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**Comments to the
Federal Trade Commission
on
Paper, Plastic...or Mobile?
Project No. 124808
August 28, 2012**

Thank you for the opportunity to comment on the protections that are needed for consumers in the emerging mobile payments world. These comments are submitted on behalf of the National Consumer Law Center's low-income clients.¹

The mobile payments market is developing fast, and the products and technology are far ahead of the legal framework. Mobile payment systems have the potential to provide convenience, access and control to many consumers. Consumers can benefit from discounts on goods and services and information about items in which they are interested. Mobile systems can also open up the electronic world and internet shopping to those who do not have traditional computer access.

Consumers who make payments on a mobile device need the same protections as consumers who use more traditional systems. It is often unclear which, if any, protections apply, and some payment systems seem designed to avoid existing rails and the rules that apply to them. Mobile payment systems also present daunting issues of security, privacy, and full and effective communication of essential information.

As regulators grapple with the blizzard of new products and technologies, it is helpful to keep in mind several principles for safe payment systems. These principles should apply regardless of the form that the payment takes.

¹ National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and policy advice on consumer law issues to attorneys, policymakers and consumer advocates across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including Consumer Banking and Payment Systems, as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments were written by Lauren Saunders.

First, consumers should have the ability to affirmatively choose which payment system they use and should not be steered into products that do not fit their needs. In the mobile payments area, especially with the development of mobile “wallets,” there is the danger that dominant players may be able to use their market position to disadvantage other players and stifle competition.

Mobile wallets should be content neutral: able to contain whatever cards a consumer might put into a physical wallet (subject to vetting for security considerations), with each “card” equally accessible or the consumer choosing which card to put on top. But one can imagine a dominant player requiring a consumer to use certain products, or making the consumer jump through hoops in order to use a different card (just as PayPal does right now by adding extra steps if the consumer wishes to use a credit card instead of an electronic withdrawal from a bank account).

Exclusive or revenue sharing deals with major providers such as a college, a transit network or a government agency could also pose problems. If consumers are steered into cards they would not choose or competitors are at a disadvantage, consumer choice could be limited and consumers could be at a risk for junk fees or other problematic terms. Regulators need to be alert to anti-competitive forces that frustrate consumers’ ability to choose and use the best payment system for them.

Second, consumers must understand the cost and terms of their accounts. When consumers shop for, sign up for, and agree to the terms of a product on a small screen, they may not fully understand the scope of the agreement. Are fees and other terms disclosed in a form that consumers truly see? Are consumers provided a record of their account agreements and disclosures? Are consumers alerted to the costs as they use a product? Smartphones open up new possibilities, but they provide less space for explanation than either a desktop computer with an attached printer or the paperwork typically provided in connection with opening a financial account. The seductive ease of use and “cool” factor of mobile apps, and difficulty in going back to study an agreement in detail, can lead consumers to be less aware of what they are getting into.

Understanding is more than disclosure. Information must not only be provided, but done so in a clear and conspicuous manner than promotes actual awareness and understanding. Consumers also need information in a form to which they can refer in the future and should not be forced to rely on memory for a product’s terms.

Third, consumers’ funds must be safe in the case of insolvency of any party involved with holding the consumers’ funds. Mobile wallets and other mobile payment products that merely access the consumer’s account at a financial institution do not jeopardize the security of funds, because the funds remain in an account insured by the Federal Deposit Insurance Corporation (FDIC) or National Credit Union Administration (NCUA). But some mobile payment systems involve pooled accounts not in the consumer’s name, or funds may be held merely on the company’s books and not at an insured institution.

Consumers do not understand the different ways in which funds may be held and whether those funds are or are not protected if the provider is insolvent. Funds tied to a physical or virtual prepaid card may, or may not, comply with the FDIC's rules for pass-through insurance. Accounts held by companies that are not banks, like American Express and LevelUp, are not insurable by the FDIC or NCUA and do not have any other federal protection if the company were to become insolvent.² State money transmitter laws may apply, but the protection they afford varies from state to state and is incomplete. These laws do not guarantee that the consumer will not lose funds that are invested in a portfolio that loses value. Consumers' access to their funds could also be frozen for a period of time while bankruptcy proceedings are sorted out. The smaller, newer companies that are entering the mobile payments market may pose even greater risks to consumers' funds.

Mobile payment systems that hold small amounts of money and function more like gift cards may not pose serious risks to consumers if the funds are lost. But that is not true of other payment products that hold greater amounts of funds and offer functionality beyond a small number of merchants.

Regulators must insist that any general use reloadable payment system that holds more than a small amount of funds carry deposit insurance, especially (but not only) if the account is used for deposit of wages, benefits, or other income. Exceptions should be permitted, if at all, only for very limited balance accounts that function more like gift cards.

Fourth, consumers need protection from errors, unauthorized charges and disputes. Volumes have been written about the security aspects of mobile payment systems. Consumers have little control over or understanding of the technologies that do or do not make mobile payment systems safe. What consumers need is assurance that, whatever happens, they have protections they can count on when something goes wrong.³

The Electronic Funds Transfer Act and Regulation E provide consumers protection against erroneous or unauthorized charges on bank account debit cards, payroll cards, and non-needs tested government benefit cards. The Truth in Lending Act and Regulation Z provide even more robust protection for credit cards.

But those protections cannot be taken for granted, even when the consumer uses a traditional debit or credit card. New mobile payment systems that involve multiple parties that pass a card payment through another account may change the relationship between the consumer and the eventual payee. Consumers should not lose Regulation E or Z protections when they use mobile payment systems.

² American Express's prepaid cards are issued by its Travel Related Services division and not its bank and do not have FDIC insurance

³ For a more in depth discussion of the need for protections against loss, theft, unauthorized charges and errors, see the comments of Consumers Union, available at <http://www.ftc.gov/os/comments/mobilepayments/00022.html>.

Moreover, regulation E does not directly apply to most prepaid cards (plastic or virtual), though prepaid cards that accept federal payments must comply, and the Consumer Financial Protection Bureau is in the process of extending the rule to more cards. Many mobile payments systems claim to voluntarily follow Regulation E, but determining whether they do requires scrutinizing fine print for complicated legalese. Even then, consumers' rights are not guaranteed to be as strong, clear or enforceable as they would be if they fell under Regulation E directly. Vague assurances of voluntary compliance or industry standards are simply not enough to protect consumers.

Many mobile payment systems are designed to avoid the interchange fees charged on debit and credit card payments. Those fees can be turned into rewards and discounts for consumers, but a side effect of pushing a payment off the debit and credit card rails may be a lack of Regulation E protections.

Regulation E also does not apply to mobile payment systems that involve direct-to-telephone carrier billing, which may have the fewest protections. In the midst of investigations by the Federal Communications Commission (FCC) and by states into the problem of cramming on phone bills, Verizon and AT&T have stated that they will no longer allow most third-party billing charges on landline customer phone bills. However, the carriers have made no similar promise to protect their cellular customers from third party charges. Federal telecommunications laws include no liability limits or strong dispute rights for unauthorized charges when the phone bill is used as a payment device.⁴ A few states have some anti-cramming protections, but the dispute rights are not as robust as Regulation E and do not always prevent the carrier and merchant from passing the buck back and forth if the consumer disputes a charge.

All mobile payment systems, beyond limited purpose gift card-like products, should be covered by Regulation E. Those that function like gift cards should comply with the Regulation E gift card rules, which restrict inactivity fees and expiration dates.

In light of the multiple parties that can be involved with mobile payment systems, especially on the loading end, Regulation E should also be updated to ensure clear responsibilities and protections for consumers when they deposit or load funds.⁵ If funds that were loaded into an account are missing, the consumer should know who is responsible for fixing the problem.

⁴ For a discussion of need protections, see Comments of Consumers Union, NCLC et al., In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges, CG Docket No. 11-116, Consumer Information and Disclosure, CG Docket No. 09-158, Truth-in-Billing and Billing Format, CG Docket No. 98-170 (FCC Oct. 24, 2011), available at http://www.nclc.org/images/pdf/energy_utility_telecom/telecommunications/cramming-comments.pdf and Reply Comments in the same docket (FCC Dec. 5, 2011), available at http://www.nclc.org/images/pdf/energy_utility_telecom/telecommunications/cramming-reply-comments.pdf.

⁵ For a longer discussion of the issues involved with the load or deposit of funds, see NCLC et al, Comments to the Consumer Financial Protection Bureau on Electronic Fund Transfer (Regulation E), General Use Reloadable Prepaid Cards, Docket No. CFPB-20120019 at 63-70 (revised July 24, 2012) ("NCLC CFPB Prepaid Card Comments"), available at <http://www.nclc.org/images/pdf/rulemaking/cm-prepaid-card-july2012.pdf>.

In addition, consumers who use mobile payment systems to make purchases – as well as those who use bank account debit cards – should have chargeback rights in case of a dispute with a merchant, just as they do with credit cards.⁶ The likelihood of a problem with a purchase is no different whether the purchase is made with a credit card, a debit or prepaid card or a mobile payment system. Consumers do not understand the different rules that apply to each, or the limits of voluntary and unenforceable zero liability rules. Consumers need the same ability to dispute a charge if they did not get what they paid for no matter what type of payment system they use.

Fifth, consumers need ample, free and convenient access to account information and customer service, beyond information conveyed on the mobile device. Consumers should have ample free methods of determining their balances, viewing transaction information, asking questions and resolving issues with their accounts and reviewing the account terms. Mobile apps are one way of providing this information. But they must be supplemented by other forms of communication – oral, electronic and, at times, paper.

Many of the newer mobile payment systems are not provided by companies that have brick-and-mortar locations with access to a human being. Fees may be charged for telephone customer service, and the consumer must enter long strings of numbers and navigate multiple menus to get to a live agent.

Consumers may receive no record of their account terms (in paper or by email). Many mobile payment systems do not offer the option of signing up for paper statements at any price, or charge high fees for doing so.

Though mobile accounts are typically viewable online as well on a mobile app, not all consumers have internet access. According the U.S. Census:

- Over 30% of all adults do not have access to the internet at home.
- Over 70% of older Americans (defined as 55 and over) do not have access either at home or work.
- About 65% of low income people in the U.S. (defined as living on income of less than \$50,000 a year) do not have access to the Internet either at home or work.⁷

Even those consumers with internet access may not be comfortable monitoring financial accounts there or may find it more convenient to review paper statements.

The E-Sign Act protects these consumers by permitting electronic communications to substitute for legally required written ones only if the consumer opts

⁶ See Gail Hillebrand, “Before The Grand Rethinking: Five Things To Do Today With Payments Law And Ten Principles To Guide New Payments Products And New Payments Law,” 83 Chi.-Kent L. Rev. 769 (2008).

⁷ See US Census Bureau, “Internet Access and Usage: 2009,” available at <http://www.census.gov/compendia/statab/2011/tables/11s1156.pdf>.

in.⁸ The E-Sign Act procedures ensure that the consumer can choose the method of account information that works best, that the consumer has the ability to access electronic information, and that the information is provided in a form the consumer can keep as a record. The Act ensures that a consumer who chooses electronic information is on the proper side of the digital divide, with real, meaningful and full internet access.

Some have suggested exempting mobile payment systems from the E-Sign Act. That would be a mistake. Merely because a consumer has signed up for a mobile payment product does not mean that the mobile device is the appropriate method of providing all information about the account to all users. Disclosures, transaction information and other communications provided on a mobile device are typically not in a form the consumer can keep as a record, and the limitations of the small screen format and app designers may result in consumers not seeing or understanding important information.

Mobile payment systems should not be a black box. These are personal, consumer, financial accounts, and consumers should be able, and encouraged, to monitor their accounts easily for fees, errors and unauthorized charges. Consumers accustomed to the cash world may have questions about how the product works. Like any consumer, they need the ability to resolve the problems that can arise. Industry has reasons for encouraging consumers to use lower cost channels, but consumers should not be inhibited from seeking the information they need in a form they can use. Rules must ensure that consumers have access to the information that they need in a form that they will see and understand.

Sixth, mobile payment systems must not have unfair fees or tricks and traps. Not every fee is troubling. If a product provides a service, then the company is entitled to charge for that service. If pricing is simple enough to be understandable, consumers can decide if the value is worth the price.

But some types of fees are problematic. Penalty fees should be eliminated whenever possible. As we saw in the credit card market, providers have terrible incentives to trick consumers into making mistakes if penalty fees are any part of the profit model.⁹ Information and customer service fees, as discussed above, inhibit consumers from getting information they need to manage their accounts. Inactivity, monthly or other fees should also not be charged against a zero balance account, creating a debt for an account that the consumer may assume is empty and closed. Some payment systems also charge quite steep or unexpected fees for other reasons.

⁸ For a longer discussion of the importance of the E-Sign Act, see NCLC, Comments to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039 at 17-23 (June 4, 2012), available at http://www.nclc.org/images/pdf/rulemaking/cm_cfpb_reply_comments_4_june_2012.pdf. For a discussion of conditions that should be placed on prepaid cards (including virtual prepaid cards on mobile devices) before granting any exemption from the Regulation E written statement requirements, see NCLC CFPB Prepaid Card Comments at 63-70.

⁹ Ideally, penalty fees will be eliminated altogether. At most, they should cover the cost of the conduct and be coupled with active measures to assist the consumer from making the mistake again.

Beyond specific problematic fees, the industry must simplify, simplify, simplify and keep fees minimal and reasonable. The more fees a product has, the more chances for confusion and unhappy customers. Providers should help consumers to understand the cost of a payment system by eliminating all fees that are not necessary and giving consumers the choice of a monthly fee that covers routine usage and a pay-as-you-go model with a small number of fees for discrete services.

Seventh, it is essential that overdraft fees and embedded credit features be eliminated from asset accounts.¹⁰ Overdraft fees are a primary reason for driving away many consumers from bank accounts. Overdraft fees created the opportunity for prepaid cards and newer mobile versions of those cards. When and how responsible small dollar credit should be provided, through separate credit accounts, is another conversation.¹¹ But the security of asset accounts should not be undermined by including dangerous embedded credit features.

Consumers need to be in control of the funds in a deposit account, whether it is a traditional bank account, a prepaid card or other newer type of asset account. Lenders should not be able to insist on payment of income off the top of income as it comes in, before the consumer pays for food, rent or medicine. Blending deposit and credit accounts is just too dangerous a combination. It leads inevitably to cycles of unaffordable debt.

Virtual mobile prepaid cards with credit features are also all too easy for creditors to use as a means of evading state usury and payday laws. Complicated fee structures and partnerships with banks can obscure the cost of credit and the laws that apply. For example, some nonbank prepaid card providers are already offering credit in excess of state usury rates, and these products will spread to mobile versions of prepaid cards if they are not stopped.¹²

Congress already directed prepaid card issuers to eliminate overdraft fees by conditioning the interchange fee cap exemption for prepaid cards on the absence of such fees. But that rule does not apply to cards (or mobile versions of those cards) issued by banks under \$10 billion. The Treasury Department took an important step forward to protect prepaid cards by banning attached lines of credit or loan agreements on cards that

¹⁰ For a longer discussion of the importance of keeping deposit accounts separate from credit accounts and eliminating overdraft fees from prepaid cards, see NCLC CFPB Prepaid Card Comments at 3-42.

¹¹ A discussion of alternatives to payday loans and the features of a genuine alternative can be found in National Consumer Law Center, "Stopping the Payday Loan Trap: Alternatives that Work, Ones that Don't" (June 2010), available at http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf. The criteria are: 36% APR with fees, amortizing installment payments generally over 90 days, no offset or mandatory electronic repayment, and consideration of ability to pay.

¹² For examples of credit features on prepaid cards, see NCLC CFPB Prepaid Card Comments at 3-10. For a legal analysis of the problems with a particular prepaid card payday loan product, see Letter from NCLC et al. to Office of the Comptroller of the Currency re Urban Trust Bank and Checksmart (May 3, 2012), available at http://www.nclc.org/images/pdf/high_cost_small_loans/ltr-urban-trust-occ.pdf.

accept direct deposit of federal payments.¹³ But that rule too does not apply to every card or mobile payment system.

Banning overdraft fees and other embedded credit features on mobile payment systems that accept consumer deposits would prevent unfair, deceptive and abusive practices and confusion.

Eighth, consumer privacy must be protected and mobile payment systems should not be used to throw consumers into the hands of predatory products. The amount of personal information that can be stored on or accessed from a smartphone is truly frightening. Consumers may be happy to reveal their location in order to find an ATM, and some will be willing to consent to alerts when their favorite store has a sale. But private information can be combined in ways that are far beyond what consumers imagine and can set them up for a myriad of deceptive or predatory pitches. Consumers who sign up for some prepaid cards already get besieged with emails pushing payday loans, and the same can happen in the mobile space.

The privacy notices required today are totally inadequate. Practices are explained in long legalese and consumers do not understand how their information is actually used or what rights they have to control it. The rules, already deficient, must undergo significant improvement in order to adapt to the potential and peril of the mobile world.

The emerging mobile payments world is fascinating, exciting and frightening. New systems can hold tremendous benefits for consumers and can open up amazing new possibilities. But the complexity that occurs behind the scenes and the possibility that things will go wrong are not comprehensible to many consumers.

The mobile payments industry will benefit if consumers are assured that systems are safe, fair and honest. Voluntary measures are important, and many in industry are working hard to build in consumer protections. But voluntary measures cannot give consumers the assurances they need or protect the good industry players from the scandals that will taint the entire sector if things go wrong. There are always outliers, and problematic practices harm not only the consumers who use them but also the reputation of a developing industry.

Regulators can help both consumers and industry by leveling the playing field and establishing strong minimum standards. The industry should welcome thoughtful regulation to help bring consumer protections into the modern world to protect emerging payment systems.

Thank you for highlighting the issues posed by emerging mobile payment systems and for this opportunity to comment.

¹³ See 75 Fed. Reg. 80335 (Dec. 22, 2010). The interim rule has not yet been finalized. NCLC's comments suggesting ways to tighten the rule to prevent evasions are available at http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/prepaid-card-comments.pdf.