and duties apply. Prepaid funds, previously deposited with a depository, reimburse merchants at the terminal end of the transactional chain. Where there is an electronic fund transfer from such an account, the EFTA²⁸¹ will not apply. This is because the account is not a consumer account; rather, it is an account belonging to a commercial entity—the card issuer.²⁸² Even in those cases where the account may have been opened in the name of the cardholder, the EFTA may still not apply. Though the account belongs to a consumer (the cardholder) it is arguable that it was not opened for personal, family or household uses.

278. See *supra* notes 79-82 and accompanying text.

279. See *supra* notes 31-32 and accompanying text.

280. The presumption that existing law sufficiently regulates SVPs, see *supra* note 12 and accompanying text.

281. 15 U.S.C. § 1693 (1978).

282. See *id.* EFTA, 15 U.S.C. §§ 1693(a)(2).

The deliberately fashioned protections of the Act, including mandatory disclosures, limitation of liability, and dispute resolution would thus be excluded from such transactions.²⁸³

The SVP as facilitator model is essentially a contractual device. It sets up but does not incorporate a payment. Payment is ultimately effected, in an external stage, between the card issuer and merchant by conventional means—such as an account or wire transfer. Deposit analogies are neither required nor are they at issue with this SVP model. The involved payments between the cardholder and card issuer and the card issuer and merchant payment—though a part of the wider transactional chain—are not, analytically speaking, a part of the SVC transaction. Bank account and wire transfers are directly regulated by U.C.C. Articles 4 and 4A.

Account analogies are readily triggered by the Mirroring SVPs. Stored value transactions ultimately involve a debit to underlying funds, which implicates the involvement of an account. The funds in that account constitute a deposit. However, true SVC models are based on *prepaid* underlying funds.²⁸⁴ Those prepaid funds are deposited in an account belonging to the card issuer payee or one which it controls.²⁸⁵ Viewed from the cardholder's perspective, the cardholder has parted with the underlying funds, and the deposit and related account do not belong to her. If the cardholder expects to recover a fraction or all of the funds, it is not based on an understanding that those funds have been lent to the card issuer for future repayment. The deposit involved belongs to the card issuer, and any questions about the safety of that deposit are directed to a third party depository institution, or the card issuer, if it is the depository institution. The wider concern that the SVP system and its issuer/operator must be prudentially sound is of course relevant to cardholders in a general sense. This is the core concern of payment systems regulatory policies and banking law in general.²⁸⁶ It is not, however, a direct concern of the cardholder in this case, as there is not a cardholder account to speak of. There is a continuing need for an unbiased assessment of

283. See *id.* EFTA, 15 U.S.C §§ 1693(a)(1), 1693(a)(2), 1693(a)(3).

284. With the possible exception of e-Value SVPs, which in their most developed form, would be currency based. The idea is that the e-Value would circulate, be issued and exchanged for value including an agreed value of unit, services (payment for services), or goods (payment for goods).

285. See *supra* note 265-278 and accompanying text.

286. See TERRI BRADFORD, MATT DAVIES & STUART WEINER, *NONBANKS IN THE PAYMENTS SYSTEMS* 9-11 (Fed. Reserve Bank of Kan. City 2003), Mark S. Flannery, *Supervising Bank Safety and Soundness: Some Open Issues*, *Economic Review* 83-100 (Fed. Res. Bank Atlanta, 2007).

what SVPs are, how they are evolving, and the legal bases of user rights and obligations. A willingness to consider such issues, even where required, is only beneficial at a rather abstract level.

Deposit analogies are also ill-suited to the e-value model. E-value systems mimic currency rather than deposit products which demands a change of analogy. Comparing e-value models to currency compares apples to apples. The deposit analogy is of some use however in the case of hybrid P2P e-currency models subject to the account ownership points already discussed.²⁸⁷ Different user concerns and policy issues are raised by such systems. With this model, prudential concerns are prominent. The card issuer-cardholder relationship existing in this model is not analogous to the banker-customer relationship, and the ideal model involves neither cardholder account keeping nor an intermediated transfer process. The payment related articles of the U.C.C. are inapplicable, and though U.C.C. Article 2 is relevant, it plays a significantly diminished role than in the case of other models. Consumer risks previously deemed worthy of regulation²⁸⁸ are unaddressed²⁸⁹ or at best, addressed imperfectly.²⁹⁰ The early presumption that market forces along with existing law would adequately regulate issues arising from SVPs has not been vindicated and calls continue to be made for enhanced consumer protection.²⁹¹

1. Conceptualizing Stored Value Transactions

The majority of this article is concerned with answering what, legally speaking, is a stored value product. This article suggests that the answer to this question depends on how the SVP is conceptualized or

287. See *supra* notes 120-124 and accompanying text.

288. For example, the risk of unfair or one-sided terms of use.

289. Deposit related protections are inapplicable, as is EFTA.

290. The unconscionability doctrine, a somewhat blunt and inexact remedy, might provide an unfairly treated consumer cardholder some relief in some cases. See Press Release, FTC Stops Prepaid SVC Card Sellers From Improper Debiting (August 7, 2007), available at www.ftc.gov/opa/2007/08/edebit.shtm. The Federal Trade Commission has also started to monitor the actions of SVP providers. See *id.*

291. Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247, 292 (2005); Jean Braucher, *New Basics: 12 Principles for Fair Commerce in Mass market Software and other Digital Products in Consumer protection*, in THE AGE OF THE 'INFORMATION ECONOMY' 177-79 (Jane K. Winn ed., 2006); cf. Richard A. Epstein, *Contract, not Regulation: UCITA and High Technology Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 328 (Jane K. Winn ed., 2006) (disagrees that there are fundamental conditions of fairness to which all consumers are entitled to as of right; standard form contracts are socially efficient); Robert Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 296 (Jane K. Winn ed., 2006) (rules creating a fair opportunity to read may be a pyrrhic victory at best).

perceived, which is in turn shaped by whether it is being assessed from the perspective of the card issuer, the merchant, or the cardholder.

The card issuer's perspective encompasses the entirety of the transactional chain from the point of issue to the execution of payment.²⁹² From this perspective, the SVP is an account-based payment product that provides cardholders with convenient spending power. The product is supported by a deposit in an account that, in most cases, is effectively under the card issuer's control. This control stems from the fact that the card issuer is the depository with which the funds have been deposited or the account has been opened in the card issuer's name with an independent depository.²⁹³ The account may be in the card issuer's or cardholder's name. Issues likely to be central from this perspective include the prudential soundness and safety of the card issuer, the safety of the card issuer's deposits in the depository, and the efficiency of the contractual arrangements between the card issuer, cardholder, and merchant.

From the merchant's perspective, the SVP is a contractual device which enables it to obtain reimbursement from the card issuer for cardholder purchases. The internal working of the payment transaction, however, concerns the merchant in two regards: (1) the stages involving the transfer of units from the merchant to the card issuer and (2) the crediting of the merchant with funds by the card issuer. The fact that reimbursement of the merchant will be paid into an account raises payments issues, but the procedural requirements for reimbursement are contractual. The merchant is barely affected by whether the underlying account is a deposit or to whom it technically belongs so long as the card issuer discharges this obligation. The card issuer is responsible for reimbursement. Thus, the card issuer's liability to the merchant is absolute and unaffected by the internal workings of the broader transactional chain.

Similarly, the transactional aspects most relevant to the cardholder center on the card/merchant stage of the transaction. The cardholder prepays the funds ultimately underlying the SVP, so after transacting, the cardholder does not owe the merchant or card issuer a debt. Except where the prepayment has been paid into a cardholder 'owned' account, ensuring payment transactions upon the underlying account is irrelevant to the cardholder. Having paid the funds over in exchange for a service, the cardholder has no expectations that those funds will be repaid to him save in limited, contractually specified cir-

292. See *supra* Figure 4.

293. A rare, but possible other alternative is that the card issuer exercises third party beneficiary rights over an account opened with a depository in the cardholder's name.

cumstances. As a result, it makes sense to consider the SVP from the cardholder's perspective as comprised of the cardholder/merchant stage of the transaction.

Herein lies a clue as to why clearer determinations of the legal nature of the SVP have been problematic. The answer to the question of what an SVP is depends on the reason why the question is being asked in the first place. If the concern is possible risks to the payments system, then the card issuer perspective will be the appropriate one to adopt. If the concern relates to consumer protection, then the cardholder's perspective is key. The two perspectives may not be entirely distinct, however. A major motivator of concern about consumer risk has been driven by the presumption that SVPs are deposits—belonging to the cardholder—which will be susceptible to wrongful dissipation if safeguards are not in place.²⁹⁴ This article demonstrates this is not the case in the majority of instances. The main thrust of such a concern is consumer protection, not the related, but distinct, concern for systemic soundness. The appropriate starting perspective for an inquiry into that concern is the cardholder's perspective which informs much of the discussion in this article. It is that perspective which has produced the three functional models discussed: the facilitating SVP, the Mirroring SVP, and SVP currency.

2. Card Issuer Liability and the Certainty of Payment

Permeating tripartite card (issuer/merchant/customer) arrangements is the merchant's confidence in being paid. The card issuer reimburses the merchant for cardholder transactions. As a result, the card issuer (not the cardholder) is liable to the merchant when goods or services are released to the cardholder, even if the SVP transfer ultimately fails.

Where the underlying account belongs to the card issuer, the merchant's presumption of payment settlement is powerful. The availability of funds to settle the merchant's right to payment is taken for granted between the cardholder and the merchant. No debt is incurred by the cardholder at the time of the sales transaction to either the merchant or the card issuer.

Where the underlying account belongs to the cardholder, the merchant's presumption that funds will be available for settlement is

294. See, e.g., comments in FDIC Opinion No. 8, *supra* note 9: "From the FDIC's perspective, the primary legal issue raised by the development of stored value card systems is whether and to what extent the funds or obligations underlying stored value cards constitute "deposits" within the meaning of section 3(l) of the Federal Deposit Insurance Act (FDIA) and are therefore assessable and qualify for deposit insurance. . . ."

weakened. In those cases, where the account belongs to the cardholder in name only, there is a *de facto* deposit account—a pseudo deposit²⁹⁵—and this presumption is only slightly impaired. Where the cardholder account is not restricted, operating instead as a transaction account from which funds may be dissipated, the availability of funds is not presumed, regardless of any agreements deeming the card issuer responsible for the merchant's reimbursement. Transaction authorizations depending on confirmed available balances are typically arranged, and the transaction resembles a cardholder account debit flow affected by an access device. When the certainty of ultimate payment is strong, the cardholder and merchant are not concerned with the underlying account. The cardholder/merchant and card issuer/merchant transactions may be treated as conceptually distinct segments, and sales transactions do not require individual confirmations of available funds. In true stored value transactions, the card issuer/merchant segment of the transactional chain is deemed conceptually distinct, and external, to the cardholder/merchant sales segment.

B. *Predominant Legal Sources*

Existing and evolving SVP models present structural differences. These differences ultimately influence the applicable law. The different SVP models have demonstrably different objectives, ranging from providing a facility that sets up but stops short of executing payment to the provision of P2P payments. Notably, the more removed an SVP sales transaction is from the payments process, the greater the relevance of contracts law. Where payment is an internal stage of the sales transaction rather than an independent subsequent external process, payments regulations and policy are accorded a higher priority. This explains why in models mimicking deposits, payment regulations and policy rules are more compelling.²⁹⁶

1. Facilitating SVPs

Facilitating SVPs function as contractual devices that create a payment obligation. This payment obligation will ultimately be satisfied by conventional means, setting up the ultimate accomplishment of conventional payments. This model of SVP is intended to set up a process facilitating payment by external means while providing the

295. See *supra* note 52 and accompanying text.

296. In the case of e-currency models, currency issue, and systemic safety and systemic policy concerns are more relevant.

convenience of digital spending power.²⁹⁷ Conceptually, the process by which the payment is accomplished, a card issuer/merchant flow, is distinguishable from the cardholder-card issuer segment of the transaction.²⁹⁸ Updated balances of the cardholder's spending power²⁹⁹ are provided to the cardholder as a contractually inspired courtesy. Terms and conditions distinguish the service, often stating explicitly that the SVP is not a deposit.

Few issues, other than contractual ones common to all three models, arise with facilitating SVPs. Issues such as whether the SVP represents goods or services, the applicable terms and conditions, and the scope of the agreement typically arise. Contracts and (indirectly) payments law apply, but in an essentially conventional manner. Contract law is the main determinant of cardholder-card issuer interests in this model.

2. Mirroring SVPs

Where the SVP functions as a mirror, the primary objective is still the provision of a service. The nature of the underlying account has a direct impact on a cardholder/merchant sale transaction. Payment processes may be incorporated more directly into the cardholder-merchant segment of the transaction than in others.³⁰⁰ The SVP presents an up-to-date balance of the cardholder's balance—a reflection of the underlying account against which the merchant's claim for reimbursement will be applied. The card issuer remains the party responsible for reimbursing the merchant regardless of name of the account holder of the underlying funds.

Contract law is the primary basis upon which the cardholder's rights against the card issuer or third party depositaries is assessed. In the absence of standardized rules determining such issues in the context of SVPs, contract and payment systems regulatory policies have had to suffice. However, standardized rules designed for this context would promote the fair and consistent resolution of these issues. The need for standardized SVP payment rules and their likely content is a topic worthy of detailed further investigation.

297. "External" is used in the sense that payment is not accomplished by means of the card, although the card facilitates preliminary steps that must be fulfilled before such payment can occur.

298. *See id.*

299. This reflects the card issuer's account in which the prepaid funds have been paid.

300. When the underlying account is a cardholder account to which the cardholder has access, for example.

3. e-Currency SVPs

When a cardholder transfers units to a merchant or another cardholder so the recipient receives those units in 'spendable' form without intermediation, the units function as a form of e-currency. They are a 'true' currency if they can be transferred to another peer without intermediation.³⁰¹ Issues arising range from the "is-a-deposit-involved?" question, to the risks of private currencies, to whether they should be permitted at all.³⁰² Yet the law and policy of such transactions is nascent. The regulation of the e-value model, whether by the law of contracts or payments rules, is uncertain and often inapplicable.

4. Perceptions and Ramifications

Contracts law is the major determinant of issues arising before and after the payment step. In contrast, payment regulations policy rules are more relevant during the external payment stage.³⁰³ Coverage of the rules and regulations depends on whether a deposit exists or if a deposit analogy appropriately applies. The role and impact of contract law and payment regulations mutually wane or strengthen, depending on the functional model concerned and the transaction stage involved.³⁰⁴

The legal definition of an SVP as technologically-enabled contractual constructs has practical ramifications. Issues arise regarding whether the regulatory framework ably accommodates the shifting SVP objectives or the potential of emergent models. The conclusion that certain SVPs are (or are not) deposits directly affects perceptions of the safety and stability of the particular systemic models. Such perceptions color how emergent private currencies should be regulated, influence which parties are permitted to participate in the business of SVPs, and affect who and how much is invested in such SVP research and development.

301. The transfer of units will extinguish debts and accomplish payment per se without the need for subsequent settlement. Where the units represent evidence of issuer liability, the mere transfer of which is not sufficient to extinguish that liability, they are not functioning as money per se.

302. See WORKING GROUP ON EU PAYMENT SYS., REPORT TO THE COUNCIL OF THE EUROPEAN MONEY INSTITUTE ON PREPAID CARDS 11-12 (2004), <http://www.ecb.int/pub/pdf/other/prepaidcards1994en.pdf> (noting the wariness arising from potential interference with control of the money supply, and concluding that only credit institutions should be allowed to issue electronic purses).

303. See *supra* Figure 9, Stages 5 and 6; Figure 11, Stages 5 and 6.

304. See *supra* Figure 9; Figure 11.

5. Payments Policy: Systemic Soundness v. Consumer Protection

The deposit concept has traditionally been a key determinant of whether banking supervisory restrictions apply to a particular payment product. The depositor leaves funds with a depository, subject to his order (and based on the understanding) that they will be payable not in the original funds but in an equal sum.³⁰⁵ The deposit is evidence of a debt, which may be enforced in a court.³⁰⁶ The operation and conduct of banks is subject to supervision because of the risks associated with the breach of a loan contract between a bank and its customer.³⁰⁷ This supervision ensures that imprudent banking decisions are not taken that might render the bank insolvent and rob the customer of deposited funds.³⁰⁸ Bank insolvency is a concern because of the possible contagious effects it may have on the wider financial system.³⁰⁹ Ensuring systemic soundness has always been a distinct objective, and this objective is also related to the protection of customers.³¹⁰

The deposit concept is central to the bank-customer relationship.³¹¹ This concept is governed by rules that define the following: authorized or unauthorized debits, the duties of a customer to read statements, and the obligations of a banker to act only on the basis of the customer's mandate. The inapplicability of the deposit analogy to a large category of SVPs means, however, that a premise for transplanting such rules and principles to the SVP context is unfulfilled. Other sources exist from which similar duties may be derived, notably the Consumer Credit Protection Act, including the EFTA.³¹² Applicability of EFTA is, however, premised on the existence of an "account."³¹³ As has already been demonstrated, the involvement of an

305. *Minnesota v. Northwestern Nat'l Bank*, 18 N.W.2d 569, 579 (Minn. 1945). A deposit though similar to a loan is distinguished because it is only left for safekeeping rather than for a fixed time, and interest may not be payable. See *State v. Corning State Sav. Bank*, 113 N.W. 500, 502-03 (Iowa 1907).

306. *Peter Kiewit Sons', Inc. v. County of Douglas*, 111 N.W.2d 734, (Neb. 1961). See also Joseph S. Sommer, *Where is a Bank Account?*, 57 Md. L. Rev. 1, 4 (1998).

307. As nonbank financial institutions (NBFI) emerged and began to participate in deposit-taking-like activity, so their activities also became subject to supervision and licensing requirements.

308. Mark S. Flannery, *Supervising Bank Safety and Soundness: Some Open Issues*, Economic Review 83-100 (Fed. Res. Bank Atlanta, 2007).

309. *Id.*

310. See FRB SVP REPORT, *supra* note 11. See also TERRI BRADFORD, MATT DAVIES & STUART WEINER, *NONBANKS IN THE PAYMENTS SYSTEMS* 9-11 (Fed. Reserve Bank of Kan. City 2003).

311. See *supra* notes 14-15 and accompanying text.

312. See 15 U.S.C. § 1693 (1978).

313. See *supra* note 49.

account, at least in the commonly understood sense, should not be taken for granted with SVPs.

SVP Functional Model	Transaction Stage	Dominant Legal Source	Dominant Objective of SVP Transaction
SVP as a Device	4	Contracts Law	Facilitate a service that sets up payment
	5	Contract Law	
	6	Contract Law	
	7	Contracts Law/ Payments Regulations Policy Rules	
SVP as a Mirror	4	Contract Law	Mirror an account to facilitate payment
	5	Contract Law	
	6	Contracts Law/Payments Regulations Policy Rules	
	7	Contract Law	
SVP as e-value	4	Contract Law	Store value as a currency unit
	5	Developing Law & Policy or Lacuna	
	6	Contract Law	

FIGURE 11: APPLICABLE LAW BY TRANSACTION STAGE ACCORDING TO SVP MODEL

Analyses that conceptualized SVPs in terms of deposit analogies strengthened the impression that existing law would provide roughly equivalent consumer protection to SVP users.³¹⁴ This impression continues to affect the thinking in this arena. A recent proposed rule by the FDIC implicates that protecting underlying deposits will protect cardholders.³¹⁵ The question of whether (and to what extent) deposit insurance applies to SVPs has been answered for now. The current recommendation is that any prepayment deposited in a bank account should be insured.³¹⁶

Funds are tracked with the overarching objective of ascertaining whether they are entrusted, at any point, to the care of a depository. This perspective takes the focus off the card issuer-cardholder relationship in most SVP models, and instead monitors the card issuer's handling of the underlying funds. However, this means of directly protecting SVP cardholders is flawed. This perspective relies on the presumption that a deposit or account requiring protection for the cardholder's sake exists. However, unless the funds underlying the

314. See FRB SVP REPORT, *supra* note 11 at 65-70, 75, 76.

315. See FDIC Proposed Rule #2, *supra* note 10.

316. *Id.*

SVP are deposited in a cardholder account, deposit insurance under this approach will protect the card issuer rather than the consumer cardholder in SVP transactions.

The implicit link between consumer protection and systemic safety issues—if the reasoning is that steps taken to ensure systemic soundness will also address the protection of consumers—is also not entirely sound. Where protection of the user is the concern, unless SVPs as e-value are the subject,³¹⁷ pointing out that systemic soundness protections also have an indirectly beneficial effect on users fails to address the key issues. The user's expectations and rights are contractual rather than deposit-based. It is not a given that contractual rights should be accorded the same priority as deposit rights because doing so disregards the marked distinction that has been drawn historically (and on policy grounds) between deposit-based rights and 'mere' contractual obligations.³¹⁸

	SVP as Device	SVP as Mirror	SVP as e-value
Terms of Use	Contract Law [provision of a service: e.g.R2nd]	Contract Law [provision of a service: e.g.R2nd]	Contract Law [provision of a service: e.g.R2nd]
Process Objective	Contractual	Contractual and/or Payments Regulation Policy Rules	Uncertain, possible lacuna
Sale Transaction	Contractual e.g. U.C.C. and/or R2nd	Contractual e.g. U.C.C. and/or R2nd	Contractual e.g. U.C.C. and/or R2nd
Payment for Sale	Payments Regulation Policy Rules e.g., potentially U.C.C. Arts 4, 4A, UMSA	Payments Regulation Policy Rules e.g. EFTA, potentially U.C.C. Arts 4, 4A	Some Payments Regulation Policy Rules e.g. UMSA, others uncertain, possible lacuna
Role and Importance of Payment Stage	External: Minor	External: Minor or rarely, Internal: Significant Payments Related ³¹⁹	Internal: Significant, Currency Related ³²⁰

FIGURE 12: ISSUES REGULATED BY APPLICABLE LAW ACCORDING TO SVP MODEL

C. *The Legal Nature of SVPs*

If SVP models incorporate deposits, then they are the properly governed under existing payments regulations. The foregoing discussion

317. This directly raises currency linked systemic stability and soundness issues.

318. Banking law, essentially the law of deposit taking, is, after all, the specialized progeny of contracts law.

319. Where access to a cardholder account is involved.

320. The issues raised here call for a closer examination of the evolution of payment products to currencies.

has demonstrated however that most stored value transactions do not incorporate a deposit when analyzed from the cardholder's perspective. What is clear from the foregoing discussion is that the answer to the thematic question of this article—the definition of an SVP—varies based on the reason why the question has been asked and the perspective from which SVP transactions are considered.

There has been a pervasive starting presumption that a deposit must be involved in some manner, and that its role most likely will be central. That presumption is not entirely misplaced as the foregoing discussion shows a deposit is involved; however, a deposit is not the central essence of most SVPs. Stored value systems are based on prepaid funds, so a cardholder deposit is typically involved. Where the issue for consideration is the cardholder's rights or risks, the fact that funds are deposited by the card issuer in an account against which merchant claims will be paid is of only indirect relevance.

A sliding standard affects which model is ultimately predominant. Quantitatively speaking, SVP-as-facilitator models (e.g., gift cards) predominate. Models designed to provide account substitutes or utilize larger values are presently in the minority. Recent issuer insolvencies highlight the uncertainties about cardholder rights yet they have not had an impact. Should such uncertainties fester or emerge in other areas, cardholders may be motivated to reserve gift card use for small amounts only, resulting in an increase in SVP-as-mirror volumes.

Stored value products test the deposit concept. In this context, the related concept of an account has limited value.³²¹ The notion that SVPs are analogous to deposits, if not quite the same thing, may encourage undue confidence in the consumer protection effects of existing laws. Implicit in the suggestion that underlying funds should be tracked for purposes of deposit insurance, for example, is the notion that protecting card issuers' deposits will protect users of the system. This is a debatable proposition. Even if it is the case that cardholder contractual rights mimic deposit related rights, it is a debatable question whether they should be accorded the same priority and protection in contemporary payments policy.

There has not been a strong public outcry about the reliability of SVPs or their one-sided contractual terms, although the recent bankruptcies of a few medium sized retail issuers created a moderate stir. This may be because SVPs, though accelerating in their growth and dispersion among the general population, are still a relatively small segment of the payments sector. It remains to be seen what effect the

321. *See id.*

current economic crisis will have on payment user preferences. It would be shortsighted however to dismiss SVPs as a minor payment system. Current trends suggest that SVPs will become more frequent, more abstract, and incorporate a greater degree of digital functionality.³²²

The majority of issues arising from SVPs are contractual in nature. This stems from the fact that, in many cases, no cardholder deposit is involved. Payment regulation policy rules,³²³ usually accorded priority over 'mere' contractual interests³²⁴ come into play when deposits or accounts are involved. Depending on the model involved, the issues arising may not relate to the core cardholder/merchant transaction but instead to the terminal, external card issuer/merchant relation. Though contract and payment law apply to aspects of the transaction, the coverage is uneven, sometimes concurrent, and sometimes exclusive. The applicable law of SVPs is not entirely sound or optimally efficient. Stored value products are still evolving, and there is no reason why a proactive approach should not be taken to prepare for emerging and future needs. Change is afoot—it is notable that some countries are making vigorous efforts to prepare for likely future developments.³²⁵

VI. CONCLUSION: A NEED FOR PROACTIVE REVIEW AND ACTION

So what does this all mean? The success of existing models is mixed, and though adopted with enthusiasm in some countries, SVPs have

322. This is now taken for granted in the EU following the establishment of the Single European Payments Area (SEPA). See <http://www.ecb.int/paym/sepa/components/html/index.en.html>.

323. For example, systemic soundness, systemic safety or preventing the financing of terrorist activity.

324. For example, promises to pay money that satisfy the requirements of U.C.C. § 3-104 are governed by that article to the extent that it is not pre-empted by Article 4 or Article 8. See U.C.C. § 3-102 (2005). Promises to pay money may also satisfy U.C.C. § 4-104(a)(9), but the parties may agree to vary the effects of the article. U.C.C. § 4-103(a) (2005). This creates an avenue through which rules of contract law may become directly relevant, although the extent to which Article 4 can be varied by the parties is limited. U.C.C. § 4-103(a) (2005); see also U.C.C. § 1-302 (providing that the effect of U.C.C. provisions may be varied by agreement unless otherwise agreed). Again this is limited in U.C.C. 1-302(b), and of course, if the contractual variation means that the promise no longer satisfies the qualifying criteria, the promise will be removed from the ambit of the code. Federal Reserve regulations, operating circulars, clearing house rules and the like take effect as agreements by virtue of U.C.C. § 4-103(b). In some cases federal law may supersede Articles 3 and 4. See, e.g., Expedited Funds Availability Act, 12 U.S.C. § 4007(b) (2006). In the event of an inconsistency both federal regulations and federal law preempt the U.C.C. See U.C.C. § 3-102(c).

325. See, e.g., *supra* note 303.

yet to fulfill their potential.³²⁶ Present SVP models are not a sure blueprint for the future. Instead, the inexorable digitalization of payments will see a future in which traditional concepts are strained, perhaps beyond repair. Clearly the present regulatory framework is beginning to show its age.

Regulators have started to take measures to ensure payments and financial systems are prepared for the future.³²⁷ Notable in this regard is the Single Euro Payments Area (SEPA), launched in January 2008, with the aim of making cashless payments across Europe as quick, easy and seamless as possible.³²⁸ Regulators in at least one country, Singapore, have been toying with a state-backed electronic currency, and are close to launching such a system.³²⁹

The central role of deposits should no longer be taken for granted. Deposits are not necessarily incorporated within payment mechanisms. Even when deposits are involved, they need not play a central role.

More explicit recognition of the contextual nature of SVP definitions is needed. Functional definitions should clarify an SVP as a contractual device supported by (the related but external) card issuer's reimbursement of the merchant. The nature of SVPs should be kept firmly in context—with a view towards assessing user risks or wider systemic safety—to ensure that proposed solutions are pragmatic and will fulfill fundamental objectives.

The United States should take small proactive steps to prepare for inevitable changes. The risks of SVP use should be reassessed in light of their current use to determine whether the types or analogous successors of risks contemplated by EFTA are raised by SVPS.³³⁰ The feasibility of extending the scope of EFTA to cover a broader range of

326. See THE EUROPEAN COMM'N, EVALUATION OF THE E-MONEY DIRECTIVE FINAL REPORT (2006), http://ec.europa.eu/internal_market/bank/docs/e-money/evaluation_en.pdf. See also Committee on Payment and Settlement Systems, Bank for International Settlements Red Book, http://www.bis.org/list/cpss/tid_57/index.htm (last visited Jan. 29, 2009).

327. See COMM. ON PAYMENT SETTLEMENT SYS., GEN. GUIDANCE FOR NAT'L PAYMENT SYS. DEVEL., 1-11, 63 (2006), <http://www.bis.org/publ/cpss70.pdf?noframes=1>.

328. See European Commission, *A Possible Legal Framework for the Single Payment Area in the Internal Market* (ABE-EBA, Working Document 2002), available at http://ec.europa.eu/internal_market/payments/docs/framework/framework-workingdoc-contrib/eba_en.pdf. See also EU Payment Services Directive 2007/64/EC, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:EN:PDF>.

329. See Low Siang Kok, *Singapore Electronic Legal Tender (SELT) – A Proposed Concept*, in THE FUTURE OF MONEY 147 (2002). See also Noor Mohd Aziz, *One Card for All E-Payments Soon*, NEWSASIA June 27, 2006 (revised system now called CEPAS will be operational by 2010 and predicted to generate transaction values of \$50B).

330. FRB SVP REPORT, *supra* note 11, at 37.

SVPs should be reassessed.³³¹ The Act seeks to protect consumer users of electronic payments. The best basis for the Act's possible application to SVPs, the likely risks of SVP use, and the frequency with which such risks are being (or will likely be) realized should also be taken into account.³³²

A stored value product does not represent an order by the cardholder for payment. The cardholder, having prepaid the funds in exchange for the service, has not deposited funds with the card issuer. The cardholder's arrangement with the card issuer is minimally concerned with the means by which the card issuer will dispatch its payment obligations to the merchant. The cardholder does not order payment from a deposit account or have any standing to order the card issuer to pay the merchant for the SVP transaction. The idea of virtual negotiable instruments is thus not raised by SVPs but is raised by e-currencies. Peer-to-peer SVCs aspire toward decentralized circulating e-value units. Negotiability and intermediation are core U.C.C. payment concepts. The conceptual bases of potentially relevant U.C.C. articles is being reassessed.³³³ A revised version of Article 3 may be foreseeable. The payment clearing process envisaged by Articles 4 and 4A may also need to be reassessed in terms of the possible future reduction or elimination of intermediation from the payments process.³³⁴

Other proactive steps should be taken to ensure the regulatory framework will remain efficient. The important first step of equating electronic documents with tangible documents has already been taken; a signature, contract, or other record may not be denied legal effect solely because it is in electronic form.³³⁵ Electronic records and signatures were thus formally recognized in the law.³³⁶

331. In other words, the FRB SVP REPORT needs a review. *Id.*

332. For example, should the conventional concept of an account be the basis for protection. Should the protection be limited to the existing heads, or may new heads of protection be added in response to contemporary risks?

333. The beginnings of this are evident in the provisions that were deliberately drafted to accommodate intangible chattel paper in revised Article 9. *See* 9-102(31) ("electronic chattel paper" means chattel paper evidenced by a record of records consisting of information stored in an electronic medium); *see* 9-314(a) (a security interest in electronic chattel paper, or electronic documents may be perfected by control of the collateral (rather than possession which is a physical concept)).

334. *See* Jane Kaufman Winn, *Couriers Without Luggage: Negotiable Instruments and Digital Signatures*, 49 S.C. L. REV 739, 785-86 (1998); *see also* Mann, *supra* note 102, at 672 (noting that the existing payments policy is inconsistent and counter-intuitive).

335. *See* §7 Uniform Electronic Transactions Act (UETA) which applies to transactions generally. Regarding transactions affecting interstate or foreign commerce. *See* §101 Electronic Signatures in Global and National Commerce Act (E-SIGN) 15 U.S.C. §§ 7001-7031.

336. *See* §106(4), 106(5) E-SIGN, and §2(7), 2(8) UETA.

This equivalency principle is not of universal application, however. An important exception is that transactions governed by most of the U.C.C. are exempt from its scope.³³⁷ Negotiable and bank deposit transactions, covered by Articles 3 & 4, are therefore exempt. However, a new obligation, the transferrable record, has been devised. A transferrable record is an electronic record that would be a note under Article 3, if it were in writing.³³⁸ Transferrable records are virtually³³⁹ negotiable in that they may be transferred by giving control to another person who becomes, as a result, the holder³⁴⁰ of the record.³⁴¹

The Uniform Law Commission has made limited provision for virtual negotiability in the UCC by introducing the concept of electronic chattel paper to Article 9.³⁴² Chattel paper may be perfected by filing, delivery, or the transfer of control under Article 9.³⁴³ Modernization of the check clearing system by Congress introduced electronic check truncation and substitute checks.³⁴⁴ Congress, the Uniform Law Commission, and the American Law Institute have an important role in the continued modernization of payments law.

The globalization of markets, the interconnectedness of contemporary economies, and the strongly centralized nature of currencies are significant factors that require close monitoring. These factors constitute a powerful collective force that increasingly suggest the most successful e-currencies will be those issued by the State or (perhaps in the distant future) a centralized global entity. Although the current prospects of private e-currencies remain contentious,³⁴⁵ the potential of

337. All sections other than 1-107, 1-206, Article 2, and Article 2A of the U.C.C. §3(b)(2) UETA.

338. Only electronic records of a loan secured by real property can satisfy this definition under E-SIGN. §201(a)(1)(C) E-SIGN.

339. Virtually is used here in both senses of it being intangibly so, and almost completely so.

340. A pivotal concept in the law of negotiability. See, e.g., §§3-104, 3-201 and their official comments.

341. See §201 E-SIGN, §16 UETA. The record may thus be 'negotiated' by transferring control using *inter alia* an electronic signature.

342. Electronic chattel paper is simply chattel paper evidenced by electronic information see U.C.C. §9-102(31).

343. See U.C.C. §9-312.

344. See Check 21 codified at 12 U.S.C. §§5001-5018. Truncation refers to the process whereby a paper check is removed from the collection or return process so that information, including an electronic image of the check, or a substitute check (paper reproduction of the original check) may be transferred in its place. 12 U.S.C. §5002(18).

345. Jeffrey M. Lacker, *SVCS: Costly Private Substitutes for Government Currency*, FED. RES. BD. OF RICHMOND ECON. Q., Summer 1996, at 1, available at http://www.richmondfed.org/publications/research/economic_quarterly/1996/summer/pdf/lacker.pdf; Gerald Dwyer, *Wildcat Banking, Banking Panics and Free Banking in the United States*, FED. RES. BANK OF ATLANTA, Dec. 1996, at 1, available at <http://www.frbatlanta.org/filelegacydocs/ACFCE.pdf>; Kerry Lynn Macintosh, *How to Encourage Global E-Commerce: The Case for Private Currencies on the Internet*, 11

the convergence of stored value and m-payment³⁴⁶ technology is inspiring current research and development and shaping investment decisions.³⁴⁷

Existing contract and payment law apply alternatively to transaction stages, and the manner of application changes according to the SVP model involved. The central role of the deposit concept (which is key to the applicability of payments regulations regulatory principles) is being undermined by SVPs. The prudential regulation of stored value products is fragmented. The protection of SVP cardholders from one-sided terms or unfair agreements is incomplete. The uncertain and fragmented regulation of SVPs affects consumer confidence in such systems, thereby impacting the viability of these systems. More significantly, these problems indicate that the current payments framework is dated.

The need to go back to the drawing board and consider the true impact of e-commerce and digitalization on payments and the wider financial system is crucial. Payment developments have fostered conceptual changes that threaten the present and future efficiency of payments regulation. Money and other value exchanges are heading into an uncertain future.³⁴⁸ It is time to harmonize payment laws for the

HARVARD J. OF L. & T. 733 (1998); Thomas A. Rohling & Mark W. Tapley, *Optimal Regulation of Electronic Money: Lessons From the "Free Banking" Era in Australia*, 17 *ECON. PAPERS* 7, 7-29 (1998); Robert G. King, *On the Economics of Private Money*, J. OF MONETARY ECON., 1983, at 127-55; George A. Selgin & Lawrence H. White, *How Would The Invisible Hand Handle Money*, J. OF ECON. LITERATURE, Dec. 1994, at 1718, 1743-5.

346. The widely used shorthand term for mobile payments is m-payments.

347. It is clearly a strengthening strategic priority to invest in this area. Visa recently entered into a joint venture to develop secure global mobile financial services; see *Visa, GMSA to Partner for Secure Mobile Financial Services Globally*, PAYMENTS NEWS, Feb. 18, 2009, and, it is one of the three parties (the others are the National Australian Bank, and Telstra, the largest national telecommunications carrier) behind a recent, very successful trial of contactless payments; see *Some Results from Australia's Trial of Contactless Mobile Payments*, PAYMENTS NEWS, Feb. 18, 2009. The Gates Foundation is also showing interest in the area, with at least two recent grants – one to partner in the development of mobile financial services; see *GSMA, Gates Foundation Partner on Mobile Financial Services*, PAYMENTS NEWS, Feb. 17, 2009, the other, to fund a research center, the The Institute for Money, Technology and Financial Inclusion at University of California, Irvine, to research the future of digital money, focusing in particular on the growing use of mobile technology in providing banking and financial services in developing countries. See also Melissa Soo Ding & J. Felix Hampe, *Reconsidering the Challenges of mPayments: A Roadmap to Plotting the Potential of the Future mCommerce Market*, INT'L J. OF BANK. MGMT, 2003, available at [http://domino.fov.uni-mb.si/proceedings.nsf/0/6570b7cac7cf74d5c1256ea2002e d0a2/\\$FILE/62Ding.pdf](http://domino.fov.uni-mb.si/proceedings.nsf/0/6570b7cac7cf74d5c1256ea2002e d0a2/$FILE/62Ding.pdf).

348. The EU has bet heavily (rightly in the opinion of the Author) that future payments will be completely paperless: “[t]he long-term goal of the EPC is to use the SEPA payment instruments only electronically. This means that in time paper-based credit transfers will disappear. Once payments are made electronically only they can be cleared and settled via STP (straight-through processing) between the banks. This poses a large potential for cost and time savings as

development of a seamless national payments framework. The present local and economic crisis presents opportunities for emerging payments and affects payment user preferences.

If the opportunity is not seized now to modernize the system *inter alia* by addressing the emerging legal issues discussed in this article, the ramifications of an inconsistent regulatory framework will intensify. The failure to act will leave the United States at a competitive disadvantage to countries with modernized payment systems. The chance that payments will evolve back towards tangibility are slim, so SVPs herald a future where payments will become increasingly digitized, abstract, and dissimilar to traditional methods. A modernization of the payment framework system depends on the reevaluation of concepts such as the deposit, an account, and negotiability.³⁴⁹

The recent call for the modernization of the financial services framework in the United States is timely.³⁵⁰ A recent report published by the U.S. Treasury called for wide-ranging reforms of the financial services regulatory structure.³⁵¹ This report noted the present regulatory structure is dated, and the position of the U.S. as a leader of global capital markets is challenged by maturing foreign financial markets.³⁵² The ability of certain foreign markets to adapt to new financial innovations was identified as a competitive advantage,³⁵³ and the present U.S. regulatory system puts the country at a disadvantage. The report recommended the immediate commencement of a long-term restructuring project under which the current regulatory model is updated.³⁵⁴ This report recommended the chartering of financial institutions, a process that is intimately linked to traditional ideas and policies rooted in the concept of a deposit.³⁵⁵ In addition, a framework should be established providing oversight over all depository institutions with federal deposit insurance.³⁵⁶

manual, error-prone intervention is not needed anymore. . . ." See The European Central Bank available at <http://www.ecb.int/paym/sepa/components/html/index.en.html>.

349. The focus of this article has limited the discussion of concepts to the deposit and account. The suggested investigation would encompass a wider selection, including "negotiability" and "instrument."

350. See The Dept. of The Treasury, *Blueprint for a Modernized Financial Regulatory Structure* (Mar. 2008) available at <http://www.treas.gov/press/releases/reports/Blueprint.pdf> [hereinafter *Treasury Blueprint*].

351. See *id.*

352. *Id.* at 2.

353. *Id.* at 110.

354. *Id.* at 15, 137.

355. See *Treasury Blueprint*, *supra* note 350, at 8.

356. *Id.*

While political reluctance to commence the undeniably complex, long-term task of modernizing payments or the wider financial system existed,³⁵⁷ such hesitancy is disappearing.³⁵⁸ The Blueprint Agenda published in the last year of the Bush Administration recognized the need and political will to revamp the U.S. financial system. While it was unclear with the change in administrations whether the new Treasury Secretary would proceed with that particular blueprint for reform, it has quickly become clear that financial system reform (the core to an economic system in crisis) is a clear priority.³⁵⁹ The campaign motto of the then-Senator Obama promised change,³⁶⁰ and the present administration is clearly not shrinking back from change. The U.S. Treasury has published its (new) framework for regulatory reform based on four main pillars: (1) addressing systemic risk; (2) protecting consumers and investors; (3) eliminating gaps in the regulatory structure; and (4) fostering international cooperation.

The need for change in the regulation of the financial system has not gone unnoticed in industry and academia.³⁶¹ The Uniform Law

357. The EU simply deemed issuers of stored value products credit institutions, subjecting them to revised banking and payments policies contained in the E-Money Directive. EU Directive 2000/46/EC, 2000 O.J. (L 275) 39 (EC), and EU Directive 2000/12/EC, 2000 O.J. (L 126) 1(EC).

358. Australia did just that between 1996-1998. See AUSTL. FIN. SYS. INQUIRY, THE WALLIS REPORT (1997), available at <http://fsi.treasury.gov.au/content/PublicInformation/Pressreleases/PR090497.asp>; AUSTL. SEC. & INVS. COMM'N, RESPONSE TO THE WALLIS REPORT (1998), available at <http://fsi.treasury.gov.au/content/PublicInformation/Pressreleases/PR090497.asp>. More recently, substantial progress has been made towards the establishment of a Single Euro Payments Area (SEPA) in the EU. For example, the European Payments Council was established in January 2002. See European Payments Council Towards our Single Payment Area, What is EPA?, http://www.europeanpaymentscouncil.eu/content.cfm?page=what_is_epc (last visited May 5, 2009). Furthermore, SEPA was officially launched in January 2008. See Press Release, SEPA Goes Live – Official Launch of the Single Euro Payments Area (Jan. 21, 2008), available at <http://www.ecb.int/press/pr/date/2008/html/pr080121.en.html>.

359. "As we act together to build a strong foundation for recovery, we need to begin the process of comprehensive reform of our financial system and the international financial system, so the world never again faces a crisis this severe." Press Release, Timothy Geithner, Statement by Secretary Tim Geithner Following G7 Meeting (Feb. 14, 2009), available at <http://www.treasury.gov/press/releases/archives/200902.html>. See also PRESIDENT BARACK OBAMA, AGENDA FOR CHANGE (2009), available at <http://www.whitehouse.gov/agenda/economy/>.

360. Strictly speaking, President Obama's Address to Congress on February 24, 2009 was not a "State of the Union" Address. See Posting of Robert Schlesinger to Thomas Jefferson Street blog, <http://www.usnews.com/blogs/robert-schlesinger/2009/02/23/12-fun-facts-on-the-state-of-the-union-address-for-the-obama-speech-to-congress.html>.

361. The Financial Meltdown Heard Around the World (evaluated through the lens of banking law) is a scheduled session at the ABA Section on Business Law's 2009 Global Business Law Forum and its Spring Meeting will cover topics such as Banking in the Post-Emergency Economic Stabilization Act of 2008; Reregulation of Consumer Financial Services – Are We Condemned to Repeat Mistakes of the Past?; Banking Development in Developing Countries – Mobile Banking and Microfinance; and Non-Uniformity in the UCC – Is it the Spice of Life or a

Commission (“ULC”) and the American Law Institute (“ALI”) have surely taken notice. The ULC’s Study Committee on Payment Issues is currently monitoring developments at the federal level, particularly with respect to the Federal Reserve Board, Treasury Department, and Congress. It is considering the advantages of maintaining the present federal/state balance of regulation in the payments area, and will recommend ULC or joint ULC/ALI projects on this topic as needed.

A crossroad has been reached, and a choice exists. Change as modernization may be fully embraced or postponed. The latter would be a significant strategic mistake from which the U.S. would struggle to recover. While the choice to be taken is still pending, the indications are that this time, perhaps, change as modernization may be fully embraced. There is no doubt that challenging but exciting times are ahead for commercial law scholars.³⁶²

Recipe for Disaster? See American Bar Association, Global Business Law Forum, <http://www.abanet.org/buslaw/meetings/2009/gblf/> (last visited May 5, 2009). The topic of the 5th ABA Annual National Institute on Banking Law II will be Risk as the Centerpiece of Bank Regulation. See American Bar Association, CLE Calendar, <http://www.abanet.org/buslaw/calendar/index.html> (last visited May 5, 2009). Exploring regulatory solutions to economic crises was the theme of a conference hosted by the Columbia Law School in February 2009 in New York. See Am. Constitution Soc’y & Columbia Law Sch., Financial Regulation, Corporate Governance and Securities Litigation: What Does the Future Hold? (Feb. 11, 2009) (video available at <http://www.acslaw.org/node/7892>).

362. This may be just the impetus needed to pull commercial law issues from the doldrums where they have been languishing for the last twenty years. See Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 1 (2007); see also The Commercial Law Blog, <http://ucclaw.blogspot.com/2008/03/teaching-commercial-law.html> (last visited Jan. 30, 2009) (for comments on this lamentable state of affairs).