

CONSUMER FINANCIAL PROTECTION BUREAU SEEKS TO EXTEND REGULATION E TO CERTAIN PREPAID CARDS

By *Monica C. Platt*

In remarks at a May 23rd field hearing in North Carolina, the Consumer Financial Protection Bureau's ("CFPB") Director Richard Cordray announced the CFPB's intent to address consumer protection in the rapidly expanding prepaid card market. While the prepaid industry is still a relatively small part of the financial services sector, it is expected to grow more than 40 percent each year over the next two years. And, in the past three years, the two largest managers of prepaid cards have seen the number of active cards in their network double. Prepaid cards provide consumers without traditional bank accounts more options to manage their money, enabling access to funds without having to use check-cashing businesses, and allowing consumers to make purchases and bill payments electronically. Increasingly, consumers are using the cards as a way to access wages, with the largest prepaid provider reporting that direct deposits increased by nearly 70 percent last year.

As Director Cordray described it, the CFPB's focus will be on the twin goals of safety and transparency. To that end, the CFPB appears to be exploring four areas: protections in the event of loss or theft; the costs, benefits, and protections related to overdrafts; fee disclosure; and disclosure of whether the card is covered under FDIC insurance.

Director Cordray explained at the field hearing that while processors of prepaid card transactions (i.e., the major credit card issuers) often require issuers to provide protections in the event of loss or theft, these requirements are contractual and subject to change, and are weaker than protections mandated for debit and credit cards. He also expressed concern that some consumers may not understand that certain prepaid cards allow them to overdraw their balance and incur overdraft fees. Another concern is the inability

to make side-by-side comparisons of card fees and terms because there are no uniform disclosure rules, and some issuers place disclosures inside the packaging — viewable only after purchase. Lastly, not all cards are protected by FDIC insurance. To make informed choices, consumers need to know whether and how their card is protected.

To begin the regulatory process, the CFPB issued an Advanced Notice of Proposed Rulemaking ("ANPR") seeking comments and data to assist the Bureau in extending Regulation E protections to general purpose reloadable ("GPR") cards. As to the focus only on GPR cards, the ANPR explains that these require greater attention because of the rapid growth of the market, consumer use, and the lack of comprehensive federal regulation in this area.

Until 2011, implementation of the Electronic Funds Transfer Act ("EFTA") rested with the Board of Governors of the Federal Reserve System. Dodd-Frank transferred this authority to the CFPB. While Regulation E covers many types of prepaid cards to some extent, it is generally inapplicable to GPR cards. Currently, it applies to various types of electronic transfers, including those made through ATMs, point-of-sale terminals, automated clearinghouse transactions, phone bill-payment plans, and remote banking services. Most of Regulation E's requirements also apply to electronic benefit transfers from governmental agencies. It also covers payroll accounts established directly or indirectly through an employer. While the Board was asked to look at extending Regulation E to GPR cards as well, it chose not to, viewing those cards as having limited and short-term use and finding that extending the regulation would increase issuers' costs while providing little benefit to consumers.

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In 2009, the Credit Card Accountability Responsibility and Disclosure Act (“CARD Act”) amended EFTA to restrict the ability to impose certain fees and expiration dates on gift cards and gift certificates. While the Act referred to “general-use prepaid cards,” the Board noted that this did not include cards not marketed or labeled as gift cards or gift certificates. Thus, GPR cards went unregulated by the Board.

In response to the vacuum of regulation on GPR cards, the CFPB now seeks comment on exactly how to regulate this rapidly growing market. Specifically, it asks for input in the following four areas: regulatory coverage by all or part of Regulation E; product fees and disclosures; product features; and other information.

With regards to regulatory coverage, the Bureau is asking how it should define GPR cards in the context of Regulation E, and what aspects of Regulation E should apply to the cards. The CFPB also seeks to find out how to most effectively regulate prepaid cards to provide consumers with appropriate disclosures about fees and FDIC insurance, and enable them to compare cards to one another and to other financial services products that may have different fee structures. As to available features, the CFPB seeks information about the costs, benefits, and consumer protection issues related to overdraft programs, savings options, and consumers’ ability to build and improve credit. Lastly, the CFPB is looking to learn about how issuers communicate information with consumers, the burden that regulatory compliance might impose on issuers, and any other relevant information.

For the time being, it is still unclear exactly how the CFPB will regulate the prepaid market. It seems almost certain that the CFPB will require additional disclosures, made in a standardized form. Based on the ANPR, it looks as though the CFPB does not plan to shy away from regulating prepaid in other ways, particularly in light of Director Cordray’s remarks on protections for lost and stolen cards and overdraft fees. ◆

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