

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

2018

### Merchant Authorized Consumer Cash Substitutes

Steven Stites

Norman I. Silber

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)



Part of the [Banking and Finance Law Commons](#)

---

#### Recommended Citation

Steven Stites and Norman I. Silber, *Merchant Authorized Consumer Cash Substitutes* (2018)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/1152](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1152)

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

## Merchant Authorized Consumer Cash Substitutes

Steven Stites and Norman I. Silber<sup>1</sup>

[A Working Paper]

### I. Rationalizing Disparate Merchant Payment Mechanisms

Smith goes to the local convenience store to buy milk and eggs. “That will be \$5.50,” the cashier says. Smith reaches into his pocket for something to pay with. He does not write a check to the store; he does not charge with his credit card; he does not initiate an electronic funds transfer. He does not reach for cash. He doesn’t sign a promissory note. Instead he hands something to the cashier, who happily takes it. Smith walks out with groceries in hand.

What did he do? Smith transferred a *merchant-authorized consumer cash substitute* (“MACCS”). In his pocket might have been a coupon, or scrip, or a gift token, or a gift card, an immediate rebate form, or a writing or electronic message on his smartphone which gave him the right to purchase on preferred terms. “MACCS” have in common four elements. All MACCS are:

- a) *pre-contractual commitments by merchants*
- b) *promising at the time of purchase or subsequently*
- c) *to diminish or render unnecessary*
- d) *amounts of consideration otherwise required to obtain their goods and services.*

It is a characteristic of MACCS that they are not private currencies or general-purpose payment vehicles; and are seller-specific, in contrast to credit cards, debit cards, and cash, which can be used at a broad number of establishments.<sup>2</sup>

MACCS have existed in one form or another for hundreds of years. In 18<sup>th</sup> century Britain, private tokens were issued by merchants and used as partial substitutes or complete substitutes for official currency.<sup>3</sup> At nineteenth century American railroad construction sites and mines far from established towns, companies paid employees with “scrip” that

---

<sup>1</sup> Working paper presented at the Hofstra Payments Processing Roundtable, Maurice A. Deane School of Law at Hofstra University, March 14, 2018. Norman Silber is a Professor of Law at Hofstra University, Maurice A. Deane School of Law, and a Senior Research Scholar at Yale Law School. Steven Stites, Hofstra Law ’13 practices law as Stites Law LLC.

<sup>2</sup> Coupons are generally the only exception to this prong. Some merchants may authorize coupons to be used at a particular location or geographic area. Private currencies are not MACCS, see *infra*.

<sup>3</sup> See Vincent Lannoye, *The History of Money for Understanding Economics* (2011) 192.

was only good at company stores.<sup>4</sup> *Coca Cola* beginning in 1887 issued coupons which entitled bearers to a glass of soda.<sup>5</sup> About the same time the Standard Oil Company—a customer—demanded rebates from railroads who shipped its oil.<sup>6</sup>

Descendants of these merchant-created substitutes are the MACCS of today-- phenomena including today's "Penny-Saver Coupons," "Groupons," "Gift Cards," "Disney Dollars," "E-bates," "Air Miles," "Rewards Points," and "cash-back offers." There are thousands of tangible and virtual MACCS. As of 2011, American consumers used coupons to save an estimated \$4.6 billion.<sup>7</sup> Consumer rebates amount to billions of dollars. Open-loop prepaid gift card purchases exceeded 354 billion in 2016.<sup>8</sup> The similarities among all MACCS-- the origination of the cash substitutes, their purposes, their terms and their risks--are no less striking than their differences compared to other methods for transferring value in exchange for goods and services.<sup>9</sup>

*MACCS merchant advantages.* Compared to giving value with a check, a credit card, or an electronic funds transfer, partial or complete payment with different kinds of MACCS can provide various advantages for businesses and for consumers. Businesses can use MACCS to compete by discounting to discrete audiences. MACCS can be used to create selective price reductions without conspicuous markdowns. They can build consumer loyalty by enticing consumers to select a particular company or a particular high-margin or overstocked product sold by the company. Stored-value "open" or "closed-loop" MACCS can lock in consumer purchasing decisions, and improve profitability by attracting payments far in advance of the goods or services provided. Consumers become, effectively lenders to merchants. Many MACCS permit businesses to avoid fees and transaction costs that they

---

<sup>4</sup> VCU Social Welfare Project, *Company Towns*,  
<https://socialwelfare.library.vcu.edu/programs/housing/company-towns-1890s-to-1935/>

<sup>5</sup> Brad Tuttle, *The History of Coupons*, Time, April 6, 2010.

<sup>6</sup> See Crane, Daniel A. "Were Standard Oil's Railroad Rebates and Drawbacks Cost Justified?" *S. Cal. L. Rev.* 85, no. 3 (2012): 559-72; Cornelia Pechmann and Tim Silk (2013) *Policy and Research Related to Consumer Rebates: A Comprehensive Review*. *Journal of Public Policy & Marketing*: Fall 2013, Vol. 32, No. 2, pp. 255-270.  
<https://doi.org/10.1509/jppm.08.155>

<sup>7</sup> NCH MARKETING RESOURCE CENTER,  
<https://www2.nchmarketing.com/ResourceCenter/default.aspx>, last visited May 1, 2013.

<sup>8</sup> <https://www.giftcards.com/gift-card-statistics>

<sup>9</sup> The "merchant" element of MACCS disqualifies several cash substitutes and virtual currencies. For example, food stamps and other government benefits serve as substitutes for cash, but they are authorized by the government, not a merchant. Public transit systems often sell cards that must be prepaid by the rider, and these cards often have expiration dates. But these, too, are public, and not merchant-authorized. Likewise many common "virtual currencies" are not MACCS, because they are not merchant-specific. Many merchants accept Bitcoin, just as many merchants accept cash or credit cards. But the merchants do not authorize Bitcoin.

might otherwise pay to third party financial institutions. Merchants also use MACCS as part of “cause marketing.”<sup>10</sup>

*MACCS consumer advantages.* Consumers enjoy advantages, too. Many are distributed for free or at apparently no cost, and reduce or even eliminate the need to spend any money at the time of the purchase. Other MACCS cost money but do not reduce the final cost of items being purchased— including most tokens, gift cards, and other stored value cards. The primary purpose of many MACCS in this category facilitate the efficiency of transactions, offer tax advantages, encourage the transferability of debt, or otherwise provide convenience.

*Risks and disadvantages.* For consumers the use of MACCS involves risks and potential disadvantages as well. Major privacy concerns arise when MACCS require consumers knowingly or unknowingly to trade personal information for bargains as they obtain real or bogus coupons, rebate offers and scrip.<sup>11</sup> Individualized coupons and rebate offers also facilitate price discrimination.<sup>12</sup> False statements, bait and switch schemes, and misleading terms in coupons and rebates cost consumers tens of millions of dollars annually.<sup>13</sup> Notwithstanding improvements to laws affecting gift cards, consumers continue to endure substantial unexpected expenses and losses-- the inability to prove a lost or a stolen gift card probably costs consumers hundreds of millions of dollars every year.<sup>14</sup> Some of these problems are unique to particular categories of MACCS. Most are not. One problem universal to MACCS is the merchant insolvency; another is the absence of standard terms in MACCS agreements.

---

<sup>10</sup> <https://cms.entertainment.com/industries/cause-marketing-incentives/>

<sup>11</sup> Scam Coupons Make Their Rounds on the Internet, WFSB, Dec. 21, 2015 <http://www.wfsb.com/story/30800404/scam-coupons-make-the-rounds-over-the-internet> (fake coupons designed to obtain personal information and load malware);

<sup>12</sup> Individualized Coupons Aid Price Discrimination, Forbes, Aug. 21, 2012, <https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/money-builder/2012/08/21/individualized-coupons-aid-price-discrimination/&refURL=https://www.google.com/&referrer=https://www.google.com/>

<sup>13</sup> See, e.g., <https://www.ftc.gov/news-events/press-releases/2000/01/ftc-agreements-protect-consumers-misleading-coupon-and-rebate>; <https://bentcorner.com/beware-deceptive-michaels-coupons/> Established companies, for example JC Penney, have sold coupons to trick customers into thinking they are getting bargains, when in reality, the customer is paying the normal price. See Brad Tuttle, *JC Penney Reintroduces Fake Prices (And Lots of Coupons Too, Of Course)*, TIME (May 2, 2013), <http://business.time.com/2013/05/02/jc-penney-reintroduces-fake-prices-and-lots-of-coupons-too-of-course>.

<sup>14</sup> Christopher Elliot, Why Do These Gift Cards Keep Disappearing, Huffington Post, Jan 31, 2017 [https://www.huffingtonpost.com/entry/why-do-these-gift-cards-keep-disappearing\\_us\\_5890d4b9e4b04c35d5835359](https://www.huffingtonpost.com/entry/why-do-these-gift-cards-keep-disappearing_us_5890d4b9e4b04c35d5835359). The authors could not locate any reasonable estimate of the amount of money left unspent on gift cards because lost, stolen, or residually too small to be used.

As a legal matter, MACCS thus far have not been addressed as obligations with fundamentally similar characteristics. They have been analyzed by courts idiosyncratically, and fragmentarily defined by codes, statutes and regulations.<sup>15</sup> The law surrounding such things as coupons, rebates, rewards, company cash or scrip, tokens, cash-back offers and the like presents a legal patchwork that has produced confusion and incoherence.<sup>16</sup> We argue that as a result, businesses operate in an unpredictable legal environment and that consumers are left unnecessarily prone to unpredictable risk, deception, fraud and abuse.

Part II further differentiates MACCS from other payment regimes. Part III explores current problems. Part IV explores disparate rules and suggests the creation of a rationalized structure for MACCS.

## **II. Consumers in Non-MACCS Payment Regimes**

### *a. Conventional Financial Institutions.*

The conventional entities that issue general credit cards, company and affinity credit cards, debit cards, and Internet bank accounts are protected from institutional insolvency risks because they are FDIC insured.<sup>17</sup> The Mastercard, VISA, American Express, and Discover card networks in fact exclude non-bank financial institutions from the ability to issue cards.<sup>18</sup> While the consumer protection regimes attached to the different payment systems vary in their strength, banks and other financial institutions are subject to governing statutes and regulations which are enforced by bank and thrift institution authorities at the state and federal level and at the Federal Reserve.

Oversight includes measuring operational performance against established standards for marketing activities, fees, clearing mechanisms, efficiency in clearing, accurately stated interest charges, dispute resolution procedures, a level of privacy protection, and, of course, monitoring the insolvency risks. Consumers in these systems further can seek to recover for unfair or abusive treatment through remedies provided in the Federal Trade Commission Act, the Consumer Credit Protection Act, the Electronic Funds Transfer Act, the Fair Debt Collection Practices Act, Dodd-Frank and other consumer legislation.<sup>19</sup> They can exercise rights pursuant to the Uniform Commercial Code.<sup>20</sup> Common law doctrines of

---

<sup>15</sup> See, e.g. [string cite to inconsistent cases.]

<sup>16</sup> In the state of California, for example, the definition of coupon rests on the word “coupon. See West’s Ann.Cal.Bus. & Prof.Code § 17537.11 (2001), in which a coupon is defined as “any coupon, certificate, document, discount, or similar matter that purports to entitle the user of the coupon to obtain goods or services for free or for a special or reduced price.” [See also]

<sup>17</sup> <https://www.fdic.gov/deposit/deposits/>

<sup>18</sup> <https://www.quora.com/What-are-the-requirements-to-issue-a-Visa-or-MasterCard>

<sup>19</sup> <https://www.consumerfinance.gov/ask-cfpb/category-credit-cards/>

<sup>20</sup> See, e.g., UCC Art. 3, <https://www.law.cornell.edu/ucc/3>

unconscionability and unfairness have been applied to such accounts as well. Important aspects of their privacy are regulated by the Graham-Leach-Bliley Act and Dodd-Frank and common law privacy rules.

*b. Merchant Banking Initiatives (Non-MACCS)*

Federal legal tender laws require companies to accept payment in dollars, but as the United States Treasury explains on its website, “Private businesses are free to develop their own policies on whether or not to accept cash unless there is a State law which says otherwise.”<sup>21</sup> Merchants have chosen to buy banks to hold substantial consumer cash deposits ever since the repeal of the Glass-Steagall Act in 1999 made that possible. They also have employed financial institutions to create company bank-like facilities that comply with the rules that govern financial institutions.<sup>22</sup> Illustrating these developments, *Consumer Reports* highlighted Walmart, Costco and BJ’s, which started to offer “smart-phone-friendly GoBank checking accounts alongside WrestleMania action figures and Ol’ Roy dog food . . .”<sup>23</sup> Consumer protections that apply to financial institutions generally apply to consumer accounts established through these merchants as well.

Another payment device favored by other merchants is to keep consumer funds in functional accounts that are intrinsic to their business models and which are not designed to create cash substitutes. Pay Pal, for example, at one point held consumer balances at other banks, and benefitted from FDIC insurance but today holds consumer funds on its own. As one writer said, “if you have a balance at PayPal, it’s an unsecured claim against Paypal. That’s right, you’re lending PayPal money.”<sup>24</sup> A substantial literature questions the asymmetries between the oversight of conventional banking and payment systems, and less regulated newer non-bank activities on the Internet and elsewhere. From a consumer protection perspective, it seems that the proper balance has not been struck between encouraging payment system innovation and protecting reasonable consumer expectations about safety and transparency, but a discussion of the problems in non-MACCS, non-bank banking is outside the scope of this essay.<sup>25</sup>

---

<sup>21</sup> <http://www.quickanddirtytips.com/business-career/legal/can-businesses-refuse-accept-cash#sthash.uwMoMLvs.dpuf>

<sup>22</sup> <http://www.nytimes.com/2012/11/14/business/major-retailers-start-selling-financial-products-challenging-banks.html>

<sup>23</sup> Should Walmart be your next bank? *Consumer Reports*, Nov. 2014.

<sup>24</sup> David Bergendahl, Your PayPal balance isn’t FDIC insured: the case for a new model for financial startups, *Medium*, Sept. 21, 2014. <https://medium.com/@dbrgndl/paypal-isnt-fdic-insured-non-banks-being-bankish-and-a-new-model-for-financial-startups-df6d16c2d4b>

<sup>25</sup> Id; see, e.g., <https://www.consumerfinance.gov/about-us/blog/the-cfpb-launches-its-nonbank-supervision-program/>

### III Selected Consumer problems associated with MACCS

For all MACCS, merchants make proprietary business decisions about maximizing the return on the MACCS; about the degree to which they will cover MACCS liabilities when they come due; about what they will do with the income they generate from MACCS-generated revenue; and about what if anything to do to insure that MACCS owners will be compensated in the event of company insolvency. Below we illustrate some legal concerns common to MACCS.

- *Bankruptcy law in the context of company scrip.* Promises to perform or to pay which merchants make to consumers through MACCS are, potentially, underfunded or unfunded liabilities. Scrip has no value if the issuing company no longer exists: when a company files for bankruptcy, consumers who own scrip from that company “may be stuck with a worthless piece of plastic.” In most cases scrip is purchased by the person who intends to use it. Gift cards are a form of stored-value company scrip that is most often purchased for the benefit third party beneficiaries who receive few or no rights in the bankruptcy process. In 2011, for example, when the *Borders* bookstore chain filed for Chapter 11 bankruptcy, plaintiff recipients of gift cards whose gift cards had become valueless missed the deadline to file claims because they were not personally notified because the company asserted its inability to tap into the personal information it had collected to do so.<sup>26</sup>
- *Civil rights law in the context of coupons.* Merchants are free to provide rewards card points, or coupons to customers who spend a certain amount of money.<sup>27</sup> Civil rights laws prohibit businesses from refusing service to protected classes of persons. But companies may provide discounts to seniors or other members of society for the purpose of marketing to these consumers.<sup>28</sup> Generally, the business judgment rule presumes that companies are motivated to generate profits for their shareholders, and permits them to make independent decisions for the betterment of the company as long as they do not breach their fiduciary duty.<sup>29</sup> As long as the company meets this low threshold, it may use scrip for various forms of promotion.<sup>30</sup>
- *Bait and switch in the context of trade-ins and store-credit vouchers.* Stores may offer items purchased for store credit, instead of full refunds. This is especially common if

---

<sup>26</sup> Id. Although notice by publication satisfies the basic requirements of due process, it remains a famously ineffective method of alerting potential plaintiffs to litigation. Perhaps most notably, a missed notice by publication was the impetus for the lawsuit in *Pennoyer v. Neff*, the case that redefined personal jurisdiction. See 95 U.S. 714, 718 (1877).

<sup>27</sup> See *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (1974).

<sup>28</sup> See *Martin v. International Olympic Committee*, 740 F.2d 670, 677 (1984).

<sup>29</sup> See *Rannels v. Meridian Bancorp Inc.*, 718 F.Supp. 10 (1989), in which the Court permitted a bank to provide discounts to seniors on the basis that this furthered a legitimate state interest to assist older citizens.

<sup>30</sup> See *In re The Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 38 (2006).

an item has been opened, or if the consumer does not return with a receipt. Once an item has been purchased and may be traded in, it effectively becomes a form of MACCS. For example, former New England Patriots tight end was indicted for murder in the summer of 2013. The team, understanding that fans may not wish to keep Hernandez jersey, made a seemingly sweet offer: Visit our official store, and we'll let you trade in the Hernandez jersey for a new jersey of a different player.<sup>31</sup> This required fans to drive to Foxborough, Massachusetts (a long distance for many Patriots fans) to the team's official store.<sup>32</sup> Once having made that commute, they were potential buyers of other high-priced merchandise at that location.<sup>33</sup>

- *Lost residual value due to expirations and frozen remainders in coupons, gift cards, and merchant stored value devices.* Coupons are generally given away for the purpose of obtaining personal information about a consumer or providing a financial discount to the consumer, which the issuer hopes will attract consumers to the store; they may or may not set expiration dates. There is no established rule as to how long such a promotional value must remain effective, creating conditions prone to abuse. An expired or declined coupon costs the consumer time and inconvenience; declined expired scrip costs the consumers the price of the value the scrip would otherwise have.<sup>34</sup> Approximately 31 percent of consumers who accumulate travel rewards points never use them, saving companies many millions of dollars.<sup>35</sup>

#### **IV. Disparate Rules.**

As indicated earlier, the rules governing MACCS are a patchwork. The CARD Act of 2009, for example, was largely devoted to the prevention of credit card abuse, but its attention to even

---

<sup>31</sup> Ben Volin, THE BOSTON GLOBE, "Patriots Were Taken Aback By Murder Charge," (June 28, 2013), <http://www.bostonglobe.com/sports/2013/06/28/patriots-had-inside-knowledge-murder-charge-before-cutting-aaron-hernandez/efZRO6DxYpy6AZd7SMH3OL/story.html>.

<sup>32</sup> Ryan Wilson, CBS SPORTS, "Patriots ProShop to Offer Free Exchange for Hernandez Jerseys," June 28, 2013, <http://www.cbssports.com/nfl/eye-on-football/22562299/patriots-proshop-to-offer-free-exchange-for-hernandez-jerseys>

<sup>33</sup> It is worth noting that the Patriots appear to have been focused more on public relations than profit; the team's owner indicated it lost \$250,000 in the exchange. See Will Brinson, CBS SPORTS, "Patriots owner: Team lost \$250K on Aaron Hernandez jersey swap," <http://www.cbssports.com/nfl/eye-on-football/22685576/patriots-owner-team-lost-250k-on-aaron-hernandez-jersey-swap>.

<sup>34</sup> See *Grimsley v. Southwest Airlines Co. Inc.*, 2012 WL 1339722 (2012), which held that Southwest Airlines was free to continue accepting coupons even without an expiration date.

<sup>35</sup> <https://www.nbcnews.com/business/consumer/31-percent-credit-card-holders-aren-t-redeeming-their-rewards-n746501>



gift certificates and gift cards was fragmentary.<sup>36</sup> It ignored scrip: it is likely that Congress simply did not consider scrip abuse to be an issue that affects consumers enough to necessitate federal action. The CARD Act's coverage of "electronic promises" mandates that the currency be increasable or reloadable. Scrip cannot be increased or reloaded. Perhaps most critically, the CARD law states that the term "gift certificate" does not include a "payment code or device that is...issued in paper form only."<sup>37</sup>

Below we indicate some of the difficulties presented by the fragmentary and silo-like treatments of MACCS.

*Deception.* Federal laws permit the FTC to address deception in some MACCS but not others. Generally the FTC statute covers advertisements which misrepresent the "nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities," language which does not reach non-advertised trade-ins.<sup>38</sup> Each state regulates deceptive coupons in some fashion--but the laws vary considerably from state to state and govern some MACCS but not others. Coupons, for example, are generally required to clearly state the discount offered or the fact that the featured price is a "sale."<sup>39</sup> Coupons for the sale of certain products often face tighter legal scrutiny. For example, Missouri law requires sellers of alcohol to list the amount of the cash rebate, but not the retail price of the alcohol in coupon advertisements.<sup>40</sup> Many of those statutes include broad language; the California law prohibits offering coupons that are "in any manner untrue or misleading."<sup>41</sup> In that state, coupons may not describe an item as "free" if the recipient must pay money for the coupon.<sup>42</sup>

*Frozen value.* Some pre-paid MACCS which do not fall into categories defined by the CARD Act require the user to spend an amount lower than the value stored on the card. A consumer may end up with a gift card with \$.15 remaining on it, which the store may decline to apply that amount to another purchase, depriving them of a small amount of the card's value and functioning as a hidden, small tax. Some stores will only accept two forms of payment for a single purchase, meaning that a consumer would need either a checkbook or a sufficient amount of cash to consummate a purchase. Additionally, many Internet merchants do not accept two forms of payment for one purchase, meaning that users of online MACCS are forced to find a purchase valued at the exact amount remaining on the MACCS to receive its full value.<sup>43</sup> California has addressed the problem by requiring merchants to allow consumers to cash out any gift card with a balance of less than \$10.

---

<sup>36</sup> S. 3636, 112<sup>th</sup> Cong. § 4 (2012).

<sup>37</sup> 15 U.S.C.A. § 1693l-1(c).

<sup>38</sup> 15 U.S.C.A. § 1125(a)(B).

<sup>39</sup> See, for example, 815 ILCS 505/2J.1.

<sup>40</sup> Vernon's Annotated Missouri Statutes 311.355(1)(2) (1995).

<sup>41</sup> West's Ann.Cal.Bus. & Prof.Code § 17537.11(a).

<sup>42</sup> Id.

<sup>43</sup> See The Lowdown on Gift Cards,

<http://www.bankrate.com/brm/news/cc/20031126a2.asp>, last visited Dec. 12, 2013.

Other states, including Maine, Montana, and Washington, have the same requirement, but set the balance amount at under \$5.<sup>44</sup> Otherwise, consumers with frozen remainders are often left in a difficult position.

*Personal Information.* Few rules regulate merchant acquisition of personal information through MACCS. What necessary disclosures regarding the data collection uses that will be made possible by the MACCS? What rules related to the value of the information being collected? What rules regarding disclaimers of responsibility for the misuse of MACCS acquired information? What limitations on sharing of MACCS information?

*Redeemability.* Some prepaid MACCS may be redeemed for cash. For example, Groupon is a form of MACCS that offers bargain deals for its consumers who pre-pay. The bargains expire. But after expiration, the consumer is entitled to the money he already spent, either in the form of a refund or as a down payment at the establishment. The redeemability of non-CARD Act scrip is a matter of private law.<sup>45</sup> A fully redeemable MACCS provides critical protection for consumers.

*Fungibility.* Some forms of scrip are wholly fungible; others cannot be substituted for each other. An item is fungible if it is “functionally interchangeable” or “physically indistinguishable.”<sup>46</sup> Generally, local currencies are fungible, but gift cards and coupons are not. A \$5 BerkShare is fungible, just like a \$5 bill is – it is physically indistinguishable from and functionally interchangeable with other \$5 BerkShares. Gift cards are not fungible, as they have various value amounts on them, and those value amounts can be loaded or reloaded.

*Breakage.* Some states consider unclaimed gift certificates to be abandoned property. New York’s abandoned property statute, for example, provides that any unclaimed amount from a gift certificate sold after December 31, 1983 and unclaimed by the owner for five years is considered legally abandoned, and escheats to the State.<sup>47</sup> While abandonment is not in the best interest of the affected consumer, it at least assures that the funds are not wasted and that the merchant does not receive unjust enrichment.<sup>48</sup>

## **V. Conclusion: A Modest Proposal for a new Merchant Authorized Consumer Cash Substitute Act**

---

<sup>44</sup> Cal. Civil Code §1749.5(b); Me. Rev. Stat. Ann. tit. 33, §1953(G); Mont. Code Ann. §30-14-108(4); Wash. Rev. Code §19.240.020(3).

<sup>45</sup> See, e.g., BERKSHARES: LOCAL CURRENCY FOR THE BERKSHIRE REGION, [http://www.berkshares.org/press/PR\\_1.htm](http://www.berkshares.org/press/PR_1.htm) (last visited March 31, 2013); [http://www.berkshares.org/how\\_to\\_spend](http://www.berkshares.org/how_to_spend) (redeemability dollar-for-dollar).

<sup>46</sup> See Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L.Rev. 151, 163 (Oct.2004).

<sup>47</sup> See McKinney's Abandoned Property Law § 1315 (2011).

<sup>48</sup> See *Kimberley's A Da Spa, Ltd. v. Hevesi*, 810 N.Y.S.2d 616 (2006).

Based on the above analysis we suggest that it would be useful to create a new federal consumer protection statute, or possibly a new section of the Uniform Commercial Code, which congregates all Merchant Authorized Consumer Cash Substitutes. For purposes of illustration, and as is true of other commercial statutes,<sup>49</sup> Part One could include definitions of such terms as “merchant,” “authorization,” “consumer,” “cash substitute,” “coupon,” “scrip,” “redeem,” “purchase,” “personal information,” and other basic terminology. Part Two could state MACCS rules of general applicability—both default rules and some nonwaivable protections. Default rules regarding damages for breach of warranties, and the responsibilities for privacy protection; nonwaivable remedies for deception; standards for the disclosure of data collection methods and uses. Part Three could pertain to particular the category of scrip and other closed-loop MACCS. Part Four could establish rules special to open-loop MACCS whose value varies according to consumer payments, including standards for disclosures of value and other minimum merchant obligations. Part Five might state rules for coupons and other MACCS whose value a merchant establishes without reference to the monetary consideration paid to acquire a MACC. Part Six might state rules concerning liquidity and redemptions. Part Seven might cover insolvency risk and record-keeping.

The authors have not developed a fuller outline of what the proposed federal statute or UCC article would look like, and further elaboration of awaits additional research, but we believe that the adoption of such a new set of rules would rationalize a field sorely in need of coherent legal rules and responsibilities.

---

<sup>49</sup> See, e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, [https://www.ftc.gov/sites/default/files/documents/statutes/credit-card-accountability-responsibility-and-disclosure-act-2009-credit-card-act/credit-card-pub-l-111-24\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/statutes/credit-card-accountability-responsibility-and-disclosure-act-2009-credit-card-act/credit-card-pub-l-111-24_0.pdf)