

Response: Mark Budnitz, Georgia State College of Law

Q1. Are you in general agreement with the payment system gaps and opportunities identified above?

No

Q1i. What other gaps or opportunities not mentioned in the paper could be addressed to make improvements to the U.S. payment system?

There are many legal gaps that need to be filled to ensure consumers have adequate protection. The UCC includes no consumer protection & has not been updated to account for developments. The EFTA is out of date.

Q2. Are you in general agreement with the desired outcomes for payment system improvements over the next 10 years?

No

Speed & ubiquity must be accompanied by a legal framework that guarantees consumers have the ability to remedy problems that occur. Legal gaps must be filled. Uniform error resolution is necessary for consumers regardless of payment device used.

Q2i. What other outcomes should be pursued?

Accessibility for all consumers.

Q4. In discussions with industry participants, some have stated that implementing a system for near-real-time payments with the features described in the second desired outcome (ubiquitous participation; sender doesn't need to know the bank account number of the recipient; confirmation of good funds is made at the initiation of the payment; sender and receiver receive timely notification that the payment has been made; funds debited from the payer and made available in near real time to the payee) will require coordinated action by a public authority or industry group. Others have stated that current payment services are evolving toward this outcome and no special action by a public authority or industry group is required.

i. Which of these perspectives is more accurate, and why?

Require coordinated action by a public authority. Otherwise, it will be decided by private organizations such as NACHA, in which non-financial businesses, consumers and government have no ability to vote. Parties include non-banks, payment processors, telecoms, etc., diverse parties who have never coordinated in an organized fashion before.

ii. What other perspective(s) should be considered?

The paper does not take into account the needs of consumers. The paper notes the need to prevent data breaches and "Advanced fraud schemes and technologies present new risks," but these are not addressed.

Q5. The second desired outcome articulates features that are desirable for a near-real-time payments system. They include:

- a. Ubiquitous participation
- b. Sender doesn't need to know the bank account number of the recipient
- c. Confirmation of good funds is made at the initiation of the payment
- d. Sender and receiver receive timely notification that the payment has been made
- e. Funds debited from the payer and made available in near-real time to the payee

i. Do you agree that these are important features of a U.S. near-real-time system?

No

Making funds available to the payee in near-real time is good policy only if consumers have the ability to obtain effective and immediate relief for errors and unauthorized transactions. NACHA and federal and state regulators have expressed strong concern over the huge extent of fraud by some payees. The payment system enables payday lenders to take consumers' funds for loans illegal under state law. A recent Pew survey demonstrates the inadequacy of bank disclosures. Because of faster processing, consumers have little opportunity to stop payment of checks and bank contracts require consumers to notify banks of forgeries & alterations under 4-406 in a ridiculously short time after the monthly statement is mailed by the bank, not received by the consumers, regardless of the vagaries of the postal system. Remotely created checks should be made illegal because they are often used to perpetuate fraud & to avoid the EFTA's safeguards. The EFTA and Reg. E do not provide consumers adequate ability to stop payments and revoke authorization. The paper acknowledges that natural disasters disrupt payments, but the UCC provides no extensions of deadlines under 4-406 for customers, only banks, and the EFTA provides an extension for consumers only under very limited circumstances .

Q8. How will near-real-time payments affect fraud issues that exist with today's payment systems, if at all? Will near-real-time payments create new fraud risks?

Yes

It is well documented by regulators that many payees use the payment system to defraud consumers. Real-time payments to those payees produces the following result: hard-pressed consumers no longer have access to their funds and must fight to get their money back. In several instances, regulators have found that banks facilitate payee fraud.

Q13. Some industry participants say that check use is an enduring part of the U.S. payment system and that moving away from checks more aggressively would be too disruptive for certain end users.

i. Is accelerated migration from checks to electronic payment methods a high priority desired outcome for the U.S. payment system? (Accelerated means faster than the current trend of gradual migration.)

No

The paper acknowledges the continued popularity of checks among consumers. Accelerated migration should not be a high priority because little has been done to ensure the security of electronic systems and privacy of customer information. There are major legal gaps regarding electronic methods such as remote deposit capture and mobile banking. The digital divide persists in which low income consumers cannot afford to use electronic devices. The elderly should not be pressured to use only electronic systems. About half of older Americans do not have computer access. During power failures, which are for extended periods of time during natural disasters, electronic systems are inoperable.

Q14. Business-to-business payments have remained largely paper-based due to difficulties with handling remittance information. Consumer bill payments also are heavily paper-based due to the lack of comfort some consumers have with electronic alternatives. In addition, many small businesses have not adopted ACH for recurring payments due to technical challenges and/or cost constraints. The payment industry has multiple efforts underway to address these issues.

ii. What other barriers need to be addressed to accelerate migration of these payments?

Consumers have good reason to fear electronic withdrawals because certain payees use account information to transfer funds where the payees have engaged in fraud and unfair and deceptive practices and the transfers are unauthorized. The abuse of the payment system by payees and their payment processors have been proven by federal regulators & must be addressed systemically. Also, the role of non-banks must be addressed. Security and privacy must be ensured. Treasury Secretary Lew stated earlier in December that legislation is necessary to safeguard the financial industry against the risk of cyberattacks.

Q17. Payment security encompasses a broad range of issues including authentication of the parties involved in the transaction, the security of payment databases, the security of software and devices used by end users to access payment systems, and security of the infrastructure carrying payment messages.

ii. Which of these threats are not adequately being addressed?

None of these safety issues are being adequately addressed. Surveys indicate the FFIEC authentication standards are not universally complied with. Databases are constantly compromised.

Q21. Please share any additional perspectives on U.S. payment system improvements.

To the extent possible, consumers need uniform rules (at least as strong as under the EFTA) for unauthorized use and error resolution, regardless of the payment instrument used or system that processes the payment, regardless of the platform used, and regardless of the type of payee. Otherwise, consumers will continue to be hopelessly confused and will not willingly migrate to electronic systems.