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Recalibrating Abstract Payments Regulatory Policy: a Retrospective after the Dodd-Frank Act

Eniola Akindemowo, Thomas Jefferson School of Law

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RECALIBRATING ABSTRACT PAYMENTS REGULATORY POLICY:
A RETROSPECTIVE AFTER THE DODD-FRANK ACT.

Eniola Akindemowo*

I. Introduction: The Efficiency of the Payments Framework is at Stake

Stored value products (SVPs)\(^1\) have become a feature of modern life.\(^2\) Introduced with great fanfare in the 1990s, the excitement has simmered down. As SVPs became more commonplace, a patchwork of regulations evolved to regulate their risks. Yet SVPs do not fit neatly into the conventional payments framework – these misfits have defied sustained efforts to pigeonhole them into traditional legal categories. Things have now reached the stage where the relevance of a hallowed concept – the deposit – is in question.

Concerns linger about the risky potential of SVPs yet the legal categorization of these items has been a dwindling priority. Early attempts to pinpoint the legal

\[^{\text{\(\star\)}}\] Professor, Thomas Jefferson School of Law, San Diego, CA; Ph.D, LL.M University of London, LL.B University of Ife. The author thanks Professors William Slomanson, Ilene Durst and Arnold Rosenberg for their thoughtful comments on earlier drafts of this piece.


\(^{\text{\(2\)}}\) They are now marketed as “a lifestyle product for everyday use” See PAYMENT NEWS Feb. 17 2010 at http://www.paymentsnews.com/2010/02/precash-introduces-transaction-fee-free-debit-card.html.
characteristics of SVPs have given way over time to narrow, pragmatic analyses. The result is the continuing significance of SVPs in the payments system is obscured while the need for analytical assessments is downplayed.

A broader analysis of the legal nature of SVPs and the legal ramifications of their awkward conceptual placement is necessary. Without an unflinching analysis, the role of SVPs in the payments framework will not be fully addressed. Rules intended to regulate SVPs will not be as efficient as they should be. Whatever rules that may evolve may be quickly superseded by technological advances. If SVPs – portents of future payments – are not adequately addressed in the payments framework, that framework will be neither efficient nor flexible. The U.S. cannot afford to rest on its laurels – other regions according regulatory readiness a higher priority have been revamping their payment systems to meet the future demands of emergent payments for quite some time. The U.S. is at risk of conceding its hard fought position of leadership in the future global payments arena because of regulatory complacency. Our claims to lead in this arena will be met with eager derision in the future if there are scrambling efforts to address legal inconsistencies and inefficiencies after the fact, particularly if other regions had the foresight and will to at least try to do so.

Mobile iterations of stored value mechanisms in the meantime, are drawing new attention. M-commerce, not e-Commerce, is the latest buzzword as mobile payments are hereafter referred to as m-payments.

\[\text{See 24 below.}\]

\[\text{Commercial transactions conducted by means of mobile devices such as a cell phones or PDAs.}\]

\[\text{Mobile payments are hereafter referred to as m-payments.}\]
generate increasing interest.\textsuperscript{6} Research and investment in m-Payment applications is booming\textsuperscript{7} because m-Payments are expected to revolutionize payments business.\textsuperscript{8}

These subjects of several rule proposal analyses over the last fifteen years have continued to evolve, intensifying the ramifications of this systemic misfit. The number of payment applications falling uneasily within or outside categorizations of ‘deposits’ testifies to the diminishing efficiency of certain payment concepts. The need to reconcile – or if not, to distinguish - characteristics of increasingly abstract, practical, mobile payment methods with jurisprudential concepts is daily evident. The path to SVP

\begin{quote}
\textsuperscript{6} Bank for International Settlements Committee on Payment and Settlement Systems [hereafter CPSS], \textit{Survey of Developments in Electronic Money and Internet and Mobile Payments} (2004) at 9, 10: “Payments made using the Internet and mobile phones have advanced rapidly and have become quite important in the field of electronic retail payments recently compared to e-money.” See also David S. Evans, The Decade’s 12 Greatest Developments in Payments: #2 Mobile Payments (2010) at http://www.pymnts.com/the-marriage-of-mobile-and-payments-make-the-world-a-better-place/. \\
\textsuperscript{7} The number of mobile payment patent applications started to increase in the late 90s and has sharply accelerated since see Hyytinen and Takalo, Who Owns Mobile Money? Pymnts Journal available at http://www.pymnts.com/who-owns-mobile-money/. \\
\end{quote}
regulation in the US has however been punctuated with false starts and timeouts in which appropriate approaches to SVP regulation has been considered and reconsidered.

The question at the heart of this article is whether SVPs can and should be regulated differently for the sake of an effective, efficient payments system in the near future. Part II details regulatory milestones, assessing the way rules and policies have been formulated in the U.S. in the past. Features of the regulatory approach to SVPs in the U.S. are critiqued in Part III. Part IV answers the question ‘where to from here?’ with suggestions for steps towards devising a deposit concept substitute for SVP policy purposes.

II. The Journey Towards SVP Regulation

A. The First Attempts: The 1996 Opinions

The legal nature of SVPs has been a thorny question in payments jurisprudence. The protection of public deposits from fraudulent or careless actions is a pillar of banking policy. It has not been entirely clear what these mechanisms are, legally speaking. Analysts and regulators alike have pondered whether SVPs are deposits or accounts.

Clarifying whether SVPs are eligible for deposit insurance under the Federal Deposit Insurance Act has been a primary priority because SVPs seemed to embody

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deposits.\textsuperscript{10} The question of whether SVPs constituted ‘accounts’ for the purposes of the 
Electronic Fund Transfer Act and Regulation E\textsuperscript{11} has been another related priority\textsuperscript{12}.

The involvement of non-traditional service providers made the probable effects of banking business prohibitions upon non-bank payment innovators an issue of interest. Payment innovators were concerned that they would be faced with the choice of either seeking formal licensing as deposit-takers, or abandoning their e-money aspirations. High compliance costs, it was feared, would leave them no choice but to opt out.\textsuperscript{13}

Similar issues began to be investigated worldwide by several agencies in the early 1990s. The European Monetary Institute\textsuperscript{14}, the Bank for International Settlements\textsuperscript{15}, the Central Bank Governors of G10 countries\textsuperscript{16}, and a number of national governments\textsuperscript{17} all published reports on this subject.\textsuperscript{18}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{10} Hereinafter FDIA. “From the FDIC’s perspective, the primary legal issue raised by the development of stored value card systems is whether and to what extent the funds or obligations underlying stored value cards constitute ‘deposits’ \textsuperscript{5} within the meaning of section 3(l) of the Federal Deposit Insurance Act (FDIA) and are therefore assessable and qualify for deposit insurance…”see 61 Fed. Reg. 40,490 at 40491.
\item \textsuperscript{11} Hereafter EFTA and Reg.E respectively.
\item \textsuperscript{12} “The Board notes that… a transaction in which a stored-value card is used to access a consumer’s deposit account, such as ‘reloading’ the card by drawing on the consumer’s checking account at an ATM, is covered by Regulation E and subject to all Regulation E requirements.” See 61 Fed. Reg. 19,696 at 19698.
\item \textsuperscript{14} This was a predecessor agency of the European Central Bank.
\item \textsuperscript{15} See BIS, Implications for Central Banks of the Development of Electronic Money, October 1996 [hereinafter BIS Implications].
\end{itemize}
\end{footnotesize}
In the United States, the Board of Governors of the Federal Reserve\textsuperscript{19}, the United States Treasury via the Office of the Comptroller of the Currency\textsuperscript{20}, the Federal Deposit Insurance Corporation, and the US House of Representatives\textsuperscript{21}, all investigated the implications of electronic money. There was at least one conference\textsuperscript{22}, a taskforce\textsuperscript{23} sponsored by the US Department of the Treasury, and House of Representatives


\textsuperscript{17} An investigation of electronic money products was a specific focus of the Financial System Inquiry set up by the Australian Federal Government in 1996 for example, see Financial System Inquiry, \textit{Financial System Inquiry Final Report} (Mar 1997), at http://fsi.treasury.gov.au/content/FinalReport.asp - (chapters 3 & 9).


\textsuperscript{19} Hereafter the FRB.

\textsuperscript{20} Hereafter the OCC.

\textsuperscript{21} Through its House Committee on Financial Institutions and Consumer Credit.

\textsuperscript{22} The conference was titled: Toward Electronic Money and Banking: The Role of Government, and was held on September 19-20, 1996 in Washington, DC.

Committee hearings. A report was submitted to Congress\textsuperscript{24}. The ultimate conclusion was that that premature regulation would harm, rather than help the emergent technology.\textsuperscript{25} Prescriptive legislation\textsuperscript{26} was not seriously pursued in the U.S as a result. The expectation was that that existing laws could apply to some aspects of SVPs, and that market forces would shape (the market) and control arising risks.\textsuperscript{27} It was during this period that opinions from the FDIC and the FRB were first published on this subject.

\begin{enumerate}
\item \textsuperscript{25} See FRB Report note 24 above at pp.75-76.
\item \textsuperscript{26} Rules that prescribed participants and formally defined e-money were formally enacted in the E.U. in 1999 \textit{see EU Directive 2000/46/EC}, 2000, \textit{O.J (L 275) 0039 – 0043 (EC)} [hereinafter the E-Money Directive].
1. The FDIC’s General Counsel’s Opinion No. 8

The FDIC issued General Counsel’s Opinion No. 8 on Stored Value Cards in July 1996. Seeking to clarify the applicability of deposit insurance, this opinion categorized SVCs into four groups. These categories were not intended to be an exhaustive classification of stored value products; they were intended to provide a mechanism by

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29 (a) Bank Primary – Customer Account Systems (hereafter BP-CA Systems); (b) Bank Primary – Reserve Systems (hereafter BP-R Systems); (c) Bank Secondary – Advance Systems (hereafter BS-A Systems); (d) Bank Secondary – Pre-Acquisition Systems (hereafter BS-PA Systems).
which funds associated with SVCs could be analyzed. The approach to categorization taken here was markedly different to adopted by the FRB and deliberately so.

The 1996 Opinion distinguished SVCs primarily by whether they are were “Bank Primary” systems or “Bank Secondary” systems. In Bank Primary systems, the stored value would be issued by the bank, and the funds underlying the SVC maintained in the customer’s account or a reserve account, pending a claim from the transferee of the stored value. The responsibility to pay claiming transferees would be the bank’s.

In Bank Secondary systems, the stored value would be created by a third party, and the funds underlying the SVC ultimately held by that third party. The responsibility to pay claiming transferees would be the third party’s. The banks role would be

30 As per 12 U.S.C. § 1813 (l). See also the FDIC Opinion supra note 28 at 40491, 40494.
31 See The Federal Reserve Board’s 1996 Regulation E Proposal below at 13 also 61 Fed. Reg. at 19,696 (May 2, 1996). In relation to the FRB’s approach, it was remarked in FDIC Opinion 8 that: “This opinion does not use these distinctions. This is not intended as a criticism or rejection of the board’s classification system. Rather it is indicative of the fact that these particular distinctions are not necessarily germane as to whether and under what circumstances the funds underlying a stored value card are deposits under the… FDIA”.
32 When referring to the holder of an SVC in a bank primary or bank secondary system, that is also the customer of a bank, the term ‘customer’ has been used in this article particularly in reference to analyses relating to the FDIC. Holders of SVCs, in the context of FRB related comments and the general discussions of this article, have been referred to as ‘cardholders’ or ‘holders’.
33 In BP-CA Systems, the customer would purchase stored value, from the bank by means of funds in the cardholder’s bank account. Those funds would however remain in the account, possibly earmarked, pending a claim by the transferee of the stored value. In BP-R Systems, the funds underlying the stored value would be withdrawn from the customer’s account when the stored value was purchased from the bank, and paid into a reserve or general liability account maintained by the bank to meet the claims of transferees.
essentially that of an intermediary, though it might on occasion incur contingent liability
to redeem the electronic value from transferees.\footnote{34}

The practical effect of FDIC Opinion 8 was that most SVC systems then in
operation, fell outside the definition of a deposit, and were deemed exempt from the
FDIA\footnote{35}. Funds underlying three of the identified system types were deemed not to
constitute a deposit liability generally speaking\footnote{36}. Only one category\footnote{37} was unreservedly
deemed to constitute deposits – however no such system was known to be in operation at

\footnote{34} Thus in BS-A Systems, stored value issued by a third party would be made available to the bank
for purchase by its customers. After the purchase of the stored value by a customer, the bank would
typically hold the (exchanged) underlying funds for a short period before forwarding it to the third party
issuer. In BS-PA Systems, the bank would have purchased the stored value in advance from the third party
issuer, so that on purchase of the stored value by a customer, the bank would not forward on, but hold the
funds underlying the stored value.

\footnote{35} The main bases of assessment were: (a) whether there had been the receipt or holding of a
balance of money or its equivalent: BP-CAS, BP-RS (yes), BS-AS (yes, transfer to third party), BS-PAS
(no, held by third party); (b) whether there was an obligation to credit an account: BP-CAS (yes), BP-RS,
BS-AS/BS-PAS(no); re BP-RS, paid into a reserve/general liability account, regarded as exempt; (c)
whether the funds were held for a special purpose: BP-RS (no), BS-AS (yes); See FDIC Opinion 8 \textit{supra}
note 39 at 40494.

\footnote{36} Because in (a) BP-R Systems the funds are not credited or obliged to be credited to an account
as per § 3(l)(1) of the FDIA, 12 U.S.C. § 1813(l)(1) nor held for a special or specific purpose as required by
§ 3(l)(3) of the FDIA, 12 U.S.C. § 1813(l)(3); (b) BS-PA Systems, the funds are received or held by a third
party rather than a depository institution as per § 3(l)(1) and 3(l)(3) of the FDIA, 12 U.S.C. §§ 1813(l)(1),
(3); (c) BS-A Systems, though the funds are held temporarily by the depository institution, the deposit
liability is owed to the third party for whom they are being held rather than the customer thus there is no
credit given or obligated to be given, as per § 3(l)(1) of the FDIA, 12 U.S.C. § 1813(l)(1), to an account
belonging to the \textit{customer}. It might qualify as a deposit obligation owed to the third party however, subject
to further qualifications – see \textit{id.} at 40491- 40493.

\footnote{37} BP-CA Systems see note 33 \textit{supra}. 

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the time in the US\textsuperscript{38}. In one other case,\textsuperscript{39} it was noted that underlying funds created deposit obligations owed to the issuing third party instead of the customer, and that these could in certain circumstances constitute deposits under the Act.\textsuperscript{40}

This opinion was welcomed by those who took the view that the industry was nascent and likely to be easily prejudiced by premature or pre-emptive regulation\textsuperscript{41}. Better still that most systems then in contemplation were deemed exempt from regulation. For others, particularly consumer advocates, it was an unfortunate outcome. Critics felt that the opinion did little to allay fears that the systems developing would be an entry point for untested unscrupulous participants. It was feared that consumer abuses, or at least consumer confusion, would be the result.\textsuperscript{42}

There were other criticisms of the FDIC Opinion 8. Given the nascent nature of SVPs, there were some commentators who felt that the definitions were premature or inconsistent with what would transpire in practice.\textsuperscript{43} It was also feared that the existence

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} 61 Fed. Reg. 40,490, footnote 4. It was further noted that there were no systems then in existence in which the underlying funds were held as trust funds.
\item \textsuperscript{39} BS-A Systems see note 34 supra.
\item \textsuperscript{40} For example where there was an obligation to credit an account as defined, or the funds were being held for a special or specific purpose as required by §3(l)(1) of the FDIA, 12 U.S.C. §§ 1813(l)(1), (3).
\item \textsuperscript{42} See for example Mark Budnitz, \textit{Stored Value Cards: The Need For Regulation}, 46 American University Law Review 1027 (1997).
\item \textsuperscript{43} See Walter A. Effross, \textit{Putting the Cards Before the Purse? Distinctions, Differences, and Dilemmas in the Regulation of Stored Value Card Systems}, 65 UMKC L. Rev. 319 at pp.322-335, 355-
\end{itemize}
\end{footnotesize}
of differing, possibly conflicting categorizations by the FDIC and FRB would be inconvenient at the least. Further, both being strongly shaped by context, it was postulated that they might prove to be of only limited use.\(^{44}\)

Despite these criticisms FDIC Opinion 8 proved to be both influential and resilient.\(^{45}\)

2. **The Federal Reserve Board’s 1996 Regulation E Proposal**

The FRB also introduced a proposal to amend the electronic fund transfer regulations - Regulation E\(^{46}\) - in 1996.\(^{47}\)

In considering the revised application of Reg. E to SVPs, FRB Proposal 1 closely analyzed SVPs, noting that systems ranged from the simple to the sophisticated,\(^{48}\) and that different systems handled transactions and data in strikingly different ways.\(^{49}\)

Because EFTA and Regulation E coverage requires EFT transactions from a consumer’s asset account, the definition and interpretation of terms such as “electronic

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\(^{357}\) 368-370, which details some of the criticisms that were made about the FDIC Opinion 8 and FRB Proposal 1.

\(^{44}\) See Effross *supra* note 43 at 368 (note 202).

\(^{45}\) It has only recently (fourteen years later) been superseded by a new General Counsel’s Opinion No. 8, *see* 74 Fed. Reg. at 67155 (November 13, 2008).

\(^{46}\) Hereafter Reg. E.


\(^{48}\) *Id.* at 19698.

\(^{49}\) *Id.* at 19699.
fund transfer”, “account”, and “financial institution” were of central importance. How closely an SVP resembled an account, or functioned as such, was the criterion chosen to test the applicability of Reg. E to SVCs. The FRB concluded that SVCs fell into three main categories: (a) on-line accountable systems, (b) off-line accountable systems, and (c) off-line unaccountable systems. A definition section included in the proposal went some way towards clarifying the concepts and distinctions drawn in the proposal.

The FRB took the view that both on-line accountable and off-line accountable systems closely resembled an “account”. It concluded however that only on-line accountable systems should be generally covered by Reg. E, with minor amendments. Off-line accountable systems were to be exempt from most of Reg. E, and off-line unaccountable systems were to be completely exempt from its application. In the case of SVCs with a value limit of $100 or less, a de minimis exception was to apply, exempting them from Reg. E coverage.

FRB Proposal 1 was not well received. The planned publication of a final rule to follow the request for comments was postponed and the proposal, in its entirety, was shelved ultimately. A report to Congress was subsequent prepared by the FRB, pursuant to its obligations under the Economic Growth and Regulatory Paperwork

50 The FRB noted that the definitions of “account” and “financial institution” were intended to be broad, to ensure anyone who provided regulated services or their equivalent would be subject to the same standards – id. at 19699.

51 (Proposed ) § 205.16 see id. at 19704.

52 Id. at 19702.

53 Though initial disclosure requirements would apply – see id. at 19699-19700.

54 Id. at 19702-19703.

55 Id. at 19703. See also proposed § 205.16(c) id. at 19704.

56 See Effross supra note 43 at 354 – 363. See also FRB Proposal 2 supra note 77 at 55998.
Reduction Act of 1996.\textsuperscript{57} The possibly negative effects of amendments to Reg. E were examined in this report, leading the FRB to ultimately conclude that Reg. E amendments of the proposed kind would be premature at that point in time, and likely detrimental at that time\textsuperscript{58}.

Neither option of amending Reg. E, or deeming SVCs prima facie accounts for Regulation E purposes, was adopted at that time. The resolution of what SVCs were legally speaking was postponed to the future.

3. \textbf{Disparate Routes to a Similar Outcome}

The FDIC deliberately adopted a narrow focus in FDIC Opinion 8. The main objective was to determine whether certain SVCs constitute deposits for the purposes of the FDIA. In considering this issue, only bank-centric products were considered in detail. The systemic model identified as being most deserving of regulation – the BP-CA System - was a rarity. Unlike such online systems, most of the systems in operation in the US at that time were off-line.

The technological features of SVCs, though taken into account, were not emphasized - possibly because the proposal did not aspire to be an exhaustive evaluation of the SVPs then in existence.\textsuperscript{59} The origin – as in the type of issuing entity - of an SVC in contrast was given prominence as an important factor for analysis. Also significant were the account evoking descriptions used.

\textsuperscript{57} See FRB Report \textit{supra} note 24.
\textsuperscript{58} \textit{Id.} at 3-4, 75-76.
\textsuperscript{59} FDIC Opinion 8 \textit{supra} at 40491 (note 6).
The FRB, in contrast, did not focus on the origin of SVCs. So long as a product was being made available to the public, the FRB’s concern was to identify whether that product constituted an account for the purposes of EFTA and Reg. E. The underlying technological arrangements were thus accorded primary significance because the focal question became whether an account had been linked, or established in relation, to an SVC. Whether an SVC was accountable or unaccountable became the primary distinction.

Accountable products were considered to very closely resemble accounts, in particular accounts that could be assessed by debit card. The FRB evidently had the intention to bring SVPs used in systems able to track individual transactions, cards or consumers within the coverage of Reg. E. Two of the three SVC types categorized in the 1996 Proposal were accordingly deemed accounts. They would have been covered by a consequently amended Regulation E had the 1996 Proposal been finalized.

B. The Reflective Era

Although FDIC Opinion #8 was relatively well received, the prospect of creeping obsolescence became more pressing with each year passing. The FRB’s unsuccessful first proposal in contrast, was criticized for being too limited and for being too difficult to understand. Technological progress mandated a reconsideration of approach.

1. Revising GCO# 8: 2004 - 2005

In response to the growing sense that Opinion 8 was out of date, the FDIC published three proposals between 2004 - 2005. The FDIC was concerned that newer

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60 FDIC Opinion 8 supra note 28 at 19696.
61 Effross supra note 43 at.359details industry criticisms.
products might fall outside the existing analytical framework simply because they were not contemplated in the 1990s. Concluding that it was time to re-address the question of which SVPs constitute deposits, the FDIC proposed revised SVC classifications in FDIC PR 1. The following year, this revision was revised itself by a simpler rule in FDIC Proposal 2a. As ideas of replacing Opinion 8 began to float around shortly, a rule to determine which funds underlying SVPs would be eligible for deposit insurance was published as FDIC Proposal 2b.

The FDIC identified three system types it believed needed closer analysis: (a) Accounts Funded By Sponsoring Companies (AFSC); (b) Pooled Accounts With Individual Sub Accounts (PAISA); and (c) Payroll Cards (PRC). The main objective was to ascertain whether funds underlying bank issued SVPs were deposits and to this end, to propose a rule that could be used to assess SVPs. A related aim was to update Opinion 8 by devising a rule that would apply irrespective of SVP type. The term ‘stored value card’ was defined as ‘a device that enables the cardholder to transfer the

62 See 69 Fed. Reg. 20558 (April 16th 2004) [hereafter FDIC Proposal 1]. “The development of new systems has created a need for additional guidance as to whether the underlying funds qualify as deposits. Although the proposed rule would provide such additional guidance, it would retain the basic principles set forth in GC8 and extend these new principles to new types of stored value card systems.”

63 See 70 Fed. Reg. 45571 (August 8th 2005) [hereafter FDIC Proposal 2a]. This proposal presented an entirely different perspective rooted in the ownership and insurability of underlying funds. The roots of this approach are traceable to an advisory opinion dating back to 2002 – see Advisory Opinion No. 02-02, August 16th 2002.

64 See Financial Institution Letter #FIL-83-2005 (August 22 2005) [hereafter FDIC Proposal 2b].

65 See FDIC Proposal 1 supra note 62 at 20558. A payroll card is a card by which an employee can access and withdraw funds deposited in a special account designated by the employer to hold the employee’s wages.

66 Regardless of whether the SVP is a payroll card, sponsored card, gift card, etc.
underlying funds (i.e. the funds received by the issuer of the card in exchange for the issuance or reloading of the card) to a merchant at the merchant’s point of sale terminal’. Under the proposal, funds underlying all SVCs would be deposits as a general rule.\(^6^7\)

The FDIC had previously considered the question of whether the funds underlying payroll cards were insurable to employers.\(^6^8\) The issue at hand was a different question however – not whether (payroll) SVPs were subject to deposit insurance, but once again, whether specific SVPs are deposits.\(^6^9\) Because FDIC Proposal 1 deliberately avoided distinguishing different models, the rule would ultimately apply to all bank issued stored cards regardless of type.\(^7^0\) Cards issued by sponsoring companies, on the other hand, were exempt.\(^7^1\)

In FDIC Proposal 1, the three SVC categories specified above were deemed deposits\(^7^2\). All three categories were deemed deposits because they were either

\(^6^7\) FDIC Proposal 1 supra at note 62 at 20562. The exception would be where: (a) the issuer of the cards is the insured depository institution (and not the employer or other sponsoring company), and (b) the depository institution maintains a pooled ‘reserve account’ but maintains no sub accounts or other supplemental records reflecting the amount of money owed to particular cardholders FIDC Proposal 1 supra note 62 at 20562. 

\(^6^8\) See FDIC Advisory Opinion No. 02-03 (August 16\(^{th}\) 2002); the conclusion was that insurability should depend on who had ownership of the funds. Id at 20562. This would also include other considerations such as what terms had been agreed by the parties, and whether the employer retained a reversionary interest in the funds. The FDIC also addressed this issue in FDIC Proposal 2b supra note 64 supra. 

\(^6^9\) The FDIC in fact was of the view that the answers to both questions were not necessarily incompatible. It was suggested for example, that underlying funds deemed deposits per the proposed rule should also be assessed for insurability per the instant ruling - FDIC Proposal 1 supra note 62 at 20562. 

\(^7^0\) Id. 

\(^7^1\) See FDIC supra note 10§§ 3a & 3b (12 U.S.C. 1813(a), 1813(b)). 

\(^7^2\) Id. at 20561 – 20563.
considered (a) to consist of a ‘commercial account’,\(^{73}\) (b) to be accounts held in the normal course of business for a special or specific purpose,\(^{74}\) or, (c) to have the potential to satisfy the new proposed rule\(^{75}\). In the case of payroll cards, if the funds in question were paid into a reserve account that is associated with individual sub accounts, they would be categorized as a deposit\(^{76}\).


The FRB published another rule to clarify the meaning of deposit in June 2004.\(^{77}\) Mindful of the outcome of its previous attempts to devise a comprehensive schematic reference\(^{78}\), the FRB set its sights on a more modest objective – extending Regulation E to one specific SVP type only. Far from devising a scheme under which most or all SVCs would be subject to Regulation E therefore, FRB Proposal 2 sought only to extend

\[^{73}\text{As per § 3 (1)(l)(1) of the Federal Deposit Insurance Act (12 U.S.C 1813(l)).}\]
\[^{74}\text{As per §3 (1)(l)(3) of the Federal Deposit Insurance Act (12 U.S.C 1813(l)).}\]
\[^{75}\text{See §3 (1)(l)(1), (3) of the Federal Deposit Insurance Act (12 U.S.C 1813(l)), also FDIC Proposal 1 which includes (proposed) § 303.16. supra note 62 at 20565, 20566.}\]
\[^{76}\text{In other words, if not associated with sub accounts, they would not be deposits FDIC Proposal 1 supra note 62 at 20562.}\]
\[^{77}\text{69 FR 55996 hereinafter FRB Proposal 2.}\]
\[^{78}\text{The shelving of FRB Proposal 1 in other words.}\]
Regulation E to payroll cards.\textsuperscript{79} Steering clear of broad aims, the FRB was more cautious this time about relying on functional analogies or perceived similarities to accounts.\textsuperscript{80}

3. Responses to the Proposals

This time, the proposal of the FRB was successful, while the proposal of the FDIC was less so.

A common criticism\textsuperscript{81} - echoing criticisms of FDIC Opinion No. 8 - was that the rule was premature.\textsuperscript{82} The industry was regarded as nascent and likely to change significantly. It was feared that the proposal might pre-empt vibrant development, or stunt the potential of the technology\textsuperscript{83}. In fact, the suggestion made in the proposal that FDIC Opinion No. 8 might be outdated was echoed in a number of criticisms. Other critics others advocated that Opinion No. 8\textsuperscript{84} be revoked outright.

Consumer advocates were less negative. They saw the proposal as a positive step towards controlling SVP risks - partial though imperfect regulation was better than

\textsuperscript{79} Electronic check conversion services illustrate the increasingly electronic nature of payments. A substantial part of FRB Proposal 2 covers electronic check conversions (and the extension of Reg. E thereto). Electronic checks - not being SVPs - will not be analyzed in this piece. Suffice to say that they are another indicator of the relentless march towards increasingly abstract payments see 44 onward below.

\textsuperscript{80} In contrast to 1996 when it proposed a definition of SVCs encompassing on-line and off-line accountable SVPs irrespective of type.

\textsuperscript{81} An archive of the comments received by the FDIC is at http://www.fdic.gov/regulations/laws/federal/04comDEPOSITDEF.html.

\textsuperscript{82} See the comments of American Bankers Association id.

\textsuperscript{83} See the comments of Mastercard International, also Visa USA Inc id.

\textsuperscript{84} See the comments of the Electronic Fund Transfer Association id.
(almost) none. There was some concern however that consumer expectations had not been well accounted for, nor sufficient attention paid to policy considerations.

The proposal to exempt funds underlying sponsoring company issued SVC aroused mixed reactions. Supporters of a wait-and-see approach were dismayed that the proposal might prove influential outside its intended scope of application. Given the usual influence of FDIC rulings and interpretations, it was feared, they might unwittingly provide a template for the regulation of non bank SVC issuing entities.

Concern about the proposal’s scope of influence hinted at a deeper fear. Might the implicit beliefs underlying the proposal be distorted once applied out of context? The proposal supported the conclusion that the FDIC believed only accountable SVPs should be regulated under the FDIA at that point in time. Of the seven categories identified in FDIC Opinion #8 after all, only two were deemed unreservedly subject to regulation. The underlying belief seemed to be that only unambiguously accountable systems should be deemed deposits and that application of the proposal would be inherently inconsistent.

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85 See the comments of the Consumer Union id for example.
86 For example, with small closed SVC products such as closed gift cards, the consumer does not expect to be able to get a refund for unspent or expired value - see the comments of the American Bankers Association and the Electronic Fund Transfer Association id.
87 Id, also see FRB Roundtable Discussion supra note 1.
88 These were the BP-CA, and PAISA systems: all the others were exempted or at best, only potentially covered. The BS-AS systems, AFSC systems and PRC payroll cards might qualify – for example – while BP-RS and BS-PA systems were unqualifiedly exempt – see FDIC Proposal 1 supra note 62.
89 Of the seven categories bank primary customer account systems, pooled accounts with individual sub-accounts and payroll are unambiguously accountable. Payroll cards were deemed covered in those circumstances where the employee would be the owner of the account – when the situation would
The FDIC’s proposal seemed to reflect a dichotomy – that accountable SVPs ought to be regulated, while unaccountable SVPs ought not to be – that was also implicit in FRB Proposal 1. It could be surmised from this that both agencies, at least implicitly, believed accountable SVPs should be regulated as deposits or accounts. The possibility that this could in time come to mean that all SVPs, save unaccountable ones, were deposits was surely alarming to prospective sponsoring company issuers. Such a policy would narrow their possible field of activity sharply – presuming that deposit related regulation was undesirable and to be avoided. It was certainly not a given that all

be accountable from the perspective of the cardholder. See FDIC Proposal 1 supra note 62. Though prospective (non bank) operators might be mollified, consumer advocates would probably not approve.

See FRB Proposal 1 supra note 47 at 19699 & 19702 regarding off-line accountable and online (accountable) stored value systems: “To the extent that off-line accountable stored value systems are similar to systems involving debit cards and traditional deposit accounts, parallel consumer protections under Regulation E may be appropriate… accountable stored value systems..[a]s in traditional deposit accounts accessed by debit cards, these…operate on-line…In general, compliance with Regulation E requirements does not appear to be a significant problem.” In relation to Offline unaccountable systems, the FRS concluded “On balance, the Board believes that it is preferable to state that off-line unaccountable cards are not covered by Regulation E.” See Id. at 19702.

While U.S. firms account for the highest number of mobile payment patent applications, the majority of the applications are submitted by potential sponsoring companies rather than financial institutions see Hytynen and Takalo, Who Owns Mobile Money? Pymnts Journal available at http://www.pymnts.com/who-owns-mobile-money/.

issuers would favor such an interpretation of ‘deposit’ or ‘account’. The ambivalence was poised, in any case, to chill investment decisions and detrimentally affect the future development of SVPs.

Although it seemed the objective of the proposed policy was to lightly regulate SVPs while encouraging their development, a more cynical observer might have wondered if there was a secondary aim of ‘pruning back the field’? Rules deeming SVPs as deposits could easily discourage non-bank SVP issuance. The discouragement of non-bank SVP issuance could be the result of three possibilities - a deliberate objective to discourage such issuance, a more sublime intent to do so, or the discouragement being a merely incidental consequence. Whichever it was however, the vibrant development of non-bank issued SVP systems did not quickly transpire.

The FDIC ultimately retreated from FDIC Opinion 8. After expanding and refining FDIC Opinion 8 in FDIC Proposal 1, the FDIC changed tack, revising FDIC

93 The dividing line between accountable and unaccountable products, for example, was ambiguous – making the category into which trackable pseudo accounts would fall arguable. See Akindemowo, *Reconsidering SVPs* supra note 1 at 327 - 336.

94 In other words, decisions about whether an entity should enter the field to participate in SVC business or invest in SVC research and development.

95 See FDIC Proposal 2a *supra* note 63 at 45579 “…a type of stored value system addressed in First Proposed Rule but not addressed in the Second Proposed Rule…the depository institution plays no role in the payment process…The FDIC is unsure whether any such systems currently exist.”
Proposal 1 in FDIC Proposal 2a. The same month, the FDIC went further, replacing Proposal 2a with FDIC Proposal 2b. In this way, the theme which the FDIC first begun to explore in FDIC Proposal 1 – namely the insurability of underlying deposits - became more dominant.\(^96\) The revocation of FDIC Opinion 8 by a new Opinion in November 2008 was the culmination of this progression.\(^97\) In this latest opinion, the FDIC moved away completely from the quest for an all-inclusive frame of reference, adopting instead the pragmatic rule of thumb\(^98\) it had proposed earlier in Proposal 2.\(^99\) The rule is now that underlying funds will constitute deposits at the point, however brief, that they are deposited in a depository institution. Acknowledging that the recipient of underlying funds is likely to deposit those funds in a depository institution at some point, the FDIC concluded that non-traditional access products are very similar to traditional products. This being so, the ultimate conclusion was that traditional and non-traditional products could and should be treated in a similar fashion.\(^100\)

The FRB similarly retreated from its initial attempt to categorize SVPs. In FRB Proposal 2, the revised objective was to simply include account-like payroll cards within Regulation E. The commitment of the Federal Reserve Board to this simplified approach was confirmed by its publication as a final rule.\(^101\)

\(^96\) This in other words, was an approach that would do something other than clarify what is and what is not a deposit for the purposes of the FDIA.

\(^97\) 73 FR 67155 [hereinafter New FDIC Opinion 8].

\(^98\) See New FDIC Opinion 8 \(supra\) note 97 at 67156.

\(^99\) See FDIC Proposal 2a \(supra\) note 63 at p.45579.

\(^100\) See FDIC Proposal 2a \(supra\) note 63 at p.45574.

\(^101\) 71 FR 51437 [hereinafter FRB Final Rule].
III. Evasive Logic or Pragmatic Policy?

The pragmatic, logical approach currently adopted by the FDIC should be applied carefully to avoid a chilling effect or the re-emergence of misplaced presumptions.

A. The Underlying Logic

It is important to keep in mind that the FDIC’s proposals referred to funds deposited in a depository institution only. This narrowed the scope of those proposals such that funds held or invested by a sponsoring company\(^{102}\) on its own behalf are excluded. It has been argued elsewhere that a distinction should be drawn between access devices and stored value products.\(^{103}\) Once this distinction is drawn, it becomes clearer still that the instant proposals did not cover the full scope of stored value products, let alone SVP products properly so called.\(^{104}\) In Europe, the term ‘e-money now covers both access devices and SVPs.’\(^{105}\) Previously the term was limited to SVPs only.\(^{106}\) A

\(^{102}\) A dual role issuer/merchant would also be included in this category.

\(^{103}\) see Akindemowo, Reconsidering SVPs supra note 1 at 509-514.

\(^{104}\) The FDIC’s comments are addressed to so called ‘stored value ‘ access devices instead of SVPs properly so called - see New FDIC Opinion 8 supra note 97 at 67156 and FDIC Proposal 2a supra note 63 at 45579.

\(^{105}\) See Directive 2009/110/EC [hereinafter New E-Money Directive] (September 16th 2009) Art 2 s.2 “electronic money means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions….which is accepted by a natural or legal person other than the electronic money issuer.” The definition covers both electronic money stored on a payment device kept in the user’s possession, and value remotely stored on a central server - see preamble 8 of the New E-Money Directive.

\(^{106}\) See Directive 200/46/EC [hereinafter Old E-Money Directive] (September 18th 2000) Art1 s.3(b) “electronic money shall mean monetary value as represented by a claim on the issuer which is (a) stored on an electronic device, (b) issued on receipt of funds of an amount not less in value than the monetary value issued (c) accepted as means of payment by undertakings other than the issuer” The term was limited to value stored on an electronic devices such as a chip card or computer memory intended for
wider technology neutral definition was adopted in 2008 to avoid hampering the
development of the technology, and so the definition of e-money might not become
quickly obsolete.\textsuperscript{107}

The question arises whether tucked away within such comments is the implicit
presumption that the proceeds of an SVP sale cannot or should not be held by a non
depository institution.\textsuperscript{108} In fact, a wide array of retailers now routinely sell gift cards.
These cards are generally non refundable it is true, or they are subject, on a severely
limited basis, to low value maximum refund limits.\textsuperscript{109} It also the case that the funds
generated by the sale of such SVPs in most cases will be deposited in an account
belonging to the retailer\textsuperscript{110}, but this need not necessarily be so. Stored value product
sales may be funded by cash, and the proceeds of such sales may be directly invested or
used to offset other obligations, though of course they may also be deposited. If the
primary concern is to protect the purchaser of an SVP, the fact that such underlying funds

\begin{flushright}
the purpose of effecting electronic payment of limited amounts – see preamble 3 of the Old E-Money
Directive.
\end{flushright}

\textsuperscript{107} See New E-Money Directive \textit{supra} note 105. A new technology neutral definition of ‘stored
value’ has been introduced for the purposes of federal consumer financial protection law by the Consumer
Financial Protection Act, Title X *

\textsuperscript{108} If that is, the logic is that a deposit is the ultimate outcome of the purchase of an SVP in all
cases, or at least in those cases the FDIC is interested in. If there are cases where a deposit is not created,
and it is argued here that there are, they are not covered by this logic, and hence remain an issue for
continued consideration if the objective is truly to protect the users, including mere purchasers of SVPs.

\textsuperscript{109} Refunds may be limited to where the remaining balance on the card is $10 or less or some
comparably low value – see Akindemowo \textit{Reconsidering SVPS} \textit{supra} note 1 at 316. Such systems tend to
be closed SVP systems.

\textsuperscript{110} In line with the general growth in electronic payments, a significant proportion of SVP sales
will be paid by credit or debit cards.
have been deposited in an account for the behalf of the issuer or seller of the SVP, does not directly address that concern. The question is, how is the SVP buyer to be protected?

Deposit analogies have played a prominent role in the quest for a clearer understanding of SVPs - the question of whether an SVP constitutes a deposit has often been the fulcrum upon which the answer has depended. If SVPs are deposits, the reasoning goes, then deposit related rules should conveniently apply albeit in adapted form. Yet deposit analogies are ill-suited to SVPs, and are of little use in the context of the protection of SVP users.\footnote{In fact to the extent that SVP deposit analogies infer that stored value products are access devices, those analogies are oxymoronic.} In fact to the extent that SVP deposit analogies infer that stored value products are access devices, those analogies are oxymoronic.\footnote{Though sometimes resembling their non-digital predecessors in a functional sense, the practical and technical arrangements underlying SVP functionality are often different. \footnote{Stored value products may function in one of at least three different modes - as a facilitating device, as a mirroring device, or as e-value.}}

Though sometimes resembling their non-digital predecessors in a functional sense, the practical and technical arrangements underlying SVP functionality are often different.\footnote{True stored value transactions are based on prepayments in which prepaid funds are transferred to the issuer. Participating merchants are reimbursed by the issuer arranging a transfer of funds from its account holding prepaid (underlying) funds to the merchant’s account. The underlying funds do not belong to the cardholder. In SVP transactions where underlying funds do belong to the cardholder as her deposit, the card functions as an access, not a stored value, device. The sale transaction depends on an authorized debit flow from an account rather than a transfer of stored prepaid units. It is in cases involving an access device that deposit analogies are appropriate. Regarding the role of deposits in stored value policy, see 31 above.} Stored value products may function in one of at least three different modes - as a facilitating device, as a mirroring device, or as e-value.\footnote{See Terri Bradford et al, NONBANKS IN THE PAYMENTS SYSTEM (Fed. Reserve Bank of Kan. City 2003) [hereinafter BRADFORD] pp. 54-60.}
Facilitating SVPs, such as gift cards, do not incorporate deposits – they are in essence a contractual device to facilitate the SVP user’s receipt of prepaid services. Where the issuer and merchant are distinct entities, the SVP also facilitates the issuer-to-merchant account transfers involved.\textsuperscript{115}

Mirroring SVPs incorporate deposit based transfers from SVP user accounts or ‘pseudo accounts’. A deposit virtually incorporated into the SVP makes it a virtual mirror of the underlying account or pseudo account. The SVP arguably is an access device and not a stored value product – at least when accounts rather than pseudo accounts are involved.\textsuperscript{116} Where a pseudo account is involved, the funds though

\footnotesize{\textsuperscript{115}See Akindemowo, \textit{Reconsidering SVPs} supra note 1 at 328.}

\footnotesize{\textsuperscript{116}Id. at 329 – 333.}
trackable\textsuperscript{117}, will not constitute a deposit theoretically speaking, even if it is pragmatically treated as one.\textsuperscript{118}

E-value systems, still emergent, aspire towards peer-to-peer direct value transfers omitting the need for a payments facilitating intermediary. Although there are a number of ways by which such P2P transfers may be structured the analysis of e-Value systems is still better served by currency, and not deposit, analogies.\textsuperscript{119}

The fact that the exchange of funds preceding use of an SVP need not result in a customer deposit, let alone any deposit at all, is important.\textsuperscript{120} This fact is implicitly recognized by both FDIC Proposal 1 & FDIC Proposal 2. By concluding that a sponsoring company deposit would exist where a sponsoring company pays underlying funds into an account, FDIC Proposal 1 infers that such funds would not constitute a user

\textsuperscript{117} The record of SVP transactions maintained by the SVP issuer – the account of transactions – belongs to the issuer, rather than the user, because the issuer owes the user no repayment obligations. The issuer however maintains the account to fulfill contractual, not depository, obligations having agreed in advance that it will provide certain services to the cardholder in exchange for a prepayment. The card issuer provides the cardholder with updated balances of the service value amounts outstanding to facilitate use of the card and to satisfy valid contractual expectations of the user. See Akindemowo, \textit{Reconsidering SVPs} at 330-331.

\textsuperscript{118} \textit{Cf.} Proposal 2a at 45578: “Arguably the form of the access mechanism is unimportant…the device is merely a device for withdrawing or transferring the underlying money. The important thing is the underlying money. The receipt of money by the bank distinguishes a ‘deposit’ liability from a ‘non-deposit’ liability. …In the case of traditional access mechanisms and payment instruments…the underlying funds held at a bank are ‘deposits’ with no exceptions except those limited exceptions expressly created by Congress. This means that the funds are ‘deposits’ irrespective of whether the bank maintains records as to the identities of customers and of account labels (such as ‘reserve account’)...an alternative approach would be to treat the funds as ‘non-deposits’ in those cases (if any) in which the insured depository institution sells stored value cards directly to cardholders without keeping any information as to the identities of the cardholders or any other party....”.

\textsuperscript{119} See Akindemowo, \textit{Reconsidering SVPs} \textit{supra} note 1 at 335-336, 339.

\textsuperscript{120} See 31 below.
The possibility that a deposit might not come into being is also recognized. By noting that such funds would need to have been forwarded by the sponsoring company to the depository institution for the settlement of payment obligations, FDIC Proposal 1 indicates there would be no deposit if the funds were forwarded for some other reason. FDIC Proposal 2a suggests that payments made by cardholders to a depository institution in bank secondary systems would also not be cardholder deposits. Only if the depository institution were obliged to hold or forward those funds for the sponsoring company would a sponsoring company deposit come into being, if only briefly.

Instead of shoehorning SVPs into an unsuitable concept, the FDIC opted for a pragmatic rule of thumb to assess ‘nontraditional access mechanisms’. The rule is a helpful guide where the question is whether funds associated with an SVP are eligible for deposit insurance. It is less helpful where the issue is what SVPs are legally speaking, or by what manner may SVP users be best protected.

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121 The inference underlying the immediately following discussion of pass through insurance in FDIC Proposal 1 is that the deposit belongs at least ostensibly to the sponsoring company. Though not the ostensible owner of the deposit, the user might at best qualify as a nominal accountholder for pass through deposit insurance purposes see FDIC Proposal 1 supra note 62 at 20561.

122 Provided that this other reason did not fulfill any other deposit sub category example under s.3(1) Federal Deposit Insurance Act 12 U.S.C. 1813(1).

123 See FDIC Proposal 1 supra note 62 at 20561.

124 The proposal is headed Deposit Insurance Coverage: Stored Value Cards and Other Nontraditional Access Mechanisms – see FDIC Proposal 2a supra note 63 at 45571. This is but another indicator that the FDIC proposals were aimed at ‘stored value access devices’ (e.g. as prepaid debit cards) rather than SVPs properly so called.
B. The Diminishing Role of Deposits – A Portent?

Stored value products may be distinguished into three functional categories, each of which has its own distinct legal characteristics. In two of these categories, the SVP functions either as a contractual device or as a form of currency. It is in one category only – where the SVP is a virtual mirror of an underlying account – that the SVP functions as an access device. In even the latter category however, accountability is distinguishable from ‘trackability’. The existence of a deposit, a conventional trigger and justification for close payments regulation, is therefore absent, or significantly minimized.

This is a significant change. The deposit concept has been central to payments regulation for centuries, both as a characteristic feature of ‘banking business’ and an assessment tool in regulatory policy formation. There was not only the desire to protect public deposits from wrongful dissipation, restricting the carrying on of banking business to established, regulated entities as banks was deemed one of the most effective ways to protect deposits and maintain public confidence in the payments and wider financial system. The involvement of a deposit in a payment mechanism therefore marked it as being one that was susceptible to fraud and needful of legal protection. Unreliable entities were barred from the business of banking while deposits were closely regulated.

\[125\] See 27 above, also Akindemowo, Reconsidering SVPs supra note 1 at 327 - 336.

\[126\] Id. at pp.282 – 288.

\[127\] See e.g. FDIC Proposal 2a supra note 63 at p.45579: “An alternative approach would be to treat the funds as “non-deposits” in those cases (if any) in which the insured depository institution sells stored value cards directly to cardholders without keeping any information as to the identities of the cardholders or any other party. This approach would be different than the FDIC’s treatment of funds underlying traditional access mechanisms.”
on the basis that they represented a vital public interest. Deposits are such a core feature – the foundation really – of the payments system that a loss of public confidence in the safety of deposits or the reliability of depositories would undermine the system and threaten its stability. In this way, intrinsically woven around the deposit concept, have policy objectives of systemic safety and user protection been entwined.\textsuperscript{128}

The need for SVP regulation might be measured by one or a combination of several possibilities including the risks raised, the need for user protection (and the urgency of same), or assessments of the technology’s potential.\textsuperscript{129} Other factors that increasingly need to be taken into account are comparative assessments of the measures that have been taken by other nations to competitively position themselves in the field.\textsuperscript{130} Certainly there is need to take an assessment of the strategic equipping the U.S. will need for leadership in this area.

C. Pragmatism and a Patchwork of Rules

The factors provoking calls for increased regulation of SVPs have been diverse. The erstwhile unfamiliarity of a technology deemed to have threatening potential\textsuperscript{131}, the perceived need for user protection\textsuperscript{132}, and the desire for systemic soundness and safety\textsuperscript{133}.

\begin{itemize}
\item[\textsuperscript{128}] In this sense the protection of systemic soundness and safety is the ultimate form of consumer financial protection.
\item[\textsuperscript{129}] See 53 below, and Akindemowo, \textit{Taxonomical Approach} in note 145 above.,
\item[\textsuperscript{130}] Id.
\item[\textsuperscript{131}] See FDIC Opinion 8 \textit{supra} note 28 at 40494, and G10 \textit{Report supra} note 16 at 1, 18-24.
\item[\textsuperscript{132}] See the Credit Card Accountability and Disclosure Act of 2009 (hereafter the Credit CARD Act) 123 STAT. 1734 (Public Law 111-23-May 22 2009) s.503. See also FRB Proposal 1 \textit{supra} note 47.
\item[\textsuperscript{133}] See ECB, \textit{Implications supra} note 15 to which the U.S. Treasury contributed.
\end{itemize}
have been three. Anti money laundering policy, the determination to curtail terrorist financing post 9/11, and likely, the aftermath of the 2008-2009 economic crisis are three others. In response to most of these stimulants, SVPs have been regulated indirectly as merely one of several other ‘risky’ payment systems. The resultant regulatory coverage has been neither extensive nor consistent - diverse aspects of SVPs are regulated to varying degrees by the different regulations.

There is not presently a cohesive comprehensive set of SVP focused regulations in the U.S. There are reasons for this. One reason is the laissez-faire approach to

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134 The Credit CARD Act directs the Secretary of the Treasury to issue final regulations implementing the Bank Secrecy Act in relation to the sale, issuance, redemption or international transportation of stored value. The regulations are specifically permitted to include stored value reporting obligations – see Title V, Section 503 of the Act. See also the Uniform Money Services Act of 2000 at http://www.law.upenn.edu/bll/archives/ulc/moneyserv/UMSA2004Final.htm (preparatory note).


136 See the U. S. Treasury, Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation, (June 17 2009) available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (hereafter WHITE PAPER) 10-18 (Summary of Recommendations). The Treasury’s recommendations include (a) the promotion of robust supervision and regulation of financial firms… by closing loopholes in bank regulation, (b) the establishment of comprehensive regulation of financial markets, including the strengthening oversight of systematically important payment, clearing and settlement systems, and (c) protecting consumers from financial abuse by the creation of a new Consumer Financial Protection Agency (CFP Bureau) with broad jurisdiction to protect consumers, and sole rule making authority for consumer financial protection statutes. See U.S. Treasury White Paper, 10-18 (Summary of Recommendations).

137 The latest additions to this patchwork of SVP rules are the gift card provisions of the Credit CARD Act see note 132 above. The act inserts new definitions and sections into the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq), to cover prepaid products such as general use prepaid cards, gift certificates, and store gift cards. The amendments restrict dormancy, inactivity or service fees and they also restrict expiration dates of less than five years on such cards.
regulating SVPs. that was adopted at the urging of the FRB, payments industry representatives, and commentators. Another is the lingering ambivalence about the general nature of SVPs. If the approach hitherto has been to apply tried and tested rules to the depository nature of payment mechanisms that approach no longer covers the field. If the deposit centered approach is becoming less relevant therefore, what approach should be used in its place? As some SVPs neither incorporate deposits nor constitute a furnishing of credit, thought must be given to what criteria, shared by SVPs in general, might fill the gap left by the diminishing deposit role. Admittedly to even postulate that the deposit concept is becoming dated is provocative – certainly there has not been a rush to embrace this possibility. The first step towards seeking a replacement for the deposit concept for some accordingly will not be a search for such a replacement, but the weighing of the validity of the very suggestion that a replacement is needed.

In times of danger, the demands of self preservation trump the need for order and consistency. A patchwork of SVP linked rules was thus the result of diverse laws passed to address threats to national security, the economy and other ‘hot button’ concerns. The search for a deposit concept replacement in contrast has not been perceived as urgent – if it has been considered at all.

138 See for example, FRB Report supra note 18 (Recommendations).
139 See the comments of Mastercard International, and Visa USA Inc supra note 81.
140 See the comments of the American Bankers Association id.
141 There are of course other established payment mechanisms that are not based on deposits e.g. credit cards, but these share other similarities with deposit transactions e.g. the maintenance of an account by the issuer for the cardholder upon which the cardholder may order payments to order, and the existence of an obligation to repay money (by the cardholder to the card issuer).
142 Deposits or pseudo deposits still play a role in access device ‘SVPs’ – see above at Error! Bookmark not defined. and following text.
A patchwork of rules does seem better than no rules at all: though not ideal, rules will are deemed sufficient if they control risks and keep threats at bay. As the mix of disparate rules seemed to be doing just that, i.e. keeping risks under control, it is understandable that they engendered a sense of sufficiency.

The adoption of a pragmatic narrow approach did signal that attempts to comprehensively analyze SVPs had been effectively abandoned. This preempted any sense of urgency, dissuading a higher priority being given to the quest for a more cohesive framework. Far sighted arguments in favor of the thoughtful legal categorization of SVPs were effectively obscured by the shorter term adequacy of such measures. Patches for SVP money laundering\textsuperscript{143} and consumer protection\textsuperscript{144} undoubtedly buttressed the complacent ‘wait and see’ attitude. They did that is, until the recent economic crisis made a wholesale review of the financial system a priority, leading to the passage of the Frank Dodd Act.\textsuperscript{145}

The need for a deposit concept replacement will become even more compelling as payments generally become less material and more virtual. If SVPs are truly a portent of the future, the deposit concept will become less relevant across the payments arena. As it is, intermediation has a diminishing role in payments and payment methods are

\textsuperscript{143} See the Patriot Act 31 U.S.C.\S\S 5311-5332 (2006).
\textsuperscript{144} See the Credit CARD Act 123 STAT. 1732 (Public Law 111-24-May 22, 2009)
\textsuperscript{145} The Frank-Dodd Act 2010, Public Law 111 – 203 – July 21, 2010, is the culmination of an extensive review of the U.S. financial system. Title X, the Consumer Financial Protection Act of 2010 and Title VIII, the Payments, Clearing and Settlement Supervisions Act 2010 together provide the seeds for the beginnings of such a cohesive framework see Akindemowo, Devising A Deposit Substitute For Post Dodd-Frank SVP Regulatory Policy Assessments: A Taxonomical Approach, TJSL Working Paper Series (2011) [hereafter Akindemowo, Taxonomical Approach]. See also 55 below.
increasingly abstract. The ramifications of the pervasive mobility that has been introduced by the ubiquitous cell phone are another significant feature of note.\textsuperscript{146}

D. Pre Dodd-Frank: A New Regulatory Priority?

The promotion of systemic stability and soundness has clearly been a priority shaping U.S. SVP regulatory policy. A lesser but still significant aim has been consumer protection. There has been the desire to foster the vigorous development of the emergent technology.\textsuperscript{147} Providing legal certainty, preempting regulatory arbitrage and preserving the status quo are other objectives that have also played a role. The latter objectives have had an effect, but a limited one on what has been a nascent industry. Before September 11\textsuperscript{th} 2001, SVP technology was nascent, the industry was emergent, the risks were mainly hypothetical. A laissez-faire policy to ‘wait and see’ before committing to what might be detrimental over-regulation was deemed the wisest course.

Though SVPs have experienced vigorous growth with increased market penetration in recent years, that growth has not been evenly distributed among all SVP

\textsuperscript{146}m-Commerce has replaced e-Commerce as the promising future of commerce – the explosive success of mobile applications exemplified by the iPhone is but one illustration of this. In the payments arena, the potential promised by the marriage of cell phone mobility with e-Payments is garnering much interest. ref Jan 24 article – decline – see CNN Money, The End of Credit Cards Is Coming at http://money.cnn.com/2011/01/24/pf/end_of_credit_cards/index.htm, also Pymnts.com News. Overall Card Sales Decline in Q4 2010 for Main Street Businesses at http://www.pymnts.com/overall-card-sales-decline-in-q4-2010-for-main-street-businesses-20110120006294/. See also Ronald Mann, What is Changing? Age, Economic Crises, And Shifting Patterns of Card Use at http://www.pymnts.com/what-is-changing-age-economic-crisis-and-shifting-patterns-of-card-use-2. In developing countries, on the other hand, credit card growth is booming see Research & Markets, Global Credit Card Industry – Emerging Markets, available from http://www.researchandmarkets.com/research/a41684/global_credit_card_industry_emerging_markets.

\textsuperscript{147}See Akindemowo \textit{Comparative Policy}, supra note 27.
types. SVPs are not widely used as a general means of payment though they are commonly used in certain contexts..\textsuperscript{148} The potential and the risks of SVPs have consequently seemed more theoretical than immediate. This has minimized – in the U.S. at least - the impetus for focused systematic attention on the novelties of SVPs. This taxed efforts aimed at identifying legal SVP characteristics in the U.S. That complacency is (hopefully) set to change. Mobile iterations of stored value are emerging, and sorts of m-Commerce apps are being taken up enthusiastically by a new generation of users that are not hesitant to try new services offered via smartphone.\textsuperscript{149}

Regarding regulatory priorities, national security is one that demands preeminence. When the safety or interests of the nation are deemed at risk, rules and regulation designed to eliminate that risk are rarely far behind. Where those threats are perceived as theoretical rather than imminent, regulation may be demoted to an on-going,


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incremental, long range task. This permits more attention to be paid to pressing risks. Before 9/11 it could be said that systemic safety was a pivotal concern and the concern to maintain national security a background, strategic constant. After 9/11, national security became the foremost priority. Containing and eliminating threats to national security became the overriding priority rather than the systemic safety of the payments or the wider financial system, let alone other objectives. This diminished tolerance for national security risks shaped SVP regulation – it led to controls on SVP issuers, policy recommendations for the control or limitation of SVP uses, and other restrictions.\footnote{See 32 above.}

Regulations affecting SVPs in the U.S. thus derive largely not from SVP specific rules, but from regulations incidentally covering activities and risks associated with SVPs and other products. SVPs, for example, are regulated under state money transmitter laws because they may be used to transmit money. Their potential as a source of terrorist finance, a national security risk, is similarly regulated under Federal law. Regulatory priorities were not the only norm to change- regulatory aspirations have shrunk also.\footnote{Early aspirations to ascertain the (common) legal nature of SVPs in general have morphed into more limited objectives to devise a pragmatic basis for deposit insurance eligibility or expand consumer protections based on account similarities – id.}

When the backing away from the quest to categorize occurred a decade ago, the impetus encouraging the rationalization of emergent payments was lost. Systemic consistency, particularly contrasted with the immediacy of issues related to national security, was reduced to a mere nicety. In this scheme of things, systemic consistency seemed a low priority, if it was deserving of any priority at all. Until Dodd-Frank, a central, basic definition of what SVPs are legally speaking did not exist in the
As a result and deposit analogies, downplayed as they were, continued their lingering influence.

The U.S. perspective on whether and how SVPs should be regulated is not the only one possible however. It is striking that the question of whether SVPs are or should be treated as deposits has profoundly shaped SVP policy in the U.S. Other approaches have developed despite the fact that the idea of deposits insurance, first introduced in the U.S during a banking crisis in 1933, has spread steadily to more than fifty countries. In other countries, the deposit concept has not played as dominant role in SVP policy regulation as in the U.S. The E.U., a global power, as is the U.S., has adopted a strikingly different approach for example. Australia, a single, federated common law jurisdiction like the U.S., has adopted a different response still.

152 The definitions are provided for the purposes of federal consumer financial protection law in relation to which the Bureau for Consumer Financial Protection has exclusive rule making authority with preemptive power. The definitions are expected to be highly influential on state law, as a term of art, for example. See CFPA §1002(14).


154 Though sharing concerns about the risks of such products for example, regulators in the European Union parted ways with U.S. regulators to pursue a distinct approach. Misapprehensions about the risks of SVPs shaped a restrictive regime that was founded on working definitions of the technology. This approach sidestepped some issues that tested the U.S. approach. A prolonged examination of whether ‘e-money’ was deposits was avoided, for example. Though the E.U. Commission stopped short of declaring e-money deposits, it imposed a form of deposit taker restrictions to e-money. This proved to be heavy handed, hindering the development of the technology. See Director General Internal Market (European Commission), Evaluation of the E-Money Directive: Final Report (17 February 2006), see also the (new) EMoney Directive 2009/110/EC (Nov 2009), recital 2. The E-Money Directive was recently revised see E-Money Directive. EU Directive 2000/46/EC, 2000 O.J (L 275) 39 (EC), and EU Directive 2000/12/EC, 2000 O.J. (L 126) 1(EC). The launch of the Single European Payments Area (SEPA) and the
IV. Post Dodd-Frank: Where To from Here?

One aim of this article is to highlight issues for further discussion, and attract renewed attention to a matter we will surely regret procrastinating about in the near future.

The question ultimately provoked by the foregoing discussion is: where to from here? A patchwork of reactionary rules have been holding the fort. Rules addressing generic security risks have been introduced piecemeal. The point is not that broad based rules are bad – on the contrary, it is the opinion of this writer that a framework rooted in broad based commonalities would be a good idea. The point is that the pre Dodd-Frank framework relating to SVPs, which is theoretically revised but currently remains in operation essentially unchanged, is unlikely to weather technological changes certain to occur. The previous approach will not serve well in the near future.

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156 These risks are generic in the sense that they are raised by a varied group of activities, not just SVP issue and use, and hence are only incidentally raised by SVPs.

These anticipated changes are not changes possibly occurring a decade from now – the beginnings of such changes have started to test the conceptual foundations of our payments system right now. Digitalization, ever more pervasive in modern societies, is affecting not only how we conduct business, but how we function socially.\textsuperscript{158} Paper based payments are gradually diminishing in number\textsuperscript{159}, card based and electronic transactions are increasing.\textsuperscript{160} Mobile transactions are becoming the norm, rather than a novelty.\textsuperscript{161} In addition to this, the prospect of digital currencies persists. The interest of certain national banking regulators in possibly developing a national e-currency is on

\textsuperscript{158} For a lighthearted illustration see a recent spoof interview (cover story) with Brad Pitt about social etiquette for the digital age – see \textit{How to Behave: New Rules for Highly Evolved Humans}, \textsc{Wired}, July 21 2009.

\textsuperscript{159} Reserve Bank statistics show that non-cash payments have been increasing at a rate of 3.9\% annually, which is faster than the gross domestic product or personal consumption expenditure growth rate (3.2\% - 3.3\% per annum between 2003 - 2006). The check collection process is increasingly electronic following the passage of Check 21 legislation – 41\% of all interbank checks are now truncated in some form. Check payments are however declining markedly – 6.4\% fewer checks were paid between 2003 – 2006, while 4.1\% fewer checks were written per annum – see Federal Reserve System, \textit{The Payments Study}, December 2000, pp.1 – 13. Credit card payments have also started to decline – see note 146 above.

\textsuperscript{160} Electronic payments account for two-thirds of all non-cash payments (i.e. checks, credit card, ACH, debit card, & EBT payments) , growing 12.4\% annually between 2003 – 2006. Debit card use at 27\% exceeds credit card use which accounted for 23\% of non cash payments in 2006. For more detailed statistics, see id., also Federal Reserve System, \textit{Electronic Payments Study}, March 2008.

\textsuperscript{161} An unsurprising consequence of the ubiquitous cell phone is that mobile transactions are showing explosive growth. Mobile payments are now acknowledged to be an important factor for the success of any business dealing in virtual goods. There has been a preference to pay for virtual goods in the U.S. via PayPal or credit card because of high carrier fees. It is expected that this will change if (when) such fees are reduced – m-payments as a means of paying for virtual goods are popular in the E.U. and in S.E. Asia – see Virtual Goods News (Feb 9, 2009) at http://www.virtualgoodsnews.com/. The iPhone has had a significant impact on the popularity of mobile transactions – in 2009, 6 million iPhone users were reported to have an eBay app on their iPhone – see Geek.com, Mobile Transactions on eBay Triple in 2009, Dec 30, 2009 at http://www.geek.com/articles/mobile/mobile-transactions-triple-on-ebay-in-2009-20091230/.
record. One country has already established the framework for a national electronic purse with the aim of establishing ultimately state issued electronic currency.

The remainder of the discussion in this article urges that present opportunities should – really, must – be seized. “Tentative, narrowly focused and determinedly pragmatic” would be a fair summary of what has been the path in the U.S. towards an SVP regulatory policy of sorts. A journey which began boldly, encountered shrinking aspirations until there was a retreat from a broad perspective to a narrow pragmatic one. There were reasons for this, of course. The approach ultimately pursued however does not answer the question of whether SVPs are deposits, or whether the very concept of a deposit is shifting imperceptibly. The focus of attention in sum has not been on whether the traditional concept of deposits, deposit-taking or traditional policy is suited to emergent payments.

The central thesis of this article is that these very questions need to be answered, and now. The policy development travails traced raise the intriguing possibility that the

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162 Singapore was first to announce plans for state issued legal tender in 2001 – see OECD….Japan, Thailand are among other countries to express interest in working towards a cashless society – see for example, Leo Lewis, Cashless vision pops up in Japan, The Australian Newspaper (June 20th 2009), and Henry Ben, Central Bank Wants Cashless Society APEC Digital Opportunity Center (ADOC), at http://www.apecdoc.org/archives/13/200911 (November 2nd 2009).

163 A reloadable multipurpose prepaid card which may be used for small retail or other payments instead of coins – see Bank for International Settlements, Glossary of Terms Used in Payments and Settlement Systems, (CPSS, March 2003). CEPHAS, apparently the world’s first national interoperable micropayments platform was launched in Singapore in 2006 so a single card may be used for all electronic payments see http://www.ida.gov.sg/News%20and%20Events/20050829100306.aspx?getPagetype=20.

164 As a part of its 2015 Master Plan to have a leading, modern IT infrastructure by 2015, Singapore announced plans for a national e-legal tender project – the Singapore Electronic Legal Tender (SELT) project - in 2001. The launch of CEPHAS in 2006 was a significant milestone towards that goal.

165 See 24 above.
deposit concept is dated. The concept at the heart of payments regulation that has been remarkably flexible and resilient for centuries may finally be showing its age. If such a core concept is being eroded, it is surely obvious that the integrity of the framework surrounding it must be affected also.

Now, in the wake of a fundamental financial review, freshly equipped to strategically reconfigure payments regulation for the long haul - is the time to devise and implement a long range plan. A long range plan courageously plotting how present opportunities to adapt the payments system for the future changes may be seized is definitely called for.

A. The Way Forward

There is no avoiding the reality that despite its recent overhaul, the payments legal framework still needs work. A proactive reassessment of future needs with an eye to continuing the strengthening of the U.S. payments framework is sorely needed. Greater account needs to be taken of SVPs as intriguing precursors of the future in such a review. Greater clarity is required about their legal effects now and in the likely near future. The objectives motivating SVP policy formation need to be clarified. Clarifying those objectives will permit a more thorough review of the payment system’s future effectiveness and competitiveness. With such elements finally in place, regulators be well equipped to formulate sound strategic SVP policies for the foreseeable future.

The potential that SVPs promise for the near future – not just their bank related potential or their short term functionality – must be thoroughly and strategically

166 See The Diminishing Role of Deposits – A Portent? below at 31.
167 See note 178 and surrounding text below.
addressed in U.S. payments regulatory policy. Before this can be done however, SVPs must be comprehensively, but not rigidly, categorized for legal purposes.\footnote{168} An effective payments framework able to accommodate future changes will likely remain elusive until this has been done. The next question this article therefore asks is: what needs to be done to facilitate the development of sound, efficient, adaptable SVP policies in the U.S.?

1. Payment System Observations and Predictions

Before addressing specific steps that may be taken to facilitate the development of such policies in the U.S., a few observations and predictions about the payments system are in order.

The payments system may be conceptually grouped into four generations – an Objects-as-Money group, a Currency-as-Money group, a Claims-as-Money group, and a Digital-Data-as-Money group. The “Objects Group” includes trade by barter, and trade with valuable objects, while the “Currency Group” is centered on the use of coins and paper notes as money. The “Claims Group” represents a shift of emphasis from objects to claims. It includes checkable deposits, credit cards, and electronic payments such as debit card transactions. The newest group, the “Data Group” is relatively new and still evolving. This presently includes e-money, SVPs, and mobile payments (hereafter ‘m-payments’).
### Figure 3: Payment System Generations

### Figure 4: Progression of Abstractness

<table>
<thead>
<tr>
<th>OBJECTS as money</th>
<th>CURRENCY as money</th>
<th>CLAIMS as money</th>
<th>DIGITAL DATA as money</th>
</tr>
</thead>
<tbody>
<tr>
<td>trade by BARTER</td>
<td>COINS</td>
<td>Checkable DEPOSITS</td>
<td>SVPs, ‘electronic money’</td>
</tr>
<tr>
<td>trade with VALUABLE OBJECTS</td>
<td>NOTES</td>
<td>CREDIT CARDS</td>
<td>Internet payments e.g. NETWORK MONEY</td>
</tr>
<tr>
<td></td>
<td></td>
<td>electronic payments e.g. DEBIT CARDS</td>
<td>Mobile payments e.g. M-PAYMENTS</td>
</tr>
</tbody>
</table>

Decreasing abstractness ➔ increasing abstractness
Abstraction, a feature of payments since the currency payments generation, came about because a convenient substitute to transfer was sought instead of the valuable object represented by the substitute. The deposit – previously a pervasive feature of (most) payments - is itself an abstract concept. It refers to a loan of money which the borrower is obliged repay - a debt recorded in an account. The debt which constitutes an obligation to repay the money loaned, is itself an abstraction and a chose-in-action, as is the account which records it. Currency on the other hand, is a manifestation of the value which it represents – a physical manifestation of value, value being a quality that all payments share.
Value - an ascribed quality, a qualitative measure of worth, is itself an abstract concept. An object would be ascribed a certain value that made it more or less desirable and thus transferrable. Eventually a note was substituted for the valuable object, and later, rather than collect the object for onward transfer, the claim over the object, evidenced by the note, would be transferred. In time the claim would be manifested in electronic form as by means of a debit card. Now some SVPs generate virtual claims that represent transferrable value which is of itself valuable, and for that reason is accepted (circulates) P2P. In short, the abstract nature of payments has increased overtime and this trend is likely to continue as virtual methods become an increasingly characteristic feature of payments.

It is likely that cash payments will continue to diminish as will paper-based payment methods like checks. Account based payments, especially those in mobile form – such as a debit transaction executed via the Internet by cell phone – are growing in variety and volume, and are likely to continue to do so for the foreseeable future. The role of banks as intermediaries, particularly in inflexibly structured transactions - which are likely to eventually decline in numbers- will also be diminished.

The need for instruments and arguably negotiability in the conventional sense is eliminated in virtual P2P payments. Instruments evolved as the tangible representation of a valuable object that would otherwise be transferred. Where there is no tangible

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More specifically, this can be done in P2P payments under laid by P2P, rather than centralized server based, architecture. A centralized server based service model depends on a central server which operates as a hub to which participant node users are linked e.g. PayPal, typical cell phone SMS P2P services. The P2P architectural model is premised on disintermediation, dispensing with the hub, necessitating a network of interconnected node users. For more on P2P systems, see JOHN F. BUFORD ET AL, P2P NETWORKING AND APPLICATIONS, (Elsevier Direct 2009).
valuable object to exchange and value, a qualitative measure, is ascribed to an abstract unit that can be transferred virtually, then there is no need for an instrument – the value can be transferred directly and conveniently.\textsuperscript{170}

The deposit concept will become less and less central than it has been hitherto in the payments system, though it is unlikely to be easily displaced across the payments system as a whole. In so far as payment may be made or value paid for units which are convertible or refundable, there will exist a deposit, a pseudo deposit or pseudo account in relation to it.

If (when) e-value currency becomes more mainstream, it is unlikely to replace cash quickly although cash will continue to decline. It seems more likely on reflection that there will be a dual currency system – of co-existent physical cash currency and e-currency\textsuperscript{171}, even if only limited convertibility back into cash from e-currency is permitted.

2. **Heed The Portent – It’s Time For A Substitute.**

The deposit concept has been a persistent influence in the journey towards U.S. SVP regulatory policy. The influence of the deposit concept is strongly discernable in traditional banking rules, payments jurisprudence and payments policy. This remains appropriate so long as the payments mechanism is deposit-based or linked to deposit-

\textsuperscript{170} Short of radically dispensing with negotiability, the Uniform Law Commission introduced electronic chattel paper - and hence the concept of virtual negotiability - to revised UCC Article 9. Electronic chattel paper is simply chattel paper evidenced by means of electronic information. Chattel paper may be perfected by filing, delivery, or the transfer of control - see U.C.C. Article 9, especially §§ 9-102(31), 9-312.

\textsuperscript{171} Or if there are competing systems, currencies.
taking. Where the involvement of a deposit is debatable or inapplicable however, deposit analogies, rules or policies become inappropriate. Deposit influenced rules and policies should not be utilized in that context without careful, balanced consideration. It has already been noted that the role and influence of the deposit concept in stored value models is waning.\(^{172}\) It is time to seriously consider the use of alternatives for SVP regulatory policy purposes.

Armed with conceptual ‘seeds’ derived from the Consumer Financial Protection Act 2010 and the Payments, Clearing and Settlement Supervision Act 2010 of the Dodd-Frank Act,\(^ {173}\) regulators in the U.S. have been given a valuable opportunity. This opportunity is a chance to re-evaluate core payment concepts with the view of recalibrating their role and effect in the payments and wider financial system. The U.S. is already strategically a step behind as far as this is concerned. Other countries started preparing their financial systems for the ultra abstract transactions that are beginning to occur, several years ago.\(^ {174}\)

A shift of perspective will be required to fully exploit the opportunity that has opened up for this in the U.S.. Attention needs to shift from deposit concepts and deposit rooted justifications, to broader technology neutral concepts that better reflect SVP characteristics, and policy weightings that more accurately assess such characteristics.

\(^{172}\) See p.48 above.


Once it is accepted that the ice has been broken in this regard by the Dodd-Frank Act, there should be greater receptiveness to this. An awareness of the cost of failing to seize the moment to do so, should also make the possibility of embracing of this broader perspective more attractive. At stake after all is a position of strategic leadership in the global payments framework of the near future, and the existence of a significantly improved, durably efficient payments framework in the U.S.

The characteristics of a deposit are well documented and beyond doubt so in ordinary circumstances there is no need to belabor what a deposit is. Attention has been focused on the topic of what constitutes a deposit in this field precisely because the concept does not tidily account for certain SVP characteristics. The question of whether SVPs are deposits was not answered directly by the rule proposals ultimately published. A pragmatic solution to the narrower question of whether SVPs should be subject to deposit insurance was provided instead. Traces of this pragmatic sidestepping of a question that persistently arising, infuses payments policy, can also be seen in the way that at least one part of the Dodd-Frank Act is structured.

The Dodd-Frank Act was passed in the wake of the 2007 – 2008 economic crisis. A comprehensive package of 16 Titles, the Act addresses subjects that legislators concluded required urgent attention. Introducing entities such as the Financial Stability Oversight Council, the Orderly Liquidation Authority, and the Bureau of Consumer Financial Protection, the Act addresses a wide range of subjects. Transparency and accountability on Wall Street, mortgage reform and anti-predatory lending, investor

175 See The Journey Towards SVP Regulation above at 5. See also note 127 supra.
176 See pragmatic supra.
protection, the supervision of payments, clearings and settlements, and consumer financial protection are some of the topic covered by the Act.\textsuperscript{177} Of particular relevance are the Consumer Financial Protection Act 2010 and the Payments, Clearing and Settlement Supervision Act 2010.\textsuperscript{178} One welcome device employed in the Dodd-Frank Act is the use of technology neutral, broad, definitive categories. The understanding resulting from a joint reading of the CFPA and PCSSA is that a ‘financial transaction’\textsuperscript{179} may involve a financial product or service\textsuperscript{180} which includes a ‘consumer financial product or service’\textsuperscript{181} but excludes ‘electronic conduit services’.\textsuperscript{182} A ‘payment instrument’ includes a check, draft, payment of fund, monetary value (other than currency) or electronic instrument.\textsuperscript{183} Financial transactions may involve ‘financial institutions’\textsuperscript{184} or ‘non-depository covered persons’.\textsuperscript{185}

A ‘financial product or service’ may consist of several activities including the taking of deposits, the extension of credit, the issue of stored value or the provision of technological payments processing services. By defining a ‘financial product or service’ thus the CFPA indicates that “engaging in deposit-taking activities, transmitting or

\begin{itemize}
\item \textsuperscript{177} Other topics include the regulation of hedge fund advisors, insurance, and the regulation of depository institutions and bank or savings association holding companies, – see §1 Dodd-Frank Act 2010, Public Law 111 – 203 – July 21, 2010.
\item \textsuperscript{178} Title VIII and X respectively of the Dodd-Frank Act. 2010, Public Law 111 – 203 – July 21, 2010. Both are respectively referred to as the CFPA and the PCSSA in this article.
\item \textsuperscript{179} See §803(7)(B) PCSSA.
\item \textsuperscript{180} See §1002(15) CFPA.
\item \textsuperscript{181} §1002(5) CFPA.
\item \textsuperscript{182} §1002(11) CFPA.
\item \textsuperscript{183} §1002(18) CFPA.
\item \textsuperscript{184} §1024 CFPA
\item \textsuperscript{185} §803(5) PCSSA.
\end{itemize}
exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer”\textsuperscript{186} and the “selling, providing, or issuing stored value or payment instruments…”\textsuperscript{187} are distinguishable activities. Though the activities may overlap, in other words, the implication is that absent such an overlap, the selling, providing or issuing of stored value is not deposit taking. In those circumstances in which the selling, providing or issuing of stored value falls outside the definition of deposit-taking\textsuperscript{188} an SVP is not a deposit.

This indirect answer to the what-is-an-SVP question is significant for another reason. It is recognition of the fact that the deposit concept is not necessarily central or even relevant to SVPs. This is at least implicit recognition that the role of the deposit concept - in SVP transactions at least - is waning. Even the wording of two contrasting definitions is telling – the deposit taking provision is framed in terms of custodial dealings with funds, while the stored value definition simply addresses the broad features of a stored value transaction without reference to any custodial dealings with funds.

The role of the deposit concept in the formation of payments policy has been core – from justifications for the regulation of a payment method to decisions of the extent to which such methods should be regulated – the deposit concept has had a pervasive role. Once the deposit concept is removed from the equation however, a gap remains that must be thoughtfully dealt with. Clearly, continuing to apply value judgments derived from such deposit rooted policies without more, would be inappropriate. Careful thought must

\textsuperscript{186} §§1002(15)(A)(IV) CFPA.
\textsuperscript{187} §1002(15)(A)(v) CFPA.
\textsuperscript{188} See § 1002(8) CFPA.
be given to what substitute will best replace the deposit concept in SVP regulatory policy assessments.

Space constraints permit only a broad outlining of an approach this author suggests as a substitute for the deposit concept in SVP regulatory policy - in brief: 189

a. Identify and Utilize A Taxonomy of SVP Commonalities.

A preliminary contemplation of which commonalities might emerge as payments incorporate more virtual features produces interesting results. Reduced to their constituent obligations, payments 190 consist of any of three main obligation types: payments obligations, performance obligations, and value obligations. The obligation(s) central to each SVP model, singly or comparatively, arranged into a taxonomy of types and corresponding risks, may then assist regulatory policy assessments of the legal riskiness of different SVP model species. This would also assist the drawing of clearer comparisons of SVP model types in the course of making decisions about which should be accorded a higher priority and perhaps for that reason, regulated more comprehensively.

b. Investigate And Differentiate SVPs To Assist Policy Steering.

Stored value payment facilities have been elsewhere rationalized into three main models. Each model should be assessed with fresh eyes to determine the risks that it poses, and the extent to which it should be regulated. The SVP taxonomy of

189 The proposals outlined and the table provided hereafter are explained in more detail in Akindemowo, Taxonomical Approach in note 145 above.

190 That is, the range of payment models to be found the currency, claims or data group categories noted at p 44 above.
commonalities suggested above will be one tool that can be used to access the normative
nature and riskiness of different species of each model type.

One approach might be to consider regulating facilitative SVPs through the use of
specialized contracts. The idea is to design specific model provision for implication into
all consumer contracts for this SVP type. The contract terms, adaptable to the specifics
of the particular bargain concerned, would import certain protections or duties
irrespective of the wording adopted by the parties.

Consideration should also be given to the use of ‘deposit lite’ rules for SVP model
species closely mimicking deposit taking but fall technically outside the definition of
deposit taking. These deposit-lite rules should again be formulated after careful regard
has been given to the riskiness of such SVP types assessed inter alia via the commonality
taxonomy suggested above.

Although at least one nation has publicly affirmed its determination to implement
state issued eCurrency, this SVP model is presently the least implemented of the three.
This may change in the future – converging demands for convenience, evolving mobile
capabilities, and the strategic ambitions of foreign governments may spur developments
in this area – that is, if innovation is not discouraged by systemic safety and stability
concerns. To remain in step with emerging directions in which payments systems may
evolve in the near future, serious discussion and debate about eCurrencies should be
encouraged. Renewed thought should therefore be given to the pros and cons of both
state issued, and privately issued eCurrencies.
c. Develop Changes Introduced In The Dodd-Frank Act.

Fledgling but significant changes such as the implicit recognition of the changing role of deposits in the payments system, and the use of technology neutral general categories in the Dodd-Frank Act should be developed. The use of definitive, technology neutral, general terms in particular may provide the means for a wider - i.e. extending beyond SVP transactions - rationalization of the payments system.\textsuperscript{191}

\textsuperscript{191} For a fuller discussion of this point, see Akindemowo, \textit{Taxonomical Approach} in note 145 above.