

COMMENTS

to the

**Department of the Treasury
Financial Management Service**

31 C.F.R. Part 208

RIN 1510-AB26

Docket Number FISCAL-FMS-2009-0003

by the

National Consumer Law Center

on behalf of its low-income clients

and the

Consumer Federation of America

as well as the following national, state and local
advocates for low and moderate income recipients of federal benefits

Center for Responsible Lending

Consumer Action

Consumers Union

National Association of Consumer Advocates

National Legal Aid and Defender Association

National Senior Citizens Law Center

US Public Interest Research Group

Community Legal Services of Arizona, Phoenix, Arizona

California Reinvestment Coalition, San Francisco, California

Jacksonville Area Legal Aid, Inc., Jacksonville, Florida

Land of Lincoln Legal Assistance Foundation, Inc., Alton, Illinois

Legal Assistance Foundation of Metropolitan Chicago, Illinois

Coordinated Advice & Referral Program for Legal Services of Chicago, Illinois

Legal Aid of the Bluegrass, Covington, Kentucky

Maryland Legal Aid Bureau, Inc., Baltimore, Maryland

Mississippi Center for Justice, Jackson, Mississippi

Empire Justice of Center, Albany, New York

North Carolina Justice Center, Raleigh, North Carolina

Advocates for Basic Legal Equality, Dayton, Ohio

Ohio Association for Justice, Dublin, Ohio

South Carolina Appleseed, Columbia, South Carolina

Legal Aid Society of Roanoke Valley, Roanoke Virginia

Mountain State Justice Charleston, West Virginia

August 16, 2010

*“Jump on the Bandwagon
Millions of people get their Social Security through Direct Deposit.
You can, too! It’s safe, quick and convenient.
Sign up today. See your bank, credit union or savings and loan.”*

Slogan from a 1997 Social Security Administration poster
encouraging recipients to use direct deposit.¹

Treasury’s ongoing push for electronic deposit of federal benefits makes sense for many – even most – people. Electronic deposit is not for everyone, however. The proposed regulation in this docket is inadequate: it mandates electronic deposit, deletes all waiver provisions from the regulations, and purports to protect recipients from the abuses of the financial services marketplace by relying on the Direct Express. The transfer away from paper checks must not be done at the expense of the most vulnerable federal benefit recipients, the elderly and the disabled.

The National Consumer Law Center² ("NCLC") on behalf of its low-income clients, and the **Consumer Federation of America** (CFA),³ as well as the additional two dozen national, state and local advocates for low and moderate income recipients of federal benefits, submit the following comments on the Treasury Department’s proposal to mandate all electronic deposits by 2013.

We do not oppose Treasury’s proposal to increase substantially the number of recipients of federal benefits receiving the payments electronically. We support Treasury’s laudable goal of

¹ U.S. Social Security Admin., Social Security History, SSA History Archives, *available at* <http://www.ssa.gov/history/directdep2.html> (emphasis added).

² The **National Consumer Law Center, Inc.** ® (NCLC) ® is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Banking and Payments Law* (4th ed. 2009), which has several chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with the electronic delivery of government benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and were very involved in the development of rules implementing EFT-99 after its enactment in 1996. NCLC’s attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments have been written by NCLC attorneys Margot Saunders and Lauren Saunders.

³ **Consumer Federation of America** is an association of nearly 300 non-profit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education. Jean Ann Fox, Director of Financial Services for CFA, contributed to these comments.

saving money, saving trees, and improving the security of the delivery of federal benefits. We agree that there are numerous advantages to receiving electronic deposit for federal benefit recipients.

However, even while electronic deposit is right for *most* recipients, it is not right for *all* recipients. There must be an articulated waiver procedure disclosed and accessible to the minority of recipients for whom direct deposit into a bank account or the Direct Express Card will not work because of factors such as disability or geography.

We are very concerned that as Treasury pushes the most vulnerable of federal recipients into the arms of banks and prepaid card providers, Treasury must adhere to its obligation to make sure that these accounts are safe for people to use. *Federal payments are exempt by law from the claims of creditors. Banks and prepaid card providers should not be permitted unfettered access to these funds for high fees or overpriced credit.*

These comments are written in conjunction with those we recently submitted to Treasury on the expansion of prepaid cards as conduits for federal payments.⁴ Everything said in those comments should be understood as incorporated into these comments, with particular attention to the following point: *we have significant concerns about the authorization for the deposit of federal benefit payments onto prepaid, stored value cards or similar products which are only subject to the conditions outlined in the proposed rule. More substantial protections are essential before these transactions should be authorized and sanctioned by Treasury.*

In these comments, we urge Treasury to recognize several crucial areas in which action must be taken:

- The need for explicit and disclosed waivers of the direct deposit requirement. While we agree that the current waiver formulae can be considerably tightened, articulated and available grounds to allow some federal benefit recipients to continue to receive paper checks must remain.
- The legal and moral need for Treasury to establish minimal rules for safe banking and prepaid card products which protect federal benefit recipients from predatory and expensive credit arrangements tied to the direct deposit of federal payments.
- The need for improvements to the Direct Express Card.

I. Waivers Must Be Granted Based on Articulated, Clear, and Limited Standards.

Treasury proposes to completely eliminate the current waiver provisions from the regulations. This would leave in place only the vaguest of waiver standards. The Secretary of the Treasury would have the authority to waive the requirement for direct deposit, and the payment agencies could waive the requirement in circumscribed situations such as payments to payees in foreign countries, certain disaster and military situations, and the like.

⁴ Comments to the Department of the Treasury Fiscal Management Service from the Nat'l Consumer Law Ctr. *et al.* (July 13, 2010), available at http://www.nclc.org/images/pdf/public_benefits/comments-fiscal-fms-2010.pdf.

The key – and most drastic – change proposed would be the complete elimination of the current hardship waiver requirement.⁵

Under *current* Treasury regulations, waivers are automatically granted to any benefit recipient who fails to provide information about a bank account to receive direct deposits. Recipients can determine – in their sole and exclusive discretion – whether they have any one of the following hardship grounds to qualify for a waiver:

- physical or mental disability
- geographic
- language or literacy barrier
- direct deposit would impose a financial hardship.⁶

The bottom line in the current system the default rule is that a paper check must be used if the consumer does not do anything. In other words, if the recipient does not provide information about a bank account and then does not answer the question about whether a waiver is desired, the agency must make the payments by paper check.⁷

Treasury's Complete Elimination of the Hardship Waiver Goes Too Far

Treasury's proposal to change the default rule – the rule governing what happens when the recipient does not provide the information necessary for the federal payment to be electronically deposited directly into a bank account – will be highly effective. Under current regulations if the recipient does not respond, the payments are made by check. Under Treasury's proposed changes, the payments will be made to the Direct Express Card.

We think this is a good and appropriate change to the rule. It should capture a substantial percentage of check payments and transition them easily into the electronic deposit system. Changing this default rule alone will likely save a substantial amount of the \$125 million Treasury says it currently spends mailing checks to federal benefit recipients.⁸

But as Treasury recognizes, there will still be some people for whom the Direct Express Card will not work. Some examples of the situations that should be grounds for a hardship waiver include:

- people with mental disabilities who cannot comprehend the idea of money on a small piece of rectangular plastic and who cannot obtain a bank account;⁹

⁵ 31 U.S.C. § 3332(f)(2)(A).

⁶ 31 C.F.R. § 208.4(a).

⁷ 31 C.F.R. § § 208.7(b) & 208.4(a).

⁸ See 75 Fed. Reg. 34394, 34399 (June 17, 2010).

⁹ Many people are shut out of the banking system, for reasons including the costs associated with having a banking account, fears of overdraft and the costs associated with those programs, or past difficulties with bank accounts, such that no bank will provide them an account.

- people with emotional disabilities – such as an anxiety disorder – who are incredibly anxious about when their prepaid card is actually loaded with benefits;¹⁰
- people with other disabilities making the use of the Direct Express Card difficult;
- people who live in rural areas, or even inner city areas, where there is not ready access to banks and ATM machines; and
- some other hardship condition which makes both a bank account and the Direct Express Card unusable for the recipient.

This waiver process need not be complicated, and it need not lead – as Treasury fears – to a complex new government bureaucracy. The key difference between the future waiver process that we envision and the existing one is that the default in the future will be that if the recipient does nothing, the Direct Express Card will be the method of delivery for federal benefits. The vast majority of current check recipients will be transferred to the electronic deposit system just by this change in the system.

The process for the new waiver can simply be a requirement that the recipient articulate – either verbally or in writing – which hardship waiver is applicable and why. The process of having to articulate which reason qualifies her or him, and to explain it in one or two sentences, will ensure that most people who do not qualify will not claim the waiver.

It is true that a simple system like this, which is not checked by anyone, will permit some who do not actually qualify to slip through the cracks. But the consequences are minimal—a few dollars a year to continue to mail paper checks. According to Treasury, the *annual* cost of mailing each recipient the check each month is approximately \$11.36.¹¹ The costs of policing a waiver system for unwarranted waiver claims would far exceed these minimal costs.

As Treasury notes, receiving paper checks for their retirement income is very important to some recipients.¹² For \$11.36 a year, is it really too much for seniors to ask of their government to allow them to receive their hard-earned pensions that way?

The number of recipients who will continue to need paper checks will undoubtedly decrease each year. First of all, as more people retire who regularly use electronic money, there will be much less resistance to both electronic deposit and the Direct Express Card. Second, more electronic access points will be made available in even the most out of the way places.

We have conducted an informal survey of over 670 attorneys and advocates who identify themselves as lawyers and advocates for seniors. This group includes people from every state in the nation. Their clients are recipients of both Social Security and SSI. We explained this proposal on

¹⁰ For example, one recipient has apparently called approximately 1800 times to check his balance. The Comerica representative who related that story acknowledged that the recipient likely has a mental disability.

¹¹ Treasury says it spent \$125 million delivering paper checks to 11 million benefit recipients in 2009. That works out to be \$11.36 per recipient per year, or \$.95 for each check to each recipient. *See* 75 Fed. Reg. 34394, 34399 (June 17, 2010).

¹² *See* 75 Fed. Reg. 34394, 34401 (June 17, 2010).

the waiver and asked the attorneys to provide us an estimate of what percentage of their clients who still receive paper check would be likely to take advantage of this waiver procedure.

There were two trends in the responses. For those that represented clients in urban and suburban areas, the estimates were that only 5 to 15% of the recipients currently receiving checks would request a waiver. This means that of the 11 million people who are currently still receiving paper checks who live in urban or suburban areas, these advocates estimate that 85 to 95% would *not* request a waiver.¹³

However, for those whose clients live in remote areas of the nation, the estimates were much higher – because of the lack of access to both banks and ATMs. Some of the comments received:

Montana: The majority of Montana is a rural and frontier state. You're asking people seventy and older to accept a direct deposit. A high percentage of our seniors don't use or trust debit cards and prefer their federal benefits are sent directly to them. With baby boomer's [sic.], the percentage decreases considerably. In the remote parts of Montana which is frontier, this will be a struggle at best. There are few ATM's.

Alaska: I take turns providing charitable legal advice to elders in the South-Central area of Alaska. Elimination of the waiver availability certainly will create a hardship for some of those people, and more so for the people in bush Alaska who often have no bank nor bank representative nor a place to use a credit card. The only reliable communication source for countless rural Alaskans is the United States Postal Service which continues to be in places so remote you cannot imagine them unless you've been up here. My guess, and it is just that, would be 10 to 30 percent [would want a waiver].

Missouri: In Missouri, we are guesstimating that between 10% and 20% of recipients are receiving checks. Of these, at least half would probably be interested in an opportunity to take advantage of such a waiver as suggested in your email. With many rural areas in our state, seniors do not always have a financial institution nearby. And, many seniors today grew up during the depression and are still reluctant to putting their money into banks. In the more rural areas, few places accept plastic of any kind so usage of the Direct Express Card would be limited.

Because this waiver procedure requires the recipient to do something proactive, and because the alternative to the waiver (the Direct Express Card) will work well for many benefit recipients, the overwhelming response we received indicates only a small minority of the current check receiving recipients would take advantage of the waiver procedure. But it will be incredibly important for this minority to have the opportunity to be able to continue to use checks.

If 10% of the current check recipients take advantage of the waiver, then Treasury's costs of delivering benefits by check will decrease by 90%: a reduction from \$125 million to \$12.5 million. This by itself will represent a huge savings.

¹³ See 75 Fed. Reg. 34394, 34401 (June 17, 2010) (stating that 11 million recipients still got checks in 2009).

The relatively small amount still spent on delivering paper checks to a dwindling number of recipients who will need checks does not make it cost effective to establish any new bureaucratic apparatus to review waivers and approve them. There need be no new costs associated with certifications and appeals.

Allowing the waiver system to continue in a limited and inexpensive way is also a matter of political necessity. There will be a huge furor if existing check recipients are switched – against their will and over their objections – to an electronic card.¹⁴ Providing a simple to administer, self-certifying waiver procedure to permit those who feel very strongly about the subject to maintain their paper checks is an essential release valve to prevent what is otherwise likely to be a political maelstrom.

Procedure for Waiver

Treasury should make the availability of the waiver known clearly and conspicuously to benefit recipients, in all of its mailings and advertisements regarding the switch to Direct Deposit. The information about the waiver should be concisely explained in a way that sets out the grounds available for the waiver and explains how to obtain the waiver. The procedure for the latter should be for the recipient to contact the federal payor agency (through its website, by telephone or in person) and fill out a form explaining the recipient's reason for needing the waiver.

It need *not* be advertised that no review would take place or that filling out the form and setting down any explanation for the waiver would be sufficient to qualify for the waiver.

II. Safe Banking Practices Are Essential.

Treasury proposes in this docket that all federal benefit recipients will be required to receive funds via direct deposit into existing bank accounts, new bank accounts established for the purpose of receiving benefit payments, the Direct Express Card, or other prepaid cards with certain – minimal – consumer protections.¹⁵ The intent of the proposed rules is to eliminate mailing paper checks and to force unbanked federal benefit recipients to become customers of financial institutions, either through traditional bank accounts or through the use of prepaid debit cards (both Direct Express and others). However, other than for the Direct Express Cards, Treasury does not propose any basic requirements for these accounts or place any limits on fees charged by banks where recipients will now be required to do business.

¹⁴ We applaud Treasury's recognition that there will need to be substantial education and assistance provided when this regulation becomes effective. We suggest a massive education campaign, along with a well-staffed 24-hour Help desk.

¹⁵ The consumer protections set out for prepaid cards were articulated in Treasury's proposed regulations on 31 C.F.R. Part 210. (Docket Number FISCAL-FMS-2009-0001; 75 Fed. Reg. 27239 (May 14, 2010); Comments were due July 13, 2010). In those proposed amendments to Treasury's regulations for direct deposit, Treasury only required that the funds be held on a prepaid cards in an account at a insured depository institution meeting the requirements for pass-through FDIC insurance, and to which the protections of the Electronic Fund Transfer apply. 75 Fed. Reg. 27239, 27247 (proposed 31 C.F.R. § 210.5).

There are several forms of high cost banking practices that Treasury must protect federal benefit recipients from: high cost overdraft protection programs, bank payday loans (so-called account advance products offered to recipients who access their funds through both traditional bank accounts and prepaid cards), as well as any new products the banks may dream up to strip recipients of their protected benefits.

Before Treasury takes steps to force eleven million unbanked federal recipients to use bank accounts, it is incumbent on the agency to make sure these accounts are safe and appropriate for low and moderate-income recipients, many of whom are seniors or suffer from disabilities. We also ask that Treasury participate actively in the public awareness campaign – currently led by the FDIC¹⁶ – designed to make safe accounts available to unbanked low and moderate income consumers and to alert recipients about the alternatives to high cost lending.

The Law Requires Treasury to Ensure Safe Accounts

The statute Congress passed to establish the requirement that federal payments be made electronically – called EFT 99 – requires that Treasury issue regulations to ensure that individuals *have access to the account at a reasonable cost and are given the same consumer protections with respect to the account as other account holders at the same financial institution.*¹⁷ Treasury has attempted to fulfill these clear instructions to protect recipients by first establishing the ETA account and now by providing access to the Direct Express Card.¹⁸

While we applaud Treasury for creating a safe new product that is available to some recipients, the availability of the Direct Express Card neither protects recipients from the problems in the marketplace nor satisfies the Congressional mandate to protect consumers.

Congress was concerned that recipients be protected from unreasonable costs imposed on them as a result of their forced participation in the direct deposit program. To ensure that the costs imposed on recipients are not *unreasonable*, Congress *requires that* Treasury protect consumers in the following manner:

Regulations under this subsection shall ensure that individuals required under subsection (g) to have an account at a financial institution because of the application of subsection (f)(1)--

¹⁶ The FDIC adopted templates for safe basic transaction and savings accounts and announced a pilot project on August 10, 2010. The FDIC specifies low (or no) fees, transparency, FDIC-insurance, federal consumer protections, simplicity and ease of use, and sustainability for both financial institutions and their customers. Overdraft and insufficient funds fees are banned. We filed comments with the FDIC and recommended additional protections and features to make Safe accounts truly consumer-friendly. FDIC Safe Account Template Comments from Consumer Action *et al.* (June 7, 2010), available at http://admin.consumerfed.org/elements/www.consumerfed.org/File/FDIC_Comments_on_a_Template_For_a_Basic_Savings_and%20Transaction_Accounts.pdf.

¹⁷ 31 U.S.C. § 3332(i)(2).

¹⁸ 75 Fed. Reg. 34394, 34398 (June 17, 2010).

(A) will have access to such an account at a reasonable cost; and
B) are given the same consumer protections with respect to the
account as other account holders at the same financial institution.¹⁹

Treasury's mandate is to ensure that "individuals required under subsection (g) [the section mandating direct deposit] to have an account . . . will have access to such an account at a reasonable cost" The development of the good program offering Direct Express Cards to recipients does not satisfy this Congressional requirement, even though these cards are available at a reasonable cost. The mandate requires that *any* account established to comply with the requirement of electronic deposit must ensure access to it "at a reasonable cost." Treasury's attempt to comply with this statutory requirement by providing access to *one* account at a reasonable cost does not comply with this clear directive.

Treasury has been working hard to protect seniors from garnishments issued by judgment creditors.²⁰ The regulation proposed in April 2010, by Treasury and several other federal agencies, was a well-considered and thorough rule requiring banks to protect direct-deposited federal benefits from seizure to satisfy garnishment orders by judgment creditors.²¹ Yet, in *this* proposed rule (and the related docket number FISCAL-FMS-2009-0001 permitting electronic deposit on to prepaid cards)²², Treasury proposes to mandate electronic deposit into bank accounts and prepaid cards which will facilitate the continuing – and increasing – threat to the recipients of federal benefits from high-cost, short-term loan products issued *by the institutions which are the repositories for those federal benefits*. Protecting benefits from third-party judgment-creditors, while at the same time failing to propose any meaningful protections against the pernicious loan products offered by banks to their customers with checking accounts or prepaid cards, is an abdication of Treasury's responsibility to ensure that bank accounts are safe.

Treasury Should Prohibit Banks from Seizing Benefits to Repay Expensive Overdraft Programs

Safeguarding direct deposited exempt federal benefits from abusive overdraft loans is essential for making bank accounts safe to use. The inherent problems, astronomical expense, and damage to consumers – particularly the elderly – have been well documented.²³

¹⁹ 31 USC §3332(i)(2) (emphasis added).

²⁰ As Social Security and other government benefits are necessary for recipients to maintain a basic level of subsistence, federal law prohibits these benefits from seizure by creditors. 42 U.S.C. § 407 (Social Security); 42 U.S.C. § 1383(d)(1) (SSI); 38 U.S.C. § 5301(a) (VA benefits).

²¹ Garnishment of Accounts Containing Federal Benefit Payments, 75 Fed. Reg. 20299, 20299-314 (proposed Apr. 19, 2010) (to be codified at 5 C.F.R. pts. 831, 841; 20 C.F.R. pts. 350, 404, & 416; 31 C.F.R. pt. 212; 38 C.F.R. pt. 1). See Comments on the Proposed Garnishment Rule from the Nat'l Consumer Law Ctr. *et al.* (June 18, 2010), available at http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/comments-treasury-june2010.pdf (discussing the merits of and the need for some changes to the proposed rule).

²² 75 Fed. Reg. 27239, 27239-48 (May 14, 2010) (proposed 31 CFR § 210.5; Docket Number FISCAL-FMS-2009-0001).

²³ Leslie Parrish & Peter Smith, Ctr. for Responsible Lending, Shredded Security: Overdraft Practices Drain Fees from Older Americans 6-7 (2008), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.html>. The figures in this report have been updated. See Ctr. for Responsible Lending, Quick Facts on Overdraft Loans (2009), available at

In a bank overdraft program, a bank covers the amount of a check, point of sale (POS) debit card purchase, or ATM withdrawal when there are insufficient funds in the customer's bank account.²⁴ The bank charges the customer a fee, typically around \$35,²⁵ each time it covers an overdraft. A typical overdraft product carries an Annual Percentage Rate ("APR")²⁶ of 1,820%.²⁷

Fee-based overdraft loans have much in common with standard payday loans:²⁸

- Both require the customer to give the lender direct access to a bank account for credit to be extended. Payday lenders obtain this access by having the borrower write a post-dated check or sign an electronic debit agreement, while banks simply deduct the loan amounts, plus fees, from the accounts consumers hold at their institutions.
- Both carry exorbitant APRs in the triple or quadruple digits.
- Both require repayment in one lump sum, as opposed to a more manageable installment plan.
- Neither includes an evaluation of the borrower's ability to repay the loan and, as a result, both products are often unaffordable.²⁹

<http://www.responsiblelending.org/overdraft-loans/research-analysis/quick-facts-on-overdraft-loans.html>.

²⁴ See Nat'l Consumer Law Ctr., The Cost of Credit § 7.5.6.1 (4th ed. 2009).

²⁵ This fee continues to be typical even as banks prepare for the new opt-in overdraft regime. See Consumer Federation of America, Consumers Warned Not to Opt In as Banks Market Expensive Debit Card Overdraft Fees (2010), available at

http://admin.consumerfed.org/elements/www.consumerfed.org/File/PR_CFA_Big_Bank_Overdraft_Opt-In062910.pdf.

²⁶ References to the APR in these comments are to the APR as calculated according to the federal Truth in Lending Act. The Truth in Lending Act APR is a uniform way to determine the true cost of a loan. It is expressed as a percentage and includes most of the fees and charges associated with the loan, as well as the interest to be earned over the term. See 15 U.S.C. §§ 1605, 1606. The APR has been the credit cost yardstick in this country for forty years and aims to provide an apples-to-apples comparison of the cost when consumers shop. See Elizabeth Renuart & Diane Thompson, *The Truth, The Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181, 186–91 (2008); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 Cornell J.L. & Pub. Pol'y 199, 211–15 (2005).

²⁷ See Consumer Federation of America, Consumers Still At Risk from Bank Overdraft Loans (2009), available at

<http://www.consumerfed.org/elements/www.consumerfed.org/file/OD%20Big%20Bank%20Reforms%20PR%20FINAL%2010%205%2009.pdf> (calculating this APR based on a \$100 overdraft at a \$35 fee extended for a week).

²⁸ See generally Consumer Federation of America, Consumers Still At Risk from Bank Overdraft Loans (2009), available at

<http://www.consumerfed.org/elements/www.consumerfed.org/file/OD%20Big%20Bank%20Reforms%20PR%20FINAL%2010%205%2009.pdf> (explaining this and other similarities).

²⁹ The products have some differences as well. Payday loans have a fixed term: they are due on the customer's next pay day. By contrast, overdraft loans come due immediately and the bank seizes the funds directly from the customer's account as soon as a deposit is made. See generally Consumer Federation of America, Consumers Still At Risk from Bank Overdraft Loans (2009), available at

<http://www.consumerfed.org/elements/www.consumerfed.org/file/OD%20Big%20Bank%20Reforms%20PR%20FINAL%2010%205%2009.pdf> (explaining this and other differences).

Under new federal regulations that take effect during the summer of 2010,³⁰ bank customers must affirmatively opt in to be covered by fee-based overdraft protection plans for ATM or one-time debit card transactions that put an account in the red.³¹ No opt in is required to cover check overdrafts.

Consumers “spend about the same amount on overdraft fees as they do on fresh vegetables every year, and only a little less than they do on fresh fruit.”³² A lot of overdraft fees are paid out of Social Security funds. It is estimated that adults aged 55 and over pay \$6.2 billion a year in overdraft fees. Within this group, those receiving at least half of their income from Social Security (of all types, but not including Supplemental Security Income) pay almost \$1.4 billion each year in overdraft fees.³³

Making the conservative assumption that overdraft expenses of recipients came equally from their Social Security and other income, *at least \$700 million of Social Security benefits has gone to pay overdraft fees each year.* This estimate is conservative because direct-deposited Social Security funds are more likely than non-direct deposited sources of income to go toward overdraft fees because they are, by definition, going into the consumer’s bank account. *Banks can then help themselves to these funds immediately upon their addition to the account.* This is the behavior that Treasury needs to stop.

New Products from Banks – New Threat to Benefit Recipients

Now, just as the new federal regulations take effect that will restrict banks’ ability to generate revenue from fee-based overdraft loan programs, the banks are developing new products to fill the projected void in their profits:³⁴ bank payday loans.³⁵

³⁰ Reg. E, 12 C.F.R. § 205.17(c)(1); 74 Fed. Reg. 59033, 59040 (Nov. 17, 2009). Banks must be in compliance by July 1, 2010 for new accounts and by August 15, 2010 for existing accounts. For additional information about the new rule, please see Nat’l Consumer Law Ctr. Reports, Consumer Credit and Usury Edition (Nov.-Dec. 2009).

³¹ 74 Fed. Reg. 59033 (Nov. 17, 2009). However, the new regulations still allow banks to make overdraft loans even when the customer has not specifically agreed to the program, for example, when the customer incurs an overdraft by writing a paper check. Reg. E, 12 C.F.R. § 205.17(b)(1); 74 Fed. Reg. 59033, 59040 (Nov. 17, 2009).

³² Overdraft fees have represented a huge source of revenue to banks. In 2008, banks and credit unions received almost \$24 billion in fee-based overdraft revenue – a 35% increase from two years earlier. Leslie Parrish, Ctr. for Responsible Lending, Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years 4-5 (2009), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/overdraft-explosion-bank-fees-for-overdrafts-increase-35-in-two-years.html>.

³³ Leslie Parrish and Peter Smith, Ctr. for Responsible Lending, Shredded Security: Overdraft Practices Drain Fees from Older Americans 6 (June 18, 2008), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.html>. The figures in this report have been updated. See Ctr. for Responsible Lending, Quick Facts on Overdraft Loans (2009), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/quick-facts-on-overdraft-loans.html>.

³⁴ See, e.g., Fair Isaac Corp. (FICO), Insights: White Papers, Opting In or Out: Protecting Revenue Under Overdraft Reform 3 (2009), available at

These products are marketed as “account advances” or with similar innocuous labels. But bank “account advance” products amount to payday loans³⁶ in all but name: cash loans to holders of bank accounts that receive direct deposits of benefits or other income. Like fee-based overdraft, these “account-advance” or “bank payday loan” products hit borrowers with astronomical fees or interest rates, offer nearly instant access, and require quick repayment.

Despite the extraordinary expense of these loans to borrowers, they pose little or no risk to the banks. This lack of risk stems from a key component of these products: they give banks *direct access to borrowers’ accounts*, so if a deposit to the borrower’s account does not repay the loan within the (generally) 35-day time limit, the bank simply reaches into the borrower’s bank account and takes the money even when this triggers overdraft fees or causes other transactions to “bounce.”

The typical bank payday loan is *not* affordable – it is made to a person who is already unable to meet current obligations and will be left in even more desperate straits by the payday loan. The only real core criterion for the loans is the receipt of a certain number of recurring direct deposits at or above a set dollar amount into a bank account in good standing or a prepaid debit card.³⁷

“Advance” amounts are usually capped at \$500 and cost at least \$10 per \$100 loaned. While banks *do* disclose *sample* account advance APRs to consumers, the disclosed rate is generally 120%. However, the *actual cost* incurred by the customer depends on the length of time the loan is outstanding: the shorter the repayment time, the higher the APR.³⁸ For example, under the terms of Wells Fargo’s Direct Deposit Advance product, the actual APR can be as high as 1,825%.³⁹

Bank Set-Off for Overdrafts and Fees Functions as an Assignment of Exempt Benefits

Banks use set-off to collect payment for account fees and overdrafts from the next deposit into the account of a consumer whose insufficient funds transactions were covered by the bank. In

http://www.fico.com/en/FIResourcesLibrary/Insights_Opting_In_or_Out_2578WP.pdf (advising banks that they “can expect a significant financial impact to their income statement through changes in non-interest income” thus “new product development” is necessary).

³⁵ See Jeff Plungis, *Banks May Use Payday-Style Loans to Replace Lost Overdraft Fees*, Bloomberg News, Feb. 23, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a25EweZDVeAU>.

³⁶ Traditional payday loans are short-term high-cost loans secured by post-dated checks or agreements to debit electronically borrowers’ bank accounts. See generally Nat’l Consumer Law Ctr., *The Cost of Credit* § 7.5.5 (4th ed. 2009).

³⁷ See Nat’l Consumer Law Center, *Runaway Bandwagon: How the Government’s Push for Direct Deposit of Social Security Exposes Seniors to Predatory Bank Loans* 10-15 (July 2010), available at www.nclc.org/images/pdf/pr-reports/runaway-bandwagon.pdf (displaying a products chart with details about the requirements for various bank payday loan products).

³⁸ See Ctr. for Responsible Lending, *Mainstream Banks Making Payday Loans* 1, 4 (Feb. 2010), available at <http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/Mainstream-banks-making-payday-loans.html>.

³⁹ See Nat’l Consumer Law Center, *Runaway Bandwagon: How the Government’s Push for Direct Deposit of Social Security Exposes Seniors to Predatory Bank Loans* Appx. A (July 2010), available at www.nclc.org/images/pdf/pr-reports/runaway-bandwagon.pdf (analyzing the bank statements from a Wells Fargo borrower who used the Direct Deposit Advance product).

other words, the bank deducts its own fees and the amount of the overdraft from the direct deposit of Social Security, SSI, Veterans benefits and other federal funds direct deposited to accounts. Despite the federal law protections for exempt funds, banks have been permitted to use set-off which functions as a form of assignment.

There is a conflict in the courts' interpretation of the protections afforded by the Social Security Act and whether the use of set-off by banks is legal. On the one hand, in 2003 the Ninth Circuit said that collecting overdraft fees directly from Social Security funds was not illegal.⁴⁰ And, in the case of *Miller v. Bank of America*, the Supreme Court of California refused to find that the practice violated California's law protecting Social Security funds against seizure.⁴¹

However, these court decisions fly in the face of the reasoning and the holdings of numerous other courts finding that bank setoff against protected funds is illegal. In the case of *Tom v. First American Credit Union*,⁴² the Tenth Circuit explained the conundrum:

We can see no reason why Congress would, on the one hand, choose to protect Social Security beneficiaries from creditors who utilized the judicial system, a system that is built upon principles of fairness and protection of the rights of litigants, yet, on the other hand, leave such beneficiaries exposed to creditors who devised their own extra-judicial methods of collecting debts.⁴³

Regardless of the resolution of these conflicting interpretations of the Social Security Act, Treasury has the authority under the protections in the various payment statutes⁴⁴ to ensure that these federal benefits and payments are not inappropriately siphoned off to pay creditors.⁴⁵

⁴⁰ *Lopez v. Washington Mut.*, 302 F.3d 900 (9th Cir. 2002).

⁴¹ 46 Cal.4th 630, 207 P.3d 531 (Cal. 2009).

⁴² 151 F.3d 1289 (10th Cir. 1998).

⁴³ 151 F.3d 1289 at 1292 (10th Cir. 1998) (citing *Crawford v. Gould*, 56 F.3d 1162, 1166 (9th Cir. 1995)).

⁴⁴ Social Security: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a) (emphasis added); Veterans benefits: "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 301(a)(1); Railroad Retirement benefits: "Except as provided in subsection (b) of this section and the Internal Revenue Code of 1986 [26 U.S.C.A. § 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. § 231m; Federal Retirement program benefits: "An amount payable under subchapter II, IV, or V of this chapter is not assignable, either in law or equity, except under the provisions of section 8465 or 8467, or subject to execution, levy, attachment, garnishment or other legal process, except as otherwise may be provided by Federal laws." 5 U.S.C. § 8470.

⁴⁵ The Supreme Court's decision in *Washington State Dep't of Health & Human Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) is irrelevant to the issue of whether a bank can access the protected funds to repay debts owed to a bank. The Court upheld the State of Washington's self-reimbursement for the

Treasury has the authority under these statutes as well as the mandate under EFT-99 to protect benefits from seizure by its expensive forms of credit foisted on recipients.

Treasury Must Specifically Require that Bank Accounts Are Safe for Recipients

As Treasury is in the process of pushing more recipients into bank accounts and prepaid cards, Treasury has the obligation to protect recipients from predatory account-based credit.

At a minimum, Treasury should prohibit financial institutions from using set-off to collect payment for overdrafts and overdraft fees and for payment of bank account advances from exempt funds. Setoff by a bank against funds held on deposit for an extension of credit is exactly analogous to the seizure of funds by a creditor.

Just as Treasury has recognized in designing the terms of the Direct Express Card, and as the FDIC is promoting with its Model Safe Accounts Template,⁴⁶ the ways to make accounts safe for exempt funds are not complicated. To us, the critical features of safe accounts include:

- seizure of the funds to repay loans and high cost fees and interest should be prohibited;
- fees charged on the account should be limited to those that are reasonable:
 1. If the account is a prepaid card, the fees should be limited to those allowed by the Direct Express Card;
 2. If the account is an ordinary checking account, fees for any form of credit – including overdraft extensions – should be prohibited if the credit has an APR exceeding 36% or is made without an evaluation of the borrower’s ability to repay
- recipients should have multiple points of access to their money: either through a bank teller window in their neighborhood or fee-less electronic withdrawals;
- bill payment options should be provided; and
- there should be protections against loss (FDIC insurance) and unauthorized withdrawals (Reg. E if the product is a card, state Uniform Commercial Code rules if the method is a bank account).

maintenance of foster children in its care from the foster children’s Social Security benefits. The State was accessing the benefits lawfully by serving as the children’s representative payee, and the Court recognized the State’s right to fill this important role for its foster children. By contrast, the practice with which we are concerned involves banks taking exempt funds – *without* the explicit legal approval for doing so that exists for representative payees – for the banks’ sole benefit, to the clear detriment of recipients.

⁴⁶ FDIC, Model Safe Accounts Template (Aug. 10, 2010), *available at* www.fdic.gov/news/news/press/2010/pr10183.html. The FDIC Template is based on an electronic deposit account designed to meet the needs of underserved consumers, a description that fits the four million unbanked federal benefit recipients who will be most impacted by the proposal to end paper checks. 75 Fed. Reg. 34394, 34401 (June 17, 2010) (providing the four million figure). It calls for transaction accounts to be card-based with free direct deposit, online and mobile banking/bill pay, free electronic statements with consumer consent, a low opening balance, and \$1 minimum monthly balance. The monthly maintenance fee is limited to \$3 with consumers getting two free money orders or e-checks per month for bill paying. Most importantly, overdraft and insufficient funds fees are prohibited. Currently, the FDIC’s pilot only applies to state-chartered non-member banks. With Treasury’s support, all financial institutions could be encouraged to offer such accounts.

Treasury should issue a set of guidelines which establish the criteria for such a “safe account.” All bank accounts accepting direct deposits of federal funds must be required to comply with the safe account guidelines.

We are not proposing that banks be prohibited from debiting normal, reasonable fees against exempt funds. Nor are we saying that normal credit and debit procedures employed by banks to balance their accounts should be inapplicable to accounts in which exempt funds are deposited. However, banks should not be allowed to clothe predatory extensions of credit in the guise of transaction fees such as overdraft fees. Treasury should adopt a rule that clearly distinguishes reasonable account maintenance fees from the fees on which predatory lending is based.

Enforcement is Essential

The protections that Treasury adopts for the direct deposit of funds to accounts other than individually owned accounts at financial institutions are no better than the paper they are written on if they are not enforceable.

First, the rules themselves must specify that no institution (bank or nonbank) may accept direct deposit of federal benefits to an account that does not meet the requirements set forth in the rules. That is, the rules should not only be requirements for Treasury, limiting where it can send funds, but also requirements for the financial institution that receives the funds.

Second, any bank that accepts direct deposit of federal benefits to an account or a prepaid card should be required to sign an agreement, on its own behalf and on behalf of any partner that issues the prepaid card, with the Treasury Department that certifies that the account meets the requirements of the rules. That agreement should provide that federal benefit recipients are third party beneficiaries of the agreement and may enforce it. Treasury could maintain a list of institutions that have signed such agreements and could identify the institutions whose accounts and prepaid cards are eligible for direct deposit and those that are not. (The institution to which the funds are being deposited is readily identifiable through the routing number of the prepaid card number)

Third, the rules should provide that any agreement with a consumer in connection with an account that improperly accepts direct deposit of federal benefits in violation of the rules is void and unenforceable against the consumer. The consumer could thus take direct action to avoid any improper fees. This last protection is essential because only the consumer is going to know if the rules are violated, and the consumer is in the best position to protect him or herself.

These provisions would be simple for Treasury to administer, requiring no more than a standard form agreement and simple revisions to the proposed rules. Treasury would merely have to (1) identify whether the account is a prepaid card account or a checking or savings account, and (2) ensure that the bank to which the funds are ultimately being deposited is one that has signed an agreement pledging to ensure that public benefit recipients could take steps to protect themselves. Treasury could easily revise its direct deposit forms – as it will need to in any event – to ask the person filling out the form to identify which type of account it is (i.e., checking, savings, prepaid).

III. Critical Features of the Direct Express Card Must Be Improved.

If the Direct Express Card is to become the default method of paying federal benefits, then critical elements of the card must be changed. As the card is currently offered as an option, the obligations of the parties – the recipient and Comerica – are set out in an agreement (“Terms of Use”).⁴⁷ This is inappropriate. Recipients cannot be construed to have agreed to use the card when it is foisted upon them because they have not provided a bank account number for direct deposit.

The Direct Express Card features can be tailored to make it more accessible and easy-to-use for low income, home-bound, and unsophisticated recipients. The extent to which these improvements are made will reduce the pressure of opposition to the mandated use of the Direct Express Card for all of those without bank accounts.

Contract Must be Changed to a Notice of Rights and Obligations

At present, the rules of the Direct Express Card are set by a contract between Comerica and the federal benefit recipients. The terms of this contract were negotiated between Treasury and Comerica. Some of those terms are inappropriate, particularly if Treasury is planning to move recipients to the Direct Express Card without their explicit consent.

The current terms of the contract between Comerica and federal recipients are inappropriate for a required government payment method of guaranteed funds. What happens if the recipient does not sign the contract? Would this mean they don’t receive their benefits via the card? That would result in a whole new basis for a waiver from the requirement of direct deposit, one which is not even authorized in the law.

Instead of the contract, each benefit recipient using the Direct Express card should be given a *Notice of Rights and Obligations*. The recipient’s obligations would be those that are currently required of a consumer under Regulation E in order to receive the protections against unauthorized use, the right to stop preauthorized transfers, and the means to resolve a dispute. The obligations of the recipient which trigger these protections must be clearly differentiated from any inference that a recipient’s failure to comply with these obligations would affect their right to *receive* ongoing payment of the federal benefit.

Some examples of the terms of the contract which will need to be changed when the contract is transformed to a notice of rights and obligations:

- There can be no waiver of the right to a jury trial or the right to bring class actions.
- Disputes regarding the rights of the recipients with regard to the card should not be interpreted based on the laws of Michigan (except if the recipient is a resident of Michigan) and venue should be considered proper in any federal district court.

⁴⁷ Terms of Use for Your Direct Express Debit MasterCard Card, *available at* http://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010).

- There cannot be a requirement that the recipient contact the merchant prior to cancelling a preauthorized transfer, as there is no such requirement in the Electronic Funds Transfer Act or in Regulation E.

Additionally, although the features of the card are generally quite good, there are necessary improvements in a few areas, discussed in the sub-sections below.

Provide Additional Cards Which Can Be Loaded with Discrete Amounts

One of the most important differences between cash and a card is the ability of the recipient to peel off a small amount of the funds. For example, a physically disabled grandmother may want to send her 14 year old grandson to pick up some milk and bread at the grocery store, but not want to provide her entire net worth (on the card) to him to pay for it. (This is especially important because the impermissible use by the grandson to treat his friends to a free day at the video parlor would not be considered an unauthorized use under Regulation E, and so the grandmother's loss would not be covered.)

Instead, the grandmother should have the option of loading an additional card with a discrete amount of funds, either through the internet or by telephone. The additional card, which should be required to have a different PIN than the primary card, would then be an optimal way for the recipient to accomplish errands.

Provide at Least One Annual Paper Statement For Those Who Do Not Elect Electronic or Monthly Statements and Encourage Opt In to Transaction Information

The Direct Express Card does not automatically provide any transaction information to cardholders. They may choose to opt in to one of the following:

- Monthly statements for 75 cents/month.
- Email, cell phone text message, or telephone alerts for deposits or low balances.
- Ad hoc statements provided upon request.
- Accessing transaction information online over the internet.

For the unbanked poor, disabled and/or elderly population that receive Social Security or SSI funds through the Direct Express Card, who are less likely to be internet or technology savvy, this means that many recipients may never see transaction information. We understand that few recipients opt for the monthly statements, and we suspect that the same is true for the alerts, ad hoc statements, and online electronic access. More should be done to ensure that recipients sign up for some form of transaction information. Viewing and having a record of transaction information is important to enable recipients to watch for unauthorized transactions and errors, to know and be able to avoid the fees they are being charged, to monitor their budgets, and to have a record for tax filing and other purposes.

First, in addition to deposit and low balance alerts, recipients should also be able to choose to receive, for free, a cell phone text message, telephone alert, or email message describing each

transaction. Such transaction alerts are commonly available on many prepaid cards and provide consumers with real-time information about charges and fees against their accounts.

Second, at the time of enrollment, applicants should have to fill in form like the following:

- I wish to receive monthly statements for 75¢ per month.
- I wish to receive notice each month when my statements are available electronically at the following email address: _____
- Every time money is deposited on my card, I wish to receive:
___ a phone call at _____
___ an email at _____
___ a text message to the following cell phone _____
- Whenever the balance on my card goes below _____, I wish to receive:
___ a phone call at _____
___ an email at _____
___ a text message to the following cell phone _____
- Whenever there is a purchase or other charge against my account, I wish to receive information about it :
___ by text message to this cell phone: _____
___ by email to this address: _____
- I do not want to enroll in any of these options at this time.

Third, for any recipient who does not enroll in monthly statements and who has not accessed his or her account electronically at least once in the previous year, an annual statement of all transactions should be mailed once a year, along with information about opting in to one of the options above.

Fourth, when accessing the account online, recipients should be able to print an annual statement of all transactions in the last calendar year in addition to monthly statements.

Clarify That the Time to Dispute a Charge Does Not Begin Running Until Information Revealing the Charge Has Been Provided to the Recipient

Section 205.15 of Regulation E governs electronic fund transfers of government benefits. Section 205.15(d)(3) provides:

For purposes of § 205.6(b)(3) [Liability of Consumers for Unauthorized Transfers], regarding a 60-day period for reporting any unauthorized transfer that appears on a periodic statement, the 60-day period shall begin with the transmittal of a written account history or other account information provided to the consumer under paragraph (c) of this section.⁴⁸

⁴⁸ 12 C.F.R. § 205.15(d)(3).

Consistent with the provision, the Terms of Use for the Direct Express Card state: “Also, if the written Transaction history or other Card Transaction information provided to you shows transfers that you did not make, tell us at once.”⁴⁹ However, the Terms go on to say: “If you do not tell us within 90 days⁵⁰ after such information is made available to you, you may not get back any money you lost after the 90 days if we can prove that we could have stopped someone from taking the money if you had told us in time.”⁵¹

We do not know how Comerica is interpreting this provision. However, the bank could be taking the position that a recipient is liable for loss even if the recipient never saw the unauthorized transactions, nothing was provided to her, and she is completely unaware of the problem, as long as the information was “made available” online (regardless, for example, of the recipient’s ability to access the internet).

The Terms of Use (which should be reconstituted as a *Notice of Rights and Obligations*), and the contract between Comerica and Treasury, should be clarified to state that the 90-day period begins running “with the transmittal of a written account history or other account information provided to and accessed by the consumer that reflects the unauthorized transfer.”

This revision would be consistent with the provision in the Terms of Use governing billing errors. There, the Terms say: “We must hear from you no later than 90 days after your [sic.] learn of the error.”⁵² In other words, the time does not begin running until some information about the error has actually been communicated to the consumer; the mere fact that the information is available online is not enough.

Comerica has chosen to forgo the expense of mailing statements to all recipients, as would be required if the Direct Express Card were a bank account, and is charging recipients to sign up for statements. Though the fee is low, the need to take affirmative action to sign up and even a modest fee will discourage most recipients from doing so, even if they cannot or realistically are unlikely to monitor their accounts online. If the Direct Express Card is to be treated as a bank account substitute, then it must come closer to the information requirements for bank accounts.

Finally, the Terms (reconstituted as a *Notice of Rights and Obligations*) should be amended to extend the time period for which ad hoc statements are available on request from the current 60 days to seven years. Tax returns can be audited for seven years, disputes over problems with benefits payments can go on for years, and recipients who are not receiving statements that they can keep may need to review years’ worth of their account. Even apart from tax returns and

⁴⁹ Terms of Use for Your Direct Express Debit MasterCard Card, Sec. VIII.1, *available at* http://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010) (emphasis added).

⁵⁰ Comerica has agreed to extend the 60 days to 90 days.

⁵¹ Terms of Use for Your Direct Express Debit MasterCard Card, Sec. VIII.1, *available at* http://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010) (emphasis added).

⁵² Terms of Use for Your Direct Express Debit MasterCard Card, Sec. IX.1, *available at* http://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010) (emphasis added).

benefits disputes, the 60 day period is completely inadequate. Problems with merchants or bills often go back several months and may not be detected immediately. Seniors or individuals with disabilities who have trouble accessing information themselves may have family members who realize belatedly that there is a problem and need to review a year or more worth of statements. The 60 day limit is especially short given the 90 day period to dispute a charge. But much more than that is needed. Electronic information is easy to store and statements or other transaction information should be available on request for seven years.

Provide Access to Checks

If the Direct Express Card is to be treated as a bank account substitute, it must have the full functionality of a bank account. For bills or vendors who do not take MasterCard, the online bill payment feature is helpful. However, it requires the recipient to have internet access and the capability of negotiating the online bill payment function. Moreover, bill payment does not work for merchants, farmers markets, service providers or others who need to be paid in person.

The card should be improved by adding the ability to write checks. Check writing capability will also help seniors and others who are homebound and depend on others to buy groceries, medicine and other items. The senior may not be comfortable handing over the entire Direct Express Card or revealing the PIN to someone assisting with errands and should have the ability to hand over a check instead for a discrete amount. Cash may not work for the same reason: the senior is dependent on someone else to take the card to an ATM to withdraw the cash.

A growing number of payroll cards and other prepaid cards come with check writing capability. The consumer is provided with unfunded checks, which cannot be negotiated until the consumer calls to activate this capability. After the consumer identifies the amount of the check, the card issuer sets aside that amount from the account, provides an activation number to be written on the check, and the check then effectively becomes a guaranteed cashier's check. Adding this capability to the Direct Express Card would make the card a more fully usable account.

Prohibit Garnishment of Funds on the Card

Currently the Terms of Use appear to indicate that garnishments may be permitted against funds on the card.⁵³ There is no reason that Treasury's garnishment rule applicable to bank accounts should not also be fully applicable to the funds held on the Direct Express Card.

Permit Other Funds to Be Loaded Onto the Card

⁵³“6. **Legal process.** We may comply with any subpoena, levy or other legal process which we believe in good faith is valid. Unless the law prohibits us, we may notify you of such process by telephone, electronically or in writing. If we are not fully reimbursed for our record search, photocopying and handling costs by the party that served the process, we may charge those costs to your Card Account. We may honor legal process that is served in any manner at any of our offices, including locations other than where the funds or records sought are held, even if the law requires personal delivery at a different location.” Terms of Use for Your Direct Express Debit MasterCard Card, Sec. XIV.6, available at http://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010).

Currently, holders of Direct Express Cards cannot add other funds to the card. We understand that the initial motivation behind the limitation was concerns about weakening the protections from garnishment if exempt and nonexempt funds were comingled. However, if the garnishment rule issued by Treasury is made applicable to prepaid cards by Treasury, there should be no impediment to opening up the Direct Express Card to other funds.

Many recipients have pensions, state or insurance disability payments, or other sources of regular income that could be easily direct deposited onto the card. The ability to do so would enable recipients to use the Direct Express Card more like a regular bank account that holds all of the person's regular income and does not require juggling between how much is in each account or create problems if neither account alone has enough to pay a bill or purchase.

Comerica would also benefit from the ability to add more funds to the card as this would increase the opportunity for interchange fees, more bill payment fees, and revenue from other uses of the card.⁵⁴

In addition to the ability to directly deposit other sources of regular income, recipients should also be able to add funds as they can to other prepaid cards through Green Dot or other payment processors. The Direct Express Card uses the Allpoint network, which includes many retailers who already handle the loading of funds onto prepaid cards. It would be a simple, mutually beneficial matter to add that capability to the Direct Express Card.

Disclosures

Though the information on the Direct Express Card is generally quite good, it could be improved. In a particular, recipients should be given a sturdy wallet-sized card that lists all of the fees on one side and all of the ways that the recipient can get cash without paying a fee on the other side (i.e., cash back from a purchase or inside at the teller window). In addition, that information should be provided in a large, conspicuous format (large enough for aging eyes) – separate from all of the other fine print – when the recipient signs up for and again when he or she receives the card, if it is not already. It is essential that recipients be aware of this information initially and that they have handy access to it as they use the card.

A separate sheet that recipients can keep, reminding them of all of the ways that they can receive information and the ability to sign up for statements and alerts, should also be provided in a large, conspicuous format both on application and when the card is delivered.

⁵⁴ The restrictions on interchange fees that Congress recently enacted do not cover prepaid cards.