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To Support Payments Innovation, Avoid Unnecessary Regulation

John R. Gardner*

This article reviews the history of consumer credit arrangements and regulation. As regulators focus on the new consumer payment products developing today, the author believes they should be guided by the successful innovation of prior decades and not by an overzealous attempt to protect consumers from problems that do not exist.

For most adults today, it is hard to imagine a world without credit cards. These plastic payment devices are ubiquitous in modern America. Of course, this was not always the case. Credit cards, as we know them, did not exist in 1950; yet, by 1970, they were a well established consumer financial product. In large part, credit cards were able to gain a foothold so quickly because the regulatory environment in the 1950s and 1960s did not create insurmountable roadblocks; indeed, the applicable law and limited amount of regulation served to encourage this innovation. As regulators focus on the new consumer payment products developing today, they should be guided by the successful innovation of prior decades and not by an overzealous attempt to protect consumers from problems that do not exist.

EARLY CHARGE CARDS

The modern credit card era began in 1950 with the introduction of the Diners Club card.[1] According to popular lore, Diners Club co-founder Frank MacNamara was entertaining business associates at a New York City restaurant when he realized that he did not have enough cash with him to cover the bill. He is said to have telephoned his wife to drive to the restaurant to deliver more money. While waiting for his wife to arrive, MacNamara came up with the idea behind the Diners Club card. His plan was to create a card that could be used

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[1] *See, e.g.*, William B. Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 Val. U. L. Rev. 218, 218–19 (1966–1967); David L. Stearns, Electronic Value Exchange: Origins of the VISA Electronic Payment System 12 (2011); Stan Sienkiewicz, Credit Cards and Payment Efficiency (Payment Cards Center of the Federal Reserve Bank of Philadelphia: Discussion Paper) 3 (Aug. 2001).

by a businessperson to pay a restaurant bill anywhere in New York City.[2]

Historically, most consumer credit arrangements had been two-party agreements between a merchant and a customer or a lender and a customer. The Diners Club card was different. Restaurants entered into contractual relationships with Diners Club, and Diners Club entered into separate contractual relationships with consumer cardholders. Under this arrangement, any consumer with a Diners Club card could use the card to pay his or her bill at any restaurant that had an agreement with Diners Club.[3] Future market entrants copied this model, with American Express and the Hilton Credit Corporation introducing their own charge cards focused on travel and entertainment expenses in 1958.[4]

Although these early cards represented significant innovation in the payments space, the evolution of the credit card was not yet complete. These early cards differed from modern credit cards in several key ways. First, they were charge cards, meaning that the balance had to be paid in full each month. Second, they were designed to appeal specifically to businesspersons for use in paying travel and entertainment expenses. Finally, the cards were accepted by a relatively limited number and type of merchants.

MODERN CREDIT CARDS

The next innovation came in the late 1950s through the 1960s, when banks began issuing credit cards to consumers.[5] Unlike the Diners Club, American Express, and Carte Blanche charge cards, these bank-issued credit cards were not marketed primarily to high-income individuals for use in paying travel and entertainment expenses. Rather, they were marketed to average consumers for personal and household purchases.[6] In fact, in order to build a customer base quickly, many banks mass-mailed "live" cards to consumers.[7] Additionally, consumers were generally permitted to pay the balances on their bank-issued credit cards over time, with interest, rather than being required to pay the entire

[2] According to at least one source, this story is pure fiction. STEARNS, *supra*, at 13.

[3] *See, e.g.,* Davenport, *supra*, at 218–19.

[4] *See, e.g.*, *id.*; STEARNS, *supra*, at 16; SIENKIEWICZ, *supra*, at 3. The Hilton Credit Corporation's product was known as the Carte Blanche card.

[5] *See, e.g.*, Davenport, *supra*, at 218–19; STEARNS, *supra*, at 17; SIENKIEWICZ, *supra*, at 3–4.

[6] *See, e.g.*, Davenport, *supra*, at 218–19; STEARNS, *supra*, at 17; SIENKIEWICZ, *supra*, at 3–4.

[7] *See, e.g.*, STEARNS, *supra*, at 21–24; Harold S. Taylor, *The Chicago Bank Credit Card Fiasco*, BANKERS MAGAZINE, Winter 1968, at 49.

balance in full each month.[8] These products quickly grew in popularity, and by the start of 1967, it was estimated that 10 million Americans held a bank-issued credit card.[9]

REGULATION

During this period of product development and expansion, credit cards were subject to relatively minimal product-specific regulation.[10] At the state level, a number of states had laws addressing liability for unauthorized use of a credit card.[11] At the federal level, product-specific requirements were essentially nonexistent prior to 1970.[12] Credit cards did not, however, develop in a regulatory vacuum. As noted above, these credit cards were issued by banks, and banks were subject to significant state and federal regulation and oversight. The Board of Governors of the Federal Reserve System stated in a 1968 report that "[d]evelopments in the credit-card field have been watched closely by supervisory authorities" and that "the credit-granting function of banks, however implemented, is always subject to supervisory considerations."[13] In the same report, the Board of Governors concluded that, "[o]ver-all, the supervisory procedures appear to be adequate to control development in the credit-card area without additional legislation."[14] Had a federal bank supervisory agency identified serious deficiencies in a bank's credit card program, the bank regulator could have obtained a cease-and-desist order to enjoin the practice in question.[15]

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[8] *See, e.g.,* Davenport, *supra*, at 218–19; Stearns, *supra*, at 17–18; Sienkiewicz, *supra*, at 3–4.

[9] Richard D. James, *New Deal in Cards*, Wall St. J., Jan. 17, 1967, at 1.

[10] *See, e.g.,* John C. Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 Mich. L. Rev. 1475, 1477–78 (1972); Eric E. Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. L. Rev. 485, 485 (1967).

[11] *See, e.g.,* Weistart, *supra*, at 1477–78.

[12] *See, e.g., id.*

[13] Bd. of Governors of the Fed. Reserve Sys., Bank Credit-Card and Credit-Check Plans: A Federal Reserve System Report 39–40, 42 (1968).

[14] *Id.* at 40.

[15] *Id.* at 42. Additionally, state banking laws shaped the development of the credit card system in meaningful ways. For example, legal restrictions on interstate banking led banks to cooperate to create arrangements whereby credit cards could be accepted on a regional or national basis. *See, e.g.*, Stearns, *supra*, at 26–28; Douglas Akers, Jay Golter, Brian Lamm & Martha Solt, *Overview of Recent Developments in the Credit Card Industry*, 17 FDIC Banking Rev. 23, 24 (2005). These cooperative arrangements eventually developed into what are today known as the Visa and MasterCard payment networks. *See, e.g.*, Akers et al., *supra*, at 24; Sienkiewicz, *supra*, at 4.

Nevertheless, Congress intervened in 1970, and the rapid growth of the credit card industry was dealt a blow with the passage of certain amendments to the Truth-in-Lending Act ("TILA").[16] At the time the TILA amendments were being debated by Congress, a company or bank seeking to enter the newly developing credit card industry as a card issuer would need to develop a sizeable customer base relatively quickly in order to achieve profitability. Existing credit card issuers had created large customer bases by sending unsolicited cards to consumers in mass mailing campaigns. The theory behind such programs was that issuers would obtain a high degree of customer loyalty once a consumer began using the issuer's card because there was little differentiation between card programs at the time, and once a consumer began making purchases on a card, a cycle of credit was established such that new purchases were often made prior to settling existing charges.[17] Essentially, customers developed a habit of using a card, and had little incentive to change.

Against this backdrop of attempting to gain a "first mover advantage," a group of five banks in Chicago formed a cooperative venture in late 1966 known as the Midwest Bank Card System. Cards issued by any of the banks in the network would be honored by all merchants who had agreed to participate in the network, making the card more convenient than other products in the market, but the profitability of individual issuers was tied to obtaining a large customer base. In early 1967, the banks in the Midwest Bank Card System network thus flooded the market with millions of cards, not only to their own customers, but to individuals with whom the issuing bank had no prior relationship. Reports surfaced of duplicate cards being issued to the same consumers many times over, cards being issued to minors, and thefts of large quantities of cards from the postal system and from recipients' mailboxes.[18] While banks took quick measures to minimize their losses,[19] including the removal of merchants from the network, requiring telephone pre-approval for all purchases, recall of cards and the use of registered mail for card distribution, the reports from Chicago had caught the attention of Congress.[20]

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[16] Act of Oct. 26, 1970, Pub. L. No. 91-508, tit. V, 84 Stat. 1126, *amending* Truth-in-Lending Act, 15 U.S.C. §§ 1601-81t (1970) (codified at 15 U.S.C. §§ 1602(j)–(o), 1642–44 (1970)).

[17] Weistart, *supra*, at 1479–80.

[18] *Id.* at 1482.

[19] The Federal Reserve reported that the loss ratio for credit cards in the Chicago District between January 1 and June 30, 1967 was 5.73 percent, as compared to 1.04 percent for all districts other than Chicago during the same time period. *Id.* at 1482 n.28.

[20] *Id.* at 1479–81.

In August of 1967, the first proposal for federal regulation of the credit card industry was introduced in the House of Representatives.[21] Regulatory proposals took various forms before the ultimate enactment of Senate Bill 721 in 1970, which had two major impacts on the credit card industry. The first, which proved to be uncontroversial, was to impose a $50 limit on a cardholder's liability resulting from the unauthorized use of his card. The second banned the unsolicited distribution of credit cards. The unsolicited distribution ban proved to be more divisive, drawing criticism from industry representatives, the Federal Deposit Insurance Corporation ("FDIC") and the Federal Reserve Board.[22] Prior versions of the bill offered alternatives to an outright ban on unsolicited distribution, such as increased security from the Postal Service and oversight from the Federal Reserve,[23] but the legislation ultimately passed, with its sponsors citing four primary objectives. First, an argument was made that the sudden introduction of the immediate availability of credit would exacerbate the existing inflation problems in the U.S. Second, it was argued that the individuals receiving the cards lacked the self control to use credit cards responsibly which would give rise to an increase in personal bankruptcy filings. Third, bill proponents argued that the mass mailing of cards would lead to additional criminal activity. Fourth, concerns were raised over the privacy implications of the unsolicited distribution of cards.[24] While each of these concerns are worthy of discussion, it is questionable whether the legislation that was passed was ultimately beneficial to consumers.

The argument that the unsolicited distribution of credit cards posed an inflation risk to the U.S. economy was based on the premise that easy access to credit would result in increased consumer spending, and increased demand for goods and services. Evidence was presented that credit card debt increased by four billion dollars (more than one third) between 1967 and 1969.[25] Overall

[21] H.R. 12646, 90th Cong., 1st Sess. (1967).

[22] Weistart, *supra*, at 1486. The Board of Governors of the Federal Reserve System opined in 1968 that legislation was unnecessary: "Over-all, supervisory procedures appear to be adequate to control development in the credit-card area without additional legislation. The capability of management, not legislation, will be the principal determining factor in the success or failure of credit-card plans, as is true of any lending program. Banks not yet in the field have been able to appraise the problems arising from mass issuance and/or inadequate controls and should have a better idea of start-up costs and of sound control procedures than banks entering the field a year or so ago." Bd. of Governors of the Fed. Reserve Sys., *supra*, at 40–41.

[23] *Id.* at 1485.

[24] *Id.* at 1487.

[25] *Id.* (citing *Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 14, 31 (1969)).

consumer debt was increasing, however, by an even greater amount (more than 20 billion) over the same time period, and the rise in credit card debt as a percentage of overall consumer debt was relatively low (11.26% at the end of 1967 vs. 12.49% at the end of 1969).[26] Thus, the impact of credit cards on U.S. inflation during this period is highly speculative. Moreover, it appears that there was no evidence presented as to the specific inflationary effect of *unsolicited* cards.[27] A ban on the unsolicited distribution of credit cards would have no effect on consumers who affirmatively applied for a credit card or obtained any other form of consumer credit. The argument by the bill proponents also failed to take into consideration the extent to which consumers used credit cards as a substitute for cash, paying the balance in full at the end of each month. While charges that are fully paid each month would add to the total outstanding reported credit card debt, such charges would not reflect an increase in either consumer spending or consumer debt. Finally, it was argued that since issuers applied a discount when settling with merchants, the amount of the discount would be passed along to consumers through increased prices of goods and services, contributing to existing inflationary pressures on the economy.[28] However, no empirical evidence was presented in support of this position, and such an argument fails to account for the increase in customer base that merchants could expect to receive as a result of offering the convenience of credit card purchases to customers, or the savings merchants would realize due to the elimination of expenses related to the maintenance of the merchant's existing collection and accounting system for purchases made on credit by the merchant's customers.[29] It is equally plausible that the increased customer base and decreased expenses associated with accepting general-purpose credit cards eliminated the need to raise prices.[30] Thus, while it was appropriate for Congress to examine the potential inflationary impacts associated with the growth of the credit card industry, the evidence does not support that a ban on unsolicited credit card distribution would have had any meaningful impact toward relieving the inflationary pressures of the late 1960s.

The second argument advanced by proponents of the 1970 TILA amendments was that the mass distribution of credit cards would lead to irresponsible credit decisions resulting in an increase in consumer bankruptcies.[31] During the

26 *Id.* at 1488 (citing 57 FED. RES. BULL., A56 (July 1971)).

27 *Id.* at 1489.

28 *Id.* at 1490.

29 *Id.*

30 *Id.* at 1489–90.

31 *Id.* at 1490.

initial Congressional inquiry into the credit card industry in 1967, consumer bankruptcies had increased for several consecutive years, and bankruptcy referees testified that they had witnessed a rise in credit card debt in the years leading up to 1967.[32] However, as discussed above, the years leading up to 1967 featured a significant rise in overall consumer debt, and no data was presented in the Congressional hearings attempting to isolate the effect of credit cards (or specifically unsolicited credit cards) as a cause of the increase in consumer bankruptcy filings during these years. Furthermore, consumer bankruptcy filings decreased in 1968 and again in 1969.[33] As a recession developed in the U.S. economy in 1969 and 1970, delinquency rates on credit cards predictably rose, but the incidence of delinquency did not appear to differ materially between cards issued to consumers who applied for cards as compared to unsolicited cards.[34] Moreover, the remedy adopted by Congress in response to this concern (banning the unsolicited distribution of cards) did nothing to regulate the credit standards under which an issuer could supply a credit card to a willing consumer. To the contrary, a consumer who posed a substantial credit risk could still receive a card at the issuer's discretion. Thus, the prohibition against unsolicited distribution of credit cards would not necessarily have a significant impact on the incidence of consumer bankruptcy cases.

The highly publicized events in Chicago in 1967 caught the attention of Congress, as reports of criminal misuse of cards coincided with congressional hearings.[35] Proponents of the legislation argued that federal supervision was necessary in response to the increased crime associated with credit cards.[36] In addition to reports in the media, the Chief Postal Inspector testified that mail fraud investigations associated with credit cards increased from 15 in 1964 to 360 in 1968 and 762 in 1969.[37] However, card issuers had a strong incentive to curb the losses associated with credit card fraud, and indeed took steps to

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[32] *Id.* at 1491.

[33] *Id.* at 1491–92.

[34] Diners Club, which only issued cards to customers who submitted applications, reported that delinquencies doubled during the period from June 1969 to December 1970, which mirrors the rates experienced by credit card issuers who mailed unsolicited cards to potential customers. *Id.* at 1494–95 n.75.

[35] *Id.* at 1496 (citing *Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 8, 12 (1969)).

[36] *Id.* at 1496.

[37] *Id.* at 1496 (citing *Hearings on H.R. 13244, H.R. 14364, and Other Bills Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st & 2nd Sess. 70 (1970)).

improve their operations and distribution techniques.[38] A 1970 survey of New York Banks indicated that a distribution of two million cards in a single week resulted in a loss of only 250 cards.[39] Rather than relying on the economic incentive of issuers to minimize their losses,[40] Congress proceeded with the unsolicited distribution ban, despite evidence that such action would not address many of the most popular credit card related criminal activities including "diversion by dishonest employees of credit card issuers, thefts during burglaries or personal assaults, retention by dishonest merchants during sales transactions and misdirection of cards by false applications or requests for renewal."[41] Thus, the controls put into place by Congress may have succeeded in reducing the volume of credit cards in circulation, but failed to address the underlying criminal issues associated with credit card fraud.

Finally, proponents of the ban on unsolicited credit card distribution argued that such mailings involved an unwanted invasion of privacy on the part of the recipient.[42] While it is probably true that many consumers would prefer not to receive mass mailings from credit card issuers, the legislation that was passed only prevented the mailing of "live" cards. Issuers were still free to call consumers and to mail credit card applications and solicitations, as long a "live"

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[38] The Board of Governors of the Federal Reserve System reported in 1968 that "[i]n California, improved mass-mailing techniques were evident in the launching of the 'Master Charge' card. Some 80 banks under a program developed by four major banks launched their plan in July 1967 with a mass mailing of cards and a minimum of confusion. Although the inevitable element of abuse has been present, fraud and credit losses to date have not been excessive. Even in the Chicago District, where mass distribution of cards by several large banks resulted in heavy credit and fraud losses and adverse publicity on a national scale, it was reported that start-up costs and losses in the credit-card field sustained by banks in that District have been fairly large in dollar amount but that the effect on the net earnings of those large banks has been small. Although probably not yet on a profitable basis, the banks now seem to have the operation under control and have already sustained the major costs." Bd. of Governors of the Fed. Reserve Sys., *supra*, at 40.

[39] Weistart, *supra*, at 1497 n.85 (citing *Hearings on H.R. 13244, H.R. 14364, and Other Bills Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st & 2nd Sess. 70 (1970)).

[40] In House hearings, representatives of both the Federal Deposit Insurance Corporation and the Federal Reserve Board had questioned the need for legislative control of unsolicited card distributions in light of the strong economic incentives for banks to correct their distribution practices in order to minimize losses. Weistart, *supra*, at 1486 (citing *Hearings on H.R. 12646 Before the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 39–54 (1967)).

[41] Weistart, *supra*, at 1497 n.87.

[42] *Id.* at 1497.

unsolicited card was not included in the mailing.[43] Thus, other than relieving consumers of disposing of the cards received in the mail, the legislation did little to reduce the intrusion into the lives of consumers by credit card issuers.

If the 1970 TILA amendments did little to achieve the stated goals of the legislation to reduce inflation, crime, consumer bankruptcy filings and personal privacy intrusions, why was the legislation enacted? At least one commentator has suggested that a ban on unsolicited credit card distribution was passed because it was politically convenient. "[T]here was relatively little political risk in a stand against credit cards since the issue was not likely to generate general public opposition. Most people would not be angered if the flow of unsolicited cards were interrupted, and those who desired the opportunity to receive a credit card could do so by a simple request to issuers who were anxious to expand their programs. Presented with an opportunity to register support for the growing consumer protection movement without inviting public controversy, the legislators were secure in approving the measure."[44]

Not only did the TILA amendments fail to adequately address the stated concerns, the new regulations arguably limited entry into the credit card market for new issuers, and had a significant anti-competitive effect on the industry. In order to achieve profitability, an issuer must incur significant start-up costs, and may experience losses for several years before the card plan becomes profitable.[45] To offset the significant start-up expenses, issuers relied heavily on the unsolicited distributions of cards to increase the issuer's customer base. A survey by an issuer bank at the time indicated that 19 percent of unsolicited cards were activated by recipients, whereas only 0.66 percent of potential customers who received applications ultimately applied for a card.[46] Thus, issuers that were able to attract a large customer base through unsolicited mailings prior to the passage of the TILA amendments had a significant advantage over issuers who had not developed a significant client base prior to the implementation of the legislation. Notably, the original version of Senate Bill 721 recognized the anti-competition risk, and proposed that: (i) implementation of the unsolicited distribution ban would take effect six months after the bill's enactment and (ii) unsolicited cards that were issued prior to the ban could be renewed only upon request of the card holder. These provisions were removed from the final version

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[43] *Id.* at 1498–99.

[44] *Id.* at 1500.

[45] *Id.* at 1501.

[46] *Id.* at 1503 (citing Board of Governors of the Federal Reserve System, Report: Bank Credit-Card and Check-Card Plans 7 (1968)).

of the bill.[47] While it is impossible to determine how the credit card market would have developed absent the ban on unsolicited credit card distribution in 1970, competition in the credit card industry has remained a significant issue for decades,[48] and a compelling argument could be made that the anti-competitive effect of the legislation did more to harm consumers (and merchants) in the long run by reducing the number of market participants who may have been incentivized through increased competition to offer reduced rates and fees, or increase benefits to attract new card users.

It is evident that, in the period prior to the TILA amendments discussed above, meaningful bank oversight, combined with minimal product-specific regulation, struck the right balance to allow credit cards to develop into a widely used consumer financial product. The bank supervision framework that existed in the 1950s and 1960s was robust enough to prevent serious consumer harm, yet flexible enough to allow credit card products to evolve and gain widespread acceptance. Had legislatures or regulators intervened sooner, credit card products and the credit card market might not have developed in the same way or at the same speed.

THE PAYMENTS INDUSTRY TODAY

Today, the payments industry has again entered a period of rapid innovation, and how best to regulate emerging payment products and services has been the subject of much discussion. Our country's historical experience with credit cards suggests that preserving as much flexibility as possible for innovation, while still providing for essential consumer protection, would be a wise approach. New payment products and services should be given a meaningful opportunity to develop within the existing regulatory framework before

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[47] *Id.* at 1501 n.102 (citing 116 CONG. REC. 11832–34 (1970) (debate on Senator Williams' amendment to relax the renewal requirement).

[48] Certain merchants and the U.S. Department of Justice have successfully challenged certain exclusionary rules and restrictions imposed by the dominant VISA and MasterCard networks through litigation. *See, e.g.*, *United States v. VISA U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (prohibiting VISA and MasterCard from banning member banks from issuing cards on rival networks following DOJ challenge that VISA and MasterCard were violating Sherman Act); *In re VISA Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003); *Wal-Mart Stores, Inc.*, 396 F.3d 96 (2d Cir. 2005) (resulting in settlement whereby VISA and MasterCard paid $3 billion to merchants related to requirement by VISA and MasterCard networks to accept all cards with VISA or MasterCard logo regardless of fees imposed on merchants). These are but a few of the examples of litigation that has arisen in the credit card industry over the years involving anti-competitive claims against the established credit card networks.

product-specific regulations are imposed.

This approach is appropriate because the current regulatory regime provides adequate safeguards to prevent significant harm to consumers. As in the 1950s and 1960s, banks today are heavily regulated. There are four federal prudential regulators—the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Administration, and Federal Reserve Board—that regulate banks, thrifts, and credit unions.[49] These regulators examine the financial institutions under their jurisdiction for, among other things, safety and soundness and compliance with consumer protection laws.[50] Depending on the size and type of the institution, certain financial institutions are also subject to supervision by the Consumer Financial Protection Bureau ("CFPB"), which independently enforces compliance with federal consumer financial protection laws.[51] Moreover, state governments have their own agencies that administer state banking laws.[52] Under this well developed regulatory regime, banks are subject to regulation and oversight that are sufficient to mitigate risks to consumers associated with the development of new payment products and services.

Similarly, money transmitters are subject to comprehensive supervision and regulation at the state level. Entities that wish to engage in money transmission, generally defined or interpreted broadly to include the sale or issuance of stored value, are subject to licensing requirements in nearly every state.[53] Among other obligations, state money transmitter licensees are generally required to maintain a certain net worth and hold high-quality assets to back their outstanding obligations to consumers.[54] Licensees are subject to examination by state

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[49] Edward V. Murphy, Cong. Research Serv., Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets (Jan. 30, 2015).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Montana and South Carolina currently do not license money transmitters. New Mexico regulates the business of selling negotiable checks, drafts, and money orders, but does not regulate money transmission more broadly. All other states and the District of Columbia regulate money transmission activities.

[54] With regard to net worth, *see, e.g.*, Tex. Fin. Code Ann. § 151.307 (requiring a minimum net worth of $100,000 or $500,000, depending on the number of licensee locations, with discretionary authority for the Banking Commissioner of Texas to increase the minimum net worth up to a maximum of $1 million); Fla. Stat. § 560.209(1) (requiring a minimum net worth of $100,000, plus $10,000 for each additional location in Florida, up to a maximum of $2 million); 205 Ill. Comp. Stat. 657/20(a)(1) (requiring a minimum net worth of $35,000 to

money transmitter regulators, and state regulators generally have the authority to issue a cease-and-desist order and/or suspend a licensee's license if necessary to protect a licensee's customers or the public.[55] Thus, for payment innovations developed by money transmitters, as for payment innovations developed by banks, there is already a regulatory structure in place sufficient to prevent significant harm to consumers.

CONCLUSION

Given the safeguards provided by the existing regulatory framework, additional regulation at this point in time could do more harm than good. The payments space is currently a wellspring of new ideas for products and services that have only begun to take shape. As new ideas move from the realm of imagination to the marketplace, it is essential that our legal system allow for experimentation and the evolution of products and services over time. If legislatures or regulators attempt to tailor new regulations to these nascent products and services, there is a very real risk that such regulations would restrict the ways in which these new products and services might develop, to the eventual detriment of consumers. Without a doubt, regulators should continue to monitor payment innovations and take action against bad actors or to prevent serious harm to consumers. However, except in these very limited circumstances, regulators should take a hands-off approach until emerging payment products and services have had ample opportunity to adapt to consumer preferences and market conditions.

Even after payment products appear to have matured, additional regulation should be imposed only after careful consideration of the purposes and likely effects of the proposed regulation. Again, the historical development of the credit card industry is instructive. A review of the development of the credit card industry leading up to the 1970 TILA amendments, and the ultimate

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$500,000, depending on the number of locations in Illinois through which the licensee conducts business). With regard to assets backing outstanding obligations, commonly referred to as "permissible investments," *see, e.g.*, CAL. FIN. CODE § 2081(a); N.Y. BANKING LAW § 651; OHIO REV. CODE ANN. § 1315.06(A)(1)(a).

[55] *See, e.g.*, TEX. FIN. CODE ANN. §§ 151.601 (addressing examinations), 151.703 (addressing suspension and revocation of license), 151.705 (addressing cease and desist orders); FLA. STAT. §§ 560.109 (addressing examinations and investigations), 560.114 (addressing disciplinary actions and penalties, including issuance of a cease and desist order and the suspension or revocation of a license); CAL. FIN. CODE §§ 2120 (addressing examinations), 2148 (addressing orders to comply with the law or discontinue unsafe or injurious practices), 2149 (addressing suspension or revocation of license), 2150.2 (addressing immediate suspension or revocation of license).

effect of the legislation when viewed against the concerns voiced by Congress, arguably demonstrate that the legislation was unnecessary, inefficient and anticompetitive. Accordingly, legislatures and regulators should take a cautious approach to enacting restrictions proposed in the name of consumer protection. To avoid the mistakes of the past, legislatures and regulators should carefully consider how such measures might limit competition and innovation, whether such measures would truly result in a benefit to consumers, and whether there are any less restrictive measures that would result in equivalent consumer protection.