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March 23, 2015

Submitted electronically

Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street NW.  
Washington, DC 20552.

Re: Comments on Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), Docket No. CFPB-2014-0031, RIN 3170-AA22

Thank you for the opportunity to submit the attached comments on the rules proposed by the Consumer Financial Protection Bureau (CFPB) to protect prepaid cards. These comments are submitted by National Consumer Law Center, on behalf of its low income clients.

We support the CFPB's proposal to extend to prepaid cards the critical protections of Regulation E. We also applaud the CFPB for going farther, not just extending Regulation E but strengthening it. The proposal is a strong one that will enhance consumer confidence in prepaid cards and be a win-win for both consumers and the prepaid industry. However, we urge the CFPB to tighten the rules to prevent evasions and to ensure that consumers are fully protected.

A summary of our comments is provided on pages 1-4, with more details in the pages that follow.

Thank you once again.

Sincerely,

A handwritten signature in black ink, appearing to read "Lauren K. Saunders", with a long horizontal flourish extending to the right.

Lauren K. Saunders  
Associate Director



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**Comments of**

**National Consumer Law Center  
(on behalf of its low income clients)**

**to**

**Consumer Financial Protection Bureau**

**Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E)  
and the Truth in Lending Act (Regulation Z)**

**Docket No. CFPB-2014-0031  
RIN 3170-AA22**

**Submitted March 23, 2015**

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## I. Introduction and Executive Summary

Thank you for the opportunity to comment on the rules proposed by the Consumer Financial Protection Bureau (CFPB) to protect prepaid cards. These comments are submitted by National Consumer Law Center® (NCLC®), on behalf of its low income clients.<sup>1</sup>

The prepaid card market has shown explosive growth over the past several years and is projected to continue growing. Prepaid accounts have filled an important niche in the payment system. They provide access to electronic payments for unbanked and underbanked individuals who have had trouble with overdraft fees and credit products. For other consumers, prepaid cards are a safe way to control spending and make internet purchases. Employers, government agencies and others use prepaid cards to deliver recurring payments in a fast, safe and efficient manner.

Yet gaps in older consumer protection laws written before prepaid cards were developed have left many cards without clear and enforceable protections. Consumers have uncertainty about the safety prepaid cards. Others assume erroneously that the cards carry the same protections that bank account debit cards do.

We support the CFPB's proposal to extend to prepaid cards the critical protections of Regulation E. We also applaud the CFPB for going farther, not just extending Regulation E but strengthening it. The proposal is a strong one that will enhance consumer confidence in prepaid cards and be a win-win for both consumers and the prepaid industry.

Adherence to the following principles will create a safer, fairer and stronger prepaid card market. In each of these areas, the proposed rules advance consumer protections. We also have suggestions in each area for further refinements to close loopholes, bolster safety, and enhance consumer choice.

**The proposed rules help to keep credit separate, honest and affordable. But loopholes remain and prepaid cards should be prepaid, without overdraft fees.** Prepaid cards must remain true to their essential nature so that they will be safe for the millions of sometimes vulnerable consumers who use the cards, as well as for others who turn to prepaid cards as a way to control spending and make payments safely.

The proposal generally helps to separate credit accounts from prepaid cards. We support the proposal to require credit accessed through prepaid cards to comply with credit card laws, including rules that ensure ability to pay, limit first year fees, give consumers control over how and when to repay, and require penalty fees to be reasonable. However, we urge the CFPB to:

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<sup>1</sup> Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications, including Consumer Banking and Payments Law; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. These comments were written by Lauren Saunders Lauren Saunders, Chi Chi Wu, and Carolyn Carter with assistance from Martin Menezes.

- Apply credit card laws to any credit line that is likely to use a prepaid card as an access device, not just one linked to a particular card specified by the creditor;
- Limit “fee harvester” fees beyond the first year and limit pre-account opening fees;
- Prevent overdraft features and ensure that consumers affirmatively choose when to use credit;
- Extend the waiting period before a credit feature can be added to a prepaid card to 90 days instead of 30;
- Ban all declined transaction fees;
- Apply Regulation Z to health account, “gift,” or other cards that are exempt from Regulation E if they have credit features.

**Prepaid accounts must carry deposit insurance and protection from insolvency; disclosure is not enough.** The CFPB proposes to warn consumers about the lack of deposit insurance. But safety is not a matter of disclosure. FDIC insurance not only protects consumers from bank failure, but also ensures that funds are set up in custodial accounts in a depository institution where they are protected from the prepaid company’s creditors and examined by bank regulators for compliance with consumer protection rules. Any account that can hold more than \$500 or accept direct deposits of wages, benefits or other essential income is a deposit account and a bank account substitute, which should be required to carry deposit insurance.

**The rules need to do more to prevent consumers from being coerced into using payroll, government benefit, campus, prison release, tax refund or other types of prepaid cards.** The CFPB has proposed disclosures to inform employees and government benefits recipients that they cannot be required to accept funds on a prepaid card. We support the disclosure, but more is needed. The ban on compulsory use should be extended to protect students, released prisoners, and recipients of tax refunds, government payments and insurance payments. More specific rules are needed to:

- Give consumers the up-front choice of whether to use a prepaid card and information on how to disenroll from a card they do not want;
- Ensure that they have the choice of direct deposit to their own account;
- Limit fees on unsolicited access devices for prepaid accounts and campus bank accounts.

**The rules promote free and convenient access to balances, customer service and account transactions, but could do more.** We support the clarification that consumers are entitled to free access to balances and transactions by telephone and online, and to receive free paper statements upon request. We also appreciate the proposal to give consumers access to account information beyond 60 days. In addition, we urge rules to make clear:

- ATM balance inquiries should be free.
- Consumers should not be charged for automated customer service for any purpose, or for reasonable access to live customer service.
- Account histories should be available online back 24 months and by request for the previous seven years.
- Consumers who want regular paper statements or an annual transaction history should have that option.
- Text messages for balance information and transactions should be available and free.
- Live foreign language support for customer service calls should be available in any languages that the institution uses in connection with the marketing of or acquisition of a card.

**The proposed clear, uniform fee charts will promote understanding and comparison shopping.** We support the proposed short- and long-form disclosures and the overall design of the two forms. The proposal strikes a good balance between enough information and not too much. However, the short form should:

- Provide better access to all fees at retail, through a flap that opens and a QR code or SMS short code;
- Omit the “overdraft/credit” disclosure for cards that lack those features. If overdrafts are permitted, use the word “overdraft” for cards that do, and distinguish cards that can overdraft from those that offer credit but no overdrafts.
- List overdraft fees, if permitted, at the full amount after any first year promotion.
- List incidence-based fees based on revenue, not occurrences;
- Omit the cash load fee from the top line and enable fair and complete comparisons between loading costs on different cards;
- Use a symbol to show lack of FDIC insurance. Offer the option of a symbol for bill pay and check deposit features;
- List the number of network ATMs;
- Have a single number with the average monthly cost;
- For settings where bigger font is possible, such as on websites, require bigger font than the small font proposed for retail packages.

The long form for all cards should have sections disclosing:

- whether the card carries overdraft fees or other credit features;
- funds availability policies;
- availability of bill payment and cost for check or electronic payments;
- availability of remote deposit capture;
- Foreign language disclosures for cards marketed in another language.

The CFPB should also prohibit incomplete or misleading fee information on websites and promotional materials.

**Prepaid cards will finally have clear liability protection, dispute rights and access to error resolution procedures. Improvements would make those rules even more clear.** In general, we support the proposal to extend the payroll card liability and error resolution regime to prepaid cards. We also support full protection for cards once they are registered. However, the current regime is too confusing and needs to be simplified, clarified and harmonized with network rules and credit card rules:

- Lost or stolen cards should be subject to a \$50 liability cap even if reported after two days.
- The deadline to dispute errors should be a simple 120 days. The current deadlines are unclear and result in a hidden 120 day policy that consumers do not know about.
- Financial institutions should be required to investigate untimely disputes (but need not provide provisional credit). A refusal to investigate an unauthorized charge would violate the rules that limit consumer liability.
- Fees for “research” needed to investigate an error should be prohibited.
- An annual written error resolution notice should still be sent for consumers who have not received an electronic or written statement in the prior year. It should include information on how to access account information and to obtain an annual account history.
- Registered, general purpose gift cards should carry protection from loss or theft.

**The scope of the proposed rule is appropriately broad but it needs to encompass more types of prepaid cards.** The rules appropriately cover a wide range of prepaid cards, including payroll, student and public benefit cards. The broad definition of “prepaid account” is important to keep the protections relevant as technology evolves, including into online, mobile and virtual currency accounts. We also support the proposal to prevent evasions by general-use reloadable cards that are marketed or labeled as gift cards. We urge the CFPB to extend the protections of Regulation E and the prepaid card rules to:

- Prepaid cards used for needs-tested benefits, unless on an EBT card platform;
- Health and flexible spending cards;
- Nonbank “bank accounts” like campus card accounts;
- Unsolicited access devices, even if the underlying account is presently covered by Regulation E.

**Posting of fee schedules and account agreements on the CFPB’s and issuers’ websites will improve transparency and enhance competition.** We support the proposal to require all prepaid cards, including payroll, government benefit and student cards, to post their fee schedules and agreements.

- Agreements should be searchable by the name of the school, employer, program manager and entity that brands a card, in addition to by the name of the bank issuer.
- Fee schedules should be searchable separately from terms and conditions.
- Text should be machine readable.

**The CFPB should prohibit forced arbitration and class action bans in prepaid card agreements.** The CFPB cannot police compliance with every rule by every provider. Wrongdoers who violate the proposed rules or other laws should be accountable in court. Forced arbitration clauses are corporate get-out-of-jail free cards.

## **II. Prepaid Cards Should be Separate from Credit Products, Which Should be Honest and Affordable**

### **A. Overdraft and other credit features are inappropriate on prepaid cards.**

The prepaid card market developed in response to the problems that overdraft fees and trouble managing credit pose for consumers. Those drivers continue to be at the heart of what a prepaid card is, how they are marketed, and why consumers turn to them.<sup>2</sup>

Overdraft fees should not be permitted on any ATM or debit card transactions, whether through a prepaid card or a bank account debit card. Overdraft protection should go back to its roots: an occasional courtesy to cover a bounced check. Overdraft services on ATM and debit card transactions are merely a crude and abusive form of credit. The failed opt-in regime under Regulation E has merely led banks to engage in deceptive practices to induce consumers into opting in. Back-end pricing through penalty fees that fall on the most vulnerable has replaced honest, up-front prices and competition.

But the CFPB does not need to decide how to treat overdraft fees on bank accounts. While overdraft practices are entrenched in the bank account world, the CFPB starts with a clean slate on prepaid cards,

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<sup>2</sup> For a longer discussion of the reasons for keeping overdraft fees and credit features off of prepaid cards and the data and studies that support those reasons, see Comments of NCLC et al., General Use Reloadable Prepaid Cards at 10-38 (July 24, 2012), <http://www.nclc.org/images/pdf/rulemaking/cm-prepaid-card-july2012.pdf> (hereinafter “NCLC 2012 Prepaid Card Comments”).

where overdraft fees are rare. The CFPB does not need to repeat the mistakes that regulators made years ago when they spotted the potential for overdraft fee abuses but did little to prevent them. In this rulemaking, the CFPB can set aside the broader debate and determine that the differentiating features of prepaid cards make overdraft and credit features undeniably inappropriate on those cards:

- The defining feature of prepaid cards is that they are prepaid and do not overdraft (whether the term “prepaid” is used or not). Consumers do not expect to be able to overdraft on a prepaid card. That is the core difference between prepaid cards and bank accounts. Marketing messages throughout the industry promote that differentiator, which is how consumers understand prepaid cards.
- Prepaid cards do not have checks (nor, usually, ACH payments<sup>3</sup>) that could be returned for insufficient funds or “bounce.” Those checks are the historic rationale for overdraft protection and are still a key reason that some consumers choose overdraft protection for bank accounts.
- Prepaid cardholders are vulnerable consumers with lower incomes and lower credit scores than the typical bank account customer.<sup>4</sup> The financial crisis, combined with the rise in bank fees, has led to an increase in consumers who cannot meet bank minimum balance requirements and are unprofitable and undesirable customers for banks.<sup>5</sup>
- Prepaid card balances are extremely low. The average daily balance of NetSpend cardholders is only \$80.<sup>6</sup>

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<sup>3</sup> Many prepaid cards do not permit incoming ACH debits. Cards that have bill payment features that use the ACH system typically segregate the funds immediately and do not permit the consumer to schedule a payment in advance without the funds to cover it. This issue is discussed at greater length in Section II.C, below.

<sup>4</sup> Prepaid card users who use the cards at least monthly have lower incomes than the general population, although 14 percent earn \$75,000 or more annually. They are more likely to earn less than \$25,000. Pew Charitable Trusts, “Why Americans Use Prepaid Cards” at 3-4 (Feb. 2014), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2014/Prepaid-Cards-Survey-Report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2014/Prepaid-Cards-Survey-Report.pdf). The vast majority of new Chase Liquid customers had no bureau score or a score below 660 when they opened their Chase Liquid accounts. Presentation by Jon Wilk, Chase, to FDIC Committee on Economic Inclusion, [http://www.fdic.gov/about/comein/2013/2013-05-16\\_presentation\\_wilk.pdf](http://www.fdic.gov/about/comein/2013/2013-05-16_presentation_wilk.pdf) (hereinafter “Liquid ComE-In Presentation.”)

<sup>5</sup> “The LMI market has continued to grow during the recent difficult economic climate, which appears to persist....[A] small, gradual slide in FICO scores has occurred, especially in the FICO score range 550 to 599. The drop in credit scores indicates that an increasingly large number of banked customers are credit impaired. Consequently, a larger percentage of consumers have a lower average daily balance than in the past. This trend has two ramifications: (1) more account holders are having difficulty maintaining an average daily balance sufficient to manage a traditional checking account, and (2) banks have a greater number of accounts that are not profitable or marginally profitable.” Mercator Advisory Group, “Opportunities in Prepaid: Advice for the Financial Institution’s Business Plan” (Oct. 2012), [http://www.accelnetwork.com/accelnetwork.com/documents/Prepaid\\_Opportunities\\_-\\_Mercator\\_Whitepaper\\_for\\_Fiserv-FINAL\\_10-17-2012.pdf](http://www.accelnetwork.com/accelnetwork.com/documents/Prepaid_Opportunities_-_Mercator_Whitepaper_for_Fiserv-FINAL_10-17-2012.pdf).

<sup>6</sup> Testimony of Daniel R. Henry, Chief Executive Officer, NetSpend Holdings, Inc., “Examining Issues in the Prepaid Card Market,” Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, Subcomm. on Fin’l Inst’ns and Consumer Protection (Mar. 14, 2012), S. Hrg. 112-560 at 13, (“NetSpend Senate Testimony”), <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76233/pdf/CHRG-112shrg76233.pdf>.

- Many consumers turn to prepaid cards because they cannot get bank accounts,<sup>7</sup> usually due to a history of overdrafts.<sup>8</sup>
- Prepaid cards are promoted as “no credit check necessary.”
- Prepaid cards are promoted for the ability to “control” spending, even when marketed for consumers without credit blemishes (i.e., for teens, as a budgeting tool).

While general purpose reloadable (GPR) prepaid cards and deposit accounts are similar in many respects, they are not identical. The prepaid card industry expects to be treated differently from bank accounts by, for example, receiving an exemption from the written statement requirement. That exemption may be appropriate given the low balances and thin margins on which prepaid cards operate. Those same low balances and other differences between prepaid cards and bank accounts, and between the typical profile of a prepaid card user and a bank account customer, make overdraft fees and credit features inappropriate.

## **B. Few prepaid cards have overdraft fees, but payday lender and some payroll cards do.**

The vast majority of prepaid cards are true to their name, purpose and customers. The CFPB’s market survey shows that 97% of prepaid cards have no overdraft or credit features.<sup>9</sup> The only major provider of prepaid cards with overdraft fees is NetSpend. Of the 66 cards surveyed in a report by Pew Charitable Trusts, only five had overdraft fees.<sup>10</sup> Four are NetSpend cards and the fifth is no longer on the market.

Most of the prepaid cards that have overdraft fees are sold at payday loan stores and follow the NetSpend overdraft fee model.<sup>11</sup> For consumers of NetSpend GPR cards who opt in to overdraft “protection,” overdraft fees are \$15, with a maximum of three overdraft fees per month and a maximum negative balance of \$100, including the fees. NetSpend manages GPR cards under its own

<sup>7</sup> The CEO of NetSpend testified that “The Bretton Woods study also reminds us that many of the consumers we try to serve no longer have access to checking accounts because they are among the 19 percent of U.S. adults who cannot qualify for an account because they are in the ChexSystems or TeleCheck’s database.” NetSpend Senate Testimony at 35. As of March 2013, 55% of Chase Liquid cardholders were not eligible to open a Chase bank account. Liquid Come-In Presentation, *supra*.

<sup>8</sup> The CFPB itself has noted “The great majority of involuntary account closures at the study banks are due to negative balances that accountholders are unable or perhaps unwilling to repay, and many of these closures are associated with the use of overdraft.” Consumer Financial Protection Bureau, CFPB Study of Overdraft Programs: A white paper of initial data findings (June 2013) at 25, [http://files.consumerfinance.gov/f/201306\\_cfpb\\_whitepaper\\_overdraft-practices.pdf](http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf). A survey by the Pew Charitable Trusts also found: “About one-third of respondents closed their checking account due to overdraft fees.” Pew Charitable Trust, “Overdraft America: Confusion and Concerns about Bank Practices,” [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Fact\\_Sheets/Safe\\_Checking/Overdraft\\_America\\_Final.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Fact_Sheets/Safe_Checking/Overdraft_America_Final.pdf).

<sup>9</sup> CFPB, “Study of prepaid account agreements” at 25 (“CFPB prepaid survey”) (Nov. 2014), [http://files.consumerfinance.gov/f/201411\\_cfpb\\_study-of-prepaid-account-agreements.pdf](http://files.consumerfinance.gov/f/201411_cfpb_study-of-prepaid-account-agreements.pdf).

<sup>10</sup> Pew Charitable Trusts, “Consumers Continue to Load Up on Prepaid Cards” at 9 (Feb. 2014) (“Pew 2014 Prepaid Card Report”), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2014/PrepaidCardsStillLoadedReportpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2014/PrepaidCardsStillLoadedReportpdf.pdf).

<sup>11</sup> Payday lender prepaid cards are discussed in Section II.C.

brand and also under the Purpose Card<sup>12</sup> and Brinks Card<sup>13</sup> brands. Insight Card Services,<sup>14</sup> which primarily sells its cards at payday lending stores, also follows the NetSpend overdraft fee model.

Another prepaid card, the Metro PCS prepaid card, followed a different overdraft fee model,<sup>15</sup> but appears to be off the market. Consumers are charged a one-time \$5.95 participation fee. When they overdraft, they receive an overdraft advance of \$50 with a \$15 overdraft fee applied. If the consumer does not pay the total overdraft amount, including fees, within 20 days, there is a late charge of \$3 per day.

The CFPB's prepaid card study found that not a single one of the 25 payroll card programs surveyed offered overdraft services.<sup>16</sup> But we are aware of several payroll card programs that have opt-in overdraft fees.

NetSpend payroll cards, offered through its Skylight brand, have an overdraft program that is significantly worse than the GPR program.<sup>17</sup> The fees are \$25 for every transaction once the \$5.00 buffer is exceeded. The cap on fees is five per month, not three. Consumers are not "cooled off" until they have incurred \$450 in overdraft fees. It is possible that, on some programs, overdraft fees may even be charged if the consumer has not opted in.<sup>18</sup> The Skylight card overdraft program is discussed at greater length in Section II.E.

Another payroll card, the ReadyFUND\$ Payroll Card issued by First Covenant Bank, charges \$35 overdraft fees, up to two per month and up to 12 per year.<sup>19</sup> The website for the card prominently pushes the overdraft "privilege."<sup>20</sup> The card appears to be heavily used by employers in the home health care business and also some McDonalds' franchises – locations where workers likely receive the minimum wage and may not have full time jobs.<sup>21</sup>

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<sup>12</sup> See <http://www.gowithpurpose.com>; <https://www.gowithpurpose.com/plans-and-fees>, attached as Exhibit 3.

<sup>13</sup> See [https://www.brinksprepaidmastercard.com/how\\_it\\_works.html#what-it-costs](https://www.brinksprepaidmastercard.com/how_it_works.html#what-it-costs), attached as Exhibit 10.

<sup>14</sup> See [http://www.insightcards.com/images/uploads/REP\\_ODP\\_Notice\\_Final\\_2.13.pdf](http://www.insightcards.com/images/uploads/REP_ODP_Notice_Final_2.13.pdf), attached as Exhibit 6.

<sup>15</sup> See [http://www.metropscscards.com/terms\\_direct.html](http://www.metropscscards.com/terms_direct.html), attached as Exhibit 11.

<sup>16</sup> CFPB Prepaid Survey, *supra*, at 25.

<sup>17</sup> See Exhibits 12, 13 (NetSpend overdraft program fact sheets).

<sup>18</sup> See, e.g., [http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight\\_fees.pdf](http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight_fees.pdf), attached as Exhibit 16. Regulation E does not require opt-in before charging overdraft fees on ACH transactions, check transactions, and recurring debit card transactions. The New York Attorney General's report on payroll cards notes that at least two of the eight payroll card vendors it surveyed did not follow the Regulation E opt-in rules. Office of New York State Attorney General Eric T. Schneiderman, "Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers" at 15 (June 12, 2014) ("NY AG Payroll Card Report"), <http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf>.

<sup>19</sup> <http://www.readyfunds.net/assets/PDFs/ReadyFund-ODP-9.5.14.pdf>, attached as Exhibit 17.

<sup>20</sup> <http://www.readyfunds.net/>.

<sup>21</sup> <http://www.readyfunds.net/partners/>.

### C. Payday lender prepaid cards: overdraft and other fees hit consumers coming and going.

NetSpend is the largest prepaid card program manager that offers overdraft “protection” on its prepaid cards. Cards branded or sold by payday lenders appear to be NetSpend’s biggest source of revenue.<sup>22</sup> ACE Cash Express<sup>23</sup> has been NetSpend’s biggest distributor.<sup>24</sup> NetSpend also provides prepaid cards for the country’s largest payday lender,<sup>25</sup> Advance America,<sup>26</sup> and several other major payday lenders: Cash America,<sup>27</sup> Check ‘n Go (CNG Financial),<sup>28</sup> Amscot,<sup>29</sup> Purpose Financial Services (Purpose Money, First American Loans, First American Cash Advance and CheckAdvance)<sup>30</sup> and Check City.<sup>31</sup> All of these NetSpend payday lender prepaid cards except the Amscot and Check City ones appear to have overdraft fees.<sup>32</sup>

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<sup>22</sup> In its last filing to the Securities and Exchange Commission (SEC), before the merger with TSYS, NetSpend disclosed that NetSpend’s largest distributor is ACE Cash Express, and cards distributed through ACE accounted for 36.6% of total revenues in 2012. NetSpend’s “long-term relationships” also include Advance America, Cash America International, and Check City. NetSpend Holdings, Inc., Form 10-K for the fiscal year ended December 31, 2012, SEC File No. 001-34915 at 7 (Feb. 2013) (“NetSpend 2012 Form 10-K”), <http://www.sec.gov/Archives/edgar/data/1496623/000104746913001507/a2212965z10-k.htm>. TSYS’s recent SEC Form 10-K does not discuss NetSpend’s activities in the same detail. But the Form 10-K does say that NetSpend’s distributors are “primarily alternative financial services providers” and “as a number of our NetSpend distributors are engaged in offering payday loans, further legislative and regulatory restrictions that negatively impact their ability to continue their operations could have a corresponding negative impact on our ability to offer GPR cards through their locations, potentially resulting in a significant decline in revenue from the NetSpend business.” Total System Services, Inc. Form 10-K for the fiscal year ended December 31, 2014, SEC File No. 1-10254 at 11, 14 (Feb. 2015) <http://www.sec.gov/Archives/edgar/data/721683/000119312515063177/d835889d10k.htm>.

<sup>23</sup> See <https://aceelite.acecashexpress.com/prepaid-debit-card/pink.m> (click on “Terms and Conditions,” which are attached as Exhibit 1).

<sup>24</sup> NetSpend 2012 Form 10-K, *supra*, at 7.

<sup>25</sup> The largest payday lenders are discussed in Susanna Montezemolo, Center for Responsible Lending, “Payday Lending Abuses and Predatory Practices” at 9-10 (Sept. 2013), <http://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf>.

<sup>26</sup> See <https://www.advanceamerica.net/services/details/visa-prepaid-cards>. The fee schedule is at <https://www.gowithpurpose.com/plans-and-fees> and is attached as Exhibit 3.

<sup>27</sup> See <http://www.cashamerica.com/FinancialServices/PrepaidVisa.aspx>; [https://www.netspend.com/how\\_it\\_works/what\\_it\\_costs.shtml](https://www.netspend.com/how_it_works/what_it_costs.shtml), attached as Exhibit 2.

<sup>28</sup> See <https://www.checkngo.com/pre-paid-debit-card.aspx>; [https://www.netspend.com/how\\_it\\_works/what\\_it\\_costs.shtml](https://www.netspend.com/how_it_works/what_it_costs.shtml), attached as Exhibit 2.

<sup>29</sup> See <http://www.amscotfinancial.com/prepaid-mastercard.aspx>; [http://www.amscotfinancial.com/resources/prepaid\\_mc\\_fees.pdf](http://www.amscotfinancial.com/resources/prepaid_mc_fees.pdf), attached as Exhibit 4.

<sup>30</sup> See <https://www.purposefinancialservices.com/services/details/visa-prepaid-card>; <http://www.gowithpurpose.com/plans-and-fees>, attached as Exhibit 3.

<sup>31</sup> See <http://www.checkcity.com/services/prepaid-debit-cards/>; <https://www.netspend.com/prepaid-debit-card/applyNow.m?AID=checkcity> (click on “Cardholder Agreement,” which is attached as Exhibit 5).

<sup>32</sup> Overdraft fees are on the fee schedules for the NetSpend cards under the NetSpend and Purpose brands. See [https://www.netspend.com/how\\_it\\_works/what\\_it\\_costs.shtml](https://www.netspend.com/how_it_works/what_it_costs.shtml), attached as Exhibit 2; <http://www.gowithpurpose.com/plans-and-fees>, attached as Exhibit 3. Overdraft fees also appear on pages of 16-19 of the terms and conditions for the ACE Cash Express card, [https://www.aceelitecard.com/account/terms/2013\\_ACE\\_Meta\\_Visa\\_CHA.pdf](https://www.aceelitecard.com/account/terms/2013_ACE_Meta_Visa_CHA.pdf), attached as Exhibit 1.

Other payday lenders also have prepaid cards. Insight Card Services manages the prepaid cards sold by Approved Cash Advance<sup>33</sup> and CheckSmart (Community Choice Financial).<sup>34</sup> The Insight cards also have overdraft fees, following the NetSpend model.<sup>35</sup>

Another large payday lender, Check Into Cash, sells prepaid cards that do not appear to offer overdraft services.<sup>36</sup> But its U.S. Money Card has particularly large and unusual fees that can be triggered by payday loans, discussed further below.

Other payday lenders sell more traditional prepaid cards that do not presently have overdraft fees.<sup>37</sup> These lenders are likely awaiting the outcome of this rulemaking before offering prepaid cards with overdraft services.

While the payday lenders generally do not issue or manage prepaid cards directly, they make money from the sale of cards in their stores. Payday lenders also may have revenue-sharing or other compensation arrangements with the prepaid card program manager, especially for cards that carry the payday lender brand, or that are sold in a payday lending store and result in a consumer using the card to receive direct deposits.

Three fairly unique characteristics of many payday lender prepaid cards add to the already destructive cost of payday loans and increase revenues on the cards:

- Overdraft fees.
- ACH debit capacity.
- ACH return fees, ACH stop payment fees, and sometimes ACH payment fees.

These features are quite rare on other prepaid cards. But many payday lender prepaid cards are designed to enable payday loans and to profit from them.

Traditionally, payday lenders have secured their loans with post-dated checks. More recently, both storefront and online lenders have also taken the electronic equivalent of a post-dated check: authorization for a series of electronic debits from the consumer's account. Those debits typically are processed over the automated clearinghouse (ACH) system.<sup>38</sup> Consumers can preauthorize an ACH

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<sup>33</sup> See <http://www.approvedcashadvance.com/visa-pre-paid-card.php>.

<sup>34</sup> CheckSmart's main website, <http://www.checksmartstores.com/>, lists several different States where the prepaid card is available. An example is: <http://www.checksmartstores.com/arizona/prepaid-cards/>.

<sup>35</sup> See INSIGHT VISA® PREPAID RELOADABLE CARD CARDHOLDER AGREEMENT, [https://www.insightcards.com/images/uploads/121221\\_TCs\\_v19a\\_REP\\_Final.pdf](https://www.insightcards.com/images/uploads/121221_TCs_v19a_REP_Final.pdf), attached as Exhibit 6.

<sup>36</sup> <http://checkintocash.com/us-money-card-prepaid-debit-card/>; <http://usmoneycard.com/fees.html>, attached as Exhibit 9.

<sup>37</sup> See, e.g., Momentum Visa Prepaid Debit Card (DFC Global, which operates the Check Cashing Store and Money Mart): <https://www.momentumcardbalance.com/DFC/fees.html?csrfToken>, attached as Exhibit 8; Ion Prepaid Card (Money Tree), <http://www.myioncard.com/CHA.pdf>, attached as Exhibit 7.

<sup>38</sup> In theory, a payday loan could also be repaid by preauthorizing a payment using the prepaid card number, with the payment being processed over the Visa, MasterCard or other card network. However, the payday lender would have to pay interchange fees on the card payment, and card network rules also generally do not permit preauthorized payments to repay a payday loan. See Visa, "Visa Core Rules and Visa Product and Service Rules" at PSR-331 (Oct. 15, 2014), [http://usa.visa.com/download/about\\_vis/15-October-2014-Visa-Rules-Public.pdf](http://usa.visa.com/download/about_vis/15-October-2014-Visa-Rules-Public.pdf).

debit by a payday lender from their account in the same way that they would authorize their mortgage company to withdraw money automatically: through a preauthorized ACH debit.

Most prepaid cards do not come with either checks or the capacity for preauthorized ACH debits. While a consumer might be able to initiate a “push” ACH payment to a merchant by using the prepaid card’s own bill payment function, the cards reject incoming ACH debits – payments that are “pulled” *by the merchant* from the consumer’s account. Prepaid cards do not permit ACH debits because they lead to overdrafts.

However, payday lender prepaid cards are the exception: many payday lender prepaid cards permit preauthorized ACH debits. Consumers who have regular income deposited to their prepaid accounts can use preauthorized ACH payments from those accounts to secure a payday loan in the same way that they can for a checking account. Consequently, it is possible for a consumer to take out a payday loan, have the loan deposited to the payday lender-branded prepaid card, and repay the payday loan through preauthorized ACH debits deducted from the prepaid card.

An ACH payment, like a check, can bounce if the account does not have sufficient funds to cover it. But if a prepaid cardholder has opted in to overdraft services, the payday loan may be repaid even if the card does not have sufficient funds, for an extra \$15 to \$25 on top of the cost of the payday loan. Even if the payday loan payment does not directly overdraft the card, the hole in the consumer’s income caused by that payment may trigger overdraft fees for subsequent purchases needed for necessities or other expenses.

The payday payment also may bounce the first time, if the overdraft protection is not sufficient to cover the payment. But the lender can wait a few days and submit it twice more. Each time the payment bounces, the consumer will pay an ACH nonsufficient funds (NSF) or return fee – just like a bank account customer would pay NSF fees if a check or ACH payment bounces. For example, the Check Into Cash U.S. Money Card charges a \$14.95 ACH decline fee. The Insight cards have \$5.00 ACH debit return fee. The ACH debit transaction decline fee is \$1.00 on NetSpend cards.

Overdraft and NSF fees on payday lender prepaid cards add to the misery of the cycle of debt of payday loans. ACE Cash Express, NetSpend’s largest distributor, was forced to enter into a consent decree with the CFPB for unfair, deceptive and abusive practices that pushed new payday loans on consumers who could not afford to repay a previous loan.<sup>39</sup> This vicious cycle of debt was part of the business model, displayed in a graphic that ACE Cash Express supplied in training materials for its debt collectors:<sup>40</sup>

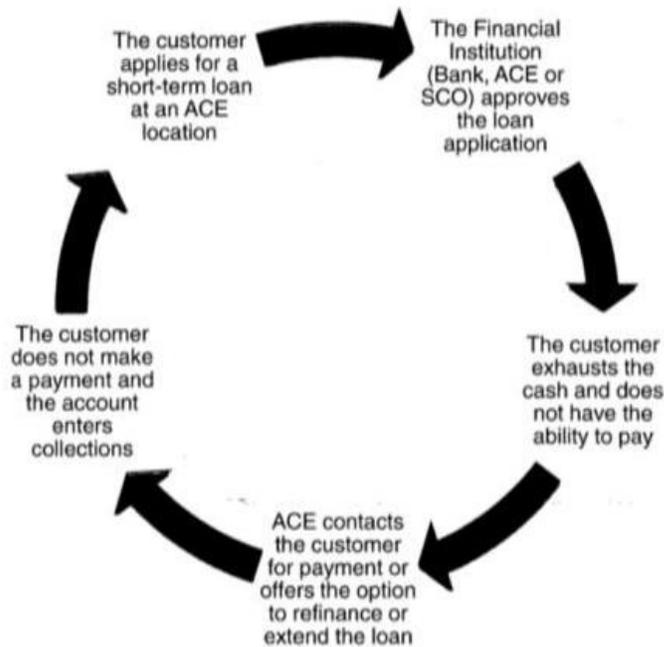
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<sup>39</sup> CFPB, Press Release, “CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers Into Cycle of Debt” (July 10, 2014) <<http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/>.

<sup>40</sup> [http://files.consumerfinance.gov/f/201407\\_cfpb\\_graphic\\_ace-cash-express-loan-process.pdf](http://files.consumerfinance.gov/f/201407_cfpb_graphic_ace-cash-express-loan-process.pdf).

### The Loan Process, Continued

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This cycle of debt was not unique to ACE; it is the payday loan business model.<sup>41</sup> For a consumer whose ACE payday loan was being repaid from the NetSpend ACE prepaid card with overdraft “protection,” overdraft fees would merely add to the misery of this cycle of debt.

The Insight payday lender prepaid cards have also been the subject of charges of unfair and deceptive conduct. The OCC took action against the Insight card’s issuer, Urban Trust Bank, after noting “troubling” concerns about the line of credit and overdraft features on the cards that “have characteristics similar to predatory payday loans.”<sup>42</sup> The payday lender CheckSmart began selling the cards as a way to make 300% loans after Arizona voters upheld a 36% rate cap.<sup>43</sup> After the OCC shut down the overdraft and line of credit features and Urban Trust Bank eliminated all overdraft fees on its

<sup>41</sup> Half of all payday loans are in a sequence at least 10 loans long. CFPB, “CFPB Data Point: Payday Lending” at 4 (March 2014), [http://files.consumerfinance.gov/f/201403\\_cfpb\\_report\\_payday-lending.pdf](http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf).

<sup>42</sup> Letter from Thomas J. Curry, Comptroller of the Currency, to Lauren K. Saunders, NCLC et al. (Aug. 23, 2012), [http://www.nclc.org/images/pdf/high\\_cost\\_small\\_loans/letter-occ-check-smart-urban-trust-bank.pdf](http://www.nclc.org/images/pdf/high_cost_small_loans/letter-occ-check-smart-urban-trust-bank.pdf).

<sup>43</sup> See Comments of NCLC et al. to CFPB on Electronic Fund Transfers (Regulation E), Advance Notice of Proposed Rulemaking, Docket No. CFPB-20120019, RIN 3170-AA22 at 5 (submitted July 23, 2012) (“NCLC Prepaid ANPR Comments”), <http://www.nclc.org/images/pdf/rulemaking/cm-prepaid-card-july2012.pdf>.

prepaid cards,<sup>44</sup> Insight moved to another bank, Republic Bank of Chicago, and revamped its overdraft protection to copy the NetSpend model.<sup>45</sup>

Payday lender prepaid cards can make money off of payday loans and negative balances even if they do not have formal overdraft protection. Like other payday lender prepaid cards, the U.S. Money Prepaid MasterCard enables payday loans by permitting preauthorized ACH debits. What makes the card unusual is that it charges \$4.95 for ACH debits *even if there are sufficient funds*.<sup>46</sup> In other words, every payday loan payment made by ACH from the U.S. Money card will cost another \$4.95 on top of the payday loan fee. In addition, the card has a whopping \$14.95 ACH decline fee (compared to the \$1 fee on NetSpend cards). The ACH decline fee can be charged up to three times on a single payday loan payment if the payment is re-submitted.<sup>47</sup> The card also charges for check packages; \$14.95 for bounced checks; and \$19.95 to stop payment of a check.

All of these fees increase the cost of credit that is extended to consumers without considering ability to pay. The fees deducted from prepaid card funds immediately or are offset against incoming deposits as soon as those deposits are made.

Consumers often take refuge in prepaid cards because they have struggled with overdraft fees, payday loans and other credit products. While the proposed rules will not prevent consumers who have prepaid cards from taking out payday loans, the rules should at least prevent the cards from adding to the costs of predatory lending.

#### **D. The “guardrails” on NetSpend’s GPR overdraft program do not prevent consumer injury.**

NetSpend touts its “Best Darn Overdraft Ever solution.”<sup>48</sup> NetSpend emphasizes the elements of its program that lessen the impact of overdraft fees on its GPR cards. While the guardrails limit injury, they do not prevent it. They do not justify a deceptive program aimed at a vulnerable population. Although promoted as a way to help consumers meet expenses, the program actually leaves consumers with less ability to meet end-of-the-month expenses, not more.<sup>49</sup> Notably, NetSpend does not even follow its own guidelines in its highly abusive payroll card overdraft fee program, discussed in the next section.

Two studies by the Federal Reserve Bank of Kansas City using NetSpend GPR card data confirm that consumers who opt in to overdraft protection pay more each month for their prepaid cards. The first study found that accountholders who used the overdraft service paid an average of \$14.62 per month

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<sup>44</sup> See NCLC, Press Release, “Bank Halts Overdraft Fees on Payday Lender Prepaid Cards; Stops Use of Cards to Evade State Payday Laws” (Feb. 1, 2013) (linking to OCC action), <http://www.nclc.org/images/pdf/pr-reports/pr-prepaid-paydayhalt-2013.pdf>.

<sup>45</sup> The overdraft services are described in these two documents:  
[http://www.insightcards.com/images/uploads/REP\\_ODP\\_Notice\\_Final\\_2.13.pdf](http://www.insightcards.com/images/uploads/REP_ODP_Notice_Final_2.13.pdf);  
[https://www.insightcards.com/images/uploads/121221\\_TCs\\_v19a\\_REP\\_Final.pdf](https://www.insightcards.com/images/uploads/121221_TCs_v19a_REP_Final.pdf).

<sup>46</sup> See <http://usmoneycard.com/fees.html>, attached as Exhibit 9.

<sup>47</sup> NACHA rules payday lenders and other merchants to submit an ACH debit three times – the original entry, and two additional times if it bounces. See 2015 NACHA Operating Rules § 2.12.4.

<sup>48</sup> NetSpend Senate Testimony, *supra*, at 13.

<sup>49</sup> See Section II.G.

more for their accounts (in all fees) than consumers who only used a free \$10 overdraft buffer.<sup>50</sup> The second study,<sup>51</sup> which focused on a narrower category of consumers,<sup>52</sup> found that the median consumer who opted in to overdraft protection paid \$9.19 in overdraft fees each month (and \$9.61 more in all fees than non-overdrafters).<sup>53</sup> Of consumers who opted in, those at the 75<sup>th</sup> percentile – the quartile that paid the highest amount of fees – paid an average of \$14.84 per month in overdraft fees and an average total of \$36.15 per month in all fees.<sup>54</sup> That is an average of 11.9 overdraft fees per year – basically, one every month.

NetSpend highlights these features of its GPR overdraft program<sup>55</sup>:

- *\$10 overdraft cushion before overdraft fees are charged.* BUT, while the cushion may prevent overdrafts on small accounting errors, it still permits a \$15 fee per overdraft once the account is negative by at little as \$10.01. And once the consumer has exceeded the overdraft buffer, every transaction – even one as low as \$1 – triggers an overdraft fee.
- *Overdraft fees of \$15 v. \$35 overdraft fees common on bank accounts.* BUT, while \$15 may seem low to many people, a single fee is enough to cover a day’s food for a family of three and is two hours work for a minimum wage worker.
- *Limit of three fees (\$45) per month.* BUT, an extra \$45 per month is a huge bite out of the income of a struggling family.
- *Limit of \$100 negative balance.* BUT, that limit includes the overdraft fees, so the program provides very small amounts of credit – at most \$85, and possibly \$55 or even less – that are unlikely to help with a significant unplanned expense. A \$100 hole in the next month’s income is significant and can still lead to a cycle of overdrafting.

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<sup>50</sup> The average monthly fees for “overdraft” users were \$27.24 and the average fees incurred by “overdraft buffer” users were \$14.62. The study did not break out how much of that difference was overdraft fees. See Fumiko Hayashi & Emily Cuddy, Fed. Reserve Bank of Kansas City, “General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees, and Fraud Risks,” Table 5.2 at 68 (Feb. 2014) (“Kansas Fed, GPR Report”), <http://www.kc.frb.org/publicat/reswkpap/pdf/rwp14-01.pdf>. “Overdraft” users were defined as anyone who had at least one overdraft transaction in excess of the buffer (though the transaction did not necessarily incur a fee). According to an email from the study’s author, Emily Cuddy, on file with NCLC, that definition was used instead of a definition encompassing anyone who had opted into overdraft protection because the difference between the two populations was trivial: more than 99% of those who opted for overdraft protection also had at least one overdraft.

<sup>51</sup> Fumiko Hayashi and Emily Cuddy, Federal Reserve Bank of Kansas City, “Recurrent Overdrafts: A Deliberate Decision by Some Prepaid Cardholders?” (October 2014) (“Kansas Fed, Recurrent Overdrafts”), <http://www.kansascityfed.org/publicat/reswkpap/pdf/rwp14-08.pdf>.

<sup>52</sup> In the second paper, the sample was only accountholders who were eligible for overdraft program over the entire lifespan of the account. *Id.* at 11. According to an email from the study’s author, Fumiko Hayashi, on file with NCLC, an accountholder who received direct deposits only 2 or 3 times in his entire account history of 12 months or so and made 1 overdraft was not in the sample studied.

<sup>53</sup> The total fees for consumers at the 50<sup>th</sup> percentile were \$25.70 per month for overdrafters compared to \$16.09 for non-overdrafters. See Kansas Fed, Recurrent Overdrafts, Table A-2 at 30. The difference is not entirely overdraft fees. At the 50<sup>th</sup> percentile, overdrafters paid an average of \$9.12 in overdraft fees but also paid more in ATM fees, but less in some other fees, than non-overdrafters. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See NetSpend “42%” Fact Sheet, attached as Exhibit 13.

- *Required opt-in to emails about overdrafts.* BUT, an email sent after the fact does not prevent the overdraft in the first place or give a consumer the choice of skipping a purchase that is not worth incurring an overdraft fee. And consumers without smartphones or computers may check their email only sporadically.
- *24 hour grace period to cure overdrafts.* BUT, a grace period does not help someone who is out of money.
- *Cooling off period after 12 fees in 12 months.* BUT, after incurring \$180 in overdraft fees – and being left with a hole up to \$100 in the next paycheck – being forced to go cold turkey for 30 days is not a consumer protection.

These features may make NetSpend’s overdraft program “less bad” than the overdraft practices of many banks. But the NetSpend cards are aimed at and used by a much more vulnerable population. NetSpend’s customers are “low-income” with an average daily prepaid card balance of only \$80.<sup>56</sup> To be eligible for NetSpend’s overdraft program, a consumer needs to have direct deposit income of only \$200 per month.<sup>57</sup>

According to NetSpend itself, “many” of its customers “no longer have access to checking account because they are among the 19 percent of U.S. adults who cannot qualify for an account because they are in the ChexSystems or TeleCheck’s data base.”<sup>58</sup> But problems with overdrafts are the leading reason why consumers can no longer obtain a bank account.<sup>59</sup> NetSpend even markets its prepaid cards to consumers who are looking to avoid overdraft fees. “Testimonials” on NetSpend’s website include:

- "My old bank used to charge me overdraft fees every time I spent more than my account balance. I felt like all my money was spent on fees and I couldn't get ahead. NetSpend has helped me manage my money and avoid unnecessary fees. I highly recommend it for anyone who is tired of excess fees from their bank." - Christina A., Spartanburg, SC
- "Between work and taking care of my family I never had time to balance my checkbook, and I always ended up paying huge overdraft fees for going over my balance. Now I use my Card with free text and email alerts. I get my balance in a text message to my phone after every transaction. I can even request my balance before making a purchase. Alerts have saved me so much money!" - Nikki D., Irvine, CA<sup>60</sup>

But NetSpend’s website does not feature customers who have been burned by its overdraft fees, like this consumer:

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<sup>56</sup> NetSpend Senate Testimony, *supra*, at 7, 13.

<sup>57</sup> See <https://www.netspend.com/account/overdraftTerms.m>.

<sup>58</sup> NetSpend Senate Testimony, *supra*, at 13.

<sup>59</sup> A study by Harvard Business School researchers estimated that only 2.5% of account closures are due to fraudulent activities; the remaining 97.5% are caused by overdrafts. Dennis Campbell, Asís Martínez Jerez and Peter Tufano, Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures (June 6, 2008) available at [www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell\\_jerez\\_tufano.pdf](http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf).

<sup>60</sup> See [https://www.netspend.com/prepaid-debit-card/prepaid\\_visa\\_card\\_testimonials.m](https://www.netspend.com/prepaid-debit-card/prepaid_visa_card_testimonials.m).

Net spend.Charged me 60.00 In overdraft fees for a charge I never made and all customer service people hung up on me.Everytime.

You call it cost you 50 cents and then they hang up on you.all I want is 45.00 back so I will not be homeless after my heart surgery. Over 19.99 they charged me three overdraft fees.

And everytime you ask to speak to a manager you are disconnected and they dodge your text on the internet I have decided to go back to cash before all my money is gone.This is one of the biggest and most dishonest scams I have seen in awhile.<sup>61</sup>

NetSpend claims that many NetSpend customers get “fee free overdrafts.”<sup>62</sup> But their data – which may not encompass the especially abusive payroll card program – are misleading. NetSpend boasts<sup>63</sup> that:

- 12% of monthly overdraft users pay no fees. BUT 88% of monthly overdraft users *do* pay a fee.
- 55% of overdraft "transactions" are fee free. BUT that is “transactions,” not people. It includes transactions that only overdraw the account by \$10 or less.
- 41% of overdraft users get at least one free overdraft a month. BUT that only means that consumers either make one transaction that goes into the \$10 buffer before paying fees on subsequent overdrafts, or have one overdraft less than 24 hours before payday. And the number of free overdrafts is less important than the number of costly ones.

Moreover, any “guardrails” on overdraft fees and practices today are self-imposed. There is nothing in current law that requires NetSpend or any other prepaid card provider or payday lender to follow them. In fact, even NetSpend does not follow its “friendly” practices consistently.

## E. NetSpend’s ugly payroll card overdraft fees

Hidden from view in the more secretive payroll card market – a market where employees do not choose the cards freely – NetSpend’s overdraft program is decidedly less friendly. Under the Skylight brand, Netspend payroll cards have been used by fast-food and other restaurants,<sup>64</sup> retail stores,<sup>65</sup> hotels,<sup>66</sup> health care providers,<sup>67</sup> state governments,<sup>68</sup> colleges and universities,<sup>69</sup> and public schools,<sup>70</sup> among

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<sup>61</sup> See <http://netspend.pissedconsumer.com/stole-my-money-20140529491712.html>.

<sup>62</sup> See NetSpend “29%” Fact Sheet, attached as Exhibit 12.

<sup>63</sup> *Id.*

<sup>64</sup> Church’s Chicken, KFC, Long John Silver, Pizza Hut, Taco Bell, White Castle, Cracker Barrel, Friendly’s, Frisch’s, Houilhan’s. See Skylight Program Partners, attached as Exhibit 14 (page from power point).

<sup>65</sup> Big Lots, Coach Leatherware, DSW, Haverty’s, Kohl’s, Liz Clairborne, Macy’s, Office Max, Payless, Shaw Flooring, SuperValu, The Limited, Valvoline. See *id.*

<sup>66</sup> MGM Mirage and Starwood. See *id.*

<sup>67</sup> Hospital Corp. of America, LifePoint Hospitals, Inc. See *id.*; Cleveland Clinic, see <https://portals.clevelandclinic.org/Portals/75/Documents/Payroll%20FAQs%202011.pdf>.

<sup>68</sup> The States of Kansas, <https://www.da.ks.gov/ar/payroll/#Paycard>, and Missouri, <http://oa.mo.gov/accounting/state-employees/direct-deposit>.

<sup>69</sup> Catholic University of America, see <http://treasurer.cua.edu/Payroll/paycards.cfm>; Kansas State University, see <http://www.k-state.edu/hr/current-employees/pay/directdeposit.html>; Wichita State University, [http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight\\_fees.pdf](http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight_fees.pdf).

<sup>70</sup> Denver Public Schools, Miami-Dade Public Schools. See <http://forms.dadeschools.net/webpdf/4679.pdf>.

others. As with other payroll cards, the Skylight cards are likely to be heavily used by workers making at or near the minimum wage and who may not have full time work.



While we cannot confirm that the overdraft services are available on every Skylight program, overdraft fees do appear on the fee schedules for Skylight cards for the State of Kansas<sup>71</sup> (also used by Kansas State University<sup>72</sup> and Wichita State University<sup>73</sup>), the State of Missouri,<sup>74</sup> and Denver Public Schools,<sup>75</sup> among others. The NetSpend payroll cards have far fewer guardrails:<sup>76</sup>

- The overdraft cushion is only \$5, not \$10.
- Overdraft fees are \$25, not \$15.
- Up to five fees can be charged each month, not three.
- The maximum negative balance is \$125, not \$100.<sup>77</sup>
- Email alerts are not required, and might not even be available.
- No grace period.
- The cooling off period kicks in at 18 fees in 12 months – **or \$450** – not 12 fees.

A minimum wage worker who incurs five overdrafts must work **17 hours** to cover the fees. Even a **single fee is three hours of work** at the minimum wage.

<sup>71</sup> See <https://da.ks.gov/ar/payroll/SOKChFeeSched.pdf>, attached as Exhibit 22.

<sup>72</sup> See <http://www.k-state.edu/hr/current-employees/pay/directdeposit.html>.

<sup>73</sup> See [http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight\\_fees.pdf](http://webs.wichita.edu/depttools/depttoolsmemberfiles/Controller/skylight_fees.pdf), attached as Exhibit 16.

<sup>74</sup> The fee schedule for State of Missouri Skylight payroll card fee schedule is attached as Exhibit 23.

<sup>75</sup> See <http://departmentforms.dpsk12.org/payroll/paycardsfaq.pdf>, attached as Exhibit 15.

<sup>76</sup> See NetSpend “42% Fact Sheet, attached as Exhibit 13.

<sup>77</sup> The employee could still incur five overdraft fees (\$125) in a month if the employee is paid biweekly. That is, after the first pay period the employee could incur three overdraft fees (\$75) on \$50 in overdrafts, and after the second pay period, the \$125 could cover two more fees.

One employer that uses Skylight payroll cards has experienced first-hand the problems that they cause. The Denver Public Schools has a “Paycards – Frequently Asked Questions” sheet that has this stern warning:

PLEASE DON'T OPT INTO THE OPTIONAL BALANCE PROTECTION PROGRAM, WHICH WILL INCURE A \$25 CHARGE FOR EACH TRANSACTION THAT PAYS INTO OVERDRAFT.<sup>78</sup>

The vehemence of this warning, in all caps, seems to indicate that the overdraft program has caused problems not only for employees but apparently for the employer as well.

A payroll card report by the New York Attorney General also confirms that overdraft fees add substantially to employee costs and payroll vendor profits. The report does not identify the payroll card vendors, so it is not clear if the cards with overdraft fees are NetSpend Skylight cards or if the fees are typical of the NetSpend programs.

The Attorney General found that, at two employers that used payroll cards with overdraft protection, overdraft fees made up more than 40% of the fees assessed.<sup>79</sup> At one of employer's, overdraft fees and declined balance fees made up 75% of its revenue. At another company, the payroll card vendor received over \$200,000 in overdraft fees over a one-year period, for an average of \$77.82 per worker – not counting the workers who did not opt in to overdraft “protection.” The total cost to use the payroll card with overdraft protection could range as high as \$20.00 per month, compared to \$1.25 in other programs without overdraft fees.<sup>80</sup>

Overdraft fees are inappropriate on any prepaid card. But targeting expensive overdraft programs at employees who may have been forced to use the card to receive their pay is inexcusable.<sup>81</sup>

#### **F. Overdraft fees cost consumers tens of millions and could lead to a race to the bottom.**

NetSpend earned roughly \$50 million or more in revenues from overdraft fees in 2014.<sup>82</sup> Every dollar in overdraft fees that NetSpend earns is a dollar out of a consumer's pocket – and most likely a dollar out of the pocket of a very low income consumer.

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<sup>78</sup> <http://departmentforms.dpsk12.org/payroll/paycardsfaq.pdf>.

<sup>79</sup> Office of New York State Attorney General Eric T. Schneiderman, “Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers” at 14 (June 12, 2014) (“NY AG Payroll Card Report”), <http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf>.

<sup>80</sup> NY AG Payroll Card Report at 9.

<sup>81</sup> The problems of employers who push employees into receiving pay on a payroll card are discussed in Section VI.B below.

<sup>82</sup> In its last 10-K filing before being acquired by TSYS, NetSpend said that 7% of the revenue on the GPR cards was related to overdraft. In addition, TSYS said on its January 2015 earnings call that payroll card overdraft fees “add several percentage points” to the 7% number. Total System Resources (TSS) Earnings Report: Q4 2014 Conference Call Transcript, TheStreet Transcripts at 8 (Jan. 28, 2015) (Paul Todd, CFO) <http://www.thestreet.com/story/13025999/8/total-system-resources-tss-earnings-report-q4-2014-conference-call-transcript.html>. Conservatively, it appears that 10% to 12% of NetSpend's revenue comes from overdraft fees. TSYS' had \$2.4 billion in revenues in 2014, *id.* at 1, <http://www.thestreet.com/story/13025999/1/total-system-resources-tss-earnings-report-q4-2014-conference-call-transcript.html>, and NetSpend accounted for 19% of that

That kind of revenue is extremely difficult for other companies to ignore. Prepaid cards are thin margin products. Consumers have low incomes and low balances. Some have said that if Green Dot were to add overdraft fees, it would dramatically amplify the company's earnings and elevate Green Dot's market capitalization by hundreds of millions of dollars.<sup>83</sup> Green Dot's CEO has estimated that adding overdraft fees would add over \$1 per share in additional profit.<sup>84</sup>

Green Dot has vowed not to add overdraft fees to its prepaid cards, despite the lure of high profits for the company as a whole and the CEO. But other companies are eager to do so if the regulatory landscape becomes clear. Certainly, payday lenders, who thrive on getting consumers in a bind, will have no compunctions in selling prepaid cards with overdraft fees.

Companies that ignore overdraft revenue will face pressure from investors and put themselves at a disadvantage with their competitors. It will be tempting to add less visible back-end fees and to minimize the up-front fees that consumers are more apt to notice. Overdraft revenue can also fund other bells and whistles to make a card more attractive.

Overdraft revenue has completely distorted the checking account market and led to a sick race to push consumers into overdrafting their accounts. Banks feel compelled to offer "free checking" that is not really free. Banks that might prefer to charge a modest and transparent monthly fee with no tricks and traps cannot do so. The same type of race to the bottom led to abusive credit card practices until Congress finally had to weigh in with the Credit CARD Act.

Overdraft fees are not yet entrenched the way they are in the bank account world. Keeping overdraft fees and overdraft revenue out of the prepaid card market is essential to keeping that market safe for consumers. It will be difficult to unring the bell if overdraft fees are allowed to spread. Keeping overdraft fees off prepaid cards will be good for both consumers and the prepaid card industry.

#### **G. Overdraft "protection" leads to a cycle of debt that leaves consumers with less, not more, liquidity for necessities.**

Defenders of overdraft services on prepaid cards claim that overdraft loans help consumers to bridge the gap to payday and handle "emergency needs."<sup>85</sup> But as with payday loans, the reality is that overdraft programs are typically used for everyday expenses<sup>86</sup> by people who have regular gaps between their income and expenses. The overdraft fees only exacerbate that gap, causing a cycle of debt that makes it *harder*, not easier, to meet those expenses.

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revenue. See Total System Services, Inc. Form 10-K for the fiscal year ended December 31, 2014, SEC File No. 1-10254 at 1 (Feb. 2015), <http://www.sec.gov/Archives/edgar/data/721683/000119312515063177/d835889d10k.htm>.

That means that at least \$45.6 million to \$54.7 million of NetSpend's revenues came from overdraft fees.

<sup>83</sup> "Green Dot Investor Call: Overdraft, Check Cashing," BankTalk (July 31, 2013).

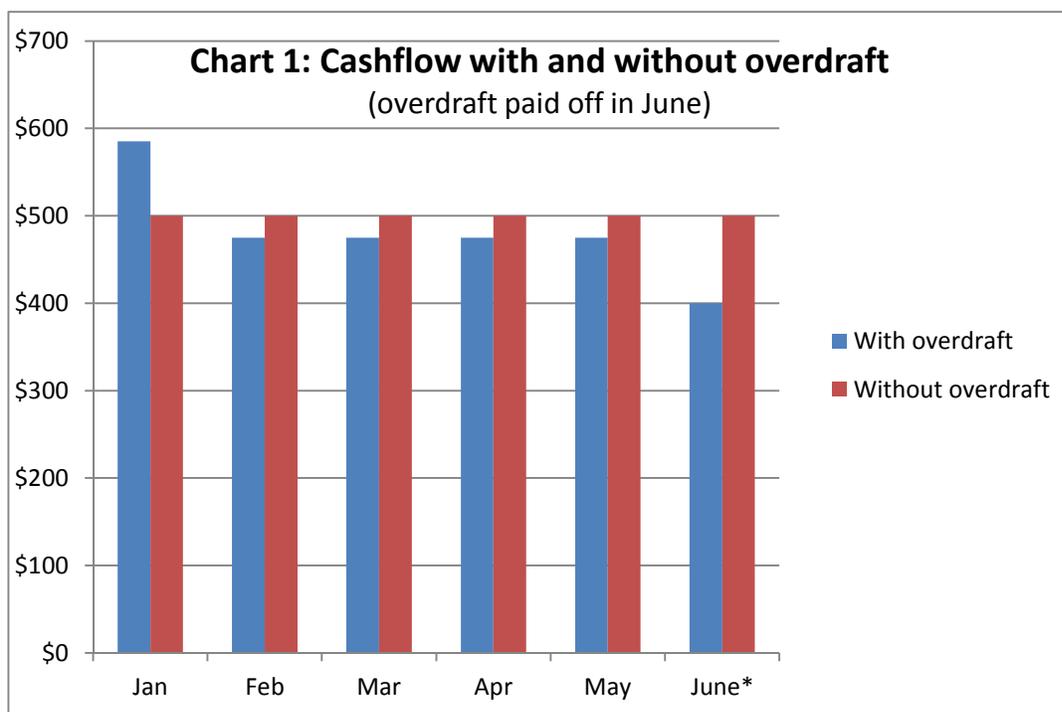
<sup>84</sup> Public remarks at Power of Prepaid Conference, Washington, DC, June 27, 2013.

<sup>85</sup> NetSpend Senate Testimony, *supra*, at 35.

<sup>86</sup> NetSpend admits that overdrafts are primarily used for "groceries and to take out cash for rent and other essential bill payments." NetSpend "29%" Fact Sheet, attached as Exhibit 12.

The first time a consumer overdrafts, the consumer temporarily has extra cash. But that overdraft leaves a hole in the next paycheck that makes the next month worse. With \$100 less pay, the consumer may need to overdraft again. But the consumer can only get \$85 in cash (\$15 goes for the fee), and cannot completely fill the hole in the paycheck. So in the second month and every subsequent month that the consumer overdrafts, the consumer has \$15 less money for necessities. The average NetSpend customer incurs seven overdraft fees a year, and a quarter of the customers incur nearly 12 fees or more – basically one a month.<sup>87</sup>

This cycle of debt can be seen in Chart 1. This chart illustrates the best case scenario under NetSpend’s GPR overdraft program: a consumer incurs only one \$15 overdraft fee and overdrafts exactly \$85 each month, so that the consumer maximizes the amount of credit for the \$100 negative balance permitted. In January, the consumer has more available cash than if she had not overspent her income. But the following months, even *after* drawing on overdraft credit, she has \$15 *less* money to meet end-of-the-month expenses. In June, when the consumer refrains from overdrafting again and repays the overdraft, the consumer needs to make it through the month short a full \$100.



The ability to overdraft at the end of the month may feel helpful, and consumers may be appreciative.<sup>88</sup> But the truth is that, even before repaying the overdraft, the consumer has less money than if she had not begun the overdraft cycle.

The \$15 overdraft fee (or \$25 if it is a payroll card) may not seem like much to many people. But for low income consumers struggling paycheck to paycheck, it is a lot of money. A single fee is two hours work at the minimum wage. With \$15, a family can buy a basket of groceries that includes macaroni, tuna,

<sup>87</sup> See Kansas Fed, Recurrent Overdrafts, *supra*, Table A-2 at 30.

<sup>88</sup> The comments of NetSpend customers are discussed in Section III.E.

peas, chicken soup, orange juice, ground turkey, eggs, cheese and bananas.<sup>89</sup> Even for those who receive nutrition aid, a bit of extra cash helps with diapers, toothpaste, gas or bus fare--things that food stamps do not cover. Those \$15 fees also add up. The median NetSpend customer who opts in to overdraft protection spends \$109.44 per year on overdraft fees.<sup>90</sup> At the 75<sup>th</sup> percentile, the average is \$178.08, and some pay far more.<sup>91</sup> The cost is also likely considerably higher for payroll card users.

Overdraft and other credit features on prepaid cards have the worst aspects of high-cost credit:

- *Short term:* Credit is repaid as soon as the next deposit comes in, usually just a few days later.
- *Balloon payment:* The entire amount of the overdraft, including the fee, is offset against the incoming paycheck.
- *Flat fees that look small but result in high rates and high costs:* Fees of \$15 to \$25 are imposed on loans as small as \$1 and no bigger than \$85 to \$100 for only a few days. Even using the best case scenario, with repayment of the overdraft occurring in ten days, if an \$85 overdraft is treated as a loan, the APR is **644%**, on a GPR card (with a \$15 overdraft fee) and **1,074%** if it is payroll card (with a \$25 overdraft fee).<sup>92</sup> The cost can run into the hundreds of dollars a year.
- *Payments seized from income before necessities:* The overdraft loan is skimmed off the top of wages or benefits and has first priority, before payment of necessities.
- *No control over how or when to repay:* The overdraft is repaid automatically. The consumer has no ability to control when to repay it or to pay other expenses first.
- *Asset-based lending with no underwriting or regard for ability to meet ongoing expenses:* The only qualification is direct deposit income **as low as \$200/month**.<sup>93</sup> Eligibility does not turn on whether the consumer's income is enough for basic expenses or whether the consumer is already overwhelmed with debt and has no capacity to repay the overdraft and the overdraft fee without re-borrowing.
- *Evasions of laws that protect public benefits and income needed for necessities.* Public benefits, pensions and wages that are protected from garnishment can be seized with no recourse.

These are the same features that make payday loans and bank account overdraft fees such destructive forms of credit.

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<sup>89</sup> See <http://morefood.org/how-much-food-could-you-buy-with-an-extra-15-per-month/>.

<sup>90</sup> See Kansas Fed, Recurrent Overdrafts, *supra*, Table A-2 at 30.

<sup>91</sup> *Id.*

<sup>92</sup> On the GPR card, the maximum negative balance is \$100, including the \$15 overdraft fee. So the maximum credit is \$85. Consumers most likely overdraft a few days before payday, and the overdraft is repaid with the next direct deposit. The credit is likely outstanding less than 10 days. A CFPB study found that the majority of debit card overdrafts are repaid in three days or less. CFPB, Press Release, "CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges" (July 31, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/>.

<sup>93</sup> See AMENDED TERMS FOR YOUR CARDHOLDER AGREEMENT, <https://www.netspend.com/account/overdraftTerms.m>.

## H. Overdraft and other credit features have been used to evade state and federal credit laws.

Overdraft and credit features on prepaid cards have been used to disguise the cost of credit and avoid state and federal credit laws, as discussed at greater length in our earlier comments.<sup>94</sup> Payday lenders have used two different models to offer high cost loans in states that otherwise limit interest rates to 36% or lower.

First, payday lenders have used overdraft fees on prepaid cards to make payday loans. After Arizona voters upheld the state's 36% usury cap, the payday lender CheckSmart began offering prepaid cards with overdraft "protection" for a fee of 15% of the negative balance. The overdrafts were virtually identical to a \$15 per \$100 payday loan, except that they were likely repaid more quickly (with the next deposit).

Second, CheckSmart also used "transfer" fees on the prepaid card to disguise the cost of a linked line of credit. The cost of the credit line was purportedly 35.9% APR. But the prepaid card charged a "convenience transfer fee" of \$3.50 per \$28.50 advance. Thus, it cost \$3.50 plus interest to yield net credit of \$25, the equivalent of \$14 per \$100 plus interest.<sup>95</sup> The loans require direct deposit of public benefits or wages to the prepaid card and were repaid by the next deposit, as soon as a day or two later. The annual rate for a 14-day loan was 390% to 401%. These 400% loans were offered in states that have usury caps of 28% to 36%. The cost of the credit was not acknowledged as a finance charge but instead was charged as a "fee" on the prepaid card account.

Both the overdraft service and the linked line of credit were nothing more than thinly veiled triple-digit interest rate payday loans. After the OCC brought a supervisory action against the bank that issued the CheckSmart cards, CheckSmart changed banks and adopted the NetSpend model of overdraft services, discussed above. Those "services" are still thinly veiled payday loans.

Payday lenders are continuously looking for new ways to disguise the cost of their loans and evade lending laws. They are undoubtedly awaiting the outcome of this rulemaking. If the CFPB does not restrict overdraft and other credit features on prepaid cards, payday lenders will once again look for ways to make loans through prepaid cards. The preemption issues that come from the involvement of a bank, the bifurcation of costs between a deposit account and a credit account, and the false claim that overdraft "services" are not credit will enable the payday lender to evade state credit laws.<sup>96</sup>

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<sup>94</sup> NCLC Prepaid ANPR Comments, *supra*, at 3-10, 26-33.

<sup>95</sup> See NCLC et al, Comment to the Dep't of the Treasury, Financial Management Service, RIN 1510-AB 24, Docket Number FISCAL-FMS-2010-00031 at 17 & Exhibits 2, 3, 4 (April 25, 2011) ("NCLC Treasury Rule Comments"), [http://www.nclc.org/images/pdf/other\\_consumer\\_issues/exempt\\_public\\_benefits/prepaid-card-comments.pdf](http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/prepaid-card-comments.pdf).

<sup>96</sup> For a discussion of whether state credit laws apply to overdraft loan charges, see NCLC, Consumer Banking and Payments Law § 2.6.3.7 (2013 & Supp.).

### III. The Proposed Rules Require Credit to be Offered Honestly as Credit, in Compliance with Credit Laws.

#### A. Introduction

For all of the reasons discussed above, overdraft features should be prohibited on prepaid cards. Other forms of credit should be completely separate from prepaid cards, not offered as a “feature” of the prepaid card. Credit, when offered to a prepaid cardholder, should be affordable, responsible and comply with credit laws. Costs should not be disguised in fees on a prepaid card account, and lenders should not have first priority over funds in a prepaid card account.

The CFPB’s proposed rules take important steps toward achieving these goals. While they do not ban overdraft services altogether, they require overdraft loans to comply with credit laws. When credit is accessed through a prepaid card, the proposal requires compliance with the important protections that govern credit cards. The proposal includes important protections that will make credit safer for consumers and give them better choices. While we offer suggestions for improving the rules in Section IV, in this section we discuss why the rules are an important first step.

#### B. Overdraft “services” are credit.

We oppose overdraft features on prepaid cards. But to the extent that they are available, we support the CFPB’s proposal not to extend the Regulation E overdraft rules to prepaid card, and instead to require overdraft credit to comply with the Truth in Lending Act (TILA) and Regulation Z. Prepaid cards that offer overdraft “services” claim that they are not offering credit in order to escape compliance with Regulation Z. But overdraft services are clearly “credit” – under both the common understanding of the term and TILA’s definition of “credit.”

Both bank account and prepaid card overdraft services lend funds to consumers after their accounts are empty, funds that are repaid later. Virtually none of the comments filed by NetSpend customers talk about overdraft protection in the traditional sense – covering a payment that would have inadvertently bounced. NetSpend emphasizes that its customers know their balances.<sup>97</sup> The NetSpend customers who have filed comments with the CFPB make clear that they are using overdrafts to borrow money until their next payday.<sup>98</sup> A quarter of overdraft users incur an average of one fee every month,<sup>99</sup> and 100,000 NetSpend customers use overdraft “regularly.”<sup>100</sup> Under any normal usage of the term “credit,” that is what overdraft services are.

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<sup>97</sup> See Fred Williams, “Please, let us keep our expensive overdraft loans, prodded consumers cry” (Mar. 20, 2015) (“Almost all overdraft users enroll in text message alerts that give them immediate updates on their balance.”).

<sup>98</sup> See, e.g., Fred Williams, “Overdrafts on prepaid cards: Good deal, or debt trap?” Creditcards.com (Dec. 24, 2012) (“Overdrafts on prepaid cards, Creditcards.com”)(, <http://www.creditcards.com/credit-card-news/overdrafts-prepaid-cards-1271.php> (quoting consumer who used NetSpend overdrafts “since Washington State has removed most of the payday loan operations”); Comment CFPB-2014-0031-2662 (“I depend on this every month.”); Comment of Marva Josepg, CFPB-2014-0031-1591 (Mar. 10, 2015) (“it helps out when I’m unable to pay a bill or just something my children may need”).

<sup>99</sup> See Kansas Fed, Recurrent Overdrafts, Table A-2 at 30.

<sup>100</sup> Overdrafts on prepaid cards, Creditcards.com, *supra*.

Similarly, overdraft services fit within the TILA and Regulation Z definitions of “credit.” Credit is “the right granted by a creditor or a debtor to defer payment of a debt or to incur debt and defer its payment.”<sup>101</sup> Federal regulators have acknowledged that “[w]hen overdrafts are paid, credit is extended,” and “[o]verdraft balances should be reported on regulatory reports as loans.”<sup>102</sup>

Overdraft fees also meet TILA’s basic definition of a “finance charge,” which is “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.”<sup>103</sup> However, the Federal Reserve Board exempted overdraft fees from TILA’s finance charge definition unless “the payment of such items and the imposition of the charge were previously agreed upon in writing.”<sup>104</sup> This strained exemption goes so far as to exempt fees even if there is a written agreement and a charge is computed by applying a rate of interest, “unless the financial institution agrees in writing that it will pay such items.”<sup>105</sup>

Even though overdraft credit is “credit” within the meaning of TILA, bank account overdraft services escape being “creditors” subject to TILA. That is because to be a creditor, the entity must extend credit that is either subject to a finance charge or is payable in more than four installments.<sup>106</sup> Under the loophole discussed above, bank account overdraft fees are not considered to be a “finance charge,” and thus banks that offer overdraft services are not “creditors.”

The result is that companies that solicit consumers to opt in to overdraft fees do a hypocritical, deceptive dance. They tout the “protection” and “service” that they offer in order to persuade consumers to opt in to overdraft coverage. At the same time, in the fine print, they claim that they are not actually “agreeing” to provide any protection or service, and may only do so as a “courtesy” at their sole discretion. Of course, the consumer has to agree to repay the courtesy.

The CFPB has appropriately determined that – if overdraft services are offered on prepaid cards – the convoluted exemption to Regulation Z need not be extended to prepaid cards. The CFPB can and should regulate overdraft credit as the credit that it is – and the providers of that credit as creditors -- consistent with the Bureau’s TILA authority over credit.

### **C. Credit accessed through a card is a credit card.**

The proposed rules appropriately require credit that is accessed through prepaid cards to comply with credit card rules. Here again, treating credit accessed through a card as a credit card is consistent with a common sense definition and also with TILA and Regulation Z.

Prepaid cards are “prepaid.” When the card is being used to access credit, it makes sense to consider it a credit card. Whether the credit is being accessed through an overdraft or being transferred onto the card and then spent, the card is a vehicle to access and use credit.

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<sup>101</sup> 15 U.S.C. § 1602(f). *See also* Reg. Z, 15 C.F.R. § 1026.2(a)(14) (“Credit means the right to defer payment of debt or to incur debt and defer its payment.”).

<sup>102</sup> 70 Fed. Reg. 9127, 9129, 9129-30 (Feb.24, 2005).

<sup>103</sup> 12 C.F.R. § 1026.4(a).

<sup>104</sup> 12 C.F.R. § 1026.4(c)(3).

<sup>105</sup> Official Interpretations to Reg. Z §Z § 1026.4(c)(3)-1.

<sup>106</sup> 15 U.S.C. § 1602(g).

The definition of “credit card” in TILA is quite expansive, applying to any device that accesses credit. It does not even require a card or any of the features traditionally associated with credit cards, such as monthly payments or a periodic interest charge. That definition is “any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.”<sup>107</sup>

Moreover, neither a finance charge nor four installments are required for a device to be considered a “credit card” under TILA,<sup>108</sup> or an entity to be considered a “creditor” for credit card purposes.<sup>109</sup> In some ways, the reach of the credit card provisions of TILA is broader than the other provisions. Prepaid cards that access overdraft services or a line of credit fit the basic definition of “credit card” in TILA. They also fit the Regulation Z definition of credit card, which has also long provided that credit cards include:

- A. A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit.
- B. A card that accesses both a credit and an asset account (that is, a debit-credit card).
- ...
- E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.<sup>110</sup>

Thus, it is consistent with TILA to consider a prepaid card to be a credit card if it accesses credit, a credit account, or can be activated or triggered to access a credit feature.

The Federal Reserve Board did adopt Commentary stating that the term “credit card” does not include “A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.”<sup>111</sup> However, this exclusion requires the credit to be “occasional,” “inadvertent,” and in the absence of a “credit feature or agreement.” The exclusion is also entirely a creature of rulemaking, and there is nothing in the TILA statute that compels the CFPB to extend it to prepaid card overdraft services that are clearly used as a form of credit.

The better analogy is the traditional treatment under Regulation Z of overdraft lines of credit. Unlike “courtesy” overdraft services, overdraft lines of credit – an explicit form of credit – have long been

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<sup>107</sup> 15 U.S.C. § 1602(l).

<sup>108</sup> 15 U.S.C. § 1602(l). We recognize that the CFPB has proposed not to extend credit card rules to prepaid cards that access credit if the creditor does not impose a finance charge or allow payment in more than four installments. As discussed in Section IV.E and IV.F of these comments, we urge the CFPB not to establish the exemption, or at a minimum to narrow the exceptions from the finance charge definition, because otherwise the proposed exemption will allow for evasions from the credit card protections.

<sup>109</sup> *Id.* at § 1602(g)(2) (“For the purpose of [Part D and selected disclosure requires in 1637], the term “creditor” shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans.”

<sup>110</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-2.i.

<sup>111</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.A.

viewed as “credit cards” under Regulation Z. The Commentary is clear that if a line of credit “can also be accessed by a card (such as a debit card), that card is a credit card ....”<sup>112</sup>

However, in 2011, the Federal Reserve Board excluded overdraft lines of credit from the narrower definition of credit card used to determine applicability of the TILA provisions added by the Credit Card Accountability, Responsibility, and Disclosures (CARD) Act of 2009.<sup>113</sup> That exception does not exist in the statute, which excludes only home-equity plans secured by credit card. The exception was added to protect traditional credit union overdraft lines of credit that are used to cover check and ACH overdrafts as well as debit card overdrafts. Here again, the exclusion is regulatory and does not need to be extended to prepaid cards.

In short, there is ample authority and precedent to require that credit extended to holders of prepaid cards be treated as credit covered by the credit card provisions of TILA. That authority also permits the CFPB to enact rules to delineate a clear separation between prepaid cards and credit in order to ensure compliance with the requirements for credit cards and to fulfill the broader purposes of TILA and other statutes that the CFPB implements.

#### **D. The rules that would apply to credit accessed through prepaid cards are reasonable and will protect consumers.**

The provisions of the proposed rule that require credit accessed through prepaid cards to comply with Regulation Z and, in most circumstances, the Credit CARD Act provisions will provide important protections to consumers. The rules do not forbid companies from offering credit to prepaid cardholders, but they do apply standard credit card rules to that credit.

*Ability to pay.* Creditors would be required to “consider[] the consumer's ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations.”<sup>114</sup> The rule does not impose any specific residual income, debt-to-income, or documented underwriting requirements. It does require the creditor to consider the consumer’s obligations and not only income, and whether the consumer has the capacity to repay the loan on its terms.<sup>115</sup> That is the bare minimum for any responsible form of credit. If anything, the CARD Act rules are too weak.<sup>116</sup>

*Reasonable time to pay.* Instead of being repaid automatically from the first incoming deposit, as early as one day later, the rule requires that the consumer be given the benefit of the credit for a reasonable

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<sup>112</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.C.

<sup>113</sup> 12 C.F.R. §1026.2(a)(15)(ii)(B).

<sup>114</sup> Reg. Z § 1026.51(a)(1)(i).

<sup>115</sup> “Reasonable policies and procedures also include consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations.” Reg. Z §1026.51(a)(1)(ii).

<sup>116</sup> The CARD Act requires consideration of “debt obligations” but not regular expenses like rent, food and transportation. The CFPB’s cost-benefit analysis concluded that “Creditors can assess consumers’ ability to pay at low cost, and as long as credit limits remain low it would be relatively easy for consumer who have or are eligible to have prepaid overdraft to be deemed able to make the minimum periodic payment on the small amount of credit currently extended in connection with these services.” 79 Fed. Reg. at 77280. It is unclear whether the CFPB is assuming that overdraft programs would be readjusted to provide small minimum payments rather than the lump sum payments that are currently required.

amount of time and have reasonable notice of the amount due each month. Payments would be due 21 days after each monthly statement.

*A limit on “fee harvester” fees in the first year.* Fees in the first year after account opening could not exceed 25% of the credit line. While the interest rate is not capped, the important fee harvester rule will prevent deception, evasion and consumer abuses. Although the creditor could charge 500% APR, it would have to disclose that rate. It cannot impose fees that individually might not appear excessive but cumulatively pile up and distort the APR. By limiting fees, costs will be primarily priced through a periodic interest rate that results in costs that are proportional to the amount of credit used and the time that it is used.

*Separate monthly credit statements.* The consumer will see clearly how much credit she has used and how much it has cost each month and year-to-date. The usage and cost of credit will not be buried in the prepaid card transaction history, obscuring how much the consumer has overdrafted and what it cost. Consent will be required before electronic statements can be provided as a substitute for written ones, so consumers who do not have the capacity to view electronic statements will have the right to paper ones.<sup>117</sup>

*Control over how to repay: no mandatory electronic repayment or offset.* As with a credit card, the consumer could voluntarily set up automated payments but would not be required to do so.<sup>118</sup> The consumer can control when, how and from what account payments are made. This requirement is especially helpful to consumers with irregular income. It also gives the lender an incentive to consider affordability, because the lender does not have first lien on the consumer’s income and repayment is not guaranteed. Necessities will come first.

*Limits on late fees, over-the-limit fees, and other penalty fees.* Penalty fees must be reasonable and proportional to the violation. Late fees would be capped at \$25, or \$35 for a second offense, and they cannot exceed the required payment. If the payment due were only \$15, then the late fee could not exceed \$15. Declined transactions fees will be banned for the credit portion of the prepaid account.<sup>119</sup>

*APR disclosure and the ability to compare credit options.* Consumers will receive a disclosure of the annual percentage rate (APR), which expresses the full cost of a loan on an annual basis. The APR enables loans of different amounts, different lengths, and different mixtures of interest and fees to be compared to each other. A loan that has a lower APR will generally cost less than one with a higher APR if the two are used for the same amount of time, whether for one week or one year.<sup>120</sup> The pricing and disclosures on overdraft fees, by contrast, prevent a consumer from knowing that the cost of borrowing

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<sup>117</sup> However, as discussed in Section XIII.B.4, we have concerns that some providers are requiring electronic communications consent for some products.

<sup>118</sup> As discussed in Section XIII.A.1 and XIII.B.6, we urge the CFPB to provide additional protections for automated payments.

<sup>119</sup> As discussed in Section IV.J, we urge the CFPB to ban all declined transaction fees for prepaid accounts.

<sup>120</sup> Because of the fee harvester limitations, credit will be priced primarily through a periodic rate, at least during the first year, making the APR a more accurate representation of the cost of credit. However, weaknesses in Regulation Z rules for calculating APRs open-end credit can result in the APR being understated for cards that have significant fees and small credit lines, even if the fees are capped at 25% of the credit line, and especially for cards in the second year if the CFPB continues to permit the fee harvester cap to expire after the first year. We urge the CFPB not only to make the fee harvester cap permanent but also to require disproportionate fees to be included in the APR disclosed in advertisements and solicitations.

\$100 for 10 days until payday would be far lower on a 29% APR credit card than on a prepaid card that charges \$15 overdraft fees. Consumers do not need to understand how the APR is calculated; they only need to know that lower is better than higher.

While not specifically set out in the proposed rule, the impact of the rules will likely lead to two other benefits:

*Clear credit line and less fudging of credit availability.* Creditors will likely tell consumers exactly how much credit they have available and will not claim that it is a discretionary “courtesy” that may or may not be available when needed. Under the current regulatory scheme, in order to evade the Truth in Lending Act rules, banks cannot tell consumers honestly how much credit they are giving them. They have to be vague and hem and haw, claiming that they are not even offering credit and are making no promises. Of course, as with credit cards and lines of credit today, the creditor can always shut down a credit line at any time. But in the absence of a reason to do so, the consumer will know how much credit she has and can count on.

*Clear separation between the prepaid card account and the credit account.* While the proposed rules do not mandate it, compliance will be easiest if the provider does create a separate credit account.<sup>121</sup> Just like other consumers who manage their deposit accounts separate from their credit lines, prepaid card consumers will be able to have a clear separation and more conscious use of credit.

Three other proposed rules that will specifically apply to prepaid card credit will also help consumers to keep their prepaid deposit account separate, to avoid credit if they wish to do so, and to manage their credit like traditional credit cardholders:

*Waiting period.* The rule requires a 30-day waiting period after registration of a prepaid card before a provider could offer or add a linked credit account or credit feature. (As discussed below, we believe the period should be 90 days.) Consumers who are shopping for a prepaid card have enough to consider and should not have to evaluate credit options too. The consumer can more easily discard a card that she does not like if there is not a credit line on it that needs to be repaid.

*Warning about credit/overdraft features.* Many consumers turn to prepaid cards because they have had trouble with overdraft fees or credit. While those features require opt-ins, consumers may wish to avoid cards that will try to push credit on them, which may be hard to resist when budgets are tight.

*Payments due no more frequently than monthly.* The current credit card rules do not specify payment frequency but do require statements for each month where there is activity and limit payments to 21 days following each statement. In practice, credit cards never require payments more frequently than once a month, and the proposed prepaid card credit rules make that practices clear for prepaid cardholders.

These rules do prevent responsible forms of credit from being offered to prepaid cardholders who have the capacity to handle the amount of credit offered. They also do not prevent links between a prepaid card and a credit account, such as the ability to transfer funds from the credit account to the prepaid card or to set up voluntary automatic payments in the other direction. The rules do limit harmful forms of credit that are not based on ability to pay and that lead to a cycle of debt.

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<sup>121</sup> As discussed below in the section-by-section analysis, we believe a separate account should be required.

## E. Prepaid cardholders will have better choices if they are not offered the false choice of overdraft “protection.”

Proponents of overdraft fees on prepaid cards argue that consumers should have the choice. NetSpend has used fear-mongering tactics to induce its customers to file comments with the CFPB asking for the “right to choose” overdraft. Many of the comments are boilerplate, obviously taken from a NetSpend template. The more individualized comments reveal several points:

- Consumers are using overdraft as credit,<sup>122</sup> but some do not understand that.<sup>123</sup>
- Many consumers are stuck in a cycle of debt, overdrafting month in and month out.<sup>124</sup>
- The comments reflect no awareness that overdrafting leaves less money to meet expenses.<sup>125</sup>
- Not surprisingly, consumers like lower overdraft fees better than higher overdraft fees.<sup>126</sup>
- Some consumers only use the free \$10 buffer, which the proposed rules would not eliminate.<sup>127</sup>
- NetSpend has not told its customers that the proposal would not ban all forms of credit (or even all forms of overdrafts), or that the rules will make credit more affordable.

Consumers deserve better choices than ones that are designed to drain their thin income, put them into a cycle of debt, and make it harder, not easier, to meet expenses at the end of the month. Harmful practices can always be defended using the mantra of “choice.” That is exactly what abusive lending is: bad choices offered to struggling individuals that take advantage of their desperate situation.

For some consumers, who have regular gaps between their income and their expenses, credit is not the answer. The best choice is to avoid taking on the added expense of overdrafts. Harder choices, like doing without, budget, saving, or going to a family member who will only lend money for a true emergency, are likely to be much better than the easy but ultimately unhelpful choice of “fast cash.” Even for irregular expenses, like a high winter heating bill, a balloon-payment overdraft loan that puts the consumer in a cycle of debt is not the best choice. A consumer who cannot overdraft might instead

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<sup>122</sup> Comment of Dayon Halcy, CFPB-2014-0031-0572 (Mar. 3, 2015) (helps out “when funds are low and the bills are hig [sic]”); Comment of Marva Josepg, CFPB-2014-0031-1591 (Mar. 10, 2015) (“it helps out when I’m unable to pay a bill or just something my children may need”); Fred Williams, “Overdrafts on prepaid cards: Good deal, or debt trap?” (Dec. 24, 2012), <http://www.creditcards.com/credit-card-news/overdrafts-prepaid-cards-1271.php> (quoting consumer who used NetSpend overdrafts “since Washington State has removed most of the payday loan operations”).

<sup>123</sup> Comment of Robert Kelley, CFPB-2014-0031-0697 (Mar. 4, 2015) (“the overdraft protection. is beneficial to most consumers, if their smart on how they use it and don’t abuse it.....credit is fine but you must have the means to repay what you borrow.....”).

<sup>124</sup> See, e.g., Comment of Mary Miller, CFPB-2014-0031-2662 (Mar. 18, 2015) (“I depend on this every month” for medication.); Comment of David Leegrand, CFPB-2014-0031-1114 (Mar. 6, 2015) (“i always max out on my card so this allows me to handle my financial responsibilities without worrying about overdraft fees.”).

<sup>125</sup> See, e.g., Comment of Priscilla Bennett, CFPB-2014-0031-0576 (Mar. 3, 2015)(“I need it. my pay covers my bills only. not everyday expensive I need it more because of this Health care . Health care doesn’t care bout your living expensive ,”).

<sup>126</sup> See, e.g., Comment of Andrea Authorlee, CFPB-2014-0031-0563 (Mar. 3, 2015) (I “only worry about a \$15.00 fee compared to the normal \$35 and up”); Comment of Tina Malone, CFPB-2014-0031-0917 (Mar. 5, 2015) (“it’s more economical than a bank’s fees”); Comment of Jerryal Williams, CFPB-2014-0031-0851 (Mar. 4, 2015) (“the fee is much lower than what the banks would normally charge you.”).

<sup>127</sup> See, e.g., Comment of Roxanne Reeves, CFPB-2014-0031-1116 (Mar. 6, 2015) (“I need that 10 dollar cushion its there without being charged a high overdraft fee like most banks charge.”).

pick up the phone and find a better option. For example, many utilities offer payment plans to cover spikes in heating or cooling costs.<sup>128</sup>

For consumers who are not too overextended, the proposed rules will result in better credit options – whether the consumer accesses the credit through overdraft (which is unnecessary and we oppose) or by affirmatively transferring funds from a line of credit. Credit will be tailored to the consumer’s ability to pay, and consumers will have more control and time to manage payments. Cost will be more proportional to the amount of credit used.<sup>129</sup> Lenders will be able to offer more affordable installment payments, which are not possible under the rules governing overdraft programs today.<sup>130</sup>

Critics claim that the proposed rules will eliminate credit options for prepaid cardholders. But two months after the proposed rules were announced, the largest GPR card provider, Green Dot, announced that it is planning to offer a line of credit to its customers, both prepaid cardholders and bank account customers.<sup>131</sup> The details are not yet public. But given Green Dot’s strong stand against overdraft fees, it appears likely that its line of credit will be considerably more affordable than overdraft protection programs today.

Here is an example of how the new rules would work if the consumer were offered a credit line at 36% APR and used it to borrow the same \$85 that is available under NetSpend’s overdraft program today. Instead of repaying the credit in a balloon payment immediately upon the next direct deposit, the consumer would have payments no more than once a month, due no sooner than 21 days after each monthly statement. Interest for borrowing that \$85 for five weeks would be \$2.93 instead of \$15 to \$25 for only a few days’ of credit.

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<sup>128</sup> See, e.g., Charlie Harak, NCLC, Helping Low-Income Utility Customers Manage Overdue Bills through Arrearage Management Programs (Sept. 2013), [http://www.nclc.org/images/pdf/energy\\_utility\\_telecom/consumer\\_protection\\_and\\_regulatory\\_issues/amp\\_report\\_final\\_sept13.pdf](http://www.nclc.org/images/pdf/energy_utility_telecom/consumer_protection_and_regulatory_issues/amp_report_final_sept13.pdf).

<sup>129</sup> The fee harvester rule would cause the credit to be largely priced through a periodic interest rate, at least for the first year. Under traditional common law principles, overdraft fees would be considered invalid liquidated damages because they are not proportional to the cost of the overdraft. See Chi Chi Wu, NCLC, “Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees” (April 2013), [http://www.nclc.org/images/pdf/high\\_cost\\_small\\_loans/common-law-overdraft-fees.pdf](http://www.nclc.org/images/pdf/high_cost_small_loans/common-law-overdraft-fees.pdf).

<sup>130</sup> “Courtesy” overdraft services cannot be based on a credit agreement, which an installment payment plan requires.

<sup>131</sup> Kevin Wack, “Green Dot Plans to Offer Credit to Prepaid Customers,” American Banker (Jan. 30, 2015), <http://www.americanbanker.com/news/consumer-finance/green-dot-plans-to-offer-credit-to-prepaid-customers-1072456-1.html>.

Chart 2: Cost of \$85 Credit NetSpend Overdraft v. 36% Line of Credit		
	Overdraft Fee	Line of Credit
<b>Cost</b>	\$15 to \$25	\$2.93
<b>APR</b>	644% to 859%*	36%
<b>Time to repay</b>	A few days	21 days from monthly statement
*Assuming the overdraft is repaid in 10 days. <sup>132</sup>		

The disparity is even greater for a smaller overdraft, for example one of \$10.01.<sup>133</sup> The overdraft fee is the same, \$15 or \$25, but the cost to borrow that amount at 36% for five weeks would be only \$0.34.

The proposed rules will result in better choices for consumers. Consumers will have more control over whether to borrow, and credit will likely be cheaper and better designed than under current practices.

#### IV. The Overdraft/Credit Rules Are a Good Start But Have Loopholes that Need to be Closed.

##### A. Creditors will evade the rules by offering credit not limited to a “particular card.”

###### 1. Overview

While the proposed rules include substantial protections for some forms of credit offered to prepaid cardholders, they contain a large loophole. The proposal applies credit card rules and other protections only to two categories of credit:

- (1) credit accessed using the prepaid card directly through an overdraft (i.e., credit “pulled” by the prepaid card from the credit line), and
- (2) credit transferred (“pushed”) to the prepaid card account from a line of credit that only “allows deposits directly into particular prepaid accounts specified by the creditor” and does not allow a consumer to directly deposit credit into any other asset account.

Credit that is transferred or “pushed” onto the prepaid card from a line of credit that may be directly deposited to accounts other than a particular card specified by the creditor would not be considered a “credit card” and would receive none of the proposed protections.

The “particular card” loophole is likely to be exploited in several ways. First, payday lenders are likely to develop open-end credit lines designed for their own prepaid cards but also accessible for other prepaid cards. Second, other predatory lenders will develop credit lines for prepaid cards that can be added to any card. Third, prepaid card providers will develop credit lines designed primarily for use with their own cards but with the theoretical possibility that the credit can be deposited into another asset

<sup>132</sup> See discussion in Section II.G.

<sup>133</sup> While overdraft fees are not incurred until the negative balance reaches \$10.01 on a GPR card or \$5.01 on a payroll card, beyond that threshold an overdraft fee is charged on every transaction, even one as small as \$1.

account. Fourth, any prepaid card that has a savings feature that is technically a separate account might be outside the rules.

To prevent these very real and likely forms of evasion, the CFPB must mandate a stricter standard. All open-end lines of credit that use prepaid cards as an access device and permit direct deposits or transfers to prepaid card accounts should be covered by credit card rules if either (1) the creditor is the same institution as or has a business relationship with the prepaid card issuer,<sup>134</sup> or (2) the creditor reasonably anticipates that a prepaid card will be used as an access device for the line of credit. A completely unrelated credit account that simply permits deposits through the ACH system to bank accounts but has no connection to prepaid card issuers or consumers identified as prepaid cards users would not be covered.

## **2. Payday lenders are already developing open end lines of credit and will link them with their own, but also other, prepaid cards**

The fear that payday lenders will exploit the loophole for nonexclusive push credit is not remote. Payday lenders are already developing open end lines of credit in order to evade credit laws, and that trend is likely to accelerate. Payday lenders are already offering prepaid cards and making loans that are deposited to and repaid from those cards. It will be natural to link the two.

One of the largest lenders, Cash America – which sells the NetSpend prepaid card – has shifted from balloon payment payday loans to longer-term payday loans and open-end lines of credit. Since 2011, Cash America’s open-end credit lines have grown both in volume and as a share of the payday lender’s business. Lines of credit made up \$21.6 million of Cash America’s domestic loan balances in the fourth quarter of 2011 and grew to \$66.2 million by the fourth quarter of 2014, comprising over 22% of the loan balances.<sup>135</sup>

Payday lenders have a considerable motivation to move to open-end lines of credit. As the payday lending industry moves away from single-payment balloon loans, they will be constrained by rate caps for installment lending in some states. But many states have no rate cap, or a looser one, for open-end lending.<sup>136</sup> Federal law also supplies a strong motivation for predatory lenders to make open-end loans. The TILA APR that must be disclosed and advertised for closed-end loans includes most fees. But the APR for open-end loans includes only periodic interest. The lower APR can help to evade rate caps that are based on the APR.

In addition, the growing focus on limiting rollovers of closed-end loans makes a move to open-end lending a natural for high-cost lenders. Open-end credit plans, by definition, contemplate repeat lending and are harder to mesh with rollover limits. Unlike a series of single payment payday loans, a

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<sup>134</sup> Throughout these comments, we generally use the term “issuer” to refer to the entity in charge of the card program, whether that entity is the issuing bank or the program manager.

<sup>135</sup> Hecht, John. “Alternative Financial Services: Innovating to Meet Customer Needs in an Evolving Regulatory Framework” at 31 (presented at the CFSa Solutions, Little Rock, AR, Feb. 27, 2014), [http://cfsaa.com/Portals/0/cfsa2014\\_conference/Presentations/CFSA2014\\_THURSDAY\\_GeneralSession\\_JohnHecht\\_Stephens.pdf](http://cfsaa.com/Portals/0/cfsa2014_conference/Presentations/CFSA2014_THURSDAY_GeneralSession_JohnHecht_Stephens.pdf).

<sup>136</sup> For example, Virginia places restrictions on closed-end payday loans but not on open-end ones. Consequently, payday lenders have moved to open-end loans. See “Lenders Find Loopholes Around Virginia Law Limiting Payday Loans,” FoxNews.com (Dec. 31, 2008), <http://www.foxnews.com/politics/2008/12/31/lenders-loopholes-virginia-law-limiting-payday-loans/>.

payday line of credit needs only a single authorization from the consumer. That credit line can go on indefinitely as long as the consumer uses it.

Payday lenders have used open-end loans have been used in attempts to evade state rate caps. Advance America – which also sells a NetSpend prepaid card – previously offered an open-end line of credit product called the Choice Line of Credit, an open-end line of credit of up to \$500 at 6 percent interest along with a monthly participation fee of \$150. Pennsylvania claimed that the fee structure was designed to evade the state’s usury law. In February 2015, Advance America agreed to a settlement of \$8 million in restitutions and was required to forgive approximately \$12 million in unpaid balances.<sup>137</sup>

All Credit Lenders offers an open-end line of credit that uses the consumer’s debit card as an access device. The lender advertises a 24% APR, but also charges an “account protection fee.”<sup>138</sup> The Illinois Attorney General has sued, alleging that the most, if not all, borrowers were enrolled in the account protection fee and that the additional fee – at least \$11 for every \$50 outstanding balance – was used to shroud the true cost of borrowing.<sup>139</sup>

Payday lenders are also active in state legislatures seeking authorization for high-cost open-end lines of credit. In Arizona, for example, the industry is pushing a “Flex Loan” bill that purports to carry a 36% interest rate but that also has “customary” fees up to one-half of one percent *per day*.<sup>140</sup> With fees included, the true APR is 218.5%. Yet due to loopholes in Regulation Z,<sup>141</sup> it is possible that only a 36% APR will be disclosed, misleading consumers.

While payday lenders will be eager to link these open-end payday loans to their own prepaid cards, the lenders are first and foremost in the loan business. They will be willing to tie their loans to whatever asset account the consumer has. But if an open-end payday loan is eligible to be linked to any asset account that permits preauthorized ACH debits, those credit lines will be outside the proposed rules – *even when the payday lender encourages the consumer to link the credit line to the payday lender’s own prepaid card*.

Once tied to a particular prepaid card, a payday lender line of credit will operate no differently than a credit line that is designated for a particular prepaid card at the outset. If the credit line is accessed through overdraft (which we urge the CFPB to prohibit), it will be covered by the proposed rules. But if credit is pushed from the credit line to the card, the consumer will have almost none of the credit card protections that the “particular card” credit lines – such as a 30-day waiting period, ability to pay, fee

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<sup>137</sup> Boyle, Jim. “Advance America Agrees to \$8M Settlement with Pennsylvania.” *Legal Newsline Legal Journal*. February 12, 2015. <http://legalnewsline.com/news/254880-advance-america-agrees-to-8m-settlement-with-pennsylvania>.

<sup>138</sup> See <https://www.allcreditlenders.net/#>.

<sup>139</sup> Complaint for Injunctive and Other Relief, Illinois vs. CMK Investments, Inc. DBA All Credit Lenders, Inc., (Cir. Ct. of Cook Co., IL, filed Mar. 18, 2014), [http://www.cfpbmonitor.com/files/2014/03/ALL\\_CREDIT\\_LENDERS\\_03-18-2014\\_16-26-531.pdf](http://www.cfpbmonitor.com/files/2014/03/ALL_CREDIT_LENDERS_03-18-2014_16-26-531.pdf).

<sup>140</sup> See Arizona General Assembly HB2611 “Consumer Flex Loans,” <http://www.azleg.gov/legtext/52leg/1r/bills/HB2611P.pdf>.

<sup>141</sup> Treatment of these fees under Regulation Z is unclear. The fees would be included in the advertising APR only if they are considered *both* a finance charge and a periodic rate. Lenders may argue that the fee is a participation fee, which is not a finance charge. Or they may charge the fee as a flat fee and not as a periodic rate.

limits in the first year, or monthly payments.<sup>142</sup> That is, payday lenders will be able to sell prepaid cards simultaneously with the credit lines in order to enable easy access to predatory, high cost credit with few protections. Instead, the rules should cover all credit lines that are linked to prepaid cards under the credit card rules, if the creditor reasonably anticipates the credit line will be accessed by prepaid cards.

### 3. Third parties will develop high-cost credit lines for prepaid cards.

In addition to payday lenders, other third parties and technology companies will develop credit lines for prepaid cards that can be added to any card. History has examples of such high cost prepaid card credit lines offered by third parties and not by the program manager of a particular card.

The tribal online lender Mobiloans claims to offer “credit ... without the card,” but uses the consumer’s ATM card as an access device for “cash” loans.<sup>143</sup> The credit can be used to “Avoid overdraft fees.”<sup>144</sup> Loans are deposited to the consumer’s account with “Easy, Automatic Payments... Just set up AutoPay with your checking account, and your payments will come out automatically on your scheduled due date.”<sup>145</sup> Only by digging deep into the terms and conditions is it possible to see that payments can also be made by check – if the consumer is willing to accept each advance on the credit line by waiting for a mailed check.<sup>146</sup> Loan contracts disclose a 0% APR and charge a draw fee of approximately 15 % of the principal dispersed, along with a periodic monthly finance fee based on the amount of the outstanding principal due. For example, an outstanding principal of \$200 would incur a monthly finance fee of \$25.<sup>147</sup>

A few years ago, Account Now developed an iAdvance deposit advance product that was available on NetSpend prepaid cards issued by MetaBank. The Office of Thrift Supervision shut it down after finding unfair or deceptive practices.<sup>148</sup> But entities like AccountNow or MetaBank could develop an updated credit line today and enable consumers to pair it up with different prepaid cards.

In another example, SureCashXtra, owned by the Chippewa Cree Tribe, offered a payday loan feature that could be appended to multiple prepaid cards.<sup>149</sup> The lender’s website was consumer-facing and did

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<sup>142</sup> The credit lines would, however, still be covered by the ban on mandatory repayment by electronic fund transfer, Reg. E §E § 1005.10(e)(1), including transfers accomplished through offset, Reg. E §E § 1005.3(c)(5); NCLC, Consumer Banking and Payments Law § 5.1.3.7.

<sup>143</sup> <https://www.mobiloans.com/>.

<sup>144</sup> <https://www.mobiloans.com/how-it-works>.

<sup>145</sup> *Id.*

<sup>146</sup> See <https://www.mobiloans.com/terms-and-conditions>.

<sup>147</sup> See <https://www.mobiloans.com/what-it-costs> and Mobiloan contract dated January 7, 2014 on file with Consumer Federation of America.

<sup>148</sup> See Meta Financial Group, Inc., Form 8-K, Securities and Exchange Commission File No. 0-22140 (Oct. 6, 2010). MetaBank was ordered to pay restitution to the cardholders. See Andrew Johnson, “OTS to Require Meta to Reimburse Loan Customers,” *American Banker* (Jan. 5, 2011), <http://www.americanbanker.com/news/meta-financial-ots-1030873-1.html>.

<sup>149</sup> See “SureCashXtra: A Facility for a Prepaid Card with Credit,” *Bank Talk* (July 25, 2012), <http://banktalk.org/2012/07/25/surecashxtra-a-facility-for-a-prepaid-card-with-credit-with-credit>. As discussed at greater length in the next section, the credit feature was available on any prepaid card that used a transaction processor that enabled SCX on its system.

not limit the loan deposits to a particular card.<sup>150</sup> Although the credit feature worked through overdraft, and overdraft credit is covered by the proposed rule, it would be simple enough to change the product into push credit under a deposit advance model instead of pull credit.

Today, mobile apps wallets could enable such prepaid card credit features. A lender could design a wallet that could hold whatever prepaid card the consumer chooses and could be used to transfer money from the credit line to the prepaid card. The credit line would have no access device of its own and would be marketed to prepaid cardholders and depend on the prepaid card as an access device. Or, it could be designed with a particular prepaid card in mind and offered to those consumers but permit them to add other accounts as well. But the fact that the lender did not specify a particular prepaid card would take the credit line out of the proposed rules.

Here again, credit lines that are offered for access through prepaid cards should be treated as credit cards under the proposed rules.

#### **4. Payment processors will develop prepaid card processing platforms that incorporate credit features that can be triggered for multiple cards.**

Prepaid card program managers rarely develop credit features on their own. Rather, those features are part of the payment processing platform that the cards rely on. Once embedded into a processing platform, the feature is potentially available for any card that uses that platform.

As noted above, a few years ago the tribal payday lender SureCashXtra developed a payday loan that functioned through overdraft on a prepaid card. As the payday lender's website described it in the FAQs:

Each branded prepaid debit card has a transaction processor that evaluates and completes ATM and Point of Sale Signature transactions that are performed on their cards. The transaction processor for your prepaid card must allow SCX [SureCashXtra] to be enabled on their system.<sup>151</sup>

A similar push-credit feature that does not rely on overdraft could be embedded into a prepaid card payment processing platform.

Indeed, before the banking regulators issued their guidance on bank payday loans, payment processors were embedding deposit advance features into their demand deposit account (DDA) processing platforms. Both Fiserv and FIS were promoting deposit advance loans as a feature to enhance revenue.<sup>152</sup> Any bank that used their processing platform could enable the credit feature on their DDA accounts with a flip of a switch. Bank payday loans were poised to spread dramatically to hundreds if not thousands of banks that used the Fiserv, FIS and other platforms that enabled deposit advance.

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<sup>150</sup> The FAQs on the website spoke about "your prepaid card." See NCLC Prepaid ANPR Comments at 7-8 (citing website that is no longer operational).

<sup>151</sup> See NCLC Prepaid ANPR Comments at 7-8 (citing websites that are no longer operational).

<sup>152</sup> See Fiserv, Press Release, "Fiserv Unveils Relationship Advance" (Nov. 18, 2009), <http://investors.fiserv.com/releasedetail.cfm?ReleaseID=425106>; Lee Kremin & Shawn Rudisill, FIS, "Navigating the Changing Tides Impacting Fee Income: Taking a Proactive Approach to Shifting Market Conditions" at 15 (2011), [http://www.figlobal.com/cmsspub/groups/public/documents/document/mvp0\\_016925.pdf](http://www.figlobal.com/cmsspub/groups/public/documents/document/mvp0_016925.pdf).

Notably, processors have separate platforms for prepaid card accounts and DDAs. Some processors actually specialize in the prepaid industry, and others offer both but on separate platforms.<sup>153</sup> Thus, a deposit advance or other credit feature built into a prepaid card platform would only impact prepaid cards, and a credit feature on a DDA platform would only affect DDA accounts.

A payday lender or a high-cost online lender that wanted to integrate its credit feature into multiple prepaid cards could do so through a payment processor without restricting the feature to a particular card. The feature would be available to any prepaid card that uses that platform and wanted to turn it on.

In this scenario, there would be no direct contact between the lender and the prepaid card program manager (or issuer), even though the program manager would be fully aware that its cards have a credit feature and who the creditor is. The prepaid card program manager's relationship would be with the processor and so would the creditor's.

Consumers could learn about and incorporate the credit feature to their prepaid card in one of two ways. First, the prepaid card could promote it for use in connection with that card. In that instance, the credit feature should fall under the "particular card" provision.

However, the consumer could also learn about the credit feature from lender marketing or a lender website that is not restricted to a particular card. For example, the lender's website could say: "Get your money instantly on hundreds of prepaid cards. Search here to find out if instant access is available for your card." Actually adding the credit feature would require some cooperation from the prepaid card. But the lender could facilitate the communications to ensure that the prepaid card enabled the credit functionality on a particular consumer's card. Once the consumer entered her card information into the lender's website as part of an application, the lender could communicate to the payment processor, which in turn could communicate to the program manager to turn on the credit feature. Alternatively, the lender could tell the consumer to "ask your prepaid card to turn on SCX credit."

The lender could even solicit consumers who do not yet have a prepaid card that enables the credit feature. The lender could act as a lead generator for those prepaid cards, encouraging consumers to "apply now." In fact, it is possible that a single application to the lender could serve as both an application for a loan and for a prepaid card.<sup>154</sup>

When the consumer learns about the credit line from the lender, the lender would not be specifying a particular card. The lender's loans would not even have to be limited to prepaid cards that enable the credit feature. The lender could also offer the option of direct deposit to any asset account the consumer has. Accessing the loan through a prepaid card feature would just be an option – perhaps faster and cheaper, perhaps no different. Yet, once enabled, the credit feature would work in an

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<sup>153</sup> See <http://paybefore.com/pay-connect/processors/>.

<sup>154</sup> One obstacle to this concept is that a lender is unlikely to be willing to make a loan that is repaid from a brand new prepaid card account, especially one that does not have direct deposit set up or a track record of holding regular income. But switching the consumer's direct deposit could be part of the application process, or the credit feature would not become functional until a certain amount of income was deposited to the card. Or, the lender could require ACH authorization to a checking account as a back-up mechanism. As technology and alternate underwriting models develop, other methods of making loans coupled with newly issued prepaid cards could emerge.

identical fashion to a “particular card” feature to permit credit transactions for that card. It would be immaterial whether the consumer came to the credit feature independently or instead through an offer from and limited to a “particular card.”

Arguably, once the credit feature was turned onto a particular card, it would fall into the “particular card” rule if the consumer could only access the credit through that card. But payment processors and lenders could design the feature so that it would also enable direct deposits to other accounts even if, as discussed in the next section, the consumer was unlikely to have those other accounts. The credit line could permit transfers to any card number or ACH number that the consumer supplied. But a consumer who has added a credit feature to a particular card would be unlikely to have or want to use another asset account for purposes of receiving the credit.

Processors would receive income from prepaid cards that pay to use the credit feature of the platform, and processors would promote the features the same way they promoted deposit advance: as a revenue generator for the prepaid cards. This dynamic could lead to the same back-end pricing and race-to-the-bottom that the proposed rules are trying to avoid.

#### **5. Prepaid card providers will develop credit lines for their own cards with other access points that are more theoretical than real.**

Under the proposed rule, prepaid card providers could develop credit lines designed primarily for use with their own cards but with the theoretical possibility that the credit can be deposited into another asset account. As long as the credit line can be deposited directly to another asset card, it would not be covered by the proposed rules as a credit card. This creates a huge opportunity for evasion.

For one thing, as both the CFPB and these comments have noted, many prepaid card holders have these cards precisely because they were driven out of the banking system due to overdrafts. They may choose not to have bank accounts due to overdrafts or may be prevented from opening accounts due to the ChexSystems blacklist. The theoretical possibility that funds from a credit line could be transferred to a bank account is entirely meaningless to consumers who do not have a bank account and in some cases cannot obtain one.

Thus, a program manager could offer a credit line marketed to its cardholders that operates seamlessly with that card. Credit could be transferred to the card instantly through internal accounting with no delay or charge. In order to escape the proposed rule, the creditor could also design the credit account so that it permitted direct deposits to other asset accounts through the ACH system, despite the fact that few if any its borrowers actually have ever deposited the accounts to a bank account and most of its borrowers do not even have a bank account. Another barrier to transfers to a bank account is that ACH deposits normally require a day or two to post, whereas transferred funds can be made available instantly. The creditor could even charge for those ACH transfers to other accounts, as many prepaid cards do. Thus, even consumers with a bank account would be discouraged from accessing the credit other than through the prepaid card.

This is not just a theoretical possibility. A few years ago, the same prepaid card provider that issued the CheckSmart prepaid card payday loans had another prepaid card called the Tandem Money MasterCard.<sup>155</sup> That card had a linked line of credit and a linked savings account called Tandem Money.

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<sup>155</sup> See NCLC Prepaid ANPR Comments at 6-7.

Advances on the credit line – at a cost of 292% to 365% for a 10-day advance – could be deposited onto two different Insight prepaid cards. In theory, the funds could also be accessed by ACH transfer to a bank account or a wire remittance transfer. But Tandem Money delayed access to the funds for five days if those options were selected, thereby steering consumers into prepaid card transfers.<sup>156</sup>

Credit lines that are designed to be accessed through a prepaid card should receive credit card protections just like exclusive push credit line. Consumers have no less need of protection even if there is theoretically another way to access the credit account.

#### **6. The addition of a savings account would bring a prepaid card out of the proposed rule.**

Finally, all a prepaid card provider would have to do to escape the current rule is to add a savings account. NetSpend already offers linked savings accounts. The NetSpend Savings Account is made available to NetSpend cardholders through MetaBank, BofI Federal Bank and The Bancorp Bank.<sup>157</sup>

While the NetSpend savings account was not designed to evade the CFPB's prepaid card rules, it could be used for that purpose. Under the proposed rule, a credit line that is linked to a prepaid card account is considered to be a "credit card" only if it "allows deposits directly into particular prepaid accounts specified by the creditor but does not allow the consumer to deposit directly extensions of credit from the plan into asset accounts other than the particular prepaid accounts specified by the creditor."<sup>158</sup> If NetSpend created a credit line and permitted consumers to transfer funds from the credit line to either the prepaid card account or to a savings account – which is an "asset account other than the particular prepaid account" – the credit line would appear to be exempt from the proposed rules.

Evasions could happen if different banks serve as the prepaid card issuer and the holder of the savings account. The now-defunct Tandem Money prepaid card, issued by Urban Trust Bank, had a linked savings account offered by Premier Bank of Iowa.<sup>159</sup> NetSpend also has relationships with at least three different banks.

The fact that a prepaid card-linked line of credit also offers the theoretical option to directly deposit extensions of credit into a savings account would be a particularly strange reason for excluding the credit line from the proposed protections. Borrowing money or the purpose of depositing it into a savings account -- even one that paid the high 5% APY on the NetSpend Savings Account – would make no sense. Plus, savings accounts are designed, by regulatory requirement and sometimes by policy, to be "inconvenient" to access.<sup>160</sup>

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<sup>156</sup> See Your TandemMoney Savings Account and Line of Credit Agreement § 2.8 (effective Jan. 2012) (TandemMoney T&C), available by clicking on the link for the terms and conditions within the Fee Summary, [http://www.insightcards.com/images/uploads/120502\\_FeeSummary.pdf](http://www.insightcards.com/images/uploads/120502_FeeSummary.pdf) (last visited 3/9/15).

<sup>157</sup> See [https://www.netspend.com/how\\_it\\_works/managing\\_your\\_money.shtml](https://www.netspend.com/how_it_works/managing_your_money.shtml) (note 1).

<sup>158</sup> Proposed Reg. Z § 1026.2(a)(15)(vii); see *id.* § 1026.2(a)(15)(ii)(C)(2).

<sup>159</sup> NCLC Prepaid ANPR Comments at 6.

<sup>160</sup> "Regulation D requires that an account, to be classified as a 'savings deposit,' must not permit more than six convenient transfers or withdrawals per month from the account. Transfers and withdrawals that are considered 'convenient' for this purpose are those made by preauthorized, automatic, telephonic agreement, order or instruction, or by check, debit card, or similar order made by the depositor and payable to third parties. 12 CFR 204.2(d)(2)." Fed. Reserve Board, Consumer Compliance Handbook, Regulation D, Reserve Requirements at 1, [http://www.federalreserve.gov/boarddocs/supmanual/cch/int\\_depos.pdf](http://www.federalreserve.gov/boarddocs/supmanual/cch/int_depos.pdf).

Certainly, the CFPB does not intend this rule. The CFPB can and should exclude savings deposits from the “asset account” options that take a line of credit out of coverage. But the Bureau should not stop there. This example should serve as a reminder about how easy it will be to evade the “particular account” rule through the mere existence of another asset account option.

**B. Credit lines that the creditor knows are likely to be accessed through a prepaid card should be covered by credit card rules.**

**1. Prepaid card lines of credit can be defined more broadly.**

The CFPB should close the “particular card” loophole. Credit that is likely to be accessed through a prepaid card should be covered by the proposed prepaid card credit rules whether or not it is limited to a particular card.

Proposed Regulation Z § 1026.2(a)(15)(vii) should be revised to define a “prepaid card line of credit”<sup>161</sup> and to provide that such credit lines are credit cards covered by the Regulation Z credit card rules, including the CARD Act rules, and also by the Regulation E and Regulation Z rules that are proposed to apply to account numbers linked to particular cards. The definition would read:

*Prepaid card line of credit* means an account number that is not a prepaid card that may be used from time to time to access a credit plan where the extensions of credit are directly deposited or transferred into, or otherwise accessed from, a prepaid account, where the creditor either:

- 1) is the same institution as or has a business relationship with the prepaid card issuer, program manager or payment processor, or
- 2) reasonably anticipates that a prepaid card will be used as an access device for the line of credit.

Like the CFPB’s proposal, this definition starts with the requirement that credit can be directly deposited to the prepaid card. That is, the prepaid card is being used as an access device for the credit. In addition, the creditor has reason to know that access through a prepaid card is likely due to either a business relationship with the prepaid card or other circumstances.

The business relationships test is aimed at situations in which the creditor and the prepaid card issuer may not be the same entity but they have a close relationship – either directly, or through the program manager or payment processor. That relationship, combined with a credit line designed to be accessible through a prepaid card, makes it appropriate for protections to apply to the inevitable linkage between the credit line and the prepaid card.

Examples of such business relationships (which might be directly between the prepaid card issuer and the creditor, or might operate indirectly, i.e. through the payment processor) include:

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<sup>161</sup> Regulation Z would be much easier to read if the CFPB uses a shorter, more intuitive term such as “prepaid card line of credit” instead of “account number where extensions of credit are permitted to be deposited directly only into particular prepaid accounts specified by the creditor.”

- 1) Affiliates or overlapping ownership.
- 2) Marketing relationship: The prepaid card provider markets the credit line or gives the creditor access to prepaid card customers for marketing purposes.
- 2) Sold together: The same entity offers the prepaid card and the credit line, such as in a payday loan store or on the same website.
- 3) Branding: The creditor brands the prepaid card or the prepaid card company brands the credit line.
- 4) Revenue: The creditor gets compensation from the prepaid card provider in connection with the prepaid card or vice versa.
- 5) Payment processing platform: The creditor pays a payment processor to enable that creditor's credit feature on prepaid cards that use a particular platform.

Situations in which the creditor reasonably anticipates that a prepaid card would be used as an access device include credit lines that permit direct deposits to prepaid cards *and*:

- 1) are advertised as being accessible through prepaid cards – either prepaid cards generally, or a list of prepaid cards that use a common prepaid card processing platform. The creditor should reasonably anticipate that the credit line will be accessed through a prepaid card.
- 2) are marketed to prepaid cardholders, such as by marketing to consumers who are on a list provided by a prepaid card company or a list of prepaid cardholders obtained from a credit reporting agency.
- 3) are designed to be used in connection with prepaid cards and to work together. For example, the credit line is enabled on prepaid card payment processing platforms. OR
- 4) do not have another equally convenient access device or equally convenient method of transferring funds to a demand deposit account.

In all of these situations, the creditor intends for the credit line to be used in connection with a prepaid card and for the credit card to function as an access device. It is appropriate in those situations for the creditor to comply with the rules for prepaid card lines of credit.

## **2. Lenders can distinguish prepaid accounts from other asset accounts in order to comply with rules for prepaid card lines of credit.**

The CFPB may have designed the “particular card” restriction in order to prevent unintended consequences for lenders who do not know what type of account the credit is being deposited into. For example, online payday lenders distribute funds and obtain repayment through the ACH system. It is not obvious to the uninformed outside observer looking at a routing and account number – the only information needed to access the ACH system – whether an account is a prepaid account or a DDA. While prepaid cards are primarily used through the 16-digit card number, there is an underlying routing and account number that looks no different on the surface from one belonging to a bank account. Payday lenders would argue that they cannot control or know what type of account it is when the consumer enters that number into its website.

However, to the contrary, we understand that it is already possible to know with a high degree of certainty that a particular account is a prepaid account. Various industry players already have reasons to want to know that information. Systems are in place now and will develop in the future to assist lenders and others who need to distinguish between prepaid accounts and other asset accounts.

At the outset, it is important to remember that the proposed rules only apply to “open-end” credit plans. Payday loans are typically closed-end loans, and closed-end loans would not be “credit cards” or impacted by either the proposed rules or our amendments to the proposal. However, as discussed above, some payday lenders are moving to open-end credit plans. Those plans, by definition, are ones where the creditor “reasonably contemplates repeated transactions.”<sup>162</sup> When a payday lender creates an open-end plan that contemplates repeated direct deposits into an account, the lender can and should determine whether the account is a prepaid account and, if so, comply with the proposed rules as a “credit card.”

A lender can make direct deposits to a consumer’s prepaid account in one of only a few ways.<sup>163</sup> First, it can use the card network, using the 16-digit prepaid card number. Some payday lenders do this today, as with a “swipe & go” payday loan.<sup>164</sup> Second, the lender can use the ACH system the way most online lenders do, using the same underlying routing and account number that would be used for other direct deposits to the card. Third, the lender can use an application programming interface (API) connection between the lender and the payment processor that authorizes the value load in real time, with funds settling later through the ACH system. Fourth, if the lender and the prepaid card issuer are the same entity, the funds could be transferred as a book-keeping function within the issuer’s accounts.

The 16-digit card number reveals whether a card is a prepaid card. Every number begins with a six digit “bank identification number” (BIN) that not only identifies the issuing bank but also reveals what type of card account it is. Services exist to help merchants identify types of cards in order to address fraud and other risks. For example, BinDB’s website explains:

The first six digits of the BIN provide the most vital identification of the user that helps you validate an order. Most importantly, it provides the name of the issuer bank and the country of its origin. It provides information whether the card is a credit, debit, or a prepaid card.<sup>165</sup>

BinDB specifically promotes its BIN Database as a service for identifying prepaid cards: “IDENTIFY PREPAID, GIFT AND VIRTUAL CARDS. Checking prepaid cards can help you to protect from fraud.”<sup>166</sup>

Second, the routing and account numbers used for an ACH transaction also reveal important information that can lead to a fairly confident, if not 100% certain, assessment of whether the account number belongs to a prepaid account. The routing number identifies the bank and is easily findable on the Federal Reserve Board’s website and through other services.<sup>167</sup> Some banks, such as Green Dot Bank, MetaBank and Bancorp, are primarily prepaid card issuers, and the chances are high that an account number from one of those banks is a prepaid account. Even for banks that do both, the banks

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<sup>162</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(20).

<sup>163</sup> The following discussion is accurate to the best of our knowledge and is based on conversations with industry participants. But of course there are others who have more expertise in the payment processing for prepaid cards and could confirm or correct the details.

<sup>164</sup> “Speedy Cash® offers Swipe & Go(SM) debit card payday loans to simplify the loan process. We’ll simply ‘swipe’ your debit card and lend you the cash you need until your next payday. Swipe & Go debit card loans provide a quick and reliable payday solution.” <https://www.speedycash.com/store-services/debit-card-loans/>.

<sup>165</sup> <https://www.bindb.com/verify-card-details.html>.

<sup>166</sup> <https://www.bindb.com/>.

<sup>167</sup> See Federal Reserve Bank Services, E-Payments Routing Directory, <https://www.frbervices.org/operations/epayments/epayments.html>.

may cluster their account numbers in ways that industry insiders can learn in order to distinguish DDA accounts from prepaid accounts.

Indeed, payday lenders and others already build models to attempt to identify prepaid accounts based on the routing and account number. Payday lenders must have some way today of rejecting loans to consumers whose prepaid accounts do not permit ACH debits. Otherwise, the ACH credit would go through with the loan deposit but the payday lender would not be repaid. Indeed, we are aware of a researcher who has attempted to take out multiple payday loans but has been unsuccessful when using prepaid cards and successful only when using bank accounts.

Other entities are also working towards ways to identify prepaid account numbers in order to address fraud and risk issues. One e-commerce operator posted the question: "Is there a database or list of routing numbers for Prepaid Debit Cards Banks with Direct Deposit capability?...We need to block these 'banks' from our ecommerce website as they are delaying or losing transactions. I'd like to create and share a comprehensive list of routing numbers to prevent other developers from the same headache."<sup>168</sup>

Moreover, a lender that uses the ACH system could simply ask the consumer for the debit or prepaid card number. Even if the lender is not planning on processing the transaction through the card network, the card number will reveal the type of account. The lender could also ask the consumer what type of account it is, the way consumers today are often asked whether an account is a checking or savings account before setting up direct deposit of a tax refund or other payment. But it would be more accurate to use the card number to identify the type of account.

Third, if a loan is enabled through a credit feature on a payment processing platform, the creditor already knows that the platform is used for prepaid cards. As discussed above, processors use different platforms for prepaid and DDA accounts.

Finally, it is possible that the lender and prepaid card issuer will be the same institution and will simply create a bookkeeping entry to transfer the funds from one account to another. In that case, the institution certainly knows what type of account it is. It is possible that the same institution would be involved on both ends even if the credit line is not limited, at least in theory, to the financial institution's own prepaid cards. Note that nonbank lenders have a strong incentive to create lending platforms where the credit originates from a depository institution in order to take advantage of interest rate exportation and avoid state usury caps.

Our proposal for closing the "particular card" loophole would limit the credit card rules to credit lines that use prepaid cards as access devices in situations in which the creditor knows that the linkage is likely to happen. In those situations, it is appropriate and workable to ask the creditor to verify what type of account it is before lending funds. If it is a prepaid account, the lender simply needs to comply with credit card rules. The rules that would apply in those situations are appropriate and are not difficult to comply with. They simply require appropriate underwriting for ability to pay, honest pricing, reasonable time to make payments, and clear separation between the prepaid card and the credit line. Credit offered through prepaid cards should not escape those requirements simply because the creditor avoids specifying exclusive access through a "particular card."

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<sup>168</sup> <http://www.quora.com/Is-there-a-database-or-list-of-routing-numbers-for-Prepaid-Debit-Cards-Banks-with-Direct-Deposit-capability>.

### 3. The Commentary can provide examples of prepaid card lines of credit.

Using the definition of “prepaid card line of credit” that we propose, the Commentary could provide the following examples of different relationships between creditors and prepaid cards that would, or would not, result in the credit line being deemed a prepaid card line of credit.

1. *Payday lender with prepaid cards and open-end payday loans.* A payday lender sells prepaid cards and also offers open-end payday loans. The payday lender receives compensation from the prepaid card company when cards are sold and/or when consumers set up direct deposit on the cards. The payday lender offers consumers the option of drawing on the credit line by visiting the store and accepting cash or by linking the credit line to the consumer’s existing checking account or to a new payday lender prepaid card account.<sup>169</sup> If the credit line is linked to the consumer’s prepaid card account, the consumer can transfer funds to that account by telephone, through a mobile app or online. If the credit line is linked to the prepaid card, it is a prepaid card line of credit because there is a business relationship between the payday lender and the prepaid card provider. In addition, the payday lender should reasonably anticipate that a purchaser of the prepaid card would access the credit line through the card because the payday lender offers that functionality (even though the consumer also has the option of accessing cash at the payday store).

2. *Payday lender that links its open-end payday loans to unrelated prepaid cards.* A payday lender that offers open-end payday loans does not sell prepaid cards, but it markets its credit lines as being accessible through prepaid cards. For a consumer who links the line of credit to a deposit or prepaid card account, deposits and repayments are made through the ACH system. When setting up the line of credit to be accessed by ACH, the lender asks the consumer for the routing and account number and also the associated debit or prepaid card number. Both the routing number and the card number confirm that the account is a prepaid account. The credit line is a prepaid card line of credit because, by marketing the credit line as accessible through a prepaid card, the creditor should reasonably anticipate that it would be accessed that way and the creditor can confirm the type of account for a given customer.

3. *Online open-end payday loans.* A company offers open-end lines of credit over the internet. The credit can be directly deposited into any prepaid card or checking account using the ACH system. The company markets to prepaid cardholders and describes on its website that prepaid cards are eligible. The credit line is a prepaid card line of credit when linked to a prepaid card.

4. *Open-end payday loan accessible through overdrafts or direct access through payment processor.* A company offers open-end lines of credit that can be accessed through overdraft or through transfers to a prepaid card. The credit lines may be linked to any prepaid card that uses a transaction processor that has enabled access to the credit line on its prepaid card processing platform. The creditor has set up relationships with several payment processors to enable credit access to prepaid cards. The creditor should reasonably anticipate that consumers will access the credit through a prepaid card.

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<sup>169</sup> Under the rules as proposed by the CFPB, the prepaid card account could be opened simultaneously with the credit line. However, under our proposal, the payday lender would have to wait 30 (or 90, as we suggest) days after the prepaid card was registered before permitting the credit line to be accessed through the prepaid card.

4. *Payroll card vendor with open-end credit lines.* A company offers payroll cards and also open-end lines of credit offered through employers. The credit lines are available to any employee who has direct deposit and are repaid by preauthorized ACH unless the employee agrees to pay a higher interest rate. Once the credit line is linked to a deposit account, the employee may access future draws by transferring funds to that account. By offering the credit lines through an employer that uses the vendor's payroll cards, the company should reasonably anticipate that some consumers will access the credit line through a payroll card, and therefore the credit line is a prepaid card line of credit when accessed through those cards. The payroll card vendor also is the same as, or has a business relationship with, the creditor and can confirm whether a particular account is a payroll card account.

5. *Prepaid card with affiliated credit line.* A company issues prepaid cards and also offers open-end lines of credit extended by an affiliate. The credit lines are marketed only to holders of the company's prepaid cards. The credit lines may be accessed by transferring funds to the company's prepaid cards, in which case funds are available immediately, or by transferring funds to an unrelated deposit account through the ACH system, in which case funds are available when the transaction settles in one to three days. If a consumer accesses the credit line by transferring funds to a prepaid card account at that company, it is a prepaid card line of credit. The creditor has a business relationship with the prepaid card company. In addition, because the credit is marketed directly to prepaid card holders and the credit is much more easily accessed through the prepaid card than through an unrelated deposit account, the company should reasonably anticipate that the credit will be accessed that way.

6. *Prepaid card issuer that offers savings accounts and credit lines.* A nonbank prepaid card issuer offers savings accounts at partner banks and its own open-end lines of credit to its prepaid cardholders. Transfers may be made between any of these accounts. The credit may be directly deposited to the prepaid card or to the savings account. The credit line is a prepaid card line of credit because the same institution is offering both the prepaid card and the credit line. In addition, the creditor should reasonably anticipate that the credit line will be accessed through the prepaid card because transfers may be made between the two; because a prepaid card is the more likely way to access credit than a savings account; and because Regulation D does not permit savings deposits to have convenient withdrawals.<sup>170</sup>

7. *Credit union offering checking, prepaid and open-end credit accounts.* A credit union offers checking accounts, prepaid card accounts and open-end lines of credit. A consumer may link a credit line to a prepaid card account or a checking account. However, the credit line may be accessed through an overdrawn transaction only if the credit line is linked to a checking account. The credit line is a prepaid card line of credit if the consumer links it to a prepaid card account because the card and the credit line are offered by the same institution. In addition, the credit union should reasonably anticipate that credit will be accessed through a prepaid card when it offers a credit line to one of its own prepaid cardholders and permits transfers from the credit line to the prepaid card. The credit line would not be a prepaid card line of credit if the

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<sup>170</sup> Regulation D requires that an account, to be classified as a "savings deposit" (and therefore exempt from the reserve requirements for "transaction accounts"), must not permit more than six convenient transfers or withdrawals per month from the account. Transfers and withdrawals that are considered "convenient" for this purpose are those made by preauthorized, automatic, telephonic agreement, order or instruction, or by check, debit card, or similar order made by the depositor and payable to third parties. 12 CFR § 204.2(d)(2).

customer only has a checking account and no prepaid card, or if the credit may not be transferred from the credit line to the prepaid card.

8. *Unrelated prepaid card and credit card.* A consumer has a prepaid card and also has a credit card obtained from an unrelated third party. The consumer can deposit funds from the credit card onto the prepaid card by writing herself a convenience check and depositing it into the prepaid card account. The credit card is not a prepaid card line of credit because funds cannot be directly deposited to the prepaid card account.

9. *Unrelated prepaid card and credit union line of credit.* A consumer has a prepaid card and also has a line of credit from an unrelated credit union. The line of credit permits transfers to other accounts through the ACH system. The credit union does not market to prepaid cardholders and does not promote use of its credit line in connection with prepaid cards. The credit union line of credit is not a prepaid card line of credit because the credit line is offered by an unrelated party and the credit union would not reasonably anticipate that the credit would be accessed through a prepaid card.

10. *Related prepaid card and credit card.* A bank issues both prepaid cards and credit cards. It markets its credit cards to its prepaid card customers and to the general public. The credit card may be used through its own access device or credit may be transferred instantly from the credit card account to the bank's prepaid card account. The credit card also has both paper convenience checks and "e-checks" that can be deposited into any deposit account through the ACH system. The bank has issued the same consumer a credit card account and a prepaid card account. The credit card is a prepaid card line of credit because there is a business relationship between the credit card issuer and the prepaid card issuer. By designing its credit cards so that funds may be transferred to its prepaid cards, the bank should also reasonably anticipate that some consumers will do so. The credit card may not be offered to its prepaid cardholders until 30 days have passed after the prepaid card is registered.

11. *Related prepaid card and faux credit card.* Same scenario as above, except that the credit card does not carry a network brand and is not broadly usable. Instead, it may be used to purchase items from a catalog or website specified by the company, or credit may be transferred instantly from the credit card account to the prepaid card account. The credit card has both paper convenience checks and virtual ones that can be deposited into any deposit account through the ACH system. Because the same company offers both the prepaid card and the faux credit card, and because the alternative means of accessing the credit card are unlikely to be used by consumers, the credit card is a prepaid card line of credit and may not be offered to the consumer for the first 30 days after the prepaid card is registered.

12. *Related prepaid card and online, virtual credit card.* A company issues prepaid cards and also offers an open-end line of credit. The credit line may be accessed through an account number that is usable directly online for purchases of goods and services; through transfers to the company's prepaid card accounts; and through cash advances deposited through the ACH system into third party deposit accounts. The credit line is a credit card that falls under the CARD Act rules under Regulation Z today, but it is not a traditional plastic credit card. The credit line is a prepaid card line of credit if held by a consumer who holds the company's prepaid card. There is a business relationship between the prepaid card issuer and the creditor, and by permitting transfers between the two, the creditor should reasonably anticipate that some

consumers will do so. The credit line may not be offered to the consumer until 30 days after the consumer registers the prepaid card.

In all of the scenarios described above, the credit line is deemed a prepaid card line of credit only in situations in which either (1) there is enough of a relationship between the provider of the credit line and the provider of the prepaid card to expect compliance with the rules, or (2) the creditor clearly designs the credit product to be used with prepaid cards.

In most of the examples, the credit line is unusable without an access device and the prepaid card becomes that access device. The existence of another direct deposit option – which takes the cards out of the current proposed rules – is more theoretical than real. Either using another account is cumbersome, or the credit is being offered to consumers who have prepaid cards and that is the account they are likely to use (and perhaps the only account they have).

These credit lines would function no differently than a similar credit line offered by a company that permitted direct deposits only onto a particular specified prepaid card. But if the “particular card” loophole in the proposed rule is not closed, consumers in most of the scenarios above would receive none of the protections that would cover “particular card” credit lines. It is also likely that companies will design their credit lines as described above – or in another fashion that we cannot presently contemplate – to evade the proposed protections.

If there is another access device, the credit line may already be a “credit card,” covered today under the Regulation Z CARD Act rules.<sup>171</sup> Treating these credit lines as prepaid card lines of credit adds only three additional rules that are both important and unlikely to be problematic: the 30-day waiting period, the credit disclosure on the prepaid card short form, and payments no more frequently than monthly. The company could avoid those rules simply by not permitting direct transfers between the credit card and the prepaid card. Direct transfers between the credit card and the prepaid card are likely to be important only if the “credit card” is in fact not a traditional credit card but rather one that is not widely usable. For example, the linkage could be critical for a very small credit line that is primarily designed to be used through the prepaid card even though it has an access device that can be used separately, such as an account number that can be used for internet purchases at select merchants.

In short, our suggested revision of the proposed rule would ensure appropriate, consistent treatment of credit lines linked to prepaid cards. The evasion scenarios described above are likely to arise.

#### **4. The “particular card” restriction is not essential to the determination that a credit line is a prepaid card.**

Both Regulation Z precedent and the CFPB’s current proposed rules demonstrate that exclusive access through a particular card is not essential to the decision to subject a credit line to credit card rules. Rather, credit lines have been or would be treated as credit cards even if they could be accessed in another manner or deposited to more than one account.

The definition of “credit card” in TILA is quite expansive, applying to any device that accesses credit. It does not require a card. That definition is “any card, plate, coupon book or other credit device existing

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<sup>171</sup> That is also likely to be true for other possible scenarios under which a credit line is accessible through an access device apart from the prepaid card.

for the purpose of obtaining money, property, labor, or services on credit.”<sup>172</sup> The Regulation Z definition is similar: “any card, plate, or other single credit device that may be used from time to time to obtain credit.”<sup>173</sup>

Consequently, account numbers have been considered to be credit devices that turn a credit line a credit card. The flexible definition of “credit card” is essential in order to prevent evasions as new technology and new practices change. For that reason, in February 2010, when finalizing the rules to implement the CARD Act,

The [Federal Reserve] Board declined requests from industry commenters to exempt all lines of credit accessed solely by an account number from the definition in § 226.2(a)(15)(ii), noting Congress’ apparent intent to apply the Credit Card Act broadly to products that meet the definition of “credit card.”<sup>174</sup>

As the Board further explained:

[T]he Board’s exclusion of HELOCs and overdraft lines of credit accessed by cards is based on the Board’s determination that alternative forms of regulation exist that are better suited to protecting consumers from harm with respect to those products. No such alternative exists for lines of credit accessed solely by account numbers.<sup>175</sup>

Later in 2010, however, the Board reconsidered in light of concerns from institutions that “offer general purpose open-end lines of credit that are linked to a checking or other asset account with the same institution.”<sup>176</sup> We understand that these concerns came primarily from credit unions that offer low interest lines of credit that function quite similarly to overdraft lines of credit but are not accessed through overdraft.

At the same time, the Board was concerned about evasions. It noted that “when an account number can be used to access an open-end line of credit to purchase goods or services, it would be inconsistent with the purposes of the Credit Card Act to exempt the line of credit from the protections provided for credit card accounts.”<sup>177</sup> The Board’s compromise was to exempt credit lines accessed by account number unless they could be used to purchase goods or services. At the same time, the Board made clear that if a debit or prepaid card could access a line of credit, even if only to obtain cash, it would be a credit card.<sup>178</sup>

The changes that we suggest are consistent with the middle ground that the Board was attempting to achieve. The credit lines that did not pose problems and that the Board was attempting to protect -- general purpose, typically low cost, credit lines linked to a checking account at the same institution -- would not be considered a prepaid card line of credit.

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<sup>172</sup> 15 U.S.C. § 1602(l).

<sup>173</sup> Reg. Z § 1026.2(15)(i).

<sup>174</sup> 75 Fed. Reg. 67458, 67459 (Nov. 2, 2010) (citing 75 Fed. Reg. 7658, 7664-65 (Feb. 22, 2010)).

<sup>175</sup> 75 Fed. Reg. 7658, 7664 (Feb. 22, 2010).

<sup>176</sup> 75 Fed. Reg. 67458, 67459 (Nov. 2, 2010).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*: Reg. Z § 226.2(a)(15)(i).

Our suggested revision would only apply to credit lines when they are accessed through prepaid card accounts and only when it would be fair to apply credit card rules because the creditor could reasonably anticipate such access. For the same reasons that the CFPB appropriately declined to extend the overdraft line of credit exemption to overdraft credit lines linked to prepaid cards, it should also not extend the account number exemption to account numbers linked to prepaid cards. There is nothing in either TILA or the Regulation Z precedent that requires the limitation that an account number linked to a prepaid card is a credit card only if direct deposits can only be made to a particular card specified by the creditor.

Moreover, there is precedent to consider a credit line to be a credit card even if it can be accessed in other ways other than through the card. For example:

The prohibition [on repayment by offset] also applies to balances arising from transactions not using the credit card itself but taking place under plans that involve credit cards. For example, if the consumer writes a check that accesses an overdraft line of credit, the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated check guarantee or debit card.<sup>179</sup>

Similarly, a credit card does not cease being a credit card just because it can be accessed by a convenience check. While the convenience check itself is not a credit card, the existence of a separate access device does not change the underlying nature of the credit card.

The distinction between overdraft credit – which is covered under the proposed rules even if the creditor offers it on more than one card – and account number “push credit” is also not essential to the determination that a credit line is a credit card. Under both the current Regulation Z rules and the proposed rules, an account number that directly accesses a credit line to purchase goods and services is a credit card.<sup>180</sup> An account number that uses a two-step process to first deposit the funds to a particular prepaid card and then spend it would not be, unless the credit is limited to a particular card. But with evolving technology, that two-step process will become increasingly seamless.

Moreover, both the CFPB’s proposed rules and the early 2010 version of Regulation Z recognize that a credit line can be a credit card even if a two-step process is required to access the credit. Under the early 2010 version of Regulation Z, an account number was a credit device even if the credit was deposited into a DDA account. The same is true under the CFPB’s proposed rules if the deposit account is a prepaid card specified by the creditor.

In short, the account number exemption in Regulation Z’s current credit card definition is a creature of a policy decision by the Board, not a limitation in TILA or Regulation Z authority. The CFPB can honor that policy decision by leaving the exemption intact for its intended target – credit lines accessed through checking accounts – while declining to extend it to credit lines accessed through prepaid cards.

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<sup>179</sup> Official Interpretation to Reg. Z §1026.12(d)(1)-3.

<sup>180</sup> Official Interpretation to Reg. Z §1026.2(a)(15)-2.ii.C.

## 5. Closing the “particular card” loophole will not adversely impact unrelated credit products.

The CFPB appears to have limited the reach of the proposed prepaid credit rules out of concern that a more comprehensive rule could have unintended adverse impacts on credit lines that are unrelated to the prepaid card. That is unlikely to be the case.

In order to fall under the credit card rules, the credit needs to be an open-end credit plan. Closed end loans transferred to and accessed through prepaid cards would not turn the card into a credit card.<sup>181</sup> (However, the CFPB could keep a look out for evasive use of closed-end credit in a recurring way that is more like an open-end line of credit.)

Open-end lines of credit on the market today tend to fall into these categories:

- *Home equity lines of credit (HELOCs).*
- *Credit cards.*
- *Bank and credit union lines of credit linked to checking accounts at the same bank.*
- *Merchant lines of credit, such as credit lines offered by home heating oil.*
- *High cost lines of credit that are attempting to evade usury caps and other consumer protections.*

Other than the last category, these credit lines are either clearly excluded from the proposed rules, already covered by credit card laws, or unlikely to be linked to or accessed through a prepaid card. Thus, closing the loophole for the last category will not adversely impact other forms of open-end credit.

*HELOCs:* HELOCs and other home-secured credit are outside of TILA’s credit card rules.

*Credit cards:* Credit cards are already “credit cards” covered by the CARD Act. The only things the proposed rules add are a 30-day waiting period before linking the card to a prepaid card, the monthly payment limitation,<sup>182</sup> and the credit disclosure on the prepaid card short form. If a credit card is offered by an issuer that also offers prepaid cards, or there is a business relationship between the two, then the additional rules should apply. But the proposed rules should not affect unrelated credit cards, as it is difficult to imagine how the credit would be accessed by or through the prepaid card. The only way to load credit onto the prepaid card would be to write a convenience check and manually deposit it into the prepaid card account, and that would not be a direct deposit to the card.

*Bank and credit union lines of credit:* Traditional bank or credit union account lines of credit that are linked to checking accounts are unlikely to be linked to a prepaid card. The credit lines are also unlikely to offer direct deposit to an outside account. But if they did, they should fall under the “particular card” account number rules. The mere fact that there might be another asset account at that bank into which

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<sup>181</sup> The CFPB should be alert to the possibility of closed-end loans being offered in connection with prepaid cards. While multi-installment loans are covered by the rule prohibiting mandatory electronic payments, lenders have been adept at evading that rule. Payments could be timed with incoming deposits, like payday loans are, and could trigger transfer fees and ACH fees even if no overdraft credit is used.

<sup>182</sup> This should not be a burden for credit card issuers, because while it is not a specific requirement for credit cards, issuers generally follow this standard already.

the credit could be deposited should not relieve the bank of the obligation to comply with the rules for prepaid card credit when the account is linked to the bank's prepaid card.

Green Dot Bank does offer both checking accounts and prepaid cards, and is planning to offer a line of credit that will be available to both checking account and prepaid card holders. But, as we understand the plan, the line of credit would comply with the proposed rules for prepaid card linked credit plans. Green Dot will underwrite the credit line for ability to pay; it will not have fees that exceed those permitted by the fee harvester provision; payments will be due monthly, at least 21 days after a statement is provided; the consumer will not be required to repay automatically or by offset, but instead can repay by another method; and the credit line will not be offered to new prepaid cardholders, but rather to existing cardholders that have a long enough transaction history to assist in underwriting. It would also be appropriate for Green Dot prepaid cards to carry the disclosure about the option of a credit feature if credit may be offered to holders of a given card and accessed through the card. (As discussed below in Section VIII.A.8, we suggest that the CFPB require two alternative credit disclosures, one for credit features that may be offered through overdraft and one for those that may not, in order to help consumers distinguish between cards where credit may be accessed inadvertently and ones where an affirmative action by the consumer is required.)

*Merchant lines of credit, such as for heating oil.* Credit offered by merchants (other than retail credit cards – which are already credit cards) is rarely styled as open-end credit. The only consumer-related example of which we are aware of is for heating oil. (We are also aware of merchants that offer lines of credit to businesses.) There may be other examples – such as a restaurant that allows a wealthy customer to run a monthly tab – but it appears unlikely that these types of lines of credit would be accessed through a prepaid card.

*High-cost lines of credit.* The final category of open-end credit lines on the market today are high-cost open-end lines of credit, often designed to evade usury and other consumer protection law. As discussed above, these are exactly the types of lenders who are likely to link their products to prepaid cards in order to reach struggling consumers and evade the law. These types of open-end credit lines are typically accessed either by cash at storefront or by depositing funds to a deposit account through the ACH system. If a consumer deposits funds to a prepaid card account, the prepaid card is likely to become the primary and probably exclusive access device – and repayment device – for the credit line. It is appropriate in that circumstance for the credit line to be considered a credit card, just as are other credit lines linked to a particular prepaid card. Consumers who access high-cost credit lines through prepaid cards will benefit from the proposed prepaid card credit protections whether or not the creditor specified a particular prepaid card as the access device. Before linking the credit line to a deposit account, the lender could simply ask or determine whether it is a prepaid card.

**6. At a minimum, all push-credit used to cover or avoid overdrafts or declined transactions should be covered even if not linked to a particular card.**

If the CFPB retains the “particular card” limitation for prepaid card lines of credit, it should at a minimum cover other lines of credit when they are being used by agreement to push funds to cover specific negative balance purchases.<sup>183</sup> Credit lines can act as overdraft substitutes even when they are not directly accessed through overdraft. This is increasingly possible with modern technology and the growing ubiquity of cellphones and smartphones. There is little difference between a one-step “pull”

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<sup>183</sup> See 79 Fed. Reg. at 77219.

process, where the prepaid card swipe automatically accesses an overdraft line of credit, and a two-step “push” process where, nearly simultaneously, the consumer replies “y” to a text and credit is pushed to cover that overdraft. Today, such a process might take several seconds or a few minutes and require two separate swipes of the card. But it is not hard to imagine a time when the difference between “pull” overdraft and “push” credit nearly ceases to exist.

The push scenario would be covered under the proposed rules only if the credit line could only be linked to a particular prepaid card. But if the consumer had another asset account option for accessing the credit line – even if the consumer did not choose that option or the option was more theoretical than real – the push line of credit would not receive the same protections. Yet in either case, the credit would work identically: the consumer would have a particular prepaid card that was able to and in fact did function as the access device for the credit line.

Certainly, this type of evasion should not be allowed. The CFPB should cover both the overdraft credit and the push line of credit under the proposed rules as a “credit card.” In either case, the credit is operating as an overdraft substitute and the prepaid card is an access device for the credit.

But coverage should not depend on the consumer being prompted to text “Y” to initiate the transfer. The consumer does not need that prompt. The mere fact that the prepaid card transaction was declined will serve as that prompt, and the consumer can then cover the transaction by initiating a transfer herself by telephone call or through a mobile app. That process, too, will likely become ever more seamless as technology evolves.

In other words, for all of the reasons outlined in the sections above, the CFPB should eliminate the “particular” card limitation and cover all lines of credit that are accessed through prepaid cards as credit cards. Just as in the first scenario (where the consumer is prompted to cover a transaction), there is no difference from the consumer’s point of view whether the prepaid card is a “particular” one specified by the credit or whether the consumer could have (but did not) link the credit line to a different asset account. In either case, the consumer is able to use the prepaid card as an access device to use that credit to make a purchase and covered a declined transaction. And in either case, the protections should be the same.

### **C. Fees harvester cards need more protection.**

One of the most important protections that the proposed rule will apply to prepaid cards that access credit is the limitation on fees during the first year of the account to 25% of the credit limit, i.e., the Credit CARD Act’s fee-harvester rule. We strongly support application of the fee-harvester rule to protect prepaid card holders from exorbitant fees. Prior to the Credit CARD Act, vulnerable consumers were charged fees by subprime card issuers that often equaled or even exceeded the amount of credit that the consumers could access, cutting into available credit and distorting the APR.

However, we urge the CFPB to go further than simply applying the fee-harvester rule. First, in order to ensure that prepaid card holders are not gouged after the first year, we urge the CFPB to apply the fee-harvester protections to the entire life of a prepaid card. Second, we urge the CFPB to include pre-account-opening fees in the 25% cap. Third, the CFPB should require that the special available credit line disclosure for fee-harvester cards be made in applications and solicitations for prepaid cards that access credit or prepaid lines of credit.

## 1. Extend fee protections past the first year.

The fee harvester rule is not a rate cap. A credit card issuer that is not subject to state usury caps, as most are not, may charge whatever rate it wishes. Only fees are limited, not the price. The fee limit serves two important purposes. First, it prevents fees from cutting too deeply into the credit line. Second, it pushes pricing into a periodic interest rate. Compared to fee-based pricing, costs determined by a periodic rate are more proportional to the amount of credit extended and the time it is extended, so cost can be compared more easily to other credit options.

But under the current proposed rule, the creditor could lure the consumer in with low first year pricing and then hike up the fees. Even worse, the creditor could offer a tiny amount of credit, such as a \$10 buffer, the first year in order to get the clock running. After that year is up, the creditor could increase the credit line and hike up the fees without limit.

These tactics would be unfair, deceptive and abusive no matter whom they were directed at, but the ramifications are especially troubling for prepaid cardholders. We urge the CFPB to extend the fee-harvester protections past the first year of the account, to cover the entire life of the prepaid card. The CFPB can use its under 12 U.S.C. § 5531, which permits the CFPB to write rules to prevent unfair, deceptive, or abusive acts or practices (UDAAP),<sup>184</sup> its authority under TILA to adopt additions and exceptions and promote the informed use of credit, and its authority under the EFTA to protect consumer rights and protect consumers using electronic fund transfers.

Prepaid card credit features are very different from traditional credit cards, even fee-harvester credit cards, in a very critical aspect – the cards are often the sole transaction and deposit account to which the prepaid card holder has access. In addition, as discussed above, prepaid cardholders are, by and large, particularly vulnerable consumers who often turn to prepaid cards because they cannot get access to credit cards or bank accounts.

For traditional fee-harvester cards, consumers who cannot afford to pay exorbitant fees or who realize that the card is too expensive -- either during the first year or after even higher fees are imposed in the second year -- have the ability to abandon the card. At worst, the consumer will owe a debt to the card issuer and be subject to collections or negative credit reporting.

Prepaid consumers, however, will likely not be able to end their relationship with a prepaid issuer and walk away from a high-cost card that is draining their very limited funds. Many prepaid cardholders rely on their prepaid cards as their only transaction account. Others have no meaningful choice because the prepaid card is a payroll card that they are compelled to have or have limited choices in avoiding. Indeed, the most abusive overdraft fee programs are on payroll cards, when an overdraft as little as \$5.01 can cost \$25 and up to \$125 per month in wages can be consumed by overdraft fees. Consumers who are tied to their prepaid or payroll cards cannot walk just away. They may feel forced to continue paying excessive fees, even when the fees are unaffordable and prevent them from paying for other critical expenses, because they need to keep their prepaid cards.

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<sup>184</sup> There is precedent for the CFPB to use its UDAAP authority to issue a limit on fees charged to a credit line. The first version of the fee-harvester cap, which limited fees to 50% of the credit line, was promulgated by the Federal Reserve Board pursuant to its authority under the Federal Trade Commission Act to prohibit unfair and deceptive acts and practices. See 73 Fed. Reg. 28904, 28923 (May 19, 2008) and 74 Fed. Reg. 5498, 5538 (January 29, 2009).

In addition, unlike traditional fee harvester credit cards, fee harvester credit features on prepaid cards are likely to be repaid through automatic payments from the prepaid card. While the proposed rules prohibit creditors from requiring preauthorized electronic repayments or mandatory offset, creditors are likely to achieve extremely high opt-in rates through incentives and other, potentially deceptive or coercive, measures.<sup>185</sup> On a traditional credit card, the consumer will look at the statement each month before taking action to decide when or even whether pay it. On a prepaid card credit feature, the payment may happen automatically from the prepaid card. This makes it more likely that the consumer will be tied to the prepaid card, stuck in a cycle of debt dependent on the next extension of credit. A consumer who is not paying credit manually is also less likely to see the statement and know what is happening.

The CFPB should also be cognizant of the fact that consumers may not even see the notices about fees increasing the second year. While the proposed rules require written Regulation Z statements unless the consumer has consented to electronic statements, some lenders require consent as a condition of credit.<sup>186</sup> But the mere fact that a consumer can provide an email address does not mean that the consumer can be effectively reached that way.<sup>187</sup>

## 2. Apply the 25% cap to pre-account opening fees.

We urge the CFPB to include fees that the consumer is required to pay before account opening in the 25% annual cap of the fee-harvester rule. These fees are abusive in and of themselves, and creditors could open and close accounts to charge them multiple times.

As the CFPB knows, the Federal Reserve Board (FRB) did promulgate a provision that included pre-account opening fees in the 25% cap. But the Bureau withdrew this provision in response to an adverse court decision.<sup>188</sup> While we urge the Bureau to re-visit this issue for all fee harvester cards, it is especially important that this loophole be not used to permit abusive credit features on prepaid cards.

The CFPB has broader authority than the FRB did when it promulgated the rule on pre-account opening fees. As the Bureau itself notes,<sup>189</sup> section 1100A(4) of the Dodd-Frank Act added the words “additional requirements” to the authority in Section 105(a) of TILA. That is, the revised text reads:

The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 that apply to a mortgage referred to in section 1602(aa), such regulations may contain such *additional requirements*, classifications, differentiations, or other provisions...<sup>190</sup>

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<sup>185</sup> See Sections XIII.A.1, XIII.B.6. For example, some payday lenders delay availability of credit if consumers do not agree to automatic repayment.

<sup>186</sup> For example, NetSpend requires consent to electronic communications as a condition of overdraft protection. See

[https://www.netspend.com/account/terms/HEB%20Premier%20GPR%20Visa%20Bofi-ODP-Eng-11AUG14\\_HTG.pdf](https://www.netspend.com/account/terms/HEB%20Premier%20GPR%20Visa%20Bofi-ODP-Eng-11AUG14_HTG.pdf). Mobiloans does the same as a condition of its loans. See <https://www.mobiloans.com/terms-and-conditions>.

<sup>187</sup> This issue is discussed in Sections VII.C, VII.E and XIII.B.4.

<sup>188</sup> First Premier Bank v. Consumer Fin. Prot. Bur., 819 F. Supp. 2d 906 (D. S.D. 2011).

<sup>189</sup> 79 Fed. Reg. at 77125.

<sup>190</sup> 15 U.S.C. § 1604(a) (emphasis added).

This is authority that the FRB never had, and it should entitle the CFPB to even greater deference than the FRB in issuing TILA regulations that establish new mandates on creditors. The CFPB should re-promulgate the provision applying the 25% cap to pre-account opening fees using this greater TILA authority to establish “additional requirements.”

At a minimum, the CFPB should prohibit pre-account opening fees for fee harvester credit features on prepaid cards.<sup>191</sup> As described above, prepaid cardholders are especially vulnerable to offers of abusive credit features. Prepaid card issuers who offer fee harvester credit features also have an easier way of obtaining that pre-account opening fee than do traditional fee harvester cards that are not tied to a deposit account. The pre-account opening fee makes it especially difficult for consumers to understand the full cost and amount of net credit they are being offered. These fees should be included in the 25% cap.

In addition, prepaid cards are also susceptible to abuses by pre-account opening fees because the credit line may be closed and re-opened even if the prepaid card remains open. For example, tax time prepaid cards may close credit lines at the end of the tax season and re-open them the following year if the consumer wants another advance.<sup>192</sup> This type of evasion could be used not only on tax-time credit lines but on any type of credit line that a consumer uses only sporadically. Including all pre-account opening fees in the fee harvester cap would prevent this evasion.

**3. Require the special fee-harvester available credit line disclosures to be included in application/solicitation disclosures for prepaid card credit cards.**

The CFPB has asked whether additional rules are needed with respect to the fee-harvester protections, and has specifically inquired whether to mandate disclosure of the initial credit line. We believe a disclosure of the initial credit line is needed, in the form of the special disclosure for fee-harvester credit cards required by Regulation Z at §§ 1026.60(b)(14) and 1026.6(b)(2)(xiii).

As the CFPB knows, Regulation Z requires both the applications/solicitations disclosures and the account-opening disclosures to contain a special disclosure when fees for the issuance or availability of credit or any security deposit charged to the account exceed 15% of the credit limit. This special disclosure informs consumers of the amount of available credit remaining after these fees or security deposits are debited to the account, based upon either the minimum credit limit in the case of the application/solicitation disclosures or the actual credit limit in the case of the account-opening disclosures.

The critical issue is that this special fee-harvester available credit line disclosure is not required for applications/solicitations disclosures for *charge cards*. As discussed in Section XIII.b.3 below, many prepaid card credit cards may not carry a periodic rate and will be considered charge cards. Under Reg. Z §1026.60(b), there are several disclosures that are not required for charge cards, including the fee-

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<sup>191</sup> If the CFPB includes pre-account opening fees in the 25% cap only for credit associated with prepaid cards, we urge the Bureau to note in the Supplementary Information that the limitation to prepaid cards has no impact on whether the Bureau has the authority to include pre-account opening fees for all credit cards in the future under its TILA authority as expanded under Dodd-Frank.

<sup>192</sup> The terms and conditions of the H&R Block Emerald Advance line of credit that may be added to the H&R Block Emerald Prepaid MasterCard appear to indicate that the credit line will be closed after April 1, 2015 if the cardholder does not qualify under one of the secured methods or possibly an unsecured method available to some cardholders. See [https://www.hrblock.com/bank/pdfs/emerald\\_advance\\_terms\\_and\\_conditions.pdf](https://www.hrblock.com/bank/pdfs/emerald_advance_terms_and_conditions.pdf).

harvester available credit line disclosure. Thus, the CFPB should require this disclosure to be made specifically for prepaid cards that are associated with fee harvester credit features.

#### **4. Load fees should also be included within the cap.**

Proposed Comment 52(a)(2)-2.ii specifies that transfer fees are among the fees that are counted in determining whether fees exceed the 25% fee harvester cap. In addition, the CFPB should clarify that “load” fees are included, even if they are charged to the prepaid account. A transfer fee and a load fee are essentially the same thing. A creditor should not be allowed to evade the fee harvester rule by charging the fees to the prepaid card.

#### **D. Credit should not be accessed through overdrafts. Consumers should affirmatively choose when to use credit.**

The proposed rules will improve credit that is accessed through an overdraft transaction. Acknowledging that overdrafts are credit, and applying credit card rules, will result in more affordable forms of credit.

But it would promote the conscious, sparing and safe use of credit to prohibit access through overdrafts altogether. Overdraft protection is unnecessary on a prepaid card. Overdraft “protection” is triggered under one of two conditions: 1) Either the consumer knows that the card has insufficient funds, or 2) she does not. If she knows the card’s balance, she can actively transfer funds from the credit line before initiating the transaction. If she does not, after the transaction is denied, she can decide whether to skip the purchase, pay in cash, or transfer credit to the prepaid account.

Overdraft protection is also unnecessary outside of the retail setting. Consumers can pay bills using the prepaid card’s bill payment function or by using the prepaid card number on the merchant’s website. In either situation, good funds are confirmed before the payment is made. If a consumer wants to access credit in order to pay a bill, she can pay directly with a credit product or transfer funds from a line of credit to the prepaid card. Paying bills through the prepaid card’s website using “credit push” – where the consumer actively makes the payment from her prepaid card account – is safer than giving a third party preauthorization for an ACH debit at some future time, when it could overdraft. As the Federal Reserve Board recently noted:

[D]ebit-pull payments ... expand[] possibilities for unauthorized parties who have access to a payer’s account information to fraudulently pull funds out of the payer’s account. Credit-push payments have become the norm when making electronic person-to-person, business-to-business and certain bill payments.<sup>193</sup>

Internet payday lenders, in particular, have been notorious for using preauthorizations to take control of consumers’ bank accounts.<sup>194</sup> Cards without overdraft protection also typically lack the debit-pull capacity that payday lenders exploit.

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<sup>193</sup> Federal Reserve System, “Strategies for Improving the U.S. Payment System,” Appendix 8 at 49 (Jan. 26, 2015), <https://fedpaymentsimprovement.org/wp-content/uploads/strategies-improving-us-payment-system.pdf>.

<sup>194</sup> See, e.g., Jessica Silver-Greenberg, “Major Banks Aid in Payday Loans Banned by States,” N.Y. Times (Feb. 23, 2013), [http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?\\_r=0](http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?_r=0).

In short, there is no need for overdraft protection on prepaid cards. Prohibiting false overdraft “protection” on prepaid cards will better protect consumers, give them more control, and promote the conscious use of credit.

**E. The exclusion of prepaid cards that offer credit but without a fee or finance charge will lead to evasions.**

The CFPB has proposed excluding prepaid cards that access credit from the definition of “credit card” and their issuers from the definition of “creditor” if the issuer does not impose a finance charge or charge excluded under § 1026.4(c). While we are not concerned about a *de minimis* \$10 buffer, we are concerned that larger “free” overdraft features and credit lines could be added to expensive prepaid cards and escape protections.

For example, a prepaid card issuer could offer a “deluxe” prepaid card that comes with \$100 in “free” overdraft protection. The card could have a \$20 monthly fee, compared to the \$5 monthly fee for the non-deluxe cards. Under proposed Comment 1026.4(b)(2)-1.iv, the monthly fee would not be a finance charge. Or, the card could have a low monthly fee but charge virtually every consumer \$15 in purportedly “voluntary” credit insurance – a fee that also is not a finance charge and does not even need to be disclosed under the CFPB proposal.

Thus, the card would not be a credit card and would not receive any of the proposed protections, including the 30-day waiting period. Because the fee was not assessed directly as a result of insufficient funds, the overdraft service also would not be covered by the opt-in rules of Regulation E.

Thus, we urge the CFPB to cover all prepaid cards that access credit as “charge cards,” whether or not there is a finance charge or fee under Section 1026.4(c) imposed. We understand the CFPB is concerned about cards that have a *de minimis* amount of credit, such as a \$10 “pad,” for which no fees are charged. We believe the CFPB can exempt those cards by providing an exception for a *de minimis* amount of credit, using \$10 as a safe harbor, if such credit is not promoted or disclosed.

Also, if all prepaid cards that access credit are considered credit cards, there will need to be an exception for truly unpreventable overdrafts. As discussed in Section IV.G, such an exception must be very narrow.

**F. The proposed rules appropriately categorize more fees as finance charges but should go farther.**

We support the CFPB’s proposal to include a broader range of fees within the definition of “finance charge” in Regulation Z when those fees are charged in connection with credit on prepaid cards. Covering fees as “finance charges” is essential to triggering important disclosures and other protections for cards that function as credit cards. Overdraft fees, participation fees, and other fees have been used to disguise the cost of credit and evade application of credit laws.

Proposed § 1026.4(b)(2)(ii) and proposed comment 4(b)(2)-1.ii through .iv. would treat charges imposed in connection with credit on prepaid cards as finance charges regardless whether similar charges were imposed in “comparable cash transactions.” The “comparable cash transactions” exception to the

finance charge definition has been completely abused in the checking account context. Overdraft fees are the cost of credit.

Similarly, transfer fees have also been used to disguise the cost of credit and are appropriately characterized as finance charges. The CheckSmart Insight card that was being used to evade Arizona's usury cap, discussed in Section II.C, did so through a "transfer fee" that cost \$14 for a \$100 two-week loan. Transfer fees on bank account overdraft lines of credit, which used to be nonexistent, are also rising and becoming another form of evasion. We have seen transfer fees as high as \$12.50 or even \$20 per day, even on small transfers from an overdraft line of credit. The "comparable cash transaction" exception could permit overdraft transfer fees on prepaid cards if the card had a linked savings account that could, in theory, be used to cover overdrafts but in practice is likely to be empty or insufficient. Transfer fees are another form of overdraft fee and can lead the APR disclosed for an overdraft line of credit to be deceptively low.

Participation fees have also been used to disguise the cost of credit. As discussed above, Advance America previously attempted to evade Pennsylvania's 6% usury cap by making payday loans with a \$150 monthly participation fee. The credit union services organization e-Access Loan formerly used \$30 to \$105 participation fees on top of a purported 18% APR on 30 day loan to enable loans with true APRs ranging from 138% to 378%.<sup>195</sup> Including participation fees in the definition of "finance charge" will prevent these evasions.

However, the proposal does not include application, late, over-the-limit, or returned payment fees in that definition.<sup>196</sup> Application fees for credit features should be considered finance charges. The CFPB should either include late, over-the-limit and returned payment fees as well or make clear that they cannot be charged on prepaid cards.

Application fees have been – and still are being – used in a similar fashion to participation fees to disguise the cost of credit. Kinecta Federal Credit Union uses application fees to make 223% payday loans at its Nix Check Cashing Stores despite the 18% usury cap for federal credit unions. Kinecta discloses a 15% APR but it adds a \$31.95 "application fee" on each two-week loan.<sup>197</sup> The Nevada Federal Credit Union previously offered a 200% to 600% payday loans that charged no interest and disclosed a 0% APR but charged a \$40 to \$50 "application fee."<sup>198</sup> Before the OCC's guidance on deposit advance products, Guaranty Bank made deposit advance loans that had no finance charge at all, only a \$30 "application" fee.<sup>199</sup> These and other abuses with application fees led the Department of Defense

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<sup>195</sup> See Letter from Lauren K. Saunders, NCLC to Michael E. Fryzel, Chairman, National Credit Union Administration at 3-4 (Jan. 27, 2009) ("Saunders 2009 NCUA Letter"),

[http://www.nclc.org/images/pdf/high\\_cost\\_small\\_loans/payday\\_loans/letter-ncua-payday-0109.pdf](http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/letter-ncua-payday-0109.pdf).

<sup>196</sup> Those fees are excluded by current Reg. Z § 1026.4(c)(1) and (2).

<sup>197</sup> See <http://nixlending.com/en/personal-loans/detail/payday-cash-advance>.

<sup>198</sup> See Saunders 2009 NCUA Letter, *supra*, at 3. It is our understanding that the loans were discontinued after the National Credit Union Administration objected in light of the fact that the application fee varied based on the size of the loan and therefore it was a finance charge. But others, like Kinecta Federal Credit Union, have been smarter and have not had variable application fees.

<sup>199</sup> See NCLC, "300% Bank Payday Loans Spreading" (Aug. 2011),

[http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/ib\\_bank\\_payday\\_spreading.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/ib_bank_payday_spreading.pdf).

to propose including application fees in the military annual percentage rate (MAPR) that is subject to the 36% rate cap of the Military Lending Act.<sup>200</sup>

One could imagine a prepaid card that offers “free” courtesy overdrafts but charges an application fee to be eligible. The fee would be similar to a first year participation fee. While application fees must be charged to all applicants whether or not credit is granted, payday lenders like Kinecta deny few if any applicants and can make their criteria clear to consumers before taking the “application.”

A prepaid card could offer free overdrafts but charge a “late fee” if the overdraft is not repaid within 24 hours – an identical program to today’s overdraft programs. Hopefully, the CFPB would view such a fee as an overdraft or negative balance fee that is a finance charge, not a late fee that is not. But to avoid any doubt, late fees should be included as finance charges. There is no reason for a late fee on a prepaid card that does not have credit that can be repaid “late.” Similarly, a prepaid card could limit overdrafts to \$10 and impose an “over-the-limit” fee if the card overdrafts more than \$10. Again, that fee should be seen as an overdraft fee, but once more, clarity is important to prevent ingenious evasions. Legitimate prepaid cards without credit do not need a fee for exceeding a credit limit.

Including all these fees as finance charges would cause the prepaid card to be a credit card. In that case, the ability-to-pay, reasonable time to pay, finance charge disclosures and other rules would apply. Creditors should not escape compliance with credit laws by disguising the cost of credit.

#### **G. Negative balances are credit. Be wary of fees for “inadvertent” overdrafts.**

We support the proposal to treat all negative balances as credit extensions. Some prepaid cards, like the CheckSmart Insight card described earlier in these comment, have charged “negative balance fees” that were payday loan fees in all but name.

We understand that some financial institutions that do not offer overdraft services have expressed concern about unintended consequences for unpreventable overdrafts that trigger fees. We are aware that, even if a financial institution attempts to prevent overdrafts, there are some situations such as restaurant bills and some foreign transactions that are authorized with apparently good funds but settle at a time or manner that causes an overdraft. The apparent concern is that if a fee, such as a foreign currency fee, is connected to the transaction, then the fee would be treated as a finance charge and the rules governing credit cards would apply to the prepaid card.

It is our understanding that such overdrafts are extremely rare – a fraction of a percent of the many millions of prepaid and debit card transactions. Issuers are also becoming better at setting up systems to deal with pay-at-the-pump and other situations that previously caused occasional unpreventable overdrafts.

Most of these transactions would also not be associated with a fee. For example, point-of-service fees are becoming increasingly rare on prepaid cards.<sup>201</sup> Any associated fees could simply be waived, as the Bureau points out. The rules pose no problem for unpreventable overdrafts that do not trigger a fee.

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<sup>200</sup> Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, RIN 0790–AJ10, 79 Fed. Reg. 58601 (Sept. 29, 2014).

If the Bureau does consider any exception for fees occurred in connection with unpreventable overdrafts, it must be tightly limited. The overdrafts must be more than “inadvertent.” The term “inadvertent” is part of the Regulation Z exception for overdraft fees on debit cards today, and those overdrafts are anything but inadvertent.<sup>202</sup> The exception has completely swallowed the rule. Given how rare it is that a prepaid card overdrafts in a truly unpreventable situation *and* a fee is charged, any rule exempting those fees from the definition of “finance charge” should apply only in extremely narrow situations. The issuer must prevent overdrafts to the extent possible. Overdrafts cannot be considered unpreventable unless they result from a force-pay situation under network rules and the issuer’s overdrafts are below some extremely low numerical threshold.

Critically, declined transaction and other penalty fees should not be permitted on any prepaid card that overdrafts, inadvertently or not. If the CFPB decides to permit certain fees charged in connection with unpreventable overdrafts, cards should not be eligible if they carry any declined transaction, penalty, negative balance, shortage or overdraft fees of any type.<sup>203</sup> The proposed rules correctly deem negative balances to be a form of credit and fees associated with credit to be finance charges. Sorting out when those fees were caused by an unpreventable overdraft and when, for example, a declined transaction fee could be charged would be messy. Cards that charged such fees should be ineligible for any unpreventable overdraft exemption. If the CFPB considers any exemption, it should be limited to truly customary, nonpenalty fees<sup>204</sup> for a noncredit transaction in which there are sufficient funds, such as ATM fees.

In short, we believe that the cleanest solution is the one the Bureau proposed: simply waive the fee. But if the Bureau decides to make any exceptions, they must be limited to issuers who do everything possible to prevent overdrafts, have overdrafts in only very rare and unpreventable situations, and do not charge penalty fees related to declined transactions, overdrafts or negative balances.

#### **H. Credit on cards not covered by Regulation E should be covered by Regulation Z.**

As the CFPB points out, there are a number of types of prepaid cards that are not covered in the proposed definition of “prepaid card” and thus are not covered by Regulation E or are only covered by the gift card rules. These cards include gift cards, rebate cards, and prepaid cards used for needs-tested benefits, health savings accounts and flexible spending programs. While those types of cards would rarely if ever have a credit or overdraft feature, we urge the CFPB to include them in the Regulation Z definition of “credit card” if they do.

Payday lenders have been known to use gift cards to evade payday loan laws. Cash1, LLC disguised small-dollar consumer loans to Washington State<sup>205</sup> and Arizona<sup>206</sup> consumers as “retail installment sales

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<sup>201</sup> Pew Charitable Trusts found that 10 of the 66 cards it surveyed had point-of-service fees. Pew 2014 Prepaid Card Report, *supra*, at 11.

<sup>202</sup> The Commentary states that the following is not a credit card: “A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.” Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.A.

<sup>203</sup> Various types of declined transaction and other penalty fees are discussed in Sections IV.J and IV.K above.

<sup>204</sup> *Id.*

<sup>205</sup> See Complaint, Spring v. Cash1, LLC, (King. Co., WA Sup. Ct. Jan. 27, 2011), on file at NCLC.

transactions" involving the sale of gift cards issued by large retailers such as Walmart, Target, Fry's, and others on a credit basis, charging consumers interest with a typical APR of 360 percent. The Arizona Attorney General obtained a consent judgment the company.<sup>207</sup> It would also be simple enough for a payday lender to label network-branded, reloadable prepaid cards as gift cards – or mention them in a single marketing message as a possible gift – and use them as vehicles for delivering credit.

Similarly, companies have proposed in the past to add credit features to health savings and flexible spending cards. Credit cards marketed for medical expenses with deceptive and abusive retroactive deferred interest features continue to be a problem even after the Credit CARD Act.<sup>208</sup> Workplace loans are a growing business, often made through payroll. It is not hard to imagine program managers that are already in the card business also issuing flexible or health spending cards and linking their loans to those types of cards.

A traditional gift card, rebate card, or card used for needs-tested benefits, health savings accounts or flexible spending should never have a credit feature. If it does, consumers would benefit from the protections proposed for prepaid cards – and the additional protections we have urged – if credit features were added to those cards. Credit should always be based on ability to pay, be priced in a transparent fashion, provide consumers a reasonable time to repay, and not endanger prepaid funds needed for necessities.

## **I. Waiting period before adding credit features**

### **1. A waiting period is important.**

We support the CFPB's proposal to require a waiting period before credit that can be deposited to a prepaid card is offered to a prepaid cardholder.<sup>209</sup> We agree that the period should begin once the prepaid card is registered.

Separating the decision to obtain a prepaid card from the decision to take on credit has several benefits. The consumer will have time to use the prepaid card and become accustomed to its features and costs. Many prepaid cards have financial management tools that help consumers to manage their finances, monitoring their balances, and budget so that credit is necessary. The consumer can discard the card if it does not work to her liking without worrying about and credit that remains unpaid.

It would also support more informed use of credit if the consumer is not pressured into accepting a credit feature at the time of sign-up for a prepaid card. The consumer can take her time to compare credit options if she wants them. And consumers would not need to add another set of decisions and considerations at the same time as they are learning about or deciding among prepaid cards.

We support the Bureau's proposal to require both the prepaid card issuer and the creditor, if they are different parties, to comply with the waiting period.<sup>210</sup> An alternative approach would invite evasions.

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<sup>206</sup> "Judgement entered in gift card scheme," KPHO (Apr. 19, 2013), <http://www.kpho.com/story/17353850/judg>.

<sup>207</sup> *Id.*

<sup>208</sup> See CFPB, Press Release, "CFPB Orders GE CareCredit to Refund \$34.1 Million for Deceptive Health-Care Credit Card Enrollment" (Dec. 10, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-orders-ge-carecredit-to-refund-34-1-million-for-deceptive-health-care-credit-card-enrollment/>.

<sup>209</sup> See Proposed Reg. E § 1005.18(g).

We agree with the CFPB's suggestion that card issuers should adopt policies and procedures reasonably designed to ensure that its affiliates, service providers, or commercial entities with whom the card issuer has a contractual relationship do not make a solicitation or provide an application to the consumer during the waiting period.<sup>211</sup> Such a requirement is particularly important for prepaid cards that are sold in payday loan stores. While the prepaid card issuer and payday lender may be different parties, they should not be allowed to plead ignorance when their products are linked.

## **2. The waiting period should be 90 days.**

While we support a waiting period, 30 days is too short. The consumer will only have gone through one monthly cycle and will not have time to explore all the card's features. More time will help the consumer see whether she can manage her finances without resorting to credit at the end of the month.

A 90 day waiting period would also help creditors to determine whether the consumer has the ability to repay credit. The transaction history from at least three monthly cycles will provide valuable information about whether the consumer has the capacity to make credit payments as they are due on top of other expenses. One month is simply not enough. The transaction history is especially important as the credit scores of many prepaid cardholders are quite low, and further evidence that the consumer has the ability to handle credit payments without re-borrowing should be required.

## **J. All declined transaction fees should be banned.**

We support the proposal to prohibit declined transaction fees on transactions that would have accessed a credit feature. That rule is consistent with the rule for credit cards, which prohibits issuers from imposing penalty fees for behavior that is not associated with a dollar amount.<sup>212</sup> However, the rules should go farther and ban all declined transaction fees.

The proposed rule permits a declined transaction fee if the transaction would only have accessed the prepaid card account and not a credit feature. This sets up a confusing rule, because it could be difficult to say what side of the coin the transaction would have accessed – prepaid or credit – when it did not access either. Presumably, if a prepaid card has an overdraft feature, and both the prepaid card account and the credit account are exhausted, it is the credit side that would have been accessed and no declined transaction fee may be charged. Indeed, if the card has an overdraft feature, it is hard to imagine a situation when the transaction would be declined while the prepaid card still has funds. It could happen if the issuer freezes the account following a data breach or suspicious transactions. But the consumer certainly should not be punished with fees in that situation when it is the issuer that has caused the declined transaction. The CFPB should simply ban all declined transaction fees if a card has an overdraft feature.

But the rule needs to go farther. It is unclear how the rule works if the prepaid card has no overdraft feature but does have a line of credit that may be transferred to the prepaid card. Does the CFPB intend

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<sup>210</sup> 79 Fed. Reg. at 77188. However, if the Bureau accepts our suggestion that a broader range of credit accounts should be covered under the proposed rules, in some narrow circumstances it might be appropriate to relieve the prepaid card issuer of liability for violating the waiting period if the prepaid card issuer has no knowledge of or control over the linking of a credit account and a prepaid card.

<sup>211</sup> 79 Fed. Reg. at 77243.

<sup>212</sup> Reg. Z, 12 C.F.R. § 1026.52(2)(i)(B).

to permit declined transaction fees if the consumer attempts to use the prepaid card when it has insufficient funds – because the consumer would not be accessing the credit line – but to prohibit the fees if the consumer attempts to access the credit account by transferring funds? While we support the ban on declined transaction fees in the latter situation, it is inappropriate to permit them in the former.

Permitting declined transaction fees if a consumer refrains from using a credit feature to cover a declined transaction gives prepaid card issuers an incentive to impose punitive fees designed to drive the consumer to use credit. Some prepaid cards, especially those sold by payday lenders, impose quite large declined transaction fees. The U.S. Money Prepaid MasterCard, sold by Check Into Cash, has a \$14.95 ACH decline fee.<sup>213</sup> In fact, that card charges the fee even if the ACH is declined as *unauthorized* – i.e., if the consumer did not authorize the transaction!

Prohibiting all declined transaction fees if a prepaid card has a linked credit feature is analogous to the rule governing over-limit fees on credit cards. Regulation Z provides that a credit card issuer cannot impose declined transaction fees if the consumer does not opt in to over limit transactions. To do so would permit issuers to coerce consumers into opting in, since they face the Catch-22 of a declined transaction fee or an over-limit fee. The same is true of consumers who have the choice of a declined transaction fee or a credit-related fee. Issuers should not use punitive fees to encourage consumers to use credit features.

But even if the prepaid card does not otherwise have an overdraft or credit feature, declined transaction fees should be prohibited to make the rules more clear, simplify compliance and protect consumers. Many of these fees would be prohibited in any event if the fee would take the account negative. The rules correctly deem a negative balance to be an extension of credit and prohibit decline fees that take an account negative just as on other credit cards. A declined transaction fee is also similar to a negative balance fee even if the fee itself does not result in a negative balance. The consumer is being punished for not having sufficient funds in the account.

Consumers who use prepaid cards often live paycheck to paycheck and spend their funds down to the wire. They may need to access their pay or benefits the moment they hit the card. Indeed, we understand that one of the busiest times at Wal-Mart is at midnight when direct deposits post. But funds do not always post the moment expected. Consumers might attempt to use a card without realizing that their direct deposit is not yet available. Checking the balance is not always easy. Not all consumers have cell phones, and they need to enter long strings of numbers to access an automated system. Checking the balance at the ATMs may incur a fee (but should not), and there is no way to do a balance inquiry at a point-of-service location.

Declined transactions also cost issuers little or nothing. The Federal Reserve Board noted that denied transaction fees “could raise significant fairness issues under the [Federal Trade Commission] Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.”<sup>214</sup> Fees for declined transactions are not necessary to make a card program work; they are unheard of on bank accounts. To the extent that ATM owners charge declined transaction fees to card issuers, the cost could be bundled into the cost of ATM withdrawals, or contracts with ATM operators could be renegotiated.

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<sup>213</sup> See <http://usmoneycard.com/fees.html>, attached as Exhibit 9.

<sup>214</sup> 74 Fed. Reg. 59,033, 59,041 (Nov. 17, 2009).

It would simplify fee schedules, make compliance easier, and protect consumers to have a clear and simple rule banning declined transaction fees. At a minimum, the CFPB should prohibit all declined transaction fees on prepaid cards that are credit cards and limit other cards to the amount needed to cover any cost to the card issuer of the decline. Otherwise, unfair practices will develop.

### K. Other penalty fees.

The CFPB should clarify that at least two other types of fees are penalty fees and are prohibited under Regulation Z<sup>215</sup> because no dollar amount is associated with the violation: fees for stopping preauthorized transfers and legal process fees. Moreover, because those transactions would be designed to prevent or result in a negative balance, which is an extension of credit, and to prevent unfair practices, those fees should be prohibited on any prepaid card that can have a negative balance.

Most prepaid cards do not permit preauthorized ACH debits. Those transactions are typically allowed only on payday lender prepaid cards, which use the ACH debits to repay payday loans.<sup>216</sup> Several payday lender prepaid cards charge \$10 fees for stopping payment of a preauthorized ACH transaction.<sup>217</sup> The fees inhibit consumers from exercising their legal right to stop payment.<sup>218</sup> Consumers may have no choice but to stop payment of purportedly preauthorized payments, because payday lenders often refuse to honor the consumer's revocation of authorization or the payment may not have been legal or authorized in the first place.<sup>219</sup> Prepaid cards that are designed to enable payday loans, in particular, cannot complain when those loans cause problems for the prepaid card. Other cards have no need for stop payment orders.

Stop payment fees should be prohibited on prepaid cards that are credit cards as penalty fees that are not associated with a dollar amount.<sup>220</sup> While stopping a payment arguably does not violate a term of the account, neither does initiating a transaction that the issuer declines, being inactive, or closing an account.<sup>221</sup> Fees for all of those activities are considered penalty fees. Those activities, like stopping payment, represent behavior that issuers would like to discourage. An issuer cannot limit application of the penalty fee provision of Regulation Z by refraining from calling an unwanted activity a "violation."

For the same reasons, legal process fees should also be considered penalty fees, covered by the ban on fees for violations that are not associated with a dollar amount. Those fees, as well, should be prohibited on all prepaid cards in order to simplify compliance with the Regulation Z penalty fee rule, laws protecting exempt funds, and our suggested rules governing unsolicited cards,<sup>222</sup> and to prevent unfair practices.

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<sup>215</sup> Reg. Z § 1026.52(b)(2)(i)(B).

<sup>216</sup> See Section II.C, above.

<sup>217</sup> *Id.*

<sup>218</sup> Fees that inhibit exercise of legal rights are discussed at greater length below in Section IX.E under Error Resolution.

<sup>219</sup> See, e.g., Complaint, United States v. Four Oaks Fincorp, Inc. and Four Oaks Bank & Trust, No. 5:14-cv-00014-BO, (E.D. N.C. Jan. 8, 2014), available at <http://www.courthousenews.com/2014/01/09/USvFourOaks.pdf>; [http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/regulator\\_rdfi\\_issues\\_letter\\_9292014.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/regulator_rdfi_issues_letter_9292014.pdf).

<sup>220</sup> Reg. Z § 1026.52(b)(2)(i)(B).

<sup>221</sup> *Id.*

<sup>222</sup> See Section VI.I below.

Legal process fees tend to be quite large, \$75 to \$100. They are likely imposed on cards held by consumers who have debts they cannot pay. Consequently, it is hard to imagine that the fees will not cause a negative balance or a subsequent denied transaction when the consumer needs the money for necessities. Thus, the fees would be covered and prohibited by the Regulation Z rule governing penalty fees for violations that are not associated with a dollar amount.

Some cards impose legal process fees even if the funds are legally protected and the garnishment is unsuccessful.<sup>223</sup> Under Treasury rules, financial institutions may not debit garnishment fees from an account that includes Social Security or other federal benefits unless the account contains funds that exceed the benefits deposited in the prior two months.<sup>224</sup> The rule applies to prepaid cards that accept direct deposit of federal benefits.<sup>225</sup> New York has a similar rule that prohibits garnishment fees from being offset against wages that are protected under state law.<sup>226</sup> Other states may as well.

Legal process fees should also be prohibited to prevent unfair practices. As discussed below, legal process fees appear to be more common on payroll and other cards that consumers do not choose and are less in the public eye.<sup>227</sup> For that reason, we propose that they be prohibited for unsolicited cards. On other cards, the fees are unlikely to be imposed often enough to make the short disclosure form unless the card has few other fees. But even if the fee does show up on the short form, research shows that consumers do not look carefully at fee disclosures. Few will understand a “legal process” fee or anticipate that they will be subject to it. Yet prepaid cards are aimed at consumers with “bad credit” – who may well be subject to legal process – as a “safe” way to “control” their funds and “avoid high bank fees.” Subjecting those consumers to legal process fees is unfair, deceptive and abusive.

Finally, the CFPB should limit the penalty fees that can be imposed (late fee, over-the-limit fee, returned payment fee) to 3% of the delinquent balance, if the creditor requires payment in full of the outstanding balance. Under § 1026.52(b)(1)(ii)(C), this 3% of the balance is the safe harbor for charge cards that require payment of the full balance at the end of the billing cycle. The CFPB should promulgate a special Comment applying this Regulation Z provision to prepaid cards or prepaid credit lines that are charge cards, if they require full payment of the outstanding balance on the first billing statement after a credit extension is made. The Bureau should also make clear that these creditors cannot use the safe harbors under § 1026.52(b)(1)(ii)(A) and (B) (currently \$27 and \$38).

#### **L. Regulation Z itself should specify when prepaid lines of credit are credit cards, and separate accounts with identified credit limits should be required.**

**Separate accounts.** As the CFPB has discussed, it appears likely that creditors would establish separate credit accounts in order to comply with the proposed rules, rather than having the credit balance be

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<sup>223</sup> For example, the Chase Liquid card as a fee for “Legal Process – Processing of any garnishment, tax levy or other court or administrative order against a Chase Liquid Card, whether or not the funds are actually paid.” [https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase\\_liquid\\_v6.pdf](https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase_liquid_v6.pdf) (emphasis added).

<sup>224</sup> 31 C.F.R. §§ 212.3, 212.6(h); 76 Fed. Reg. 9939, 9947 (Feb. 23, 2011).

<sup>225</sup> 31 C.F.R. § 212.3; 78 Fed. Reg. 32,099, 32103 (May 29, 2013).

<sup>226</sup> N.Y. Civ. Practice Law & Rules § 5222j.

<sup>227</sup> See Section VI.I below.

reflected as a negative balance on the prepaid account.<sup>228</sup> In fact, the Bureau should require separate credit accounts.

The key purpose of the rules that the CFPB has proposed is to keep credit accounts separate from prepaid accounts. The rules require a separate statement, separate underwriting, separate fee and finance charge disclosures (both pre-acquisition and on the statement), and a separate agreement at a separate point in time. It is hard to imagine how a creditor could comply with these rules without creating a separate account. The Bureau should not let them try. Reflecting credit solely as a negative balance would be confusing to consumers and undercut the message that the consumer is being given and being charged for credit.

**Clear credit line.** The CFPB asks whether it would be helpful to mandate the disclosure to consumers of the initial credit line that is made available under the terms of the account, including any linked credit accounts.<sup>229</sup> We agree that creditors should be required to tell the consumer what the credit limit is. Consumers should not have to play a game of hit-or-miss to know how much credit they have. Requiring disclosure of the credit limit is possible under the proposed rules because creditors will not be able to use the Regulation E opt-in rules, which encourage secrecy about the credit limit in order to preserve the myth that there is no agreement to extend credit. The fee harvester rule also cannot fully protect consumers unless they know what their credit limit is and can check to see if fees exceed 25% of that limit. For cards where fees exceed 15% of the credit limit, as discussed in Section IV.C.3, creditors must be required to give the special disclosures of the available credit after fees are subtracted.

**Identify prepaid card lines of credit as “credit cards” in Regulation Z directly.** In addition, Regulation Z itself, and not just the Commentary, should directly state when prepaid card lines of credit (“account number where ...”) are CARD Act credit cards. While the Commentary at Comment 2(a)(15)-2.i. G is clear (except for the cumbersome “account number ...” term), Regulation Z itself only discusses the coverage of prepaid cards as credit cards as an exception to the exclusion of overdraft lines of credit from the special CARD Act definition. One could imagine a creative defense lawyer arguing that since Regulation Z only refers to prepaid cards as credit cards in the context of overdrafts, a line of credit that is accessed by a prepaid card but not in the form of an overdraft is not a credit card. While the logical counter-argument is to point out that the Commentary clearly states these prepaid lines of credit are credit cards, it would not be inconceivable for a judge to accept the defense lawyer’s argument. Furthermore, there have been instances when both courts and lawyers have failed to even cite or read the Commentary. Being specific in Regulation Z itself would avoid any such problems.

## V. The CFPB Should Require Funds in Prepaid Accounts to Carry Deposit Insurance and Protection from Insolvency.

Before almost anything else, funds on prepaid cards need to be safe. For the vast majority of prepaid cards, they are. Most cards carry pass-through deposit insurance payable to the consumer, provided by the Federal Deposit Insurance Corp. (FDIC) or the National Credit Union Share Insurance Fund (NCUSIF). Deposit insurance should be required for any prepaid card account that is a bank account substitute – reloadable and capable of holding more than \$500 or eligible for direct deposit of wages, benefits or other regular income such as retirement income.

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<sup>228</sup> 79 Fed. Reg. at 77217.

<sup>229</sup> 79 Fed. Reg. at 77248.

Deposit insurance protects consumers if the bank or credit union fails. But it does much more than that. When a prepaid card account is designed to be eligible for deposit insurance, consumers receive three separate protections:

- Deposit insurance payable to the consumer if the bank or credit union fails;
- Clarity that the funds belong to the consumer and are protected from the prepaid card company's creditors;
- Examination by bank regulators for compliance with consumer protection rules.

All three are essential for consumer transaction accounts.

The FDIC has clarified that, to be eligible for pass-through insurance, prepaid card funds must be held in a custodial subaccount held for the benefit of the consumer, with records indicating the identity of the consumer who owns the funds. Holding the funds in a custodial account in a depository institution also has the side effect of protecting the funds from the insolvency of the program manager – something that is far more likely than a bank failure. In other words, if the program manager becomes insolvent, creditors will not have any claim on the consumer's funds, and those funds should not become tied up in a bankruptcy proceeding.

Funds protected by deposit insurance also have another important protection: they are, by definition, held in a depository institution that is supervised by bank regulators and/or the CFPB, both for safety and soundness and for compliance with consumer protection rules. Thus, funds in depository accounts have an added layer of safety far greater than protection from insolvency. The accounts will be scrutinized for compliance with the full panoply of Regulation E, UDAAP and other consumer protection issues.

While most prepaid cards funds are held in accounts at depository institutions, not all are. The American Express for Target card is not FDIC insured. The American Express Prepaid Card for Student IDs – which appears to be on the market – was not.<sup>230</sup> The American Express Bluebird Card was not originally. Consumers do not have FDIC insurance on funds held in PayPal accounts – a virtual form of prepaid card – although the PayPal Prepaid MasterCard does carry pass-through deposit insurance.

The funds on the uninsured cards are simply held in a company account that is likely well above FDIC insurance limits and does not provide pass-through protection to consumers. The consumer's "account" is just an entry on company's books, and the funds are not protected in the case of insolvency. Consumers could be unsecured creditors. Wages, public benefits and other critical funds deposited onto the cards could be frozen for months while bankruptcy proceedings progress, and ultimately lost completely. While the funds are protected by state money transmitter laws, those laws do not provide

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<sup>230</sup> See NCLC, Comments to CFPB Request for Information Regarding Financial Products Marketed to Students Enrolled in Institutions of Higher Education, Docket No. CFPB–2013–0003 at 8 (Mar. 18, 2013) [http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/student-products-cfpb-comments-nclc-18march2013.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/student-products-cfpb-comments-nclc-18march2013.pdf) (citing web page that is now re-directed to another page).

full, robust protection to consumers.<sup>231</sup> Nor are the accounts examined by bank regulators in the way they would be if the funds were in FDIC insured accounts.

The Treasury rule that requires pass-through deposit insurance for cards that receive direct deposits of federal payments helps. But it does not apply to cards that are used to receive state public benefits, wages or other critical funds. That rule may have encouraged American Express to add FDIC insurance to the Bluebird card but it has not stopped the company from offering direct deposit of wages and benefits to the uninsured Target card.

Beyond American Express, other large nonbanks like Google, PayPal, Apple, Amazon and Facebook are offering or developing prepaid cards and prepaid payment systems. If these accounts hold significant amounts of funds, they should be required to have deposit insurance. Examination by bank regulators may be especially important for technology companies that are relatively new to financial services and do not have robust consumer protection regimes.

Issuers that hold their funds in accounts not protected by deposit insurance have an unfair competitive edge over other issuers. They do not have to pay the costs of deposit insurance premiums and avoid the scrutiny of bank regulators.

The CFPB has proposed to require prepaid cards to carry a disclosure informing the consumer if the funds are not protected by deposit insurance.<sup>232</sup> But fine print in 7-point font disclosing that the card does not carry deposit insurance on a form primarily designed to attract attention to the **Fees at the Top** is not enough to ensure safety. The focus of the short form disclosure form is fees. The other statements are likely to be overlooked. More importantly, consumers should not be expected to choose whether their funds are safe or not.

It is true that consumers may not understand what protections FDIC insurance provides.<sup>233</sup> That is exactly why disclosure is not the right answer. Consumers cannot be expected to evaluate the benefits of insurance they do not understand when selecting a card. Even if there was widespread consumer understanding of FDIC insurance, consumers should not be put in the position of weighing whether to accept a lower monthly fee that they definitely will pay or to pay a higher fee and take the very remote risk of insolvency of the card issuer. They should have confidence that their funds are safe without having to figure out if they are or not.

Cards that accept direct deposit of wages and benefits, in particular, are bank account substitutes. The very term “direct deposit” implies that funds are being “deposited” to a “deposit” account. Deposit accounts should carry deposit insurance. However, the American Express for Target prepaid card accepts direct deposit of wages and state benefits but does not provide FDIC insurance. The Target card promotes direct deposit,<sup>234</sup> yet disclaims in the fine print that it is not a “demand deposit or consumer

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<sup>231</sup> Pew Charitable Trusts, “Imperfect Protection: Using Money Transmitter Laws to Insure Prepaid Cards” (March 2013), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2013/Pewprepaidmoneytransmitterpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/Pewprepaidmoneytransmitterpdf.pdf).

<sup>232</sup> Proposed § 1005.18(b)(2)(i)(B)(13).

<sup>233</sup> 79 Fed. Reg. 77166-77167.

<sup>234</sup> <http://www.americanexpress.com/us/content/prepaid/american-express-for-target-card/how-it-works.html>.

asset account.”<sup>235</sup> While American Express appears to be a stable company, even large, reputable companies have failed, and workers’ basic income could be at risk.

Newer technology-based providers like Google, PayPal, Apple, Amazon and Facebook may also be tempted avoid the costs of deposit insurance and the scrutiny of bank regulators. They should not have an unfair advantage over other prepaid providers by being able to hold consumer funds without deposit insurance.

To accept a consumer’s core income and hold it in an account that is not safe is unfair. If either the bank or program manager were to fail, consumers would suffer substantial injury if they lost their funds or were denied access to their income for an extended period of time. The injury is not reasonably avoidable because consumers can do nothing to protect themselves in that situation. It is not reasonable to expect consumers to simply avoid unsafe cards. The typical prepaid card consumer does not understand deposit insurance, reasonably expects that cards that are permitted to be on the market hold funds in a safe manner, and does not expect the issuer to fail. There are no countervailing benefits to competition; competition is undermined by permitting some cards to avoid deposit insurance. Any benefits to consumers are outweighed by the harm.

Holding funds in an account that lacks deposit insurance is also abusive. It takes unreasonable advantage of consumers’ lack of understanding of the material risks and costs. Consumers are unable to protect their interests. Consumers reasonably rely on the prepaid card issuer to hold funds in a safe manner.

It is also deceptive to offer an “account” and to accept “deposits,” including direct deposit of wages, benefits or other income, and not to put those funds in an account with deposit insurance. Prepaid cards also offered as bank account substitutes and it is deceptive to offer an account that mimics a bank account but is not equally safe.

Any reloadable prepaid card that *either* can hold more than \$500 *or* accepts direct deposit of wages, benefits or other regular income should be required to carry deposit insurance. Most prepaid cards do today, and adopting a uniform rule now will prevent evasions in the future. A clear, level playing field is especially important as the payments industry expands beyond depository institutions and other entities that are primarily in the financial services business.

## **VI. Additional Rules are Needed to Prevent Compulsory Use of Payroll, Government Benefit, Campus and Other Types of Prepaid Cards.**

### **A. Overview**

The CFPB has taken several steps to enforce the existing rule in Regulation E that consumers may not be compelled to establish an account at a particular institution as a condition of receipt of wages or government benefits. We appreciate those efforts, including proposed comments and new disclosures.

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<sup>235</sup> <http://www.americanexpress.com/us/content/prepaid/american-express-for-target-card/cardmember-agreement.html>.

But stronger rules are needed to implement the existing ban on compulsory use and to ensure that consumers have a true choice. In addition, that ban should be extended to cards used for students, insurance payments, released prisoners, tax payments and any government payment owed to a consumer.

The CFPB has authority to impose strong rules to prevent compulsory use of prepaid cards both under its compulsory use authority and under the EFTA provision restricting unsolicited issuance of prepaid cards.<sup>236</sup> The unsolicited issuance rule applies to a broader range of cards than does the compulsory use provision. That rule also reinforces the requirement for consumer choice.

In order to implement both the compulsory use ban and the conditions on unsolicited issuance, the CFPB should also limit fees. The rules should forbid unsolicited issuance of a prepaid card unless the card offers a genuine method of withdrawing funds without charge and certain fees are limited.

## **B. Up-front choice, not back-end disenrollment.**

We support the CFPB's efforts to make clear to employers and government agencies that they may not require consumers to receive wages or benefits via a prepaid card (including a payroll card). The CFPB made that clear for employers in a Bulletin issued before these proposed rules, and for government agencies in Proposed Comment 10(e)(2)-2 and the discussion of that comment in the Federal Register. However, even more clarity is needed, along with further rules to ensure that consumer choice is real.

First, the rules should be specific that a consumer ***cannot be automatically enrolled in a prepaid card and expected to disenroll*** in order to exercise her choice or avoid receiving funds in a particular account. Some employers<sup>237</sup> and government agencies<sup>238</sup> default consumers into cards without giving them an up-front choice. That practice violates the EFTA ban on requiring a consumer to have an account at a particular institution as a condition of receipt of wages or government benefits. It discourages consumer choice and likely results in the consumer being forced to use the card at least for the initial payments until direct deposit or payment by check can be arranged.

A rule against enrollment by default is consistent with the interpretation of another aspect of the compulsory use ban: the rule prohibiting compulsory payment by electronic fund transfer as a condition of credit. Courts have consistently held that a creditor conditions credit on electronic repayment if the creditor defaults the consumer into that repayment method, even if the consumer has the option to cancel the electronic repayment as soon as the first payment.<sup>239</sup>

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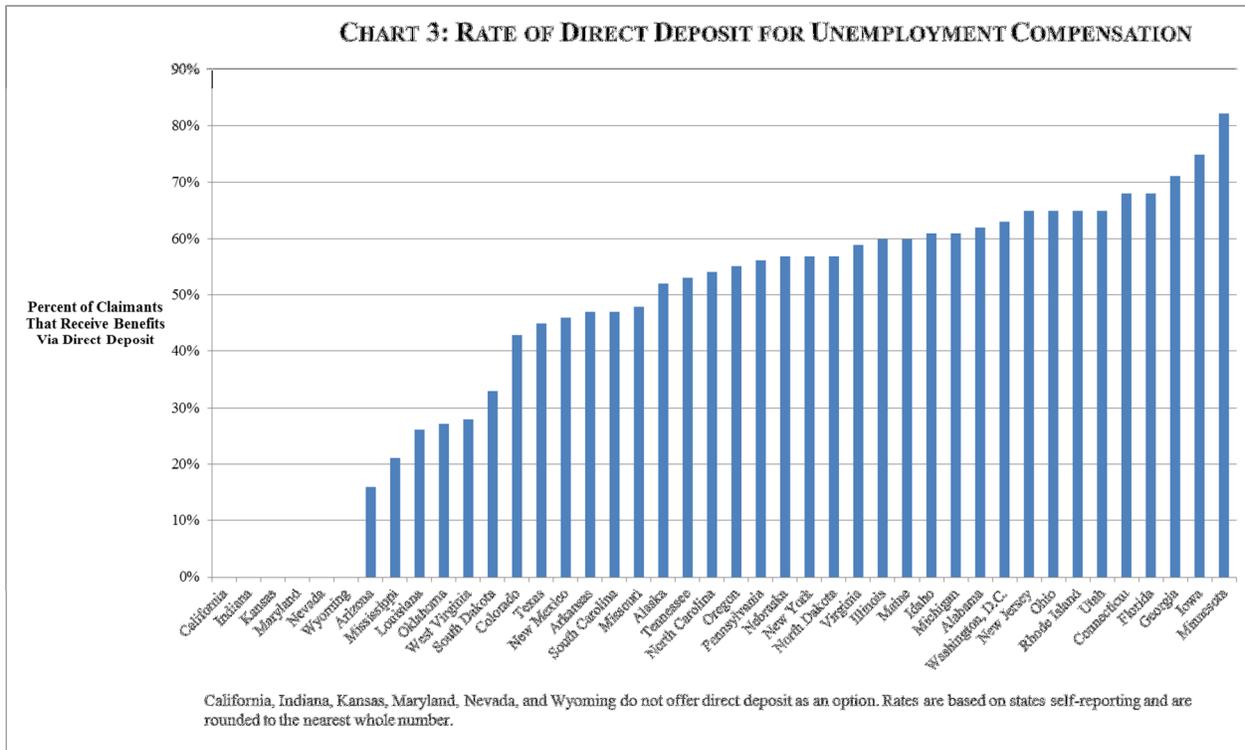
<sup>236</sup> 15 U.S.C. §§ 1693i, 1693k(2); see Section VI.H below.

<sup>237</sup> Sandra Pedicini, "More companies opt to give workers payroll debit cards," Orlando Sentinel (Oct. 6, 2013) ("Orlando Sentinel, Companies Opt Payroll Cards") ("At Darden, which owns chains including Olive Garden and Red Lobster, new employees automatically are set up to receive debit cards, but they can make a phone call or go online to opt out."), <http://www.orlandosentinel.com/business/os-cfb-cover-payroll-cards-20131006,0,1927050.story> An official with Pacific Sunwear also boasted about default enrollment at an industry conference.

<sup>238</sup> California, Indiana, Kansas, Maryland and Nevada require consumers to receive unemployment benefits on the state's prepaid card. See Lauren Saunders & Jillian McLaughlin, NCLC, "2013 Survey of Unemployment Compensation Prepaid Cards" at 10 (Jan. 2013) ("NCLC Unemployment Prepaid Card Report"), <http://www.nclc.org/images/pdf/pr-reports/report-prepaid-card-2013.pdf>.

<sup>239</sup> See Fed. Trade Comm'n v. Payday Financial, L.L.C., 2013 WL 5442387 (D.S.D. Sept. 30, 2013) (lender violated compulsory use provision because loan was conditioned on agreement to repay by EFT despite right to cancel EFT).

Our survey of state unemployment prepaid cards makes clear that default options matter and can prevent consumers from exercising their choice. In our survey of direct deposit rates for unemployment compensation, we found that the median direct deposit rate was 57% with a high of 82%.<sup>240</sup> The state with the lowest direct deposit rate, Arizona at 16%, did not give workers the initial choice of direct deposit.<sup>241</sup> Workers were automatically enrolled in the prepaid card and had to disenroll to choose direct deposit. Other states with low direct deposit rates also did not offer the initial choice of direct deposit for all unemployment applicants and required extra steps for the worker to choose that option.<sup>242</sup>



In light of the confusion that the CFPB notes about the requirements for payroll and government benefits cards, the CFPB should make the rules crystal clear. Just as with a creditor, an employer or government agency conditions receipt of wages or government benefits on use of a prepaid card, in violation of the compulsory use ban, if it defaults the consumer into the card, even if the consumer can disenroll.<sup>243</sup>

payments even before first payment); *Pinkett v. First Citizens Bank*, 2010 WL 1910520 (N.D. Ill. May 10, 2010); *O’Donovan v. CashCall, Inc.*, 2009 WL 1833990 (N.D. Cal. June 24, 2009) (finding violation of EFTA despite fact that borrowers could cancel authorization before the first payment); *West Virginia ex rel. McGraw v. CashCall, Inc., et al.*, No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012) (same), [www.nclc.org/unreported](http://www.nclc.org/unreported).

<sup>240</sup> NCLC Unemployment Prepaid Card Report, *supra*, at 7.

<sup>241</sup> *Id.* at 9.

<sup>242</sup> *Id.* at 9.

<sup>243</sup> The credit rule is part of the same EFTA provision as the compulsory use ban for wages/government benefits. 15 U.S.C. § 1693k. Both subparts take about a “condition,” *id.* 1693k(1), (2), and the interpretation of what is a “condition” should be the same for both.

Second, the rules should make clear that an employer or government agency must give the consumer **clear notice of her options before** the consumer acquires a card. An investigation by the New York Attorney General found that many employers obscure or discourage choices that employees have under New York and federal law.<sup>244</sup>

The proposed rules require an employee or government benefits recipient to receive fee disclosures before a card is acquired.<sup>245</sup> Proposed comment 18(b)(1)(i)-1 gives an example that makes clear that the employee must be presented the short (and long) form to review before agreeing to receive a payroll card. That much is good.

However, the disclosures do not inform employees about their other pay options or tell them how they can choose another option. The short form disclosure for payroll cards merely includes the notice: “You do not have to accept this payroll card. Ask your employer about other ways to get your wages.” The government benefits short form has a similar statement. The warnings are helpful, but too vague.

Similarly, proposed Regulation E Comment 18(b)(1)(i)-1(ii) gives an illustration of an acceptable process where the consumer somehow “learns that he or she can receive wages via a payroll card account,” receives the fee disclosures, and then “agrees” to accept the card.<sup>246</sup> But the comment does not say anything about presenting the consumer’s other options.

The onus should not be on the employee or government benefits recipient to ask about other ways to get their money. They should be told. Choice is meaningless without clear information to exercise it. In our survey of direct deposit rates for unemployment compensation, the state that came out on top, Minnesota, makes it easy for workers to sign up for direct deposit. When workers apply, they are given the clear, up-front choice of direct deposit. Workers can also change their payment method by logging into their account online or by phone. States at the bottom, with low direct deposit rates, forced recipients to figure out how to sign up.<sup>247</sup>

Employers and government agencies should be required to present clear options to the consumer before card acquisition. A comment should make that requirement clear. A vague notice that is part of a form designed mostly to draw attention to fees is not enough give employees and government benefits recipients a choice.

Third, the consumer must have **sufficient time to review the payroll card disclosures and to exercise her choice** of pay method before being given a card. The CFPB highlighted this issue in discussing the importance of receiving disclosures before an account is acquired:

Further, the Bureau believes that some employees acquiring payroll card accounts may receive information about the accounts in a manner that makes it difficult for an employee to comprehend the accounts’ key fees. For example, employees might receive terms and condition documents regarding payroll card accounts at the same time they receive other benefits-related

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<sup>244</sup> NY AG Payroll Card Report, *supra*, at 16-18.

<sup>245</sup> Proposed Reg. E §E § 1005.18(b)(1)(i).

<sup>246</sup> Proposed Reg. E Comment 18(b)(1)(i)-1.

<sup>247</sup> NCLC Unemployment Prepaid Card Report at 9.

paperwork, making the fees difficult for employees to comprehend while sorting through other important and time-sensitive paperwork.<sup>248</sup>

Yet nothing in the proposal prevents this scenario from occurring. In fact, proposed Regulation E Comment 18(b)(1)(i)-1.ii **seems to endorse it**. The comment discusses a consumer who learns about the payroll card, is given the disclosures, and agrees to receive the card, all apparently at the same time.

Instead, consumers should receive complete information about their pay options and have **30 days to choose** how to receive their pay before they can be sent a payroll card.<sup>249</sup> Consumers no longer routinely carry around checks that list their routing and account numbers for direct deposit. They should have a reasonable amount of time to provide that information—or even to open a new account—in order to enable them to receive their funds in the account of their choosing. The employer could encourage an early choice by telling employees to bring their checkbooks or account numbers to their first day of work or when coming in to fill out employment forms if they want direct deposit, or by encouraging them to open bank accounts before starting work. Of course, consumers can be encouraged to make a choice earlier than 30 days and can be provided a payroll card immediately if that is their choice.

The Cleveland Clinic, for example, gives employees **three months** to set up direct deposit before enrolling employees in the payroll card.<sup>250</sup> A 30 day waiting period might require the first wage or benefits payment to be made by check. But that is better – and less costly for the prepaid card issuer – than setting up a prepaid card account and issuing a personalized card for a consumer who will opt out after the first deposit.

Finally, while the payroll card bulletin and the Federal Register discussion are clear that the compulsory use rules apply to payroll and government prepaid cards, **the Regulation E commentary itself** should make that crystal clear. Existing Comment 10(e)(2)-1 and Proposed Comment 10(e)(2)-2 should be revised to state that consumers cannot be required to receive funds “by direct deposit to any particular institution, including a payroll [prepaid] card account at a particular institution.”

### C. Direct deposit must be one of the choices.

When providing a consumer with the option of how to receive funds, one of the required options must be direct deposit to an account of the consumer’s choosing. While the vast majority of employers and government agencies that use prepaid cards offer the choice of direct deposit, a few do not. According to one article:

Applebee's spokesman Dan Smith said the franchisee who owns Central Florida restaurants does not allow direct deposit.

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<sup>248</sup> 79 Fed. Reg. at 77151. The Bureau also points out the importance of comparison shopping, even for student or payroll card accounts. 79 Fed. Reg. at 77152. For example, an employee might choose to open a bank account or a different prepaid card account in order to receive direct deposit. But an employee can only comparison shop if given some time.

<sup>249</sup> Of course, in some states, the consumers’ affirmative consent is needed. But in others, employers are allowed to enroll the employee in a payroll card without affirmative consent.

<sup>250</sup> See <https://portals.clevelandclinic.org/Portals/75/Documents/Payroll%20FAQs%202011.pdf>.

"The default option is the payroll card, but if they'd rather have the check mailed to them, that option is available to them," Smith said.<sup>251</sup>

An employee should not have to wait for her paycheck to arrive in the mail if she does not want the company payroll card. Workers who receive payroll cards often work at restaurants and other retail locations where they receive minimum wage or low hourly wages. They need their pay as soon as possible. The same is true of individuals who receive government benefits. A coerced choice is no choice at all.

Employers are not required to pay electronically. But if they choose to do so, they must allow the employee to choose where to receive the direct deposit. Otherwise, the employee is being required to establish an account with a particular institution in order to receive electronic fund transfers.

#### **D. Mandating a government benefit card with transfers does not comply with the compulsory use ban.**

The CFPB requests comments on whether an institution would comply with the Regulation E ban on compulsory use if it provides the first payment to a benefit recipient on a government benefit card and, at that time, provides information on how to divert or otherwise direct future payments to an account of the consumer's choosing. The answer is clearly no, both as a matter of the EFTA rule and as a matter of policy.

The EFTA prohibits requiring a consumer to have an account at a particular institution as a condition of receipt of public benefits.<sup>252</sup> In the scenario described above, the consumer is still required to have a prepaid card account at a particular institution. Having a card is a condition of receipt of the first payment. It is also a continuing requirement if the only option is to set up an automatic transfer for future payments, because the consumer must continue to hold the prepaid card account. The consumer still has the obligation to review that account for errors or unauthorized charges –which could happen just as they can on any Visa or MasterCard account. Moreover, a consumer who elects automatic transfers to her own account is penalized from exercising her choice because she must wait longer for her funds due to the slowness of the ACH system.

An opt-out system also stifles consumer choice. Defaults tend to be sticky, and defaulting people into a prepaid card will result in fewer people going to the time and effort to figure out how to get out. The median direct deposit rate for unemployment compensation is 55%. But states that require opt out have far lower rates. Arizona had the lowest direct deposit rate at 16%. Mississippi was second lowest and does not permit enrollment in direct deposit at time of application unless the worker applies online. Similarly, only 24% of California recipients and 21% of Maryland workers – who are also automatically enrolled in the prepaid card – went to the effort to set up automatic transfers to their bank accounts.

Thankfully, the CFPB has not asked whether employers can be allowed to use an opt-out system for employees, and hopefully the Bureau is not considering that possibility. Permitting opt-out in the employment area would be even worse, as neither employers nor payroll cards receive the same public scrutiny as government agencies and government cards. Nor do most employers have the number of potential customers or the bargaining power that state governments have.

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<sup>251</sup> Orlando Sentinel, Companies Opt Payroll Cards, *supra*.

<sup>252</sup> 15 U.S.C. § 1693k(2).

The identical legal provision of the EFTA applies to both employers and government agencies. The EFTA does not permit employers to require use of a payroll card, even if automatic transfers are an option. The same rule holds for government agencies.

#### **E. Consumers need information on the right to, and how to, disenroll.**

Information about up-front choices is important. But sometimes that information will be obscured by other important matters, or the consumer will not get around to providing her depository account information. When issuing a payroll or government benefits card, the card issuer should be required to give the consumer a reminder of her other options and information on how to disenroll and receive funds another way.

The proposed notice on the short form for payroll and government benefits cards is a good start. But here again, the short form is mostly designed for fee information. A separate sheet of paper should call attention to the options available to the consumer and tell her how to exercise them. For example, the cover letter that comes along with a payroll card could say:

Welcome to your Employer X Payroll Card. Your wages will be deposited to this card each pay period. **If you prefer to receive your wages by direct deposit to another account or by check (if available from your employer), please contact your employer at (800) 111-2222 or go to [www.employerX.com/payroll](http://www.employerX.com/payroll).**

Providing specific information about how to contact the employer is important. Payroll cards are often used at fast food and other retail establishments, and the manager in the store is unlikely to be the one who manages payroll. The employee should not have to hunt for that information. We found in our unemployment prepaid card report that states that hid the ball on how to exercise the choice of direct deposit resulted in fewer consumers choosing their own account.<sup>253</sup> Any letter mailed personally to an employee at a particular employer can easily contain standard language with that employer's human relations department and website.

#### **F. Card issuers must have reasonable policies and procedures to prevent compulsory use.**

Card issuers – and not just employers and government agencies – should be required to adopt policies and procedures reasonably designed to ensure compliance with the ban on compulsory use. Involving card issuers more in the process of communicating pay choices is natural given their heavy role in developing and providing materials to employers and government agencies regarding the cards. They are also the ones who are promoting use of and profiting from the cards and should bear some of the responsibility to ensure that the cards are not being forced on people.

More involvement by card issuers will improve compliance and will especially help small businesses that may know little about Regulation E. Employers are responsible to know the law. But it would help the owner of a couple of McDonalds franchises if the payroll card provider reminded the owner about Regulation E requirements and confirmed that direct deposit was being offered before beginning to issue payroll cards for those employees.

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<sup>253</sup> NCLC Unemployment Prepaid Card Report, *supra*, at 8-9.

Reasonable procedures should include due diligence before accepting funds to deposit to a card and communications with the consumer when providing the card. Before setting up a new payroll card program – and annually thereafter – the card issuer should confirm that the employer also offers employees the choice of direct deposit and, if required in the state, checks. The card issuer should ask to see the employer’s materials for presenting choices to the employee and require the employer to provide that information along with the disclosures about the payroll card. As discussed above, it should also be the card issuer’s responsibility to provide the notice about disenrollment rights and information along with the card when it is issued.

#### **G. Campus, insurance, released prisoner, tax and other cards should not be compulsory.**

While the compulsory use ban is currently limited to wages and public benefits, it should be extended to several other types of cards. Like any prepaid card, these cards can be full of fees that cut into payments that consumers are due. Prepaid cards should not be used as a vehicle for giving consumers money they are owed unless consumers have a choice in the matter. In addition, as discussed in Section VI.I, stricter rules are needed for cards that are issued on an unsolicited basis. Section 1005.10(e)(2) should be amended to read:

No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or as a condition of receipt of:

- (A) a government payment,
- (B) insurance or workers’ compensation proceeds,
- (C) funds owed to a student enrolled in an institution of higher education, or
- (D) funds due a consumer upon release from prison or jail.

Student should not be required to use a card to receive funds in connection with higher education. Most students already have or are eligible to open their own bank accounts. There is no need to force them into using a college card just because it likely provides revenue to the college. The abuses of colleges that put revenue sharing ahead of free choice by their students are well documented.<sup>254</sup>

Campus cards that are used for government-funded financial aid (a public benefit), work study or other employment should already be covered by the Regulation E ban on compulsory use. But some colleges have not gotten the message. For example, the Emmanuel College Prepaid Card “is automatically issued to all students currently enrolled at Emmanuel and is the primary way that any financial aid refunds or work-study payments are delivered to students.”<sup>255</sup> Higher One also continues to coerce students into using Higher One accounts to receive financial aid refunds despite last year’s enforcement action.<sup>256</sup> While the Higher One accounts purport to be bank accounts and not prepaid cards, the compulsory use provisions of Regulation E govern either type of account.

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<sup>254</sup> See U.S. PIRG, “The Campus Debit Card Trap” (May 30, 2012), <http://www.uspirg.org/reports/usp/campus-debit-card-trap>.

<sup>255</sup> <http://www.ec.edu/about-ec/emmanuel-prepaid-card>.

<sup>256</sup> See section X.B below.

Explicitly adding funds in connection with higher education to the compulsory use provision would improve compliance. In addition, it would avoid ambiguities when students are forced to receive funds at a particular institution for purposes other than wages or public benefits, such as financial aid that is not publicly funded. All general-use<sup>257</sup> campus cards should be covered regardless of the source of the funding in order to prevent any confusion and make compliance easier.

There have also been abuses by prisons that have forced released prisoners to receive money that is owed them on a prepaid card that is full of fees and difficult to use.<sup>258</sup> Those funds may represent wages from a prison job or public benefits that were paid to the prisoner while in prison. Since the money was taken from and is owed back to the releasee, fees take his or her property without due process or just compensation. Releasees should have a choice of how their money is returned to them, and all choices should enable them to full reimbursement without fees.

Consumers who are due insurance payments, tax refunds, and any government payment (other than needs-tested benefits paid on an Electronic Benefit Transaction (EBT) card) should have a choice of how to receive their funds. Consumers who are forced to accept prepaid cards for money owed to them do not have any say in the terms of a prepaid card and have no ability to choose a card that has low fees or is easy to use. As the prison example shows, those cards can come with fees such as high weekly fees that are virtually impossible to avoid.

In fact, a study by the Federal Reserve Bank of Kansas City showed that cards distributed by tax preparers were far more expensive than those distributed by any other outlet. Consumers paid on average \$26.81 per month for tax refund cards, compared to \$11.17 per month on the next highest category of cards, those sold by check cashers.<sup>259</sup> Neither tax preparers nor government revenue departments should require consumers to receive a tax refund on a prepaid card.

Notably, for one-time payments, it is actually more costly to produce and issue a prepaid card than it is to issue a paper check. That cost is covered by inactivity and other fees that profit the card issuer but bleed consumers. Payment vehicles should not be designed to skim consumers of money they are owed.

## H. Limit fees on payroll, campus and other unsolicited cards

The EFTA generally bans unsolicited issuance of access devices.<sup>260</sup> A prepaid card is an access device for a prepaid account. A financial institution may send a consumer an unsolicited prepaid card only if, *inter alia*, the card is not validated; “the consumer may dispose of it if validation is not desired”; and the card is “validated only in response to the consumer's oral or written request for validation.”<sup>261</sup>

But for employees, students, public benefits recipients, prisoners and others, disposing of the card is not any option. Many states allow employers to require electronic pay through either direct deposit or a

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<sup>257</sup> We are not urging coverage for closed-loop cards that merely pay for laundry or meals on campus.

<sup>258</sup> See Prison Policy Initiative, Proposed Amendments to Regulation E (March 2015), <http://www.prisonpolicy.org/releasecards/>.

<sup>259</sup> Kansas Fed, Recurrent Overdrafts, *supra*, at Table 5.2, p. 68. However, consumers who overdrafted paid on average \$27.24 per month. *Id.*

<sup>260</sup> Reg. E, 12 C.F.R. § 1005.5(a).

<sup>261</sup> Reg. E, 12 C.F.R. § 1005.5(b)(2), (4).

payroll card. The same is true for government benefits. But direct deposit is not an option for an unbanked consumer, who can therefore be automatically enrolled in a prepaid card without consent. A consumer who does not have another account for direct deposit – or who was not given that choice – has to validate the card in order to receive the funds. Even if the consumer is able to set up direct deposit eventually, she will need to validate and use the card until that can happen. In addition, closing the account itself may cost the consumer a fee as high as \$15.

The CFPB should limit the fees on cards that are provided on an unsolicited basis. Using its authority over compulsory use and unsolicited cards, the rules should permit an issuer to send an unsolicited card only if the card meets minimum requirements and has a truly convenient method to access the funds to the penny without fees. These rules should apply to all general-use payroll, campus, public benefits, release, insurance, workers compensation and other unsolicited cards, but especially to cards that an employee or other consumer may be enrolled in without affirmative consent.

The fee limits must make full access to the consumer's money a reality. While every state requires that payroll cards provide a method for employees to withdraw their wages in full, to the penny, without fees, that rarely turns out to be the reality. The New York Attorney General's survey found that only "25%-30% of workers successfully utilized their payroll cards without any fees."<sup>262</sup>

Convenience checks and teller withdrawals, the two methods used to permit a complete cash withdrawal on prepaid cards, are rarely used and are inconvenient.<sup>263</sup> Bank tellers are unfamiliar with the cash withdrawal rules,<sup>264</sup> and convenience checks are "cumbersome," "complex" to use, and "inconvenient."<sup>265</sup> While cards may offer at least one free ATM withdrawal, surcharge-free ATMs may not be conveniently located. In the New York survey, workers withdrew cash at out-of-network ATMs far more than they did at network ATMs.<sup>266</sup> While it is theoretically possible to access wages for free on a payroll card, and the cards do provide conveniences for unbanked workers, it is essential that workers be given clear choices of how to receive their pay.

In addition, junk fees are common on unsolicited cards provided to consumers who have no choice but to accept them. Competition does not work in that situation. High junk fees especially flourish in the secretive payroll card market.<sup>267</sup> For example, payroll cards charge fees as high as \$100 for "legal process,"<sup>268</sup> a fee not found on any of the more public unemployment compensation prepaid cards used by states.<sup>269</sup> Some payroll cards also charge \$15 to \$25/hour for "research."<sup>270</sup> These fees are not

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<sup>262</sup> NY AG Payroll Card Report, *supra*, at 3 n.3.

<sup>263</sup> In the four companies that provide complete information, only 4% to 9% of the workers used teller withdrawals and less than 1% used convenience checks. *Id.* at 8.

<sup>264</sup> Visa and MasterCard have both been forced to develop flyers that consumers can take with them to bank tellers to remind them of the network rules. But consumers do not know about those flyers and cannot be expected to carry a stack around with them every time they need cash.

<sup>265</sup> NY AG Payroll Card Report, *supra*, at 16, 17, 19.

<sup>266</sup> Out-of-network ATM withdrawals amounted to 46% to 67% of cash withdrawals at the four large retailers who supplied information, compared to 25% to 49% for network ATM withdrawals. *Id.* at 8.

<sup>267</sup> Payroll card providers have refused to supply us with fee schedules, even for cards issued by state governments.

<sup>268</sup> The state employee payroll cards in Arizona, New Hampshire, New Jersey, Texas and Washington all charge \$100 legal process fees. See Exhibits 19, 25, 26, 31, 34. The fee is \$40 in Ohio. See Exhibit 27.

<sup>269</sup> See NCLC Unemployment Prepaid Card Report, *supra*.

common on general use prepaid cards marketed to the public. The lack of competition and public scrutiny of unsolicited cards leads to higher fees.

Fees for “legal process” are especially inappropriate on payroll cards (and, indeed, on any prepaid card.) Employees may be unbanked and unable to receive their wages by direct deposit precisely because they have had problems with credit and expenses that exceeded their income. Unbanked employees are likely to have unpaid debts. They can do nothing to prevent legal process against a payroll card other than paying their debts. But their low income and blemished credit are why they have the payroll card in the first place. Moreover, their pay may even be exempt from garnishment.<sup>271</sup> A payroll card should be a safe place to get their pay, not a place where they can be hit with a \$100 fee.

The CFPB should require that unsolicited cards provide a meaningful ability to withdraw funds in full without fees. Given the difficulty of using convenience checks and teller withdrawals, and to protect consumers from unfair fees, unsolicited cards should come with:

- unlimited free withdrawals at network ATMs;
- no PIN debit fees, which are incurred if a consumer asks for cash back from a purchase;<sup>272</sup>
- at least one other method that permits a full, fee-free withdrawal to the penny;
- no legal process or other penalty fees that are not reasonable and proportional to the violation as set forth in Regulation Z;<sup>273</sup>
- no fees for research or other fees for complying with the issuer’s legal responsibilities or that inhibit the consumer from exercising legal rights;<sup>274</sup>
- compliance with the rules governing overdraft and credit features;<sup>275</sup>
- no inactivity fees,<sup>276</sup> and
- no fees to close the account.<sup>277</sup>

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<sup>270</sup> The Ohio state employee payroll card charges \$15/hour. See Exhibit 27. South Dakota charges \$25/hour. See Exhibit 30.

<sup>271</sup> Both federal and state laws exempt a certain amount of wages from being garnished through the employer. Federal law has been interpreted narrowly, with the protection being lost once the funds are transferred to the employee’s bank account. See NCLC, Collection Actions § 12.4.6. The concern may be distinguishing wages from other funds in the employee’s account. But a payroll card contains only wages. Some state laws operate in a similar fashion, but some provide protection even after the wages are deposited into the employee’s account. See *id.* at § 12.6.1.

<sup>272</sup> PIN debit fees are becoming increasingly rare. But Higher One charges a \$0.50 fee on PIN transactions on its student cards. See <https://www.higheroneaccount.com/studentaccount/feeschedules.do>.

<sup>273</sup> 15 U.S.C. § 1665d; Reg. Z § 1026.52(b). Legal process and other penalty fees are discussed in Sections IV.K and VI.I above.

<sup>274</sup> Fees for research and exercising legal rights are discussed in Section IX.E under Dispute Rights below.

<sup>275</sup> Those rules would apply to prepaid accounts in any event, but incorporating them into the unsolicited access device rule could extend them to unsolicited devices that access demand deposit accounts, such as Higher One accounts. That issue is discussed in Sections VI.I and X.B.

<sup>276</sup> See Section VIII.A.7.

<sup>277</sup> The New York Attorney General has opined that fees to close the account and issue a check for the remaining balance violate the law requiring employees to be able to access their wages in full. See NY AG Payroll Card Report, *supra*, at 6. Account closing fees also prevent consumers from exercising their choice to dispose of an unwanted card, as required under 15 U.S.C. § 1693i(b)(3).

In addition, several of these fees should not be allowed on any prepaid card.<sup>278</sup>

New rules on unsolicited access devices should apply to all access devices, whether they access a DDA account or a prepaid account. We are unaware of any use of unsolicited DDA access devices other than in the campus card context. As discussed in Section X.B below, those cards have been the source of considerable abuse and are effectively prepaid cards, but are currently outside the proposed rules. A rule limiting fees on all unsolicited access devices would not only impact prepaid cards or prepaid card-like products, but would avoid evasions.

In addition, as discussed in Section X.B below, nonbank “bank accounts” should be subject to the prepaid card rules. There are different ways to accomplish this result, but one would be to require compliance with some or all of the prepaid card rules for any account that is initiated through an unsolicited access device.

## VII. Account Information Should be Free and Convenient.

We support the efforts made in the proposed rule to ensure that consumers have free and convenient access to basic account information, including balances and transaction histories. Below we make suggestions to improve access to account information.

### A. Balance information

#### ***By telephone and online***

We appreciate the admonition that consumers must have the ability to check their balances by telephone and online with no fees. We believe that the requirement for free telephone access requires a toll-free number. Some consumers still pay long distance charges on their home phones or their mobile phones, and they should not have to pay those charges simply to check their balance.

While the payroll card rule has long required issuers to provide balance information by telephone, many payroll cards charge fees for customer service calls even if the consumer only uses the automated system (“interactive voice response” or IVR) to find out the balance. Several state government payroll cards charge such fees. For example, the Georgia card offers five free calls per month and charges \$0.35 each time after.<sup>279</sup> Indiana allows two free calls per month, one free call per deposit and charges \$0.50 for additional balance inquiries by telephone.<sup>280</sup> Ohio has four free calls per month and charges \$0.35 each time after.<sup>281</sup>

Providing balance information is a requirement and issuers should not be allowed to charge for it. Especially for the lower income consumers who use prepaid cards, balance information is essential to

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<sup>278</sup> See Sections IV.J, IV.K, IX.E below.

<sup>279</sup> See Exhibit 20.

<sup>280</sup> See Exhibit 21.

<sup>281</sup> See Exhibit 27.

managing their finances and they need to keep a close eye on it. While the fees are small, they can add up. Payroll card issuers have observed that consumers often check their balances several times a day.<sup>282</sup>

### ***ATM balance inquiries***

Free access to account balances by telephone and online is important but not enough. Many consumers do not have internet access. Obtaining balance information by telephone can be inconvenient and does not work for everyone. The consumer needs to enter a long string of numbers and navigate an automated menu. Customer service lines are generally unavailable in languages other than English and Spanish. Not everyone has a mobile phone available to check balance information when they need it, before withdrawing cash or making a purchase – risking declined transaction fees. Many consumers have limited minutes available on their phone plans, or their prepaid telephone plans may have run out with no money at the moment to refill it.

We support the proposal to retain the requirement for balance information at a terminal (i.e., an ATM) for government benefit cards and urge the CFPB to expand it to all prepaid cards. The CFPB should add a comment in both the government benefits card section and the general prepaid card section stating that ATM balance inquiries must be free. ATMs are available to everyone, are simple to use, and are easier to navigate for non-English speakers than oral information. Balance information at a terminal should be free, just as it will be by telephone. While some ATM owners may charge prepaid card issuers for balance inquiries, the cost is minimal, likely less than prepaid cards charge. Any cost can be bundled into the cost of an ATM withdrawal, simplifying fee schedules and making it easier for consumers to understand and estimate the cost of cards. Issuers can also offer and steer consumers toward other convenient channels for balance information, such as text messages.

### ***Balances by text and email***

The capacity to send text messages has become so ubiquitous at minimal cost that issuers should also be required to offer balance information by text upon request. Once the consumer's mobile number is linked to the account, texting is the fastest and easiest way to obtain the balance for a consumer who has a mobile phone. Text messages are even easier for non-English speakers to use than an ATM. Text messaging also enables checking balances before making a purchase at a location where there is no ATM.

In addition to balances, issuers should offer opt-in automated text, telephone and email messages about low balances and deposits. Those messages will also help consumers manage their accounts and avoid the need for telephone calls to check whether a balance in order to know if a deposit has arrived.

## **B. Customer service calls**

### **1. Cost**

As discussed above, we support the requirement to provide free telephone access to balance information. In order to make sure that this is a reality and that consumers also have free access to other basic information about their accounts, all automated customer service calls should be fee-free.

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<sup>282</sup> Comment at Payroll Card Salon in New York City sponsored by Center for Financial Services Innovation, Sept. 23, 2015.

Consumers who are not receiving statements need access not only to balances but to their last deposit, recent transactions, and other information.

Indeed, it could be quite confusing to consumers if IVR calls for balance information are free but a fee is charged if the consumer accesses another part of the menu for other information. Issuers may emphasize that calling to obtain balance information is free. The consumer could get caught in a bait and switch if she makes what she believes to be a free call only to be charged for it.

Moreover, consumers should also have reasonable access to free live customer service calls in case they have questions or need to discuss a problem. Not every question or issue can be answered by an automated menu. Plus, automated menus do not work for everyone. Seniors receive Social Security on prepaid cards. Individuals with mental and physical disabilities receive disability benefits on prepaid cards. Prepaid cards are generally not sold through bank branches or other locations that provide access to a human being. Access to live customer service is essential.

Customer service calls should be free. Eliminating customer service fees would free up space on the short form. At a minimum, automated calls should be free and consumers should have at least four free live calls per month, along with free calls to raise a problem or dispute a charge. Eliminating fees for IVR calls and standardizing a minimum number of free live calls would also eliminate significant confusion, as discussed below in the section on the short form.

As discussed above, the customer service line should be a toll-free number. This is especially important for live customer service, as consumers may be put on hold for a considerable period of time. Consumers should not have to pay long distance charges in order to dispute transactions or discuss problems with their accounts.

## 2. Foreign languages

We urge the CFPB to require foreign language support for live customer service calls in any language that the issuer uses in connection with marketing or acquisition of the card. The New York Attorney General found that none of the payroll card programs surveyed provided telephone services in any languages other than English and Spanish, regardless of the language typically used by the employer to communicate with workers.<sup>283</sup> As with the short and long form disclosures, if a prepaid card issuer seeks customers who speak another language, customer service should be available in that language.

Interpreters must not only be generally fluent in the spoken language but should also have fluency and expertise in the field of prepaid products and features. Deploying generalist interpreters who do not have product expertise can result in inaccurate or incomplete information. If a prepaid card issuer solicits non-English speaking customers, it must provide them with substantially the same level of access to services received by English-speaking individuals.

## C. Account histories and statements

Statements or other forms of transaction histories are an essential part of managing an account. They help consumers to check for unauthorized charges and errors, and also to understand the fees they are being charged. Statements provide records of purchases that might be needed if there is a problem,

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<sup>283</sup> NY AG Payroll Card Report, *supra*, at 13.

and a history of the individual's financial life that could be part of a rent or mortgage application or a tax return. Statements also help consumers to understand their spending patterns and to budget.

**No fees for required information.** We support proposed Comment 18(c)-3, which essentially states, without saying so directly, that an issuer may not charge fees for providing electronic access to account information or for requesting paper statements on an ad hoc basis up to once a month. However, this point should be made more directly. A sentence should be added to say: "A financial institution may not charge a fee for providing account information required under § 1005.18(c)(1)."

Online information and ad hoc statements have been requirements of the payroll card rule. Yet many payroll cards charge for such information. State government payroll cards used in Ohio (\$3.00), South Dakota (\$3.00) and Wisconsin (\$2.00) all charge for statement requests.<sup>284</sup> As the CFPB noted, very few consumers request paper statements,<sup>285</sup> and this is a minimal burden. Yet it can be important for consumers when they need it.

**24 months of transactions online.** While we appreciate the proposal to lengthen the available online account history from 60 days to 18 months, we urge the Bureau to go a bit farther, to 24 months. That allows a consumer to get a complete two-year picture of her finances and to see seasonal patterns. A consumer doing her taxes on October 15 – as one of the writers of these comments has unfortunately done – may need to see last minute information online about transactions earlier than March 15 of the previous year.

**7 years of statements upon request.** With respect to written account histories, here again, 18 months is better than 60 days, but information needs to go back much farther. Seven years would be appropriate. Just like any bank account customer, a prepaid cardholder who uses the card as her primary transaction account could be audited by the IRS, need to show a longer history to apply for a mortgage, or have another reason to look up an older charge. Consumers who do not receive paper statements are unlikely to have these records, and the only way to obtain them is to call and ask.

**No fee for any ad hoc statement requests.** Proposed Comment 18(c)-3 permits an issuer to charge a fee for providing account information that is older than the transaction histories that the issuer is required to provide. We oppose this provision. All ad hoc statements should be free. Less than one percent of consumers seek even recent statements, and it will be quite rare for a consumer to need older information. If an institution has older information in its computers, it should cost no more to print out and mail that information than newer information. If an issuer is getting relief from the monthly statement requirement, it should be required to supply the information for free when it is needed.

Permitting a fee for older account histories will also confuse consumers about their right to free information. The fee might be a required disclosure on the short form if the issuer does not have three other incidence-based fees. Even on the long form, where more detail can be provided, seeing the fee may confuse consumers.

**Automatic periodic statements.** While the proposed rules give consumers the right to receive a free paper statement every month if they request, the rules do not require the issuer to give the consumer the option of signing up for regular statements without a phone call every month. Consumers should

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<sup>284</sup> See Exhibits 27, 30, 36.

<sup>285</sup> 79 Fed. Reg. at 77270 ("generally well under one percent of active cardholder-months").

have the option of signing up for automatic, periodic paper statements. While written statements do not need to be provided for all consumers, many consumers do not have computers or smart phones. Even if they do, they may find it more convenient to review their accounts for fees and unauthorized charges through paper statements rather than by remembering a password and logging in every month. The CFPB's own data shows that consumers do not access their accounts online. The fact that few consumers are likely to sign up means that it will not be a large burden to supply periodic statements to those who want them.

Although the consumers in the CFPB's focus groups did not express interest in paper statements, those focus groups were not exhaustive. The prepaid card customer base is diverse and growing larger and more diverse every day. Older consumers who are more accustomed to paper use prepaid cards, and paper statements make it easier to keep financial records.

Consumers are also not yet accustomed to thinking about prepaid accounts as their long term bank account. Once that mental shift occurs, consumers may want regular paper records. News reports of identity theft targeted at prepaid cards may also lead consumers to want easier ways to glance at all their recent transactions.

Consumers who want paper statements should not have to call each month – taking up customer service time and potentially paying a fee. Getting regular statements should be an option for those who want them. Statements should be free or for a minimal fee of about \$1/month. (For prepaid cards that are credit cards, however, as we discuss in Section XIII.B.4, the CFPB should clarify that no fee can be charged for paper statements to avoid coercing card holders into consenting to electronic statements.) The CFPB's data show that the cost providing ad hoc paper statement is about \$1, including the cost of fielding the incoming call.<sup>286</sup> Consumers should not be dissuaded from getting the information they need to manage their accounts by a fee that is large than is needed to cover costs.

**Annual transaction histories.** Consumers should also have the option of an annual transaction history. Some consumers may not need monthly statements but will want a summary of their transactions for record-keeping or tax-time purposes. As discussed below, notice of the availability of an annual history should be provided as part of the annual error resolution notice.

**Monthly and year-to-date fee totals.** We support proposed § 1005.18(c)(4), which requires electronic or written transaction histories to supply monthly and year-to-date fee totals. Setting that information apart clearly is important to helping consumers to understand the cost of their accounts and how to minimize it. In fact, fee total information is so important that the CFPB should also require issuers to offer the option of opting in to automatic text messages or emails with that information.

**Third-party fees.** Proposed Comment 18(c)-5 states that account histories do not need to summarize third-party fees. However, the CFPB has asked whether such fees should be listed if the issuer is able to determine the amount. This information would be extremely useful and we urge the CFPB to require it. If a consumer withdraws \$40 cash from an out-of-network ATM that charges a \$2.50 surcharge, the withdrawal will appear as \$42.50. An ATM withdrawal in an odd amount can be used to determine ATM surcharges. Providing monthly and year-to-date totals for ATM surcharges will help consumers to understand what they are paying and how they can avoid those charges. Those surcharges can be a very significant part of the cost of a prepaid card. For example, the New York Attorney General found that

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<sup>286</sup> 79 Fed. Reg. at 77270 n.462.

employee withdrew cash from out-of-network ATMs more frequently than they did from in-network ATMs.<sup>287</sup>

Along with a summary of ATM surcharges, the CFPB should require issuers to include a statement such as: “You can avoid these fees by using network ATMs, which can be found by using our mobile app, calling customer service, or visiting our website.”

**Methods to locate network ATMs.** As discussed in Section VIII.B below, the long form should inform consumers on how to locate network ATMs. That information should also be included on statements and in a prominent location on the issuer’s website.

#### D. Email and text alerts

While we appreciate the proposed rules providing important information in account histories and statements, very few consumers will access that information. The CFPB’s own data show that prepaid cardholders rarely get written statements *or* access their account histories electronically. Not a single prepaid provider that shared information with the CFPB had more than one percent of active customers requesting written histories on a regular basis.<sup>288</sup> But electronic access to account history – as distinct from balance information – also appears to be very low. When one program manager provided electronic periodic statements to all of its customers, only one percent of active accounts viewed the statements.<sup>289</sup> The number is likely even lower in programs that do not email electronic statements and rely on consumers to check the website on their own without any reminder.

Yet statements provide information that is important for consumers to see. A consumer who does not regularly review her statements may not see unauthorized charges or fees that add up.

Consequently, we believe that one of the requirements for modification of the Regulation E statement requirement should be offering the option of signing up for email or text alerts for one or all of the following pieces of information:

- Individual transactions;
- Low balance alerts;
- Deposit alerts;
- Individual fees charged;
- Monthly fee totals, including year-to-date;
- Availability of the monthly statement;
- Availability of an annual statement;
- Annual error resolution notice;
- Potentially unauthorized charges and any corresponding decision to freeze the account.

Providing the option of receiving this information by text or email will help consumers to manage their accounts.

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<sup>287</sup> New York Attorney General Payroll Card Report, *supra*, at 8 (Out-of-network ATM withdrawals amounted to 46% to 67% of cash withdrawals at the four large retailers who supplied information, compared to 25% to 49% for network ATM withdrawals.).

<sup>288</sup> 79 Fed. Reg. at 77179.

<sup>289</sup> 79 Fed. Reg. at 77269.

Any email or text that includes out-of-network ATM charges (either an individual transaction or a monthly total) should include a statement that the fees may be avoided if the consumer uses network ATMs. The message should also inform the consumer how to find such ATMs.

An email or text about the availability of the monthly statement should remind the consumer of the ability to access the statement online or a written statement upon request.

The consumer should have the option of selecting any of the alerts listed above individually and should not have to generally opt in to electronic communications. In particular, opting in to alerts should not require consent to receive marketing, informational or promotional messages. Many consumers have email or text overload and should be able to selectively choose the information that is important to receive.

## E. Mandatory electronic communications

The proposed requirement for free access to account balances and account histories is triggered only if a prepaid card issuer takes advantage of the Regulation E modification and does not provide statements. However, some issuers could choose to avoid the requirements that come along with the modified rules – such as free access to balances and written statements – by instead providing electronic statements and requiring consumers to “consent” to electronic communications. To avoid this result, the CFPB should clarify that issuers that do not follow the modified requirements must offer the option of paper statements. In addition, all prepaid cards should be required to offer free access to account information, even if they offer statements.

The essence of the Electronic Signatures in Global and National Commerce (“E-Sign”) Act<sup>290</sup> is that electronic information may substitute for legally required written information only if the consumer *chooses* an electronic format.<sup>291</sup> The consumer must have “affirmatively consented” to electronic writings, must be informed of the availability of paper records, has the right to withdraw consent, and must be told the procedures for doing so.<sup>292</sup> As the CFPB explained: “Before receiving such consent, the E-Sign Act requires that financial institutions make clear to a consumer that they have the option of receiving records in paper form ....”<sup>293</sup>

Yet many products require consumers to “opt in” to electronic statements as part of the application process, without giving consumers the option of paper statements. The leading provider of prepaid cards with overdrafts fees today requires consent to the delivery of electronic disclosures.<sup>294</sup> But just because a consumer has an email address does not mean that she has regular internet access.

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<sup>290</sup> 15 U.S.C. § 7001 *et seq.*

<sup>291</sup> For a longer discussion about the importance of the E-Sign Act, see NCLC, “Comments to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039” at 17-23 (June 4, 2012) (“NCLC Streamlining E-Sign Comments”), [http://www.nclc.org/images/pdf/rulemaking/cm\\_cfpb\\_reply\\_comments\\_4\\_june\\_2012.pdf](http://www.nclc.org/images/pdf/rulemaking/cm_cfpb_reply_comments_4_june_2012.pdf).

<sup>292</sup> See 15 U.S.C. § 7001(b)(2), (c); see generally National Consumer Law Center, Consumer Banking and Payments Law § 11.3.5.1 (4th ed. 2009 and Supp.).

<sup>293</sup> 79 Fed. Reg. at 77170.

<sup>294</sup> “IF YOU WISH TO PARTICIPATE IN THE OPTIONAL OVERDRAFT PROTECTION SERVICE YOU MUST CONSENT TO RECEIVE COMMUNICATIONS FROM US IN ELECTRONIC FORM THROUGHOUT THE ENTIRE DURATION OF YOUR PARTICIPATION IN THE OVERDRAFT PROTECTION SERVICE.”

Voluntary consent to electronic communications is important even as some prepaid cards move into the virtual world. A consumer who uses a mobile payment system does not necessarily have sufficient data available at all times and also may not be comfortable monitoring the account completely on a mobile device. Mobile devices do not provide a record the consumer can keep. We discussed these issues in greater length in earlier comments.<sup>295</sup>

In addition to consent, E-Sign requires that the consumer demonstrate the ability to access electronic information and that the information be provided in a form the consumer can keep. Nevertheless, we suspect that some companies are not following these requirements, and the record keeping requirement in particular may not be satisfied by mobile payment systems.

Whether or not electronic or paper statements are being provided, we urge the CFPB to require compliance with the prepaid card account information. Free access to balances and account information is important to managing an account even if the consumer also receives statements.

## VIII. Disclosures

We support the proposal to improve fee transparency by requiring all prepaid cards to disclose fees in both short- and long-form charts that are uniform and can be easily compared. We generally support the design of both forms and believe that they will improve competition and help consumers to understand the terms of their accounts. We have several suggestions below to improve the disclosures.

### A. Short form

#### 1. Overall

We support a required short form for all cards, on the outside of packages sold at retail and provided in a conspicuous manner in other settings. While consumers need access to complete information, prepaid cards can be deceptively complex products. Highlighting the most salient information in a usable form will be very helpful to consumers.

In general, the overall proposed design strikes a good balance. It provides as much information as possible without overwhelming consumers, enabling them to find the most critical information quickly and minimizing the potential for evasions.

We agree that only the highest fee that can be charged should be displayed on the short form. Adding too much information to the short form will make it less likely that any of the information will be understood. The rules need to ensure that consumers know about the top fee they could pay. Issuers will have plenty of incentives to find ways to highlight ways to avoid or pay lower fees. That will also encourage consumers to look at the long form.

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<https://www.netspend.com/account/terms/HEB%20Premier%20GPR%20Visa%20Bofi-ODP-Eng-11AUG14 HTG.pdf>.

<sup>295</sup> See NCLC, "COMMENTS to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations," Docket No. CFPB -2011-0039 at 17-23 (June 4, 2012), [http://www.nclc.org/images/pdf/rulemaking/cm\\_cfpb\\_reply\\_comments\\_4\\_june\\_2012.pdf](http://www.nclc.org/images/pdf/rulemaking/cm_cfpb_reply_comments_4_june_2012.pdf).

Our specific comments and suggested improvements are below.

## **2. Single APR-like number reflecting average cost**

We continue to urge the CFPB to develop a single number, like the APR, that can be used to compare cards based on actual usage. Two cards could have identical fees shown on the short form but result in wildly different costs. One card might have a small ATM network and charge declined transaction fees on every declined transaction. The other card one might have a large ATM network, multiple methods of communicating with consumers to encourage them to use surcharge-free ATMs, a bill payment feature that avoids the need to withdraw cash to pay a landlord, and waivers for four declined transaction fees each month.

While consumers use cards differently and a single number cannot convey those nuances, neither does the APR. But consumers who do not pay interest and care more about annual fees or rewards know to look for those items when shopping for a credit card. Similarly, a consumer who is looking for a card for purposes of online purchases can focus on ones with low or no POS fees and can disregard ATM fees that may increase a monthly average. Moreover, a consumer's mental calculations about cost based on a complicated fee disclosure are not likely to be accurate and cannot take into account subtle differences not displayed on the short form. A single number is a rough rule of thumb, but the full short form – and full long form – make clear that the consumer needs to go beyond that number.

A single number based on actual average costs also will have a powerful effect on competition. Issuers will compete to bring that number down, rather than to maximize revenues within the constraints of the short form. Lower average costs will benefit consumers overall.

Alternatively, the CFPB could develop an H/M/L (high/medium/low) disclosure ranking based on actual cost. That would avoid a specific number that might not be accurate for all consumers.

## **3. Cards with multiple service plans**

Model Form A-10(f), the short form disclosures for prepaid accounts with multiple service plans, is difficult to compare to the other short forms and should be rejected. It lacks the large fees at the top to draw consumer's attention and is overall less appealing. Consumers will be confused when trying to compare it to other short forms. Prepaid card issuers who wish to minimize their fees may add multiple plans just so that they can take advantage of this form and start with a \$0 for the monthly pay-as-you-go charge.

Instead, the CFPB should consider a way for a card to have two short forms, perhaps one on an outside flap and another one on an inside flap. That way, an issuer could display the fees for a consumer who sets up direct deposit or otherwise is a more regular user. Separate short forms could also be used on websites, where there is more flexibility.

## **4. Top line fees**

We support the basic design of the short form, with the fees that consumers are most likely to care about in larger font on top. Drawing attention to those fees increases the likelihood that consumers will actually look at them. We agree that monthly, per purchase, and ATM withdrawal fees should be on the top line.

However, we disagree about listing cash reload fees in the top line. Consumers who load cash onto their cards mostly do so by purchasing packs sold by third parties, not the card issuer. Thus, many cards would list a \$0 fee even though consumers would pay to load cash. On the other hand, a company that has a proprietary reload mechanism would need to list that fee, making the card appear more expensive when it might not be.

In addition, as more and more retailers are beginning to offer free cash loads, it is not clear that cash reload fees are even one of the more important fees. The CFPB needs to come up with a mechanism to compare the total cost of loading cash – including both card fees and third party fees – and then list the total. It probably makes sense to list it in the second category of fees, where there is more space to explain how the fees are incurred.

If the CFPB eliminates the cash reload fee from the top, perhaps it should consider making the fourth fee an incidence based fee. For many cards, it would be the same type of fee. But if another fee was more important for a given card, it would draw more notice.

We agree with the proposal that the purchase price of a card sold at retail does not need to be one of the top line or required fees. However, it should be a potential incidence-based fee, as noted in proposed Comment 18(b)(2)(i)(B)(8)(I)-2. Requiring the fee to be listed could take up scarce space on a card – such as online cards – that do not have such fee. For cards sold at retail, the purchase price can be made obvious on another part of the package, as is common today. Consumers will certainly notice the price they pay to acquire the card. Highlighting a one-time fee in the short form could overemphasize it and mislead consumers into comparing it with recurring fees. Some consumers could choose a card that has a lower purchase price even though, overall, a card with a higher price but lower recurring fees is less expensive.

On the other hand, we understand that some consumers buy a new card every month rather than pay monthly or reload fees. If a substantial number of consumers incur purchase or activation fees, then those fees will show up as incidence-based fees and consumers can see them on the short form.

## 5. Other required fees

### **Overall**

We agree that balance inquiry, customer service and inactivity fees should be required to be listed on the short form, and that they should be in smaller font below the top line fees. Those fees are important fees that consumers should see before they buy a card. We agree that the highest fee possible should be disclosed if there is a range of fees, to warn consumers and prevent evasions and deception.

However, it would simplify the short form and free up space for other important information if the CFPB were to follow our suggestion, discussed above, to prohibit balance inquiry and customer service fees. For example, eliminating those fees from prepaid cards and from the short form would permit space for additional fees, or for a quick response (“QR”) code or symbol to indicate bill pay.

### **Customer Service**

Making clear that automated customer service calls are completely free is especially important to avoid making the short form misleading or bumping additional fees to the long form only. If only one line for “customer service” is disclosed, consumers will not know whether that fee is imposed for automated

calls, live calls, or both. If they understand it to include IVR calls, they may not realize that calls to access balance information must be free.

The interaction between IVR and live customer service calls is also very confusing. Some states provided different number of free transactions for IVR and live calls. But it is necessary to go through the IVR menu to get to a live agent. Thus, a consumer will use us a free IVR call even if she ends up paying for a live call.

This type of detailed information will be provided in the long form. But many consumers will not look at that long form. They will rely on the short form for a summary of the basic information about how to use their cards.

Listing IVR and live calls as separate items on the short form would also use up one of the lines for fees. Consumers would then have less information about other fees readily accessible on the short form.

While we believe that all customer service calls should be free, at a minimum IVR calls should be. In that case, a much more clear disclosure on the short form could read:

Live customer service	\$1.50 per call
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Such a disclosure will highlight for consumers the fact that they will be charged for live calls but can avoid them if they use the automated menu.

### ***Inactivity fees***

We agree that inactivity fees, if charged, should be listed on the short form. The fees can also be known as “dormancy” or “maintenance” fees. The CFPB should require the term “inactivity” to be used to avoid confusion.

But we also urge the CFPB to ban inactivity fees. The Bureau itself appears to have concerns about inactivity fees, noting that the requirement to list the fee “is not an endorsement of the practice of imposing such a fee.”<sup>296</sup> If a card has been inactive for a period of time, the issuer should make an attempt to contact the consumer and inquire whether the consumer wishes to continue using the card or if the funds should be returned and the account closed. If the consumer cannot be reached, a check should be mailed. At best, inactivity fees should be limited to accounts with only tiny amounts of remaining funds such as under \$5.

Proposed Regulation E Comment 18(b)(2)(i)(B)7)-1 states that issuers should specify whether an inactivity is imposed in lieu of or in addition to the periodic fee. We oppose this comment, which seems to permit a practice that should be prohibited. To the extent that a financial institution is using inactivity fees as a way of closing out inactive accounts with only a couple of dollars left, a monthly fee will serve that purpose. If an account has more substantial funds, it is all the more important to return the funds. Piling on both monthly and inactivity fees in order to take the consumers’ funds is inappropriate.

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<sup>296</sup> 79 Fed. Reg. at 77160.

## 6. Incidence-based fees and other fees

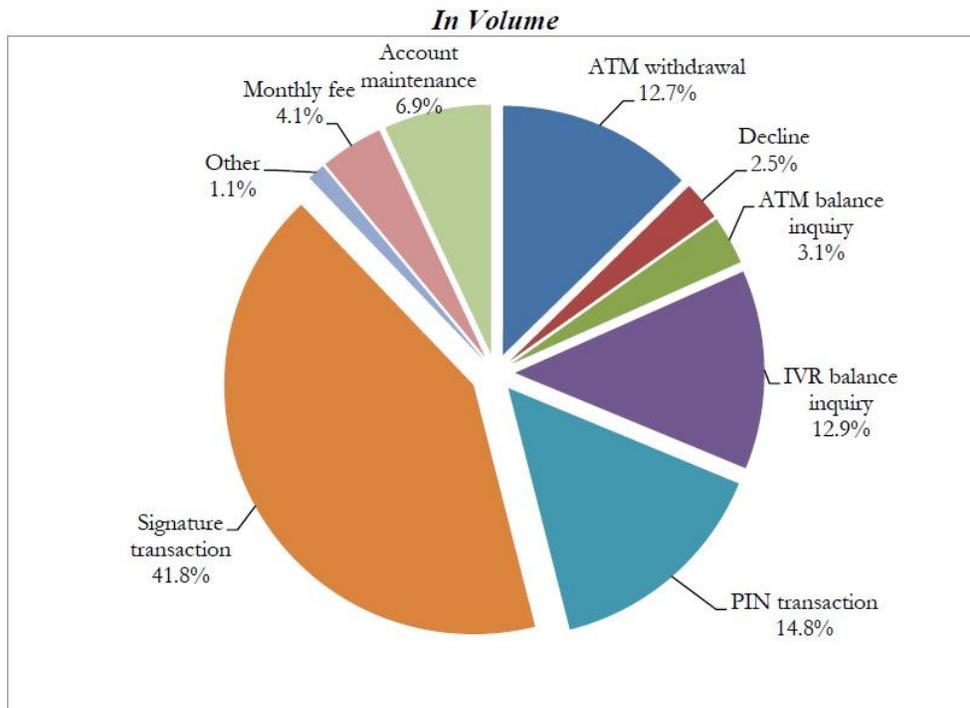
***Incidence-based fees are important.*** We support the requirement to include up to three incidence-based fees on the short form. This rule is especially important because it prevents prepaid cards from designing their fee schedules to minimize the fees that are on the short form and to maximize those that are only listed on the long form. Similarly, we believe that it is very important to include the statement: “We charge X more fees not listed here” if not all fees are listed on the short form. That disclosure will encourage issuers to simplify their fee schedules so that all fees are disclosed on the short form. The short form already provides space for nine fees, more than enough for most cards. If a card charges additional fees, consumers should not be misled into thinking that the short form is comprehensive, and should be encouraged to review the long form.

***Incidence based on revenue, not occurrences.*** Incidence should be determined based on revenue, not number of occurrences. That way, the most costly fees, rather than simply the most numerous fees, would be included on the short form. It is more important that the form warn consumers about a large fee that impacts a smaller number of consumers (but enough to generate significant revenue) than a very small one that is charged more often. In many cases, selection based on revenue or occurrences will not change the fees that are disclosed on the short form, especially in light of the fees that are required to be disclosed.

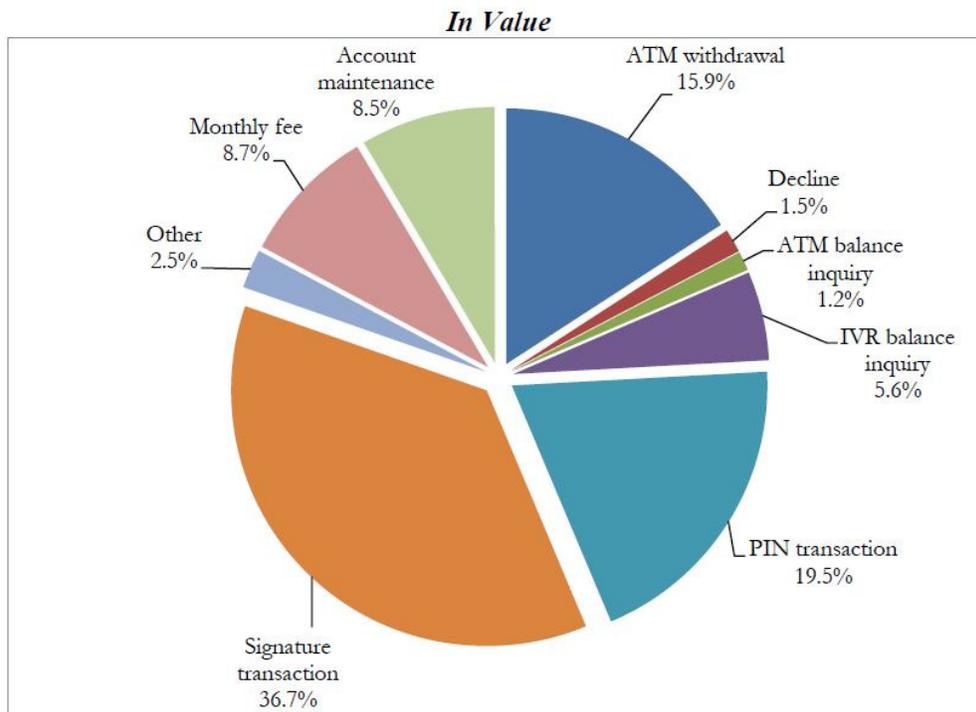
But it can make an important difference for some of the larger fees, especially overdraft fees. For example, the Federal Reserve Bank of Kansas City did a study based on data provided by NetSpend. The “other” category – which includes overdraft fees – was dead last out of nine categories in volume at 1.1%. But it came in seventh at 2.5% in terms of revenue. (As discussed above, however, we believe that overdraft fees should be banned, and if not banned, then one of the fees required on the short form.)

The converse was true for a small fee, IVR (automated telephone call) balance inquiries. IVR fees were third in volume at 12.9%, but only sixth in value at 5.6%.

**Chart 4: Average Fee Composition, NetSpend Cards (In Volume)<sup>297</sup>**



**Chart 5: Average Fee Composition, NetSpend Cards (In Value)<sup>298</sup>**



<sup>297</sup> Source: Kansas Fed, GPR Report, *supra*, at 67.

<sup>298</sup> *Id.*

If purchase price is potentially an incidence-based fee, it could also be one of the higher incidence fees even if it is not one of the costliest. Every consumer who purchases a card at retail will pay the fee (though only once), but an overdraft fee could be higher and cost consumers more, even if fewer consumers pay it. We believe it is more important to highlight the fees that cost consumers the most. Otherwise, prepaid cards could take advantage of and impose significant costs on a smaller number of consumers in order to subsidize others.

**Fees not incurred in previous 12 months.** Proposed § 1005.18(b)(2)(i)(B)(8)(I) and proposed Comment 1 require incidence-based fees to be disclosed only if they were incurred in the previous 12 months. We believe that there should be no 12-month limitation. A fee like a \$100 legal process fee may be charged sporadically but could be devastating to a consumer who incurs it. Consumers who use prepaid cards may have unpaid debts and may wish to avoid cards that can compound the harm from a garnishment order from a debt collector. If a fee is small and rarely charged, then the issuer should be encouraged to eliminate it.

**No de minimis exception.** There should not be any “de minimis” exception for fees on the short form. If a fee is so tiny or imposed on so few people that it is nearly immaterial, then providers should be encouraged to eliminate it. If not, it will fall on someone and could significantly harm that person. That consumer should know.

For example, in our review of state payroll cards, we found that many of them charge \$100 “legal process” fees.<sup>299</sup> The Chase Liquid card, which is generally a low fee card, also charges an \$80 legal process fee, which is buried in the fine print on its website. Prepaid cards are marketed to consumers who are eager to avoid a credit check, and many of those consumers may have debts that are being collected against them. In fact, some consumers turn to prepaid cards in order to protect their funds from garnishment.<sup>300</sup> A \$100 fee could be devastating to those consumers, and they should not have to dig through the details of the long form to see it. If the fee is almost never imposed, then it will not make it onto the short form based on volume or revenue. But if the revenue is significant, the fee should be listed on the short form. That fee is more important to warn a consumer about than a \$0.10 fee that is imposed on more consumers.

**Inapplicable fees.** We support listing a fee as “\$0” if there is no fee for a service and do not believe that designation will be confusing. If, however, a service is not available, it should say “not offered.”

## 7. Other fees

**“Research” fees.** As discussed in Section IX.E below concerning dispute resolution, the CFPB should prohibit “research” fees.

**“Legal process” fees.** As discussed in Section VI.I above under unsolicited issuance, the CFPB should prohibit fees for “legal process.”

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<sup>299</sup> For example, Arizona, New Jersey, New Hampshire, Texas, and Washington all charge \$100 “legal process” fees. See Exhibit 19, 25, 26, 31, 34. The fee is \$40 in Ohio. See Exhibit 27.

<sup>300</sup> Unless they contain exempt funds, prepaid cards could be subject to garnishment. However, garnishment of prepaid cards appears to be quite rare to date.

**“Stop payment fees.”** As discussed in Section IV.K above under credit card penalty fees, the CFPB should prohibit stop payment fees on cards that can have negative balances or other credit features.

**Fees for account closing/return funds by check.** Some cards also charge a fee to close the account and/or to return the balance by check. For example, the South Dakota state payroll card has a \$15 fee to return funds by check and the Kansas state payroll card charges \$10.<sup>301</sup> On some fee schedules, it was difficult to tell whether the fee was only for requesting a paper check or also simply to request that the account be closed.

The CFPB should ban these fees. Consumer should not be charged if they wish to close an account, and receiving the balance by check is often the only convenient or manner to withdraw the full amount of the remaining. As noted above, bank tellers are often unfamiliar with rules for withdrawals from prepaid cards.

**PIN changes.** When we began our research into state payroll cards, we observed a small number of cards that charged consumers who changed their PINs more than a certain number of times per year. Those fees now seem to have been eliminated on state payroll cards. We do not know if other cards charge such fees.

Certainly, consumers who have concerns about the security of their cards should not be charged for changing the PIN. The regular news about data breaches is reason for endorsing this practice, not penalizing it, whether the consumer is changing the PIN in response to a particular report or merely as a proactive measure.

**Standardized term for bill payment.** One of the incidence-based fees could be a fee for using a bill payment feature on the prepaid card issuer’s website to make electronic and check payments. The CFPB should require a standard term (i.e., “bill payment”) to describe bill payment features. The rule should also prohibit use of that term in solicitations and advertisements when only describing the ability to use a card to pay bills on a merchant’s website.

## 8. Disclosure of overdraft and other credit features

As discussed above, overdraft features should be eliminated from prepaid cards. Doing so will also simplify the short form, limit the amount of information the consumer is expected to process, and increase the likelihood that the information provided will be meaningful to and understood by consumers.

We also believe that it is unnecessary to disclose the *lack* of an overdraft or other credit feature. Most cards do not have such features, which consumers do not expect on prepaid cards. Raising this issue could be confusing. The disclosure on cards that *do* have such features will also stand out more starkly when compared to one that does not. But the warning should include the word “overdraft.”

We support a warning for consumers to the extent that a prepaid card does have an overdraft or other credit feature. This is very important information for consumers. Difficulty with credit, the desire for controls to limit spending, or the search for a safe payment mechanism are key reasons why nearly

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<sup>301</sup> See Exhibits 22, 30.

every consumer turns to prepaid cards. A card that will offer credit is significantly different from one that will not, and that key difference should be conveyed through the short form.

However, more prominent and complete information is needed about overdraft charges, if permitted. The consequences of overdrafts that can be triggered inadvertently are especially critical for consumers.

Overdraft fees, if allowed, should be listed on the short form, even if it is not one of the highest incidence fees. Overdraft fees tend to be quite high relative to other fees.<sup>302</sup> They can have a big impact on the consumers who incur them, even if those consumers are in the minority.

If overdraft fees can increase after the first year, the higher, second-year fee should be listed, not the first year fee, which is essentially a promotional rate. This is consistent with the rule for credit cards, which requires disclosure of the second year APR in the disclosure box for a card that has a lower first year promotional rate. As with other fees that can vary, an asterisk can indicate that the fee could be lower, and the details can be provided on the long form. The issuer could also use any other part of the packaging to display any waivers or discount the first year. However, as discussed above, we urge the CFPB to extend the fee harvester limits beyond the first year to avoid bait-and-switch tactics.

Any fee triggered by an overdraft or negative balance should be **labeled as an “overdraft fee,”** whether it purports to be a transfer fee, load fee, negative balance fee, nonsufficient funds fee or any other fee triggered by an overdraft or negative balance. That term is understood by consumers, and avoiding fees in the event of an overdraft is important to many consumers. Issuers should not be allowed to hide the ball by giving the fee another name.

In addition to listing the fee, we support a separate disclosure about the potential for overdraft or other credit features. However, it is important that the warning **include the word “overdraft”** if the feature is one that can be triggered by overdrafts. Merely mentioning “credit-related fees” is opaque and will not be understood by consumers nearly as well as using the word “overdraft.” As the CFPB observed, the word “overdraft” is clearly understood by and is important to consumers.<sup>303</sup> It would be strange to use the word “overdraft” on the disclosure for cards that do not have overdrafts but to omit it from card that do.

The disclosure should be **different if the credit feature can be triggered by overdrafts or if it cannot be.** A card that can be triggered by overdrafts enables credit to be used unthinkingly and potentially in situations when the consumer would prefer to avoid credit or should think twice. Thus, use of the word “overdraft” is important. But an institution that offers a low cost line of credit that can only be used if the consumer affirmatively chooses to should not have to disclose “overdrafts” that cannot happen.

The warning about “overdraft” and “credit” should be more prominent, in larger, bold font. The current disclosure is in only 8-point font and may be overlooked. We suggest 10-point font for the words “overdraft” and “credit.”

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<sup>302</sup> While the fee harvester rule will limit fees in the first year, high overdraft fees could still be charged. An issuer could charge one or two fees and then waive the remainder until the first year is up. Or, the issuer could charge lower fees in the first year and then increase them in the second.

<sup>303</sup> 79 Fed. Reg. at 77164.

Thus, the two possible disclosures would be:

This card may charge **credit**-related fees.

This card may charge **overdraft/credit**-related fees.

It is hard to overemphasize the importance of warning consumers about overdraft potential. As studies, the CFPB's focus groups, and comments by other organizations have shown, most consumers who turn to prepaid cards want to avoid overdraft fees.

Some cards that provide overdraft services appear to go out of their way to hide the potential for overdraft fees when marketing their cards. ACE Cash Express, for example, emphasizes "control" and the "No-fee \$10 purchase cushion" on its website, with no mention of the potential to opt in to overdraft fees.<sup>304</sup> NetSpend's home page emphasizes "no credit check" and how consumers can avoid "excessive fees" from banks, with no mention of the overdraft fees it charges.<sup>305</sup> Additional marketing messages are discussed in Section II.D above. If the CFPB is going to permit overdraft charges on prepaid cards, it must make sure that consumers who are looking to control spending and avoid overdraft fees can do so.

## 9. Lack of deposit insurance

As discussed above, deposit insurance should be required on prepaid cards that are reloadable and hold more than \$500. Disclosure is not an adequate substitute for safety.

But if the CFPB is going to permit uninsured cards, a stronger and more visual warning should be required. The current disclosure is in only 7-point font and is listed at the bottom along with a lot of other verbiage that will be ignored. Instead, the CFPB should require use of the FDIC symbol with a slash on it:



Other institutions have used such warnings,<sup>306</sup> which will be clearly understood by consumers and will be more likely to be noticed.

If the CFPB retains the current short form disclosure – "This card does not provide [FDIC][NCUSIF] insurance." – only the term "FDIC" should be used, unless the card is issued by credit union. The same language should be used whether the card is issued by a bank or a nonbank.

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<sup>304</sup> See <https://aceelite.acecashexpress.com/prepaid-debit-card/applyNow.m>.

<sup>305</sup> See <https://www.netspend.com/>.

<sup>306</sup> See, e.g., <https://www.central-bank.net/business-insurance.htm>.

## 10. Methods to access information about other fees and the long form

While many consumers will shop on the short form alone, access to complete information in the long form is important. The short form has its limitations. It cannot provide all the details and conditions on the fees listed. It will not describe ways that consumers can avoid fees. And the short form may not include all of the fees.

We support the disclosure on the short form that “We charge 6 other fees not listed here” if that is the case and to put that warning in bold font. The warning might be more easily read if the bold font were limited to “6 other fees.”

In addition to providing access to the long form, cards that charge fees that are not listed on the short form should be required to have physical way to see those fees at retail. As discussed below, none of the methods of accessing the long form is fully satisfactory, and the long form itself is complicated and consumers may ignore it. Cards with numerous fees should have a flap that is not secured that continues the short form chart with any additional fees. The disclosure could say: “We charge **7 other fees**. Open here to see them. =>”

Similarly, in order to provide access to the long form, enabling consumers to see a physical form at retail is the best option. Consumers should not have to have a smartphone to see all the fees. Even for those who do, consumers are more likely to look at a physical form than to call in and listen to a long message or type in a URL. The CFPB’s own testing showed that some consumers did not notice or understand the methods to access the long form.<sup>307</sup> The package can be designed so that it has a flap that is either unsecured or secured only with Velcro and can be opened before purchase without breaking the packaging. The model package that the Pew Charitable Trusts developed includes a folded long form that can be seen at retail. Consumers could be encouraged to open the flap by a statement such as: “For details on all fees and services, open the flap below or call 800-234-5678 or visit [bit.ly/XYZprepaid](http://bit.ly/XYZprepaid).”

Non-English-speaking consumers will also benefit from direct, physical access to the long form at retail. A telephone message in English – or even in Spanish – may not work for many consumers.

We support listing both a telephone number and a URL. A telephone number is important for consumers who do not have smartphones or internet access.

For consumers who call for fee information, the CFPB should provide more explanation on how to disclose the long form. In fact, a different “form” is necessary, as the long form itself will be unintelligible or tedious by telephone. The explanation should begin with the fees in the short form, and then list any additional fees. The consumer can then be told additional information, such as the further conditions or details that are in the long form. The telephone disclosure should also offer to text or email the consumer a link to the full form.

The URL on the short form should be a short one that consumers can more easily type in. The rule should limit the number of characters that the URL can contain.

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<sup>307</sup> 79 Fed. Reg. at 77154.

We also urge the CFPB to add at least one more method of accessing the long form. We doubt that many consumers will either listen to a long telephone message or type in a URL. They are more likely to scan a QR or bar code or send a short text that solicits a reply with a link to the long form.

A short SMS code takes up little space and could probably fit at the end of the existing disclosure sentence (which might be shortened a bit by omitting “and conditions”). A text has the advantage of working for people with either smart or basic phones. Even if a basic phone cannot click on the link in the text, a text can be forwarded to an email that can be viewed on a home computer. In addition, a text can be retained for viewing at a later time. Thus, a consumer who is shopping but is not ready to buy could send the text, get the response, and then look over the long form later at home, when the consumer has more time – and even has the capacity to compare the card to options on the internet.

QR or bar codes are even easier to use. The CFPB expresses concern that QR adoption is low. We are not sure if that is the case, and at any rate expect usage to grow as both smartphones and understanding of QR codes rises. One survey, for example, found that 19% of adults had used a QR code in 2013 and momentum was growing.<sup>308</sup> We encourage the CFPB to refine the short form so that it has space for a QR Code.

#### **11. Identical, not substantially similar, terms**

One of the important benefits of the CFPB’s proposed short and long forms is the use of the same terms across different cards. When conducting our reports on unemployment prepaid cards and our investigation of payroll cards, we found it sometimes quite difficult to understand what a particularly fee was. For example, some cards had a fee for “cash advance.” It was not clear if that was a credit feature or, more likely, a teller withdrawal. Consumers who are not used to withdrawing money from prepaid cards at bank tellers would unlikely have no idea what that meant.

Proposed rule 1005.18(b)(2) requires fees to be labeled with the terms identified in the rule or “substantially similar terms.” We urge the CFPB to require the terminology to be identical, not similar, in order to avoid confusion. Issuers should not be allowed to use different terms for the items listed in the proposal.

#### **12. Font size**

One overall concern about the short form is that the font size is quite small for much of the information: 7 or 8 point for all but the top line fees. This problem can be seen in the model disclosures the CFPB provided on its website.<sup>309</sup>

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<sup>308</sup> See, e.g., “QR Code Adoption: 2013 Trends & Statistics,” <http://www.scanlife.com/blog/2013/02/qr-code-adoption-2013-trends-and-statistics/>.

<sup>309</sup> See [http://files.consumerfinance.gov/f/201411\\_cfpb\\_prepaid-model-sample-disclosure-forms.pdf](http://files.consumerfinance.gov/f/201411_cfpb_prepaid-model-sample-disclosure-forms.pdf).

Monthly fee	Per purchase	ATM withdrawal	Cash reload
<b>\$4.95*</b>	<b>\$0</b> with sig. <b>\$0</b> with PIN	<b>\$0</b> in-network <b>\$2.00</b> out-of-network	<b>\$2.00*</b>
This card may charge credit-related fees.			
ATM balance inquiry (in-network or out-of-network)			\$0 or \$1.00
Customer service			\$1.50 per call
Inactivity (no transactions for 3 months)			\$4.50 per month
[Incidence-based fee]			\$2.95
[Incidence-based fee]			\$3.95
[Incidence-based fee]			\$1.00
*Fees can be lower depending on how and where this card is used.			
<b>We charge 6 other fees not listed here.</b>			
Find details and conditions for all fees and services inside the package or call <b>800-234-5678</b> or visit <b><a href="http://bit.ly/XYZprepaids">bit.ly/XYZprepaids</a></b> .			
Register your card with XYZ Prepaid Company to protect your money.			
This card does not provide [FDIC][NCUSIF] insurance.			
For more information about prepaid cards, visit <b><a href="http://cfpb.gov/prepaids">cfpb.gov/prepaids</a></b> .			

The short form looks quite clear and appealing in the large version provided on the first two pages. But when shrunk to actual size on the next two pages, most of the information other than the top four fees looks like fine print that consumers will skip over.

The small print may be unavoidable for packages at retail. But size is not constrained in other settings and the CFPB should require more readable information. Larger information should be required on websites and in settings where the consumer will be handed written information – such as by depository institutions, employers and government benefit agencies.

For example, websites should be required to display the short form in the same size as the CFPB did on the first two pages. Short forms that are provided along with other written information should be an entire separate page so that the information will stand out and consumers will pay attention to it.

### 13. Other important information

While we appreciate the difficulty of squeezing a lot of information into the short form, we urge the CFPB to experiment with ways to convey the following information on the short form. We note that many of our suggestions in these comments eliminate the need for information on the short form, including a ban on fees for overdrafts, balance inquiries, or customer service, and mandatory deposit insurance. The CFPB could also offer optional information that could be displayed on the short form if a particular card has few fees and extra space.

The **number of surcharge-free ATMs** can differ significantly among cards and have a big impact on cost. A disclosure of the approximate size of the ATM network could fit in the place of the disclosure about

lack of FDIC insurance (which could be omitted if deposit insurance is required, or if a symbol is used instead). The disclosure could read:

35,000 surcharge-free ATMs

The rules could provide tolerances for the number and periodic adjustments in a similar way as for incidence-based fees.

The CFPB should develop standardized symbols to indicate cards that offer bill pay or remote deposit capture. Those are key services for unbanked consumers. They can help consumers avoid ATM fees (if a bill can be paid through bill pay) or cash load and check cashing fees. It would help consumers to shop for the right cards if they could identify cards with those services.

## B. Long Form

We support the proposal to require all cards to provide a long form fee disclosure in addition to the short form.<sup>310</sup> The conditions under which prepaid cards fees can be incurred can be quite complex, and the long form enables consumers to get complete information.

We agree that the full long form should always be provided by issuers on websites, by employers, by colleges, and in other non-retail settings. Consumers should always receive the full long form if at all possible. Any exceptions such as the one the CFPB proposes for retail settings should be minimized. As discussed above, we also believe that the long form should be accessible at retail through a flap that can be opened before purchase.

In addition, we have other suggestions for information that should be included in the long form.

**Presence or absence of overdraft fees or other credit features.** We support proposed § 1005.18(b)(2)(ii)(B) requiring disclosure of the possibility of overdraft (if not prohibited, as we urge) or other credit features. But the absence of such features should also be listed on the long form. The long form should be a comprehensive place to get complete information about the card. Specifying that overdraft or other credit features are not available on a card could be important to clarify and give consumers comfort.

**Lack of deposit insurance.** The warning about lack of deposit insurance should include more description. Unless the card is used by a credit union, it should use the term “FDIC” alone, not “NCUSIF,” which no one understands. The warning should also be part of the chart, in an “Important Notices” section at the end as follows:

Important Notices	
FDIC insurance	This card does not provide FDIC insurance. If the institution that holds or manages your funds becomes insolvent, you are not protected by deposit insurance and could lose some or all of your money.

**Number of surcharge-free ATMs and ATM locator.** The long form should disclose the approximate number of surcharge-free ATMs in the card network and how to locate them, including methods by

<sup>310</sup> Proposed Reg. E § 1005.18(b)(2)(ii).

mobile app, by calling customer service, and on the issuer’s website. That information should be called out on a separate line in the “Get cash” section, not buried in fine print on the line describing ATM fees. Phone access is important in addition to online access, as not all consumers have internet access.

In addition, the issuer’s website should be required to have a prominent link taking the consumer to a page where number and location of network ATMs can be determined. Knowing whether a card has convenient surcharge-free ATMs can be an important piece of information when shopping for a card. If network ATMs can only be found by contacting one or more third parties, such as the MoneyPass website or the websites of other ATM networks, a link to each of those websites should be provided on the issuer’s website.

**Free transactions.** The sample long form does not provide any examples of how an issuer would describe free transactions that are provided before a fee is charged. Yet it is common for cards to provide such free transactions and it is important for consumers to know about them and their limits. All cards issued by institutions with more than \$10 billion in assets must provide one free ATM withdrawal per month. Payroll and governments benefits cards also typically provide free ATM withdrawals, but the number can vary card to card. The same is true for the number of free live or IVR customer service calls.

We suggest that free transactions be described in a uniform manner through abbreviations as well as description, such as:

ATM withdrawal, in-network	\$1.00/1 F per W	The first withdrawal each week is free.
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The CFPB could adopt standard abbreviations such as “W” for week, “M” for month, “D” for deposit, and “Y” for year.

**Bill payment features.** The long form should also disclose whether bill payment features are available, using a standard term, and should list the cost of using such features to pay a bill electronically or through a mailed check. Some cards charge different fees for those two types of bill payments, and the long form should clarify whether the same fee applies even if the issuer mails a check. For example:

Bill payment by electronic payment: \$0  
 Bill payments by check: \$1.00

**Remote deposit capture.** The availability of remote deposit capture should also be listed on the long form (using the more understandable term, “mobile check deposit”). Like bill pay, RDC is an important feature that can reduce costs. Consumers should be able to identify whether a card does or does not offer that service.

**Funds availability.** The long form should also disclose the issuer’s funds availability policy for cash or checks deposited by ATM, by teller or by remote deposit capture. Having access to their funds as quickly as possible is important to consumers and policies can vary considerably among prepaid cards. For example, Chase’s Liquid card typically gives consumers access to the full check the next business day

and, at a minimum, the \$200 required under Regulation CC for bank accounts.<sup>311</sup> But the American Express Bluebird Card puts a 10-day hold on checks.<sup>312</sup>

We hope that the CFPB and the Federal Reserve will soon amend Regulation CC to make clear that the Expedited Funds Availability Act applies to prepaid cards in the same manner that it applies to bank accounts, and that the timeframes also apply to mobile check deposits through remote deposit capture. Once deposit hold times are standardized, additional disclosures would be less critical, but they would still be helpful in order to help consumers compare cards that might have more favorable policies.

**Cash back at point-of-sale.** One of the easiest and often free ways to withdraw cash from a prepaid card is to ask for cash back from a purchase. A growing number of retailers provide this service. A PIN debit transaction is typically required in order to withdraw cash. Therefore, if the prepaid card charges a PIN debit fee, that fee will be incurred if the consumer wishes to ask for cash back. While the PIN debit fee will be described, both on the short and long forms, consumers may not understand that it will be incurred when asking for cash back. It would be helpful for the CFPB to add a line under the “Get Cash” section of the long form about cash back at retail. In addition to alerting the consumer to the fee, specifying cash back capacity will inform consumers about this convenient option to withdraw cash, which may be cheaper than incurring an ATM fee.

**Third-party fees.** We support proposed § 1005.18(b)(2)(ii)(A) requiring disclosure of specific third party-fees if the amount is known or the third-party is an agent. But even if the amount is not known, the CFPB should find a method to ensure a fair comparison between cards that use third parties to load funds or perform other functions and those that have proprietary capacity, as discussed in Section VIII.A.4. For common fees like load fees using a MoneyPak or similar device, perhaps the CFPB should require disclosure of an approximate amount, as some cards do today.

**Introductory periods.** We support proposed Comment 18(b)(2)(ii)(A)-2 permitting disclosure of “\$0” or “free” only if the fee does not increase after an introductory period or if the free service requires enrollment in an additional service. This rule should also apply if an issuer has a practice of increasing overdraft, load or other fees after the fee harvester limits expire.

**Electronic disclosures.** We support proposed § 1005.18(b)(3)(i)(B), which requires disclosures to be provided electronically if the consumer acquires the account electronically. However, if the issuer issues a physical card, the short and long form should be including in writing along with the card.

**Retainable form.** We support proposed § 1005.18(b)(3)(ii), which requires disclosures to be provided in retainable form. For disclosures that are provided electronically, the CFPB should add a comment explaining that the disclosures may not be provided through a window that pops up in a form that cannot be easily printed.

**Oral disclosures.** A consumer who is provided the disclosures orally should be offered the option of having the disclosures emailed. As discussed above, the disclosures should also be provided in written form along with any physical access device.

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<sup>311</sup> [https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase\\_liquid\\_v6.pdf](https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase_liquid_v6.pdf).

<sup>312</sup> “Bluebird has funding/spending limits and funds availability timeframes that are different than those of bank accounts.” <https://www.bluebird.com/>.

**Other aspects of the long form.** We generally support the other requirements for the long form, including a ban on use of asterisks or symbols; disclosure of cash load limits; disclosure of the Regulation E and Z information on the same page if possible; a telephone number, website and mailing address; the CFPB’s website and telephone number; and machine-readable text.

### C. Foreign language disclosures

We support proposed § 1005.18(b)(6), which requires both the short and long form disclosures (whether provided on a package, on a website or by telephone) to be provided in any foreign languages that the card issuer principally uses in connection with the acquisition of a card. The same is true if a card is marketed in another language. If an issuer markets in a foreign language or otherwise specifically reaches out to non-English speakers, it must ensure that it conveys full fee information in that language.

We note that the requirement to provide the long form disclosure in foreign languages would also apply if the long form is provided by telephone in a retail setting. For that purpose, in particular, it is essential that the customer service representative not only be fluent but also have fluency and expertise in the field of prepaid products and features, as discussed in Section VIII.C above.

### D. Fee information online; incomplete or misleading fee information on websites and promotional materials

We support the rule that the short and long form must be provided *before* a consumer acquires an account electronically. Proposed Regulation E Comment 18(b)(1)(i)-2 appropriately warns institutions that the forms must be provided before the consumer provides any personal information and before she agrees to accept the account. Requiring the disclosures before personal information is provided is important because consumers otherwise would be inhibited from doing comparison shopping. Consumers also should not be required to provide personal information online if they are shopping for a card they intend to purchase at retail.

A few points, however, could be made more clear or benefit from an additional comment.

The comment implies but does not directly state that the consumer must actually be shown both the short and long forms and not merely a link to get to them.<sup>313</sup> The requirement to actually display the forms before the consumer begins filling in personal information should be explicit. In addition, the consumer should be required to scroll to the bottom of the forms in order to click an “apply” button in order to increase the likelihood that the consumer actually saw the form. Otherwise, the forms would be easily bypassable, especially the long form, which may not fully appear on the consumer’s screen.

The CFPB should add a second comment illustrating this principle for a mobile device. Scrolling or clicking through the entire short and long form should be required. Otherwise, the consumer will never see the information and it will be easily bypassable.

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<sup>313</sup> Proposed Comment 18(b)(1)(i)-2 states that a consumer should not be able to “easily bypass” the disclosures and includes a compliant example of both forms being provided on the same Web page. But the comment also indicates that an institution could “include a hyperlink to the longer form disclosure on that same Web page” if “the consumer must not have to review any unrelated links before viewing the long form disclosure.” It is unclear whether this means that the consumer must have to proceed directly to the long form or instead that the link must take the consumer directly to the long form but the link is not one that the consumer is required to click through.

Apart from the direct disclosure of the short and long forms, the CFPB should issue rules prohibiting issuers from providing only subsets of fee information online and in brochures. We found this to be quite a problem when reviewing websites, FAQs, and brochures to obtain fee information for unemployment prepaid cards and state government payroll cards. Websites frequently highlighted free information or provided only a partial listing of fees in a way that implied that the information was complete. Some even provided a fee disclosure box that appeared to be complete but was not.

For example, when researching our 2013 survey of unemployment compensation prepaid cards, we found that both Alaska and Arizona had incomplete fee schedules posted on the state website.<sup>314</sup> Alaska's website had this Q&A:

Are there fees associated with my debit card? You can make up to two free cash withdrawals per month from any JPMorgan Chase or Allpoint ATM's. There will be a surcharge fee on other ATM's. The amount will depend on the bank that owns the ATM. The ATM will notify you of the surcharge fee and allow you to cancel the transaction prior to being charged the fee.

This answer misleads workers into thinking that the only fee is the surcharge at out-of-network ATMs, a fee that will be displayed on the screen. In fact, workers will incur a \$1.50 fee even if they use a network ATM after making more than two withdrawals per month, and the ATM will not notify the worker about that fee. The Alaska card also charges \$0.40 for all balance inquiries, \$5.00 for all teller withdrawals, \$0.50 for all declined transactions, and \$0.35 for live or IVR customer service calls after four calls each month. Yet the website says nothing about these fees and provides no link to a fee schedule.

Similarly, the Arizona website included a clear tab for "Fees," but the pop-up read: "There are no fees if you use your EPC at point-of-sale retailers, JPMorgan Chase or Allpoint ATMs." The website did not describe the fees that the card does charge or provide a link to a fee schedule, which included \$0.25 for calls after eight per month, \$0.75 to check the balance at an out-of network ATM, and \$1.50 for out-of-network ATM withdrawals after the fourth per month.

The problem was not limited to information supplied by states. Brochures provided by card issuers also emphasized free transactions and had incomplete fee schedules, directing consumers in fine print to refer to the "complete" fee schedules provided with their card.

Prepaid card providers should not be allowed to mislead consumers by over-emphasizing free transactions or providing only partial listing of fees. Online, any time a provider mentions the cost (or lack of cost) for a transaction, it should be required to provide a prominent link to the short and long forms. Written materials should not be permitted to provide partial fee schedules. They should list all fees or none unless the materials are clearly focused on a narrow issue, such as the ways in which a worker can withdraw cash for free.

## **E. New disclosures when a status change results in different fees**

Some payroll and campus cards are designed to be used after the consumer is no longer an employee or student. In particular, monthly fees that were previously waived may start applying. Other fees could

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<sup>314</sup> See NCLC 2013 UC Survey, *supra*, Appendix C at 39.

change as well. Issuers could even be tempted to add credit features that they refrained from offering while the consumer was an employee or student.

In addition to disclosing the dual fee structure before the card is acquired,<sup>315</sup> issuers should be required to send the new short and long forms to the consumer after a change in status if the account still contains funds or if new funds are added. For payroll cards, the account may well be empty and the employee will have no intention of using the account. But if new fees could be deducted from existing or new funds, the consumer should have fair warning. The consumer should be given information on how to close the account and withdraw any remaining money.

While issuers likely disclose these potential changes when consumers obtain the accounts originally, consumers should not be expected to understand or remember the new fee structure. Indeed, it is hard to imagine how the short form would even work to disclose both the original and subsequent fee structure. The short form generally requires disclosure of the highest fee that can apply if certain conditions are not met. But it would make no sense to disclose a monthly fee that does not apply to an employee getting wages on a payroll card or to a student getting financial aid on a college card. The consumer could be given two short forms before the card is issued, but that would be confusing and consumers would likely ignore the form that does not apply to them at the time and might never. For a student, it could be four, six or more years until the higher fee structure kicks in. The same is true for a payroll card.

The revised fee schedules should be sent in written form, even if the consumer opted in to electronic communications. Students often have campus-based email accounts that change after they are no longer a student. Even if the original email account is not closed – and emails sent there do not bounce – the student may stop using it. Consent to receiving communications electronically could have been made a condition of the account and the consumer had no real choice, even if she prefers written communications. Emails are more easily overlooked than a letter. A significant change in fees is important enough that a back-up mailed copy of the new disclosures should be provided. Mailing also has the benefit of informing the issuer if there is a problem with the address on file that needs to be updated.

## **IX. Dispute rights and error resolution**

The proposed rules, like the existing payroll card rules, modify the Regulation E dispute rights and error resolution requirements to account for the fact that not all consumers will receive a periodic statement. Thus, the proposal adjusts the deadlines for consumers to raise disputes or errors and for issuers to respond. The proposal also permits dispute rights only for registered cards. In general, we support the proposal with a few modifications.

First, the deadline to dispute charges or raise errors is confusing and, indeed, deceptive. Instead, the CFPB should give consumers a flat 120 days from the transaction, regardless whether or when the consumer accessed account information.

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<sup>315</sup> It probably makes most sense for the original short form disclosure to reflect only current status and for the long form to disclose both sets of fees.

Second, discussion in the proposal continues existing inconsistencies and ambiguities about the consumer's liability and the issuer's responsibility in the case of an untimely dispute. The rules should clarify that consumers may raise untimely disputes, up to one year from the transaction. However, the issuer would not be bound by the provisional rules for timely disputes and would not need to reimburse the consumer for unauthorized transactions that could have been prevented with timely notice.

Third, we support the proposal that cards purchased at retail be registered in order to exercise dispute rights and that registered, general-use gift cards be covered.

Finally, we urge the CFPB to retain the annual mailed error resolution notice for consumers who have not opted into electronic communications and have not accessed either a written or electronic history in the previous 12 months. The notice should also include information on how to access account information on either an ad hoc or periodic basis.

#### **A. Deadlines should be simplified: at least 120 days**

The proposed rule follows the current payroll card deadlines governing when a consumer must submit a dispute about a charge on the account. Those rules are extremely confusing. Consumers are told that, once an unauthorized charge or error appears in their account history, they have 60 days from the time that they either access their account electronically or are sent a written statement. But most consumers probably misunderstand this rule and think that they have 60 days from the date of the transaction.

Moreover, under the payroll card rule and the proposal, the deadline to dispute a charge can expire even if the consumer does not access an electronic or written history and *never* sees the error or unauthorized charge. The issuer can impose a 120 day deadline as long as the card issuer investigates all disputes made within 120 days.

But this 120 day policy is silent and deceptive. The issuer does not need to tell consumers about it. The model language for the account agreement terms can tell the consumer that they have 60 days from accessing a written or electronic history. The account agreement is thus misleading and deceptive on two counts. If the issuer follows the 120-day rule but the consumer sees the account history for the first time after 120 days, the deadline has run even though the account agreement says it has not. Consumers who have gotten a written statement or have logged onto the account (even if they never looked at the account history or saw the charge), are told that the time expired in 60 days even if the issuer has a silent policy of giving 120 days.

As discussed in Section VII.D above, the CFPB's own data show that prepaid cardholders rarely get written statements or access their account histories electronically. Consequently, the 60-day deadline disclosed to consumers – 60 days from accessing their account history – is rarely relevant. For issuers who choose to rely on the 120 day deadline, that is the deadline that controls. But consumers do not know about it and are misled. The current rule is also extremely difficult to explain and educate consumers about.

Instead, the CFPB should amend the rule to provide prepaid cardholders 120 days from the time the charge is credited or debited to the consumer's account. A simple 120 day rule would be easier to publicize, understand, and comply with.

At a bare minimum, account agreements should be clear and issuers should not be allowed to have it both ways. They should have to choose and clearly disclose their policy: either 60 days from accessing an account history – even if that is several months later – or 120 days from the transaction. In that case, the CFPB should add a comment explaining that a dispute raised 10 months after the transaction, for example, is still timely if the consumer only first saw the charge within the previous 60 days.

We do not object to an outer limit of one year to raise a dispute, even though there is no such limit in the EFTA. Indeed, putting a final one year deadline would both cut off late disputes and make clear that disputes up to that deadline may still be timely. Issuers would then have an incentive to take measures to encourage consumers to see their account histories sooner, using whatever option works for the consumer – paper statements, electronic access, or a mobile app.

To the extent that the CFPB retains the current approach, with deadlines running from electronic or written access, we support proposed Comment 18(e)-2, which states that access through a mobile application is electronic access but a text message, alert or telephone call about the balance is not.

### **B. Harmonize credit, debit and prepaid card liability limits and dispute rights for lost or stolen cards.**

We urge the CFPB to harmonize the Regulation E and Regulation Z liability limits and dispute rights in the case of a lost or stolen card. Regulation E subjects consumers to up to \$500 in liability if they fail to report a lost or stolen card within two business days of realizing that it is missing. Credit cardholders have no deadline and a \$50 liability cap.

The \$500 liability rule for debit cards is also misunderstood. Consumers think that they are unprotected if they take more than two business days to report a lost or stolen card. However, they cannot be held liable for more than \$50 even if the dispute is not timely if the charges were made in the first two days and could not have been prevented even with a timely dispute.<sup>316</sup> The \$500 limit also does not apply if the card was not lost or stolen and the consumer disputes unauthorized charges on her statement within 60 days (or 120 days for prepaid cards).<sup>317</sup> But in the wake of repeated data breaches, consumers mistakenly believe their debit card accounts are unprotected.

Most prepaid cards are covered by network dispute rules that follow the credit card rules. It would eliminate confusion, protect consumers, and give the public confidence in debit and prepaid cards if Regulation E followed the Regulation Z rule and industry practice and limited liability to \$50.

### **C. Clarify error resolution responsibilities for an untimely dispute of unauthorized charges.**

The proposed rule retains the confusing and cryptic interaction between the consumer liability provisions of current § 1005.6 and the error resolution provisions of current § 1005.11 and proposed § 1005.18(e) in the event of an untimely dispute. The CFPB should add comments to make clear that a financial institution must follow the error resolution procedures if a charge is disputed as unauthorized, even if the dispute is tardy, but that the institution does not need to follow the provisional credit rule.

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<sup>316</sup> Reg. E §E § 1105.6(b)(2).

<sup>317</sup> Reg. E §E § 1005.6(b)(3).

Like current Regulation E Comment 11(b)(2)-7, proposed Comment 18(e)-3 states that an institution “is not required to comply with the [error resolution] requirements of § 1005.11” if a notice of error is untimely. Yet the comment also says that if the “consumer’s assertion of an error involves an unauthorized EFT, however, the institution must comply with § 1005.6 ... before it may impose any liability on the consumer.” Section 1005.6 limits consumers’ liability for unauthorized charges even if the consumer is late in reporting a missing card or an unauthorized charge.<sup>318</sup>

This comment makes no sense. An institution does not “impose” liability on a consumer. Rather, an unauthorized charge appears on the consumer’s statement, and the consumer then can challenge it and ask for it to be reversed. There is nothing that the institution can do “*before* it may impose any liability.” It makes no sense to say, on the one hand, that a financial institution cannot hold a consumer responsible for unauthorized charges, and on the other hand that the institution does not need to respond to or investigate a dispute, recredit the consumer’s account, or provide an explanation if it does not. Doing all three of those things are required in order to ensure that the consumer does not bear liability for an unauthorized charge.

The CFPB should make clear that the institution must follow the error resolution provisions of § 1005.11 even for untimely errors. However, it would be appropriate to relieve the institution of the 10 day deadline for investigating or providing a provisional credit. In addition, the institution could have 90 days to investigate, as in the case of new accounts, out-of-state transactions, and POS debit card transactions.<sup>319</sup> Otherwise, the institutions should follow the procedures set out in § 1005.11.

Clarifying this rule is especially important in light of growing internet frauds involving cramming and unwanted goods and services. Especially without receiving regular statements, consumers may not notice small charges or may assume that they agreed to them. Once a consumer realizes that she has been charged for unwanted monthly membership clubs or other scams, it may be only then that she sees that the charges go back several months. Consumers should have clear recourse in that situation.

In addition, the model clauses should be revised to inform consumers that they may report an unauthorized charge even if the dispute is untimely. The current model clauses say “We must allow you to report an error until 60 days after ...”<sup>320</sup> This statement implies that the institution does *not* need to allow a consumer to report an error later than that date. That implication contradicts proposed Comment 18(e)-3, discussed above, which incorporate the rule that an institution cannot impose liability on a consumer for an unauthorized charge that could not have been prevented even with a timely dispute.

The model clauses could also be simplified if the CFPB adopts our suggestion for providing consumers a simple 120 days. Thus, the model clauses should say:

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<sup>318</sup> The consumer liability provisions of § 1005.6 set up two different scenarios, one involving a lost debit card (or other access device) and one where the card was not lost or stolen but an unauthorized charge appears on the statement. In both cases, the consumer’s liability increases and is potentially unlimited if the consumer does not dispute a charge in a timely fashion. However, in both cases, even if the consumer delays, her liability is limited to \$50 (if a card was lost or stolen) or \$0 (if it was not) for early charges that could not have been prevented if the consumer had made a timely dispute. Reg. E § 1005.6(b)(2)(i), (3).

<sup>319</sup> Reg. E § 1005.11(c)(3)(ii).

<sup>320</sup> Proposed A-5 Model Clauses for Government Agencies; Proposed A-7 Model Clauses for Financial Institutions Offering Prepaid Accounts.

**In Case of Errors or Questions About Your Electronic Transfers** telephone us at [telephone number] write us at [insert address] [or email us at [insert email address]] **as soon as you can**, if you think an unauthorized charge or other error has occurred in your [agency's name for program] account. ~~We must allow you to report an error until 60 days after the earlier of the date you electronically access your account, if the error could be viewed in your electronic history, or the date we sent the FIRST written history on which the error appeared.~~ You may request a written history of your transactions at any time by calling us at [telephone number] or writing us at [address] [optional: Or by contacting your caseworker]. You will need to tell us:

- Your name and [case] [file] number.
- Why you believe there is an error, and the dollar amount involved.
- Approximately when the error took place.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

**As long as you report the error within 120 days**, we will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

**If you report an unauthorized charge after 120 days but no later than one year after the transaction, or for errors involving new accounts ...**

We also urge the CFPB to develop a more accessible, stand-alone form to advise consumers of their dispute rights. Even the language above is quite dense, and it is buried inside a long legal set of terms and conditions. With increasing concern about identity theft and internet fraud, more clear information about dispute rights would be extremely helpful.

#### **D. Registration is appropriate, with dispute rights for prior transactions.**

We support proposed § 1005.18(e)(3), which requires consumers to register their cards before they may exercise their dispute rights and to permit consumers, once registered, to dispute errors or unauthorized charges that occurred prior to registration. This proposal strikes a balance between protecting consumers and ensuring that fraudsters cannot act anonymously.

We agree that individuals who receive payroll, government benefit, student or other cards that are issued to specific, identified individuals should not need to register their cards before exercising dispute rights. However, the CFPB needs to make clear in the Commentary that this rule applies to a broader range of cards and not just payroll or government benefit cards. For example, the explanatory material states:

Thus, the Bureau expects that financial institutions providing prepaid accounts for purposes such as student financial aid disbursements or property or casualty insurance payments would likely not be able to avail themselves of the exclusion in § 1005.18(e)(3) because consumer identifying information is collected and consumers' identities verified by the financial institution, or a service provider or agent of the institution, prior to distribution of such prepaid accounts.<sup>321</sup>

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<sup>321</sup> 79 Fed. Reg. at 77185.

Yet Regulation E itself and the Commentary appear to apply the registration requirement to all but payroll and government benefit cards. Even if an issuer has some information about a consumer sufficient to issue a card, the issuer could contend that it has not “completed its collection of consumer identifying information and identity verification.” Proposed § 1005.18(e)(3). A comment should be added making clear that, if identifying information is collected prior to distribution of the access device, then the registration requirement for error resolution does not apply.

The CFPB should also codify its expectation that issuers will inform consumers who call with disputes about on unregistered cards about the registration requirement and will begin the registration process.<sup>322</sup> That should be a requirement, not just an expectation.

### **E. Clarify that no fees may be charged for exercising dispute rights or other legal rights.**

Consumers have a right under the EFTA and Regulation E to exercise dispute rights if they believe there is an error in their account. Errors include:

- Unauthorized charges;
- Mistakes in a debit or credit to the account, including an erroneous fee;
- Items missing from the statement;
- Incorrect amounts dispensed from an ATM;
- The consumer's request for a debit or ATM card receipt, notice that a preauthorized transfer occurred, or additional information or clarification concerning a debit or a request to investigate whether another error has incurred.<sup>323</sup>

Raising questions about these issues is a legal right, even if the consumer only wants information or clarification.

Yet some prepaid cards charge \$25/hour “research” fees. The fee schedules generally do not disclose what types of “research” is covered. But one card apparently charged the fee “to resolve billing discrepancies.”<sup>324</sup> Higher One charges fees for “research regarding transaction activity or history on your account. This may include statement balancing.”<sup>325</sup>

Some cards may waive the fee if the issuer acknowledges the error. But charging the fees inhibits consumers from exercising their legal right to ask about potential unauthorized charges and errors even if they turn out to be wrong. And just because the bank denies the error does not mean the bank is correct.

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<sup>322</sup> 79 Fed. Reg. at 77185.

<sup>323</sup> 12 C.F.R. § 1005.11(a)(1).

<sup>324</sup> Jon Hilkevitch, “2 fees dropped, but CTA's Ventra still pricey,” Chicago Tribune (March 26, 2013), [http://articles.chicagotribune.com/2013-03-26/news/ct-met-ventra-debit-deal-0326-20130326\\_1\\_new-ventra-fare-card-prepaid-debit-debit-card](http://articles.chicagotribune.com/2013-03-26/news/ct-met-ventra-debit-deal-0326-20130326_1_new-ventra-fare-card-prepaid-debit-debit-card).

<sup>325</sup> See, e.g., <https://untdebitcard.higheroneaccount.com/studentaccount/feeschedules.do>. The reference to statement balancing appears to be a relic from the days when banks helped consumers balance their checkbooks (and perhaps still do for some consumers). It seems unlikely that consumers who use prepaid cards are calling to ask with help balancing their checkbooks, unless the question is really about an incorrect charge.

The ability to raise questions is especially important for accounts that do not come with paper statements and for consumers who may not have computer access. Even for those with smartphones, a small mobile device is awkward for reviewing anything but the most recent transactions.

The recent waves of identity theft, cramming and fraudulent charges that can result from internet shopping make it all the more important for consumers to be able to ask about charges on their account that they do not recognize. But knowing if a charge is improper or legitimate can be difficult, as the cryptic descriptions of ACH and debit card transactions in periodic statements are often indecipherable. This is especially true now that services like PayPal and Square may either not provide an item description or take up some of the few characters to identify their own role in the transaction. Many scams focus on charging small fees month in and month out for bogus membership clubs or subscriptions.<sup>326</sup> They prey on the fact that consumers may overlook those charges. Consumers who spot those fees may find out that they go back months.

Disputing ATM machine errors or unauthorized withdrawals can also result in a he-said she-said that can only be resolved with research to look at the videotape. Despite the EFTA rule that the burden is on the financial institution to show that a charge was authorized,<sup>327</sup> banks may flip the presumption if a PIN was used.<sup>328</sup> Yet mere use of a PIN does not show that the consumer authorized the transaction. Identity thieves are becoming more and more sophisticated about combining information acquired from several sources to enable them to change a consumer's PIN.<sup>329</sup> Or, the PIN could have been stolen along with the card.

Fees should not be used to dissuade consumers from exercising rights that they have under the law or to penalize them for doing so. The CFPB should clarify that prepaid cards may not charge fees when consumers exercise their legal rights. In particular, financial institutions must comply with error resolution requirements and provide other information about the account without charging research or other fees.

#### **F. Registered, general-purpose gift cards should carry protection from loss or theft.**

As discussed below under Scope, we agree that cards should be both marketed *and* labeled as a gift card in order to be exempt from the definition of "prepaid card." In addition, general purpose gift cards should be protected from loss or theft and covered by error resolution rules even if they are both marketed and labeled as gift cards. Giving the consumer a mechanism to replace a lost or stolen card would benefit consumers. In addition, some consumers use gift cards not as gifts but for themselves as a vehicle to make online payments. Consumers do so because they believe that using a prepaid card is

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<sup>326</sup> FTC, "10 Ways to Avoid Fraud" ("Dishonest merchants bill you for monthly 'membership fees' and other goods or services without your authorization"), <http://www.consumer.ftc.gov/articles/0060-10-ways-avoid-fraud>.

<sup>327</sup> 15 U.S.C. § 1693g(b).

<sup>328</sup> Recently, our office was contacted by a lawyer attempting to help a Social Security recipient. While the elderly consumer was in an extended inpatient VA hospital stay in another city, his new Direct Express card was stolen from the mail and emptied by five charges in two hours: three at bars and two ATM withdrawals. He asked the bank to look at the videotape, but the fraud claim was denied with no explanation other than a "conflict" in the information. We have heard many similar stories.

<sup>329</sup> See Crayton Harrison, "Anthem Hacked in 'Sophisticated' Attack on Customer Data," Bloomberg Business (Feb. 4, 2015), <http://www.bloomberg.com/news/articles/2015-02-05/anthem-hacked-in-sophisticated-attack-exposing-customer-data>.

safer than using a debit card online. But the prepaid account information is subject to identity theft and the cards are subject to scams and unauthorized charges. As long as the card is registered, consumers should be able to exercise the dispute rights that would be available for any network-branded card.

Covering registered, general-purpose gift cards under the error resolution rules will also prevent evasions. A mobile prepaid account could be designed to generate a code for each transaction that is used only once. The provider could argue that each code is a separate gift card, instead of the mobile device being a single device that is reusable multiple times. Providing error resolution obligations for general-use gift cards would narrow the incentives for this type of evasion and protect consumers who use such mobile products.

#### **G. Provisional credit**

We support the proposal to extend the provisional credit requirements to all prepaid cards as long as the consumer registers the card. We do not believe that this requirement should necessitate unduly harsh fraud screening requirements or preclude consumers from obtaining prepaid card accounts. We oppose any alternative suggestion that provisional credit might only be provided to consumers who receive direct deposits, accounts that have been open for 30 days, or accounts over a certain balance.<sup>330</sup>

However, we urge the CFPB to pay close attention to the fraud screening practices of prepaid card issuers to ensure that issuers are not using the “fraud” label too quickly. We have observed that some banks will characterize an account as “account abuse” even if it was closed merely because the consumer did not repay an overdraft.<sup>331</sup> The same could happen for consumers who do not repay provisional credits that are reversed. Some banks are also sloppy and label an account as “closed for fraud” when the consumer was the victim, not the perpetrator.<sup>332</sup> The CFPB should warn prepaid card issuers not to do the same.

#### **H. Retain the annual paper error resolution notice for consumers who have not accessed statements or electronic history.**

The proposal eliminates the current requirement for government benefits cards for an annual written (paper) notice to consumers of their dispute rights. The proposal makes the government benefits rule the same as the payroll card rule: the notice can be on the statements that consumers can access electronically.

We urge the CFPB to retain the annual written notice requirement and to extend it to all prepaid cards for one group of consumers: those who have not accessed *either* a written or electronic statement in the previous 12 months. Having the notice is meaningless if consumers do not see it. Understanding error resolution rights is especially important in light of the increasing number of data breaches. Retaining the annual notice in these circumstances would give issuers an incentive to encourage consumers to access electronic or written statements.

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<sup>330</sup> See 79 Fed. Reg. at 77183.

<sup>331</sup> NCLC, “Introduction to Account Screening Consumer Reporting Agencies” (October 2014), [http://www.nclc.org/images/pdf/credit\\_reports/ib-cra-screening.pdf](http://www.nclc.org/images/pdf/credit_reports/ib-cra-screening.pdf).

<sup>332</sup> *Id.*

Moreover, the annual notice should include additional information beyond error resolution rights. The notice should also:

- Inform consumers about their options for obtaining written and electronic transaction histories and encourage them to review their transactions regularly.
- Remind them that their statements contain a monthly and year-to-date summary of fees.
- Give consumers the right to request an annual history instead of a monthly one.

An annual reminder will protect consumers who have not obtained information recently and will encourage them to monitor their accounts.

## **X. Scope**

### **A. A broad definition of “prepaid card” is appropriate.**

We support the proposal to cover a broad range of prepaid cards and prepaid payment systems within the scope of Regulation E. The rules cover general use reloadable cards, payroll cards, student cards, public benefits cards, workers compensation cards and many other types of cards, stored value accounts, and mobile or online equivalents.

We support the decision to adapt the current payroll card regulation to cover all prepaid card, including payroll cards and government benefit cards. Having a single, uniform rule that applies to all prepaid cards will eliminate complexity and confusion and enable consumers to compare different types of cards that could be used to receive funds.<sup>333</sup> Moreover, while payroll and government benefit cards are covered today under Regulation E, that has not prevented all problems, as discussed throughout these comments. The additional new requirements proposed in these rules will better protect those cards.

We support a broad definition of “prepaid card.” As payment systems evolve, it is especially important not to have a narrow definition that permits evasions. The definition appropriately covers mobile prepaid accounts and other emerging payment systems when they hold consumer funds, such as PayPal and person-to-person accounts. A plastic card or paper check is no longer necessary to access funds in an electronic account or to make payments.

We support proposed Comment 1005.2(b)(3)(i)-5, which extends protections to accounts that store funds before a destination is designated. Payment systems that hold funds that will be used at a later time for electronic fund transfers should be covered by Regulation E. While pass-through devices like Google Wallet need not be covered if they are not storing funds, consumers need basic fee disclosures and error protections when their funds are held in accounts with entities not currently covered by Regulation E. We also support the clarification in the same comment that pass-through vehicles that do not store funds are exempt from Regulation E only if they do not change the character of the protections that the funds receive.

We agree with Comment 1005.2(b)(3)(i)-6 that cards should not need to be reloadable in order to obtain protections. We also agree with proposed Regulation E § 1005.2(b)(3)(i)(B) that an account that is

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<sup>333</sup> However, we support the decision to retain § 1005.15 governing government benefit cards, while generally aligning the requirements with § 1005.18. Cards issued by government agencies may provide unique issues, and retaining the rule also enables the CFPB to provide specific reminders to government agencies about obligations that they have ignored, such as their duty to comply with the compulsory use ban.

usable for person-to-person transfers should be covered, regardless whether the funds are redeemable at merchants or ATMs.

Virtual currencies should not be outside the rule's protections if they are used for consumer purposes. The lack of consumer liability protection, dispute rights, and error resolution requirements in virtual currency systems is extremely troubling. Virtual currencies today are not typically used for consumer purposes. But if they are, consumers need protections.

## **B. Campus and other nonbank “bank accounts” should comply with prepaid card rules.**

The proposed definition of “prepaid account” excludes bank accounts that are already covered by Regulation E.<sup>334</sup> But some nonbanks offer “bank accounts” that have more in common with prepaid cards than they do with DDA accounts. This is particular true in the campus card market. These accounts should be protected by the prepaid card rules.

For example, Higher One offers accounts for students at Baker College,<sup>335</sup> University of North Texas,<sup>336</sup> and Mt. San Antonio College,<sup>337</sup> among many others. These accounts purport to be an “internet-only checking account serviced by Higher One.” They are designed and serviced by a nonbank. They are designed to be card-based. Students are provided an unsolicited card, either in the mail or through their student ID card. After they validate the card and activate the account, they are given only “3 complimentary starter checks.” The accounts do not offer access to a bank branch or any physical location where a consumer could ask questions. There is a 3.5% fee for making a withdrawal using a bank teller and a \$2.50 fee for using any ATM other than one of the very few Higher One ATMs. For example, for students at the Baker College Flint campus, there are only two surcharge free ATMs in the entire city of Flint.<sup>338</sup>

Students are pushed into using these accounts through coercive and deceptive measures that inhibit them from receiving financial aid and other funds in bank accounts of their choosing. In July 2014, the Federal Reserve Board obtained a consent order and cease and desist order against Cole Taylor Bank involving the following deceptive practices by Higher One that misled students about the financial aid refund selection process and the Higher One OneAccount:

- The omission of material information about how students could get their financial aid refund without having to open a OneAccount;
- The omission of material information about the fees, features, and limitations of the OneAccount product, which may have made it more difficult for students to make fully informed decisions prior to selecting the method for financial aid refund disbursement;
- The omission of material information about the locations of ATMs where students could access their OneAccount without cost and the hours of availability of those ATMs; and

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<sup>334</sup> Proposed Reg. E § 1005.2(b)(3)(i).

<sup>335</sup> See <https://bakeronecard.higheroneaccount.com> and <http://bakeronecard.com/info/oneaccountagreementsbybankpopup.jsp?bankID=3>.

<sup>336</sup> See <https://untdebitcard.higheroneaccount.com/> and <https://untdebitcard.higheroneaccount.com/info/outoneaccountagreements.jsp>.

<sup>337</sup> See <http://mtsaccard.com/info/oneaccountagreements.do> and <https://mtsaccard.higheroneaccount.com/>.

<sup>338</sup> See <https://www.higheroneaccount.com/info/publicatmlocator.jsp?state=MI>.

- The prominent display of the school logo, which may have erroneously implied that the school endorsed the OneAccount product.<sup>339</sup>

Despite last year’s action against Higher One’s bank partner Cole Taylor Bank, Higher One – now using WEX Bank – continues to coerce students into using its account. In partnership with colleges and universities, Higher One has set up a system that delays student access to their funds unless they elect to use the Higher One account. The Higher One website emphasizes “same business day” access if the money is deposited to the Higher One account, but “2-3 business days” – with a graphic showing a complicated several step process -- if the money is deposited in the student’s own account.<sup>340</sup>

Same business day deposit to the OneAccount	Deposit to another account	Paper check via US mail
<b>OneAccount</b>		
University Releases Money	University Releases Money	University Releases Money
Money Available to Spend	Submit ACH Information to Higher One	Check Printed
<b>Money Deposited into Account Same Day</b>	Higher One Sends Money to Federal Reserve	Higher One Mails Check Within One Business Day
	Federal Reserve Sends Money to 3rd Party Bank	U.S. Postal Service Delivers Check
	Money Available to Spend	Receive Check in Mail
	<b>2-3 Business Days</b>	Check Cashed
Money Available to Spend		
	<b>5-7 Business Days</b>	

Financial aid can easily be directly deposited to the student’s own account just as quickly as into a Higher One card account. Students could be encouraged to submit their bank account information to the school early, before funds arrive, to enable direct deposit immediately. The school does not need to set up a system where funds are passed through Higher One, setting up delays for students who use their own accounts. Funneling the money through Higher One only serves to push students into using an account they might not want.

Higher One is able to steer students into its account because it provides students an unsolicited access device – either by enabling functionality on the student ID or by mailing the student a card before the funds arrive. While Regulation E’s unsolicited issuance rules apply equally to DDA accounts and prepaid cards used for public benefits like student aid, unsolicited issuance is rarely a problem for DDA accounts. Consequently, as discussed in Section VI.I above, we urge additional rules for prepaid cards that are not solicited. Those rules should apply to Higher One DDA accounts. Indeed, the fact that the Higher One

<sup>339</sup> Press Release, Federal Reserve Board (July 1, 2014), <http://www.federalreserve.gov/newsevents/press/enforcement/20140701b.htm>.

<sup>340</sup> See <http://www.myonemoney.com/yourrefundchoices>.

accounts are based around an unsolicited card is precisely why they are more akin to prepaid cards than to a DDA account.

Higher One has also been subject to other enforcement actions involving unfair practices. In 2012, Higher One was forced to agree to a Consent Decree with the FDIC involving \$11 million in restitution to students. Higher One was charging student account holders multiple nonsufficient fund (NSF) fees from a single merchant transaction; allowing these accounts to remain in overdrawn status over long periods of time, thus allowing NSF fees to continue accruing; and collecting the fees from subsequent deposits to the students' accounts, typically funds for tuition and other college expenses.<sup>341</sup>

Higher One responded by limiting NSF fees to three fees per transaction. But the Higher One cards continue to charge not just NSF fees but also overdraft fees (fees imposed when an item is paid, not rejected) and to offset those fees from deposits to student accounts. Using the term "Insufficient Funds Fee" for overdrawn items, the Higher One card charges \$29 for the first overdrawn ACH payment during the lifetime of the account and \$38 for each additional item.<sup>342</sup> Using a loophole in the Regulation E opt-in rules for overdraft fees, Higher One does not need to obtain the student's consent to pay those items.<sup>343</sup> A separate "Unavailable Funds Fee" in the same amount is imposed for bounced ACH payments, with a total of up to three fees of either type per item. While the fees also apply to overdrawn or bounced checks, Higher One supplies students with only three checks initially and clearly expects students primarily to use the card or online bill payment.

If the Higher One account were subject to the proposed rules, the card would have to comply with the proposed rules for overdraft features. Instead of a hidden, unsolicited fee-based overdraft program, Higher One would have to offer an explicit overdraft line of credit covered by Regulation Z and based on ability to pay. Higher One would have to disclose the amount of the overdraft credit line and charge fees in the first year that are no more than 25% of that line. While Higher One could charge whatever interest rate it wished,<sup>344</sup> the cost of the overdraft would be primarily priced based on the amount of the credit and the time it was outstanding, rather than flat fees that quickly add up to be disproportionate to the amount overdrawn. Students would also have a reasonable amount of time to repay the overdraft, rather than having it offset against the first incoming deposit.

Under the proposed rules for prepaid card credit features, Higher One also could not charge any "unavailable funds fee" (which is basically a denied transaction fee). The fee would be a penalty fee and would be prohibited because no dollar amount is associated with it.<sup>345</sup> Under Higher One's current fee schedule, a student could pay up to \$114<sup>346</sup> for a single item as small as \$5.01 that either bounces three times or bounces twice and is then paid. Under the proposed rules, the bounces would be free. The cost of the overdraft protection would vary depending on the interest rate and the size of the overdraft, but the cost would likely be far lower than \$114.

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<sup>341</sup> Press Release, "FDIC Announces Settlements With Higher One, Inc., New Haven, Connecticut, and the Bancorp Bank, Wilmington, Delaware for Unfair and Deceptive Practices, FDIC (Aug. 8, 2012), <https://www.fdic.gov/news/news/press/2012/pr12092.html>.

<sup>342</sup> <https://untdebitcard.higheroneaccount.com/studentaccount/feeschedules.do>.

<sup>343</sup> The opt-in requirement only applies to ATM and one-time debit card transactions. Reg. E § 1005.17(b)(1).

<sup>344</sup> Because the accounts are bank accounts, Higher One would probably not be subject to state interest rate limits, as the banks could take advantage of interest rate exportation or parity laws.

<sup>345</sup> Reg. Z § 1026.52(b)(2)(i)(B)(1).

<sup>346</sup> The fee would be \$105 the first time, since the first fee in the lifetime of the account is \$29 instead of \$38.

Another reason to subject nonbank bank accounts to the more detailed prepaid card rules in Regulation E is that nonbank prepaid card program managers like Higher One are not currently subject to regular supervision for compliance with consumer protection laws the way banks are.<sup>347</sup> While the Fed and the FDIC were able to bring enforcement actions through Higher One's partner banks, Higher One is not subject to the same direct scrutiny as banks that provide bank accounts.

The Higher One "bank" accounts are covered by the Regulation E error resolution and unauthorized charges protections. But they would also benefit from the additional rules provided in the current rulemaking for prepaid cards, including:

- Clear fee disclosures with the short and long form.
- Disclosure that the student does not have to use the account.
- Rules governing overdraft and other credit features.

Under the CFPB's proposal, Higher One will also not be subject to the modified Regulation E account information rules proposed for prepaid cards, even though Higher One *requires* students to consent to electronic communications, even if a student is more comfortable receiving paper statements and getting other communications in writing.<sup>348</sup> It is important to remember that students are a diverse group in age and background. Not all own computers, smartphones or are internet- and mobile-savvy. Yet students will receive none of the Regulation E protections for prepaid cards that do not provide paper statements.

Like other card accounts that do not provide periodic written statements, nonbank student accounts should provide:

- Free statements upon request. Higher One charges \$5 after the first copy.
- Dispute deadlines that run from the time the consumer accesses the account history, not from the time a statement is delivered.
- Free access to balance information and customer service.

In addition, under the rule as proposed, it appears that neither Higher One nor its bank partners will be required to post fee schedules and account agreements on the CFPB's website or their own. Higher One's prepaid card competitors, however, will be required to post their agreements.

In order to correct these discrepancies, the definition of "prepaid account" should also include:

An account under paragraph (b)(1) of this section that is offered or serviced by a financial institution that is not a depository institution and that requires the account holder to consent to electronic communications.

This addition will ensure that all accounts that are effectively prepaid cards in all but name do not escape the important protections to be added in this rulemaking.

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<sup>347</sup> The CFPB could set up a supervision program for the larger prepaid card program managers but has given no indication that it intends to do so. It is unclear whether the CFPB intends to rely on supervision through the banks that typically issue prepaid cards or whether direct supervision of program managers will be coming in the future.

<sup>348</sup> See, e.g., <http://bakeronecard.com/info/oneaccountagreementsbybankpopup.jsp?bankID=3>;  
<https://untdebitcard.higheroneaccount.com/info/outoneaccountagreements.jsp>;  
<http://mtsaccard.com/info/oneaccountagreements.do>.

This nonbank bank account provision could also be limited to accounts that would be “credit cards” under the proposed rules and are offered pursuant to an agreement between an institution of higher education and a credit card issuer. The CARD Act has special provisions protecting college students and younger adults, including special ability-to-pay considerations, restrictions on marketing to students, and disclosures of marketing agreements between credit card issuers and schools.<sup>349</sup> These CARD Act provisions are evidence of Congress’s heightened concern for the financial well-being of college students, and the recognition of their particular vulnerability. Protecting college students from unsolicited issuance, excessive fees, and other abuses by Higher One-type accounts is absolutely justified under these provisions of the CARD Act.

Finally, as discussed in Section VI.H above, the CFPB could require any unsolicited account, whether a prepaid account or a DDA account, to comply with the prepaid card rules.

### **C. All accounts accessed through unsolicited devices should comply with prepaid card rules.**

The rules governing prepaid accounts should apply to all accounts that are provided to consumers through an unsolicited access device, even if that device accesses a DDA account. The only context we are aware of in which unsolicited DDA access devices are used is for campus cards. Expanding the prepaid rule to cover unsolicited DDA accounts would protect consumers and prevent evasions. It would help to ensure coverage of nonbank cards like the Higher One account that are prepaid in all but name. Payroll and other accounts could not evade the prepaid rules by restructuring themselves as DDA accounts. Including all unsolicited access devices would also extend protections to campus card programs like those run by banks, which have been the subject of problems similar to the nonbank programs.

If necessary, DDA accounts could be subject to only some of the prepaid card rules. For example, financial institutions should not be allowed to take advantage of the Regulation E modifications without complying with the E-Sign consent rules. But if consent to electronic communications is required for an account and is not a voluntary choice, then the protections that come along with the modifications should apply.

### **D. Prepaid cards used for needs-tested benefits.**

#### **1. Overview**

Despite the broad definition of “prepaid account” in the CFPB’s proposal, the rules do not appear to cover prepaid cards used to distribute needs-tested government benefits such as Temporary Aid to Needy Families(TANF).<sup>350</sup> While the CFPB has not discussed the rationale for excluding needs-tested prepaid cards, the Bureau is apparently of the belief that the cards are covered by the exemption in the

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<sup>349</sup> 15 U.S.C. §§ 1637(c)(8), 1650(f).

<sup>350</sup> Although the CFPB has not added a new exemption to Regulation E, its discussion and proposed Commentary make clear that the Bureau interprets the existing exemption for EBT systems, 15 U.S.C. § 1693b(d)(2)(B), to include prepaid cards used for needs-tested benefits even if they are not EBT cards. See 79 Fed. Reg. at 77123.

EFTA for “electronic benefit transfer” (EBT) systems through which government agencies establish accounts to distribute needs-tested benefits.<sup>351</sup>

However, prepaid cards are not EBT cards and the two types of cards are quite different. Prepaid cards did not exist in 1996 when Congress passed the EBT exemption. The CFPB has the authority to make clear that the EBT exemption is limited to its intended target: EBT cards.

Prepaid cards are more vulnerable to fraud and unauthorized charges than are EBT cards, and the extremely low-income users of these cards especially would benefit from the proposed protections. Neither the language of the EFTA nor the policy behind the EBT exemption supports a Regulation E exemption for the financial institutions that issue prepaid cards used to deliver cash-based means-tested benefits.<sup>352</sup> Indeed, the only two current providers of needs-tested prepaid cards comply with Regulation E and do not need the EBT exemption.

## **2. The EBT exemption is an exemption for state and local government agencies, not for financial institutions.**

When the EFTA was enacted in 1974, the only type of consumer-related account that Congress imagined, and the only type covered by the EFTA, was the consumer’s own account at a financial institution. However, by the early 1990s, states and localities were beginning to develop EBT systems that did not involve an account in the name of the consumer.

In 1994, the Federal Reserve amended Regulation E to declare that EBT systems were within the scope of the EFTA, to be effective in 1997. At about the same time, Congress was developing legislation that would require states to move from costly paper-based systems of government transfer payments to more efficient electronic transfer systems.

State and local governments, which did not have the experience that banks did with Regulation E, reacted with consternation. Although the move from paper-based payments to electronic payments was expected to save money, state and local governments expressed dismay at the potential costs of complying with Regulation E’s liability provisions and of protecting consumers from lost or stolen funds or unauthorized charges.

Congresswoman Marge Roukema summarized the concerns at a 1996 hearing on the issue:

Several States have indicated that the liability provision of Reg E would subject States to indefinite liability and jeopardize EBT development because of the increased costs for the States in complying with the liability of Reg E. ... Some local governments have stated that the expense involved in complying with the liability provisions may cause them either to not implement EBT or to terminate the current EBT system. That is the heart of this controversy.<sup>353</sup>

One state commissioner testified:

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<sup>351</sup> 15 U.S.C. § 1693b(d)(2).

<sup>352</sup> There is a separate statutory exemption from the EFTA for Supplemental Nutrition Assistance Program (SNAP) benefits (food stamps). 7 U.S.C. § 2016(h)(10).

<sup>353</sup> Opening Statement of Rep. Marge Roukema, “Electronic Benefit Transfer Systems And Regulation E,” Hrg. of the House of Rep., Subcomm. on Fin’l Inst’s and Consumer Credit, Comm. on Banking and Fin’l Svcs. (June 19, 1996) (“House EBT Hrg.”).

Reg E mandates that the entity issuing cards, in this case, States and localities, but typically banks and other financial institutions, must replace all but \$50 of lost or stolen funds. This decision radically changes significantly current social service benefits policy by creating a new entitlement to lost or stolen benefits.... The preliminary results from the first several months of pilot tests of implementing Reg E in two States, including ours, also show that this expense—*not so far that we have seen on the benefit replacement side but the investigatory administrative side—in the fair hearing cost side has been very high*.... Many States have decided to delay EBT implementation or have not gained approval to move forward with their contract until it is clear that Congress and the President will approve an exception.<sup>354</sup>

A state comptroller emphasized the distinction between subjecting states and banks to the EFTA:

Many participants in EBT systems development, most notably the States, hold the position that Regulation E, *crafted for the private sector in 1976*, is inappropriate to government EBT in 1996.<sup>355</sup>

Ultimately, Congress passed a bill requiring states to provide food stamps by electronic delivery and encouraging states to develop electronic systems to deliver other types of benefits as well.<sup>356</sup> The bill also exempted EBT systems from the EFTA.<sup>357</sup> In addition to the EBT exemption within the EFTA, a parallel exemption was added to the Food Stamp Act.<sup>358</sup> The Food Stamp Act contains its own provisions governing lost or stolen cards, error resolution and account records.<sup>359</sup> There is no federal exemption outside of the EFTA for other types of needs-based benefits, such as TANF (which replaced AFDC).

As illustrated above, the exemption was crafted for state and local governments and was designed to address their particular needs. The exemption was not aimed at banks, which were already covered by the EFTA and had a well-developed infrastructure for handling errors, loss, theft, and unauthorized charges.

The EBT exemption does not cover needs-based benefits distributed by the federal government.<sup>360</sup> For example, Supplemental Security Income, a needs-based disability and income security program distributed in part through the Direct Express® prepaid card, is covered by the EFTA and Regulation E. Thus, there is nothing inherent in needs-based benefits that demands an exemption from the EFTA.

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<sup>354</sup> Statement of William Waldman, Commissioner, NJ Dep't of Human Svcs., Representing the American Public Welfare Association, House EBT Hrg. (emphasis added). States may have felt compelled by the Due Process Clause to conduct fair hearings, which banks, which are not subject to the Fourteenth Amendment, do not provide when resolving liability issues under Regulation E.

<sup>355</sup> Statement of William Kilmartin, Comptroller, State of Massachusetts, House EBT Hrg. (emphasis added).

<sup>356</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); see generally National Consumer Law Center, Consumer Banking and Payments Law § 8.1.1 (4th ed. 2009 and Supp.).

<sup>357</sup> 15 U.S.C. § 1693b(d)(2).

<sup>358</sup> 7 U.S.C. § 2016(h)(10).

<sup>359</sup> See NCLC, Consumer Banking and Payments Law § 8.7, 8.8 (9th ed. 2009 and Supp.).

<sup>360</sup> The EBT exemption applies to a system "established under State or local law or administered by a State or local government." 15 U.S.C. § 1693b(d)(2)(B).

### 3. EBT card systems and prepaid card systems have important differences

Although the term EBT often refers to the legal definition in the EFTA (and the needs-based benefits covered by that definition), the term has a second, more technological definition. The term “EBT card” often is used to refer to the specific form of card and of technology currently used to deliver most needs-tested benefits. EBT cards and EBT payment systems differ in many ways from the newer prepaid card platform developed several years later.<sup>361</sup>

#### a) EBT Cards

Under an EBT system, a bank account is established by a government agency and is held in that agency’s name. The agency deposits benefits into that account, but the funds remain in the hands of the agency until the funds are spent. Until then, the government agency retains control over the funds, earns any interest generated, determines whether the funds allocated to a particular recipient expire if unused, and keeps those funds if they do expire.

The government agency or the bank produces an EBT card that is issued to the benefit recipient to access the funds. When a recipient uses an EBT card, funds are transferred through the automated clearinghouse (“ACH”), typically under the Quest Operating Rules. That is, at the end of the day, the funds to cover all of the day’s transactions are transferred from the government to the merchant (or to a bank, if the funds are accessed through an ATM) over the ACH system. Technologically, the transfer is no different from any other form of ACH transfer, such as an electronic bill payment from a consumer’s account to pay a bill.

Similarly, if the benefits recipient loses the card, the card is stolen, or there are unauthorized charges, the recipient must generally resolve the problem and seek any reimbursement from the government agency. It is up to the government agency to decide whether or under what circumstances the consumer will be reimbursed. The process for doing this and the rights recipients have in recovering unauthorized withdrawals vary by state. The government agency covers any losses that the recipient does not bear. EBT cards are not Visa- or MasterCard-branded do not carry any network “zero liability” coverage.

EBT cards are accepted only at limited locations, generally those that subscribe to the Quest rules or another network. The transactions travel over a different payment rail than credit or debit cards. That is why, at a supermarket for example, the consumer has the choice of selecting “EBT,” separate from “credit” or “debit,” at the register. Traditionally, only markets, check cashers and ATM machines have accepted EBT cards, but some pharmacies, clothing stores, salons and other locations now accept them. The cards typically carry the Quest logo or another EBT network logo, not a Visa or MasterCard logo, and are not accepted on nearly the same widespread basis.

Currently, EBT cards can only be used in person and require entry of a personal identification number (PIN). They cannot be used over the internet and do not carry bill-pay features, though it is possible that this capability may be added in the future.

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<sup>361</sup> The following description is based on our understanding following several conversations with various experts. We believe it is accurate but would appreciate hearing about any inaccuracies.

## **b) Prepaid Cards**

Prepaid cards operate on a different system than EBT cards. With a prepaid card, the government agency transfers the funds in a lump sum on a periodic schedule to the bank that issues the prepaid card. For example, if benefits are paid biweekly, then every two weeks the agency will transfer to the bank all of the benefits for the recipients entitled to payments.

The funds are held in a pooled account in the name of the prepaid card program manager, not the government agency, with subaccounts for the individual recipients. The government agency does not control the account or the distribution of the funds to recipients. After a purchase is made, the funds are transferred from the pooled account to the merchant (or to a bank, if funds are accessed through an ATM) over the ACH system.

The bank controls the funds and keeps any accrued interest and may collect inactivity fees if the recipient does not use the funds. Unused funds may not return to the benefits agency, though eventually they could escheat to the state if they have not been consumed by inactivity fees.

Only the bank, not the government agency, produces prepaid cards issued to the benefits recipient. Prepaid cards carry the brand of a network association, typically Visa or MasterCard, and funds are distributed across the applicable network. The cards are accepted anywhere Visa or MasterCard debit cards are accepted. They are covered by the Visa or MasterCard zero liability policies. Prepaid cards can be used for signature-based transactions but still require a personal identification number for ATM withdrawals and locations that do not accept credit cards.

On a prepaid card, the bank is responsible for resolving and assuming liability for loss, theft, error or unauthorized charges (subject of course to timely reporting by the consumer and absence of fraud). The government agency bears no responsibility for reimbursing the consumer for lost funds.

Virtually all government prepaid card programs follow Regulation E rules and regulations. Vendors who have been talking to states about switching from EBT cards to prepaid cards have been representing that the cards are fully Regulation E (payroll card rule) compliant.

Most benefits deposited onto prepaid cards are cash benefits with minimal or no restrictions on their use. EBT cards, on the other hand, are often restricted to particular food items.

Prepaid cards deliver so much revenue for banks that they typically offer to administer government benefits programs at no cost to state governments, and even on occasion to share that revenue with the state. Revenue comes from two primary sources: interchange fees on merchants and fees imposed on consumers.

Prepaid cards can come with a variety of fees, including ATM fees (in addition to surcharges), balance inquiry fees, inactivity fees, and sometimes PIN debit, declined transaction, teller withdrawal and other fees that are not typically charged on EBT cards.

### **4. The EBT exemption does not and should not cover prepaid cards issued by banks**

The EBT exemption is found in the Regulations section of the EFTA:

§ 1693b. Regulations

(a) Prescription by the Bureau and the Board

(1) In general. Except as provided in paragraph (2), the Bureau shall prescribe rules to carry out the purposes of this subchapter.

...

(d) Applicability [of the EFTA] to service providers other than certain financial institutions

(1) In general

If electronic fund transfer services are made available to consumers by a person *other than a financial institution holding a consumer's account*, the Bureau shall by regulation assure that the disclosures, protections, responsibilities, and remedies created by this subchapter are made applicable to such persons and services.

As the section heading and general provision of section (d) make clear, this section is aimed at the circumstances under which *government agencies* would be covered by the EFTA. Financial institutions were already covered.

This exemption is designed for EBT systems, which are systems “under which a government agency distributes needs-tested benefits by establishing accounts that may be accessed by recipients ...”<sup>362</sup> With prepaid cards, however, the government does not distribute the benefits or establish accounts. The bank that issues the prepaid card distributes the funds through an account and subaccounts that the bank or prepaid card program manager establishes.

In light of the legislative history of the EBT exemption and the differences between EBT and prepaid cards, the CFPB would be acting well within its statutory authority if interpreted the EBT exemption to apply only government agencies that issue EBT cards and not to banks that issue prepaid cards. Only EBT cards are systems “under which a government agency distributes needs-tested benefits by establishing accounts ...” Neither the rationale for nor language of the EBT exemption extends to prepaid cards.

It is consistent with both the policy behind the exemption and the statutory language for the CFPB to interpret the EBT exemption to cover only cards that operate on an EBT platform, a system under which the government agency itself directly manages the funds and handles loss and error resolution issues. This exemption would not extend to banks or program managers that operate cards on the prepaid card platform.

Even if the statutory language did not mandate this construction, the Bureau should use its exception authority to limit the scope of the EBT exemption. The EFTA provides that the CFPB may adopt “such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of electronic fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.”<sup>363</sup>

Coverage of prepaid cards that distribute needs-tested benefits is consistent with the purpose of the EFTA:

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<sup>362</sup> 15 U.S.C. § 1693b(d)(2)(A)(i).

<sup>363</sup> 15 U.S.C. § 1693b(c).

(b) Purposes. It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.<sup>364</sup>

Protecting recipients of needs-tested benefits, who need the same rights as other users of prepaid cards, fulfills the purpose of the EFTA.

#### **5. Extending Regulation E to needs-based government benefits prepaid cards will not impose an impediment to adoption of such cards**

Whatever cost concerns Regulation E posed in 1996 for state and local governments, those concerns are not an impediment today to extending Regulation E to prepaid cards issued by financial institutions for the purpose of paying needs-based benefits. Banks routinely comply voluntarily with Regulation E's payroll card rules for any prepaid card they issue, even though Regulation E does not presently apply to most prepaid cards.

Regulation E coverage for prepaid cards used to pay unemployment benefits has been no impediment to states' adoption of such cards.<sup>365</sup> Forty states and the District of Columbia use such cards.<sup>366</sup> There is no reason that needs-tested benefits should be treated any differently.

Even when they are distributing needs-based benefits, banks and program managers typically provide Regulation E protections on their prepaid cards. For example, Comerica Bank, which distributes the needs-tested Supplemental Security Income (SSI) payments through the Direct Express Card, provides Regulation E coverage by contract even though Regulation E does not directly apply.

Similarly, the Treasury Department's new rules mandating electronic payment of SSI require that *any* prepaid card that accepts the payments (whether the official Direct Express® card or a privately selected prepaid card) must provide Regulation E protections.<sup>367</sup>

Vendors who are soliciting state contracts to distribute needs-tested benefits, or discussing migration from the EBT platform to the prepaid card platform, represent that the prepaid cards will come with Regulation E protections. That is one of the benefits that states (and the advocates who advise them) are urged to consider.

Advocates and states rely on these representations in advising consumers who use needs-tested prepaid cards. In order for these representations not to be deceptive, it is essential that the cards be fully, legally protected by Regulation E and not merely the subject of vague voluntary assurances. Despite years of claims that all prepaid cards comply with Regulation E, we are hearing that those

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<sup>364</sup> 15 U.S.C. § 1693(b).

<sup>365</sup> The EFTA explicitly covers employment-related programs, including unemployment benefits. See 15 U.S.C. § 1693b(d)(2)(A)(ii).

<sup>366</sup> See NCLC Unemployment Prepaid Card Report, *supra*. The District of Columbia adopted unemployment prepaid cards in December 2011. See <http://does.dc.gov/does/cwp/view,a,1232,q,644297.asp>.

<sup>367</sup> The cost concerns may have been overstated even in 1996. Despite the fact that EFT-99 also mandated the federal government to switch from check-based to electronic payment systems, the EBT was only extended to state and local governments, not to needs-based federal benefit programs.

representations may not always have been true and that some programs are scrambling to comply with the new Treasury rules.

Financial institutions are eager to switch states from EBT cards to prepaid cards because prepaid cards generate more revenue for banks. Banks earn interchange fees on prepaid cards, which is a welcome trade-off for Regulation E obligations.

Banks that would be otherwise subject to interchange fee caps are exempt when they issue prepaid cards for government benefits, including needs-tested benefits. Compliance with Regulation E should be a condition of that exemption. Interchange revenue can fund any losses from complying with the consumer liability and error resolution provisions.

The EFTA and Regulation E are familiar terrain for banks and program managers that issue prepaid cards. There is no need for an exemption when those cards are used for needs-tested benefits.

#### **6. Recipients of needs-tested benefits paid on prepaid cards need Regulation E protection.**

Consumers who receive needs-tested benefits are, by definition, the neediest of all consumers. TANF is provided to households that have little or no income, and the median benefit is only \$428 a month or a paltry \$5,136 per year for a family of three.<sup>368</sup> Benefits are *below* 50 percent of the poverty line in *all* states and are below 30 percent of the poverty line in the majority of states.<sup>369</sup> Other state-based programs such as general assistance tend to have even lower eligibility levels and lower payments. At these levels, even tiny fees have a big impact. To consumers living below the poverty line, every dollar is obviously critical. Every dollar that is lost, stolen or mistakenly taken out of that consumer's account is potentially a meal for the consumer and her family.

EBT cards do not come with the same protections that other cards receive under the EFTA. The SNAP regulations require only that the state assume liability for food stamp benefits taken after the recipient has reported the loss of the card.<sup>370</sup> Recipients are not protected against liability for losses before the theft is report nor for unauthorized charges taken through skimming without using the physical card. There are no federal requirements for the protections for TANF or for state-based benefits. For all of these needs-based programs, the protections from loss, theft, unauthorized charges, and errors are up to the state. Many states do not have any statutes establishing the rights of these consumers. Typically, many states protect recipients from liability only for funds lost *after* the card is reported lost or stolen or unauthorized charges are reported. That is, if the thief wipes out the entire account before the recipient realizes the card is missing, the recipient can lose the entire amount in the account.

A legal services attorney in New York described the problem one recipient had:

In 2008 I represented a client whose benefits were being removed from his EBT card by unknown person(s). Someone who had knowledge of his personal information and card # was

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<sup>368</sup> Iffe Floyd and Liz Schott, Center for Budget and Policy Priorities, "TANF Cash Benefits Have Fallen by More Than 20 Percent in Most States and Continue to Erode" (October 30, 2014), <http://www.cbpp.org/cms/?fa=view&id=4222>.

<sup>369</sup> *Id.*

<sup>370</sup> 7 C.F.R. § 274.12(f)(5)(iv).

able to go into the EBT system and change his PIN and access his pa/fs benefits without using the physical card, apparently by going to store(s) and keying in the card number and PIN. The client requested replacement benefits but was declined, and lost a hearing. We appealed in state court. The case was settled and his lost benefits were restored, but the State's position is that benefits taken from EBT accounts cannot be replaced until and unless the client reports the first occurrence and the welfare agency does not act to fix the situation as by putting a PIN lock on the account. If the agency doesn't act to protect the benefits after the initial report, subsequent losses can be restored, but still not the loss from the initial theft. Recently, I saw that Unemployment Insurance Benefits recipients in NY State, victimized by identity theft, were getting stolen benefits replaced. I asked a NY state welfare agency official why that happened for UIB recipients but not EBT users. His response was that UIB recipients have Regulation E protection, EBT users do not.<sup>371</sup>

A newspaper article described the hardship that an 81-year old Food Stamp recipient, sick and mourning the passing of his wife, faced when his card was compromised and benefits were stolen:

Food stamps and Supplemental Security Income barely cover Mr. Fishman's monthly expenses. When the thieves cleared out his monthly food stamp allowance of \$162 - by duping Mr. Fishman's son into giving him the account information over the phone - he was left to rely on others for food.

The next month, the thieves struck again....

Last summer, someone called Mr. Fishman's house, and said he had to confirm information about the benefit card Mr. Fishman used for food stamps. Mr. Fishman handed the phone to his son, Aleksander.

He thought it odd that the man was calling in the evening, but he and his son soon forgot about the call - until the day Mr. Fishman tried to use his food stamp card. He contacted the police, but somehow the thieves were able to clear out the account a second time.

When he read an article about food stamp theft in a Russian-American Jewish newspaper, Mr. Fishman contacted the Edith and Carl Marks Jewish Community House of Bensonhurst, a beneficiary agency of UJA-Federation of New York, one of the seven agencies supported by The New York Times Neediest Cases Fund. At the community house, he was given a cash grant of \$100 from the fund (and a hot lunch).<sup>372</sup>

While the substandard protections on EBT cards are already problematic, more robust protections against unauthorized charges are especially essential as needs-based programs move to prepaid cards:

- Prepaid cards are much more widely accepted – anywhere that accepts a Visa or MasterCard debit card – compared to EBT cards, which are typically only accepted at grocery stores and pharmacies. They will be used at more locations where they can be subject to identity theft and are more attractive targets.
- Prepaid cards are easily used without the physical card, such as over the internet or telephone. Thus, the card can be the subject of unauthorized charges without the consumer even knowing

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<sup>371</sup> Email from Maryanne Joyce, Legal Services of New York City-Bronx to Lauren Saunders (Feb. 25, 2010) (on file with NCLC).

<sup>372</sup> Kareem Fahim, "The Neediest Cases: Mourning and Ailing, Then Robbed, Twice" (January 24, 2009), <http://www.nytimes.com/2009/01/24/nyregion/24neediest.html>.

that the card has been compromised. The state liability rules that apply to EBT cards are totally inadequate to protect users of network branded prepaid cards.

- Prepaid cards are functionally no different from debit or credit cards and are subject to the same scammers who steal identities from other Visa or MasterCard users. EBT cards are less a target of scammers.
- EBT cards require use of a personal identification number (PIN), whereas prepaid cards do not. Fraud is more common and easier to perpetrate with signature-based purchases.
- Without Regulation E protections, states are less likely to take up the prepaid card option. Some contractors are promising protections to states and rules must ensure that the promise is real.

Consumers who use prepaid cards need full Regulation E protection even if, or especially if, their cards are loaded with needs-tested benefits. The CFPB should provide that protection as part of the upcoming GPR rulemaking.

### **E. Health and flexible spending cards.**

The CFPB has proposed to exempt health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement accounts from the definition of prepaid account (which we will refer collectively to as “health and flex accounts”).<sup>373</sup> We oppose an exemption for health and flex account cards.

These cards are used over an extended period of time and can carry significant amounts of funds, up to several thousand dollars. Health and flex cards are one of the fastest growing segments of the prepaid card market.<sup>374</sup> We are aware of no reason why the cards could not comply with or benefit from the proposed protections. Consumers who use these cards also need fraud protection, error resolution and dispute rights, free access to account information, and protection from predatory credit products (sometimes aimed at dental and other medical expenses), among other protections. Health and flex cards are subject to fraud or errors just like any other GPR card.

Consumers need account information for health and flex accounts just as with other GPR cards. Fee disclosures and protection from overdraft programs and abusive credit features could also be important. (As we discuss above in Section IV.H, some health card issuers have considered adding expensive credit features. We support covering such cards under Regulation Z as credit cards even if they are not covered by Regulation E.)

There is nothing in the specialized nature of these cards that dictates an exemption from Regulation E. Indeed, there may be even more need with health spending cards for the error resolution requirements, given how complicated health care billing has become with the intersection of insurance denials or partial payments, deductibles, co-payments and other bureaucratic complexities. Providers can accidentally double bill, or overcharge before an insurance payment comes in. A consumer should have the ability to invoke the error resolution process when she suspects a healthcare provider has billed the wrong amount, or the card issuer has erroneously processed a transaction. The Regulation E rules

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<sup>373</sup> Proposed § 1005.2(b)(3)(iii).

<sup>374</sup> See Mercator Advisory Group, 11th Annual U.S. Prepaid Cards Market Forecasts, 2014–2017 (Nov. 4, 2014), [http://www.mercatoradvisorygroup.com/Reports/11th-Annual-U\\_S\\_-Prepaid-Cards-Market-Forecasts\\_-2014%E2%80%932017/](http://www.mercatoradvisorygroup.com/Reports/11th-Annual-U_S_-Prepaid-Cards-Market-Forecasts_-2014%E2%80%932017/).

should not pose a problem for health and flexible spending cards, and many if not most programs already comply.

The Bureau should also consider whether full Regulation E statement requirements should apply to health and other flexible spending programs. These accounts can be especially prone to errors that consumers may not realize, and paper statements may be a more appropriate default rule. Consumers are provided these cards without requesting them,<sup>375</sup> may not use them or do so rarely, may not be monitoring their accounts, and may not suspect that the card has even been used without their authorization. Yet the cards are Visa or MasterCard branded and are subject to fraud and authorized charges like other prepaid cards (even if they are not so broadly useable). The CFPB should consider whether paper periodic statements are important to give a consumer proactive notice about transfers from these accounts unless the consumer has opted in to electronic statements following the E-Sign Act requirements.

#### **F. Larger “gift” cards, and cards marketed or labeled as gift cards.**

The CFPB is proposing to add § 1005.2(b)(3)(i)(C), which would provide that gift certificates or gift cards that are subject to the Regulation E gift card provisions<sup>376</sup> are not “prepaid accounts” subject to the prepaid rules. The gift card rules generally limit inactivity fees and expiration dates, limits that are not imposed in the prepaid rules. However, the Bureau is proposing to subject one narrow category of gift card to both the gift card rules and the prepaid rules: a general-use prepaid card that is *either* marketed as a gift card or gift certificate *or* labeled as such, but not both.

We agree with the Bureau that evasions are possible if general-use prepaid cards could escape coverage under the prepaid rules simply by being marketed or labeled as a gift card. There is little or no difference beyond the label between such a card and one that can be used as a bank account substitute. Indeed, a card could be marketed as “give the gift of a bank account.” Simply using the word “gift” on a label in marketing -- or in fine print on a card -- should not deprive a card that has broader uses of important protections. Payday lenders in particular could put the word “gift” on their cards and then completely escape the vital rules keeping credit separate from prepaid accounts.

The proposal will ensure a clear distinction between gift cards and prepaid cards. It is simple enough for a true gift card to be both labeled and marketed as a gift card. But a card that functions like any other GPR card – i.e., that is Visa- or MasterCard-branded or otherwise available for general use and is reloadable – must be both labeled and marketed as a gift card in order to be outside the general GPR card protections.

We also urge the CFPB to apply the prepaid card rules to gift cards that can hold more than \$500. Any card or account that can hold a sizeable amount of money needs liability protection and error resolution protection. Covering larger cards will also prevent evasions.

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<sup>375</sup> At NCLC, for example, every employee who has signed up for a flexible spending account receives the prepaid card. Yet in light of the uncertainty about what payment is due for a doctor before insurance has been processed, and overlapping spousal benefit programs, some employees may not use the cards at all and instead submit claims manually.

<sup>376</sup> The gift card rules cover a gift certificate as defined in § 1005.20(a)(1) and (b); a store gift card as defined in § 1005.20(a)(2) and (b); a loyalty, award, or promotional gift card as defined in § 1005.20(a)(4) and (b); and a general-use prepaid card as defined in § 1005.20(a)(3) and (b).

## G. Accounts currently subject to Regulation E

The proposed definition of “prepaid account” is in some ways defined as a negative: It is an account “not otherwise an account under paragraph (b)(1) of this section ...”<sup>377</sup> This negative appears to be designed to make clear that traditional bank accounts are not prepaid cards. Thus, bank accounts do not need to comply with the special prepaid card disclosures and other rules, nor can they take advantage of the special Regulation E modifications for prepaid cards. The exclusion for traditional banks accounts is not itself problematic,<sup>378</sup> but ambiguities could result in evasions of the prepaid card.

The definition of what is an “account under paragraph (b)(1)”<sup>379</sup> is not so clear. While it has been generally understood that prepaid cards are not covered under (b)(1), that conclusion is not compelled by the language. A (b)(1) account includes a checking, savings, “or other consumer asset account ... held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.”<sup>380</sup> A prepaid card account could easily be an “asset account” that fits that definition. A “financial institution” does not even need to be a depository institution.<sup>381</sup>

Thus, it is possible that a prepaid card provider could argue that it was already “an account under paragraph (b)(1)” and is excluded from the new rules. This is not a problem for payroll and government benefits cards, which are currently (b)(1) accounts but are explicitly included in the “prepaid account” definition. But there could be other ambiguities. For example, prepaid cards that accept direct deposits of federal benefits – and are required under Treasury rules to comply with Regulation E – could argue that they are (b)(1) accounts. Or, newer nontraditional prepaid payment systems that are built around a bank account base could claim (b)(1) status.

In order to prevent evasions, the CFPB should add that the term “prepaid account” includes:

a subaccount of a master account that is not in the name of or held for the benefit of the consumer, regardless whether the subaccount is an account under paragraph (b)(1).

A subaccount/master account structure is the main feature that differentiates prepaid cards from accounts that are considered (b)(1) accounts today. While a subaccount structure should not be required to bring an account within the scope of the term “prepaid account,” an account that uses a subaccount structure should not escape the prepaid rules by claiming it was already a (b)(1) account.

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<sup>377</sup> Proposed Reg. E § 1005.2(b)(3)(i).

<sup>378</sup> However, as discussed above, campus card programs that style themselves as bank accounts should be covered by the prepaid card rules.

<sup>379</sup> Reg. E § 1005.2(b)(1).

<sup>380</sup> Reg. E § 1005.2(b)(1).

<sup>381</sup> Reg. E § 1005.2(i).

## **XI. Posting of fee schedules and account agreements on the CFPB’s and issuers’ websites.**

### **A. Post all fee schedules, including those of payroll cards.**

We support requiring prepaid card issuers to provide their terms and conditions and short- and long-form fee schedules to the CFPB for posting on a central CFPB website. We also support requiring issuers to post the same information on their own websites and to provide written copies to consumers upon request. These simple measures will have important benefits. Consumers will more easily be able to shop for cards and find their own fee schedules and agreements. Comparison websites will develop that can help consumers quickly find and compare cards. Researchers and consumer advocates will be able to compile information, spotlight positive trends, and put the floodlights on inappropriate practices. Employers, government agencies, nonprofits and other entities considering a prepaid card program will be able to see the various terms offered in the market. Competition and public scrutiny will lead to better prepaid cards.

We strongly support the proposal to require posting of all payroll card agreements and other cards offered to limited populations.<sup>382</sup> The payroll card market, in particular, is extremely secretive. Issuers and employers have refused our requests for their fee schedules. Payroll card issuers will not even provide us with fee schedules for public employers, and we have had to request those fee schedules through a time consuming and cumbersome process of submitting public records requests. Employees do not get to choose which payroll card they use. The sunshine of payroll card fee schedules would improve fees.

The impact of public scrutiny can be seen in the market for unemployment compensation prepaid cards. After NCLC began issuing reports on those cards, fees came down. Between the 2011 and 2013 reports, 18 states improved their unemployment prepaid cards by reducing fees for ATM withdrawals, balance inquiries, purchases, and other transactions.<sup>383</sup> In 2013, 18 out of 42 state cards received a “thumbs up” and only 3 cards a “thumbs down.” In 2011, 8 cards out of 40 merited a positive rating and 16 were negative.

But the research for those two reports was incredibly time consuming and difficult, even though these are public programs. We discovered that state websites even had inaccurate information at times, if they posted fee schedules at all. Reports such as ours will be easier will all of the agreements in one place and required to be accurate. Agencies researching the best also will not have to wait for a report; they can do their own research on the website.

While payroll card programs may have confidentiality clauses in their contracts with employers, those clauses do not bind employees. Once they begin issuing cards to thousands of workers, the fee schedules and agreements are not confidential. Thus, there is no legitimate purpose in keeping withholding that information from the public. But posting it in one place on the CFPB’s website will create more competition and public exposure.

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<sup>382</sup> The CFPB has various sources of authority for this requirement, including the broad EFTA purposes of providing consumer rights and promoting the informed use of electronic fund transfers and the general authority under the Dodd-Frank Act to promote competition and transparency.

<sup>383</sup> See NCLC Unemployment Prepaid Card Report, *supra*, at 2.

It is also important that complete fee schedules and agreements be posted on issuer websites. Not everyone will think to look at the CFPB's website. A consumer considering a particular card by shopping on the web should find that information in the logical place.

Consumers also need to be able to access their own agreements. Most will not save their original copy. The agreement should be accessible on the website but we also agree that consumers should be entitled to a paper copy upon request.

## **B. When amended agreements must be submitted.**

Proposed section 1005.19(b)(2) requires an issuer to submit new agreements to the CFPB only if the agreement has been substantively "amended." A change to the issuer's corporate name or name of the prepaid account is not presently considered substantive,<sup>384</sup> but it should be. A change of name impacts whether a consumer or researcher would be able to find an agreement on the CFPB's website by searching under the new name.

## **C. Submissions by "issuers" and quarterly submissions.**

### ***Identifying cards associated with companies other than the issuer.***

The proposed rule requires only the "issuer" of the card to submit the agreement. However the information gets to the CFPB, it is critical that the information on the CFPB's website be searchable not only by the name of the bank issuer but also by program manager, branding entity, employer, institution of higher education and other names that might be associated with the card. It is not clear from the proposal whether this will be the case. For example, someone searching to see whether ACE Cash Express has a prepaid card and to see that agreement should be able to search for that name and should not need to know to look for NetSpend cards. The same is true of a college or employer.

The CFPB's recent enforcement action against Continental Finance highlights the importance of being able to search for agreements along several different metrics.<sup>385</sup> The CFPB took action against a fee-harvester credit card that misrepresented charges and hit consumers with excessive fees. However, the card was issued by a credit union.<sup>386</sup> One would have to know and search for the name of the credit union in order to find the agreement in the CFPB's credit card database. Instead, it should be possible to search for the agreement using any name associated with the card.<sup>387</sup>

The CFPB has asked whether program managers that use the same agreement with multiple issuers should submit a separate agreement for each issuer.<sup>388</sup> The Bureau asked the same question about payroll card programs that use the same agreement for multiple employers. The critical question is whether a person searching for a particular agreement would be able to find it. A single agreement could be submitted as long as it is labeled and searchable in such a way that multiple names were listed

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<sup>384</sup> 79 Fed. Reg. at 77192.

<sup>385</sup> See CFPB, Press Release, "CFPB Orders Subprime Credit Card Company to Refund \$2.7 Million for Charging Illegal Credit Card Fees" (Feb. 4, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-orders-subprime-credit-card-company-to-refund-2-7-million-for-charging-illegal-credit-card-fees/>.

<sup>386</sup> See David Morrison, "Predatory Lender Met Compliance Standards: ICUL," Credit Union Times (Feb. 11, 2015), <http://www.cutimes.com/2015/02/11/predatory-lender-met-compliance-standards-icul>.

<sup>387</sup> We understand that the CFPB is in the process of enhance its' credit card database, and we hope that this functionality will be possible for credit cards as well as prepaid cards.

<sup>388</sup> 79 Fed. Reg. at 77193.

on it. Indeed, that might be preferable, as it would enable the public to see that the agreement is the same for several entities, without having to spend the time reviewing each one.

**Programs no longer offered to the public.** The proposed rules only require submission of agreements offered to the public. However, programs that still have a significant number of open accounts should also be required to continue submitting those agreements, along with a notation that the program is no longer offered. That will avoid confusion about active programs that would otherwise be absent from the database and enable comparisons between newer programs.

**Machine readable text.** We support the proposed requirement that agreements on the issuer's website be machine readable. We urge the CFPB to adopt the same requirement for information submitted to the CFPB's website. That will enable researchers and comparison websites to analyze information more easily.

#### D. De minimis exception

The proposal exempts issuers who have fewer than 3000 accounts.<sup>389</sup> We do not believe that a de minimis exception is needed or a good idea. Small issuers can have some of the highest-fee cards and need public scrutiny. In addition, abusive problems start small. Submitting the fee schedule to the CFPB is not time consuming and will not be a burden to small issuers.

#### E. Product testing exception

The proposal exempts agreements that are being used for product testing and have fewer than 3000 accounts. We agree with the CFPB's suggestion that more limits are needed to prevent evasions.<sup>390</sup> The product testing exemption should be limited to three months and it should not be available if substantially all of an employer's employees are enrolled in a payroll program.

#### F. Fee information

It is very important that the short and long forms be searchable on the CFPB's website separate from the full agreement. Many users of the database will not be interested in the lengthy terms and conditions and will only want to compare fee schedules. Some will want to compare the long forms, but many will only be interested in the short forms, which should include most of relevant fees. Users of the database should be able to separately pull up both long and short forms without having to scroll through or download long documents.

#### G. Agreements for credit features

The CFPB has expressed the expectation that issuers would submit for posting both the initial prepaid card agreement and any subsequent agreement for a credit feature.<sup>391</sup> The CFPB should codify that expectation in the rules, not simply hope that institutions will comply or remember what the explanatory materials say.

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<sup>389</sup> Proposed Reg. E § 1005.19(b)(4).

<sup>390</sup> 79 Fed. Reg. at 77198.

<sup>391</sup> 79 Fed. Reg. at 77194.

In addition, both the CFPB's website and the issuer's website should be designed so that the public can find credit agreements separately. It should not be necessary to open up every prepaid card agreement and search to see whether it contains a credit feature.

The CFPB has declined to add a comment similar to the one in Regulation Z excluding ancillary agreements from posting requirements, such as agreements for debt cancellation, debt suspension, credit insurance or other optional products.<sup>392</sup> As the CFPB has explained, these products are not relevant in the prepaid card context. In addition, if such products are attached to a prepaid card, it would be important to include them in the database, as they could be used as a way of evading the rules governing credit features. If a prepaid card does have any of those features, it should be deemed a credit card, and the agreements for the ancillary products should be submitted and searchable like other credit agreements.

In general, we agree that it is unnecessary for the Bureau to adopt an exception to posting requirements for private label prepaid cards along the lines of the provisions governing private label credit cards.<sup>393</sup> As the Bureau notes, the prepaid card equivalent of a private label credit card is a gift card, which would generally be outside the proposed rules.

However, we urge the CFPB to require posting of any gift cards that have credit features. As discussed in Section IV.H above, such cards should be considered to be "credit cards" subject to Regulation Z even if they are not covered by the prepaid card provisions of Regulation E. Such cards could also be used to evade the prepaid card rules. A general use reloadable card that is both labeled and marketed as a gift card could be used to evade the prepaid card rules. The CFPB should keep track of those agreements, make them available to the public, and adopt additional rules if necessary.

#### H. Consumer's access to their own agreements

We support the CFPB's proposal to require issuers to give consumers access to their own account agreements.<sup>394</sup> Consumers rarely will retain long terms and conditions that are full of legalese, but they should have access to them if they need them. Consumers should also be able to obtain another copy of the short and long form disclosures governing their accounts if they need them. However, we urge the CFPB to tighten up the proposed rule in several respects.

**Upon request even if posted.** First, an issuer should be required to make the consumer's agreement available "even if" not "unless" the issuer posts it on the public portion of the website.<sup>395</sup> Similarly, the issuer should be required to post the agreement on its website *and* to make the agreement available in paper form upon request, not one or the other.<sup>396</sup> The issuer should not be relieved of the requirement to provide a paper copy just because the agreement is on either the public or private portion of its website. We do not believe that the CFPB intended this result, as proposed § 1005.19(d)(2)(vi) provides that the agreements must be provided "pursuant to paragraph (d)(1)(ii) of this section must be provided in paper form unless the consumer agrees to receive the agreement electronically." However, paragraph (d)(1)(ii), which allows the consumer to request the agreement, is not a requirement; the issuer must

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<sup>392</sup> 79 Fed. Reg. at 77198.

<sup>393</sup> 79 Fed. Reg. at 77194.

<sup>394</sup> Proposed Reg. E § 1005.19(d).

<sup>395</sup> Proposed Reg. E § 1005.19(d)(1).

<sup>396</sup> *Id.*

“either” post the agreement to the website under paragraph (d)(1)(i) “or” provide the agreement on request under paragraph (d)(1)(ii).<sup>397</sup> Providing consumers the right to request a paper copy would be consistent with proposed § 1005.19(e), which excludes the requirements of paragraph (d) from the exemption the CFPB is otherwise providing from the consent requirements of the E-Sign Act.

Moreover, we interpret proposed § 1005.19(d)(vi) to require an issuer to supply a paper copy of the agreement to a consumer upon request even if the consumer has previously provided a general consent to electronic communications. That is appropriate.

**Posted even if available upon request.** Conversely, the consumer should be able to obtain her own agreement online even if the issuer also supplies it upon request. The proposed rules would not impose that requirement.<sup>398</sup> Consumers who manage their accounts online should have easy access to their account agreements. The agreement should be easily findable in a conspicuous place in the “my account” section of the website after the consumer logs in. Consumers should not have to navigate a complicated IVR menu and to wait for an agreement to be sent through the mail in order to refer to their agreement. At best, any relief from the posting requirement should be limited to small issuers.

**Posted in “my account” section even if same as public agreement.** In addition, either agreement or a link to the agreement should be posted on the password protected “my account” section of the issuer’s website even if the agreement is identical to the one currently offered to the public. Consumers who obtained their accounts in the past will not know that their agreements are the same as those currently offered. The “my account” area of the website is also where they will logically search for their agreements.

**No fee for copy of agreement.** As with requests for account histories, the CFPB should make clear that no fee may be charged for requesting a copy of one’s own agreement.

**No de minimis exception.** We agree with the Bureau that there should be no de minimis exceptions to the requirement to provide consumers a copy of their agreements, even if – or especially if – the agreement is no longer offered to public. All consumers need to have access to a legal document binding them.

## XII. The CFPB should prohibit forced arbitration and class action bans.

The CFPB’s first study found that forced arbitration clauses and class action bans are rampant in prepaid card agreements.<sup>399</sup> The second study confirmed what everyone knows: forced arbitration clauses deny consumers access to justice.<sup>400</sup> Forced arbitration clauses are primarily used to prevent consumers from obtaining any resolution of their claims. When consumers do proceed to arbitration, they are pushed into a secretive, biased and lawless forum. Arbitrators have an incentive to rule for the company that is

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<sup>397</sup> *Id.*

<sup>398</sup> 79 Fed. Reg. at 77201.

<sup>399</sup> CFPB, “Arbitration Study Preliminary Results” at 12 (Dec. 12, 2013),

[http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>400</sup> CFPB, Press Release, “CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers,”

<http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>.

in a position to bring them repeat business, not for the consumer. Arbitrators do not need to follow the facts or the law and their decisions are unreviewable. Forced arbitration clauses are not an alternative system of justice; they are a method of suppressing claims and denying access to justice altogether.

Arbitration clauses are increasingly paired with class action bans that prevent either the arbitrator or a court from ordering a company that engages in widespread violations to compensate all of its victims. Class action bans make it impossible to pursue small claims and keep millions of consumers in the dark about legal violations that injure them.

Now that the CFPB's studies are complete, it is time to act on the obvious solution. The CFPB should ban forced arbitration clauses and class action bans in prepaid card contracts and all consumer financial contracts.

### XIII. Other Section-by-Section Comments

#### A. Regulation E

##### 1. Repayment by preauthorized electronic fund transfer; right to revoke authorization - § 1005.10(e)

**Coverage of prepaid card overdraft plans.** We support the decision not to exempt overdraft credit on prepaid cards from the EFTA rule prohibiting creditors from requiring repayment by preauthorized fund transfer as a condition of credit.<sup>401</sup> As discussed above, overdraft protection is not needed on prepaid cards, and giving consumers control over how and when to repay credit will protect prepaid cards and given creditors incentives to consider ability to pay. The exemption from the compulsory use ban is not in the statute and should not apply to prepaid cards.

**Coercive incentives.** We urge the CFPB to clarify that lenders cannot use coercive incentives to obtain "consent" to preauthorized payments. As discussed in Section IV.A.3 above, some lenders conceal the right to repay by other methods in fine print or delay distributing funds if a consumer does not want to consent to preauthorized payments. Under Regulation E, a "creditor may offer a program with a reduced annual percentage rate or other *cost-related* incentive for an automatic repayment feature."<sup>402</sup> But a non-cost-related incentive, or anything more than a modest cost discount, should violate Regulation E.

**Right to revoke authorization.** The CFPB should also make clear that consumers have the right to revoke authorization of preauthorized payments. A right to revoke authorization is implicit in Regulation E today and explicit in NACHA rules, but more clarity would be helpful.<sup>403</sup> Consistent with NACHA and Regulation E rules, disclosure of the right to revoke should be part of the authorization agreement, be readily identifiable, and have terms that are clear and readily understandable.<sup>404</sup> Consumers should have the right to revoke authorization for repayment in writing, electronically or

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<sup>401</sup> Proposed Reg. E § 1005.10(e)(1).

<sup>402</sup> Official Interpretation to Reg. E § 1005.10(e)(1)-1.

<sup>403</sup> See Official Interpretation of Reg. E § 1005.10(c)-2; NCLC Consumer Banking and Payments Law §§ 5.3.7.1, 5.3.7.2.3, 5.8.4.2 (Supp. 2014).

<sup>404</sup> See Official Interpretation of Reg. E § 1005.10(b)-6; NCLC Consumer Banking and Payments Law § 5.3.1.2 (Supp. 2014).

orally<sup>405</sup> in any manner that provides the creditor with reasonable notice and opportunity to act.<sup>406</sup> The process must be as simple and accessible as possible for consumers to exercise the right.<sup>407</sup> Otherwise, creditors could obstruct the consumer's right to revoke authorization by placing huge hurdles, such as requiring a particular written form to be sent by mail to an obscure address. While such tactics likely violate Regulation E today,<sup>408</sup> clearer rules would be helpful.

***Credit lines drawn on through convenience checks.*** We support proposed Regulation E Comment 1005.10(e)(1)-3, which makes clear that the ban on compulsory use applies to any credit extended under a prepaid card line of credit, even if the consumer writes a check that accesses the plan.

## 2. “Financial institution” -- § 1005.18(a)

Proposed § 1005.18(a) imposes a duty to comply with the prepaid card rules on “financial institutions.” Proposed Regulation E Comment 18(a)-2 states that employers and third-party service providers typically do not meet the definition of “financial institution” unless they hold a prepaid account or issue a card and agree to provide electronic fund transfer (EFT) services. This comment is generally not problematic, as the issuer or its agent will have the responsibility for ensuring compliance with the rules.

However, some of the provisions of Regulation E beyond the compulsory use provision should apply to employers, government agencies, institutions of higher education and others that use prepaid cards to distribute funds. Those entities should share responsibility with the financial institution to provide disclosures. It is often the employer, for example, not the issuing bank, that will first provide information about the prepaid card to the consumer. The CFPB should add a rule under the compulsory use provision requiring an entity that uses prepaid cards to distribute wages or government benefits (or any other funds covered under the compulsory use provision, as discussed in Section VI.G) to either provide the disclosures or to ensure that a financial institution will provide them. As discussed in Section VI.B, the rule should require that the disclosures be provided 30 days before the card is issued so that the consumer has time to consider whether to use the card. That responsibility should fall on the employer or other entity that is using the card to distribute funds.

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<sup>405</sup> Just as with the right to stop payment of a preauthorized electronic fund transfer, the institution could require that an oral request be followed up with a written confirmation. See Reg. E § 1005.10(c)(2).

<sup>406</sup> This would be similar to the rules governing revocation of preauthorized ACH payments. The NACHA Operating Guidelines provide a model form for revoking authorization that “should be filled with a statement of the time and manner that notification must be given in order to provide company a reasonable opportunity to act on it (e.g., ‘In writing by mail to 100 Main Street, Anytown, NY that is received at least three (3) days prior to the proposed effective date of the termination of authorization’).” 2015 NACHA Operating Guidelines § VII, app. G at OG290.

<sup>407</sup> *Murphy v. Law Offices of Howard Lee Schiff, P.C.*, 2014 WL 710959, at \*3 (D. Mass. Feb. 26, 2014) (“If plaintiff attempted to orally cancel a payment within the applicable time period, he would have breached the terms of the payment plan, even though he was within his EFTA-conferred rights.”); *Baldukas v. B & R Check Holders, Inc.*, 2012 WL 7681733 (D. Colo. Oct. 2, 2012), *adopted by* 2013 WL 950847 (D. Colo. Mar. 8, 2013).

<sup>408</sup> Courts have found a violation of the EFTA’s anti-waiver provision when an agreement permits a consumer to stop a preauthorized electronic fund transfer only by giving written notice or prohibits the consumer from revoking authorization for a preauthorized transfer altogether. *Murphy v. Law Offices of Howard Lee Schiff, P.C.*, 2014 WL 710959 (D. Mass. Feb. 26, 2014); *Baldukas v. B & R Check Holders, Inc.*, 2012 WL 7681733 (D. Colo. Oct. 2, 2012), *adopted by* 2013 WL 950847 (D. Colo. Mar. 8, 2013); *Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995) (plaintiff stated claim under state unfair and deceptive practices statute that lender violated EFTA anti-waiver provision by falsely representing in account agreement that plaintiffs could not revoke their authorizations to have the payments transferred to the finance company’s account).

Similarly, any entity that provides a consumer with an unsolicited access device should be responsible if the rules for unsolicited issuance are violated. It may be an employer or institution of higher education that provides the consumer with the access device, even though that entity will not provide EFT services. But the rules prohibiting unsolicited issuance apply only to “a financial institution.”<sup>409</sup> As discussed in Section VI.H, those rules could be violated if the consumer is not given a choice of rejecting the device or if – under our proposal – the account to which the device is attached carries fees that should not be permitted in case of unsolicited issuance. The entity that provides the access device should also have responsibilities.

### **3. Different terms on cards with and without credit features - § 1005.18(g)**

Proposed § 1005.18(g)(2) prohibits issuers from offering different terms to consumers who do not link a credit plan to their account, other than terms that relate to extension of credit, carrying credit balance, credit availability. We support this general rule, which is essential to prevent issuers from pushing consumers into accepting credit features. The proposed rule will also prevent creditors from disguising the cost of credit in higher fees for unrelated services.

However, Proposed Regulation E Comment 18(g)-2.i explains that an issuer may offer different terms on two separate card programs, one that has the potential for a credit link and one that does not. We are concerned about this rule and urge the CFPB to consider narrowing it. Issuers could steer consumers who want to activate a credit feature to an entirely different card that has additional fees or other features. In fact, that other card could be one that is not even offered to the general public, but only to consumers who have asked about or likely to opt in for a credit feature. Or, a “deluxe” card could have more functionality, but consumers could be led to believe that they must activate the credit feature on it.

Proposed Regulation E Comment 18(g)-2 contains a partial list of terms and conditions that cannot vary between consumers who do and do not link a credit product to their prepaid card. We support the items on the list. But we urge the CFPB to add load or transfer fees to the list. Those fees could be triggered by a transfer of credit to the card, but they could also be charged if funds from an outside source were loaded or transferred onto the card. An issuer should not be permitted to charge a higher or lower fee for loading funds if the consumer selects the credit feature.

We also urge the CFPB to adopt a similar rule in Regulation Z, prohibiting different credit terms based on whether a consumer does or does not link the credit account to a prepaid card. For example, a creditor who offers credit that can be directly deposited to either a particular prepaid card or any other account should not be allowed to offer a discount if the funds are loaded onto the prepaid card.

## **B. Regulation Z**

### **1. “Open-end credit”-- § 1026.2(a)(2)**

We support the proposal to treat supposedly “courtesy” overdrafts on prepaid cards (and also on debit cards) as open-end credit under a “plan,” even though the creditor retains discretion to deny the transaction.<sup>410</sup> The consumer is committed under the account agreement to repay the overdraft and the overdraft fee. As the CFPB succinctly explains, overdraft plans are automated and are little different

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<sup>409</sup> Reg. E § 1005.5(a), (b).

<sup>410</sup> Proposed Reg. Z Comment 2(a)(2)-2.ii, iii.

from credit agreements where the creditor retains discretion to decline a given credit extension. The occasional courtesy coverage of a bounced check is largely a relic of the past. “Courtesy” overdrafts are a fiction developed to permit regulatory arbitrage and to evade credit laws.

While we agree that it is appropriate to treat overdraft “protection” plans on prepaid cards as open-end credit, we urge the CFPB to reserve judgment in other contexts about whether a series of credit extensions constitute open-end credit or a series of closed-end loans. Even if there is a supposed “plan,” it may be spurious open-end credit if the “credit line” is small and the consumer typically exhausts it with each extension, pays a flat fee instead of a periodic rate for each extension, repays each extension in a balloon payment, does not reuse the replenished credit line except after a previous extension is repaid, or does not have a device to access the credit without further approval from or interaction with the lender.<sup>411</sup>

As discussed in Section IV.A.2 above, payday lenders are moving to supposedly open-end loans in order to evade state payday loan and usury laws and to take advantage of TILA’s weaker APR disclosures for open-end credit. The CFPB should not accelerate this trend by endorsing an overly broad definition of open-end credit.

For example, we agree that prepaid card fees are imposed on “an outstanding balance” – one component of the definition of an open-end plan – if there is no specific amount financed, as discussed in proposed Comment 2(a)(20)-4.ii. But in other contexts, a finance charge that is a flat fee fixed in advance could be one element that leads to a conclusion that an extension of credit is closed-end.

On the other hand, the CFPB should also be alert to the possibility that a creditor could evade the requirements of this rule by structuring credit as a series of closed-end loans rather than as an open-end line of credit. For example, the creditor could give the consumer the option of “applying” for individual closed-end loans simply by sending a text or going online, with “instant approval” and instant delivery of funds. If this service functioned essentially as an open-end line of credit, it should be subject to the proposed rules.<sup>412</sup>

## 2. “Card issuer”-- § 1026.2(a)(7)

We support the proposed rule to consider a third party that offers an open-end credit plan accessed by a prepaid card to be an agent of the prepaid card issuer and thus a credit card issuer with responsibilities under Regulation Z.<sup>413</sup> This rule will avoid evasions by third party credit plans that are linked to prepaid cards.

As discussed above, prepaid cards have been used by payday lenders such as CheckSmart to deliver credit offered by a purportedly unrelated third party that might even have been an affiliate. The credit services organization (CSO) model of payday lending used in Texas and other states also demonstrates the dangers of viewing third parties as unrelated. Under the CSO model, the consumer must pay a huge fee to the CSO for brokering a loan from a purportedly separate “lender” that charges a modest interest

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<sup>411</sup> For a discussion of spurious open-end credit, see NCLC, Consumer Credit Regulation § 2.2.5.9; NCLC, Truth in Lending § 6.2.3.1.

<sup>412</sup> The CFPB will need to be careful before setting policy about whether a particular arrangement is open- or closed-end credit. In general, the rules for closed-end credit are more protective of consumers than the rules for open-end credit. The proposed rules would be the main exception.

<sup>413</sup> Proposed Reg. Z Comment 2(a)(7)-1.

rate. The same bifurcations and convoluted structures can develop on prepaid cards if the creditors are not held responsible for credit features they create for prepaid cards.

### 3. “Charge card”-- § 1026.2(a)(15)

We support the proposal to require prepaid cards that are charge cards to comply with the regular credit card rules giving consumers 21 days from delivery of the statement to make a payment and preventing imposition of late fees if payments received in that time frame.<sup>414</sup> The fact that charge cards impose finance charges that are not reflected by a periodic rate is immaterial to the consumer, who still needs adequate time to repay the credit.

As discussed in Section XIII.B.3, however, we believe that more cards should be categorized as charge cards.

### 4. Periodic statements -- §§ 1026.7, 1026.8

#### a) *Written credit statements are important; prohibit paper statement fees and mandatory electronic communications.*

**No exemption from written statement requirement.** We support the decision not to give prepaid card lines of credit an exemption from the Regulation Z written statements requirement.<sup>415</sup> While the consumers in the CFPB’s prepaid card focus groups expressed little interest in paper statements, that finding should not be taken as applicable to credit card statements.<sup>416</sup> There is a fundamental difference between a deposit account statement and a credit card statement: the first is for information purposes only; the second triggers a responsibility on the consumer’s part to make a payment. The CFPB itself has noted the importance of periodic statements for prepaid cards that are credit cards or prepaid lines of credit.<sup>417</sup> While many prepaid card holders may have Internet access, not all do, and others may find electronic statements inconvenient or not as useful.

A study just released by the Post Office Inspector General found that consumers overwhelmingly prefer to receive paper bills, even if they typically pay them online.<sup>418</sup> A three-month analysis of customer records from a major East Coast utility found that 91% of customers elected to receive their bills by mail. Even among younger, supposedly digitally-savvy customers, an average of 89% of customers chose paper bills. “Research shows that consumers value the physical mail piece as a record-keeping tool and

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<sup>414</sup> Proposed Reg. Z Comment 2(a)(15)-3.ii.

<sup>415</sup> 79 Fed. Reg. at 77232.

<sup>416</sup> We also question whether it is universally true for prepaid card statements. All of the participants in the CFPB’s focus groups had smartphones, but not all prepaid cardholders do. Low paper statement uptake may also be due to the fact that programs do not promote paper statements.

<sup>417</sup> In the Supplementary Information, the CFPB noted that its “proposed changes to the timing requirement for a periodic statement in § 1026.5(b)(2)(ii), the offset prohibition in § 1026.12(d) and the compulsory-use provisions in Regulation E (proposed § 1005.10(e)(1)), would allow consumers to retain control over the funds in their prepaid accounts even when a credit card feature becomes associated with that account, which is consistent with the prohibition on offsets.” 79 Fed. Reg. at 77233. Thus, meaningful periodic statements are part of the CFPB’s strategy to give consumer’s control over repayment of credit associated with their prepaid cards.

<sup>418</sup> Office of Inspector General, U.S. Post Office, “Will the Check Be in the Mail? An Examination of Paper and Electronic Transactional Mail” (Feb. 9, 2015), available at <https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006.pdf>.

reminder to pay.”<sup>419</sup> An earlier study also found that consumers were less likely to adopt paperless options for accounts where a payment is due upon receipt of the statement than for other types of accounts.<sup>420</sup>

Even if a consumer has set up automatic payments, a paper bill can still be important. It is a conspicuous notice of the amount that will be debited from the consumer’s account. The paper bill is a reminder that consumer needs to plan other payments and purchases accordingly.

***No paper statement fees or mandatory consent to electronic communications.*** The CFPB should prohibit lenders from making consent to electronic communications a condition of a credit feature and from charging fees for providing paper periodic statements under Regulation Z. While this prohibition should apply to all credit cards and open-end credit, we are particularly concerned that prepaid cardholders whose cards are linked to credit will be coerced into accepting electronic communications even if paper would serve them better.

As discussed above in Section II.D, consent to electronic communications is being required today for consumers who wish to enroll in overdraft protection. Consumers who are desperate for liquidity will do what they need to do in order to get credit. But the ability to provide an email address does not mean that electronic communications are the best way to reach the consumer.

Consumers should not be required to accept electronic communications as a condition of credit. The CFPB should prohibit such clauses. The CFPB should also prohibit fees for Regulation Z paper statements, which can also be used to coerce consent to electronic communications.

Prepaid cardholders are particularly vulnerable to the use of fees to pressure them into consenting to electronic statements. Prepaid cardholders by and large have very low incomes and little disposable income, and any fees are a hardship for them. Moreover, unlike traditional credit cards, issuers of prepaid cards that are credit cards will already have systems set up to provide for the alternative methods of providing account information that proposed Regulation E §§ 1005.18(c)(1) and (2) permit them to use. Issuers will be heavily incentivized to get their customers to consent to electronic statements, because unlike credit card issuers, most of their customers might not get paper statements. One way to compel such consent is to charge significant fees for paper statements.

The CFPB’s own research shows that consumers who are provided electronic statements for prepaid cards rarely access them.<sup>421</sup> These consumers should have the right to have paper statements without a fee. Failure to receive the information could result in late fees, unanticipated debits from the prepaid account, and negative credit reporting. No consumer should be required to pay for a disclosure that is mandated under the Truth in Lending Act.

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<sup>419</sup> *Id.* at 1.

<sup>420</sup> Emmett Higdon, eBusiness & Channel Strategy Professionals, “Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders” at 2 (Nov. 1, 2010).

<sup>421</sup> Proposed Reg. Z Comment 8(a)-2.ii.

### *b) Identification of sales transactions*

The CFPB has proposed treating as sale credit those credit transactions where a prepaid that that is a credit card (overdraft credit) is used to obtain goods or services.<sup>422</sup> Such transactions would be treated as sale credit and not as overdrafts, which would otherwise be nonsale credit. We support this treatment and agree it is more helpful to consumers when a transaction is identified by the seller's name and the location of the transaction.

For transactions that draw on a prepaid line of credit (push credit), we urge the CFPB to treat certain transactions as sale credit. These would be transactions where the extension of credit is made to fund a prepaid card; the consumer uses the funds contemporaneously to purchase a good or service at that time; and the extension of credit funds the purchase amount. This treatment is similar to proposed Comment 13(a)(3)-2.ii's treatment of whether an extension is covered for billing error purposes. In such cases, the extension of credit was made specifically to fund the purchase, and identification of the seller and location of the purchase would be helpful for the consumer.

### *c) Part credit/part prepaid transactions*

The CFPB asks whether the Regulation Z statement should identify transactions that are partially funded by a prepaid account and partially by a credit account.<sup>423</sup> We agree that it would be important to list the entire transaction practice on the credit statement – and also on the prepaid card statement – indicating that only part came from each account. Consumers who are trying to identify transactions will be confused if the amount on the statement does not match purchase.

## **5. Claims and defenses against merchants -- § 1026.12(c)**

**Overdraft credit.** Proposed Regulation Z Comment 12(c)-5 clarifies that the consumer's right under § 1026.12(c) to raise claims and defenses that the consumer has against the merchant also applies when a consumer uses overdraft credit. We support this proposed comment and believe it will protect consumers by preserving their right to be free from a holder-in-due-course type rule for credit cards, which was Congress's intent in passing 15 U.S.C. § 1666i.

**Partial transactions.** Proposed Regulation Z Comment 12(c)-5 also clarifies that, for transactions that are partly funded by the prepaid account and partly funded by credit, only the amount funded by credit is entitled to the protections of § 1026.12(c) However, Regulation E does not have a provision allowing consumers to raise claims and defenses against the creditor, so the amount funded by the prepaid account will not have any such protections. We urge the CFPB to use its authority under Section 105 of TILA to extend the claim and defenses provision to the prepaid amount in order to avoid consumer confusion. It makes no sense to permit a claim or defense against only a partial amount of a purchase simply due to the anomaly of whether there were some funds drawn from the prepaid account.

**Push credit to cover a purchase.** Proposed Regulation Z Comment 12(c)(1)-1.i states that consumers cannot raise claims and defenses against merchants for if the consumer first transfers credit to a prepaid account and then makes a purchase using the prepaid card. However, we urge the CFPB to extend claims and defenses if the extension of credit and the purchase are contemporaneous, or nearly

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<sup>422</sup> Proposed Reg. Z Comment 13(i)-4.

<sup>423</sup> 79 Fed. Reg. at 77232.

contemporaneous, and the extension of credit matches the purchase amount. This treatment is similar to proposed Comment 13(a)(3)-2.ii's treatment of whether an extension is covered for billing error purposes. In such cases, the extension of credit was made specifically to fund the purchase, and covering the purchase under § 1026.12(c) is appropriate.

## 6. Security interests and automatic payments -- § 1026.12(d)

### a) *The ban on mandatory offsets should apply to prepaid card lines of credit, including ones repaid by payroll deduction.*

The CFPB has rightfully recognized that one of the key problems with credit linked to prepaid card accounts (or frankly, linked to any asset account), is the ability of creditors to be paid immediately when new funds are deposited into the account. These creditors place themselves first in line to grab the consumer's often limited funds, before the consumer can use them to pay more critical bills, such as rent, food, and transportation expenses. This "super-priority" status is why such creditors often do not engage in a meaningful ability-to-pay analysis. They have the ability to collect, which is all they need, not assurance that the consumer has sufficient income to afford to pay necessities and the credit. Thus, the application of the rule against offsets in TILA, § 1666h and Reg. Z § 1026.12(d) is crucial for protecting prepaid card holders. We strongly support the CFPB's proposal to enforce that rule for prepaid card credit features.

We urge the CFPB to add a comment making clear that payroll deduction plans are covered by the ban on mandatory offsets and/or the Regulation E ban on compulsory use. An overdraft credit plan or a prepaid card line of credit is clearly considered a "credit card" under the proposal even if it is repaid by payroll deduction. The definitions do not turn on how the credit is repaid.<sup>424</sup> The CFPB discusses payroll deduction plans in the proposal and clearly intends to cover them: The explanatory material discusses how payroll deduction plans are treated under the rule permitting automatic payment no more frequently than monthly.<sup>425</sup>

However, it would help to prevent any doubt that the proposed offset rules apply to payroll deduction plans. A creditor could argue that a payroll deduction is neither an offset "against funds of the cardholder held on deposit with the card issuer" under Regulation Z<sup>426</sup> nor an electronic fund transfer that debits or credits a consumer's account within the scope of Regulation E.<sup>427</sup>

On the other hand, the prepaid account that accesses the credit plan is clearly an account within the scope of Regulation E, and the credit plan is within Regulation Z. Applying the rules against offset and compulsory use to this transparent evasion is clearly within the CFPB's authority to "provide for such adjustments and exceptions ... to prevent circumvention or evasion" of the provisions of the EFTA.<sup>428</sup> It is also within the CFPB's authority to set the rules for the interaction of those two accounts. Workplace loans are becoming more common and they may well interact with payroll cards. The careful rules that the CFPB has set up to protect prepaid and payroll cards could be evaded if payroll deduction plans are not covered.

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<sup>424</sup> Proposed Reg. Z § 1026.2(a)(15)(i), (vii).

<sup>425</sup> 79 Fed. Reg. at 77236.

<sup>426</sup> Reg. Z § 1026.12(d)(1).

<sup>427</sup> See Reg. E §§ 1005.2(k), 1005.3(b), 1005.10(e)(1).

<sup>428</sup> 15 U.S.C. § 1693b(c). See also 15 U.S.C. § 1604(a) (comparable language of TILA).

*b) Consumers should have a right to revoke offset payment plans.*

Under existing Regulation Z, credit card issuers are permitted to obtain the consumer's written authorization to make automatic deductions from a deposit account to repay a credit card. The CFPB has proposed new § 1026.12(d)(3)(ii) and Comment 12(d)(3)-3 to govern application of this provision to prepaid cards that are credit cards or prepaid lines of credit. In particular, the CFPB has provided that such automatic deductions cannot occur more than once per month from a prepaid account.

We support the CFPB's proposal to prohibit automatic deductions from a prepaid account more than once per month. A monthly payment is the standard for mainstream forms of credit. A specific rule has not been necessary in the credit card context, as credit cards never take payments more than once a month. But prepaid card credit features have operated more like payday loans or worse, repaid as soon as a deposit hits the account. Consequently, to ensure that consumers have a reasonable time to use the credit and a reasonable time to pay, the 30-day rule is necessary.

However, we are still concerned that the use of written authorizations for automatic deductions can still be abused, in that the authorizations will not be truly "voluntary." As discussed below, it is too easy for a creditor to obtain the consumer's signature on a document to provide for such written authorization.

To protect consumers, we urge the CFPB to make clear that consumers have the right to revoke authorization for an offset payment plan under Regulation Z. A right to revoke would complement the stop payment and revocation rights that consumers have when creditors obtain consent to repayment by preauthorized electronic fund transfer under Regulation E.<sup>429</sup> The Regulation Z ban on mandatory offsets and the Regulation E ban on mandatory electronic repayment are two sides of the same coin, both helping to maintain the sanctity of deposit accounts and both rest on a foundation of consumer choice and control. As discussed above for preauthorized electronic payments, consumers should be able to exercise the right to revoke offset authorization easily, in writing, electronically or orally.<sup>430</sup>

The CFPB should also remind creditors that the disclosures required to obtain consent to repayment by offset must be clear and conspicuous, like all Regulation Z disclosures.<sup>431</sup> As under Regulation E and NACHA rules, the disclosures, the authorization and the right to revoke for a Regulation Z offset plan should be readily identifiable with terms that are clear and readily understandable.<sup>432</sup>

The CFPB asks whether it should adopt rules to cover the situation where the consumer authorizes periodic deductions but there is not enough money to cover a payment when due. We believe the Bureau should adopt such rules to protect prepaid card holders in this situation, particularly by banning any fees for that situation as declined transaction fees, which are not permitted under Regulation Z.<sup>433</sup> In the alternative, the CFPB could use its authority to establish "additional requirements" to provide for a "right to cure" period for the limited circumstance of prepaid consumers who have authorized automatic deductions to repay credit associated with their prepaid card. The CFPB could require the creditor to provide a limited time period, such as one week, to add funds to the prepaid card account before imposing a penalty fee could be imposed. Of course, any penalty fees would be subject to the

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<sup>429</sup> See Section XIII.A.1.

<sup>430</sup> *Id.*

<sup>431</sup> Reg. Z § 1026.5(a)(1)(i).

<sup>432</sup> See Official Interpretation of Reg. E § 1005.10(c)-6.

<sup>433</sup> Reg. Z § 1026.52(b)(2)(i)(B).

limitations of Reg. Z, § 1026.52(b), i.e., a safe harbor of \$27 (or 3% of the balance if a charge card), only one fee per violation, and the fee cannot exceed the amount of the payment or portion unpaid.

***c) The CFPB should ban security interests or require they be established only using a separate account.***

In proposed Regulation Z Comment 12(d)(2)-1.iii, the CFPB establishes several specific requirements in order for a creditor to take a security interest in prepaid account funds. The Comment would require any security interest to be in a separate, signed document that refers to the specific account number of the prepaid card, the amount of funds being taken as a security interest, and the conditions for enforcing the security interest. However, in lieu of these requirements, the CFPB asks for comment on whether the Bureau should prohibit creditors from obtaining ANY security interest in prepaid accounts to prevent circumvention of the offset ban.

We would support and would urge the CFPB to ban any security interests in a prepaid account. Even with the proposed safeguards in place, it is too easy for a creditor to obtain the consumer's signature on a document in the "paper (or nowadays electronic) shuffle" of opening a prepaid account. Disclosures are a weak consumer protection tool, especially for low-income or credit-impaired consumers who might have limited financial literacy or even English-language ability. Desperate cash-strapped consumers will sign the documents that a creditor demands of them in order to access credit, even when the credit is harmful. Substantive protections are necessary to ensure that consumers are not compelled, either directly or out of ignorance or desperation, from signing away their rights.

If the CFPB is interested in permitting a truly secured credit card associated with a prepaid card, the Bureau could allow funds from a prepaid card that would be the security interest to be segregated into a different, separate account that is not a transaction account, such as a savings account. We would not object to a narrow exception for segregated accounts with funds to which the consumer does not have access until the security interest is relinquished. But the security interest should be limited to the initial deposit. The CFPB should not permit an unrestricted security interest in future deposits as currently permitted under Comment 12(d)(2)-2. This clarification would be necessary to protect consumers with prepaid cards that receive regular income streams, such as payroll or benefits cards.

Finally, the CFPB asks if it should engage in consumer testing and develop model disclosures and forms for prepaid card security interests based on the requirements in Comment 12(d)(2)-1.iii. We do not think such testing and development of model forms is necessary or helpful. The better course of action would be to ban or severely restrict security interests, and the development of model forms would just encourage such security interests.

**7. Application/solicitation disclosures**

***a) Disclosures omitted for charge cards generally should be required for charge cards accessed through prepaid cards.***

Under § 1026.60(b), charge cards are exempted from some of the disclosures required for the mandatory table for applications fixed finance charges. Among other items, charge card disclosures need not include minimum or fixed finance charges under § 1026.60(b)(3), credit insurance/debt suspension products under § 1026.60(b)(13) or the available credit line for fee harvester cards under § 1026.60(b)(14).

It is likely that many credit cards accessed through prepaid cards will not carry a periodic rate and will be considered charge cards. However, unlike conventional charge cards like the classic American Express, prepaid card charge cards have a significant possibility of imposing fixed finance charges, having fees in excess of the 15% threshold for the fee-harvester disclosure, or offering credit insurance/debt suspension. Thus, we urge the CFPB to promulgate a special provision for charge cards accessed through prepaid cards to require disclosure of these items in the applications/solicitations table.

**b) “Transaction fees”**

Proposed Comment 60(b)(4)-3 explains that fees are transaction charges, whether they be a flat per transaction fee, flat fee per day, or one-time transfer fee. Thus, these fees will be required to be listed in the required table for application/solicitation disclosures if they will be imposed on prepaid card credit card account. We support this proposed comment.

Proposed Comment 60(b)(8)-4 explains that cash advance fees include ATM fees for obtaining cash that draws on credit. The comment provides examples of how to disclose such fees. For example, if there is a \$15 overdraft fee, a \$1 ATM fee and a \$1.50 out of network ATM fee, the cash advance fee that must be disclosed is \$16 for network and \$16.50 for out of network, with the breakout between the OD and ATM fee shown. We support this proposed comment as well, and agree that disclosing the total makes it more easily understood.

#### **XIV. The CFPB Should Adopt an Anti-Evasion Rule.**

The proposed rules reflect close attention to the possibility of evasions. The CFPB has included a number of provisions or discussions aimed at ensuring compliance with the rules. Throughout these comments, we have also suggested many other places where the rules could be tightened or clarified to avoid evasions. But it is impossible to fully anticipate the creativity of those who are determined to circumvent the rules. Specific provisions will never head off every possibility.

The CFPB should include an anti-evasion provision in these rules. Even if an issuer finds a crack that arguably permits conduct that is against the spirit of the rules, the CFPB should be able to rely on an anti-evasion rule to prohibit conduct that clearly is intended to avoid compliance.

#### **XV. Conclusion**

We appreciate the complexity of this undertaking. Prepaid cards are a product that appear simple but in fact have numerous complexities underneath. The number of issues, various ways in which prepaid accounts are used, different players involved, and developing technologies all pose daunting issues for the CFPB.

The proposed rules reflect careful, detailed thought about the prepaid card market. The rules will better protect consumers when they use the products on the market today, prevent harmful practices from emerging, and provide room for the right kind of innovation that serves consumers well.

Thank you for the opportunity to comment on the proposal. We hope that our comments will help the CFPB refine and strengthen what is already a very strong proposal.