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THE LAW, MARKETING AND BEHAVIORAL ECONOMICS OF CONSUMER REBATES**MATTHEW A. EDWARDS***

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INTRODUCTION

Consumer rebates have evolved into a major marketing method. Although exact figures are difficult to ascertain, estimates of total rebate offer volume now range from \$4 to \$10 billion per year.¹ According to one consulting firm, over 80% of consumers participated in rebate offers in 2004, redeeming over 5 billion rebates worth more than \$3 billion.² The prevalence of rebates within the market for consumer electronics and high-tech products is particularly pronounced — one recent industry study indicated that 25% of all computer hardware product purchases almost 50% of personal computer sales included rebate offers.³ Yet despite their popularity, few

¹ See Brian Grow, with Rishi Chatwal, *The Great Rebate Runaround*, *Business Week*, December 5, 2005, at 34 (citing “Hal Stinchfield, a 30-year veteran of the rebate business” who stated that businesses offer 400 million rebates each year with a total face value of \$6 billion); Howard Millman, *Customers Tired of Excuses for Rebates That Never Arrive*, *N.Y. Times*, Apr. 17, 2003, at G9 (citing “industry analysts” for the proposition that \$10 billion worth of rebates were offered in 2002);

Over the last five years, rebate volume has been skyrocketing. The actual volume is hard to pin down because it is only tracked by guesstimators in the industry. One of those guesstimators, Michael Leonard, vice-president of marketing at Continental Promotions Group, says the volume of rebates is about \$4 billion U.S. today. Back in 1999, it was reported at just \$1 billion.

Carol Vinzant, *The Great Rebate Scam*, *Slate*, Tuesday, June 10, 2003, available online at <http://slate.msn.com/id/2084210>; see also Renee DeGross, *The Spate of Rebates; More Sellers of Products Use Them to Entice Customers—Some of Whom End Up Unhappy*, *Atlanta Journal-Constitution*, Dec. 18, 2003 at 1C (\$6 billion in rebate offers up from \$3.3 billion in 1999) (quoting Peter Kastner, who is discussed infra note ____). One problem is that “industry associations and the vast majority of manufacturers do not maintain data on rebate promotions, limiting the availability of market data.” Timothy Guy Silk, *Examining Purchase and Non-Redemption of Mail-In Rebates: The Impact of Offer Variables on Consumers’ Subjective and Objective Probability of Redeeming* 3 (2004) (unpublished Ph.D. Dissertation, University of Florida) (available through UMI Dissertation Services).

² See NPD Insights, *Issue 2* (May 2005), available at <http://www.npdinsights.com/corp/enewsletter/html/archives/May2005/index.html>; Peter K. Tat & C.H. Schwepker, Jr., *An Empirical Investigation of the Relationships Between Rebate Redemption Motives: Understanding How Price Consciousness, Time and Effort, and Satisfaction Affect Consumer Behavior*, 6 *Journal of Marketing Theory and Practice* 61, 61 (1998) (“According to Donnelly Marketing Services, 85 percent of the responding firms in its annual survey of sales promotion practices offered rebates to consumers.”); Peter K. Tat et al., *Consumer Perceptions of Rebates*, 28 *Advertising Res.* 45, 45 (1988) (citing sources that claimed that 45% of households participated in rebate offers in 1981, up from 27% in 1977). Peter K. Tat et al., *Consumer Perceptions of Rebates*, 28 *Advertising Res.* 45, 45 (1988) (estimating that consumers collected over \$702 million in rebates in 1980) (citing Jennifer Jones, *Coupon Power* (1981)).

³ See Stephen Baker, *The Changing Role of Rebates in Technology and Consumer Electronics*, available at http://www.npdtechworld.com/techServlet?nextpage=viewpoint_body.html&content_id=2149 (summarizing survey evidence); see also Adams, *supra* note ____ (“Among consumer electronics retailers, rebate offers have become the norm.”); Patrick Burns, “We Want Our Money Back” — Rebate Offers Are on the Rise, But So Are Complaints About the Popular Incentives, *Lancaster New Era/Intelligencer Journal*, December 8, 2003 (“Nearly 75% of the ads placed last year by retailers and manufacturers” of “[h]ighly competitive industries like electronics, phones,

marketing practices have received as much negative press as rebates. The difficulties of meeting rebate redemption requirements have become a staple of consumer affairs and business columns⁴ and frustrated consumers frequently write into newspapers to complain about rebates gone astray.⁵

Negative consumer sentiment regarding rebates goes beyond gripes in the press — each year thousands of consumers complain about rebates to the Federal Trade Commission, state and local consumer protection and law enforcement agencies, and organizations such as the Better

computers and software” included rebate offers, (citing Beyen Corp, a Niagara Falls, N.Y.-based market research company).

⁴ See, e.g., See Steve Adams, The Check is in the Mail. Or Is It? As Rebate Offers Proliferate, Consumers Wonder Whether They’re Worth All the Trouble, *The Patriot Ledger*, May 29, 2004, at 31; Catherine Greenman, The Trouble with Rebates, *N.Y. Times*, Sept. 16, 1999, at G1; Brian Grow, with Rishi Chatwal, The Great Rebate Runaround, *Business Week*, December 5, 2005, at 3; Caroline E. Mayer, CompUSA Bound By Advertised Rebates, *The Wash. Post*, March 17, 2005, at E1; Howard Millman, Customers Tired of Excuses for Rebates That Never Arrive, *N.Y. Times*, Apr. 17, 2003, at G9; Bruce Mohl, If Rebates Annoy You, They’re Working as Intended, *Boston Globe*, Nov. 2, 2003, at C1; Mike Musgrove, Rebates Fuel Sales, Frazzle Buyers, *Wash. Post*, Sept. 19, 2004, at F6; Don Oldenburg, The Rebate Check May Not Be in the Mail, *Wash. Post*, Feb. 1, 2005, at C10; Jane Spencer, Rejected! Rebates Get Harder to Collect — As Cash-Back Offers Multiply, So Do Obstacles to Consumers, *Wall Street Journal*, June 11, 2002, at D1; Joseph B. Treaster, Rebates May Save Money, Just Maybe Not for You, *N.Y. Times*, Sept. 20, 2000, at H10; Companies Are Boosting Rebates to Drive Sales — and Driving Many Customers Crazy, *Newsweek*, June 23, 2003, at 48; Alina Tugend, A Growing Anger Over Unpaid Rebates, *N.Y. Times*, March 4, 2006, at C5.

⁵ See, e.g., Asa Aarons, Woman’s Being Seeing Red After Snail Mail-In Rebate, *N.Y. Daily News*, February 8, 2001, at 60; Catherine Greenman, Two Companies Agree to Send Speedy Rebates to Customers, *N.Y. Times*, Jan. 13, 2000, at G3; Sheryl Harris, Persistence Pries Loose Promised Rebate, *Cleveland Plain Dealer* Oct. 23, 2002, at E1; Sheryl Harris, Avoiding the Pitfalls of Rebates, *Cleveland Plain Dealer (Ohio)*, December 10, 2003, at E1; Jolayne Houtz, Where’s My Rebate Check?, *Seattle Times*, Dec. 19, 2004, at M6; Anne Kandra, Rebate, Rebate, Who’s Got the Rebate, *PC World Online*, July 1, 2000; Erik Lacitis, Reader Says, ‘Dude, What Happened to My Rebate?’, *Seattle Times*, Jan. 23, 2003, at E1; Kevin McGurk, Consumer’s Copies Help Solve Rebate Runaround, *The Republic (Columbus, Ind.)*, Feb. 27, 2005, at D4; Nancy Paradis, Making Rebate Requests Less of a Hassle, *St. Petersburg Times*, Jan. 13, 2005, at 2; Nancy Paradis, Another Obstacle Pops up on Rebate Course, *St. Petersburg Times*, Feb. 19, 2004, at 2E; Nancy Paradis, Tardy Rebate Comes with Company Apology, *St. Petersburg Times*, Mar. 1, 2004, at 2E; Nancy Paradis, Reading Fine Print for Rebate Didn’t Help, *St. Petersburg Times*, Feb. 13, 2004, at 2E; Nancy Paradis, Rebate Offers Sound Great, but Can Be Tough to Track, *St. Petersburg Times*, Aug. 22, 2004, at 2E; Nancy Paradis, Rebate Check is Accompanied by an Apology, *St. Petersburg Times*, Mar. 24, 2003, at 2D; Nancy Paradis, Redeeming a Rebate? First Make Copies of All Paperwork, *St. Petersburg Times*, October 26, 2003, at 2F; Nancy Paradis, Rebate Offer was for a Specific Product, *St. Petersburg Times*, Dec. 4, 2003, at 2E; Nancy Paradis, Read Rebate Offers Carefully for Instructions, *St. Petersburg Times*, Nov. 20, 2003, at 2E; Nancy Paradis, Another Cautionary Rebate Tale, *St. Petersburg Times*, July 21, 2002, at 2F; Nancy Paradis, Rebate Data Takes Wrong Route, *St. Petersburg Times*, June 30, 2002, at 2F; Nancy Paradis, Customer Wants Rebate, Not Reward Choice, *St. Petersburg Times*, May 27, 2004, at 2E; Nancy Paradis, Another Twist in Tough-to-get Rebate Story, *St. Petersburg Times*, Feb. 4, 2005, at 2E.

Business Bureau. And these numbers are growing:⁶ the New York Times recently reported that annual rebate complaints to the Better Business Bureau had increased nearly three-fold from 2001 to 2005 — from 964 to 2,715.⁷ Given the small stakes involved in many rebate programs and the effort required to file a formal complaint, it is reasonable to conclude that the actual number of consumers with rebate complaints is much higher than these numbers suggest.⁸

Despite rising consumer complaints about rebates, legal scholars thus far have not paid much attention to consumer rebates,⁹ perhaps because rebates have escaped significant direct legal regulation. But the dramatic expansion of rebate promotion usage and resulting consumer dissatisfaction has begun to exert pressure on regulators and lawmakers to take action on rebates. This trend is evidenced by FTC enforcement actions against rebate providers who have failed to hold up their end of the rebate bargain,¹⁰ as well as proposed rebate legislation in several states,

⁶ See Adams, *supra* note __, at 31 (noting rebate complaints to the Federal Trade Commission as follows: 1,073 in 2001; 1,162 in 2002; and 1,982 in 2003); Sandra Block, *Rattled About Rebate Hassles? Regulators Starting to Step In*, USA Today, March 22, 2005, at B3 (21% increase in rebate complaints to Better Business Bureau over previous year); Patrick Burns, “We Want Our Money Back” — Rebate Offers Are on the Rise, But So Are Complaints About the Popular Incentives, Lancaster New Era/Intelligencer Journal, December 8, 2003 (rebate complaints to Pennsylvania Attorney General doubled from 2002 to 2003); Mayer, *supra* note __, at E1 (“A total of 1,710 complaints about rebates were filed with the Better Business Bureau in 2003 . . . compared with 964 complaints filed in 2001. At the FTC, complaints about rebates for computer equipment climbed from 1,004 in 2000 to 1,857 in 2004.”); Carole Fleck, *The Long Rebate Wait: Clip the Bar Code, Circle the Receipt, Cross Your Fingers*, AARP Bulletin, April 2004, available at http://www.aarp.org/bulletin/yourmoney/Articles/a2004-04-22-long_rebate.html (“Matthew Gold, a lawyer with the Federal Trade Commission, says complaints about rebate offers nearly doubled last year.”); Dan Zehr, *Rebates Can Be Alluring, But They Play Hard to Get; Most Consumers Don’t Send in the Forms, and Companies Count on It*, Austin American Statesman, August 30, 2004, at A1 (587 rebate complaints to Texas Attorney General from August 2002).

⁷ Alina Tugend, *A Growing Anger Over Unpaid Rebates*, N.Y. Times, March 4, 2006, at C5.

⁸ In 2004, the editor of one website devoted to consumer complaints claimed that he had received 35,000 complaints regarding consumer rebates in less than two years. See Tamara Chuang, *Improve Your Odds of Getting A Rebate*, Orange County Register, January 18, 2004, at E7 (claims made by Ed Magedson, editor of The Rip-Off Report, www.ripoffreport.com).

⁹ One significant, recent exception is Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 William & Mary L. Rev. 1635 (2006) [hereinafter, Sovern, *Transaction Costs*] (discussing rebates as a method of exploiting buyers by increasing arguably unnecessary transaction costs). Consumer rebates have been the subject of marketing and economics literature. See *infra* notes ____.

¹⁰ See *infra* notes __ and accompanying text.

including California and Texas,¹¹ and a rebate law that was recently enacted in New York.¹² As more legislators and regulators begin to focus on rebates, they will undoubtedly ask how the “problem” of rebates should be solved. In response, policy-makers likely will get ample input from consumer rights advocates, who will be inclined to suggest additional rebate regulation, and from business advocates who will recommend a laissez faire approach to rebates. This article will focus on a threshold question in this emerging “rebate debate” that should not be neglected: what exactly *is* the problem with consumer rebates? As this Article aims to demonstrate, there are several distinct categories of rebate complaints, and how the problem of rebates is understood should inform potential legislative or regulatory responses. In short, clear problem identification should precede any rebate regulation.

The article proceeds as follows. Part I covers the fundamentals of consumer rebates. It surveys the consumer rebate process and introduces the reader to the relevant marketing terminology for the various forms of rebate redemption and non-redemption. Part I then explores the reasons why manufacturers and retailers offer rebates, with particular emphasis on the concept of economic price discrimination. In particular, Part I explains how rebates allow firms to sell goods at different prices to different consumers, thus extracting a greater part of the consumer surplus than would otherwise be possible under a uniform pricing regime.

¹¹ California Governor Arnold Schwarzenegger and Texas Governor Rick Perry vetoed the proposed legislation in their respective states. See *infra* notes ___ and accompanying text.

¹² See NY GBL § 391-p (McKinney 2005), as amended by 2005 N.Y. S.B. 6355 (June 7, 2006). A research note is necessary: At the time this Article went to press, there were two separate sections of the GBL, both passed in 2005, with the same numerical designation: § 391-p. One section pertains to rebates, the other to the rental of previously worn clothing. Presumably, this clerical error will be corrected by the New York State Legislature. If so, the GBL section number referenced throughout this Article may change. In addition, NY GBL § 391-p (pertaining to rebates), was amended by N.Y. SB 6355, but the amendments have not yet been codified. For the purposes of this Article, however, citations will be made to NY GBL § 391-p, as if the amendments have been integrated fully into the code.

Part II covers three of the major categories of consumer complaints regarding rebates, that: (1) many rebate offerors and rebate fulfillment centers intentionally or negligently fail to honor qualified rebate requests; (2) manufacturers and retailers complicate the rebate redemption process as part of an insidious effort to reduce the number of successful rebate submissions, thus increasing what is known as slippage or breakage in the marketing literature; and (3) it is unfair or unethical to charge different prices to different consumers for the same product, as facilitated by rebates.

Part III confronts the possibility that even without intentional inducement of rebate non-redemption, rebate offerors may be taking advantage of predictable patterns of sub-optimal consumer behavior because some consumers will “irrationally” fail to redeem their rebates. Part III, therefore, addresses two important issues: (1) why some consumers fail to redeem rebates, despite their original intention to redeem, and (2) why some consumers fail to anticipate and account for their own sub-optimal behavior in the purchase process. To answer these questions, Part III confronts the complexities of intertemporal decision-making, by drawing on economic and psychological literature literature on procrastination, prospective memory, prospect theory, overconfidence, and temporal construal theory.

Part IV addresses the ways in which rebates have been and might be regulated to address the various categories of consumer complaints treated earlier in the article. Part IV reviews several potential regulatory approaches, including: (1) bans on rebates; (2) federal and state unfair or deceptive trade practice litigation against rebate offerors; (3) legislation or regulation aimed at minimizing irrational or sub-optimal consumer rebate redemption behavior; (4) legislation or regulation aimed at rebate offerors to prevent the most egregious rebate abuses; and (5) permitting the market to self-correct. By surveying the advantages and disadvantages and

disadvantages of various regulator approaches, Part IV endeavors to show how the precise nature of one's complaints regarding rebates should be linked to the design of particular rebate remedies. The purpose of this part, therefore, is to provide regulators and legislators with the information necessary to make enlightened choices as to the regulatory "fit" between purported rebate problems and rebate solutions.

I. THE FUNDAMENTALS OF CONSUMER REBATES

A. The Rebate Offer and Redemption Process

1. Consumer Rebates Defined

A consumer rebate¹³ is a delayed incentive¹⁴ offered by either a product manufacturer or retailer that requires consumers to: (1) make a purchase at a pre-rebate shelf price; (2) submit a request for a refund amount by mail or the Internet to the rebate offeror or a fulfillment center that processes rebates for the rebate offeror;¹⁵ and (3) wait some period of time after the purchase and the rebate submission for the rebate offeror or its agent to send a rebate check or something of value, known as the "rebate reward,"¹⁶ to the consumer.¹⁷ Because of the delay in receipt of

¹³ This Article will only deal with mail-in or on-line consumer rebates; it will not address other rebates, such as those granted by manufacturers to distributors or retailers or automobile rebate offers, which are significant but distinct marketing practices.

¹⁴ See Dilip Soman, *The Illusion of Delayed Incentives: Evaluating Future Effort-Money Transactions*, 35 *J. of Marketing Research* 427, 427 (1998) (defining delayed incentives). A recently passed New York rebate statute explicitly draws the distinction between delayed and instantaneous incentives. See NY GBL § 391-p (West 2005) (defining rebate as "an offer to provide cash, credit, or credit towards future purchases, that is offered to consumers who acquire or purchase a specified product or service and that is conditioned upon the customer submitting a request for redemption after satisfying the terms and conditions of the offer" and excluding "any discount from the purchase price that is taken at the time of purchase").

¹⁵ See Russell D. Bowman, *Profit on the Dotted Line: Coupons and Rebates 206-07* (2d ed. 1985) (discussing the role of third-party fulfillment centers in the rebate process).

¹⁶ See John T. Gourville & Dilip Soman, *The Consumer Psychology of Mail-In Rebates: A Model of Anchoring and Adjustment* at p. 4, Working Paper, December 10, 2005, available at <http://ssrn.com/abstract=875658>.

¹⁷ This process is outlined as a diagram in Appendix 1.

the reward and the risk that redemption will not follow purchase, rebates are often contrasted with coupons, which have the characteristic of immediate redemption.¹⁸

2. *Types of Rebate Redeemers and Non-Redeemers*

The rebate redemption process begins with a product or good that is being offered to consumers with a rebate. This article will assume that all of the parties to the exchange have determined their reservation prices.¹⁹ For buyers, this is the maximum amount that they would pay for the good, while for the seller it is the minimum price that he will accept for his product.²⁰ At the outset, neither party knows the other's reservation price (though they may attempt to discern this information²¹). If a product is offered with a rebate, the consumers will fall into one of two groups: *rebate-dependent* purchasers — those whose purchase decisions are influenced by

¹⁸ See Yuxin Chen, Sridhar Moorthy & Z. John Zhang, Price Discrimination After the Purchase: Rebates as State-Dependent Discounts, 51 *Management Science* 1131 (2005); Gourville & Soman, *supra* note __, at 6; Sridhar Moorthy & Qiang Lu, Coupons versus Rebates, forthcoming *Marketing Science* (unpublished manuscript, on file); Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 *UCLA L. Rev.* 991, 1023 (2002) (“Rebates are generally more administratively difficult than coupons because they require the consumer to mail additional paperwork to the manufacturer and to cash a rebate check.”); See Tim Silk & Chris Janiszewski, Managing Rebate Promotions: An Empirical Analysis of Purchase and Redemption 3, Working Paper, Sauder School of Business, University of British Columbia. (under review at *Journal of Marketing*) (unpublished manuscript) (copy on file with the author of this paper) (“Rebates are distinct from coupons because the effort required to obtain the cost savings and the receipt of the cost savings both occur after rather than at or before purchase.”); Silk, *supra* note __, at 5 (contrasting rebates with coupons); Soman, *supra* note __, at 427.

¹⁹ This Article will not address how consumers arrive at their reservation prices. See Hyeong-Min Kim, Small Print Versus Large Print: Consumer Evaluations of Different Rebate Ad Formats, 29 *Advances in Consumer Res.* 149, 149-50 (2002) (discussing internal reference prices and perceived transaction value); Tridib Mazumdar & Sung Youl Jun, Consumer Evaluations of Multiple versus Single Price Change, 20 *Journal of Consumer Research* 441, 441 (1993) (“[C]onsumers evaluate a purchase price against an internal price standard (or reference price) and their purchase decisions depend on whether the purchase price compares favorably with the reference price.”); Joel E. Urbany et al., The Effect of Plausible and Exaggerated Reference Prices on Consumer Perceptions and Price Search, 14 *J. Consumer Res.* 95 (1988).

²⁰ See Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 1.1, at 4 (3d ed. 2005) (“A reservation price is the highest amount that a consumer is willing to pay for a product.”); Russell Korobkin, Aspirations and Settlement, 88 *Cornell L. Rev.* 1, 5 (2002) (“In any bargaining situation, negotiators have a reservation price, defined as the maximum amount the negotiator is willing to give up or the minimum amount the negotiator is willing to accept, as the case may be, to consummate a transaction.”).

²¹ See Steven S. Posavac, Overbidding in Value Elicitation: When Consumers Report Inflated Reservation Prices, and What to Do About It, 11 *J. of Consumer Psychology* 87, 87 (2001) (“Estimating consumers’ reservation prices, or maximum willingness to pay, for goods and services is an important endeavor for both marketers and economists involved in public policy decision making.”).

the existence of the rebate,²² and *rebate-independent* purchasers — those who purchase a product without being influenced by the existence of the rebate.²³ Rebate-dependent purchasers can further be broken down into intended redeemers —those who estimate their probability of redeeming at 100%, and probabilistic redeemers — those who estimate their probability of redeeming is less than 100% but still sufficient to merit purchase.²⁴

To illustrate, let us assume that a product is being sold for \$100, with a \$20 mail-in rebate. The seller’s reservation price, the lowest price that he will accept, is \$80, the shelf price less the possible rebate amount. Further assume that there are four consumers in the marketplace, each with different reservation prices as indicated in the following chart.²⁵ Finally, for present purposes, assume that all of the parties are wealth-maximizing decision-makers and that the price of the product is the only factor being considered in the purchase decision.

Table 1

Party	Reservation Price
Seller (S)	\$80
Consumer #1 (C₁)	\$110
Consumer #2 (C₂)	\$90
Consumer #3 (C₃)	\$90
Consumer #4 (C₄)	\$50

²² See Silk, *supra* note __, at 5.

²³ See *id.*

²⁴ See *id.*; Silk & Janiszewski, *supra* note __, at 6; see also Gourville & Soman, *supra* note __, at 4.

²⁵ Perhaps the least realistic assumption embedded in this hypothetical is that the transaction itself or the seller’s pricing strategy does not affect the buyer’s reservation price.

C₄'s reservation price, the most that C₄ will pay (\$50), is below S's reservation price (\$80), the lowest price that S will accept. As there is no price that is acceptable to both S and C₄, with or without the rebate, no sale will occur between these two parties. In contrast, we can assume that C₁ would make a *rebate-independent* purchase because the price without the rebate (\$100) is less than C₁'s reservation price of \$110. This is not to say that C₁ will not be pleased to see that the rebate is being offered and that he may not attempt to redeem the rebate after purchase; if he does so, we would refer to him as an "opportunistic redeemer,"²⁶ because his initial purchase decision was not influenced by the existence of the rebate. On the other hand, if he does not intend to redeem the rebate, then he would be an intended non-redeemer, a rebate-independent consumer who purchases a product that is offered with a rebate without the intention to redeem the rebate.²⁷

Finally, S may make the sale to C₂ and C₃. Recall that both have reservation prices of \$90, so neither would make the purchase at the original, pre-rebate shelf price of \$100. But the \$80 "strike price"²⁸ (price after rebate) is less than their reservation prices. If C₂ believes with 100% certainty that she will redeem the rebate and decides to make the purchase on this basis, she is a *rebate-dependent* purchaser and intended redeemer.²⁹ In contrast, let us assume that C₃ is not certain, at the time of purchase, that she will redeem the rebate; she thinks that there is a 60% chance that she will do so. She is, thus, a probabilistic redeemer, and if she purchases the product because of the rebate, she too would become a rebate-dependent purchaser.

²⁶ See Silk, *supra* note __, at 5-6; Silk & Janiszewski, *supra* note __, at 6.

²⁷ *Id.*

²⁸ See Silk & Janiszewski, *supra* note __, at 7.

²⁹ Whether such a decision is necessarily economically rational will be bracketed here. For present purposes, it is sufficient to state that some consumers will decide to purchase a good because of the existence of a rebate.

3. *Rebate Non-Redemption*

a) Rebate Redemption Terminology

A brief survey of rebate redemption terminology is necessary before discussing redemption rates, since the terminology is used inconsistently in the literature. When a good is sold with a rebate, the rebate redemption rate is the number of successful redemptions divided by the number of units sold.³⁰ If 1,000,000 sales are made and 300,000 consumers successfully redeem their rebates, then the rebate redemption rate is 30%. Incremental sales are the number of sales that would not have been made but for the existence of the rebate offer.³¹ For example, if a seller predicts that he would sell 750,000 units without a rebate, but the seller offers a rebate and sells 1,000,000 units, the incremental sales in this case are 250,000 units. “Breakage” is the failure of rebate-dependent purchasers to complete and send their rebate reward requests.³² This definition excludes rebate-independent purchasers who do not attempt to redeem. Breakage also does not include rebate-dependent and rebate-independent purchasers who try unsuccessfully to redeem a rebate. At least three groups of consumers fall into this category. First, we have purchasers who attempt to redeem their rebates, but fail to satisfy the technical requirements of the rebate offer, resulting in a disqualification from the promotion and a forfeiture of their rewards.³³ This group is captured by the *rejection rate* — the percentage of rebate requests that are denied due to purported consumer failure in the redemption process.³⁴ Second, some

³⁰ See Silk, supra note __, at 5.

³¹ See Silk & Janiszewski, supra note __, at 5-8.

³² See Silk & Janiszewski, supra note __, at 9 n. 7 (“Breakage is the industry term for rebate-triggered (i.e., rebate-dependent) purchasers that fail to redeem the rebate.”); Silk, supra note __, at 2 (“[B]reakage ... occurs when consumers are enticed to purchase as a result of a rebate offer but subsequently fail to apply for the reward.”).

³³ For example, the consumer may fail to include an original receipt or a bar code (“UPC”) from the product packaging with the rebate request, thus leading to a rejection of the rebate request.

³⁴ See Silk, supra note __, at 19 n. 1 (observing that “rejection rates typically range between 1% and 10% of submitted applications and can reach as high as 25%”); see also Spencer, supra note __ (noting rejection rate of 15% for one Nokia phone rebate promotion); TCA, <http://www.tcarebates.com/new-program.htm> (fulfillment center

consumers satisfy all of the rebate requirements and receive their rebate check, but simply fail to cash it within the time period allotted.³⁵ Third, some consumers appear to satisfy all of the rebate requirements but the manufacturer, seller or the rebate fulfillment center fails to honor the offer. Reasons for this failure might include the seller's financial insolvency, negligence in rebate processing or outright fraud in the rebate promotion.

It should be observed that news and marketing articles sometimes use the term "slippage" instead of breakage, but this term lacks definitional consistency and precision. It is not clear whether slippage is meant to be a synonym for breakage (covering only rebate-dependent purchasers who fail to redeem) or whether slippage is the overall non-redemption rate (covering rebate-dependent and independent purchasers).³⁶ To confuse matters even further, some

website observing that rejection rates should average 12-22%);

³⁵ See *infra* note ___ and accompanying text.

³⁶ A passage from an online dictionary illustrates this problem. It defines slippage as "[a] promotion marketing term that describes when a consumer purchases a product because of an associated incentive, such as a rebate, but does not send in the rebate form. Slippage is difference between the amount of incentives actually redeemed and the total possible redemptions if at 100%." <http://www.marketingpower.com/mg-dictionary-view4135.php>. But note that the two sentences from the definition differ in key respects. The first sentence limits its scope to rebate-dependent purchasers (those who are affected by the presence of the rebate offer), while the second sentence covers all purchasers, including those who are rebate-independent. Thus, it is not clear from these formulations whether the concept of slippage embodies more than the overall non-redemption rate. Other published definitions vary in the extent to which they make clear whether slippage is limited to rebate independent consumers. Compare Bowman, *supra* note ___, at 196 ("[E]xperienced marketers know that more consumers buy a product to get the refund but for some reason never follow through. . . . This is called slippage — the amount of product purchased by consumers who bought the product in response to the offer but never took advantage of it."); Marvin A. Jolson, et al, *Correlates of Rebate Proneness*, 27 *J. Advertising Research* 33, 34 (1987) (defining slippage as "the proportion of consumers who are enticed to purchase as a result of the rebate offer but fail to request refunds to which they are entitled") with Peter K. Tat & C.H.Schwepker, Jr., *An Empirical Investigation of the Relationships Between Rebate Redemption Motives: Understanding How Price Consciousness, Time and Effort, and Satisfaction Affect Consumer Behavior*, 6 *Journal of Marketing Theory and Practice* 61, 62 (1998) (defining the slippage rate as the "percentage of consumers who fail to send in the refund request from among would-be rebate seeking customers"). It is not clear, however, who exactly falls into the category of "would-be rebate seeking customers," and whether this term includes both rebate-dependent and rebate-independent consumers. In another article, Peter Tat refers to the slippage rate as "the percentage of consumers who fail to send in the refund request." Peter K. Tat, *Rebate Usage: A Motivational Perspective*, 11 *Psychol. & Marketing* 15, 17 (1994). This would seem to include both rebate-dependent and rebate-independent consumers.

observers have referred to a distinct phenomenon — consumers’ failure to cash their rebate checks — as slippage.³⁷

b) Rebate Redemption Rates

Reliable rebate redemption rate data are difficult to obtain;³⁸ few industry insiders have systematically studied such matters and those with access to such information are not eager to make it public.³⁹ Based on a survey of rebate fulfillment centers, marketing scholars Tim Silk and Chris Janiszewski state that rebate redemption rates on total sales ranged from 1.1% to

³⁷ See Oldenburg, *supra* note ___, at C10 (“Then there’s what the industry calls ‘slippage’ — the percentage of people who get a check and forget to cash it.”); Grow, *supra* note ___, at 34 (“Rebate checks that are never cashed are called ‘slippage.’”); TCA, <http://www.tcarebates.com/new-program.htm> (rebate fulfillment center website using term in this way); Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* § 4.6.3.2, at 221 (6th ed. 2004) (referring to slippage as “rebate checks that are never cashed”). Some observers contend that rebate checks appear to be junk mail, which can lead to their disposal. See James Gallagher, *Consumers Often Find Rebates Not Worth the Trouble*, *Augusta Chronicle*, December 16, 2003 (quoting Paul Richard, the executive director of the Institute for Financial Education); Richard J. Dalton, Jr., *Many Consumers Never Cash in on Rebates*, *Newsday*, January 23, 2005 (“Some consumers receive the rebate but then forget to cash the check, an oversight usually limited to rebates for \$10 or less.”) (quoting Tamara Pattison, vice president of products for Cairo.com, “a website providing deals at retailers”).

³⁸ Several newspapers, including the *New York Times*, *USA Today*, and the *Wall Street Journal* have relied on an industry analyst named Peter Kastner for a rebate redemption rate of 40%. See Kelli B. Grant, *Mail In That Rebate Fast*, *Wall Street Journal*, May 7, 2006; Lorrie Grant, *Rebates Motivate Consumer Choices; but Many Buyers Don’t Bother with the Paperwork*, *USA Today*, Mar. 1, 2004, at B6; Millman, *supra* note ___, at G9; Tugend, *supra* note ___, at C5. Kastner also appeared on the NBC nightly news on May 25, 2003. Consumer advocates picked up on Kastner’s 40% number as well. See Letter from Consumers Union to Governor Arnold Schwarzenegger Requesting Signature on SB 1154 (Figueroa), Request for Signature, available at http://www.consumersunion.org/pub/core_financial_services/001353.html (“[W]idely quoted estimates show that 60% of rebates go unfulfilled; 40 percent are never claimed and the other 20% are denied.”) (citing *NY Times*, April 17, 2003, quoting Peter Kastner of Aberdeen Group).

But the Aberdeen Group, with whom Kastner used to be associated, has denied ever researching rebates, leading one author to call the 40% number an “urban myth.” Sheryl Harris, *Avoiding the Pitfalls of Rebates*, *The Plain Dealer* (Cleveland, Ohio), Sept. 2, 2004, at C5 (citing Paula Rosenblum director of retail research at Aberdeen). In an email correspondence, Mr. Kastner (who is no longer with the Aberdeen Group) stated that he had not done any research on rebates. See e-mail (on file with the author). Yet, just recently Mr. Kastner, now a director at Vericours Inc., was quoted again in the *New York Times* and the *Wall Street Journal* on the issue of rebates. See Tugend, *supra*; Grant, *supra*.

³⁹ Tim Silk and Chris Janiszewski’s survey of rebate fulfillment centers contains a telling bit of support for this point: 80% of those surveyed indicated that they would benefit from additional research of rebates, but nearly 83% of respondents stated that they themselves would not supply data on past rebate promotions and almost 69% responded that they would not participate in a test market or field study. See Silk & Janiszewski, *supra* note ___, at 25 (tbl 1). While writing this paper, I became aware of a rebate study conducted by a private marketing consulting firm, NPD Group, but the costs of obtaining the study prevented me from reviewing its findings. See Baker, *supra* note __ (discussing study).

40.7%,⁴⁰ which is consistent with the wide range of rebate redemption estimates that one finds in scholarly works and press accounts.⁴¹ Perhaps not surprisingly, “promotion managers informed [Silk and Janiszewski] that redemption rates tend to be ‘very low’ when the reward is below \$10, that rebates of \$10 to \$20 on a \$100 software product range between 10% and 30%, and that redemption rates on consumer electronics average approximately 40%.”⁴² Redemption rates rise as the value of the rebate rises — one industry insider asserts that rebates of over \$50 garner a 66% redemption rate.⁴³ Unfortunately, rebate redemption rates can be misleading because they are distorted by the inclusion of two categories of consumers whose initial purchase decision are

⁴⁰ Silk & Janiszewski, *supra* note __, at 8.

⁴¹ See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1450 (1999) (stating that manufacturers offer rebates because “only five to ten percent of product purchasers actually redeem them” but “at the time of purchase ... consumers anticipate the rebate and perceive the sticker price as lower”) (citing William M. Bulkeley, *Rebates' Secret Appeal to Manufacturers: Few Consumers Actually Redeem Them*, Wall St. J., Feb. 10, 1998, at B1); Jolson, et al, *supra* note __, at 39 table 5(e) & 40 (self reported non-redemption rates of approximately 30%); Marlon Manuel, *Rebate and Switch: Money-Back Pitches Spur Sales Big Time, But the Promises Don't Always Pan Out*, Atlanta Journal Constitution, January 21, 2005, at G1 (“Only 5 percent of eligible consumers file for rebates, estimates Marlene Ferber, who's in charge of rebate delivery for ClientLogic, a Nashville processor.”); Mayer, *supra* note __, at E1 (citing marketing firm chairperson's estimate that “about 30 percent of consumers actually redeem rebates”); Bob Norberg, *Rebate Debate; Manufacturers Betting Consumers Won't Apply for Refunds*, The Press Democrat, October 28, 2002 at D1 (asserting that redemption rates are “just a few percentage points for rebates of less than \$10” and “100% for rebates of \$100 or more”) (quoting Tom Edwards of NPD Techworld, a market research firm); Silk, *supra* note __, at 7 n. 2 (“Redemption rates typically range from 2% to 40% depending on the product category.”); Spencer, *supra* note __ (“Only 5% of offers are claimed by consumers, which allows companies to advertise low prices without having to absorb the cost of a flat-out price cut. Claim rates rise with the value of the rebate, but even on electronics, redemption rates are still only 40% on average, according to BDS Marketing.”); Tat & Schwepker, *supra* note __, at 62 (citing 47 percent slippage rate); Vinzant, *supra* note __ (“Even with the most attractive rebates, 10 per cent of consumers fail to get their act together to turn in the form. Often the failure rate tops 90 per cent.”).

⁴² See Silk & Janiszewski *supra* note __, at 5; see also Mayer, *supra* note __; TCA, <http://www.tcarebates.com/new-program.htm> (fulfillment center website noting that “[w]hen the dollar amount is below \$10, redemption rates decrease sharply”); Vinzant, *supra* note __ (“noting that the rebate redemption “success rate goes up as the rebate gets more valuable”).

⁴³ See Mayer, *supra* note __, at E1 (“Britt Beemer, chairman of the consumer behavior marketing firm America's Research Group, estimates that about 30 percent of consumers actually redeem rebates. The lower the dollar value of the rebate, the lower the redemption rate, with rebates above \$50 sometimes garnering a 66 percent redemption rate, he said.”); see also Block, *supra* note __ (quoting Beemer). Due to high redemption rates one prominent Internet retailer, Cyberrebates, went into bankruptcy after offering many products that were free after rebate. Peter Edmondson, *Free-With-Rebate Costs Web Buyers Some Big Bucks*, Wall Street Journal, May 18, 2001, at B1.

not motivated by the presence of the rebate offer: intended non-redeemers and opportunistic redeemers.⁴⁴ This presents problems for those designing rebate promotions:

In an ideal world, a manager would be able to monitor redemptions by opportunistic redeemers and rebate-dependent purchasers so as to learn how to discourage the former and encourage the later. Unfortunately, most firms do not have access to this level of specificity in their redemption data. Still, most firms are able to estimate the incremental sales owing to a rebate promotion. As such, a metric of *redemptions/incremental sales* can be computed. Although this metric includes opportunistic redemptions in the numerator, it is still a more diagnostic metric than the redemption rate on total sales.⁴⁵

Questions regarding overall rebate redemption rates naturally leads to one of the most important empirical questions regarding rebates: How much breakage occurs? Unfortunately, this is not an easy question to answer.⁴⁶ A firm can easily judge how many sales were made and how many rebates were successfully redeemed. But breakage involves non-redemption by rebate-dependent purchasers, and consumers do not identify their redemption intentions at the time of purchase. Moreover, questioning consumers after they have failed to redeem their rebates presents self-reporting problems because they may rationalize their failure to redeem by suggesting that they did not intend to redeem at the time of purchase or they may not remember their intentions at the time of purchase.⁴⁷ With this in mind, industry insiders have estimated that 63.5% of non-redeemed rebates are due to breakage,⁴⁸ and 36.5% of rebate non-redemption is due to intended non-redemption.⁴⁹ A series of experimental studies conducted by Tim Silk using undergraduate students arrived at significantly different estimates of breakage. Three of Silk's

⁴⁴ Silk & Janiszewski, *supra* note __, at 7-8; Silk, *supra* note __, at 6-7.

⁴⁵ *Id.*

⁴⁶ See Silk, *supra* note __, at 7 (“[R]esearch has yet to obtain accurate measures of breakage.”).

⁴⁷ See *id.* at 8 (discussing self-reporting of breakage found in Jolson, *supra* note __).

⁴⁸ This was the mean estimate from a survey of rebate fulfillment centers. See Silk & Janiszewski, *supra* note __, at 4-5, 9 & 25 tbl. 1.

⁴⁹ *Id.*

experiments, which varied required redemption efforts and rebate amounts,⁵⁰ generated breakage rates of 33%,⁵¹ 26%,⁵² and 16%,⁵³ respectively. These percentages are considerably lower than the estimates by industry insiders noted above. The upshot is that more empirical work needs to be done to establish the proportion that breakage (non-redemption by rebate-dependent purchasers) constitutes of all rebate non-redemption. There is no doubt that breakage is a significant phenomenon, but the exact extent of breakage remains unknown, a fact that regulators and legislators may wish to consider before they attempt to intervene in the rebate process.

B. The Purposes of Rebate Promotions

1. *Common Justifications for Rebate Promotions*

Fully understanding the legal issues involving rebates requires an understanding of why firms use rebate promotions. Common explanations for offering rebates include increasing in-store traffic, introducing consumers to a new brand, generating or reinforcing brand loyalty, and meeting sales goals for a particular period.⁵⁴ In a sense, though, these generic reasons could

⁵⁰ Silk attempted to isolate breakage from non-redemption by offering a purchase that was only attractive with the rebate offer. See Silk, *supra* note __, at 22.

⁵¹ Silk, *supra* note __, at 30, 32, fig. 9 at 36.

⁵² *Id.* at 39.

⁵³ *Id.* at 48. This study involved repeat purchasers. *Id.*

⁵⁴ See Abdul Ali, Marvin A. Jolson & Rene Y. Darmon, A Model for Optimizing the Refund Value in Rebate Promotions, 29 *J. of Bus. Research* 239, 239 (1994) (noting that there are “four basic mechanisms by which promotions contribute incremental sales: brand switching, repeat purchasing (rebuys), purchase acceleration and category expansion) (citing Robert C. Blattberg & Schott A. Neslin, *Sales Promotion: Concepts, Methods and Strategies* (1990)); Ramon A. Avila, Joseph D. Chapman & Teresa K. Avila, An Exploratory Study on Consumers’ Attitudes Toward Rebates, 12 *Developments in Marketing Science* 273, 273 (1989) (rebates build product loyalty) Peter K. Tat et al., Consumer Perceptions of Rebates, 28 *Advertising Res.* 45 (1988) (“Rebates are effective in creating new users, brand switching, and repeat purchases among current users of a product...”); Peter K. Tat & C.H.Schwepker, Jr., An Empirical Investigation of the Relationships Between Rebate Redemption Motives: Understanding How Price Consciousness, Time and Effort, and Satisfaction Affect Consumer Behavior, 6 *Journal of Marketing Theory and Practice* 61, 69 (1998) (“Rebates are typically offered to entice the consumer to try a new product, or to increase sales in the face of competition.”); Peter K. Tat & C.H.Schwepker, Jr., An Empirical Investigation of the Relationships Between Rebate Redemption Motives: Understanding How Price Consciousness, Time and Effort, and Satisfaction Affect Consumer Behavior, 6 *Journal of Marketing Theory and Practice* 61, 69 (1998) (“Manufacturers are also interested in having consumers redeem rebates because it affords the manufacturer the opportunity to make a positive statement about the product, service, or company.”); Wee, *supra* note __ (“Rebates have the power to instantly generate high customer traffic in retail stores. If the rebates are advertised

justify many marketing methods. Given the administrative costs of rebate promotions,⁵⁵ one might ask whether a straight sale or a coupon with immediate redemption might be less costly methods for accomplishing these objectives.⁵⁶ However, rebates offer firms advantages over a price cut or an incentive with immediate redemption. First, firms may prefer to use marketing strategies that do not have a long-term affect on consumers' perceptions of the "regular" sale price of a product.⁵⁷ Two scholars explain:

Rebates permit firms to lower prices temporarily without unduly affecting consumers' perception of the normal sale price. The advantage of a rebate over a price cut for stimulating demand is that a rebate is a temporary inducement which can be taken away without altering the basic structure. Pricing experts have discovered that people are more sensitive to price increases than to price decreases. Thus, the manufacturer who decides to reduce prices to increase demand for a short period of time and later raises prices to former levels, will meet more resistance than if a rebate method of price discounting is used. The manufacturer has the best of both worlds when using rebates; price can be temporarily reduced without reducing the upper price threshold. Because price marked on the product never changes, the consumer is less resistant to paying the usually marked price once the rebate is discontinued.⁵⁸

outside the store premises, the customer traffic is made up of purposeful shoppers who are drawn to the store to buy the special offers."); see also Bowman, *supra* note __, at 22-25 (discussing promotion objectives for "refunds").

⁵⁵ See Ali, et al., at 240 ("The incremental costs incurred in rebate promotion include advertising, distribution, and redemption processing costs, in addition to the promised refund."); Vinzant *supra* note __ ("A store offering a rebate must pay a fulfillment centre anywhere from 40 cents to \$1.75 U.S. to process each claimed rebate."). It should be noted that coupon promotions also carry administrative costs. See Bowman, *supra* note __, at 201-06.

⁵⁶ See Ramon A. Avila & Teresa K. Avila, *Rebates: An Ethical Issue?*, 1 *Mid. American J. of Bus.* 41, 43 (1986) ("Instant rebates would eliminate many of the difficulties currently experienced as consumers would receive immediate recognition of their purchase and an immediate refund."); Vinzant, *supra* note __ ("The store doesn't have any good reason to offer a rebate, since it could just as easily have a sale— if in fact it wanted you to have the product at a lower price."). These reasons are stronger when it comes to manufacturers. See Vinzant, *supra* note __ ("When a manufacturer offers a rebate, you needn't be too suspicious. The manufacturer wants to lower the price temporarily (to move an old product or combat a competitor's new low price), but doesn't have faith that the retailer will pass on the savings.").

⁵⁷ Keeping a list price high may lead consumers to believe that the product sold with a rebate at a higher list price is superior in quality to a good offered without a rebate, even if the net price to consumers is the same. See Lynda Wee, *Can Asian Retailers Deploy Rebates As a Successful Sales Tactic?*, *Retail Asia*, October 31, 2003. But this does not explain why retailers or manufacturers would prefer a mail-in rebate over an immediate incentive.

⁵⁸ Avila & Avila, *supra* note __, at 41 (citations omitted); see also Ramon A. Avila, Joseph D. Chapman & Teresa K. Avila, *An Exploratory Study on Consumers' Attitudes Toward Rebates*, 12 *Developments in Marketing Science* 27, 273-74 (1989) (making same point); TCA, <http://www.tcarebates.com/new-program.htm>.

Second, the rebate redemption process can be a method of gathering potentially valuable information about customers, which can be used along with other available data for direct marketing and advertising purposes.⁵⁹ Peter K. Tat and C.H.Schweper note: “[W]hen the consumer redeems the rebate the manufacturer has the opportunity to provide important promotional information to the consumer. Indeed, some companies are finding that the consumer can be reminded about complimentary products or on-going sales or product information by providing appropriate information along with the rebate check.”⁶⁰ For example, a computer manufacturer might use contact information on recent buyers to market additional software and computer peripherals to targeted consumers. In addition, firms can learn how much consumers spend during trips to different types of retailers, what types of products are purchased together, and whether shopping patterns vary in different store locations.⁶¹ This information may be useful for designing future sales and promotions. A seller who learns that consumers who buy a computer printer often buy a ream of paper along with the printer, might offer a special

⁵⁹ See Peter K. Tat & C.H.Schweper, Jr., An Empirical Investigation of the Relationships Between Rebate Redemption Motives: Understanding How Price Consciousness, Time and Effort, and Satisfaction Affect Consumer Behavior, 6 *Journal of Marketing Theory and Practice* 61, 69-70 (1998) (“[N]ames and addresses obtained from consumers who redeem rebates provide valuable information for a company’s customer data base.”); David Becker, CNET News.com available at <http://news.com.com/2100-1040-965514.html?tag=nl> (“Rebates work as well as actual price cuts in driving store traffic, but they have the added benefit for the publisher of providing useful customer information from completed rebate coupons.”); Sovern, Transaction Costs, supra note __, at 1702 (“[M]erchants might attempt to rationalize the use of rebates by arguing that they generate mailing lists of consumers who have purchased a particular product, and that such mailing lists are valuable.”) (footnotes omitted) (citing P.J. Huffstutter, *O.C. Tech Beat; Freeafterrebte.com Offers What Name Says for the Record*, Los Angeles Times, July 12, 1999 at C1; Ellen James Martin, *100 Years of Cutting Along the Dotted Line; Cents-able: Since the First 5-Cents-Off a Glass of Coke Offer, Coupons Have Saved Americans \$4.8 Billion a Year*, Balt. Sun, Dec. 27, 1995, at 1E; Stuart Silverstein, *As Rebates Spread, Some Consumers Fume; Marketing: PC and Electronics Makers and Sellers Have Joined in the Promotional Trend, But Sometimes the Money Doesn’t Arrive for Months — Or at All*, Los Angeles Times, Dec. 13, 1998 at C1)); Wee, supra note __ (“Rebate forms provide information about the consumers and their consumption patterns. For customers who complete their rebates application, these completed forms are a good source for building customer database [sic].”).

⁶⁰ Tat & Schweper, supra note __, at 69; see also Joseph B. Treaster, Rebates May Save Money, Just Maybe Not for You, N.Y. Times, Sept. 20, 2000, at H10 (rebate information can help firms “sell something else,” “determine whether they are reaching their target audience,” and enable the seller to “persuade customers to try a product that they might otherwise have passed up”).

⁶¹ See TCA, <http://www.tcarebates.com/new-program.htm>.

combination printer/paper deal or might simply display paper closer to the printers to induce purchase. The direct marketing facilitated by rebates need not only benefit sellers; it also could benefit consumers who are eager to learn about special deals and promotions offered by companies from whom they are purchased goods or services in the past.⁶² The third and most important reason for using rebates, rather than instant incentives, is to engage in price discrimination. The next subsection addresses this point.

2. *Rebates as Price Discrimination*

It has become conventional wisdom within the marketing literature that rebates facilitate economic price discrimination⁶³ — the sale of the same good or service at different prices to different consumers based upon their willingness to pay.⁶⁴ The basic idea is that the consumers' willingness to spend the time and effort to redeem a rebate can serve as a proxy for price sensitivity or willingness to pay. Consumers who are less price-sensitive presumably are less likely to redeem rebates, while those who are more price-sensitive are more likely to redeem

⁶² Though there are costs to consumers as well, such as sorting through a deluge of unwanted special offers.

⁶³ See Yuxin Chen, Sridhar Moorthy & Z. John Zhang, Price Discrimination After the Purchase: Rebates as State-Dependent Discounts, 51 *Management Science* 1131, 1131 (2005); Chakravarthi Narasimhan, A Price Discrimination Theory of Coupons, 3 *Marketing Sci.* 128 (1984).

⁶⁴ Economists provide a more precise definition of price discrimination. See Hal R. Varian, Price Discrimination, in 1 *Handbook of Industrial Organization* 597, 598 (Richard Schmalensee & Robert Willig eds., 1989) (explaining that economic price discrimination occurs “when two or more similar goods are sold at prices that are in different ratios to marginal costs”) (citing George Stigler, *Theory of Price* (1987)). For examples of the economics literature on price discrimination, see Lars A. Stole, Price Discrimination in Competitive Environments (unpublished University of Chicago GSB Working Paper, Nov. 7, 2003, forthcoming in the *Handbook of Industrial Organization*, available at <http://gsblas.uchicago.edu/papers/hio-disrib.pdf>); Jean Tirole, *The Theory of Industrial Organization* 133-152 (1988); Louis Phipps, *The Economics of Price Discrimination* (1983); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 290-308 (4th ed. 2005). Helpful law review treatments can be found in Mark Klock, Unconscionability and Price Discrimination, 69 *Tenn. L. Rev.* 317 (2002); Michael J. Meurer, Copyright Law and Price Discrimination, 23 *Cardozo L. Rev.* 55 (2001); Marcel Kahan & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 *Cornell L. Rev.* 1205 (2001). In addition, an overview of economic price discrimination can be found in Matthew A. Edwards, Price and Prejudice: The Case Against Consumer Equality in the Information Age, 10 *Lewis & Clark L. Rev.* ____ (forthcoming 2006). The term price discrimination also has a legal meaning, which is quite different. See *id.* at ____.

rebates. Therefore, by offering a product with a rebate, the manufacturer effectively sells the same product at two different prices.⁶⁵ As one article explains:

According to the conventional theory, rebates are a marketing tactic that sellers use to price discriminate between high and low reservation price consumers. The seller sells at the shelf price to those willing to pay more for the product, and at a lower, rebated price to those willing to pay less, achieving the necessary separation between the two groups by relying on the higher costs of redeeming rebates faced by high reservation price consumers.⁶⁶

This point can be illustrated with another simple example. Assume that the seller's reservation price, the lowest price that he will accept for a particular good, is \$80, and we have three consumers in the marketplace, Grover, William and Betty, with reservation prices of \$100, \$90 and \$80 respectively.⁶⁷ The total consumer's surplus available is the difference between the least that the seller would accept from these three buyers (\$240) and the most that they would pay (\$270).⁶⁸ If the seller could engage in first-degree or perfect price discrimination,⁶⁹ he would sell the items for a total of \$270 (the sum of the buyers' reservation prices) and obtain the entire

⁶⁵ See Avila, et al., *supra* note __, at 274 (“In many instances it appears that manufacturers increase demand for their product virtually without cost, while consumers are led to believe that they are getting a price deal.”); Avila & Avila, *supra* note __, at 42; Steven P. Croley & Jon D. Hanson, What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability, 8 *Yale J. on Reg. L.* 34 (1990) (“[M]odern marketing techniques, including coupons and consumer rebates, are easily and often directed at particular subgroups of consumers and have the effect of offering the same products to different consumers at different prices.”); Sovern, Transaction Costs, *supra* note __, at 1639 (“It appears that manufacturers employ rebates chiefly because they increase sales by creating an illusion of a lower price while the transaction costs they generate permit manufacturers effectively to charge the unrebated price to most consumers.”). But see Eitan Gerstner & James D. Hess, Who Benefits From Large Rebates: Manufacturer, Retailer or Consumer, 36 *Economics Letters* 5, 5 (1991) (observing that price discrimination is not a reasonable explanation for dollars-off rebates since most consumers are likely to redeem them).

⁶⁶ See Chen, Moorthy & Zhang, *supra* note __, at 1131.

⁶⁷ This basic example comes from Edwards, *supra* note __, at __.

⁶⁸ See Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 70 (4th ed. 2005) (“Typically, consumers value the goods they purchase above the amount they actually pay for them. Consumer surplus is the amount the price paid that a consumer would willingly spend, if necessary, to consume the units purchased.”); Richard A. Posner, *Economic Analysis of Law* 279 (6th ed. 2003) (“Consumer surplus is a measure of the aggregate value that consumers attach to a product over and above the price they pay for it.”).

⁶⁹ See Edwards, *supra* note __, at ____ (under first-degree or perfect price discrimination “the seller extracts the entire consumer surplus by ‘charging a different price for each unit of the good so that the price charged for each unit is equal to the maximum willingness to pay for that unit’”) (quoting Hal R. Varian, Price Discrimination, in 1 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 597, 600 (Richard Schmalensee & Robert Willig eds., 1989)).

\$30 consumer's surplus. Assume, in contrast, the seller cannot determine the buyers' demand function, so he uniformly prices the item at \$80 and makes all three sales for a total of \$240. Since the consumers, in the aggregate, would have paid \$270 (the sum of their reservation prices), all \$30 of the consumers' surplus has been allocated to the buyers.

Rebates offer a potential solution. The seller can offer the product at \$100 with a \$20 rebate. Grover buys the product because both the shelf price (\$100) and the post-rebate price (\$80) satisfy his reservation price (\$100). William will buy the product if he believes that he has at least a 50% chance of redeeming the rebate,⁷⁰ since the post-rebate price of \$80 meets his reservation price of \$90. Betty, with a reservation price of \$80, will buy the product if she is certain that she will redeem the rebate, since the post-rebate price of \$80 meets her reservation price of \$80. So, three sales are made for a total of \$300. If all three buyers redeem their rebates, the average sale price will be \$80, which meets the seller's reservation price. The effect is basically the same as an \$80 uniform price: the buyers obtain \$30 of the consumers' surplus. In the terminology discussed earlier, Grover would be an opportunistic redeemer, William is a probabilistic redeemer, and Betty is an intended redeemer.⁷¹

Let us assume, however, that Grover does not redeem his rebate because he was a rebate-independent purchaser (his reserve price was met by the shelf price), while the rebate-dependent purchasers, William and Betty, both redeem their rebates. In this case, the total sales prices will be \$260 (\$300 shelf price less two \$20 rebates). As opposed to the scenario with an \$80 uniform price (or 100% rebate redemption), the buyers only obtain \$10 of the consumers' surplus, the difference between what they were willing to pay (\$270) and what they actually paid (\$260).

⁷⁰ Assuming that we treat a 50% certainty of receiving a \$20 rebate as equivalent to a \$10 discount in the shelf price. See Gourville & Soman, *supra* note __, at 4.

⁷¹ See *supra* notes __ and accompanying text.

From the perspective of the seller, he has gained \$20 of the surplus, since he was willing to accept \$240, but has received \$260. The worst-case scenario for the seller (all three buyers redeeming) was at least as good as a fixed pricing scheme at \$80, while the best-case scenario had the seller obtaining a significant portion of the consumers' surplus. We can thus see why a seller might decide to offer a rebate as a method of price discrimination, assuming, of course, that the costs of administering a rebate program do not outweigh these benefits.⁷²

3. Rebates as Exploitation of Suboptimal Consumer Behavior

Even beyond the normal price discriminating function of rebates, it could be argued that another purpose of rebates is to enable firms to exploit the “irrational” failure of some consumers to redeem their rebates resulting in breakage.⁷³ Part III of this paper will address this argument in great detail. To use the example from above, the seller's reservation price, is \$80, and the consumers, Grover, William and Betty, have reservation prices of \$100, \$90 and \$80 respectively. The seller prices the item at \$100 with a \$20 rebate. What if all three consumers purchase the product but none of them redeem their rebates? (Put to the side why such arguably irrational behavior might occur.⁷⁴) The total sales price will be the \$300 (three times the \$100 shelf price), which actually exceeds their reservation prices (\$270). The seller has obtained the entire consumers' surplus (\$30), plus an additional \$30 — the difference between the price actually paid and the sum of the sellers' purported reservation prices — a “bonus” due to what might be considered a distortion in the demand curve.⁷⁵

⁷² See supra note ___ (discussing costs of administering rebate programs).

⁷³ See Jeffrey J. Rachlinski, Cognitive Errors, Individual Differences, and Paternalism, 73 U. Chi. L. Rev. 207, 227-29 (2006) (discussing distinction between socially beneficial price discrimination and marketing efforts to exploit cognitive vulnerability).

⁷⁴ See infra notes ___ and accompanying text.

⁷⁵ See Sovern, Transaction Costs, supra note ___, at 1684 (“Consumers who intend to seek the rebate but never bother, or fail in the attempt because they do not comply with arcane requirements, experience a distortion of their demand function.”); see also infra notes ___ and accompanying text.

II. CONSUMER COMPLAINTS ABOUT REBATES

Firms use rebates to stimulate sales, obtain marketing information and, most important, to engage in price discrimination. This raises the question: what is the problem? Why do consumers find rebates more objectionable than other marketing tools? This section begins to answer this question, by focusing on the most conventional complaints regarding rebates, while Section III will address more complex behavioral critiques of rebates.

A. Rebate Offeror Fraud, Negligence and Delay

The first complaint regarding rebates is the most straightforward: Consumers complain that rebate offerors and rebate fulfillment centers fail to honor valid rebate requests in a timely manner,⁷⁶ if at all. Frustrated with rebate payment delays, observers have even suggested that rebate offerors are hanging on to their money as long as possible, perhaps to earn additional interest.⁷⁷ Although there is undoubtedly some intentional malfeasance within the rebate industry,⁷⁸ it seems more likely that delays in payment to consumers are due to administrative incompetence not duplicity.⁷⁹ In particular, late payments from rebate offerors to fulfillment

⁷⁶ See Block, *supra* note __, at B3 (“Many consumers complain that rebates take months to arrive, or never show up.”).

⁷⁷ See Rae-Dupree & Spring, *supra* note __ (“‘With money in the bank, there is no hurry to pay the rebates,’ says Todd Fernandez, a financial analyst at Glass Lewis & Company. ‘Businesses can sit on consumer money [while it earns interest] for a quarter, or sometimes two--a great way to facilitate working capital.’”); Treaster, *supra* note __ (“‘Finally, the seller has an opportunity to earn interest on the money until the rebate is paid several weeks later, although some analysts say many manufacturers are not organized enough to put the check into an interest-earning account while the rebate is processed.’”).

⁷⁸ See Govern, *Transaction Costs*, *supra* note __, at 1642 (“One way to address rebates is to see them as a particular species of fraud and deal with them through existing common law deceit claims and deceptive trade practices legislation. Certainly some seller rebate practices violate these rules, *and perhaps all do.*”) (emphasis added and footnotes omitted); see also Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* § 4.6.3.2, at 221 (6th ed. 2004) (“Fulfillment houses that process rebates may even be paid a percentage of the ‘slippage,’ i.e., rebate checks that are never cashed, so they have an incentive to impede payment of rebates.”). But see Janet Rae-Dupree & Tom Spring, *Rebate Roulette: Still Waiting For That Check in the Mail? Here’s the Ugly Truth About Rebates — And How to Steer Clear of the Gotchas*, *PC World*, March 1, 2004, at 135 (comments by Frank Giordano, founder and CEO of TCA Fulfillment, disputing claims that the firm intentionally loses rebates and discussing his firm’s unsatisfactory rating with the metropolitan New York Better Business Bureau).

⁷⁹ See Fleck, *supra* note __ (“Other companies don’t set aside enough money for rebates, underestimating how many consumers will submit claim forms. But some deliberately make it difficult to redeem rebates by imposing complex

centers can result in delayed payment to consumers.⁸⁰ FTC attorneys have been quoted in the press on more than one occasion advancing the view, shared by industry consultants,⁸¹ that “most companies that fall short on rebate promises are poorly managed — not underhanded.”⁸²

Fraud is not involved in most rebate problems, Mr. Gold said. “The biggest problem is companies’ providing rebates late or not at all,” he said. “It’s not something we’re seeing that they’re doing intentionally — companies are not entering the rebate program with the intent to rip off — rather, it may be a small company that gets in over its head and may have offered a very generous rebate that it didn’t really prepare for.”⁸³

Finally, it is possible that legitimate disagreements between consumers and the rebate offerors as to whether a consumer has satisfied the rebate offer requirements can be perceived by consumers as untoward efforts to thwart rebate redemption. For example, a consumer might send

qualifying terms and conditions.”).

⁸⁰ See Tamara Chuang, *Consumers Like the Discounts. Retailers and Manufacturers Like the Sales Boost. But Nobody Likes the Rebate Paperwork*, Orange County Register, December 4, 2003, at Business 1 (“Most fulfillment centers won’t send out rebate checks until they’re paid by the manufacturer, which is where delays can set in. Some manufacturers pre-pay, but others won’t pay until the fulfillment center sends an invoice.”); Jonathan B. Cox, *The Lure of the Rebate Entices Many to Pay Full Price and Regret that They Didn’t Heed the Fine Print*, News and Observer, May 21, 2003, at F1 (“Checks can be delayed because fulfillment centers won’t send them until they have the necessary money from manufacturers.”); Fleck, supra note __ (“But increasingly, says Mike Leonard of the Continental Promotion Group in Scottsdale, Ariz., which handles rebates for more than 400 companies, some manufacturers are slow to pay the centers. ‘No fulfillment house sends out checks to the consumer until they’ve been paid,’ he says, adding that it’s an industry-wide problem.”); Millman, supra note __ (“‘Fulfillment houses have to wait to receive the rebate money from the manufacturers, and that can cause added delays.” (quoting Frank Giordano, president of TCA Fulfillment Service); Rae-Dupree & Spring, supra note __ (“[F]ulfillment houses can’t cut any checks until the sponsoring manufacturer or retail store hands over the rebate money, which can take anywhere from 15 to 90 days after the fulfillment company’s invoice date. If the sponsor pays the invoice with a paper check, the fulfillment house must wait several days for that check to clear before it can write any checks to consumers. Sometimes the manufacturer doesn’t pay the invoice at all.”)

⁸¹ See Oldenburg, supra note __, at C10:

Paula Rosenblum, director of retail research at Aberdeen Group, a Boston-based market research firm, doesn’t think companies are intentionally ripping off rebate customers. “They are expecting some percentage of consumers will space out and forget, some percentage won’t bother. And in some cases their requirements are so complicated -- like get the serial number off the hard drive you’ve already installed -- that the rebate won’t happen,” she says.” They are relying on that. But I don’t see a lot of malice. I don’t think they are intentionally not paying

⁸² See Fleck, supra note __ (“‘With larger companies, it’s more of a bureaucratic problem caused by a lack of planning,’ Gold says. ‘There’s some negligence involved, but I wouldn’t characterize it as anything stronger than that.’”); Rae-Dupree & Spring, supra note __ (quoting Matthew Gold).

⁸³ Tugend, supra note __; see also Spencer, supra note __ (“Part of the problem is that many companies aren’t equipped to follow through, says Michael Dershowitz, a senior attorney at the FTC. ‘They don’t realize the demand they’re creating,’ he says.”).

in a rebate request with a copy of a UPC code rather than an original as required by the terms of the rebate offer. If the rebate offeror or fulfillment center denies the rebate, the consumer may claim “fraud,” even if the rebate offeror believes that non-payment was warranted.⁸⁴

B. Intentional Complication of the Rebate Redemption Process

Commentators and consumers contend that firms intentionally complicate the rebate redemption process to: (1) increase the number of rebate requests that will be rejected on arguably valid grounds; and (2) reduce the number of consumers who will complete the redemption process.⁸⁵ This is one of the most enduring complaints about rebate programs, fueled by allegations of rebate instructions in tiny print,⁸⁶ unavailable rebate forms,⁸⁷ short redemption

⁸⁴ See Millman, *supra* note __ (“Manufacturers and companies that process rebates say they are being blamed for problems they do not cause. ‘Consumers complain because they don’t receive their rebates,’ said Frank Giordano, president of TCA Fulfillment Services in New Rochelle, N.Y. ‘Maybe that’s because they didn’t buy the right product, or bought it at the wrong time, or did not follow the submission rules.’”).

⁸⁵ See Avila, et al., *supra* note __, at 273 (discussing redemption requirements); Avila & Avila, *supra* note __, at 42 (same); Mary Hunt, *Be Vigilant About Filing For Product Rebates*, *The Cincinnati Post*, September 2, 2003, at B8 (“[T]he conditions can be so rigid that it becomes nearly impossible for the average consumer to comply. And that’s exactly the way they want it. Manufacturers have a vested interest in making the rebate process difficult. They’re hoping we won’t bother — that we’ll lose our proofs of purchase and miss our deadlines.”); Mike Langberg, *Consumer Relectronics Rebates Rife With Abuse*, *San Jose Mercury News*, December 17, 2004 (“This system gives the industry an ugly incentive to manage down the number of rebate requests it approves, by making the process of applying unnecessarily complicated and by using trivial technicalities to reject legitimate requests. No one keeps statistics on this, but I’ve heard too many horror stories not to believe there aren’t abuses in this largely unregulated system.”); Oldenburg, *supra* note __ (“[I]n some cases their requirements are so complicated -- like get the serial number off the hard drive you’ve already installed -- that the rebate won’t happen. They are relying on that.”) (quoting Paula Rosenblum director of retail research at Aberdeen Group, a Boston-based market research firm) (internal quotation marks omitted); Silk & Janizewski, *supra* note __, at 14 (“The academic literature and business press support the majority view that the effort and the complexity of the redemption task discourages consumers from redeeming rebate offers.”); Sovern, *Transaction Costs*, *supra* note __, at 1640 (“Commentators claim that some manufacturers, in an effort to make rebates even more profitable, impose time-consuming requirements on rebate applications largely to discourage consumers from submitting them.”) (collecting sources); Tat, *supra* note __, at (discussing complexity and time consuming nature of rebate redemption process); Tat et al., *supra* note __, at 45 (same).

⁸⁶ See Cox, *supra* note __ (discussing complaints over size of print in rebate instructions); Rae-Dupree & Spring, *supra* note __ (lack of contact information and size of type on rebate coupons presents problems for consumers).

⁸⁷ See Avila, Chapman & Avila, *supra* note __, at 273; Avila & Avila, *supra* note __, at 42. There are laws that address this. See *infra* notes __ and accompanying text.

deadlines,⁸⁸ and onerous or bizarre rebate offer requirements. A well-known Consumers Reports article from twenty years ago provides some of the most outlandish examples:

Valvoline offered a . . . rebate with the purchase of 12 quarts of motor oil. To collect, you had to send in a dated sales receipt for the 12 cans, plus the emblems from 7 cans — and you had to do it within 30 days of purchase. Stripping the emblem from the cardboard can require care: Cut too deep and the oil would leak out. . .

Elmer's used a similar theme with its silicone sealer: To get a \$1.50 rebate, you had to cut the price code from the tube and send it in before the expiration date. Nice — as long as you're using the whole tube right away.

Cepacol mouthwash has a subtle variation: To receive a \$1 refund, you had to fill out your name and address on a "certificate." But the space for the name was ¾-inch long, the space for the address even shorter.

The terms of the Kidde fire-extinguisher rebate were less subtle: you had to cut the price code from the carton. But there was no price code on the carton.⁸⁹

Outrageous examples of difficult to redeem rebates reinforce the notion that firms routinely try to induce breakage, but regulators and legislators must consider whether these are typical rebate offerings.⁹⁰ While it certainly can be annoying to save receipts⁹¹ and cut out UPC bar codes,⁹² on a "complexity spectrum," rebate submission hardly seems to be one of the more

⁸⁸ Rebate deadlines have also been shortened in an effort to increase breakage, see Silk, *supra* note __, at 8; Silk & Janiszewski, *supra* note __, at 22 (Managers also tell us that they fear increasing the length of redemption deadlines because they generally believe that giving consumers more time to redeem will increase redemption rates."). But it is not clear whether shorter deadlines have that effect. See *infra* notes __ and accompanying text.

⁸⁹ The Rebate That Isn't, *Consumer Reports* 67 (January 1986).

⁹⁰ For example, Jeff Sovern notes that one "manufacturer instructed consumers to hold a bottle under boiling water for five minutes to remove the neck label so it could be submitted to the manufacturer." See Sovern, *supra* note __, at 1641 (citing Edward J. Finn, *The Great Rebate Caper*, 131 *Sales & Marketing Mgmt.*, Oct. 10, 1983, at 43). Sovern is correct to note this admittedly ridiculous rebate requirement. But the article Sovern cites is from almost 23 years ago, and I think it is fair to ask whether marketing and rebate practices have evolved since then.

⁹¹ Sending in an original receipt can be problematic if the consumer has made multiple purchases that are reflected on the same receipt and he wishes to retain the receipt for the non-rebated goods. See Avila, Chapman & Avila, *supra* note __, at 274; Avila & Avila, *supra* note __, at 42.

⁹² Consumers may not want to remove the UPC code from a gift item. See Avila, Chapman & Avila, *supra* note __, at 274; Avila & Avila, *supra* note __, at 42. This does not deter some consumers. See DeGross, *supra* note __ (discussing consumers who cut out UPC symbol on gift to obtain \$50 rebate).

onerous consumer tasks, despite what comments in the press suggest.⁹³ In addition, focusing on outrageous rebate requirements ignores that sellers do have a legitimate interest in minimizing rebate fraud, which is the main reason why original receipts and UPC box codes are required in many rebate promotions.⁹⁴ Nevertheless, the counterargument to this point is simple: it does not matter whether or not rebate redemption requirements seem difficult in some objective sense; the point is that these requirements do in fact stimulate breakage and that they may go beyond what is necessary to prevent consumer rebate fraud. Before moving on, I want to make this point clear — I have little doubt that there are rebates that are difficult to redeem and such obnoxious practices should not be countenanced by the law. But arguments against rebates should not be based on a parade of horrors from over 20 years ago, but rather on an honest appraisal of current rebate practices.

⁹³ See Harris, *supra* note __ (“We can’t just blame ourselves, though, because some companies put on so many conditions that rebates are nearly impossible to collect. Some won’t accept copies of receipts, only originals, which if you buy other stuff, you may be loathe to part with. Some rules require you to perform a surgical procedure to cut UPC stickers off boxes - which may mean the manufacturer won’t take the item back if a problem develops. Others have long, involved forms to fill out.”). Given my lack of medical training, I suppose I should be proud of the surgery that I have performed on product boxes to get UPC codes.

⁹⁴ See Burns, *supra* note __ (rebate steps “greatly lower the chance of fraud”) (quoting Claire Rosenzweig, President of the Promotion Marketing Association); Chuang, *supra* note __ (discussing rebate fraud); Mohl, *supra* note __ (“[M]any manufacturers believed that collecting the UPC barcode was the best way to prevent consumers from collecting a rebate more than once or attempting to collect a rebate while returning the product for a refund.”) (quoting Jim Sherlock, director of sales and merchandise at Staples); Oldenburg, *supra* note __ (“[W]hat appear to be overly complicated procedures often are how manufacturers combat rebate fraud, in which criminals mass-produce rebate forms and redeem them.”) (quoting Tim Silk); Wee, *supra* note __ (rebate requirements minimize fraud); Cox, *supra* note __ (“Manufacturers require original receipts, box cutouts with product codes and other information to thwart fraud. Without such requirements, consumers could return a product after they request the rebate, bilking companies for millions or billions of dollars.”); Dan Zehr, *Rebates Can Be Alluring, But They Play Hard to Get; Most Consumers Don’t Send in the Forms, and Companies Count on It*, *Austin American Statesman*, August 30, 2004, at A1 (rebate requirements reduce fraud according to Brian Hatch general counsel at Continental Promotion Group, which handles rebates for Dell Computers); Bill Husted, *Cut It Our, Send It In: Use of Rebates Climbs As Spending Dwindles*, *Houston Chronicle*, January 27, 2003, at 4 (rebate requirements are fraud protection) (quoting Ken Bernhardt, professor of Marketing at Georgia State University).

C. Price Discrimination, Inequality and Market Power

Rebates facilitate price discrimination, which raises both consumer fairness and market power concerns.⁹⁵ First, one might argue that there is something inherently improper about differential or dynamic pricing simply because it is wrong to sell the same good to different consumers at different prices. Consumers certainly resent being charged more than other consumers for the same good or service but price discrimination against end-use consumers is not typically illegal,⁹⁶ and economists would oppose a blanket prohibition given that price discrimination can be either welfare enhancing or diminishing, depending on the context.⁹⁷ Price discrimination can enhance welfare by enabling a firm to sell its goods at multiple price points, thus opening the market to those consumers who would otherwise be unable to purchase the good under a uniform-pricing regime.⁹⁸

One could attempt to justify rebate regulation by arguing that rebate offerors, as practitioners of a form of price discrimination, possess market power, and that it is this market power that is objectionable and which requires remediation.⁹⁹ Building upon this theory, a critic

⁹⁵ This argument is included here to provide a comprehensive overview of possible consumer complaints against rebates. Although consumers do complain about differential or dynamic pricing generally, consumer rights advocates have not advanced the view that rebates, in particular, are objectionable because they facilitate differential pricing.

⁹⁶ See Edwards, *supra* note __, at __ (“Although it is often lawful, price discrimination is extraordinarily unpopular with consumers.”) (citing Jessica Davis, *American Consumers Will Force E-Tailers to Just Say No to Dynamic Pricing*, 22 *Info World* (Oct. 9, 2000); Ellen Garbarino & Olivia F. Lee, *Dynamic Pricing in Internet Retail: Effects on Consumer Trust*, 20 *Psychology & Marketing* 495, 501(2003); Michael E. Levine, *Price Discrimination Without Market Power*, 19 *YALE J. ON REG.* 1, 4 (2002)); see also James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 *Vand. L. Rev.* 2007, 2038 (2000).

⁹⁷ See Glen O. Robinson, *Personal Property Servitudes*, 71 *U. Chi. L. Rev.* 1449, 1506 (2004) (“As a matter of general economic theory, systematic price discrimination can be efficient or inefficient depending on whether it increases total output or merely reallocates output between buyers with different price elasticities.”). For a brief overview of this issue, see Edwards, *supra* note __, at ___.

⁹⁸ See Edwards, *supra* note __, at ___ (collecting sources).

⁹⁹ See Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory — And the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681, 726 (2003) (“[P]ricing above cost seems to meet a standard definition of market power, given the normal premise that firms in a competitive market price at marginal cost. Relatedly, standard analysis assumes that an ability to price discriminate implies the firm must have market

of rebates could conceivably take the position that rebates should be regulated or even prohibited because they demonstrate, per se, the existence of excessive market power. Although the “price discrimination equals market power” argument has appeal, in recent years, scholars have argued that price discrimination can indeed exist in competitive markets.¹⁰⁰ In any case, it seems rather audacious to argue that *all* rebate offerors have market power,¹⁰¹ given the multiplicity of markets in which rebates are offered.

III. A BEHAVIORAL CRITIQUE OF REBATES

A. Introduction

We have seen that consumers complain that firms affirmatively act to discourage rebate redemption through the imposition of onerous fulfillment requirements and claim that firms fail to honor legitimate rebate submissions in a timely manner. These are complaints about the manner in which rebate offerors administer rebate promotions. But one can make an argument that there is something inherently unfair about rebate promotions because some consumers will fail to redeem their rebates due to a variety of psychological phenomena that lead to “irrational” or sub-optimal rebate redemption behavior.¹⁰² As Jeff Sovern argues:

power.”) (footnotes omitted); Michael E. Levine, Price Discrimination Without Market Power, 19 YALE J. ON REG. 1, 3-4 (2002) (“In thinking about price discrimination, economists have historically constructed the following argument: In a competitive market, price equals marginal cost. Wherever there is price discrimination, price deviates from marginal cost. Therefore, if there is price discrimination, the market must not be competitive and there must be market power.”) (footnote omitted).

¹⁰⁰ See Jonathan Klick, The Microfoundations of Standard Form Contracts: Price Discrimination v. Behavioral Bias, 32 Fla. St. U. L. Rev. 555, 564 (2005) (“Although many discussions of price discrimination assume a significant degree of monopoly power on the part of the discriminator, price discrimination can exist in a zero-profit equilibrium in which total consumer welfare is improved relative to the nondiscriminatory case.”) (citing Jean Tirole, The Theory of Industrial Organization 139 (1988)); see also Edwards, supra note ___, at ___ (collecting sources on the welfare effects of price discrimination).

¹⁰¹ The precise relationship between “market power” and monopoly has been the subject of discussion in the antitrust literature. See Einer Elhauge, Defining Better Monopolization Standards, 56 Stan. L. Rev. 253, 257-60, 330-37 (2003); Andrew I. Gavil, Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act, 68 Antitrust L.J. 87, 102-03 (2000); Andrew I. Gavil, Integrating New Economic Learning With Antitrust Doctrine: Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance, 72 Antitrust L.J. 3, 11-14 (2004).

¹⁰² The existence of sub-optimal rebate redemption behavior does not necessarily mean that legal intervention is

[C]onsumers who purchase an item in the mistaken belief that they will obtain the rebate have suffered a distortion of their demand function; they have purchased an item they would not otherwise have bought. Consumers who submit the required form lose the time needed to complete the form; as discussed above, some of that loss is a dead weight loss to society. The result is that the benefit to the company is less than the loss to consumers.¹⁰³

The next subsections discuss situations in which rebate redemption is rational from a wealth maximizing perspective,¹⁰⁴ and then explore why suboptimal redeeming behavior occurs.

B. Rational Non-Redemption

Some decisions not to redeem rebates plainly can be considered rational if we assume that consumers are wealth maximizing.¹⁰⁵ First, we have consumers for whom the costs of redemption including redemption effort and opportunity costs¹⁰⁶ — outweigh the benefits of the

warranted. This paper largely brackets important, broader philosophical questions about when regulatory intervention is warranted based upon the teachings of behavioral economics. For discussions see Edward L. Glaeser, *Paternalism and Psychology*, 73 U. Chi. L. Rev. 133 (2006); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U.L. REV. 1245 (2005); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U L Rev 1165 (2003).

¹⁰³ Id. at 1704. Soeren argues that the harm goes beyond those who fail to redeem. See Soeren, *supra* note __, at 1685 (“Even consumers who obtain the rebate incur transaction costs that do not benefit society because they must comply with the requirements for the rebate. If the seller simply offered the product at a reduced price, consumers would not have had to fulfill any requirements to obtain the reduced price. Accordingly, the rebate comes at a dearer price than necessary.”); Id. at 1685 n. 173 (“Only consumers who purchase the item never intending to seek the rebate—that is, consumers who are willing to pay the higher price—suffer no losses because of the rebate offer.”).

¹⁰⁴ For an excellent overview of various forms of rational choice theory, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 Cal. L. Rev. 1051 (2000); see also Thomas Ulen, *Rational Choice in Law and Economics*, in *Encyclopedia of Law and Economics* 790 (Boudewijn Boukert & Geerit de Geest eds., 2000).

¹⁰⁵ For this discussion, I am assuming that consumers prefer to pay the least amount possible for a product, taking into consideration the costs of searching for and acquiring the product and redeeming any immediate and delayed incentives. This is not to imply that it would be irrational for a consumer to consider certain non-economic factors in the redemption process., such as the satisfaction that one receives from redeeming rebates. See Tat & Schwepker, *supra* note __, at 69 (“[S]atisfaction with redeeming rebates plays a pivotal role in determining whether the consumer will redeem rebates. . . . It appears that consumers who enjoy redeeming rebates are more likely to do so.”).

¹⁰⁶ The costs include finding the rebate and fulfilling the rebate requirements, such as filling out the rebate form, cutting out the UPC code from the package, and assembling and mailing the required materials to the rebate offeror or the rebate processing center. See Moorthy & Lu, *Coupons Versus Rebates*, *supra* note __, at 4.

Conceivably, a wealth-maximizing consumer could be irrationally rebate-independent. If the rebate amount outweighs the costs of rebate redemption, one might argue that the consumer is irrational for not redeeming her rebate, even if the existence of the rebate did not affect her initial purchase decision.

rebate reward.¹⁰⁷ A law firm partner who bills her time at \$800 per hour might decide that her time is better spent working on a major corporate transaction, rather than spending 15 minutes cutting out bar codes, copying receipts and filling in a form for a \$10 rebate.¹⁰⁸ In addition, recent work by Yuxin Chen, Sridhar Moorthy and Z. John Zhang suggests another class of rational non-redeemers¹⁰⁹ — consumers of experience goods¹¹⁰ who use rebates as “state dependent discounts”:¹¹¹

When consumers purchase an experience good on rebate, and consider subsequently whether to redeem the rebate, their redemption decision will depend on a number of things that were uncertain at the time of purchase. In particular, it will depend on the consumer’s marginal utility of income after purchase, which could vary depending on postpurchase consumption states. To the seller, this presents an additional opportunity for price discrimination — not price discrimination between consumers, but price discrimination within a consumer. It can leverage the variation in the consumer’s marginal utility of income to “utility arbitrage,” giving discounts when they are most valuable, and withholding discounts when they matter the least. The net result is an increase in the consumer’s up-front willingness to pay, which the seller can extract with a higher regular price.¹¹²

In this case, the consumer’s preference for wealth maximization remains constant, but the behavior necessary to meet this goal can change as the decision-maker obtains updated utility information in the post-purchase period.

¹⁰⁷ See Jolson, et al., *supra* note ___, at 36 (noting that benefits of rebates include money saving, astute shopping accomplishment, and utility provided by the product, while the “negatives” include refund processing efforts, opportunity costs of time, risk of untried brand and pre-need investment and storage).

¹⁰⁸ If the consumer gets an enormous amount of personal satisfaction from the rebate redemption process, one could say that she was acting as a rational maximizer if she chooses to redeem. But then the consumer is not wealth maximizing in the traditional sense as we are assuming here.

¹⁰⁹ See Chen, Moorthy & Zhang, *supra* note ___, at 1132 (“In our model, consumers are fully rational: they anticipate their future redemption behavior and take that into account when deciding whether to buy the product.”).

¹¹⁰ Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 5 (1999) (“Economists say that a good is an *experience good* if consumers must experience it to value it.”).

¹¹¹ See Chen, Moorthy & Zhang, *supra* note ___, at 1132.

¹¹² *Id.*.

C. Irrational or Sub-Optimal Non-Redemption

If we assume a consumer goal of wealth-maximization, a puzzle is created by rebate-dependent purchasers who fail to redeem their rebates.¹¹³ Since the redemption value of a rebate reward is fixed (it does not increase or decrease depending on when it is redeemed), wealth-maximizing consumers that have decided to redeem presumably would redeem their rebates as soon as possible after purchase. The longer that a consumer waits to redeem, the less that the rebate reward is worth.¹¹⁴ But we know that the facts do not bear this out; many consumers delay, and a significant percentage *never* redeem their rebates.¹¹⁵ This raises two related questions. First, why do some consumers fail to act on their previously formed intentions to redeem their rebates? Second, why do some consumers fail to incorporate their knowledge the possibility that they may not act their previously formed intentions into their decision-making process?

1. *Irrational Failures to Redeem: A Behavioral Account*

Various strands of economic and psychological literature suggest that that the fundamental structure of rebate promotions — a purchase with a delayed incentive — leads to sub-optimal consumer redemption behavior and breakage.¹¹⁶ This section will discuss

¹¹³ Assuming that the rebate reward exceeds the costs of redemption and there is no post-purchase change in their utility calculation. See *supra* ____.

¹¹⁴ See Samuel C. Thompson, Jr., *A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions*, 21 J. Corp. L. 457, 469 (1996) (“One of the basic principles of finance is that a dollar received today is worth more than a dollar received tomorrow. This is because a dollar received today can be invested today and begin earning an immediate return, whereas a dollar received tomorrow cannot be invested until tomorrow.”) (footnote omitted); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L.J. 1981, 2043 (1998) (stating same basic principle); Bernhard Grossfeld, *Global Financial Statements/Local Enterprise Valuation*, 29 J. Corp. L. 337, 350 (2004) (same).

¹¹⁵ See *supra* notes ____ and accompanying text.

¹¹⁶ Breakage can be optimal from a wealth-maximizing perspective if the initial decision to purchase a product due to the presence of an associated incentive was irrational.

scholarship on procrastination, overconfidence, prospective memory and temporal construal that supports this viewpoint.

a) Intertemporal Decision-Making and Procrastination

Decision-makers are regularly confronted with choices that will have an effect on their future well-being. We decide whether to eat chocolate cake today, knowing that it will affect whether we can fit into our favorite suit or dress for a special event next month.¹¹⁷ We choose whether to spend money today knowing that this will affect how much money we will have when (or if) retirement arrives.¹¹⁸ We decide whether to have an unpleasant dental procedure today knowing that it may prevent a more painful and costly emergency next year.¹¹⁹ Economists refer to “decisions involving trade-offs at among costs and benefits occurring at different times”¹²⁰ as *intertemporal choices*.¹²¹ Whenever we make an intertemporal choice, we are serving multiple masters — our present selves and all of our future selves.¹²² This leads to a fact with which we are all familiar:

¹¹⁷ See John G. Lynch & Gal Zauberman, When Do You Want It? Time, Decisions, and Public Policy, 25 J. of Pub. Pol’y and Marketing 67 (2006) (“A dieter may weigh the immediate pleasure of a luscious chocolate cake against short-term weight gain or long-term problems of obesity.”).

¹¹⁸ See *id.* (“A factory worker may weigh whether to replace a two-year old car with a shiny new model against driving an old car and saving for retirement.”).

¹¹⁹ See Manuel A. Utset, A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts, 2003 Utah L. Rev. 1329, 1357 (2003).

¹²⁰ Shane Frederick et al., Time Discounting: A Critical Review, 40 J. Econ. Lit. 351 (2002). This article was reprinted as Shane Frederick et al., Time Discounting: A Critical Review, in *Advances in Behavioral Economics* 162 (Colin Camerer, et al. eds. 2004).

¹²¹ Frederick et al., *supra* note __, at 351.

¹²² See Utset, *supra* note __, at 1349-50 (“The intertemporal decision-maker attempts to satisfy her ‘current self’ and her ‘future selves;’ she makes choices by taking into account both current and (expected) future preferences.”); see also Katherine J. Strandburg, Privacy, Rationality and Temptation: A Theory of Willpower Norms, 57 Rutgers L. Rev. 1235, 1242-43 (2005) The future is unknown, but economists assume “in situations that involve uncertainty, people have well-formed beliefs about how uncertainty will resolve itself, and when new information becomes available, they update their beliefs using Bayes’s law — the presumed ability to update probabilistic assessments in light of new information.” Camerer, et al, *supra* note __, at 1215; see also Camerer, *supra* note __, at 596 (Bayes’ rule represented as a formula).

People are impatient, they like to experience rewards soon and to delay costs until later. Economists almost always capture impatience by assuming that people discount streams of utility over time exponentially. Such preferences are *time-consistent*: A person's relative preference for well-being at an earlier date over a later date is the same no matter when she is asked.¹²³

But this economic model is incorrect. In reality, decision-makers do not exhibit time-consistent intertemporal preferences, as Ted O'Donoghue and Matthew Rabin observe:

[T]here is a mass of evidence that intertemporal preferences take on a specific form of time inconsistency: a person's relative preference for well-being at an earlier date over a later date gets stronger as the earlier date gets closer. In other words, people have self control problems caused by a tendency to pursue immediate gratification in a way that their "long-run selves" do not appreciate.¹²⁴

The classic self-control problem is procrastination, which can be defined in both economic and non-economic terms. According to the Nobel Prize winning economist George Akerlof: "Procrastination occurs when present costs are unduly salient in comparison with future costs, leading individuals to postpone tasks until tomorrow without foreseeing that when tomorrow comes, the required action will be delayed again."¹²⁵ Psychologists, in contrast,

¹²³ Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, in *Advances in Behavioral Economics* 223 (Colin Camerer, et al. eds. 2004) [hereinafter O'Donoghue & Rabin, *Doing It Now or Later*]; see also Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 *Quarterly Journal of Economics* 121, 125 (2001) ("The standard economic model assumes that intertemporal preferences are time-consistent: a person's relative preference for well-being at an earlier date over a later date is the same no matter when she is asked.") [hereinafter O'Donoghue & Rabin, *Choice and Procrastination*]; Herbert Gintis, *Beyond Homo Economicus: Evidence from Experimental Economics*, 35 *Ecological Economics* 311, 312 (2000) ("H. economicus has a rate of time preference that allows him to allocate consumption over time in a consistent manner, reflecting his welfare and his concern for the welfare of future generations."). Manuel Utset explains how economists model this:

Economists have traditionally modeled this impatience or time preference using exponential discounting, whereby future rewards decline in utility at a constant rate over time. In making an intertemporal choice, a decision-maker undertakes a cost-benefit analysis in which she discounts future costs and rewards to reflect the degree of her time-preference. A constant discount rate implies that after the individual has made her intertemporal choice, her preferences (from a time-preference point of view) will remain consistent over the relevant period — i.e., an individual's later preferences must coincide with her earlier preferences.

Utset, *supra* note __, at 1350-51 (footnotes omitted).

¹²⁴ O'Donoghue & Rabin, *Choice and Procrastination*, *supra* note __, at 124-25 (footnote omitted) (citing sources); see also Lynch & Zauberman, *supra* note __, at 73 ("Time-inconsistent preferences lead to problems of self control. The problem is that the same decision between smaller, sooner and larger, later rewards appears different when the smaller, sooner reward is close from when it is viewed as far off in time in either the future or the past.").

¹²⁵ George A. Akerlof, *Procrastination and Obedience*, 81 *American Economic Review* 1 (1991); see also

explain the phenomena of procrastination as “the lack or absence of self-regulated performance and the behavioral tendency to postpone what is necessary to reach a goal.”¹²⁶ Implicit in both the economic and psychological accounts of procrastination is that not all delay is procrastination. Sometimes it is logical for a decision-maker to take the time to obtain and assimilate information before acting.¹²⁷ A CEO who delays a week before deciding whether to oppose or support a major corporate transaction may be acting reasonably if she is waiting for relevant materials prepared by her subordinates. This delay conceivably could improve the quality of her decision making.¹²⁸ Similarly, a consumer might anticipate difficulty in returning a product without an original receipt or with the UPC code from the box cut out. Thus, he might decide to wait until he starts using the product before redeeming the rebate to make sure that he is satisfied with the product. Such delay would not constitute procrastination in the sense that concerns us here.

But some people delay even when it does not seem to generate a strategic advantage.

One clever explanation is that procrastinators may receive some short-term emotional benefits

O’Donoghue & Rabin, *Doing It Now or Later*, supra note __, at 233 n. 16 (“‘procrastination’ means that an agent chooses to wait when her long-run self . . . would choose to do it”).

¹²⁶ Angela Hsin Chun Chu & Jin Nam Choi, Rethinking Procrastination: Positive Effects of “Active” Procrastination Behavior on Attitudes and Performance, 145 *Journal of Social Psychology*, 245, 245 (2005); see also Joseph R. Ferrari & Dianne M. Tice, Procrastination as a Self-Handicap for Men and Women: A Task-Avoidance Strategy in a Laboratory Setting, 34 *Journal of Research in Personality* 73, 73 (2000) (referring to procrastination as simply “delay in the start and/or completion of a task”).

¹²⁷ See William J. Knaus, Procrastination, Blame and Change, 15 *Journal of Social Behavior and Personality* 153, 155 (2000) (“Not all delays represent procrastination. Strategic delays prove advantageous when part of the strategy involves gathering, sorting and absorbing vital preparation information.”).

¹²⁸ One must be careful about accepting the common procrastinator’s excuse that delay serves to improve the quality of the procrastinator’s work, as some studies show that this might not be so. See Diane M. Tice & Roy F. Baumeister, Longitudinal Study of Procrastination, Performance, Stress and Health: The Costs and Benefits of Dawdling, 8 *Psychological Science* 454, 457 (1997) (noting that procrastinators end up producing inferior work). Though there may be a class of “active” procrastinators who do thrive under pressure and accomplish their goals in an impressive fashion. See Chu & Choi, supra note __, at 247 (“Active procrastinators . . . like to work under pressure. When faced with last-minute tasks, they feel challenged and motivated, and that feeling immunizes them against the kind of suffering common in passive procrastinators.”)

from procrastination.¹²⁹ Watching television, reading blogs on the Internet, or playing with a neighbor's puppy, may be more fun than filling out rebate forms. Although this explanation suggests that procrastination can be utility maximizing, the short-term benefits of procrastination often prove ephemeral, and many procrastinators eventually suffer negative emotional reactions, such as low self-esteem, depression and anxiety,¹³⁰ especially as deadlines draw nearer.¹³¹ In sum, unlike Homo Economicus, people procrastinate and feel regret for their procrastination. We see this in the rebate context, where rebate dependent consumers may procrastinate until it is even too late to redeem and then regret their failure to obtain the rebate reward — though they may try to minimize these ego-threatening feelings by asserting after the fact that they never intended to redeem in the first instance.¹³²

b) Prospective Memory & Forgetting to Redeem

While procrastinators may put off redeeming (even until it is too late to redeem), other consumers just forget to redeem their rebates despite their original intentions to redeem.¹³³

Psychologists refer to remembering previously performed actions or events as *retrospective memory*, while remembering to perform actions is *prospective memory*.¹³⁴ If I ask you whether

¹²⁹ See Chu & Choi, supra note __, at 246 (“[C]ompared with nonprocrastinators, procrastinators experience less stress and have better physical health when deadlines are far off. In this sense, procrastination can be seen as a strategy that they use to regulate negative emotions.”) (citing Tice & Baumeister, supra note __, at 454-58).

¹³⁰ See Ferrari & Tice, supra note __, at 74 citing studies and noting that procrastination leads to “low self-esteem, self-confidence, and self-control and high states of perfectionism, noncompetitiveness, self-deception, dysfunctional impulsivity, depression, and anxiety.”); Chu & Choi, supra note __, at 246 (surveying advantages of nonprocrastination).

¹³¹ See Tice & Baumeister, supra note __, at 456 (“Procrastinators may enjoy a healthy, stress-free life when deadlines are far off, but they suffer more when deadlines are imminent.”); id. at 457 (explaining that the cumulative effect of procrastination on stress and health is negative).

¹³² See infra note ____.

¹³³ A person may be both a procrastinator and forgetful; a consumer could remember prior to the rebate deadline that she wanted to redeem the rebate, but then procrastinate until she actually forgets about redeeming.

¹³⁴ Gilles O. Einstein & Mark A. McDaniel, Retrieval Processes in Prospective Memory: Theoretical Approaches and Some New Empirical Findings, in *Prospective Memory: Theory and Applications* 115 (Maria Brandimonte, et al. eds 1996) (“*Prospective memory* is memory for actions to be performed in the future, such as remembering to

visited the Eiffel Tower during your recent visit to Paris, you will draw on retrospective memory to respond to this inquiry. If I ask you to pick up wine for tonight's party, this will be a prospective memory task. The terminology can be a bit misleading, though, since prospective memory (memory for intentions) includes prospective and retrospective components.¹³⁵ Remembering to remember is known as the prospective component, and remembering what to remember, is known as the retrospective component.¹³⁶ To use a common example from the psychological literature, in remembering to give a friend certain message — the prospective component is remembering that you have to pass along a message, while the retrospective component involves remembering the message itself.¹³⁷ A failure of either the prospective or retrospective component can lead to a failure to act on previously formed intentions.¹³⁸ Imagine that Mary intends to give a message to Jim that he is to bring a bottle of red wine to the party tonight. Mary might run into Jim and forget to tell him the message at all (“Oh, no! I just saw Jim and I forgot to tell him to bring the bring wine to dinner tonight”) or Mary might see Jim and remember that she was supposed to pass along a message but be unable to recall the content of the message (“Hey, Jim – I know that I was supposed to tell you to do something, but I can't remember what it was.”).

return a library book, give someone a message, perform your back exercises, and pick up the children at work.”); Melissa J. Guynn, et al, Remembering to Perform Actions: A Different Type of Memory, in *Memory for Action: A Distinct Form of Episodic Memory* 25 (2001).

¹³⁵ See Gilles O. Einstein & Mark A. McDaniel, Retrieval Processes in Prospective Memory: Theoretical Approaches and Some New Empirical Findings, in *Prospective Memory: Theory and Applications* 115 (Maria Brandimonte, et al. eds 1996).

¹³⁶ See H. Shanker Krishnan & Stewart Shapiro, Prospective and Retrospective Memory for Intentions: A Two-Component Approach, 8 *J. Consumer Psychology* 141, 143-44 (1999); Rebekah E. Smith & Ute J. Bayen, A Multinomial Model of Event-Based Prospective Memory, 30 *J. Experimental Psychology: Learning, Memory & Cognition* 756, 756 (2004).

¹³⁷ See Krishnan & Shapiro, *supra* note ___, at 143-44.

¹³⁸ See *id.* at 144.

As the example shows, there is a special challenge in the case of prospective memory — the lack of an external agent prompting remembering.¹³⁹ If Jim asks Mary whether he needs to bring anything to the party tonight, this will place Mary into “retrieval mode”¹⁴⁰ and activate certain mental processes that trigger remembering the message that she was supposed to deliver. On the other hand, if Mary and Jim are talking about a motion picture that they both watched, it is less likely that the reminder about the wine will come to mind (unless, perhaps, they are talking about the film, “Sideways”).¹⁴¹ Consumers face similar problems when redeeming rebates; the rebate offeror does not call you up and remind you to redeem your rebate. Thus, unless the consumer designs and implements some system on his own, the consumer’s memory must be triggered in the post-purchase period by an “event-based prospective memory cue”¹⁴² — a reminder of the consumer’s previously formed intentions.¹⁴³ For example, a consumer could keep her unredeemed rebate materials on a bulletin board in her office, so every day when she arrives at the office she will be reminded that she had planned on filling out the paperwork and sending them in. Hopefully, the act of remembering the rebate will increase the likelihood of remembering this same task in the future.¹⁴⁴ Of course, just remembering is not sufficient —

¹³⁹ Guynn, *supra* note __, at 25 (“[T]here is not an external agent prompting remembering. A friend does not ask you, ‘What message were you supposed to give me?’ but instead you must remember on your own to give the friend the message.”).

¹⁴⁰ *Id.* at 26.

¹⁴¹ It is not surprising, then, that psychologists believe that the prospective and retrospective components of prospective memory rely on different mental retrieval processes. See *id.* at 43-45 & fig 2.1 (comparing retrieval processes for cued retrospective memory and prospective memory); Krishnan & Shapiro, *supra* note __, at 144 (“The two components are assumed to rely on different retrieval processes. Whereas the prospective memory component is presumed to be relatively spontaneous, the retrospective memory component supposedly relied on directed processes that probe for the content of the previously formed intent.”).

¹⁴² Richard L. Marsh, et al., The Dynamics of Intention Retrieval and Coordination of Action in Event-Based Prospective Memory, 28 *Journal of Experimental Psychology: Learning, Memory and Cognition* 652, 652 (2002).

¹⁴³ *Id.*

¹⁴⁴ See Sendhil Mullainathan, A Memory-Based Model of Bounded Rationality, 117 *Quarterly Journal of Economics*, 735, 741 (2002) (according to the principle of rehearsal “recalling a memory increases future recall probabilities”).

whether or not a consumer will respond to this cue will depend, in part, on what else she is doing,¹⁴⁵ and she still may procrastinate and fail to complete the task.¹⁴⁶

c) Prospect Theory

The path-breaking work by Daniel Kahneman and Amos Tversky on prospect theory¹⁴⁷ and its scholarly progeny provide another theoretical basis for understanding rebate non-redemption.¹⁴⁸ Prospect theory takes “a position that is diametrically opposed to the tradition of

¹⁴⁵ Id.

¹⁴⁶ Cf. Dan Ariely and Klaus Wertenbroch, Procrastination, Deadlines, and Performance: Self-Control by Precommitment, 13 *Psychological Science*, 219, 224 (2002) (“What is clear from our empirical evidence is that procrastination is a real behavioral problem, that people strategically attempt to curb it by using costly self-imposed deadlines and that self-imposed deadlines are not always as effective as some external deadlines in boosting task performance.”).

¹⁴⁷ See Chris Guthrie, Prospect Theory, Risk Preference, and the Law, 97 Nw. U. L. Rev. 1115, 1117 (2003) (discussing Kahneman and Tversky’s work). Along with Herbert Simon, Kahneman and Tversky were two of the founding figures of the behavioral economics movement. Simon (1978) and Kahneman (2002) were honored with Nobel Memorial Prizes for their scholarship; Tversky passed away in 1997, prior to the recognition of his groundbreaking work with Kahneman. See Gregory Mitchell, *Mapping Evidence Law*, 2003 Mich. St. L. Rev. 1065, 1068 n.3 (“Daniel Kahneman received the Nobel prize in economics for 2002 for his research into judgment and decision-making, an award which he would have shared with Amos Tversky but for Tversky’s untimely death in 1996.”) (citing Jon E. Hilsenrath, Nobel Winners for Economics Are New Breed, *Wall St. J.*, Oct. 10, 2002, at B1); Guthrie, *supra* note __, at n. 10 (“Had he been alive in 2002, Tversky would no doubt have shared the Nobel Prize with Kahneman.”).

¹⁴⁸ Another possibility is that the manner in which rebates are accounted for mentally leads to breakage. For background on mental accounting, see Richard H. Thaler, The Winner’s Curse: Paradoxes and Anomalies of Economic Life 107-21 (1992) (discussing mental accounting); Richard H. Thaler, Saving, Fungibility, and Mental Accounts, *Journal of Economic Perspectives* 193 (1990); Richard H. Thaler, Mental Accounting Matters, in Camerer, et al., *supra* note __. A key assumption of traditional economic theory is that money is fungible. See Sunstein, Progress Report, *supra* note __, at 129; Cass Sunstein, Introduction to Behavioral Law & Economics 1, 6 (Cass R. Sunstein, ed. 2000); Richard H. Thaler, Saving, Fungibility, and Mental Accounts, *Journal of Economic Perspectives* 193, 194 (1990). But Thaler’s work on mental accounting suggests, to the contrary, that people compartmentalize their wealth into different categories, thus violating principles of fungibility. See Marianne Bertrand, et al, Behavioral Economics and Marketing in Aid of Decision Making Among the Poor, 25 *Journal of Public Policy & Marketing* 8, 10 (2006) (“Contrary to standard assumptions of fungibility, people compartmentalize wealth and spending into distinct budget categories, such as savings, rent, and entertainment, and into separate mental accounts, such as current income, assets, and future income.”). Roland Bénabou and Jean Tirole explain:

Ethnographic accounts document the prevalence, especially in poor households, of ‘mental budgeting,’ the hallmark of which is a violation of the fungibility of money. Individuals or families thus earmark certain sources of incomes to specific uses (primary wage earner’s salary for necessities, secondary earnings for savings, windfalls and capital income for luxuries, etc.) or keep in separate envelopes or “tin cans” the monies reserved for food, rent, school supplies, “fun,” and the like.

Roland Bénabou & Jean Tirole, Willpower and Personal Rule, 112 *J. Political Economy* 848, 853 (2004) (citing Viviana A. Zelizer, *The Social Meaning of Money* (1997)); Sunstein, Progress Report, *supra* note __, at 130 (“A glance at ordinary practice shows that people often organize decisions in terms of separate budgets and accounts,

explaining decisions by attitudes to wealth [i]n prospect theory, the carriers of decision utility are gains and losses relative to a reference level, which is often the status quo.”¹⁴⁹

Prospect theory involves a set of related biases that are often grouped together¹⁵⁰ — the status quo bias,¹⁵¹ endowment effects,¹⁵² and loss aversion,¹⁵³ — which support the view that the allocation of initial entitlements and how decisions are framed may affect decision-makers, even though such matters should not be relevant according to wealth-maximizing versions of expected utility theory.¹⁵⁴ Jeff Sovern connects these biases to the rebate redemption process:

and they often segment these accounts. Some money is for retirement; some is for vacations some is for college tuition; some is for mortgage or rental payments.”).

Perhaps, then, at the time of purchase, the consumer has a certain amount in his product acquisition mental account and he is willing to credit this account with the rebate amount prior to purchase, redemption and reward receipt. After purchase, for some reason, the consumer no longer views the rebate amount as part of his product acquisition budget, but he fails to allocate the rebate amount in any other account.

¹⁴⁹ Daniel Kahneman, Objective Happiness, in *Well-Being: The Foundations of Hedonic Psychology* 3, 17 (Daniel Kahneman, et al., eds. 1999).

¹⁵⁰ See Camerer, *supra* note __, at 669-70.

¹⁵¹ Korobkin, *supra* note __, at 1228-29 (“[I]ndividuals tend to prefer the present state of the world to alternative states, all other things being equal.”); see also Colin Camerer, Prospect Theory in the Wild: Evidence from the Field, in Camerer, et al., *supra* note __, at 154 (“Samuelson and Zeckhauser coined the term *status quo bias* to refer to an exaggerated preference for the status quo . . .”) (citing William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 *J. Risk & Uncertainty* 7 (1988)).

¹⁵² Korobkin, The Endowment Effect, *supra* note __, at 1228 (“[P]eople tend to value goods more when they own them than when they do not.”) (footnotes omitted) (crediting Richard Thaler for coining the term in Richard Thaler, Toward a Positive Theory of Consumer Choice, 1 *J. Econ. Behav. & Org.* 39, 44 (1980)); see also Daniel Kahneman, Jack L. Knetsch & Richard Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, in Camerer, et al., *supra* note __, at 55.

¹⁵³ Guthrie, *supra* note – at 1119 (“[I]ndividuals tend to value losses more heavily than gains of the same magnitude.”) (citing Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 *Econometrica* 263, 279 (1979)); Jolls, et al., *supra* note __, at 1535 (“[O]ne of the central features of Kahneman and Tversky's prospect theory is that people evaluate outcomes based on the change they represent from an initial reference point, rather than based on the nature of the outcome itself; also, losses from the initial reference point are weighted much more heavily than gains.”) (citing Kahneman & Tversky, *supra* at, 277-79)). Russell Korobkin breaks loss aversion down further based upon various second-order explanations for loss aversion. See Korobkin, The Endowment Effect, *supra* note __, at 1250-55.

¹⁵⁴ Korobkin & Ulen, *supra* note __, at 1104-07; (discussing framing); Rostain, *supra* note __, at 978 (“Contrary to the requirement of description and process invariance, experimental evidence establishes that preferences depend importantly on how choices are described.”). But see Mitchell, *supra* note __, at 1961-63, 2005-11 (skeptical discussion of framing effects literature); James N. Druckman, Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects, 98 *Am. Political Science Rev.* 671, 683 (2004) (“[F]raming effects depend in critical ways upon context. As a result, framing effects appear to be neither robust nor particularly pervasive.”).

At the time the consumer makes the purchase, the price looks like a loss, and so the consumer experiences the rebate as a reduction in pain —making the rebate attractive. By the time the consumer contemplates the work required to obtain the rebate, the rebate seems less like a reduction in a loss than a gain—and that makes it appear less important.¹⁵⁵

Conceivably, the endowment effect is at work here — once the consumer owns a product that was purchased with a rebate, the consumer values the product more as an owner than he did as a consumer considering purchase.¹⁵⁶ It is challenging, however, to determine whether the endowment effect is at play rather than a valid post-purchase re-appraisal of a product post-based upon the consumer’s experience with the good.¹⁵⁷ For example, imagine a consumer with a \$70 reservation price who buys a \$100 computer printer with a \$30 rebate. After using the product, the consumer realizes that he would have spent \$100 on the computer printer and thus he no longer needs to redeem the rebate to meet his new reservation price. In contrast, imagine that the consumer’s experience with the good does not change his impression of the value of the printer or the price that he paid. But post-purchase, the consumer realizes that he has failed to redeem the rebate perhaps due to procrastination or prospective memory failure, and thus that his reservation price was not actually met. The consumer wishes to make to minimize negative

¹⁵⁵ Sovern, Transaction Costs, *supra* note __, at 1656; see also Silk & Janiszewski, *supra* note __, at 10 (“In effect, initiating the redemption process encourages people to reframe the rebate amount as a payment for the redemption effort and assess whether the pay is sufficient for the effort.”); Soman, *supra* note __, at 429, 435; Jolson, et al., *supra* note __, at 35 (“A large refund offer may be capable of moving a price-sensitive consumer with nonexistent for the product from unawareness to conviction within a few seconds.”).

¹⁵⁶ Russell Korobkin surmises:

Perhaps loss aversion, and hence the endowment effect, exists because individuals form attachments to what they own rather than as a consequence of negative emotions associated with the abstract concept of loss. If so, an item owned will have a predictably higher value than the very same item that is unowned. From this perspective, an unowned widget is merely a commodity with a value based on its potential for use or exchange. An owned widget, however, loses at least a portion of its commodity status and takes on additional value.

Korobkin, The Endowment Effect, *supra* note __, at 1251 (footnotes omitted).

¹⁵⁷ See *supra* notes ___ and accompanying text (discussing state dependent discounts).

feelings about the deal initially struck and experiences regret avoidance.¹⁵⁸ Rather than feeling self-loathing for making a decision contrary to his wealth-maximizing interests, the consumer decides that the printer is worth \$100 to him and that his reservation price was actually met — a familiar type of rationalization.¹⁵⁹

2. *Failing to Plan for Failure*

If we accept that some consumers will either procrastinate until it is too late to redeem their rebates or will forget to redeem their rebates, this raises the following crucial question: why do many consumers fail to incorporate their knowledge about possible procrastination or forgetfulness into their decision-making process?¹⁶⁰ If a consumer knows that she often forgets to redeem rebates or that she puts off redeeming until the deadline passes — why would she fail to account for these personal tendencies and ignore or discount the availability of the rebate when purchasing a product?¹⁶¹

a) Overconfidence, Anchoring and Temporal Construal

Some consumers may be overconfident or over-optimistic in their predictions of their own rebate redemption behavior, and thus fail to account sufficiently for the possibility that they

¹⁵⁸ See Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 *Vand. L. Rev.* 1583 (1998); Korobkin, *The Endowment Effect*, *supra* note __, at 1254-55.

¹⁵⁹ Roland Bénabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 *Quarterly Journal of Economics* 871, 885 (2002) (“Psychologists, and before them writers and philosophers, have long documented people’s universal tendency to deny, explain away, and selectively forget ego-threatening information. . . . [A] lot of research has confirmed that people tend to recall their successes more than their failures, have self-servingly biased recollections of their past performances.”) (citations omitted).

¹⁶⁰ Decision makers vary in the degree to which they are aware of their future self-control problems. See O’Donoghue & Rabin, *Choice and Procrastination*, *supra* note __, at 126 (contrasting sophisticated, naïve and partially naïve people); see also Dan Ariely and Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 *Psychological Science*, 219, 223 (2002) (observing that a decision maker who is aware of the likelihood of procrastination may impose deadlines on himself).

¹⁶¹ See Gourville & Soman, *supra* note __, at 4:

[W]hile low rebate redemption rates have been extensively documented and commented upon in the managerial literature, little academic research has attempted to understand how consumers evaluate rebate offers. In particular, why do consumers tend to overestimate the likelihood of redemption? When might we expect this bias to hold? Can it be reversed? And what can be done to reduce this bias?

will procrastinate or forget to redeem.¹⁶² Jeffrey Rachlinski sums up various self-serving biases as follows:

Psychologists have noted a strong tendency for individuals to make inferences that are self-serving. This tendency can be divided into three different phenomena: overoptimism, which consists of overestimating one's capabilities; overconfidence, which consists of overestimating one's ability to predict outcomes; and egocentricism, which consists of overstating the role that one has played in events in which one has participated.¹⁶³

The overconfidence bias has been documented in a wide range of contexts,¹⁶⁴ but most relevant for our purposes, “people are overconfident when making personal forecasts about behaviors involving desirable outcomes.”¹⁶⁵ Several factors can affect confidence including: (1)

¹⁶² See Gourville & Soman, *supra* note __, at 6; Soman, *supra* note __, at 429; Silk & Janiszewski, *supra* note __, at 15-16; Silk, *supra* note __, at 14-16.

¹⁶³ Rachlinski, *supra* note __, at 1172 (footnotes omitted); see also Jolls et al., *supra* note __, at 1524 (“A common feature of human behavior is overoptimism: People tend to think that bad events are far less likely to happen to them than to others.”); Korobkin and Ulen, *supra* note 107, at 1091 (describing the overconfidence bias as “the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us”); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. Pa. L. Rev. 101, 139 (1997) (discussing “the systematic tendency of many people to overrate their own abilities, contributions, and talents . . . [that] readily takes the form of excessive optimism and overconfidence, coupled with an inflated sense of ability to control events and risks.”); But see Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. Chi. L. Rev. 111, 119 (2006) (“Just as there is an optimism bias in some people, it seems easy to identify an ‘Eeyore’ effect in others, who are excessively risk averse with respect to the outcome of future events.”).

¹⁶⁴ Jon Hanson and Douglas Kysar cite some of amusing evidence of overconfidence:

[T]here is growing evidence that we are naively and stubbornly optimistic at heart, regardless of how well informed we are. For instance, respondents in one study, although correctly estimating that fifty percent of American couples end up in divorce, estimated their own chance of divorce at zero. Similarly, college students are six times more likely to think they will have above average job satisfaction than below average. They are also about six times more likely to think they will own their own homes, two times more likely to think they will have a mentally gifted child, seven times less likely to think they will have drinking problems, and nine and one-half times less likely to think they will divorce soon after marriage.

Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 655 (1999) (footnotes omitted) (citing Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *Law & Hum. Behav.* 439, 443 (1993); Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 *J. Personality & Soc. Psychol.* 806, 810 (1980)).

¹⁶⁵ Silk & Janiszewski, *supra* note __, at 11 (citing Stephen J. Hoch, *Counterfactual Reasoning and Accuracy in Predicting Personal Events*, 11 *Journal of Experimental Psychology: Learning, Memory and Cognition*, 719 (1985); Briony D. Pulford & Andrew M. Colman *Overconfidence, Base Rates, and Outcome Positivity/Negativity of Predicted Outcomes*, 87 *British Journal of Psychology* 431 (1996); Robert. P. Vallone, et al. *The Overconfident Prediction of Future Action Outcomes by Self and Others*, 58 *Journal of Personality and Social Psychology*, 582

the relative frequency of an event; (2) the time gap between a prediction and the predicted event; (3) the desirability of the predicted event.¹⁶⁶

Less frequent life events are more difficult to predict than common occurrences in part because decision-makers lack “base rate information” — the relative frequency with which an event occurs.¹⁶⁷ A person who drives to work every day might be optimistic about whether there will be a parking spot available directly in front of her office, but this optimism will be tempered by her daily parking experience. In contrast, someone who rarely drives to work will have a more difficult time predicting the likelihood of finding a prime parking space in front of her office. But this merely suggests that the person making the prediction will be inaccurate, which could be either optimistic or pessimistic. Scholars claim, however, that in the absence of relevant base rate information and “faced with an attractive rebate offer, a consumer anchors on successful rebate redemption and adjusts inadequately (or not at all) for the many things that could prevent redemption.”¹⁶⁸ In other words, the infrequency of rebate redemption arguably makes it difficult for consumers to accurately predict their own redemption behavior¹⁶⁹ and in such situations consumers tell themselves a successful rebate redemption story and fail to consider everything that could go wrong with in their optimistic narrative.¹⁷⁰

(1990)). The planning fallacy is an example of this phenomenon. See Lawrence J. Sanna & Norbert Schwarz, Integrating Temporal Biases: The Interplay of Focal Thoughts and Accessibility Experiences, 15 *Psychol. Sci.* 474, 478 (2004) (“Research on the planning fallacy indicates that people adopt an optimistic ‘narrow focus on successful future plans’ and this leads them to be overly optimistic in estimating completion times.”) (citing Griffin R. Buehler & H. McDonald, The Role of Motivated Reasoning in Optimistic Time Predictions, 23 *Personality and Social Psychology Bulletin* 238 (1997)).

¹⁶⁶ See Silk, *supra* note __, at 15 (“Studies in overconfidence have demonstrated that people become more confident in their personal forecasts as outcomes become more desirable.”) (citing Pulford & Colman, *supra* note __).

¹⁶⁷ See Plous, *supra* note __, at 115.

¹⁶⁸ See Gourville & Soman, *supra* note __, at 7.

¹⁶⁹ See *id.* __, at 6.

¹⁷⁰ Gourville and Soman have an even more intriguing and provocative claim — they contend that the consumer’s own underlying motivation to purchase a product affects how the consumer will view the likelihood of redemption.

Several external factors also may influence confidence levels. First, confidence in rebate redemption can be affected by rebate amounts.¹⁷¹ For example, imagine that a seller who is offering a \$20 rebate on a \$100 (a 20% discount) increases the rebate to \$30 rebate while keeping the list price the same (thus increasing the discount to 30%). This can result in increased sales to intended and probabilistic redeemers (due in part to increased redemption confidence on the part of the latter group) but at the same time, the increased reward will inspire all segments of consumers (including rebate independent consumers) to redeem more rebates.¹⁷² Whether this change will be profitable for the rebate offeror will depend on the exact “tradeoff between the benefit of increased sales from a larger discount percentage and the cost of higher redemption rates.”¹⁷³

Second, confidence that a person will take a certain action increases as the temporal distance increases between a prediction and the predicted event.¹⁷⁴ We have all experienced this phenomenon — if someone gives us a longer deadline to complete a task, we become more confident that we will get our work done, even though this may not be the case. Amos Tversky

If consumers are motivated to purchase a rebated product, they overestimate their probability of redeeming the rebate in order to make the purchase more attractive. However, if they are motivated to avoid purchasing the product, they underestimate their possibility of redeeming the rebate in order to make the purchase seem unattractive.

Id.

¹⁷¹ See id. 11-13.

¹⁷² Id. at 12, 26 (tbl. 2)

¹⁷³ Id. at 12. Silk and Janiszewski argue that increasing the rebate reward and the pre-rebate shelf price while maintaining the strike (after-rebate) price, by increasing the pre-rebate price, may lead to less sales but increased redemptions. See id.

¹⁷⁴ See Silk & Janiszewski, *supra* note __, at 15 (citing Thomas Gilovich, et al., Effect of Temporal Perspective on Subjective Confidence, 64 *Journal of Personality and Social Psychology* 552 (1993)); Michael Milburn, Sources of Bias in the Prediction of Future Events, 21 *Organizational Behavior and Human Performance*, 17-26 (1978); George Wright & Peter Ayton, Judgmental Probability Forecasting in the Immediate and Medium Term, 51 *Organizational Behavior and Human Decision Processes*, 344 (1992); Silk, *supra* note __, at 17-18 (“Research shows that deadlines help to mitigate procrastination by facilitating the completion of tasks. . . . Research also has demonstrated that the longer people are given to complete a task, the greater the likelihood of procrastination and failing to complete the task.”)

and Eldar Shafir conducted a study conducted in which they offered students \$5 to answer a long questionnaire by a certain date.¹⁷⁵ The group that was given five days to complete the task had a 60% rate of return, the group that was given a three-week deadline had a 42% rate of return, and the group that was given no deadline had a 25% rate of return.¹⁷⁶ Tversky & Shafir concluded:

[T]he more time people had to complete the task, the less likely they were to do it. Just as the addition of options enhances the tendency to defer decision, so can the addition of time enhance the tendency to delay action. This observation, which represents a temporal violation of the regularity condition, is as common in daily experience as it is puzzling for decision theorists.¹⁷⁷

But *why* does added time increase confidence, despite the possibility of procrastination and prospective memory failure? Temporal construal theory (“TCT”) or construal level theory¹⁷⁸ helps to explain why delay between purchase and rebate redemption may lead to overconfident predictions of rebate redemption behavior.¹⁷⁹ TCT draws a distinction between high and low level construals.¹⁸⁰ High-level construals represent a more simplified, abstract, decontextualized way of representing an event,¹⁸¹ while low-level construals involve more complex, concrete,

¹⁷⁵ Amos Tversky and Eldar Shafir, Choice Under Conflict: The Dynamics of Deferred Decisions, 3 Psychological Science 358 (1992); see also Silk, *supra* note- at 17-18 (citing Tversky and Shafir, *supra*).

¹⁷⁶ Tversky & Shafir, *supra* note __, at 358.

¹⁷⁷ *Id.* Under the “regularity condition” to which Tversky and Shafir refer, the market share of any option should not be increased by increasing the number of options present. *Id.* at 360. For example, imagine that my donut shop sells two types of donuts: Boston creme and chocolate glazed, and they have market shares of 60% and 40%, respectively. I then add a third donut to the mix: a jelly donut. The new jelly donut could reduce the market share of either of the two original donuts being sold, but we should not see an increase in the percentage of Boston creme or chocolate glazed donuts sold.

¹⁷⁸ See Yaacov Trope & Nira Liberman, Temporal Construal and Time-Dependent Changes in Preference, 79 Journal of Personality and Social Psychology 876 (2000); Yaacov Trope & Nira Liberman, Temporal Construal, 110 Psychological Review 403 (2003) [hereinafter Trope & Liberman, Temporal Construal]; Shiri Nussbaum, Nira Liberman & Yaacov Trope, Creeping Dispositionism: The Temporal Dynamics of Behavior Prediction, 84 Journal of Personality and Social Psychology 485 (2003); Michael S. Sagristano, Yaacov Trope & Nira Liberman, Time-Dependent Gambling: Odds Now, Money Later, 131 Journal of Experimental Psychology 354 (2002).

¹⁷⁹ See Silk, *supra* note __, at 16.

¹⁸⁰ Trope & Liberman, Temporal Construal, *supra* note __, at 405.

¹⁸¹ *Id.* at 405 table 1 (listing the following traits for high-level construal: abstract, simple, structured/coherent, decontextualized, primary/core, subordinate, goal relevant).

unstructured way of representing an event.¹⁸² The basic idea of TCT is “that temporal distance changes people’s responses to future events by changing the way people mentally represent those events”¹⁸³ — a distinction that leads to underweighting the effort required to satisfy longer term goals.¹⁸⁴ As Lynch and Zauberman explain:

According to construal-level theory, people represent events at a “high level” in the distant future and at a “low level” in the more immediate future. In the near future, people think concretely about the feasibility of action, that is, what constraints on action exist. In the more distant future, thoughts are dominated by more abstraction about the desirability of the same events.¹⁸⁵

For example, professor might state that she wishes to write a book on behavioral economics and the law next year. The goal or action will be represented in the professor’s mind as a high level construal, in rather abstract terms. In contrast, if the professor is asked on Monday to give a BLE presentation to her colleagues on Tuesday, the task will be represented in her mind as a low-level construal, as she concentrates on the concrete, goal-oriented efforts that will be required to complete a presentation in one day. In the case of rebates, the prediction is the assessment of one’s likelihood of sending in a rebate form at the time of purchase and the predicted event is the actual rebate redemption.¹⁸⁶ According to TCT, a longer rebate

¹⁸² Id. (listing the following traits for low-level construal: concrete, complex, unstructured/incoherent; contextualized, secondary/surface, subordinate, goal irrelevant).

¹⁸³ Trope & Liberman, Temporal Construal, *supra* note __, at 418; 110 *Psychological Review* 403, 418 (2003); Trope & Liberman, Time-Dependent Changes in Preference, *supra* note __, at 887-88.

¹⁸⁴ Gal Zauberman and John Lynch have advanced a complementary theory based on “resource slack.” See Gal Zauberman & John G. Lynch, Resource Slack and Propensity to Discount Delayed Investments of Time Versus Money, 134 *J. of Experimental Psychology: General*, 23 (2005). Their research shows that people expect to have greater slack for time, or excess time available to complete tasks, in the future, even when no empirical basis exists for these expectations. Id.

¹⁸⁵ Lynch & Zauberman, *supra* note __, at 69; see also Trope & Liberman, Temporal Construal, *supra* note __, at __; Trope & Liberman, Time-Dependent Changes in Preference, *supra* note __, at 877.

¹⁸⁶ Silk & Janiszewski, Why Are Rebate Redemption Rates So Low? Understanding Breakage of Mail-In Rebates 9 (unpublished manuscript January 14, 2004) (on file with the author of this paper) (“[T]he reward is most likely a high-level construal since it represents the superordinate purpose of the action and is the essential feature of the rebate offer. The specific tasks that comprise the effort component are most likely low-level construals since they represent the subordinate details that comprise the “how” aspects of the action.”).

redemption period will lead to breakage because consumers will mentally represent rebate redemption as a high-level construal, which leads to underweighting the effort that redemption will require.

IV. REBATE REGULATION: PRESENT AND FUTURE

A. Rebate Regulation and Paternalism

As discussed in this paper, there are four major categories of consumer complaints regarding rebates. It can be argued that firms (1) improperly deprive consumers of legitimately earned rebates; (2) attempt to depress rebate-redemption rates by imposing onerous rebate redemption requirements;¹⁸⁷ (3) use rebates to engage in price discrimination; and (4) benefit from behavioral tendencies that lead to sub-optimal rebate redemption rates.

The first task for lawmakers is to determine which of these problems, if any, require regulatory intervention. Once lawmakers determine which, if any, of the rebate complaints require regulatory intervention, they must then determine what form of regulation is most suited to solving the precise problem at issue. Regulatory options range from “hard” or strong forms of paternalism,¹⁸⁸ which limit consumer choice and impose more significant costs on those consumers who do not need the benefit of government intervention,¹⁸⁹ to softer forms of paternalism, such as libertarian paternalism¹⁹⁰ or asymmetrically paternalistic regulation:

¹⁸⁷ Even here, we must acknowledge that it may be difficult to draw the line between a rebate offeror’s intentional inducement of breakage and a firm’s passive acceptance of the benefits of consumer irrationality. Tat & Schwepker, *supra* note __, at 70 (“Manufacturers . . . hope that not all buyers will actually rebate. . . . If the system is made simple, then manufacturers will have a greater cost for their offers. However, this cost may be outweighed by the benefits of higher customer satisfaction, which might transfer to higher customer loyalty and access to consumer information. . . .”). After all, any rebate offering is going to have *some* paperwork required of redeemers, especially to minimize rebate fraud. See *supra* note __ and accompanying text.

¹⁸⁸ See Gerald Dworkin, Paternalism, in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (2005), available online at <http://plato.stanford.edu/entries/paternalism/> (visited May 9, 2006) (“Paternalism is the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm.”).

¹⁸⁹ See Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards* __ *Minn. L. Rev.* __ (forthcoming), available online at <http://ssrn.com/abstract=766824> (noting that under “hard

A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.¹⁹¹

B. Banning Rebates: The Strongest Form of Paternalism

A complete ban on consumer rebates is the one measure that would address every category of rebate complaints discussed in this paper.¹⁹² It also reflects the strongest or hardest form of paternalism.¹⁹³ One who believes that rebate promotion abuse is endemic or that rebates are inherently unfair or deceptive based upon either the price discriminating effects of rebates¹⁹⁴ or the behavioral economics discussed in this paper might see a complete ban on mail-in rebates as an attractive solution.¹⁹⁵ Unfortunately, a ban on rebates would also eliminate the arguably

forms of paternalism . . . government determines what is best for citizens and accordingly restricts the freedom of citizens to act otherwise). Cass Sunstein, *Boundedly Rational Borrowing*, 73 U. Chi. L. Rev. 249, 254 (“[S]trong paternalism forecloses choice, typically on the ground that all or most people will choose unwisely.”).

¹⁹⁰ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159 (2003).

¹⁹¹ Camerer, et al., *supra* note __; see also Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U.L. REV. 1248 n. 10 (2005) (contrasting both forms of regulation); Sunstein, *supra* note __, at 257 (discussing similarities and differences between asymmetrical paternalism and libertarian paternalism).

Mandatory disclosure laws, such as the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (2005), are classic examples of asymmetrically paternalistic regulation, because disclosure laws impose little cost on informed consumers, while providing a great benefit to uninformed consumers. See Camerer, et al., *supra* note __, at 1232-33; Glaeser, *supra* note __, at 133 (“Typical examples of soft or libertarian paternalism include ‘debiasing’ campaigns, default rules, and other interventions that change beliefs and attitude without impacting formal prices faced by consumers.”). But see Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 Cornell J. of Law & Public Policy 199, 217 n. 101 (2005) (discussing costs incurred by those who must provide mandatory disclosures).

¹⁹² Rebates are forbidden in rare circumstances. For interesting examples, see Ky. Rev. Stat. Ann. § 244.461 (Michie 2004) (permitting rebates for distilled spirits and wine, while forbidding the same for malt beverages); Mo. Rev. Stat. § 311.355 (2004) (providing that “[m]anufacturers of intoxicating liquor other than beer or wine shall be permitted to offer consumer cash rebate coupons”).

¹⁹³ See *supra* note __.

¹⁹⁴ Given that rebates facilitate price discrimination, one might ask whether consumer rebates are prohibited under the Robinson-Patman Act, which makes it “unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality.” 15 U.S.C. § 13(a). Despite this language, the Robinson Patman Act does not forbid merchants from engaging in differential pricing practices against end use consumers. See Edwards, *supra* note __, at __.

¹⁹⁵ See Lynch & Zauberman, *supra* note __, at 76 (“We recommended regulations that require sellers to offer only rebates that must be redeemed immediately or class-action lawsuits to allow consumers redress if the recommended

possible positive benefits of rebates. A ban would prevent firms from using rebates to engage in potentially welfare-enhancing price discrimination,¹⁹⁶ and would prevent firms from collecting information that facilitates direct marketing efforts that can, in some cases, be mutually beneficial for firms and consumers.¹⁹⁷ Putting these benefits to the side, there is no indication that consumers or lawmakers desire a radical prophylactic approach such as a complete ban on rebates.¹⁹⁸ Thus, the remainder of this section will focus on more feasible regulatory options.

C. Unfair or Deceptive Trade Practice Actions

1. *A Brief Survey of Federal and State UDAP Law*

Unfair or deceptive business practices are prohibited under both state and federal law.¹⁹⁹ Section 5(a)(1) of the Federal Trade Commission Act provides: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”²⁰⁰ The FTC is empowered to enforce Section 5(a)(1)²⁰¹ via

regulations prove inconsistent with prevailing FTC unfairness doctrine.”); Sovern, *supra* note __, at 1642 (“Another way to respond to the rebate problem is to adopt legislation outlawing or regulating rebates. This might force manufacturers to offer their products at a lower price to all consumers or perhaps to sell at the actual price without misleading consumers into erroneously thinking they will obtain a rebate.”) (footnote omitted); Sovern, *supra* note __, at 1699 (“Assuming that rulemakers wish to regulate rebates, they would most likely choose one of two approaches: either they would ban rebates altogether, or as a less sweeping first step, rulemakers could regulate them, by, for example, requiring simplified rebate procedures.”). A requirement that all rebates be paid at the time of purchase is nearly the same as a ban from the perspective of a seller who is using rebates to engage in price discrimination.

¹⁹⁶ See *supra* notes __ and accompanying text.

¹⁹⁷ An instant rebate, however, could require that the consumer provide identifying information, thus retaining one benefit of traditional mail-in rebates.

¹⁹⁸ Cf. Lynch & Zauberman, *supra* note __, at 72 (“It is outside the scope of our expertise to judge whether any remedy is likely to be considered or adopted for promotional incentives (e.g., rebates) that provide an economic benefit to some consumers but significant costs to others.”).

¹⁹⁹ What follows is merely a brief survey of federal and state UDAP law. For comprehensive treatments, see Dee Pridgen, *Consumer Protection and the Law* (2003); Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* (6th ed. 2004).

²⁰⁰ 15 U.S.C. § 45(a)(1). In addition, if applicable, sellers must comply with the FTC Mail or Telephone Order Merchandise Rule, which imposes additional duties upon merchants. See 16 C.F.R. § 435; see also Pridgen, *supra* note __ § 9:18, at 597 (“The rule requires mail order merchants to have a reasonable basis to expect they will be able to ship the merchandise within 30 days or other specified time period, or give the consumer the opportunity to cancel the sale and obtain a refund.”); Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* 5.8.1.1, at 483-84 (6th ed. 2004) (discussing FTC Mail and Telephone Order Merchandise Rule).

litigation²⁰² and to promulgate “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”²⁰³ In addition to federal law, every state has its own “UDAP” law that prohibits unfair or deceptive acts and practices.²⁰⁴

These state statutes (sometimes referred to as a “Little FTC Acts”²⁰⁵) are based in varying degrees on different model laws²⁰⁶ and differ widely in their approaches.²⁰⁷ Some states prohibit

²⁰¹ See 15 U.S.C. § 45(a)(2) (“The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”).

²⁰² See 15 U.S.C. § 45(a)(3) (proceedings before the Commission); 15 U.S.C. § 53(b) (temporary restraining orders and injunctive relief); 15 U.S.C. § 57b (civil actions for violations of rules and cease and desist orders); see also Pridgen, *supra* note __ § 12.1, at 973 (“The traditional remedy for unfair or deceptive trade practices has always been the simple cease and desist order. Through both statutory amendments and common law development, the Commission’s arsenal has been expanded by many other enforcement measures such as injunctions, civil penalties, [and] consumer redress....”); Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* §§ ____ (surveying FTC enforcement options).

²⁰³ See 15 U.S.C. § 57a. The FTC also promulgates “industry guides,” that do not have the force of law.

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

16 CFR § 1.5; see also Serge Mezhburd, *The Unintelligible Standard: Rethinking the Mandate for the FTC from a Nondelegation Perspective*, 57 N.Y.U. Ann. Surv. Am. L. 361, 367 (2000) (citing *Application of Guides in Preventing Unlawful Practices*, 16 C.F.R. Part 17 (2001); *FTC Rules of Practice*, 16 C.F.R. § 1.5 (2001)).

²⁰⁴ See Sheldon & Carter, *supra* note __ § 1.1, at 1 (“All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace.”); see also Debra A. Burke, *Cruise Lines and Consumers: Troubled Waters*, 37 Am. Bus. L.J. 689, 710-11 (2000) (“All states have enacted some type of unfair or deceptive trade practices act (DTPA) which generally prohibits deceptive acts and unfair methods of competition in the conduct of trade or commerce.”); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1895-96 (2000); Jeff Sovern, *Protecting Privacy With Deceptive Trade Practices Legislation*, 69 Fordham L. Rev. 1305, 1349 (2001) (“[E]very state has enacted a “little FTC” act, prohibiting, in one form or another, deceptive, and sometimes unfair, trade practices.”) [hereinafter Sovern, *Protecting Privacy*].

²⁰⁵ See Pridgen, *supra* note __ § 3:5, at 101; see also Sheldon & Carter, *supra* note __ § 1.1, at 1 (noting that “this name is only precise for those statutes that parallel the FTC Act”).

²⁰⁶ See *Unfair Trade Practices and Consumer Protection Law*, in *Council of State Governments, 29 Suggested State Legislation 141-50* (1970); *Revised Uniform Deceptive Trade Practices Act*, Nat’l Conf. of Comm’rs on Uniform State Laws, Ann. Conf. 1966; *Unif. Consumer Sales Practices Act*, 7A U.L.A. 206 (1970) (adopted by Kansas, Ohio and Utah). *Unif. Deceptive Trade Practices Act*, 7A U.L.A. 273 (1966)); see also Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and other Consumer Goods Safer*, 17 Yale J. on Reg. 253, 276 (2000) (noting various model laws for state UDAP statutes); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection*

a list of specified practices and then contain a catch-all provision that bars a person from engaging “in any other conduct which similarly creates likelihood of confusion or of misunderstanding,”²⁰⁸ while other states mimic the FTC Act²⁰⁹ and contain only a broadly worded injunction against misleading, deceptive or unfair business or trade practices.²¹⁰

Regardless of the precise approach taken, state laws are valuable to plaintiffs for several reasons. First, courts have held that consumers may not bring private actions under the FTC Act,²¹¹ but “nearly all state acts create a private cause of action for aggrieved consumers.”²¹² Second, state UDAP laws often have more relaxed standards of proof than common law fraud or breach of contract claims.²¹³ Plaintiffs often need not prove a defendant’s intention to deceive,²¹⁴

Acts, 54 Kansas L. Rev. 1 (2005) (“Most little-FTC Acts were based on alternative forms suggested by the FTC or model state legislation developed by the National Conference of Commissioners on Uniform State Laws. Although these laws take various forms, each broadly prohibits unfair or deceptive acts, as does the FTCA Act.”) (footnotes omitted).

²⁰⁷ See Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1895-96 (2000) (summarizing different approaches); Peter S. Menell, *Regulating “Spyware”: The Limitations of State “Laboratories” and the Case for Federal Preemption of State Unfair Competition Laws*, 20 Berkeley Tech. L. J. 1363, 1390 (2005) (“The landscape of unfair competition law can best be characterized as fragmented, uncoordinated, and amorphous.”); Sovern, *Protecting Privacy*, supra note __, at 1349. For a statute-by-statute analysis of state UDAP laws, see Sheldon & Carter, supra note __ Appendix A.

²⁰⁸ Sovern, *Protecting Privacy*, supra note __, at 1349 (citing section 2(12) of the Uniform Deceptive Trade Practices Act); see also Pridgen, supra note __ § 3:5 (stating that 26 jurisdictions enumerate 13 prohibited practices and then generally prohibit any other practice that is unfair or deceptive); Unif. Deceptive Trade Practices Act § 2(a)(12), 7A U.L.A. 273 (1966) (catch-all provision prohibiting conduct that creates a likelihood of confusion or of misunderstanding similar to the specifically prohibited business practices in the Uniform Act).

²⁰⁹ The importance of the FTC Act in the field is profound: several state statutes even direct their state courts to draw on federal law in determining what conduct is forbidden under the state UDAP statute. Greenfield, supra note __, at 1898 (“Of the twenty-six states that borrow the language of the federal statute, twenty of them explicitly piggyback on the federal applications of the federal law. These statutes direct the state courts to pay attention to interpretations that the Commission and the federal courts have given section 5(a).”) (footnotes omitted).

²¹⁰ See Burke, supra note __, at 710-11; Sovern, *Protecting Privacy*, supra note __, at 1349.

²¹¹ See Pridgen, supra note __ § 12:41, at 921 (“The FTC does not explicitly provide for a private right of action for consumers and the overwhelming majority of judicial opinion has rejected claims that the Act implies such a right.”); Sovern, *Protecting Privacy*, supra note __, at 1321 n. 63 (collecting cases rejecting private right of action under FTC Act).

²¹² Burke, supra note __, at 710-11; Pridgen, supra note __ § 3:5, at 10; Jeff Sovern *Private Actions Under The Deceptive Trade Practices Acts: Reconsidering The FTC Act As Rule Model 52 Ohio St. L.J. 437, 448 (1991)* [hereinafter Sovern, Rule Model]. Iowa is an exception. See Schwartz & Silverman, supra note __, at 16.

²¹³ See Burke, supra note __, at 710-11 (“observing that “[v]iolations of these state laws are typically easier to establish than common law fraud or misrepresentation”).

and many traditional defenses to a common law breach of contract are not available to defendants sued under UDAP statutes.²¹⁵ Third, some states permit recovery of attorneys' fees, as well as statutory,²¹⁶ multiple²¹⁷ and punitive²¹⁸ damages in UDAP actions.

2. *UDAP Claims as Rebate Regulation*

Given the broad, flexible language found in Section 5 of the FTC Act and many state UDAP statutes, unfair or deceptive trade practice claims by regulators and consumers directly against rebate offerors are one possible form of rebate regulation.²¹⁹ The FTC has already experimented with this approach, bringing enforcement actions under Section 5 of the FTC Act²²⁰ against companies who were remiss in processing their rebates.²²¹ The first such case was commenced in 2002, when the FTC filed a complaint against Philips Electronics North America

²¹⁴ Sovern, Rule Model, supra note __, at 450.

²¹⁵ Id. at 451-52.

²¹⁶ See Sheldon & Carter, supra note __ § 8.4.2.1, at 623 (“About half the states authorize private litigants who have proven a UDAP violation to obtain minimum damage awards ranging from \$25 to \$5000, even if actual damages have not been proven.”).

²¹⁷ See Sheldon & Carter, supra note __ § 8.4.2.1, at 623 (“About half of all UDAP statutes authorize treble or other multiple damage awards.”); see also Burke, supra note __, at 710-11; Pridgen, supra note __ § 3:5, at 101 (“While the characterization ‘Little FTC Act’ has stuck, state legislation of this type is actually broader and has considerably more bite than its ‘mother statute.’ The state laws generally provide for private enforcement with statutory minimum or even treble damages...”). Other states even allow for punitive damages in UDAP actions. See Sheldon & Carter, supra note __ § 8.4.3.1, at 635.

²¹⁸ See Schwartz & Silverman, supra note __, at 24 (“[A]t least fourteen states permit punitive damages in lawsuits under CPAs for conduct ranging from recklessness to intentional conduct or ill will or in cases involving flagrant or repeated violations. In six of these jurisdictions, it appears that punitive damages may be awarded despite the availability of statutory or treble damages.”) (footnotes omitted).

²¹⁹ See Sovern, Transaction Costs, supra note __, at 1642 (“One way to address rebates is to see them as a particular species of fraud and deal with them through existing common law deceit claims and deceptive trade practices legislation.”).

²²⁰ In addition, if applicable, sellers must comply with the FTC Mail or Telephone Order Merchandise Rule, which imposes additional duties upon merchants. See 16 C.F.R. § 435; see also Pridgen, supra note __ § 9:18, at 597 (“The rule requires mail order merchants to have a reasonable basis to expect they will be able to ship the merchandise within 30 days or other specified time period, or give the consumer the opportunity to cancel the sale and obtain a refund.”); Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* 5.8.1.1, at 483-84 (6th ed. 2004) (discussing FTC Mail and Telephone Order Merchandise Rule).

²²¹ See, e.g., Federal Trade Commission, Press Release, *Iomega Corporation Agrees to Pay \$900,000 Civil Penalty To Settle FTC Charges It Violated Mail Order Rule*, December 9, 1998, available at <http://www.ftc.gov/opa/1998/12/iomega2.htm>.

Corporation,²²² after over fifty thousand consumers experienced delays of up to six months in receiving their rebates in violation of the original terms of the rebate promotion.²²³ The FTC alleged that Philips's unilateral modification of the terms of the rebate offer (which stated that payment would be made within eight weeks of receipt of valid requests) was unfair.²²⁴ The FTC also settled cases against America Online, Inc.,²²⁵ CompuServe Interactive Services, Inc.²²⁶ and the nationwide computer superstore, CompUSA, for delaying rebate payments to consumers.²²⁷ Of special interest in the CompUSA case, was that the retailing giant was also held accountable for delays and non-payment of rebate offers made by a third-party manufacturer, Q.P.S., Inc., which eventually filed for bankruptcy.²²⁸ This was the first time that the FTC held a retailer liable for a third-party rebate offer.²²⁹ The FTC reasoned that CompUSA bore some responsibility for QPS's actions because CompUSA helped to advertise the QPS rebate offers and it knew that QPS was having difficulties in meeting its rebate obligations.²³⁰

²²² See Complaint, Philips Electronics North America Corp., File No. 022-3095 (2002), available at <http://www.ftc.gov/os/2002/08/philipscomp.pdf>.

²²³ See Federal Trade Commission, Press Release, FTC Settles Charges Against Two Computer Peripherals Sellers for Failing to Keep Rebate Promises, August 5, 2002, available at <http://www.ftc.gov/opa/2002/08/philipsokie.htm>. The complaints and consent orders for Philips Electronics North America Corp and a second rebate offeror, Tim R. Wofford, the president and owner of OKie Corporation are available on this page.

²²⁴ Id.

²²⁵ See Federal Trade Commission, Press Release, AOL and CompuServe Settle FTC Charges of Unfair Practices, September 23, 2003, available at <http://www.ftc.gov/opa/2003/09/aol.htm>. For copies of the complaint and the consent orders, see <http://www.ftc.gov/os/caselist/0023000.htm>.

²²⁶ Id.

²²⁷ See Federal Trade Commission, Press Release, The Rebate Debate: Why Were They Late? FTC Settles Charges Against CompUSA, March 11, 2005, corrected March 17, 2005, available at <http://www.ftc.gov/opa/2005/03/compusa.htm> [hereinafter CompUSA Press Release]; see also 13501 Federal Register, Vol. 70, No. 53, Monday, March 21, 2005, Notices (notice of proposed consent agreement); Block, *supra* note ___, at B3 (discussing FTC settlement with CompUSA).

²²⁸ See CompUSA Press Release, *supra* note ____.

²²⁹ Id.

²³⁰ Id.

State attorneys general have experimented with applying state UDAP statutes to rebate offerings. For example, New York has a broadly worded statute that outlaws “deceptive acts or practices” in business.²³¹ In a case brought jointly with the FTC,²³² the New York Attorney General applied this statute, along with FTC Act § 5, to UrbanQ, a rebate offeror that had failed to pay rebates to deserving consumers in a timely manner.²³³ The Ohio Attorney General brought an enforcement action against the national office supply superstore, OfficeMax, under Ohio’s Consumer Sales Practices Act,²³⁴ for failing to pay promised rebate, delays in paying rebates, and for not having rain-checks available when advertised goods were out of stock.²³⁵ Finally, private plaintiffs have also availed themselves of state UDAP laws. A Michigan court held that plaintiffs stated a valid claim where the defendant allegedly failed to clearly and conspicuously disclose that rebate promotion had ended.²³⁶ The court stated that such a claim could violate the Michigan’s Consumer Protection Act,²³⁷ a statute based upon the Uniform Deceptive Trade

²³¹ GBL § 349(a) (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”).

²³² See *FTC v. UrbanQ*, Stipulated Final Order for Permanent Injunction, CV 03-3147, July 7, 2003., available online at http://www.oag.state.ny.us/internet/litigation/urbanq_final_order.pdf.

²³³ See Press Release, New York State Attorney General, Online Retailer Must Pay Overdue Rebates To Consumers, Hundreds of Complaints Filed in New York Against UrbanQ, June 26 2003, available online at http://www.oag.state.ny.us/press/2003/jun/jun26a_03.html. This case was brought jointly with the FTC. See *FTC v. UrbanQ*, Stipulated Final Order for Permanent Injunction, CV 03-3147, July 7, 2003, available online at http://www.oag.state.ny.us/internet/litigation/urbanq_final_order.pdf.

²³⁴ See Ohio Rev. Code Ann. §§ 1345.02(A) (West 2005) (“No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.”); Ohio Rev. Code Ann. §§ 1345.02(B)(1) (West 2005) (deceptive for seller to represent that “the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have”).

²³⁵ The complaint can be found online http://www.ag.state.oh.us/press_releases/attachments/050114_officemax.pdf.

²³⁶ *Munem v. Best Buy Co.*, No. 224366 (Mich. Ct. App. 2002), appeal denied, 655 N.W.2d 554 (Mich. 2002).

²³⁷ See Mich. Comp. Laws § 445.903 (1)(i) (2005).

Practices Act,²³⁸ which prohibits sellers from “[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.”²³⁹

3. *Disadvantages of UDAP Claims*

a) Procedural Limitations on UDAP Claims

Despite the potential reach of UDAP statutes, there are barriers to using federal and state UDAP litigation as a method of consumer protection. First, as noted above, courts have held that consumers may not bring private actions under the FTC Act,²⁴⁰ which means that consumers must rely on state UDAP provisions. Second, some disputes related to rebates might be governed by mandatory arbitration clauses, removing these cases from the courts altogether.²⁴¹ Third, and perhaps most important, as with all consumer disputes, the costs of bringing such actions may dissuade possible plaintiffs from seeking to enforce their rights in court, especially since recovery in rebate cases is likely to be modest.²⁴² Class actions would be one possible solution to this problem,²⁴³ but there are barriers to this approach.²⁴⁴ Several states explicitly

²³⁸ See Unif. Deceptive Trade Practices Act U.L.A. § (2)(a)(11), 7A 273, ___ (1966) (“A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he . . . makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.”); see also Unif. Consumer Sales Practices Act § 3(b)(8), 7A U.L.A. 206 (1970) (deceptive for seller to indicate “that a specific price advantage exists, if it does not”).

²³⁹ Mich. Comp. Laws § 445.903 (1)(i) (2005).

²⁴⁰ See Pridgen, *supra* note __ § 12:41, at 921 (“The FTC does not explicitly provide for a private right of action for consumers and the overwhelming majority of judicial opinion has rejected claims that the Act implies such a right.”); Sovern, Rule Model, *supra* note __, at 1321 & n. 63 (“[O]nly the FTC itself can enforce the FTC Act.”) (collecting cases rejecting private right of action under FTC Act).

²⁴¹ See, e.g., *Falbe v. Dell Inc.*, 54 U.C.C. Rep. Serv. 2d (Callaghan) 239 (N.D. Ill. 2004) (granting defendant Dell’s motion to stay proceedings and compel arbitration of rebate claim).

²⁴² See Jeff Sovern, *The Jewel of Their Souls: Preventing Identity Theft Through Loss Allocation Rules*, 64 U. Pitt. L. Rev. 343, 383-84 (2003) (“The transaction cost problem is especially troublesome in consumer litigation because the stakes tend to be small in such cases, relative to the cost of litigation. Few consumers will spend more to assert their rights than those rights are worth.”); Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 85 (1993) (discussing impediments to consumer litigation).

²⁴³ See Greenfield, *supra* note __, at 1889 (“The obvious solution to the infeasibility of a private action to capture the losses inflicted by an allegedly unfair act is litigation by means of class action, in which numerous small claims are joined together to take advantage of the efficiency of a single action”).

prohibit UDAP class actions,²⁴⁵ while other states' UDAP statutes have been interpreted by courts to reach this result.²⁴⁶ Even in states where UDAP class actions are permitted, class certification may raise certain challenges in rebate cases.²⁴⁷ These problems can be seen in *Stone v. CompuServe Interactive Services, Inc.*,²⁴⁸ where the court upheld the trial court's denial of class action certification in a consumer rebate case in part because common issues of fact did not predominate among class members.²⁴⁹ The Court of Appeals quoted the trial court as follows: "Each rebate applicant's history is unique and CompuServe's liability for 'late,' 'untimely' or 'unreasonable' performance simply cannot be adjudicated by looking to the class as a whole."²⁵⁰

b) Substantive Barriers to UDAP Claims: The Limits of "Unfairness" and Deception

In addition to the procedural barriers discussed above, rebate claims based on behavioral economics face substantive hurdles under state and federal UDAP law. The language found in the FTC Act is, by design, broad enough to capture a wide array of ever-evolving unfair business practices.²⁵¹ The House Report from the 1914 version of the Act makes the point well:

²⁴⁴ See *id.*

²⁴⁵ See Sheldon & Carter, *supra* note __ § 8.5.2 (citing Alabama, Georgia, Mississippi, Montana and South Carolina code provisions).

²⁴⁶ See Sheldon & Carter, *supra* note __ § 8.5.2 (citing cases).

²⁴⁷ See Schwartz & Silverman, *supra* note __, at 17 ("[T]he vast differences in the application of state laws makes it particularly inappropriate for courts to certify multi-state class actions alleging CPA claims or to apply the CPA of one state to conduct that occurred in another state").

²⁴⁸ *Stone v. CompuServe Interactive Services, Inc.*, 804 So.2d 383, 388-89 (Fla. Ct. App. 2001).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 388. But see *Amalfitano v. Sprint Corp.*, No. 36673/99, Slip Op. (N.Y. Sup. Ct. 2004) (certifying class of consumers who purchased a certain model telephone at Radio Shack element and "who applied for a rebate which was rejected on the basis that the model did not qualify for the rebate offer"); but see Schwartz & Silverman, *supra* note __, at 33-34 ("[T]he relaxation of the need to show proof of actual, reasonable reliance and damages has made it easier to bring class action lawsuits.").

²⁵¹ See Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and other Consumer Goods Safer*, 17 *Yale J. on Reg.* 253, 276-79 (2000) (discussing intentionally broad language found in UDAP statutes).

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.²⁵²

Despite this flexibility, there are limits to what conduct might be deemed unfair under Section 5. Under current federal law, the FTC cannot deem an act or practice unlawful unless: (1) the act is likely to cause *substantial* injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.²⁵³ This three-part statutory codification and refinement of the FTC's Policy on Unfairness,²⁵⁴ reflects the FTC's position that "the principal focus of . . . unfairness policy is on the maintenance of consumer choice or consumer sovereignty, an

²⁵² H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914); see also Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (citing the House and Senate reports favorably). Although the quote is still pertinent, note that H.R. Conf. Rep. No. 1142 is referring to the original text of the FTC Act which only covered "unfair methods of competition." The Act was amended in 1938 by the Wheeler-Lea Act. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. at 244 ("The amendment added the phrase 'unfair or deceptive acts or practices' to the section's original ban on 'unfair methods of competition' and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors.").

²⁵³ The FTC Act now provides:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition

15 U.S.C. § 45(n).

²⁵⁴ See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science, and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), reprinted in *International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984). For an excellent judicial treatment of the development of the unfairness doctrine, see *American Financial Services Association v. FTC*, 767 F.2d 957 (1985). For scholarly treatments, see, e.g., Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 *Geo. L.J.* 225 (1981); Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 *J. Pub. Pol'y & Marketing* 192 (2003); Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 *B.U. L. Rev.* 349 (1988); Stephen Calkins, *FTC Unfairness: An Essay*, 46 *Wayne L. Rev.* 1935 (2000); Ernest Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 *DUKE L.J.* 903 (1983); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 *GEO. WASH. L. REV.* 1 (1983); Roger E. Schechter, *The Unfairness of Click-On Software Licenses*, 46 *Wayne L. Rev.* 1735, 1759-66 (2000).

economic concept that permits specific identification of conduct harmful to that objective.”²⁵⁵

Under this unfairness standard, the FTC has held that systematic breaches of consumer form contracts are unfair and unlawful,²⁵⁶ so it is no surprise that the FTC has treated the chronic denial and delay of legitimately earned rebate rewards, in violation of the stated terms of a rebate offer, as a UDAP.²⁵⁷ Moreover, one could also imagine courts holding that rebates with extreme redemption requirements, such as those discussed earlier in this paper,²⁵⁸ are unlawful under or state federal UDAP law.²⁵⁹ Support for this conclusion can be found in the FTC Credit Practices Rule,²⁶⁰ which prohibits six different creditor remedies²⁶¹ under a market failure theory,²⁶² as the D.C. Circuit explained:

As long recognized, however, certain types of seller conduct or market imperfections may unjustifiably hinder consumers' free market decisions and prevent the forces of supply and demand from maximizing benefits and minimizing costs. In such instances of market failure, the Commission may be required to take corrective action. Such corrective action is taken “not to second-guess the wisdom of particular consumer decisions, but rather to halt some form

²⁵⁵ See *International Harvester Co.*, 104 F.T.C. 949, 1070/73 (1984).

²⁵⁶ See *Sheldon & Carter*, supra note __ § 5.2.5.2 (citing *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988), cert. denied 484 U.S. 1041 (1989)).

²⁵⁷ See supra notes __ and accompanying text.

²⁵⁸ See supra notes __ and accompanying text.

²⁵⁹ State UDAP statutes follow their own analogous (though distinct) approaches to unfairness. Although the following discussion will track the current FTC approach, it should be noted that most states have not adopted this definition of unfairness, continuing to rely on an earlier, arguably more liberal, FTC standard. See *Sheldon & Carter*, supra note __ § 4.3.3.4 (“[M]ost courts in interpreting state UDAP statutes do not apply this current FTC unfairness definition. Instead they use the “S&H” standard.”) (referring to *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972) (quoting *Cigarette Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose*, 29 Fed. Reg. 8324, 8355 (1964)). I do not mean to gloss over the possible differences between these two standards, but for my purposes, the differences are unlikely to alter the basic point of this section — that purely behavioral arguments may conflict with how the concept of unfairness is applied at the state and federal level. See *Sheldon & Carter*, supra note __ § 4.3.3.6 at 159 (“To some extent, distinctions between the “S&H” standard and the current FTC definition of unfairness may have little practical effect.”).

²⁶⁰ FTC Trade Regulation Rule Concerning Credit Practices, 16 C.F.R. § 444.

²⁶¹ For an overview of the Credit Practice Rule, see *Sheldon & Carter*, supra note __ §§ 5.13, 4.3.4.1. See also *American Financial Services Association v. FTC*, 767 F.2d 957 (1985) (upholding FTC’s promulgation of the Credit Practice Rule).

²⁶² See *The Statement of Basis and Purpose of the FTC’s Credit Practices Rule*, 49 Fed. Reg. 7744 (March 1, 1984).

of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.”²⁶³

It is not clear, though, whether regulators or courts would hold that an honestly and efficiently managed rebate promotion is unlawful based solely upon the behavioral economics behind breakage or the price discriminating effects of rebates.²⁶⁴ First, this would require a determination that the injury caused to rebate-dependent redeemers who fail to redeem is not reasonably avoidable by consumers themselves.²⁶⁵ Regulators or courts might be skeptical of such a claim since many consumers do indeed redeem rebates and avoid the harm being addressed here.²⁶⁶ In addition, depending on the particular consumer good at issue, consumers who do not care for rebates can search out retailers or manufacturers who sell their products without rebates. Second, a finding of unfairness requires that the injury caused by breakage not be outweighed by countervailing benefits to consumers or to competition.²⁶⁷ A Senate Report acknowledged the difficulties of this task:

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in

²⁶³ American Financial Services Ass’n, 767 F.2d at 976 (citing FTC Policy Statement, *supra* note ___, at 37).

²⁶⁴ See Lynch & Zauberman, *supra* note ___, at 71 (“Some people may believe that knowingly offering a rebate that a substantial percentage of consumers are unlikely to redeem (though they believe otherwise) is an unfair competitive practice. However, the FTC appears to operate under a definition of unfairness that makes this outcome unlikely.”); Schechter, *supra* note ___, at 1766 (observing that “[i]n the 15 years since the International Harvester decision, the F.T.C. has made cautious use of its unfairness authority”).

²⁶⁵ See Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. Rev. 349, 417-18 (1988) (“[T]he first question the FTC asks when considering a challenged practice is whether the practice is ‘not reasonably avoidable.’ This turns out to be primarily a matter of whether there is a market failure or imperfection that prevents consumers from registering their preferences through market mechanisms.”) (citing Credit Practices Rule Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7744, 7745-7748 (1984)).

²⁶⁶ See Lynch & Zauberman, *supra* note ___, at 71-72 (“Consumers who follow the redemption protocol receive the benefit, and they might point out that those who do not could have easily avoided the financial loss. However, it is highly predictable that in the aggregate, consumers will have low redemption rates.”) (footnote omitted).

²⁶⁷ See Schechter, *supra* note ___, at 1785-86 (“[T]his prong of unfairness analysis calls for a cost-benefit analysis of the practice in question, and the Commission will ‘prohibit a practice only where doing so can be shown to result in a net benefit.’”) (citing Braucher, *supra* note ___, at 421).

other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.²⁶⁸

In the case of rebates, the harm of breakage (non-redemption by rebate-dependent consumers)²⁶⁹ would have to be balanced against any positive welfare benefits created by the price discriminating effects of rebates,²⁷⁰ and other benefits generated by the information gathering facilitated by rebates.²⁷¹ The net economic effect of particular rebate promotions may be difficult to determine in part because breakage causes harm only to a sub-group of rebate-non-redeemers (rebate dependent purchasers who fail to redeem), and as we have seen, the size of this subgroup has not yet been established conclusively.²⁷² In any case, a court considering these costs and benefits could come to the conclusion that the benefits of rebates in a particular market outweigh the costs to consumers who experience breakage.²⁷³

If proceeding under an unfairness theory presents problems, it seems even more unlikely that honestly administered rebate redemption programs, under which no affirmative misrepresentations are made to consumers, would be deemed “deceptive” under Section 5 of the

²⁶⁸ S. Rep. No. 103-130, at 13 (1993).

²⁶⁹ Technically, some breakage might be welfare-enhancing. See supra note __.

²⁷⁰ See supra notes __ and accompanying text (discussing price discrimination and rebates); see also Sovern, Transaction Costs, supra note __, at 1700 (“Many practices that inflate consumer transaction costs have legitimate justifications. Some may even benefit consumers by reducing business expenses, thus enabling firms to offer their products at lower prices, at least in competitive markets.”) (footnotes omitted).

²⁷¹ See supra notes __ and accompanying text.

²⁷² See supra notes __ and accompanying text.

²⁷³ Jeff Sovern offers the following sage guidance:

Policymakers should approach the problem of inflated consumer transaction costs, then, by first asking whether the firm has increased the consumer's transaction costs. If the firm has, policymakers should next ask whether the practice involves a term that is salient to a significant number of consumers. If it is not, policymakers should then explore whether the practice runs afoul of any of the other criteria discussed above: whether the practice affords any significant benefit other than to increase consumer transaction costs, whether the practice is one that consumers would agree to in a competitive market, how consumers would behave in a world of zero transaction costs, and whether the loss to consumers outweighs the benefit to the firm.

Sovern, Transaction Costs, supra note __, at 1705.

FTC Act or analogous state law provisions. According to the FTC Policy Statement on Deception, “The Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.”²⁷⁴ Under this policy, “A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers.”²⁷⁵ While one could argue that it is deceptive to offer a rebate without making redemption effort clear,²⁷⁶ research has failed to reveal any cases where a failure to inform buyers of their own potential suboptimal behavior has been held to be deceptive. Whether or not the FTC would endorse such an expansive view of deception is questionable.

D. Possible Forms of Rebate Legislation and Regulation

Rebates can also be governed through legislation and regulation.²⁷⁷ It is helpful to divide this into two approaches: (1) regulation aimed at altering the conduct of consumers to reduce

²⁷⁴ FTC Policy Statement on Deception, 103 F.T.C. 174, appended to Cliffdale Assocs., 103 F.T.C. 110 (1984) [hereinafter “FTC Policy Statement on Deception”]; id. (“Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.”); see also Sheldon & Carter, *supra* note __ § 4.2; Jean Braucher, Delayed Disclosure in Consumer E-Commerce As An Unfair and Deceptive Practice, 46 Wayne L. Rev. 180, 1852-54 (2000) (discussing deception based upon non-disclosure).

²⁷⁵ See FTC Policy Statement on Deception, *supra* note __, at n. 4. But see Sheldon & Carter, *supra* note __ § 4.2.14.3, at 138 (“The FTC has also proffered a complex analysis, not adopted by any court interpreting the FTC Act or any court interpreting a state UDAP statute of when a failure to disclose is deceptive.”).

²⁷⁶ See Braucher, *supra* note __, at 1854-58 (arguing that non-disclosure of various types of contract terms, such as licenses, mandatory arbitration provisions, and limitations of remedies, is deceptive).

²⁷⁷ This Article will not address the comparative advantages or disadvantages of regulating rebates through adjudication as opposed to rulemaking or legislation. See Kaplan & Smith, *supra* note __ 302-04 (discussing advantages of regulation over case by case UDAP litigation); Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 Kansas L. Rev. 1 (2005) (observing that private lawsuits create “policy in a piecemeal and retroactive manner”) (citing *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 986 (D.C. Cir. 1973)); Jeffrey J. Rachlinski, Rulemaking versus Adjudication: A Psychological Perspective, 32 Fla. St. L. Rev. 529 (2005) (discussing strengths and weaknesses of varying regulatory approach from a psychological perspective); Schechter, *supra* note __, at 1793-94 (discussing problems with FTC rulemaking); Sovern, *supra* note __, at 1706 (“[C]ourts tend to be more limited than legislatures and administrative agencies in fashioning remedies. Thus, while legislatures and administrative agencies occasionally resort to disclosure requirements courts rarely do. Courts

their purported irrationality or suboptimal decision-making; and (2) regulation aimed at altering the conduct of rebate offerors primarily to eliminate the most egregious rebate promotion abuses.

1. Regulating Consumers (By Regulating Rebate Offerors)

In the rebate context, asymmetrically paternalistic regulation could be used to reduce purported irrationality or suboptimal consumer decision-making.²⁷⁸ If the problem with consumer decision-making is a lack of relevant information, then mandatory disclosure provisions can ensure that decision-makers have the information necessary to make better decisions.²⁷⁹ On the other hand, if decision-makers are subject to cognitive biases, mandatory disclosure can be used to de-bias decision-makers and thus improve their decision-making.²⁸⁰

A few states already have mandatory rebate price disclosure statutes that embrace this approach. New York,²⁸¹ California,²⁸² Connecticut,²⁸³ and Oklahoma²⁸⁴ require rebate offerors to

seldom can do more than either permit a term to stand or strike it.”) (footnotes omitted).

It should be noted, however, that the FTC only has legal authority to regulate deceptive and unfair trade practices. See supra note ___ and accompanying text. Therefore, if rebates are not inherently unfair or deceptive, legislation would be required to empower the FTC to regulate in this area, though the FTC already arguably has the authority to regulate rebate promotions with onerous or impossible redemption requirements. See supra notes ___ and accompanying text. In the alternative, Congress and the states could directly regulate rebates. Regardless of which approach is superior, it is not clear how rebate offerors would respond to a multiplicity of state approaches. Governor Schwarzenegger made this point when he vetoed a rebate bill in California. See infra notes ___ and accompanying text

²⁷⁸ See supra notes ___ and accompanying text (discussing asymmetrically paternalistic regulation).

²⁷⁹ See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 *J. Legal Studies* 199, 207 (2006) (“If the problem of limited consumer understanding . . . merely reflects a law of information, then the traditional corrective is the straightforward provision of additional information.”).

²⁸⁰ See Gourville & Soman, supra note ___, at 8 (“[I]f consumers are indeed anchoring on a successful redemption and failing adequately to adjust for things that could go wrong, one could attempt to debias the insufficient adjustment of such consumers.”); Mitchell, supra note ___, at 1255 (“[A]sking decisionmakers to imagine ways that a chosen option might fail or an ignored option might succeed can remove or reduce the effects of several biases (although asking individuals to generate many alternative futures may actually exacerbate the underlying biases if individuals have difficulty generating counterfactuals.)” (Lawrence J. Sanna & Norbert Schwarz, *Integrating Temporal Biases: The Interplay of Focal Thoughts and Accessibility Experiences*, 15 *PSYCHOL. SCI.* 474, 480 (2004); Lawrence J. Sanna et al., *When Debiasing Backfires: Accessible Content and Accessibility Experiences in Debiasing Hindsight*, 28 *J. EXP’L PSYCHOL.: LEARNING MEMORY & COGNITION* 497 (2002)); Sunstein, supra note ___, at 257-58 (discussing de-biasing efforts).

²⁸¹ See GBL § 350-a(3) (stating that it is “false advertising to display . . . the price of an item after deduction of a rebate unless the actual selling price is displayed or announced, and clear and conspicuous notice is given in the advertisement that a mail-in rebate is required to achieve the lower net price.”). New York recently enacted more

clearly indicate when rebate redemption is required to achieve an advertised price.²⁸⁵ A leading consumer law treatise explains the basic idea behind these provisions: “Advertising the net price of a product for which a manufacturer’s rebate is offered has been determined to be inherently misleading unless the retail advertiser makes the rebate available to reduce the regular price at the time of purchase.”²⁸⁶ Other states have statutes that forbid²⁸⁷ a seller from representing that

extensive rebate controls. See *infra* notes ___ and accompanying text.

²⁸² California Business and Professions Code § 17701.5 (“It is unlawful for any person to advertise a price that requires the buyer to send in a coupon to the manufacturer for a cash rebate, unless the price actually paid to the person selling the item is clearly and conspicuously advertised along with the final price with the coupon.”).

²⁸³ In Connecticut, the relevant legal provision is a regulation promulgated by the Connecticut Commissioner of Consumer Protection under authority granted under the Connecticut Unfair Trade Practices Act (“CUTPA”). See Conn. General Statutes § 42-110b(a) (“No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”); Conn. General Statutes § 42-110b(c) (“The commissioner may . . . establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive . . . Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.”). The regulation states that it is an unfair or deceptive act or practice to:

Advertise the availability of any type of rebate by displaying the net price of the advertised item in the advertisement, unless the amount of the rebate is provided to the consumer by the retailer at the time of purchase of the advertised item. A retailer will not be required to provide the purchaser of an advertised item with the amount of the rebate if the retailer advertises that a rebate is available without stating the net price of the item. For the purpose of this subsection, “net price” means the ultimate price paid by a consumer after the consumer redeems the rebate offered for the advertised item.

Conn. Agencies Regs. § 42-100b-19 (2005). See also *Caldor, Inc. v. Heslin*, 577 A.2d 1009, 1011 (Conn. 1990) (discussing Conn. Agencies Regs. § 42-100b-19).

²⁸⁴ Okla. Stat. tit. 78, § 53(a)(12) (2004) (stating that a person engages in a deceptive trade practice when “[he] advertises the price of an item after deduction of a rebate unless the actual selling price is advertised and clear and conspicuous notice is given in the advertisement that a mail-in rebate is required to achieve the lower net price”).

²⁸⁵ Such laws have been proposed in other states. See Maryland House 852, 421st Session (February 8, 2006) (“A merchant may not advertise the availability of a rebate for consumer goods by displaying the net price of the consumer goods in the advertisement, unless the amount of the rebate is provided to the consumer by the merchant at the time of the purchase of the consumer.”); New Jersey Assembly 1874, 211th Legislature (September 23, 2004).

It shall be an unlawful practice for a retail mercantile establishment to advertise merchandise for sale indicating the availability of a manufacturer's rebate by displaying the net price of the item of merchandise, unless the amount of the manufacturer's rebate is provided to the consumer by the retailer at the time of purchase of the advertised item actual selling price of the merchandise is disclosed in the same font and size as the net price and a clear and conspicuous notice is provided in the advertisement that a mail-in rebate is required to achieve the lower net price.

2005 Rhode Island House Bill No. 7573, 2005-2006 Legislative Session, Section 6-13.1-(6)(xx).

²⁸⁶ See Howard J. Alperin & Roland F. Chase, *Consumer Law: Sales Practices and Credit Regulation* § 76, at 40 (2004 Supp) (citing *Caldor, Inc. v. Heslin*, 577 A.2d 1009 (Conn. 1990)); Pridgen, *supra* note ___ § 3:20, at 136-37 (reviewing deceptive pricing practices, including rebates); Sheldon & Carter, *supra* note ___ § 4.6.3.2, at 180.

the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.²⁸⁸

Like rebate price advertising laws, these warnings aim to make the terms of the rebate offering salient to consumers, which can reduce errors by consumers in determining whether the seller truly is meeting the buyer's reservation price.²⁸⁹

Mandatory disclosure could go even further to improve consumer rebate decision-making with respect to rebates, as Lynch and Zauberger suggest:

[An] argument could be made that sellers should disclose and make salient the steps that are required to redeem as well as the success rate (i.e., the frequency of rebate redemptions). If consumers understand that they are unlikely to redeem a rebate, they might give the rebate less weight in choosing among competing products than a somewhat smaller, though immediate, price reduction. Such an informational remedy might provide incentives to marketers to compete by offering rebates that were more attractive and easier to redeem.²⁹⁰

²⁸⁷ These statutes are technically disclosure prohibiting rather disclosure mandating, but they are included here since they regulate the flow of information to the consumer in a potentially asymmetrically paternalistic manner.

²⁸⁸ See Cal. Civ. Code § 1770(a)(17) (2005); Mich. Comp. Laws § 445.903(1)(w) (2005). Despite the potentially broad scope of such language, California courts have held that this provision does not outlaw typical mail-in consumer rebates, even though the benefit (the rebate reward) is contingent on a subsequent event (submission of a completed request). See *Kramer v. Intuit Inc.*, 18 Cal. Rptr. 3d 412 (Cal. Ct. App. 2004); *Pollard v. Ericsson, Inc.*, 22 Cal. Rptr. 3d 496 (Cal. Ct. App. 2004) (cell phone rebates that required consumer to enter into wireless service contracts with a third-party company not unlawful because the condition could be satisfied before or simultaneous to the purchase and thus was not a "subsequent" condition). When faced with the issue, the California Court of Appeals simply concluded that there was "no indication that the Legislature intended to outlaw rebates that are neither deceptive nor misleading." *Kramer v. Intuit Inc.*, 18 Cal. Rptr. 3d 412, 416 (Cal. Ct. App. 2004).

The Uniform Commercial Sales Practices Act, also states that it is a deceptive act for a supplier to indicate:

that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction.

Unif. Consumer Sales Practices Act § 3(b)(11), 7A U.L.A. 206, 2__ (1970); see also Ind. Code Ann. § 24-5-0.5-3 (Michie 2004) (language similar to UCSPA § 3(b)(11)); Md. Code Ann., Commercial Law § 13-304 (2004) (same); Va. Code Ann. § 18.2-242.1 (b) (same).

²⁸⁹ For other legal treatments of deceptive pricing practices, see *Guides Against Deceptive Pricing*, 16 C.F.R. Pt. 233 (2005); 16 C.F.R. § 233.1 (former price comparisons); 16 C.F.R. § 233.2 (retail price and comparable value comparisons); 16 C.F.R. § 233.3 (manufacturers suggested retail/list prices); 16 C.F.R. § 233.4 (bargain offers based upon purchase of other merchandise); 16 C.F.R. § 233.5 (miscellaneous price comparisons).

²⁹⁰ Lynch & Zauberger, *supra* note __, at 71 (citations omitted). Lynch and Zauberger may overstate the precedent for such provision, when they note:

Building upon this idea, one could imagine a mandatory rebate disclosure statute akin to the warning label on cigarettes:²⁹¹

To obtain the advertised price, you must submit a rebate form by mail along with an original receipt and the UPC code from the box by [DATE]. Psychological and economic research suggests that many consumers will not redeem their rebates despite an original intention to redeem. Consumers thus should take this into consideration when considering the purchase price of this product.²⁹²

Another version follows:

To obtain the advertised price, you must submit a rebate form by mail along with an original receipt and the UPC code from the box by [DATE]. Consumers therefore should consider whether they are likely to redeem this rebate when considering the purchase price of this product.

There are a few possible problems with mandatory warnings such as these. First, informational remedies may be suitable for correcting informational problems, but they may not be sufficient to address suboptimal decision-making due to pervasive cognitive short-comings:²⁹³

A parallel might be drawn between consumers' misunderstanding of the likelihood that they will enjoy the proffered benefit of a rebate-reduced price and the likelihood that they will benefit from a weight-loss supplement. Consider an advertisement that trumpets "Lose 5 pounds in 10 days," with ad copy about how easy it is to lose weight by taking the product three times a day, accompanied by before-and-after pictures. If the product works, but only in conjunction with a rigorous diet and exercise program, the advertisement might be deceptive if it does not make sufficiently salient the additional conditions that make even motivated consumers unlikely to lose the promised weight. The FTC has also advocated disclosures of success rates.

Id. But the source to which they cite bears the following disclaimer: "This is the Presiding Panel's report of the conference proceedings. The views expressed herein by individual government participants do not necessarily reflect the views of their respective government agencies." Report of the Presiding Panel, Commercial Weight Loss Products and Programs —What Consumers Stand To Gain and Lose, A Public Conference on the Information Consumers Need to Evaluate Weight Loss Products and Programs, October 16-17, 1997, available at <http://www.ftc.gov/os/1998/03/weightlo.rpt.htm#B.%20Weight%20Loss%20Products%20a>. But the point still has merit.

²⁹¹ See Xavier Gabaix & David I and Laibson, Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets, 121 *Quarterly Journal of Economics* 505, 530 (2006) ("[R]egulators could simply warn consumers to pay attention to shrouded costs. For example, required 'warning labels' could be placed prominently on marketing materials, much like cigarette warning labels.").

²⁹² See Lynch & Zauberman, *supra* note __, at 71 (noting that an argument "could be made that sellers should disclose and make salient the steps that are required to redeem as well as the success rate (i.e., the frequency of rebate redemptions)").

²⁹³ Jeffrey Rachlinski notes:

If a lack of information is the chief cause of erroneous choice, then the least costly cure is ensuring more informed decisions. If, however, the problem is that individuals make bad choices even

Public policy favors less restrictive informational remedies if rebates are judged deceptive or unfair. However, we are not sanguine that these kinds of standard informational remedies would produce dramatic effects on consumers' susceptibility to rebates or alter their probability of redemption. People fail to redeem rebates because of fundamental and predictable principles of human motivation and cognition. . . . People systematically underestimate the burden of time costs to be borne in the future and fail to learn from personally relevant base-rate information that they later regret committing to time-consuming activities in the future.²⁹⁴

Second, not only might behavioral warnings be ineffective, but they might actually distort the market.²⁹⁵ Decision-makers may be unable to disregard information that is irrelevant to their decision-making,²⁹⁶ so we run the risk that warnings will turn off those consumers who benefit from rebates, creating a situation where the cure is worse than the disease.²⁹⁷ As an end result, both intended redeemers and intended non-redeemers might overweigh the possibility of rebate redemption failure or larger numbers of rebate-independent purchasers might redeem, thus

when they have good information, then information disclosures and warnings are useless. In fact, they might even be counterproductive if they inspire overconfidence.

Rachlinski, *supra* note __, at 1177 (footnotes omitted); see also Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 483-84 (2002) (arguing that the form of presentation of contract terms may not affect cognitive factors).

²⁹⁴ Lynch & Zauberman, *supra* note __, at 72; Sunstein, *supra* note __, at 260 (“There are, however, serious problems with informational approaches. Most fundamentally, they do not adequately come to terms with bounded rationality.”)

²⁹⁵ In a discussion of disclosures to reduce excessive borrowing and use of credit, Ronald Mann explains:

[T]he parallel to smoking campaigns illustrates how difficult such a campaign would be. It has taken decades of concerted effort at all levels of the government to bring the growth of smoking among young people to something of a standstill--this for a product without redeeming social value, plainly addictive and associated with the most catastrophic health consequences. Consumer expenditure and credit, on the other hand, are more ambiguous in their effects on our economy: we can hardly expect the government to urge consumers not to spend

Mann, *supra* note __, at 921.

²⁹⁶ See Katherine J. Strandburg, Privacy, Rationality and Temptation: A Theory of Willpower Norms, 57 Rutgers L. Rev. 1235, 1273 (2005).

²⁹⁷ Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 J. Legal Studies 199, 225 (2006) (“It is easy to imagine situations in which bounded rationality presents a modest problem, so that any cure is worse than the disease.”). Scholars have also noted that regulators themselves are subject to cognitive biases and other pressures. See Glaeser, *supra* note __; Sunstein, *supra* note __, at 255.

weakening the price discriminating effects of rebates.²⁹⁸ (Of course, one who objects to rebates precisely because of their price discriminating effects would be pleased if disclosure had such broad effects.)

Finally, as a practical matter, one might wonder whether mandatory rebate warnings would survive criticisms that they are a form of nanny-state intervention.²⁹⁹ For example, Lynch and Zauberaman call for two different disclosures: the rebate submission requirements and success rates.³⁰⁰ Mandatory disclosure of the terms of a bargain has a distinguished pedigree in the law,³⁰¹ and is hard to find objectionable. But disclosure of psychological evidence concerning aggregate consumer behavior is not as well-established and whether an approach that includes warning cognitive biases is politically tenable is unclear. Critics might argue that it is one thing to warn about the nearly irrefutable, damaging health effects of smoking, but that it is quite another thing to warn people about their tendency to forget to do things or to procrastinate. Nevertheless, the fact that behavioral or cognitive warnings of this sort have not yet been tried does not mean that the concept is without merit.³⁰²

²⁹⁸ Richard Epstein has made the point in the context of regulating credit cards that “by putting government into the fray, there is always the risk that de-biasing will take the form of re-biasing, by overstating credit card risks to individuals who would do well to have them.” See Epstein, *supra* note __, at 131.

²⁹⁹ A well-known Washington Post editorial levied this charge against the FTC when it pushed for a ban on advertising to children. See Editorial, *The F.T.C. As National Nanny*, Wash. Post, Mar. 1, 1978, at A22; see also Calkins, *supra* note __, at 1954 (“[T]he press and business interests pilloried the agency as the ‘National Nanny’ after it proposed a rule regulating advertising to children; Congress passed legislation cutting back on the FTC’s jurisdiction over a wide swath of the economy and preventing ‘unfairness’-based regulation of commercial advertising, and the Commission strategically (and hastily) retreated.”) (footnotes omitted).

³⁰⁰ Lynch & Zauberaman, *supra* note __, at 71.

³⁰¹ See, e.g., The Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (2005).

³⁰² See Sunstein, *supra* note __, at 261 (noting that “the argument for de-biasing is far stronger for smoking” than for over-borrowing, though the same basic principles apply).

2. *Regulating Rebate Offerors*

In a letter to the FTC, U.S. Senator Charles Schumer recently proposed a variety of rebate protections for consumers aimed at rooting out the most egregious rebate promotion practices.³⁰³

A few states already have experimented with paternalistic forms of rebate regulation that aim to by directly imposing standards of conduct on rebate offerors.³⁰⁴ These types of provisions, which will be discussed below, include: (1) requiring rebate form availability; (2) fixing time periods for consumer rebate redemption;³⁰⁵ (3) fixing time periods for payment of rebate rewards; and (4) liberalizing rebate submission requirements.³⁰⁶

a) Rebate Form Availability

Maine requires stores to ensure that sufficient rebate forms are available for consumers and to remove outdated forms from view.³⁰⁷ In a similar vein, New York recently passed a rebate

³⁰³ Under Senator Schumer's proposal: (1) companies must provide consumers at least 30 days to redeem their rebates and must fulfill the terms of the rebate within the same amount of time required of consumers but it should not exceed 60 days; (2) companies must take steps to send the rebate check in a manner which identifies the piece of mail as the expected rebate check; (3) companies must accept copies of receipts, not just originals; (4) companies cannot require consumers to write identifying information on the rebate form unless the receipt does not identify the purchased product; (5) Companies offering rebates may not require information that is not necessary to process the rebate, including information other than name, address and phone number; (6) companies must provide telephone numbers or contact information for rebate inquiries so consumers are able check on the status of their rebates. See Press Release, Schumer Warns: Post Holiday Rebate Scams Are Fool's Gold – Stores Hire Rebate Companies Whose Job It Is to Make Sure You Don't Get Your Money Back, January 2, 2006, available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2006/PR01.Rebate.010205.pf.html [hereinafter Schumer Rebate Proposal].

³⁰⁴ Several of the major proposals are summarized on a chart that is an appendix to this paper. See Appendix B.

³⁰⁵ This alternative can be seen as a de-biasing approach.

³⁰⁶ See Govern, *supra* note __, at 1699 (noting that “[a]ssuming that rulemakers wish to regulate rebates . . . rulemakers could regulate them, by, for example, requiring simplified rebate procedures”).

³⁰⁷ Me. Rev. Stat. Ann. tit. 10, § 1232 (2004):

Any person . . . which causes to be advertised by means of a newspaper advertisement, circular, television or radio announcement, in-store promotion or otherwise, the availability of a manufacturer's rebate form shall have available to the consumer at the time of advertising and promotion and make available to the purchaser at the time of sale the appropriate manufacturer's rebate form. This form, or a notice as to its location, shall be located with the merchandise to which it pertains. Forms which have expired shall be removed from consumer availability in a timely fashion.

See also Me. Rev. Stat. Ann. tit. 10, § 1231 (2004) (defining manufacturer rebate); Me. Rev. Stat. Ann. tit. 10, §

law,³⁰⁸ that requires rebate offerors to provide the rebate redemption form “directly with the product, or at the same location and at the same time that the consumer purchases the product or at the time a contractual agreement for service is signed by the consumer.”³⁰⁹ Similar proposals have been made in other states.³¹⁰

Mandatory rebate form availability provisions could be viewed as either a method for correcting the problem of difficult to satisfy rebate redemption requirements (what is more difficult than a rebate promotion without a form to submit?)³¹¹ or as an indirect form of de-biasing regulation. A consumer who sees that rebate is being offered but that forms are not currently available may take the rebate into account in the purchase decision because he is unduly optimistic or confident about the likelihood that he will follow up to obtain the form from the rebate offeror at a later date and eventually redeem the rebate. One could logically assume that the absence of available rebate form creates another step in the rebate redemption process and another opportunity for procrastination and prospective memory failure. Therefore, form availability provisions are also geared towards minimizing sub-optimal behavior.

b) Mandatory Rebate Redemption Terms

Regulators interested in a harder form of paternalism could seek to impose mandatory rebate redemption terms including fixed periods for rebate redemption and for payment of rebate

1233 (2004) (setting forth statutory damages for violations of § 1232).

³⁰⁸ See the research note, *supra* note __ for a discussion of this Article’s citation of this statute.

³⁰⁹ NY GBL § 391-p(2)(a). Violations can give rise to statutory damages. See NY GBL § 391-p (5) (statutory damages of \$100 to \$1000 per violation). The New York statute provides a reasonable alternative, allowing statutory compliance through the rebate offeror’s provision of sufficient forms, based upon reasonably anticipated sales, to the retailer or some means of creating a rebate form prior to or at the time of the sale. See NY GBL § 391-p (2)(b)(1)-(2). The statute also has a special provision for internet and telephone sales. See NY GBL § 391-p (2)(c).

³¹⁰ See 2005 Massachusetts House 3670, 184th General Court (December 13, 2004) (“Every rebate, however advertised, offered or communicated to the public, shall be provided to a purchaser of the particular good or article, at the time of purchase by the retailer.”); Texas H. 3421, 79th Legislature (March 11, 2005), § 21.023.

³¹¹ See *supra* Part __.

rewards.³¹² Legislators in California, New York and Texas have experimented with this approach, with mixed success. In 2004, the consumer advocacy group, Consumers Union, supported a bill introduced by California State Senator Liz Figueroa,³¹³ which (like the Schumer Proposal³¹⁴) would have required that companies provide consumers at least 30 days to redeem their rebates.³¹⁵ Senate Bill 1154 was vetoed by Governor Schwarzenegger. An effort to set rebate terms met with more success in New York, where a recently enacted statute requires rebate offerors to give consumers at least 14 days to redeem their rebates.³¹⁶ In addition, the statute mandates payment of the rebate (mailing of the check or transmission of payment) within 60 days after receiving a valid rebate request.³¹⁷ Violations of this law can result in statutory damages of \$100 to \$1000 per violation.³¹⁸ At present, New York appears to be the only state law to fix rebate redemption and reward payment terms; no analogous law exists at the federal level.³¹⁹

³¹² See Lynch & Zauberman, *supra* note __, at 72.

³¹³ Senator Figueroa has introduced another rebate bill. See California S. 1737 (February 24, 2006). It has not passed the California legislature as of this writing.

³¹⁴ See *supra* note __.

³¹⁵ Governor Schwarzenegger explained his action as follows:

While this bill purports to provide flexible options for compliance for companies offering rebates, the bill will have the effect of reducing the number of rebates offered by manufacturers. This bill will present unnecessary barriers for companies doing business in multiple states since the rebate terms for California residents would differ from those in the rest of the country.

Existing contract law and federal and state consumer protection laws make this bill unnecessary and could cause conflicts for companies that make nationwide rebates offered that would encourage companies to exclude California from their nationwide consumer rebate offers.

http://www.governor.ca.gov/govsite/pdf/vetoes/SB_1154_veto.pdf.

³¹⁶ See NY GBL 391-p(3) (“Any . . . entity that offers a consumer rebate shall allow a minimum of fourteen days from the date the consumer purchases the product, or becomes eligible for the rebate upon satisfying the terms and conditions of the offer for the submission of a request for redemption by the consumer.”).

³¹⁷ See NY GBL 391-p(3) (“Upon receipt of a request for redemption meeting the terms and conditions of the rebate offer, an . . . entity shall mail the rebate check or transmit the rebate funds to the consumer within sixty days.”).

³¹⁸ See NY GBL § 391-p (5) (statutory damages of \$100 to \$1000 per violation).

³¹⁹ U.S. Senator Charles Schumer has proposed such protections. See Schumer Rebate Proposal, *supra* note __.

New York's new timing rules, like the other major rebate proposals (the Schumer Rebate Proposal, California SB 1154, and Texas HB 511) while well-intentioned, embody some potentially flawed common sense about rebates. Neither the New York statute nor any or proposed law, fixes a *maximum* rebate redemption period. Instead, all of these proposals assume that the real problem is with rebate offerors who offer short rebate redemption deadlines and that regulators would not want to interfere with rebate offerors who provide longer deadlines. Although most consumers might express a preference for long task completion deadlines,³²⁰ as we saw earlier, scholarly work actually supports a different, counterintuitive notion that longer deadlines may lead to increased breakage and that shorter deadlines might increase rebate redemption.³²¹ Regulators, therefore, might want to consider mandating shorter redemption deadlines:

One approach would be to restrict sellers' ability to offer rebates with a long time frame, on the grounds that such rebates are inherently deceptive or unfair (as supported by empirical work and sound psychology). If rebates require fairly immediate action, people could realistically appraise their likelihood of following through. Placing a short redemption deadline on consumers is no hardship, because as we noted previously, people are more rather than less likely to redeem a rebate with a shorter deadline.³²²

In the interests of realism, though, it seems highly unlikely that shorter deadlines will become a reality any time soon. First, consumer rights advocates and sympathetic legislators probably would object to the idea of shorter, mandatory rebate redemption deadlines, regardless of what the embryonic social science evidence on this point suggests. Second, shorter deadlines for rebate redemption could present problems for consumers who wish to evaluate a product fully before deciding whether to keep the product and redeem the rebate or return the product to

³²⁰ Bruce Mohl, *Obstacle Courses Can Put Rebates Out of Reach*, Boston Globe, February 16, 2003 (noting consumer complaints over short rebate deadlines).

³²¹ See *supra* notes ___ and accompanying text.

³²² Lynch & Zauberman, *supra* note ___, at 72.

the retailer. A one-week submission deadline might decrease breakage, but it also might make it difficult to permit consumers who are unsatisfied with their products to return them to sellers. This problem could be ameliorated if consumers are permitted to submit copies of receipts and UPC codes with rebate offers. But then rebate offerors would be in a bind because purchasers could redeem a rebate and then return the product to the store.³²³ Third, shorter deadlines might turn off consumers who would perceive them as detrimental to their interests, which could result in lower sales and eventually a decrease in rebate usage. (This would not be objectionable to those who would support a ban on rebates, but those who see rebates as welfare-enhancing might find this troubling.) A more plausible alternative to short mandatory deadlines would be uniform rebate deadlines across the board, either via federal law or a uniform state law.³²⁴

c) Mandatory Rebate Payment Terms

As discussed earlier, one of the main frustrations that consumers face is what they perceive as interminable delays in the payment of rebate rewards.³²⁵ This problem, faced by consumers who have redeemed their rebates, has nothing to do with suboptimal consumer behavior. Some legislative proposals tackle this issue head-on by setting maximum payment periods from the time that a valid rebate submission is received. California S.B. 1154 and the Schumer Rebate Proposal require rebate offerors fulfill the terms of the rebate within the same amount of time required of consumers, with a maximum time period of 60 days.³²⁶ New York now provides for a 60-day maximum payment period, without any reference to the amount of time required of consumers.³²⁷ A vetoed bill in Texas³²⁸ would have required rebate offerors that

³²³ See supra notes ___ and accompanying text (discussing rebate fraud and the need for original UPC codes).

³²⁴ Cf. Mann, supra note ___, at 927-32 (discussing benefits of term standardization for consumer credit contracts).

³²⁵ See supra notes ___ and accompanying text.

³²⁶ See S.B. 1154.

³²⁷ See NY GBL § 391-p.

offered rebates of \$10 or more³²⁹ to mail rebate awards to consumers within 30 days of receiving a valid request³³⁰ notify consumers who submitted incomplete rebate requests of any errors or missing paperwork,³³¹ and allowed them an additional 30 days to resubmit the rebate request without penalty.³³² In contrast to the imposition of deadlines for rebate submission, there is no downside for consumers to mandating payment periods³³³ so the only objections would come from rebate offerors, who might be dismayed to see inconsistent payment rules imposed in different states or the emergence of unreasonably short payment periods that complicate the relationship between the rebate offeror and the fulfillment center.³³⁴

d) Liberalizing Rebate Redemption Requirements

Legislative proposals have also attempted to liberalize rebate submission requirements. Several states have focused on the consumers' need to retain original receipts. California Senate Bill 1154 would have forbidden companies from requiring original receipts from consumers unless they provide duplicate originals,³³⁵ while a proposed bill in Rhode Island makes a refusal

³²⁸ Governor Perry vetoed the bill, claiming that it would result in an unwarranted expansion of expensive class action lawsuits against rebate offerors with reasonable procedures for paying rebates. See HB 511 Veto Proclamation, June 17, 2005, available at http://www.governor.state.tx.us/divisions/press/bills/veto2005_files/hb0511.pdf (“Under the guise of consumer protection, this bill would vastly expand class action lawsuits without a direct relationship to demonstrable harm.”).

³²⁹ See HB 511, § 35.43(a)(2) (limiting the definition of a consumer rebate as “an offer to a consumer of cash, credit, or credit toward future purchases that is made in connection with a sale of a good or service to the consumer, is in an amount of \$10 or more”).

³³⁰ See HB 511, § 35.43(b)(1) (firms must “mail the amount of the rebate to the consumer or electronically pay the consumer the amount of the rebate within the time period promised in the rebate information provided to the consumer, or if silent, not later than the 30th day after the date the person receives a properly completed rebate request”).

³³¹ See HB 511, § 35.43(d)-(e)

³³² See HB 511, § 35.43(f).

³³³ Unless the statutorily imposed deadlines are longer than current typical rebate payment periods and the new laws create a less beneficial payment norm than currently exists.

³³⁴ See supra note ____ (sources explaining that fulfillment centers must be paid by the rebate offeror before they pay consumers).

³³⁵ See S.B. 1154. This bill also would have (1) forbidden companies from requiring consumers to write identifying information on the rebate form unless the receipt does not identify the purchased product; (2) forbidden companies

to accept photocopy of receipt unlawful.³³⁶ A proposed amendment to New York's rebate law goes even further and would entitle all consumers to a duplicate rebate receipt at the time of purchase.³³⁷ The New York proposal also makes clear that the same original documentation cannot be required for multiple items.³³⁸ Other proposals attempt to prevent rebate offerors from requiring unnecessary information from consumers.³³⁹ Both the Schumer Rebate Proposal and California Senate Bill 1154 forbid companies from requiring consumers to provide unnecessary information to rebate offerors or to write identifying information on the rebate form unless the receipt does not identify the purchased product. Some proposals address the purported problem of hard to identify rebate checks.³⁴⁰ The idea is to prevent situations where consumers will inadvertently dispose of their checks because they think that it is junk mail. Once again, it is difficult to see such laws facing a huge amount of resistance, with the exception of the problem of having multiple state standards to satisfy.

E. Market Self-Correction

Even assuming that consumer decision-making is suboptimal, one might question whether the rebate market can self-correct, thus obviating the need for paternalistic (asymmetric

from requiring information that is not necessary to process the rebate, including information beyond a name, address and phone number; and, (3) required that companies provide a telephone number (or internet site for online sales) to consumers for rebate inquiries to check on the status of their rebates. *Id.*

³³⁶See Rhode Island H. 7573 (February 16, 2006), Section 6-13.1-(6)(xxi).

³³⁷ New York Sen. 7577-A, 228th Leg. Sess. (April 25, 2005) ("Any consumer who purchases a product for which a consumer rebate is offered, is entitled, at the time of purchase, to a duplicate original sales receipt or a duplicate original sales receipt that only contains the product for which the rebate is offered.")

³³⁸ See New York Sen. 7577-A, 228th Leg. Sess. (April 25, 2005) ("No . . . entity offering a consumer rebate shall require as a term or condition of the rebate offer, the same original documentation for more than one rebate offered for the same item.").

³³⁹ See North Dakota Sen. 2231, 59th Legislative Assembly (January 17, 2005) ("A person offering a mail-in rebate to the purchaser of a product or merchandise may not require the purchaser to provide a street address as a condition to receive a rebate).

³⁴⁰ See Schumer Rebate Proposal, *supra* note __; Tugend, *supra* note __. New York Sen. 7577-A, 228th Leg. Sess. (April 25, 2005) ("Any rebate mailed to a consumer . . . shall prominently and in the English language state, on the rebate, the name of the product purchased for which such rebate has been issued and that this is a rebate.").

or otherwise) regulatory intervention. Many retailers realize that rebates — especially manufacturers’ rebates, which are out of their control — can reflect poorly on the store that advertises and sells the product, thus leading to consumer dissatisfaction with the retailer.³⁴¹ Thus, contrary to the relentlessly negative narratives of exploitive rebate programs, there is emerging anecdotal evidence that some firms are responding on their own to complaints regarding rebates and that rebate offerors are working to simplify rebate redemptions.³⁴² One article notes: “Instead of making it as difficult as possible for a consumer to claim a rebate, some retailers are simplifying the process, figuring fewer hassles along the way will build customer loyalty and raise sales.”³⁴³ For example, major retailers such as Best Buy, Office Max and Walgreens provide duplicate rebate receipts at check-out.³⁴⁴ Other businesses similarly have

³⁴¹ See Tamara Chuang, Persistence Can Pay Off In Rebate Wrangle: Consumers Still Have Options When Mailing a Claim Doesn’t Work, *Orange County Register*, November 17, 2003; DeGross, supra note __ (“Consumers take up complaints with the retail stores, which shift blame to the manufacturers, which shift blame to a rebate house, which often outsources the work.”); Rae-Dupree & Spring, supra note __ (discussing consumer resentment towards stores for manufacturer rebate). The blame game goes both way; manufacturers claim that retailers insist that they include rebates with their products as a prerequisite to being allocated shelf space. See Rae-Dupree & Spring, supra note __; Tamara Chuang, Consumers Find Rebates Aren’t Always Easy Money, *Orange County Register*, January 12, 2004, at C1.

³⁴² Cox, supra note __ (“Companies are working to streamline the process. Some, such as Verizon Wireless and Circuit City, operate Web sites where customers can track the status of their refunds. Others allow people to sign up for automatic e-mail updates when their information is received at the processing center and when the check is mailed.”).

³⁴³ Bruce Mohl, Globe Staff, Retailers Simplify The Rebate Process, *The Boston Globe*, 7 November 2004, at C1; see also Block, supra note __, at B3 (“Some retailers, aware that many consumers are disgruntled about rebates, are trying to make the process easier.”).

³⁴⁴ See Sheryl Harris, Avoiding the Pitfalls of Rebates, *The Plain Dealer* (Cleveland, Ohio), December 10, 2003, at E1 (“At Office Max, you get two receipts for an item eligible for a rebate: one to mail in and another to keep for your records.”); Mohl, supra note __ (“Best Buy, Circuit City, Office Max and Walgreens made the rebate process fairly easy, with special rebate receipts and slips.”); Rae-Dupree, supra note __ (“Best Buy, Circuit City, CompUSA, OfficeMax, Office Depot, and Walgreens don’t combine all of their vendors’ rebates either, but they do print separate rebate receipts. Some of them, including Best Buy, also print out claim forms at the register as Costco does, and they offer toll-free customer-service phone numbers for reporting problems.”); see also Block, supra note __, at B3 (“Warehouse discounter Costco provides customers with rebate-claims forms at the cash register. Customers can also submit claims through the company’s Internet site.”); Rae-Dupree, supra (crediting Costco as being among the first retailer to print out a separate rebate receipt and cash-register-generated claim form along with the customer’s copy of the receipt).

been working to streamline their rebate processes or to move their rebate programs online.³⁴⁵ Staples, the nationwide office superstore, recently created an online “Easy Rebates” system, which obviates the need for mailing in rebates.³⁴⁶ Rebates from Rite Aid, a drug store chain, can be requested online without submitting any actual UPC codes or receipts by entering information found on the original receipt.³⁴⁷ Under this “Single Check Rebate” program, a consumer can request one check that will cover all of the valid rebates for each monthly.³⁴⁸

The scope of these trends — modernizing and simplifying rebate offerings — relative to the entire rebate business is not clear. But the retailers involved are major players, which suggests that even without legislative intervention the rebate marketplace already is responding to some degree, to the types of consumer complaints discussed in this Article, probably because they perceive a competitive advantage in offering less onerous rebate programs. A comparison can be drawn here to the disruption wrought by Netflix upon Blockbuster:

Generally, Blockbuster's profit model in the early years of this decade coupled low rental fees with high late fees. If consumers underestimated the amount of late fees or the probability that they would pay them, they would underestimate the costs of renting from Blockbuster. By designing a product that exploited that error, Blockbuster increased its short-term profits. Netflix responded with a two-pronged approach: a pricing model that does not involve late fees and an education strategy designed to create an aversion to late fees. It is too soon to tell

³⁴⁵ See Adams, *supra* note __ (discussing rebate simplification efforts by Best Buy and Circuit City); Mark Jewell, *Some Retailers Offering Online Rebates*, Associated Press Newswires, 7 November 2004; Associated Press, *Retailers Are Making Rebates Paperless*, St. Petersburg Times, 22 November 2004, at 6D; *Retailers Are Making Rebates Paperless*, Associated Press, St. Petersburg Times, November 22, 2004, at 6D (BJ's Wholesale Club customers redeeming rebates online increased from 35% to 70% from June 2003).

³⁴⁶ Block, *supra* note __ (discussing rebate simplification efforts at Staples); Mohl, *supra* note ___ (discussing Staples' efforts to simplify rebates through its “Easy Rebate” system).

³⁴⁷ See <https://riteaid.rebateplus.com>; see also Dalton, *supra* note __ (noting that Costco, BJ's Wholesale Club and Rite Aid offer online rebates).

³⁴⁸ A personal observation: I joined Rite Aid's online rebate program, and in months when I have entered receipts but failed to request a check at the end of the month, Rite Aid still has sent me a check anyway. I hardly want to imply that Rite-Aid's actions are representative of a wide range of businesses or their regular business practice, but much of the evidence of rebate “scams” is anecdotal, so I see little harm in supplementing the record with anecdotal evidence of my own. Another author complained about the unavailability of rebate forms at CVS, but noted that the company honored his rebate request even though it was technically late. See Mohl, *supra* note __.

whether the Netflix approach will result in a long-term market position for Netflix, but it did disrupt Blockbuster's profit model.³⁴⁹

The bottom line is that a business that relies on exploiting consumers' sub-optimal behavior runs the risk that competitors will exploit consumer dissatisfaction.³⁵⁰ This may explain why some major retailers, including Wal-Mart, have traditionally avoided rebates,³⁵¹ and others, including Best Buy, Gateway and Sprint PCS have floated the idea of doing away with rebates altogether,³⁵² leading commentators to conclude that rebates in their present form may be phased out in the next few years.³⁵³ The demise of rebates may seem implausible, especially in light of the evidence of enormous rebate expansion cited earlier in this article.³⁵⁴ But it not so many years ago that consumers were complaining about trading stamps,³⁵⁵ yet competition and new marketing methods drove them out of the marketplace.³⁵⁶ Also, the question is not whether rebates will survive, but rather whether rebates in their current form will survive. It is possible

³⁴⁹ See Ronald J. Mann, "Contracting" For Credit, 104 Mich. L. Rev. 899, 913 (2006).

³⁵⁰ Gabaix & Laibson, supra note ___, at 1 ("When consumers make mistakes, firms will try to exploit those mistakes. In some markets, competitive pressure may undermine such exploitation. For example, competing firms could reveal the exploitation and win over customers.") (footnotes omitted).

³⁵¹ Chuang, supra note __ (noting that "Kmart, Wal-Mart and Target almost never have rebates") (citing Roger Lancot, Beyen Co's director of advertising analysis); Burns, supra note __ ("We try to avoid rebates and prefer to offer our customers everyday low prices' Wal-Mart Spokesman Suzanne Haney said.").

³⁵² See Cox, supra note __ (Sprint PCS stopped offering mail-in rebates, and now only uses instant rebates; Gateway refrains from rebates on its own branded merchandise); Millman, supra note __ (noting Gateway's elimination of rebates); Ellen Roseman, Mail-In Rebates Less Than They Seem: Stories Abound of AWOL Refunds, Toronto Star, April 23, 200, D5 ("Best Buy Co., the largest electronics retailer in North America, will bow to customer complaints and phase out rebates over the next two years.").

³⁵³ See Baker, supra note __. But see Musgrove, supra note __ ("It's hard to see [rebates] going away anytime soon,' said Steven Baker, an analyst with research firm NPD group Inc. He said companies find them a pretty useful way to drive people to specific products."); Use Them Or Lose them: Rebates Key to Driving Tech Sales, Business Wire, December 27, 2004 ("Rebates are here to stay," said Stephen Baker, director of industry analysis for The NPD Group. . . . Properly applied, rebates turn out to be a pretty good deal for all involved - manufacturers, retailers and consumers.").

³⁵⁴ See supra notes ___ and accompanying text.

³⁵⁵ See generally Ernest Gellhorn, Trading Stamps, S & H, and the FTC's Unfairness Doctrine, 1983 Duke L.J. 903 (1983). According to one scholar, in 1958, approximately two-thirds of U.S. families participated in trading stamp programs. See Steven M. Shugan, Brand Loyalty Programs: Are They Shams?, 24 Marketing Science 185, 186 (2005).

³⁵⁶ See Shugan, supra note ___, at 190-91.

that 20 years from now something called “rebates” will still exist, but that technological changes in communication and electronic payment systems will transform them into something quite unlike the traditional mail-in rebate that predominates today.

CONCLUSION

As consumer rebate volume soars and consumer complaints regarding rebates rise, regulators and legislators will be implored to take some action on the “rebate problem.” As this Article has show, however, there is not one single problem with rebates, but rather there are several different categories of complaints, each of which affect different groups of consumers and raise distinct regulatory issues. Rebate offerors arguably (1) deprive consumers of legitimately earned rebates; (2) impose onerous rebate redemption requirements; (3) use rebates to engage in price discrimination; and (4) benefit from behavioral tendencies that lead to sub-optimal rebate redemption rates. Before taking any action, therefore, regulators must identify which of the problems regarding rebates, if any, warrant additional legal intervention and second, they must be careful to tailor their regulatory responses to the precise rebate problems being addressed.

A failure of problem identification can lead to inappropriate regulatory prescriptions. For example, consumers, advocates and scholars have complained that rebate offerors and fulfillment centers improperly deprive consumers of legitimately earned rebates, delay in paying rebate rewards and attempt to discourage rebate-redemption by imposing onerous and unnecessary rebate redemption requirements. UDAP actions under existing law can be a good method of focusing on such pernicious practices, perhaps with procedural fixes that make it easier for consumers to bring such actions. On the rulemaking or legislative front, rebate offerors could be required to:

1. Accept copies of receipts or to provide duplicate rebate receipts;

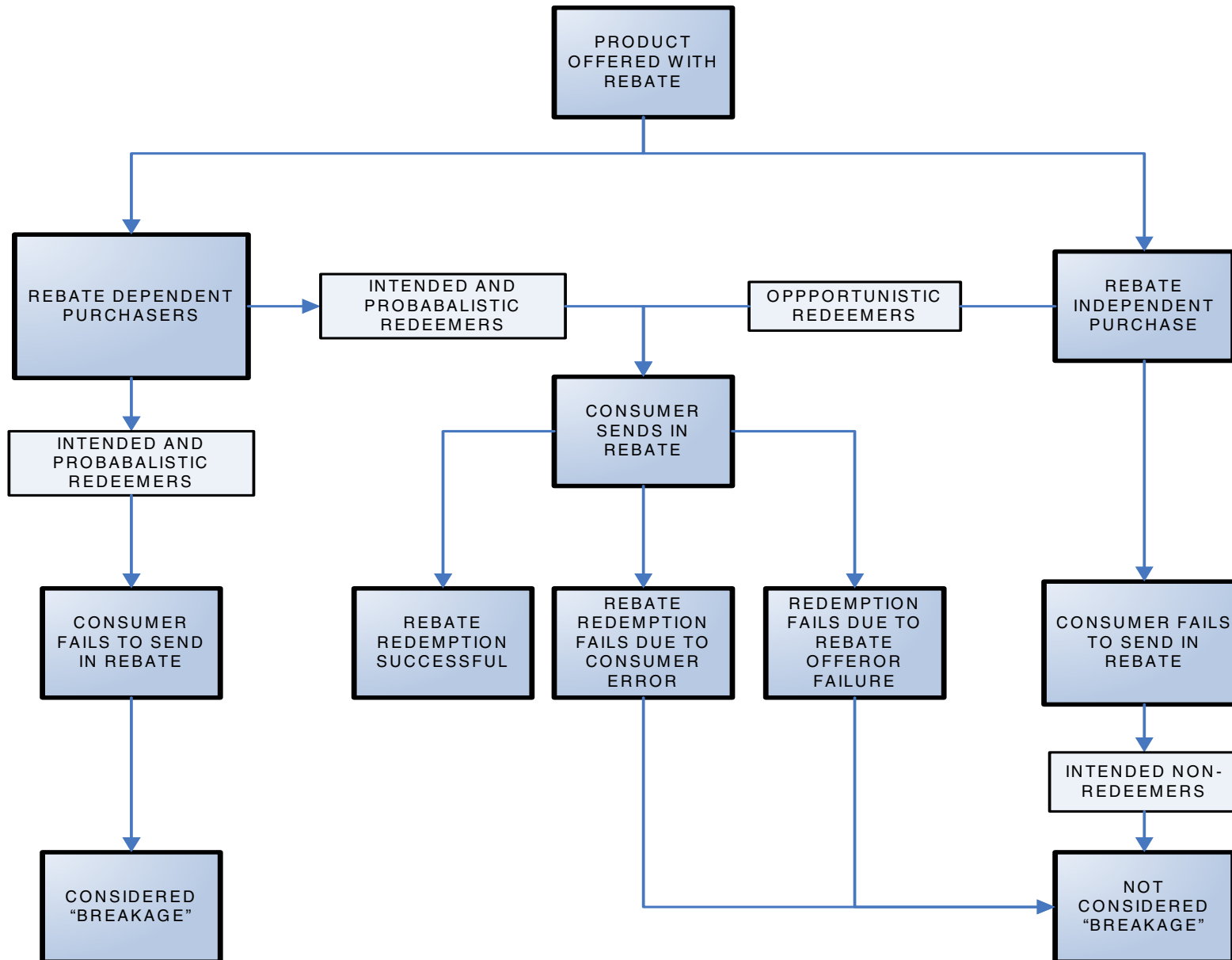
2. Ensure that sufficient rebate forms are available;
3. Clearly convey the terms of the rebate promotion prior to purchase;
4. Pay rebate rewards within a specified period of time after receipt of a valid request;
5. Clearly identify the rebate reward check;
6. Provide some method for tracking rebate submissions.

All of these proposals would ameliorate some of the most unpleasant aspects of current consumer rebate practice that crop up repeatedly in press accounts of the so-called rebate scam.

Beyond overt actions by rebate offerors allegedly geared towards thwarting rebate redemption, some commentators are troubled by the possibility that rebate non-redemption is due to market-distorting, irrational or sub-optimal consumer behavior. This deeper more fundamental behavioral complaint about rebates does not necessarily entail any malfeasance by rebate offerors — the very existence of a rebate program may be exploitative or unfair from this perspective. Such problems are more complicated for regulators because legal efforts to reduce suboptimal behavior can have unpredictable and unwanted consequences. Efforts to de-bias consumers might eliminate the potentially beneficial welfare effects of differential pricing schemes. Therefore, regulators who are not bothered by the price discriminating effect of rebates might be opposed to overbroad de-biasing remedies, just as they would not support a ban on rebates. Moreover, de-biasing remedies face practical problems. Although shorter deadlines might be beneficial to consumers because they might reduce procrastination and memory failure, consumer rights advocates are unlikely to support such provisions. In any case, it is not clear how much rebate non-redemption is due to intended non-redeemers or rebate-independent purchasers, as opposed to breakage (non-redemption by rebate-dependent purchasers). More empirical work needs to be done on this point, but regulators might be hesitant to intervene in the marketplace if we learn that breakage does not affect a significant number of consumers.

Finally, without being too overoptimistic, it is reasonable for legislators and regulators to take note of the extent to which the marketplace has already responded to some consumer complaints regarding rebates. In recent years, several prominent national retailers have simplified rebate redemption requirements and introduced on-line rebate redemption programs. In light of these hopeful trends, regulators and legislators may wish to focus their efforts on the most egregious rebate promotion practices, while waiting to see how rebate programs continue to evolve in the years ahead.

APPENDIX A: THE REBATE PROCESS³⁵⁷



³⁵⁷ This chart is based, in part, on Silk, supra note ____.

APPENDIX B

SUMMARY OF MAJOR REBATE PROPOSALS

Proposal	Status	Minimum Time to Redeem	Maximum Time for Rebate Payment	Consumer Must Submit Original Receipts?	Submission Requirements	Rebate Offeror Contact Information/Status Tracking Mandated?
Schumer Proposal	Proposed to FTC.	30 days.	Same time provided to consumers to redeem but no more than 60 days.	No.	Consumers not required to write identifying information on the rebate form unless the receipt does not identify the purchased product. Consumers not required to provide unnecessary information; name, address and phone number permissible.	Yes.
California S.B. 1154	Vetoed.	30 days.	Same time provided to consumers to redeem but no more than 60 days.	Not unless duplicate originals are provided.	Basically same as Schumer Proposal.	Yes.
Texas H.B. 511	Vetoed.	None. 30 day grace period for re-submitting of deficient requests.	Must be paid within time promised and no more than 30 days after receipt of valid request if no time is stated.	No provision on point.	No provision on point.	Consumers must be notified of incomplete requests and must be given a 30-day grace period to cure.
NY GBL § 391-p	Enacted and recently amended.	14 days.	60 days.	No.	Consumers not required to submit the same original documentation for multiple rebates on the same item.	No provision on point.