

MAKING PREPAID SAFE FOR CONSUMERS: A FRAMEWORK FOR PROVIDING DEPOSIT INSURANCE AND REGULATION E PROTECTIONS

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General purpose reloadable prepaid cards are part of a larger trend toward a cashless society. This market offers significant benefits to both traditional depository institutions and new non-bank entrants in the payments industry. Electronic transfers significantly reduce the costs associated with paper-based payment systems. To balance the benefits received by payment providers, consumer protections must be established to prevent consumers from becoming the sole bearers of the risks inherent in any payment system. Simple protections, those traditionally afforded to mainstream banking clients using checking accounts and debit cards, must be adopted for the GPR prepaid product to ensure long-term product safety for consumers. GPR prepaid cards are a new product, so deposit insurance should simply be extended to maintain the historical principles underlying deposit insurance. Likewise, the extension of Regulation E protections to GPR prepaid cards would simply complete work initiated by the Federal Reserve eighteen years ago. Both the EFTA and Dodd-Frank give the CFPB the authority to extend these consumer protections. Part I of this Article will provide a brief overview of the prepaid card industry and consumer use of the GPR prepaid product. In Part II, the Article outlines the gaps in the regulatory scheme for prepaid cards and highlights the initial steps federal regulators have taken to close the gaps. Part III outlines reasons for extending consumer protections to GPR prepaid cards by illustrating that consumers are unable to protect against risks inherent in GPR prepaid card programs. Finally, Part IV outlines the existing statutory provisions giving the CFPB broad authority to regulate GPR prepaid cards and includes an analysis of recent proposed legislation that would provide additional support to the CFPB's work to ensure the safety and transparency of the gen-

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eral purpose reloadable card for consumers. This section highlights the CFPB’s broad power under Dodd-Frank to regulate consumer financial products to insure the consistent application of federal consumer protection laws. Ultimately, consumer safety and transparency goals will be supported by the CFPB’s comprehensive regulation of GPR prepaid cards.

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INTRODUCTION

The general purpose reloadable (“GPR”) prepaid card is the fastest growing consumer financial product in the market. The funds loaded on GPR prepaid cards more than doubled between 2009 and 2012, growing to

\$65 billion in 2012.¹ Prepaid card payments are growing faster than credit, debit and check payments.² Of the 9.2 million prepaid card payments in 2012, 34% were made with a GPR prepaid card.³ The Federal Reserve's finding that consumers are using GPR prepaid cards and debit cards in similar types of transactions, supports the market's understanding that GPR prepaid cards are increasingly used by consumers as a substitute for a traditional checking account.⁴

Although unbanked and underbanked households in America utilize prepaid cards,⁵ GPR prepaid cards are used by a broad cross-section of Americans. With over 3.5 million Americans living in zip codes situated more than ten miles from a bank branch⁶ and with many merchants' reluc-

1. THE PEW CHARITABLE TRUSTS, WHY AMERICANS USE PREPAID CARDS: A SURVEY OF CARDHOLDERS' MOTIVATIONS AND VIEWS 1 (2014) [hereinafter PEW, WHY AMERICANS USE PREPAID CARDS], available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/PrepaidCardsSurveyReportpdf.pdf. Mercator Advisory Group, Inc. reports that the money loaded onto general purpose reloadable prepaid cards tripled from 2009 to 2012, with \$76.7 billion loaded onto the cards in 2012. Odysseas Papadimitriou, *Debit Card & Prepaid Card Market Penetration*, CARDHUB BLOG (Aug. 13, 2014, 10:23 AM), <http://www.cardhub.com/edu/market-size/>.

2. Between 2006 and 2012, consumer use of prepaid cards increased by 18.5% per year, faster than all other payment types. BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM TRENDS IN THE UNITED STATES: 2000-2012 37 & Ex. 15 (2014). First Data analyzes payment trends by payment type and offers insights on consumer spending each month. First Data's June 2014 report indicates that prepaid cards were the fastest growing non-cash payment type in terms of use and dollar volume in June 2014. *Prepaid Cards No. 1 in Growth for June*, ATM MARKETPLACE (July 14, 2014), <http://www.atmmarketplace.com/news/prepaid-cards-no-1-in-growth-for-june/>.

3. BD. OF GOVERNORS, *supra* note 2, at 37. In the Federal Reserve Study, the "prepaid card" category included private-label prepaid cards (except for transportation), general-purpose prepaid cards and electronic benefit transfer (EBT) cards.

4. *Prepaid Cards No. 1 in Growth for June*, *supra* note 2.

5. Susan Herbst-Murphy, *Improving Experience in the Prepaid Card Industry: A Customer Service Workshop*, (Fed. Reserve Bank of Phila., Payment Cards Ctr., Discussion Paper 14-01, 2014), available at <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2014/D-2014-Prepaid-Cards.pdf> (exploring the customer service challenges associated with government-sponsored prepaid card programs designed to provide previously unbanked individuals with access to electronic banking services); see also BLACK ECON. COUNCIL, ET. AL., FINANCIAL INDEPENDENCE FOR THE UNBANKED AND UNDERBANKED THROUGH PREPAID CARDS (June 26, 2012), <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0019-0059> (responding to the CFPB's request for comments, suggesting that prepaid cards, if properly regulated, could become the preferred payment instrument for households under age 25 and households at or below 120 percent of the median income line).

6. Senator Elizabeth Warren, Keynote Address at the Financial Services and the Post Office Conference (July 16, 2014), available at <http://www.pewtrusts.org/en/about/events/financial-services-and-the-post-office>; see also THE PEW CHARITABLE TRUSTS, *The Geography of Banks and Post Offices*, at 6 (July 16, 2014), <http://www.pewtrusts.org/~media>

tance to accept paper checks, Americans are forced to adjust to a changing reality about how financial services are provided.⁷ Increasingly, Americans are relying on nonbank providers of consumer financial products.⁸

Despite the increased need for payment alternatives and rapid adoption of this popular consumer financial product, the Consumer Financial Protection Bureau (“CFPB”) is just beginning to craft comprehensive federal regulation for GPR prepaid cards.⁹ The proposed regulations come af-

/Assets/2014/07/FIN_Presentation-of-Pew-Research--The-Geography-of-Banks-and-Post-Offices.pdf (“10% [of 74,000 Census tracts] do not have a bank branch within five miles of their population center”).

7. At a hearing hosted by the Senate Banking Committee on the prepaid market, Jennifer Tescher, President and Chief Executive Officer of the Center for Financial Services Innovation, described the change as follows:

Prepaid cards are virtual bank accounts, and they represent a truly new point of financial access at a time when access is diminishing. Prepaid cards function like electronic bank accounts without checks; consumers load funds on the card and, with the majority of prepaid cards, can spend only what they load.

Examining Issues in the Prepaid Card Market: Hearing Before the Subcomm. on Fin. Inst. & Consumer Prot. of the S. Comm. on Banking, Hous. & Urban Affairs, 112th Cong. 2 (2012) (statement of Jennifer Tescher, President & CEO, Center for Financial Services Innovation). See generally Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004) (arguing that technological innovation can help the poor to access financial services); STAFF OF THE BUREAU OF CONSUMER PROT., COMMENT ON ELECTRONIC FUND TRANSFERS (REGULATION E) AND GENERAL PURPOSE RELOADABLE PREPAID CARDS (2012), available at <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2012/07/ftc-staff-comment-consumer-financial-protection> (discussing the lack of protection in some of the prepaid card payment methods).

8. Warren, *supra* note 6 (“Twenty-eight percent of all households, 68 million people rely on nonbank financial services like check cashing or payday lending and the costs of these services [are] extraordinary.”). At the conference, Sen. Warren expressed her support for a proposal to use the U.S. Postal Service to offer financial services to consumers who do not use traditional, mainstream banking accounts.

9. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102 (proposed December 23, 2014) (to be codified at 12 C.F.R. pts. 1005 and 1026); Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at Prepaid Cards Field Hearing (May 23, 2012) (transcript available at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-prepaid-cards-fieldhearing>) (stating that federal regulation does not reach GPR prepaid cards); Press Release, Senator Carolyn B. Maloney, Maloney: 5 Years Later, Credit CARD Act Has Saved Consumers Billions (May 22, 2014) (“I also believe we must take a look at the growing use of prepaid cards, which are not subject to comprehensive federal regulations. I am hopeful that my colleagues in Congress will work with me to build on the great success of the Credit CARD Act with additional protections.”); see also *Developing the Framework for Safe and Efficient Mobile Payments: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 2 (2012) (statement of Sandra Braunstein, Dir., Div. of Consumer Cmty. Affairs, Bd. of Governors of the Fed. Reserve) (explaining the use of the mobile phone to make payments that are charged to a credit card or withdrawn from a bank account); Philip Keitel, *Federal Regulation of the Prepaid Card Industry: Costs, Benefits and Changing Industry Dynamics* (Fed. Reserve Bank of Phila., Payment Cards Ctr.,

ter nearly two years of concentrated efforts to study the GPR prepaid market. In May 2012, the CFPB issued an Advanced Notice of Proposed Rulemaking (“ANPR”) seeking information about a variety of topics related to the prepaid market.¹⁰ A few days after issuing the ANPR, at a town hall meeting in Durham, North Carolina, community leaders and the prepaid industry offered insights about the market and consumer use of prepaid cards.¹¹ The wealth of information gathered by the CFPB after the town hall meeting about consumer reactions to the fee disclosure forms and industry viewpoints articulated in comments to the ANPR,¹² along with empirical studies conducted by other federal agencies,¹³ will inform the

Discussion Paper 11-03, Apr. 8-9, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908336 (summarizing the presentations about the prepaid card industry).

10. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30923, 30923-30925 (proposed May 24, 2012) (to be codified at 12 C.F.R. 1005). The CFPB received approximately 225 comments in response to the ANPR on prepaid cards. The comments submitted in response to the ANPR may be viewed at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dt=PS;D=CFPB-2012-0019>.

11. See *Live From Durham, NC!*, CONSUMER FIN. PROT. BUREAU (May 23, 2012), <http://www.consumerfinance.gov/blog/live-from-durham-nc/> (summarizing a field hearing on prepaid cards).

12. The CFPB field-tested a variety of prepaid disclosures aimed at providing a uniform disclosure of fee information for consumers. Eric Goldberg, *Prepaid Cards: Help Design a New Disclosure*, CONSUMER FIN. PROT. BUREAU (Mar. 18, 2014), <http://www.consumerfinance.gov/blog/prepaid-cards-help-design-a-new-disclosure/> (including pictures of the model disclosure boxes); Mike Ferullo, *CFPB Testing Uniform Fee Disclosures for Prepaid Cards: Proposal Due Late Spring*, BLOOMBERG BNA BANKING DAILY (Mar. 19, 2014). Green Dot and others tested the disclosure boxes. See, e.g., Pat Dulnier, *Prepaid Debit Card Issuers to Test Fee-Disclosure Box*, BANKCREDITNEWS (Mar. 14, 2012), <http://bankcreditnews.com/news/prepaid-debit-card-issuers-to-test-fee-disclosure-box/> (discussing the motivation behind fee disclosure boxes).

13. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2014 [hereinafter, BOARD OF GOVERNORS, MOBILE FIN. SERVICES], (2014), <http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf>; BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS (2014) [hereinafter, BOARD OF GOVERNORS, REPORT TO CONGRESS], http://www.federalreserve.gov/publications/files/2014_Prepaid_Cards_Final.pdf (reporting as required annually by Section 1075 of the Dodd-Frank Act, providing Congress with detailed statistics about cards used for a variety of federal and state government benefits); STAFF OF THE BUREAU OF CONS. PROT., IN THE MATTER OF REQUEST FOR COMMENT ON ADVANCE NOTICE OF PROPOSED RULEMAKING ELECTRONIC FUND TRANSFERS (REGULATION E) AND GENERAL PURPOSE RELOADABLE PREPAID CARDS (2012), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-consumer-financial-protection-bureau-concerning-electronic-fund-transfers/120730cfpbstaffcomment.pdf; Susan Herbst-Murphy, *Improving Experience in the Prepaid Card Industry: A Customer Service Workshop* (Fed. Reserve Bank of Phila., Payment Cards Ctr., Discussion Paper 14-1, 2014),

CFPB's evaluation of the need for comprehensive regulation. While waiting for the agency action, The Pew Charitable Trusts published several reports detailing various aspects of the prepaid market.¹⁴ In addition, The Pew Charitable Trusts and the Center for Financial Services Innovation have both collaborated with industry leaders to bring changes to the market in advance of the proposed rulemaking.¹⁵

Market driven reforms in recent years by industry leaders clearly have benefitted consumers, but comprehensive regulation is needed to ensure long-term product safety for consumers.¹⁶ The CFPB exercised its clear au-

cards-center /publications/discussion-papers/2014/D-2014-Prepaid-Cards.pdf; Philip Keitel, *A Prepaid Case Study: Ready Credit's General-Purpose & Transit-Fare Programs* (Fed. Reserve Bank of Phila., Discussion Paper, 2012), available at <http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussionpapers/2012/D-2012-April-Ready-Credit.pdf> (describing the business model to market both transit and general use prepaid cards outlined by Ready Credit Corporation at an August 22, 2011 workshop); Zhu Wang & Alexander L. Wolman, *Payment Choice and the Future of Currency: Insights from Two Billion Retail Transactions* (Fed. Reserve Bank of Richmond, Working Paper 14-09, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2420420 (using three years of detailed transactional data from a specific merchant to forecast a decline in the need for currency).

14. THE PEW CHARITABLE TRUSTS, CONSUMERS CONTINUE TO LOAD UP ON PREPAID CARDS: CHANGES IN GENERAL PURPOSE RELOADABLE PREPAID CARDS MAKE THEM MORE LIKE CHECKING ACCOUNTS BUT WITHOUT IMPORTANT PROTECTIONS (2014) [hereinafter PEW, CONSUMERS CONTINUE TO LOAD UP], http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/PrepaidCardsStillLoadedReportpdf.pdf (providing a comprehensive review of the features on general purpose reloadable prepaid cards); THE PEW CHARITABLE TRUSTS, LOADED WITH UNCERTAINTY: ARE PREPAID CARDS A SMART ALTERNATIVE TO CHECKING ACCOUNTS (2012) [hereinafter, PEW, LOADED WITH UNCERTAINTY], http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/PrepaidCheckingreportpdf.pdf?la=en (surveying the various fee structures and disclosures for general reloadable prepaid cards); PEW, WHY AMERICANS USE PREPAID CARDS, *supra* note 1.

15. In June 2012, the Center for Financial Services ("CFSI") issued a "Compass Guide to Prepaid" outlining four principles or guidelines for improving the quality of the general-purpose reloadable prepaid product. The principles include: (1) Embrace Inclusion; (2) Build Trust; (3) Promote Success; and (4) Create Opportunity. The CFSI also outlined practices, at three different levels, that will uphold the four principles. See Beth Brockland & Romy Parzick, *The Compass Guide to Prepaid*, CENTER FOR FINANCIAL SERVICES INNOVATION (2012), <http://www.cfsinnovation.com/CMSPages/GetFile.aspx?guid=d5fbc416-f7c3-40b7-b102-e6a26f1746f7> (providing an expanded explanation of the principles). VISA, the largest network participant in the general reloadable prepaid card industry, announced a program designed to identify general reloadable prepaid cards that meet or exceed a set of consumer protection measures suggested by consumer advocates. See *Visa Elevates Prepaid Cards to New Level of Simplicity, Protections and Opportunity*, VISA (June 3, 2014), available at <http://investor.visa.com/news/news-details/2014/Visa-Elevates-Prepaid-Cards-to-New-Level-of-Simplicity-Protections-and-Opportunity/default.aspx> (announcing an effort to improve cards by providing a "stamp of approval" for cards that meet certain requirements).

16. Cf. Mark Budnitz, et al., *Deceptive Claims for Prepaid Telephone Cards and the*

thority under the Electronic Fund Transfer Act (“EFTA”) to amend Regulation E¹⁷ to require certain disclosures for GPR prepaid cards, to establish procedures for error resolution and to set limits on consumer liability for unauthorized transactions.¹⁸ However, in addition to Regulation E protections included in the proposed regulations, the CFPB should use its authority under Dodd-Frank to require federal deposit insurance for funds loaded on GPR prepaid cards. Hopefully, the CFPB will safeguard consumers’ use of this new consumer financial product by issuing regulations requiring these basic protections.

Part I of this Article will provide a brief overview of the prepaid card industry and consumer use of the GPR prepaid product. In Part II, the Article outlines the regulatory gaps for prepaid cards and highlights the initial steps federal regulators have taken to close the gaps. Part III outlines reasons for extending consumer protections to GPR prepaid cards by illustrating that consumers are unable to protect against risks inherent in GPR prepaid card programs. Finally, Part IV outlines the existing statutory provisions giving the CFPB broad authority to regulate GPR prepaid cards and includes an analysis of recent proposed legislation supporting the CFPB’s work to ensure the safety and transparency of the general purpose reloadable card for consumers. This section highlights the CFPB’s broad power under Dodd-Frank to regulate consumer financial products to insure the consistent application of federal consumer protection laws. Ultimately, consumer safety and transparency goals will be supported by the CFPB’s comprehensive regulation of GPR prepaid cards.¹⁹

Need for Regulation, 19 LOY. CONSUMER L. REV. 1 (2006) (calling for federal regulation of telephone prepaid cards based on consumer experiences with the telephone prepaid market and finding that because consumers did not have adequate information to protect themselves due to ineffective or lack of disclosures and the inability of the industry to engage in effective self-regulation, national regulation establishing a floor for disclosures and substantive protections and consumer remedies should be established).

17. Regulation E, promulgated under the Electronic Funds Transfers Act, provides a fairly comprehensive regulatory scheme for consumer electronic payments. Debit card payments and other non-card based electronic payments are subject to the regulation if a consumer account is utilized.

18. See generally Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77 (2013) (discussing the internet and mobile payments and outlining the regulatory gaps for payment systems utilizing mobile technologies); Air M. Cohen, Note, *Protecting the Underserved: Extending the Electronic Fund Transfers Act and Regulation E to Prepaid Debit Cards*, 5 BROOK. J. CORP. FIN. & COM. L. 215 (2010). Cf. Todd J. Zywicki, *The Economics and Regulation of Network Branded Prepaid Cards*, 65 FLA. L. REV. 1477 (2013) (claiming that consumer protection concerns are minimal); Sarah Jane Hughes, *Federal Payroll, Gift and Prepaid Card Developments: FDIC Deposit Insurance Eligibility and the Credit CARD Act of 2009*, 65 BUS. LAW. 261 (2009) (outlining federal standards established to preempt state laws regarding the regulation of prepaid cards).

19. Cordray, *supra* note 9 (federal regulation does not reach GPR prepaid cards)

I. OVERVIEW OF THE PREPAID INDUSTRY

General purpose reloadable prepaid cards have become a popular payment product in recent months.²⁰ Chase, American Express, NetSpend, Green Dot and Wal-Mart are just a few of the entities offering a GPR prepaid card.²¹ GPR prepaid cards are associated with a payments network, Visa, MasterCard or American Express, and can be used at any location accepting cards on that network.²² The Federal Reserve Bank of Boston's bi-annual Survey of Consumer Payment Choice evidences the growth in the prepaid market. The survey reveals that one-third of those surveyed in 2010 had a "prepaid card" and that they loaded the card two times a month with an average of \$79.²³

A. *Defining the GPR prepaid card*

General purpose reloadable prepaid cards are part of a large prepaid industry. Prepaid products may be structured for particular markets including travel, health, campus or government benefits.²⁴ This Article focuses on the open loop card, identified in the CFPB's ANPR, funded initially with government benefits from a federal or state agency, with pay from an employer or with cash from the cardholder/consumer. The card is re-

("Over the course of this rulemaking [on prepaid cards], we are going to focus on two key issues: safety and transparency.").

20. Press Release, Senator Mark Warner, Sen. Warner Urges Banks to Offer Better Consumer Protections for Users of Prepaid Cards (January 9, 2014), http://www.warner.senate.gov/public/index.cfm/mobile/pressreleases?ContentRecord_id=12c3bb8b-22fc-4692-8c37-3fd30526555d ("At nearly \$700 billion in sales each year, prepaid cards are one of the fastest growing parts of the financial industry.").

21. Chase refers to its GPR prepaid card as "Liquid" and views these customers as important members of the Chase family; Bank of America, in contrast, elected to adopt a special bank account rather than invest in a GPR prepaid card program. Michael Corkery & Jessica Silver-Greenberg, *Lenders Offer Low-Cost Services for the Unbanked*, N.Y. TIMES (July 22, 2014), http://dealbook.nytimes.com/2014/07/22/offering-small-fees-banks-cater-to-low-income-customers/?_r=0.

22. GPR prepaid cards and open-loop cards are distinct from their cousin, the closed loop or non-reloadable prepaid card. The latter can be used only at a specific store or chain, such as Target or Walgreens. Generally, non-reloadable prepaid cards are issued in small denominations and given as graduation, birthday and holiday gifts.

23. KEVIN FOSTER, ET. AL., FED. RESERVE BANK OF BOSTON, THE 2010 SURVEY OF CONSUMER CHOICE, RESEARCH DATA REPORT NO. 13-2, at 25, 37, 58, (2013), available at <http://www.bostonfed.org/economic/rdr/2013/rdr1302.pdf>.

24. Mercator Advisory Group's review of the industry suggests that there may be as many as eleven different categories of closed and open loop prepaid cards and sixteen different market segments for open loop prepaid cards. MERCATOR ADVISORY GROUP, DEBUNKING MYTHS OF PREPAID 12 (2013), <http://www.paymentsjournal.com/Download.aspx?id=16813>.

loadable automatically through direct deposit (e.g., an electronic transfer of weekly payroll), or at a retail location participating in the network.²⁵ Some GPR prepaid programs are experimenting with reloads using remote deposit capture technology. After loading, the GPR prepaid card is used for recurring household expenses such as groceries, rent and utilities, or for unexpected transactions such as a car repair. This Article focuses on GPR prepaid cards, used or marketed for use as a substitute for a traditional checking account and drawing on funds in an account maintained with a bank or a non-bank entity whenever the card or its sixteen-digit number (or other code) is used to authorize a transaction.²⁶

25. Lewis Goodwin, Chief Executive Officer, Green Dot Bank, Testimony at the Emerging Payments Task Force of the Conference of State Bank Supervisors (May 16, 2014), available at <http://www.csbs.org/regulatory/ep/Pages/phmay16.aspx> (explaining a new real-time program allowing consumers to reload a Green Dot prepaid card).

26. Popular examples include Chase's Liquid Card and American Express's Bluebird card. At this time, prepaid cards may be used in a brick and mortar store, online, or to fund expenditures within a mobile application. Starbucks' mobile application is an example of a mobile application allowing customers to use funds loaded onto a closed loop, reloadable prepaid card. See, e.g., Braden Lammers, *Why Your Starbucks Card is a Threat to Banks*, BUSINESS FIRST, (March 17, 2014), <http://www.bizjournals.com/louisville/news/2014/03/17/why-your-starbucks-card-is-a-threat-to-banks.html> (citing an Accenture report that banks' market share might be "up for grabs" as consumers shift to digital banking products).

However, variations using mobile technology closely resemble transactions utilizing a physical GPR prepaid card in the current market. For example, a GPR prepaid card could be linked to Google Wallet, Skrill or Square in the same manner that one links a debit card, credit card or bank account. In this instance, the funds loaded onto the GPR prepaid card, bearing a network logo (VISA, MasterCard, Discover or American Express), are still the payment mechanism. Whether used online, within a mobile app, or in conjunction with close-proximity technologies in a brick and mortar store, the funds loaded on the card are used to settle the transaction. Any anticipated regulations should apply in these contexts because the funds loaded onto the card are still the funding source for the transaction.

In contrast, some online (or brick and mortar) transactions are (or will be) funded with money held by a non-bank, such as PayPal or Dwolla. In these instances, the consumer places funds into a PayPal account and uses those funds over a period of time to make online purchases. Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEXAS L. REV. 681, 696 n.88 (2005) (outlining the regulatory gap when an online account used to fund an online purchase transaction with a credit card, loaded funds or the consumer's bank account). Currently, the contractual relationship between the consumer and the non-bank entity govern the error resolution procedures and liability limits for unauthorized use. In some instances, these contracts state that the funds in the account are not protected by FDIC insurance. These relationships might be subject to any rules issued in response to the ANPR. As articulated by Professor Ramasastry:

To the extent that P2P funds transfers out of non-bank accounts are covered, it is hard to distinguish between a prepaid debit card and a PayPal funds transfer. In both, consumers are accessing a funded account (one linked to a device, the other stored online) to pay for goods and services Is there really a distinction to be made between a PayPal account and a prepaid debit card?

A GPR prepaid card may be acquired in a matter of minutes without the need for an extensive credit check. A card-based payment is convenient because sufficient amounts of cash may be difficult or risky to carry or because the consumer frequents merchants unwilling to accept paper checks. The cards offer easy access to funds to pay bills or to make purchases at a local vendor or online. Some cards give cardholders access to cash at an ATM. For the unbanked, the GPR prepaid cardholder eliminates the need to frequent a check-cashing store. Thus, in many ways, the GPR prepaid card provides a convenient payment mechanism in this cashless society.²⁷

From the funding perspective, GPR prepaid cards usually represent a low cost mechanism to distribute funds and eliminate many of the costs associated with distributing those funds. Increasingly, employers are offering direct deposit to a prepaid card account.²⁸ Likewise, government benefits offered by federal and state agencies, including unemployment, social security, veterans' benefits, Temporary Assistance for Needy Families, ("TANF") and Supplemental Nutrition Assistance Program ("SNAP") benefits, are made often times electronically, requiring that the recipient have a means to accept the benefits.²⁹ The GPR prepaid card issued by the government agency or another approved issuer eliminates the costs associated with mailing. Although some cards do not have stated limits, most GPR

Anita Ramasastry, *Confusion and Convergence in Consumer Payments: Is Coherence in Error Resolution Appropriate?* 83 CHI.-KENT L. REV. 813, 852 (2008).

27. DAVID WOLMAN, *THE END OF MONEY: COUNTERFEITERS, PREACHERS, TECHIES, DREAMERS—AND THE CASHLESS SOCIETY* (2012); Tu, *supra* note 18, at 77-78 (discussing the internet and mobile payments and outlining the regulatory gaps for payment systems utilizing mobile technologies).

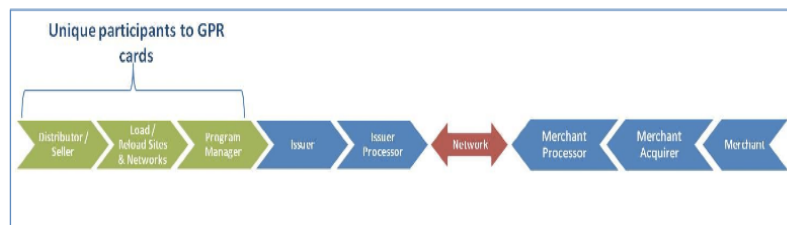
28. Indeed, it would be a violation of the Electronic Funds Transfers Act to require employees to accept wages on a prepaid card selected by the employer. 15 U.S.C. § 1693k. Thus, prepaid must be one of the options available for payroll. The Act, however, does not prohibit an employer limiting the prepaid option to an issuer selected by the employer.

29. GPR prepaid cards are also used by colleges and universities as a mechanism to disburse financial aid funds. ROHIT CHOPRA, CONSUMER FIN. PROT. BUREAU, *BANKING ON CAMPUS FORUM*, slide 2 (2013), http://files.consumerfinance.gov/f/201309_cfpb_banking-on-campus-forum.pdf (describing the agency's findings from a 2012 Request for Information Regarding Financial Products Marketed to Students Enrolled in Institutions of Higher Learning). Loan proceeds have been issued on prepaid cards in other contexts as well. The OCC took enforcement action against a Florida bank when it issued prepaid cards loaded with funds from a payday loan. They explained that the arrangement between the bank and the payday lender presented a risk to the bank and issued Agreement by and Between Urban Trust Bank, Lake Mary, Florida and the Office of the Comptroller of Currency, No. 2012-190 (July 18, 2012) [hereinafter, *Urban Trust Bank Agreement*], available at <http://www.occ.gov/static/enforcement-actions/ea2012-190.pdf>. See also Sheryl Harris, *OCC smacks bank for issuing prepaid cards for payday lender: Plain Dealing*, CLEVELAND.ORG (Sept. 12, 2012), http://www.cleveland.com/consumeraffairs/index.ssf/2012/09/occ_smacks_bank_for_issuing_pr.html.

prepaid cards allow a cardholder to carry a balance of \$10,000 and two cards have a maximum value load of \$15,000.³⁰ While the card balances could be high, most cards set daily load limits (generally between \$2000 and \$5000), single transactions (up to \$5000), cash withdrawal limits from ATMs (many set at \$500) and in-person cash withdrawal limits (between \$400 and \$5000).³¹

There are numerous participants in a GPR prepaid card chain.³²

Figure 1: The GPR Prepaid Card Value Chain



*Figure 1*³³

A diagram, Figure 1 above, illustrates the relationships between the various bank and non-bank entities involved in the typical prepaid card program. In addition to the card issuer, payment network, merchant acquirer and processor present in any credit or debit card program, prepaid card programs

30. Douglas King, *Have Anti-Money Laundering Measures Kept Pace with Rapid Growth of GPR Prepaid Cards?* 1, 8 (Fed. Reserve Bank of Atlanta, Retail Payments Risk Forum Working Paper, 2013), https://www.frbatlanta.org/-/media/Documents/rprf/rprf_pubs/130117wp.pdf?la=en (“Of the thirteen programs that disclose a maximum card value, eleven of these programs have a maximum that is \$10,000 or less and two programs have a maximum of \$15,000. Of the two programs that do not disclose a card value limit, one program’s cardholder terms and agreement states that ‘the maximum value of your card may be restricted.’”).

31. For a full discussion of these features, see PEW, *CONSUMERS CONTINUE TO LOAD UP*, *supra* note 14.

32. Philip Keitel, *Insolvency Risk in the Network-Branded Prepaid-Card Value Chain* 1, 4 (Fed. Reserve Bank of Phila. Payments Card Center, Discussion Paper, 2011) (reporting on a workshop to examine the risk of insolvency in the prepaid marketplace), <https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2011/D-2011-September-NBPCA-Keitel.pdf>; FINANCIAL ACTION TASK FORCE, *GUIDANCE FOR A RISK BASED APPROACH: PREPAID CARDS, MOBILE PAYMENTS AND INTERNET-BASED PAYMENT SERVICES* 6 (2013), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/guidance-rba-npps.pdf> (making recommendations to ensure that prepaid cards are not used for anti-money laundering and terrorist financing).

33. King, *supra* note 30, at 3 (Figure 1 from this working paper is part of a full discussion about the relationships between the participants and various risks in a prepaid card program).

also rely on a program manager, a distributor and a retailer for the issuance of the cards. While non-bank entities initially led the development of this product, major banks are now some of the largest issuers of GPR prepaid cards.³⁴ Bank participation in this industry increased after the Durbin Amendment to the Dodd Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) limited fee revenues from debit cards.³⁵ Exemptions in Dodd-Frank for general purpose reloadable prepaid cards³⁶ allow traditional banks to recoup revenues lost under the Durbin Amendment by charging higher interchange fees on prepaid card transactions.³⁷ Given the significant growth in the market in recent months and changing de-

34. *Find the Best Prepaid Debit Card for You*, BANKRATE.COM (Aug. 13, 2014, 3:58 PM), <http://www.bankrate.com/finance/banking/best-prepaid-debit-cards.aspx>.

35. See Zywicki, *supra* note 18, at 1494 & n.94.

36. The Durbin Amendment defines a “general-use prepaid card” as:
a card or other payment code or device issued by any person that is—
(i) redeemable multiple, unaffiliated merchants or service providers, or automated teller machines;
(ii) issued in a requested amount, whether or not that amount may, at the option of the issuer, be increased in value or reloaded if requested by the holder;
(iii) purchased or loaded on a prepaid basis; and
(iv) honored, upon presentation, by merchants for goods or services, or at automated teller machines.

15 U.S.C. § 1693l-1(a)(2)(A) (2014); Fumiko Hayashi & Emily Cuddy, *General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees and Fraud Risks* 3 n.4 (Fed. Reserve Bank of Kansas City, Research Working Paper 14-01, 2013) (“Regulation II . . . caps debit card interchange fees received by large financial institutions. Certain types of prepaid cards, such as reloadable prepaid cards, are exempt from this interchange fee cap.”). Dodd-Frank exempts cards from the interchange fee rules (1) if the issuer and its affiliates have assets of less than \$10 billion; (2) the prepaid card is provided to a person pursuant to a government payment program and the cardholder can only access the funds or (3) it is a “reloadable general-use prepaid card” with certain characteristics. 12 C.F.R. § 235.5. Specifically, the “reloadable general-use prepaid card” is exempt if it is:

Not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis);
Reloadable and not marketed or labeled as a gift card or gift certificate; and
The card is the only means of access to the underlying funds, except when all remaining funds are provided to the cardholder in a single transaction.

12 C.F.R. § 235.5(c) (2014). Accordingly, the card cannot be used for ACH or remittance transactions. However, all cards, including GPR prepaid cards, are subject to the routing and exclusivity rules in Dodd-Frank.

37. See generally Todd J. Zywicki, Geoff A. Manne & Julian Morris, *Price Controls on Payment Card Interchange Fees: The U.S. Experience* 18-20 (George Mason Law & Econ. Research Paper No. 14-18, 2014), available at <http://ssrn.com/abstract=2446080> (outlining the various indirect strategies taken by banks to recoup revenues lost after the Durbin Amendment) and Brad G. Hubbard, *The Durbin Amendment, Two-Sided Markets, and Wealth Transfers: An Examination of Unintended Consequences Three Years Later* 48-57 (May 20, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2285105>.

mographics, the GPR prepaid card is likely to become an increasingly important consumer financial product.³⁸

B. Demographics of the GPR Prepaid Card User

GPR prepaid cards appeal to a broad cross-section of American households.³⁹ Across all income levels, American households are using the GPR prepaid card for a variety of purposes. Many households utilize the cards as a substitute for a checking account.⁴⁰ The card offers a secure mechanism to receive a paycheck and pay bills without incurring predatory check-cashing fees, money order fees or overdraft charges. Some households utilizing the GPR prepaid card in this fashion are characterized as unbanked or underbanked.⁴¹ With the number of unbanked and underbanked households rising to over 28% of U.S. households—nearly sixty eight million adults—the prepaid market offers low-cost or no-cost accessibility to funds.⁴² While some GPR prepaid cardholders do not qualify for a traditional checking account, major bank issuers express a hope that these customers will become “regular” bank customers.⁴³ Given

38. See generally, Susan Herbst-Murphy & Greg Weed, *Millennials with Money: A New Look at Who Uses GPR Prepaid Cards* 1 (Fed. Reserve Bank of Philadelphia, Payment Cards Ctr. Discussion Paper No. 14-3, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494406 (reporting on market surveys that suggest a “strong and growing” GPR prepaid card market skewed “heavily to younger consumers”).

39. According to The Pew Charitable Trusts, prepaid card users are less likely to be married, but more likely to be renters, earn less than \$25,000, be African American and be younger than 50 years of age. PEW, WHY AMERICANS USE PREPAID CARDS, *supra* note 1, at 3.

40. See Gadi Dechter & Joe Valenti, *It's Time to Regulate Prepaid Cards as Bank Accounts*, AM. BANKER (Nov. 29, 2012), <http://www.americanbanker.com/bankthink/its-time-to-regulate-prepaid-cards-as-bank-accounts-1054698-1.html> (acknowledging that prepaid cards are effectively bank accounts).

41. Describing this market, Director Cordray stated:

[About 9 million American families] are known as the ‘unbanked.’ . . . Another 21 million are the so-called ‘underbanked’—although they actually have a bank account, they often use nonbank products to meet their financial needs. But these are just labels. The tens of millions of Americans who bear these labels are just hard-working people living paycheck to paycheck . . .

Cordray, *supra* note 9. For a map identifying the location of unbanked and underbanked households in America, see Ethan Geiling, *The Most Unbanked Places in America*, INCLUSIVE ECON. BLOG (Dec. 14, 2011, 4:00 PM), http://cfed.org/newsroom/experts/ethan_geiling/the_most_unbanked_places_in_america/index.html.

42. FED. DEPOSIT INS. CORP., 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 4 (2012) (reporting that seventeen million adults are unbanked and fifty one million adults are underbanked).

43. See Constance Gustke, *Do Big-Bank Prepaid Cards Lead the Pack?*, BANKRATE.COM (April 7, 2014), <http://www.bankrate.com/finance/banking/do-big-bank->

the ongoing policy concerns related to “unbanked and underbanked households,” the GPR prepaid card, with proper consumer protections, could serve as a mechanism to move households from “unbanked” to “banked.”

The phrase “unbanked or underbanked” may also refer to millennials who have not yet established a formal relationship by opening a checking account and obtaining a debit card with a traditional financial institution. These individuals may not wish to place routine expenses on a credit card, but they need “plastic” to make purchases online or at retailers who do not accept cash.⁴⁴

As the prepaid market matures, a variety of new uses will become available. The merger of prepaid cards and mobile services will undoubtedly create opportunities for a variety of financial services. Within the mobile environment, the GPR prepaid card could become a virtual card accessible from the mobile device or used as the funding source at the time of checkout. Although the Federal Reserve’s 2014 Payment Study reveals that only 5% of mobile payment users linked a mobile application to a GPR prepaid card, consumer concerns about payment security might increase the likelihood that prepaid cards, rather than debit cards or credit cards, are linked to a mobile application.⁴⁵ This will allow consumers to enter the mobile environment with more confidence and provide further avenues for growth of the prepaid industry.

C. Consumer use of GPR Prepaid Cards

The 2013 Federal Reserve Payments Study, released on July 24, 2014, contains the most recent statistics about the use of prepaid cards in the United States.⁴⁶ The study is particularly insightful due to its focus on

prepaid-cards-lead-the-pack.aspx (stating that, according to a Consumers Union staff attorney, consumers are turning to prepaid cards due to financial difficulty).

44. Studies confirm that most prepaid card households use a GPR prepaid card *in addition* to a traditional checking account to manage the household finances. PEW, WHY AMERICANS USE PREPAID CARDS, *supra* note 1, at 4, 7 (observing that 59% of prepaid card users also have a checking account and noting that of those 59%, 77% consider their checking account as their primary mechanism for managing money); *see also* Ann Carrns, *Prepaid Debit Cards May Augment Bank Accounts*, N.Y. TIMES, Feb. 8, 2014, at B5 (citing PEW, WHY AMERICANS USE PREPAID CARDS, *supra* note 1, to illustrate that many prepaid card users have a checking account). If the household utilizes both a checking account and a prepaid card, the prepaid card may be a budgeting mechanism offering the ability to limit spending in different categories, a financial education tool for teens in the household or a mechanism to send funds to college-age children living away from home.

45. BOARD OF GOVERNORS, MOBILE FIN. SERVICES, *supra* note 13, at 20.

46. BD. OF GOVERNORS, *supra* note 2. Initiated in 2001, this is the fifth installment of the Federal Reserve’s triennial study on payments. The Federal Reserve collects data from several surveys and captures business and consumer payments with a variety of payment

noncash payments. When conducting the study, the Federal Reserve distinguishes between credit cards, debit cards, prepaid cards carrying a network brand, electronic benefit transfer cards (with government benefits) and private label prepaid cards, typically issued by merchants and “only for use at locations owned by the issuing business.”⁴⁷ Based on a review of the estimated 159.1 million GPR prepaid card in force during 2012, each prepaid card averages 10 payments per month.⁴⁸ Moreover, a graph from the report, Figure 2 below, showing the distribution of payments based on the amount of the transaction, indicates that prepaid card use mirrors debit card use during the applicable period, thus further supporting the observation that consumers view GPR prepaid cards as a near substitute for the debit card connected to the traditional checking account.⁴⁹

Exhibit 7: Relative frequency of transaction value ranges in 2012, by general-purpose card type

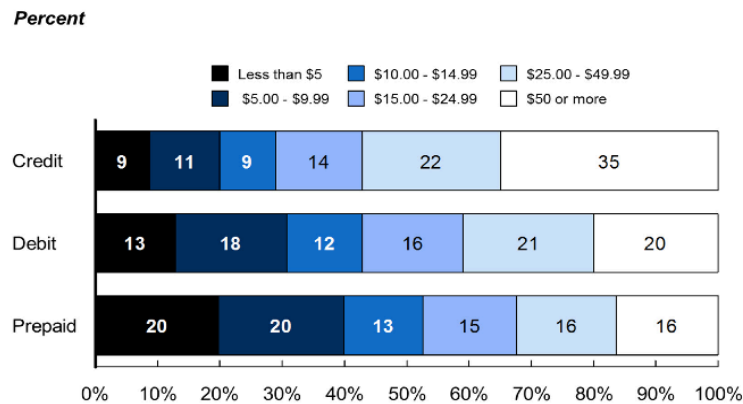


Figure 2⁵⁰

A long-term study by Hayashi and Cuddy reflects the changes in consumer use of general purpose reloadable prepaid cards.⁵¹ Hayashi and Cuddy examined over three million transactions on NetSpend GPR prepaid cards activated between July 1, 2011 and June 30, 2012. NetSpend permitted four types of transactions with the cards: (1) purchases; (2) ATM cash withdrawals; (3) bill payments; and (4) person-to-person funds

mechanisms.

47. *Id.* at 15 & fig. 7.

48. *Id.* at 16.

49. *Id.* at 26.

50. *Id.*

51. Hayashi & Cuddy, *supra* note 35, at 18.

transfers between NetSpend prepaid cardholders.⁵² The study included observations about the number and amount of PIN and signature transactions, the socio-demographic characteristics of the cardholders; the average monthly fees paid by the users and fraud rates. Hayashi and Cuddy found that cards with direct deposits were used longer and those with direct deposits by governments had a longer life span than those funded by direct deposits by non-government entities.⁵³ Further, cardholders made an average of seven purchase transactions per month valued at \$303.⁵⁴ The researchers also observed differences in PIN-based transactions based on fees. Specifically, for cardholders paying a monthly fee, PIN transactions exceeded signature transactions by about ten percentage points.⁵⁵

A different study—a six year study of 280 million prepaid card transactions made with more than three million cards from a dozen different prepaid card programs—revealed that open loop cards with regularly scheduled loads remain active for longer periods of time.⁵⁶ Like Hayashi and Cuddy, Wilshusen found that prepaid cards loaded with regularly scheduled direct deposits were active “for much longer periods and are used much more intensively by the cardholder.”⁵⁷ The data revealed that cash withdrawals amount for a significant number of transactions on the prepaid card.⁵⁸ The researchers also captured some revenue information concluding that the revenues varied from a few dollars to \$12 a month depending on the prepaid cards and that cards with longer active periods generated more revenue for the card issuer.⁵⁹ While the researchers warned that the study could not be generalized to all users of prepaid cards,⁶⁰ the study confirmed the increased use of GPR prepaid cards and provides a framework for future studies.

Economist Oz Shy looked more closely at how buyers allocated spending between debit cards, credit cards and prepaid cards using the

52. *Id.* at 22.

53. *Id.* at 15.

54. *Id.* at 26.

55. *Id.*

56. Stephanie M. Wilshusen et. al., *Consumers' Use of Prepaid Cards: A Transaction-Based Analysis* 11 (Fed. Reserve Bank of Phila., Payment Cards Ctr., Discussion Paper 12-02, 2012), available at <http://www.philadelphiafed.org/consumer-credit-and-payment-cards-center/publications/discussion-papers/2012/D-2012-August-Prepaid.pdf>.

57. *Id.* at 42.

58. *Id.* at 6-7, 34.

59. *Id.* at 31, 41.

60. *Id.* at 43.

2012 Diary of Consumer Payment Choice.⁶¹ Shy found that payment card users tend to engage in “single-homing,” a term used to describe how consumers allocate their transactions between card types.⁶² Shy found that consumers do not view the various card types as interchangeable; rather they tend to select one card-type and use it for all transactions.⁶³ According to this survey, consumers tended to concentrate their purchases on the preferred card regardless of the volume or value of the transactions.⁶⁴ The study speculated as to reasons for this consumer behavior (e.g., the preferred card may contain preferred payment features), but did not reach any conclusions. The study found that only 2.9% of the surveyed consumers concentrated their payments on a prepaid card; however, consumers that preferred prepaid cards concentrated 86.3% of all their transactions on the prepaid card.⁶⁵ In other words, those that use prepaid cards frequently rely on the prepaid card for all transactions. In contrast, consumers that concentrate their payments on debit or credit cards are less likely to use the preferred card for all payments.⁶⁶ Because this study suggests that consumers that prefer GPR prepaid cards will use them extensively, it underscores the importance of bringing comprehensive consumer protections to the product.

D. The Confusing & Predatory Fee Structures

Consumer confusion about fees abounds. The fees associated with GPR prepaid cards are as varied as the brands. Each card operates under a different fee schedule. Fees may be incurred for activation, balance inquiries, ATM use, loading funds, replacing cards or speaking to customer service representatives. Some cards eliminate some fees when the cardholder establishes a recurring direct deposit. And while it is difficult to understand, some prepaid cards charge overdraft fees. According to a July 2014 report, prepaid card issuers collected \$502 million in fees from government administered prepaid card programs during 2013, with 35% of the total coming from cardholder fees.⁶⁷ Although this is a small sample of the market, it demonstrates the importance of fee income in the business strategy.

61. Oz Shy, *How Many Cards Do You Use?* (Fed. Reserve Bank of Boston, Working Paper No. 13-13, 2013), available at <http://www.bostonfed.org/economic/wp/wp2013/wp1313.pdf>.

62. *Id.* at 1.

63. *Id.* at 8.

64. *Id.*

65. *Id.* at 8, 12.

66. *Id.* at 8.

67. BOARD OF GOVERNORS, REPORT TO CONGRESS, *supra* note 13, at 1.

Recent reports suggest that with increased competition in the market the fee structures might change.⁶⁸ For example, in November 2013, American Express announced that money could be loaded on its Serve prepaid product at no cost.⁶⁹ Similarly, funds may be loaded on Bluebird at any Wal-Mart store.⁷⁰ Other issuers modified programs to allow consumers to withdraw cash at an ATM without cost.⁷¹ With these market-driven changes some GPR prepaid cards are a better value than checking accounts at a traditional bank. These market changes together with a new fee disclosure format should ease consumer confusion about fees.⁷²

II. REGULATORY GAPS: PROTECTIONS NEEDED FOR GPR PREPAID CARDS

Although proposed regulations for the cards are pending, issuers of GPR prepaid cards and their affiliates are already subject to a number of federal and state regulations. For example, issuers of prepaid cards and others in the prepaid chain must comply with anti-money laundering regulations issued by the Financial Crimes Enforcement Network (“FinCEN”),⁷³ supervisory guidance provided by the Office of the

68. See Jane Adler, *Prepaid's Big Makeover*, DIGITAL TRANSACTIONS (Mar. 1, 2014), <http://www.digitaltransactions.net/news/story/4602> (detailing the efforts to expand the customer base and reduce prices of prepaid cards); PEW, CONSUMERS CONTINUE TO LOAD UP, *supra* note 14, at 2-3 (“More cards are charging monthly fees but not charging other transaction-based fees, such as point-of-sale or customer service fees. This fee structure more closely resembles traditional checking accounts than a fee structure in which no monthly fee is charged and cardholders incur fees for varying uses of the card.”). *But see* Constantine Von Hoffman, *Are Prepaid Debit Cards Right for You?*, CBS MONEYWATCH (July 22, 2014, 12:49 PM), <http://www.cbsnews.com/news/are-prepaid-debit-cards-right-for-you/> (citing an industry report that cards from large financial institutions may be “87 percent less expensive” than cards from small entities).

69. Ann Carrns, *Prepaid Debit Cards Shed Some Fees, but Face Scrutiny*, N.Y. TIMES (Oct. 9, 2013), http://www.nytimes.com/2013/10/09/your-money/prepaid-debit-cards-shed-some-fees-but-face-scrutiny.html?_r=0.

70. *Id.*

71. *Id.*

72. THE PEW CHARITABLE TRUSTS, *The Need for Improved Disclosures for General Purpose Reloadable Prepaid Cards* 3 (Feb. 26, 2014), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/PrepaidCardsDisclosureIssueBriefpdf.pdf.

73. See Bank Secrecy Act Regulations-Definitions and Other Regulations Relating to Prepaid Access, 76 Fed. Reg. 45403 (proposed July 29, 2011) (to be codified at 31 C.F.R. pts. 1010 and 1022) (updating FinCEN’s 1999 stored value rules to provide a comprehensive approach to regulate “providers” and “sellers,” two types of Money Services Businesses (MSBs), of prepaid programs); FIN. CRIMES ENFORCEMENT NETWORK, OUTREACH TO THE PREPAID ACCESS INDUSTRY (2012) [hereinafter FIN. CRIMES ENFORCEMENT NETWORK, OUTREACH], http://www.fincen.gov/whatsnew/pdf/Outreach_to_the_Prepaid_Industry2_508.pdf (summarizing discussions during town hall meetings in 2012 to reviewing industry

Comptroller of Currency⁷⁴ and state escheat laws.⁷⁵ Prepaid program participants also seek to avoid enforcement actions by the FTC (or the CFPB) for an unfair or deceptive trade practice.⁷⁶

In contrast, the GPR prepaid card is largely exempt from regulatory oversight. Certain prepaid products are subject to the Durbin Amendment of the Dodd Frank Wall Street Reform and Protection Act of 2010.⁷⁷ Likewise, while specific categories of prepaid products are governed by the provisions in Regulation E governing disclosures, billing error disputes,

concerns about the implementation of the 2011 Rule); U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FINCEN RULING FIN-2012-R003 (2012), *available at* http://www.fincen.gov/news_room/tp/rulings/pdf/FIN-2012-R003.pdf (providing guidance on the application of money service business regulations on a non-bank prepaid card program participants when a bank is the named "provider" of the prepaid program in an agreement between the bank and the non-bank). FinCEN's rules do not apply to closed loop cards for less than \$2000, programs funded with only government benefits, cards for access to IRS defined "flexible spending accounts" or "health reimbursement accounts," and payroll cards and open loop cards with a maximum of \$1000 per day, provided the card program does not allow international transfers, person to person transfers, or loads from non-depository sources. FIN. CRIMES ENFORCEMENT NETWORK, OUTREACH, *supra*, at 2. Providers and sellers are required to (1) develop an AML program; (2) report suspicious activity (3) collect and verify consumer information (e.g. name, address, identification number, date of birth), (4) maintain transactional records and providers must register as an MSB (sellers are not required to register). *Id.* at 4, 6-7. Similarly, the Office of Foreign Assets Control (OFAC), within the U.S. Department of Treasury, sanctions those that engage in activities with countries, groups or individuals listed on the Specifically Designated Nationals and Blocked Persons (SDN) List, such as terrorists, narcotics traffickers and those engaged in the proliferation of weapons of mass destruction. *See generally Specially Designated Nationals List (SDN)*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last updated Apr. 28, 2015).

74. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF TREASURY, OCC BULL. 2011-27, RISK MANAGEMENT GUIDANCE AND SOUND PRACTICES (2011), *available at* <http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-27.html> (recognizing that prepaid products are "increasingly" marketed to consumers "as an alternative or supplement to traditional bank accounts" and advising banks to create an effective prepaid access program taking steps to "identify, measure, monitor and control" risks associated with the prepaid product and draft written policies and procedures for the program, including a procedure oversight of any third party service providers).

75. All fifty states have abandoned property laws that require funds underlying gift cards, gift certificates, and prepaid cards be returned to the state after three to five years. *See generally* Teagan J. Gregory, Note, *Unclaimed Property and Due Process: Justifying "Revenue-Raising" Modern Escheat*, 110 MICH. L. REV. 319, 344-45 (2011) (arguing that recognizing aggressive state escheat statutes can provide comfort to owners and the public at large, provide certainty, and encourage trust in the legislative process).

76. DAVID VLADECK ET. AL, FTC STAFF COMMENT TO THE CONSUMER FINANCIAL PROTECTION BUREAU CONCERNING ELECTRONIC FUND TRANSFERS (REGULATION E) AND GENERAL PURPOSE RELOADABLE PREPAID CARDS (2012), *available at* <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2012/07/ftc-staff-comment-consumer-financial-protection>.

77. *See supra* notes 36-37 and accompanying text.

consumer liability for unauthorized transaction and rights to statement information for electronic payments, the Regulation E does not apply to GPR prepaid cards. Moreover, no federal statute requires that a GPR prepaid product be structured in a manner that ensures “pass through” deposit insurance. Over the past few months, some card issuers took steps to offer consumer protections for the prepaid product. For example, VISA recently announced a program.⁷⁸ Likewise, Green Dot, a major prepaid cards issuer, is also very vocal about its commitment to consumer protection.⁷⁹ The Center for Financial Services Innovation (“CFSI”) issued a “Compass Guide to Prepaid” in an effort to define best practices for the prepaid industry.⁸⁰ The guide identifies four principles—Embrace Inclusion, Build Trust, Promote Success, and Create Opportunity—and outlines three levels of practices that help to fulfill each of the four principles.⁸¹

However, reliance on the industry to provide deposit insurance or any other type of consumer protection provision will not ensure that the protections are offered industry-wide.⁸² There may always be industry participants that lag behind others in the industry and disparities may arise in the market that would severely impact some households. Because new non-bank entities may enter this market (e.g., Apple, Facebook and others) clear regulations are needed. Reserving regulatory action until a crisis arises is unacceptable. Instead, regulatory action ensuring uniformity across products will benefit all participants—issuers and consumers.⁸³

78. *Visa Elevates Prepaid Cards to New Level of Simplicity, Protections and Opportunity*, VISA (June 3, 2014), <http://investor.visa.com/news/news-details/2014/Visa-Elevates-Prepaid-Cards-to-New-Level-of-Simplicity-Protections-and-Opportunity/default.aspx>.

79. *Green Dot Supports Visa's New Prepaid Card Designation*, GREEN DOT CORP. (June 6, 2014), <http://ir.greendot.com/phoenix.zhtml?c=235286&p=irol-newsArticle&ID=1937968&highlight=> (expressing its commitment to efforts to improve consumer protections).

80. Beth Brockland & Romy Parzick, *Compass Guide to Prepaid*, CENTER FOR FIN. SERVICES INNOVATION (June 24, 2012), <http://www.cfsinnovation.com/content/compass-guide-prepaid>.

81. *Id.*

82. A survey by The Pew Charitable Trusts indicates that “almost all” GPR prepaid cards have FDIC insurance. PEW, CONSUMERS CONTINUE TO LOAD UP, *supra* note 14, at 37. Zywicki observed that because only one major issuer did not offer deposit insurance, regulation was unnecessary. *Cf.* Zywicki, *supra* note 18, at 1518. At the time Zywicki’s article was published, American Express, a non-bank entity, did not offer deposit insurance, but subsequently added the feature to its prepaid product. *Cf.* Danielle Douglas, *Wal-Mart and American Express Prepaid Card gets FDIC Insurance*, WASH. POST., Mar. 26, 2013, available at http://www.washingtonpost.com/business/economy/wal-mart-and-amex-prepaid-card-gets-fdic-insurance/2013/03/26/521fa0aa-9560-11e2-ae32-9ef60436f5c1_story.html.

83. See generally Ari M. Cohen, Note, *Protecting the Underserved: Extending the Electronic Fund Transfers Act and Regulation E to Prepaid Debit Cards*, 5 BROOK. J. CORP. FIN. & COM. L. 215, 240 (2010) (detailing how federal laws and regulations must be extend-

Moreover, Congress's directives to provide consumer protection are not satisfied by acquiescence to industry practices. Instead, regulatory action must be taken to set a clear standard in the industry, and accordingly, close any regulatory gaps.⁸⁴

A. *Outlining the Regulatory Gap: Deposit Insurance*

Section 8 of The Banking Act of 1933 created the Federal Deposit Insurance Corporation and, with it, insurance for all deposits placed in insured banks. For 107 years leading up to this historical step in 1933, efforts to create a state system of deposit insurance had failed.⁸⁵ Although President Franklin D. Roosevelt initially opposed the legislation, he signed

ed to protect the underserved and the nation's most vulnerable consumers in light of the increasing popularity of prepaid debit cards).

84. The United States is not alone in its attempts to determine the proper regulatory scheme for GPR prepaid cards. Canada issued regulations covering prepaid cards in early 2014. *Prepaid cards: Your rights and responsibilities*, FIN. CONSUMER AGENCY OF CANADA <http://www.fcac-acfc.gc.ca/Eng/forConsumers/topics/yourRights/Pages/prepaid-prepays.aspx> (last updated Apr. 29, 2014). Canada takes a broad approach in its regulation by defining prepaid as including products, “[w]hether physical or electronic, that are—or can be—loaded with funds that can be used by the cardholder to make withdrawals or purchase goods or services.” While moving to issue regulations for some consumer protections, Canada committed to study the need for deposit insurance for the product. *Prepaid Cards: 10 Things to Consider*, FIN. CONSUMER AGENCY OF CANADA, <http://www.fcac-acfc.gc.ca/Eng/resources/publications/paymentOptions/Documents/PrepaidC-Lescarte.pdf> (last updated May 6, 2014); see also Ben Fung et. al., *Electronic Money and Payments: Recent Developments and Issues* (Bank of Canada, Discussion Paper No. 2014-2, 2014), available at <http://www.banqueducanada.ca/wp-content/uploads/2014/04/dp2014-2.pdf> (discussing the need for insurance to ensure safety and efficiency); Tanai Khiaonarong, *Oversight Issues in Mobile Payments* (Int'l Monetary Fund, Working Paper No. WP/14/123, 2014), available at <https://www.imf.org/external/pubs/ft/wp/2014/wp14123.pdf> (summarizing developments in Kenya, Norway, Hong Kong, the European Union, the United States, and the United Kingdom on a variety of issues including the provision of deposit insurance for new payment products). According to the website for the Financial Services Compensation Scheme, which is the deposit insurance authority in the United Kingdom, prepaid cards are not covered by deposit insurance. *Q&As about the UK Deposit Protection Scheme*, FIN. SERVICES COMP. SCHEME, http://www.fscs.org.uk/what-we-cover/questions-and-answers/qas-about-deposits/#Are_pre_paid_cards_covered_by_the_FSCS (last visited Jan. 23, 2015). The cards are considered e-money in the United Kingdom and thus governed by the EU's Payment Services Directive, which went into effect on May 1, 2014.

85. See FED. DEPOSIT INS. CORP., A BRIEF HISTORY OF DEPOSIT INSURANCE IN THE UNITED STATES (1998), available at <https://www.fdic.gov/bank/historical/brief/brhist.pdf> (listing all the state attempts between 1829 and 1886 to establish a system of deposit insurance and noting the 150 proposals introduced to Congress for a federal deposit insurance system between 1886 and 1933); see also Roger Lowenstein, *There's a Reason for Deposit Insurance*, N.Y. TIMES, Mar. 23, 2013, at BU3, available at <http://www.nytimes.com/2013/03/24/business/deposit-insurance-and-the-historical-reasons-for-it.html> (providing similar historical context).

it on June 12, 1933, three months after declaring a bank holiday. Representative Steagall led the effort to enact deposit insurance, and his efforts advanced the strong public sentiment supporting the concept.⁸⁶ At the time, deposit insurance symbolized a commitment to protect Americans' hard-earned savings⁸⁷ and a way to stabilize the monetary system.⁸⁸

Concern for the everyday depositor was also one of the seven basic principles of deposit insurance identified in 2001. Reviewing the deposit insurance system, Alan Binder and Robert F. Wescott listed as Principle Six: "Deposit insurance should relieve small depositors of the burden of monitoring banks."⁸⁹ This sixth principle remains important in today's economy. For the past eighty years, bank customers have placed funds in their checking accounts with the confidence that the government guaranteed the safety of those funds. With the arrival of a new financial product, expansion of deposit insurance is necessary to maintain the historical principles underlying deposit insurance.⁹⁰

In 2008, the FDIC issued an opinion declaring that deposit insurance was available to stored value cards that met certain criteria.⁹¹

86. See generally *Understanding Deposit Insurance*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/deposit/deposits/> (last updated Jun. 3, 2014). Federal deposit insurance coverage has grown from the "temporary" coverage amount of \$2,500, stated in original legislation, to \$250,000, established with the passage of the Dodd-Frank Act in 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 335, 124 Stat. 1376, 1540 (2010) (codified at 12 U.S.C. § 1821(a)(1)(E) (2010)).

87. See *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 435 (1986) (observing that deposit insurance was intended to protect "the assets and 'hard earnings' that businesses and individuals have entrusted to banks"). The case provided guidance on the purpose of deposit insurance, but refused to extend the concept of "deposit" to include a standby letter of credit.

88. Christine M. Bradley, *A Historical Perspective on Deposit Insurance Coverage*, FED. DEPOSIT INS. CORP. BANKING REV., 2000, at 5 (quoting Senator Robert Owen's 1932 statement before the House Committee on Banking and Commerce that deposit insurance was designed for two reasons: "[t]o provide the people of the United States with an absolutely safe place and a convenient place to put their savings and their deposits [are] essential to the stability of banking, bank deposits and loans, the checks which function as money and business conditions in every line").

89. ALAN S. BLINDER & ROBERT F. WESTCOTT, FED. DEPOSIT INS. CORP., REFORM OF DEPOSIT INSURANCE: A REPORT TO THE FDIC (2001), <http://www.fdic.gov/deposit/insurance/initiative/reform.html>

90. The United States scheme for deposit insurance has been criticized and debated by academics. However, as one scholar observed, "[e]ach of these concerns may be valid to some extent, yet the public appears to remain convinced that a deposit insurance program is worth the costs, which ultimately is borne by them." A BRIEF HISTORY OF DEPOSIT INSURANCE IN THE UNITED STATES, *supra* note 85, at 7.

91. *Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms*, 73 Fed. Reg. 67155 (Nov. 13, 2008). This opinion replaced an older ruling, General Counsel's Opinion No. 8; *Stored Value Cards*, 61 Fed. Reg. 40490 (Aug. 2,

Specifically, the General Counsel's opinion declared that funds placed with an insured depository institution are "deposits"⁹² and are eligible for "pass-through" insurance coverage if: (1) the deposit account records discloses the existence of a custodial relationship, (2) either the records maintained at the depository institution or by the custodian disclose the identity of the "actual owners of the funds and the amount owned by each such owner," and (3) the funds in the account must be owned by the identified owners and not by the custodian.⁹³ Two years later, at a conference addressing the new prepaid card industry, Christopher Hencke of the FDIC explained, "the goal was to treat underlying prepaid deposits like other deposits that are eligible for pass-through coverage."⁹⁴

The United States Treasury recognized the importance of deposit insurance in 2010 when it issued regulations permitting electronic federal payments to be loaded onto prepaid cards.⁹⁵ The rule requires that the

1996). Because the earlier ruling did not view the funds underlying the stored value cards as "deposits," the holders of the cards could not receive deposit insurance if the bank holding their funds failed during the 2008 crisis. The crisis prompted consumer advocates to seek clarification from the FDIC about deposit insurance coverage. Sarah Jane Hughes, *Federal Payroll, Gift, and Prepaid Card Developments: FDIC Deposit Insurance Eligibility and the Credit CARD Act of 2009*, 65 BUS. LAW. 261 (2009); Paul T. Clark, *Just Passing Through: A History and Critical Analysis of FDIC Insurance of Deposits Held by Brokers and Other Custodians*, 32 REV. BANKING & FIN. LAW 99 (2012).

92. The Federal Deposit Insurance Act defines "deposit" as—

[T]he unpaid balance of money or its equivalent received or held by a bank . . . in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings . . . account

12 U.S.C. § 1813(l) (2011) (emphasis added). Thus, deposit insurance is available only when the funds are maintained in an insured depository bank.

93. See John Douglas et. al., *New General Counsel's Opinion No. 8: The FDIC Provides Clarity on Deposit Insurance and Assessments on Funds Underlying Stored Valued Cards*, 126 BANKING L.J. 234 (2009) (explaining the 2008 General Counsel's opinion).

94. PHILIP KEITEL, FED. RESERVE BANK OF PHILA., FEDERAL REGULATION OF THE PREPAID CARD INDUSTRY: COSTS, BENEFITS AND CHANGING INDUSTRY DYNAMICS 7–8 (2011), available at <https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/events/conferences/2011/C2011-Federal-Regulation-of-Prepaid-Card-Industry.pdf>.

95. Section 210.5(b) provides:

(5)(i) Where a Federal payment is to be deposited to an account accessed by the recipient through a prepaid card that meets the following requirements:

(A) The account is held at an insured financial institution;

(B) *The account is set up to meet the requirements for pass-through deposit or share insurance such that the funds accessible through the card are insured for the benefit of the recipient by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund in accordance with applicable law (12 CFR part 330 or 12 CFR part 745);*

(C) The account is not attached to a line of credit or loan agreement under which repayment from the account is triggered upon delivery of the Federal

funds underlying the prepaid card be placed in an insured depository institution in an account eligible for “pass-through” insurance for the cardholder.⁹⁶ The rule also prohibits the extension of any loan or line of credit that would be paid from an account upon the delivery of additional benefits and the issuer must comply with Regulation E’s requirements for payroll accounts. Studies indicate that the federal government is the largest source of repeat funding for GPR prepaid cards.⁹⁷ Thus, with the adoption of this rule, GPR prepaid card issuers had to evaluate their programs to ensure compliance with the rule’s requirements and eligibility to receive disbursements from Treasury.

Since 2011, some states have established similar rules for card programs that receive state benefits.⁹⁸ In each instance, deposit insurance is one of the features required by state governments when it authorizes the funding of a GPR prepaid card. While deposit insurance protection is mandatory for prepaid cards loaded with government benefits, this basic consumer protection is not available for all GPR prepaid cards.

payments; and

(D) The issuer of the card complies with all of the requirements, and provides the holder of the card with all of the consumer protections, that apply to a payroll card account under the rules implementing the Electronic Fund Transfers Act, as amended.

(ii) No person or entity may issue a prepaid card that receives Federal payments in violation of this subsection, and no financial institution may maintain an account for or on behalf of an issuer of a prepaid card that receives Federal payments if the issuer violates this paragraph.

31 C.F.R. § 210.5 (2011) (emphasis added).

96. *Id.*

97. See generally BOARD OF GOVERNORS, REPORT TO CONGRESS, *supra* note 13, at 5 (reporting that \$142 billion (or 13.5%) of the reported \$1.054 trillion in disbursements were made to prepaid cards); see also Sarah Jane Hughes, Stephen T. Middlebrook & Broox W. Peterson, *Developments in the Law Concerning Stored Value and Other Prepaid Payment Products*, 62 BUS. LAWYER 229 (2006) (examining the increasing prevalence and regulation of prepaid payment products).

98. See, for example, California’s recent enactment of A.B. 1280 that provides protections for unemployment benefits that are deposited directly to a CalWorks or prepaid card obtained on the private market. A.B. 1280, 2013-14 Sess. (Ca. 2013) (codified at CAL. UNEMP. INS. § 1339.1 (West 2014)). The law ensures that “cash grants on these cards are subject to federal protections in order to assist low-income consumers and help keep their benefits safe.” Press Release, CA Legal Advocates, California Protects Benefits Deposited to Prepaid Cards (Dec. 11, 2013), available at http://www.calegaladvocates.org/news/article.503017-California_Protects_Benefits_Deposited_to_Prepaid_Cards. This protection afforded to benefits loaded on a prepaid card is similar to the steps taken to prevent bank fees against social security payments paid into a bank account.

B. Outlining the Gaps in Regulation E's Consumer Protections

Like deposit insurance protection, the consumer protections found in Regulation E have been extended to a limited number of prepaid products in a piecemeal fashion over a period of years. Beginning in 2006 with the Federal Reserve's amendments to Regulation E to incorporate payroll cards,⁹⁹ and again in 2010, with Congressional action extending Regulation E protections to certain gift cards and gift certificates with the CARD Act,¹⁰⁰ federal lawmakers have been incredibly slow to establish consumer protections for new consumer financial products.

When Regulation E's protections were extended to payroll cards, the Federal Reserve amended the definition of "account" in Section 205.2(b) to include:

a "payroll card account" which is an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation (such as commissions), are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution or any other person.¹⁰¹

Regulation E's provisions for payroll cards are limited in scope. Specifically, the initial disclosures provisions, a modified method for providing account history information, and the error resolution and limitation of liability provisions, modified to recognize the electronic environment, apply to payroll card accounts. At the time, the Federal Reserve explained that it would not regulate GPR prepaid cards because the cards "may only be used for limited purposes or on a short term basis."¹⁰²

Four years later, the Federal Reserve made similar modifications to the error resolution, liability limitation and notice provisions in Regulation E to accommodate gift cards and gift certificates in accordance with congressional directives in the Credit Card Accountability, Responsibility and Disclosure Act of 2009. The CARD Act created a new regulatory scheme for credit cards and certain types of prepaid products. The CARD Act imposed disclosure requirements, restrictions on fees and expiration dates on general-use prepaid cards (open loop cards), store gift cards

99. 12 C.F.R. § 205.18 (2013).

100. 12 C.F.R. § 205.20 (2012).

101. 12 C.F.R. § 205.2(b) (2012).

102. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30,923, 30,924 (May 12, 2012).

(closed loop cards) and store gift certificates.¹⁰³ Despite all the attention on the prepaid market, the regulatory changes did not expressly apply to GPR prepaid cards.

These 2007 and 2010 actions may seem helpful, but were a step backwards with respect to regulation of prepaid cards. In 1996, the Federal Reserve Board, then the regulator responsible for the EFTA, issued proposed regulations to extend Regulation E to stored value cards. At the time, the market was at its infancy, and ultimately, arguments calling for the elimination of legal barriers to innovation prevailed. However, even at that time, the Federal Reserve Board noted the legislative history supporting its ability to regulate bank and non-bank entities that offered the stored value product and focused its regulation on the product rather than the entity issuing the product.¹⁰⁴ After wading through the Board's attempt to distinguish "online" and "offline," and "accountable" and "non-accountable" systems, the Board concluded that fully on-line, accountable systems—parents of today's GPR prepaid cards—would be subject to all requirements of Regulation E.¹⁰⁵ The Board was willing to exempt any stored valued cards with a maximum load of \$100.¹⁰⁶ Turning the clock forward eighteen years, it is time for action from the CFPB, which has been charged with protecting consumers and regulating their interactions with electronic-based financial products.

C. *Initial Steps to Close the Regulatory Gap*

The CFPB's release in 2012 of an ANPR for prepaid cards must be viewed as an attempt to provide uniformity and clarity for the consumer financial product. The ANPR sought insights on four categories of information:

- (A) Regulatory coverage of products by some or all of Regulation E,
- (B) Product fees and disclosures,
- (C) Product features, and

103. 15 U.S.C. § 1693L-1(b)-(c) (2014). For a summary of the success of the final CARD Act rules, see JOSHUA M. FRANK, CENTER FOR RESPONSIBLE LENDING, CREDIT CARD CLARITY: CARD ACT REFORM WORKS (2011) (concluding that the Act did not cause prices to increase or access to credit to fall).

104. Catherine Lee Wilson, *Banking on the Net: Extending Bank Regulation to Electronic Money and Beyond*, 30 CREIGHTON L. REV. 671, 704 & n.224 (1997).

105. Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,699-703 (May 2, 1996)

106. *Id.*, at 19,703. The Board did not proceed with the proposed rules after a six-month moratorium on further action was imposed by the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

(D) Other information on GPR cards.

The CFPB also asked for details about the application of Regulation E to the prepaid card.¹⁰⁷ The CFPB also asked a specific question about the appropriateness of deposit insurance although the question seemed to focus only on the need for a disclosure about deposit insurance.¹⁰⁸ The CFPB also included a number of other questions related to the specific questions about product features, including whether the cards should offer credit features, savings features, or the ability to build credit.¹⁰⁹

107. The ANPR sought information on Regulation E's application, stating:

How should the CFPB define GPR cards in the context of Regulation E? Should certain prepaid products not be included in this definition, such as cards that may serve a limited purpose (*e.g.*, university cards or health spending cards)? Why or Why not?

Should only certain aspects of Regulation E be applied to GPR cards? . . . If the Bureau were to propose modifications to the Regulation E protections, what alternative protections or requirements, if any, should the Bureau propose?

Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 20,923, 20,925 (proposed May 24, 2012).

108. With respect to deposit insurance, the ANPR asks:

5. Many, but not all, GPR card accounts are insured by Federal Deposit Insurance Corporation (FDIC) pass-through insurance (coverage that "passes through" the agent to the holders of the accounts). Other GPR cards may provide alternative security mechanisms, but do not offer FDIC pass-through insurance. *Should the existence, or lack thereof, of FDIC pass-through insurance associated with a GPR card be disclosed to the consumer? If so, how and when should the existence of FDIC pass-through insurance be disclosed?*

Id. (emphasis added) (internal citations omitted).

109. Specifically, the ANPR asked, in part:

6. Currently most GPR cards do not offer credit features, such as an "overdraft" feature that may be linked to a traditional checking account. While an overdraft can occur in unusual circumstances, as when a small-item transaction is submitted for settlement without prior authorization or when a submitted transaction exceeds the authorized amount, generally speaking most GPR cardholders may not be able to withdraw or spend more than the funds loaded on the card. Nonetheless, some GPR card programs do allow cardholders to opt in to an overdraft program in which the issuer may authorize overdrafts and charges an overdraft transaction fee. The Bureau seeks public input on the costs, benefits and consumer protection issues related to any credit features that may be offered by GPR cards.

7. Currently, most GPR cards do not offer a savings account associated with the card. The Bureau seeks public input on the costs, and benefits, and consumer protection issues related to savings features offered with GPR cards.

8. Currently some GPR cards include a feature that claims to offer consumers the opportunity to improve or build credit. Consumers generally need to opt in to this feature, which involves the reporting of certain information to credit reporting agencies. The Bureau seeks public input and data concerning the efficacy of credit reporting features on GPR cards in enabling consumers to improve

A public discourse about the proper features for the GPR prepaid cards was prompted by the ANPR.¹¹⁰ A number of consumer advocates and industry leaders support the extension of important consumer protections to prepaid cards. Some consumer advocates urge the extension of Regulation E's protections to the GPR prepaid card.¹¹¹ Others call for deposit insurance protection so funds are safeguarded in the event the card issuer files for bankruptcy.¹¹² Still others seek changes with respect to overdraft features and the use of arbitration to resolve a consumer dispute.¹¹³ All of these views were presented to Congress and the CFPB over a period of several months. On November 13, 2014, after months of anticipation, the CFPB announced its proposed regulations at a Town Hall meeting in Wilmington, Delaware.¹¹⁴

III. REGULATION OF GPR PREPAID CARDS WILL ENSURE CONSISTENT PROTECTION FOR CONSUMERS AND PROMOTE FAIR COMPETITION

The growing consensus in the prepaid industry about the protections needed for GPR prepaid cards provides a good foundation for establishing regulations for the GPR prepaid product. The CFPB may utilize the data and information presented at the 2012 Town Hall meeting on Prepaid Cards, the formal comments to its ANPR and information

or build credit. The Bureau also seeks information on whether regulatory provisions should address how such services are marketed to consumers.

Id.

110. News reports document consumer experiences with GPR prepaid cards, including confusion about fees, errors at ATM machines and difficulties recovering funds after an error is acknowledged. Although no reliable information is available to assessing the frequency of errors, clear rules would assist consumers seeking to correct mistakes.

111. Letter from Karen Harris, Dir., Asset Opportunity Unit, Sargent Shriver Nat'l Ctr. on Poverty Law, to Monica Jackson, Office of the Exec. Sec'y, Bureau of Consumer Fin. Prot. (July 11, 2012) (on file with author); Letter from John W. Ryan, President & CEO, Conference of State Bank Supervisors, to Monica Jackson, Office of the Exec. Sec'y, Bureau of Consumer Fin. Prot. (July 23, 2012) (on file with author).

112. Letter from Dory Rand, President, Woodstock Inst., to Monica Jackson, Office of the Exec. Sec'y, Bureau of Consumer Fin. Prot. (March 23, 2015) (on file with author).

113. See, e.g., Goodwin, *supra* note 25; NAT'L CONSUMER L. CTR., COMMENTS OF NATIONAL CONSUMER LAW CENTER ON ELECTRONIC FUND TRANSFERS (REGULATION E) 3-41, 87 (2012), <http://www.nclc.org/images/pdf/rulemaking/cm-prepaid-card-july2012.pdf> (discussing overdraft and arbitration). In California, the NCLC worked with the Western Center on Law and Poverty to convince lawmakers about the need for deposit insurance when public unemployment benefits are loaded onto prepaid cards.

114. cfpbvideo, *Wilmington, DE: Field Hearing on Prepaid Accounts*, YOUTUBE (Dec. 18, 2014), <https://www.youtube.com/watch?v=4F-bLzz-pM4>.

gathered by its Research, Markets and Regulations Division,¹¹⁵ to guide its regulations and meet Congress' directive that the agency ensure that, with respect to consumer financial products, "[f]ederal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."¹¹⁶

Numerous witnesses at the CFPB's 2012 Durham, North Carolina, Town Hall Meeting highlighted the similarities between the GPR prepaid card issued by banks and nonbanks and the traditional checking account offered by traditional banks and credit unions.¹¹⁷ Various studies about prepaid cards echo this theme by suggesting that millennials, with their smartphones, use GPR prepaid cards to pay rent and buy groceries just as their parents have used the traditional banking products, checks and debit cards, for the same purposes.¹¹⁸ Because of the similarities between a checking account, which may be connected with a debit card, and GPR prepaid cards, consumers expect that both products will carry certain protections. Consumer expectations, therefore, weigh in favor of ensuring that the prepaid product is not second-rate or inferior to an account maintained with a depository institution.¹¹⁹

A. *Functionally equivalent consumer financial products should be regulated similarly*

Requiring deposit insurance for all GPR prepaid cards will help ensure that this popular product effectively protects all users of similarly featured financial products. For a number of years, the OCC, the primary regulator for national banks, interpreted its authority to regulate the "business of banking" under the National Bank Act by determining, initially, whether a new activity was the "functional equivalent or logical

115. Goal 3 in the CFPB's Strategic Plan is to "[i]nform the public, policy-makers, and the CFPB's own policymaking with data-driven analysis of consumer finance markets and consumer behavior." *Consumer Financial Protection Bureau Strategic Plan FY 2013-FY 2017*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/%20strategic-plan/#goal3> (last visited May 8, 2015).

116. 12 U.S.C. § 5511(b)(4) (2011).

117. cfpbvideo, *Durham, NC: Field Hearing on Prepaid Cards*, YOUTUBE (Jun. 7, 2012), <https://www.youtube.com/watch?v=n-05GfuhrAc>.

118. See Herbst-Murphy & Weed, *supra* note 38, at 1.

119. See Tom Feltner, Vice-President, Woodstock Inst., Speech at CFPB Prepaid Card Field Hearing (May 23, 2012) (transcript available at http://www.woodstockinst.org/sites/default/files/documents/120522_cfpb_prepaid_fieldhearing_0.pdf) (noting in response to the CFPB's ANPR, that the GPR is simply a "collection of features already widely available" and that "[f]rom the consumer perspective, . . . swiping a debit, credit or GPR card looks and feels the same regardless of what rules apply.").

outgrowth of a recognized banking function.”¹²⁰ Over the years, the banking industry has asked the courts to recognize new activities and products as part of the “business of banking” because they were “functionally equivalent” to another banking activity.¹²¹ Accordingly, because GPR prepaid cards function like traditional checking accounts protected by deposit insurance, deposit insurance should be available for GPR prepaid cardholders. Due to the deposit insurance requirement for any card receiving funds for government benefits, some non-bank GPR program participants have already found a way to participate despite this restriction and therefore would not incur any additional costs if this feature were required. Other GPR prepaid issuers will incur costs to bring their cards into compliance, but the costs are small when compared to the potential loss to consumers in the event a non-bank entity fails. The Network Branded Prepaid Card Association (“NBPCA”), an industry trade association, noted the low costs associated with a deposit insurance requirement when it observed that the requirements for “pass through” deposit insurance could be met “without excessive administrative burden or invasion of consumer privacy.”¹²²

120. Julie L. Williams & Mark P. Jacobsen, *The Business of Banking: Looking to the Future*, 50 BUS. LAW. 783, 785 (1995) (arguing that the Supreme Court’s decision in *VALIC* allows banking powers to evolve “over time to keep pace with developments in business practices, consumer needs and new technologies.”).

121. See, e.g., *Securities Industry Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 716 F.2d 92, 103 (2d Cir. 1983) (noting that the principal concern is “whether the proposed service is functionally related to traditional services banks generally have performed.”); see also *M&M Leasing Co. v. Seattle First Nat’l Bank*, 563 F.2d 1377, 1383 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978) (noting that leasing personal property is “functionally interchangeable” to traditional secured lending).

122. A NBPCA Position Paper states:

The NBPCA supports rules that would require certain reloadable prepaid card programs, like payroll cards, to be structured to fulfill FDIC “pass-through” requirements. *Such programs can be made to comply with existing rules without excessive administrative burden or invasion of consumer privacy.* However, nonreloadable prepaid card programs—with their high-volume, low-value transactions—are not conducive to compliance with the FDIC’s “pass through” requirements. Moreover, due to heightened consumer vigilance with regard to issues such as identity theft and privacy, it is impractical to collect and unreasonable to expect consumers to furnish the information necessary for provision of FDIC pass-through insurance when purchasing a low-value nonreloadable prepaid card. As such, absent new FDIC rules that would provide specialized treatment for pooled accounts, the NBPCA believes that deposit insurance requirements for non-reloadable prepaid cards would diminish their availability and usefulness.

Prepaid Cards & Deposit Insurance, NETWORK BRANDED PREPAID CARD ASSOCIATION (emphasis added), available at <http://www.nbpca.com/~media/F6A8D19D6F414D01844F4A706B8E4586.ashx> (last visited May 8, 2015).

Most prepaid card issuers structure their programs by pooling the funds loaded on the prepaid card into a single account at a federally insured depository institution. If the pooled account is structured in a way that ensures FDIC insurance, the consumer has the benefit of FDIC deposit insurance. However, the consumer does not know and cannot assess the issuer's compliance with the FDIC's guidance.¹²³ Requiring FDIC insurance for all participants will eliminate the need for consumers to monitor this aspect of a GPR prepaid program.

B. Consumers cannot properly assess risks

Deposit insurance is also needed because consumers cannot assess risks in a GPR prepaid program by monitoring the behavior of the card issuers.¹²⁴ It is unreasonable—even in the information age—to expect all consumers to monitor the behavior of the participants in the GPR prepaid industry. Not only are consumers unaware of the architecture underlying the GPR prepaid card, with multiple entities participating in a single prepaid program, consumers simply cannot monitor the financial health of each participant or understand the domino effect that might arise if one participant becomes insolvent or violates one of myriad compliance rules.¹²⁵ A non-bank entity may be incorporated under the laws of one state, but subject to money transmitter regulations in two or more states.¹²⁶ With information about these entities scattered in various places, a requirement of deposit insurance eliminates an otherwise heavy cost of monitoring for the consumer.

Even if the consumer could gather the necessary information to evaluate a GPR prepaid program in a timely manner, it is unlikely that the average consumer could properly assess all the different types of risks

123. The Illinois Attorney General recently filed suit against a small lender alleging that the lender is offering a short-term loan designed just like a revolving line of credit (or credit card product) in order to evade an interest rate cap on small-dollar or “payday loans.” The complaint outlines the similarities between the loan offered and the restricted product, notes that the lender does not offer any of the consumer protections required for small-dollar loans issued in the state, and suggests that the products should be treated similarly. *People of Illinois v. CMK Investments, Inc.*, No. 2014CH04694 (Ill. Cir. Ct. Cook County, filed Mar. 18, 2014).

124. See *supra* notes 89-90 and accompanying text.

125. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF TREASURY, OCC BULL. NO. 2011-27, PREPAID ACCESS PROGRAMS OCC ISSUANCES BULLETINS 2011 (2011) (providing guidance for national banks on assessing and managing risks associated with prepaid card programs, including programs outsourced to third party service providers.) The OCC has taken some actions against banks involved in GPR prepaid card programs for failing to create a proper business plan assessing the risks and available controls for the program. See, e.g., *Urban Trust Bank Agreement*, *supra* note 29, at *7-8.

126. Douglas King, *supra* note 30, at 3.

associated with a prepaid card program.¹²⁷ GPR prepaid cards, like credit cards and debit cards, are susceptible to fraud and security breaches. Early reports suggest that wrongdoers are attacking back office platforms to load funds onto counterfeit cards or remove daily or weekly spending limits on prepaid cards and change available balances on cards. If the wrongdoer can obtain the PIN associated with the card, then cash can be withdrawn from an ATM.¹²⁸ These schemes are difficult to identify and investigate.¹²⁹ Cybersecurity is another significant risk that must be managed by all organizations in today's digital environment.¹³⁰ The annual reports of these institutions highlight the risks of insolvency stemming from security breaches and fraud schemes. For example, Target recently reported that it incurred significant expenses in connection with a security breach.¹³¹ While new technologies should make payments more secure,¹³² it is impossible to expect the consumer to adequately assess the risks that could clearly impact the financial health of an organization.

In addition to insolvency and fraud risks, compliance penalties associated with the anti-money laundering ("AML") rules promulgated under the Bank Secrecy Act could impact the financial health of a prepaid issuer. New AML regulations for prepaid access programs that took effect in March 2012 require several participants in a prepaid program to register as a Money Service Business ("MSB") and implement procedures to know

127. See Laurence J. Trautman, E-Commerce and Electronic Payment System Risks: Lessons from PayPal (May 16, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314119 (outlining the variety of risks, including cybercrime, cyber terrorism, fraud and anti-money laundering that PayPal, an e-commerce business must disclose and manage).

128. Megan Goldschmidt, *Prepaid Cards' Role in Fraud: Experts Says Cards are Replacing Money Mules*, BANKINFOSECURITY (Apr. 1, 2014), <http://www.bankinfosecurity.com/prepaid-cards-role-in-fraud-a-6693/op-1> (discussing fraud schemes involving the takeover of an online bank account, connecting it with a prepaid card, and then laundering funds through a combination of the two products).

129. See, e.g., *id.* For a full discussion of crimes utilizing prepaid cards, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-407T, MOVING ILLEGAL PROCEEDS: OPPORTUNITIES EXIST FOR STRENGTHENING GOVERNMENT'S EFFORTS TO STEM CROSS-BORDER CURRENCY SMUGGLING (2011), available at <http://www.gao.gov/assets/130/125688.pdf>.

130. On June 24, 2014, the Federal Financial Institutions Examination Council launched a website designed to highlight the federal government's resources for cybersecurity. The CFPB and all the traditional banking regulators—the OCC, Fed, FDIC, and NCUA—joined with the FFIEC to host the website. Press Release, Fed. Fin. Inst. Examinations Council, FFIEC Launches Cybersecurity Web Page, Promotes Awareness of Cybersecurity Activities (June 24, 2014), available at <https://www.ffiec.gov/press/pr062414.htm>.

131. Target Corp., Current Report, Items 2.02 and 9.01 (Form 8-K) (Aug. 5, 2014).

132. Christopher Elliott, *U.S. Cards Aren't Keeping Up*, WASH. POST, June 22, 2014, at F2 (comparing American credit card security measures with European chip-and-PIN technology).

and verify the identity of their customers.¹³³ Given the numerous players involved in a prepaid card program, third-party compliance associated with outsourcing is another source of risk.¹³⁴ While these risks may lead to non-monetary reputational losses, compliance penalties could impact the entire prepaid program.¹³⁵

Traditional payment law concepts support the regulation requiring deposit insurance for the GPR prepaid product. For many years, payment law in the United States has been based on Articles 3 and 4 of the Uniform Commercial Code, a law built, in part, on the philosophy that the person best able to prevent the loss should bear the loss.¹³⁶ In the prepaid card market, the card issuer can prevent consumer losses due to insolvency by simply structuring the program in a way that ensures deposit insurance.

Finally, the pace of change in the payments industry hinders the consumer's ability to adequately monitor and manage their finances. As Director Cordray explained:

[A]s consumer financial life has become more complex, and thus harder for people to manage and control, and as third parties take on a larger role in the financial matters of individuals, we need to remain vigilant to protect the safety and integrity of these systems for consumers We all know that consumers do not fully understand how these systems work, which leaves them vulnerable to abuses.¹³⁷

Federal regulation of the GPR prepaid card is needed because of the limits on a consumer's ability to monitor the financial industry.

133. See King, *supra* note 30, at 6-7 (outlining the compliance requirements for anti-money laundering regulations); see also *Prepaid Money Card MoneyPak Becomes Vulnerable to Fraud Schemes*, THE PAYPERS (August 4, 2014, 6:42 PM), <http://www.thepaypers.com/e-identity-security-online-fraud/prepaid-money-card-moneypak-becomes-vulnerable-to-fraud-schemes/756053-26> (discussing the MoneyPak fraud schemes).

134. See U.S. DEP'T OF THE TREASURY, OFFICE OF THE COMPTROLLER OF CURRENCY, OCC BULL. NO. 2013-29, RISK MANAGEMENT GUIDANCE (2013), *available at* <http://www.occ.treas.gov/news-issuances/bulletins/2013/bulletin-2013-29.html> (providing guidance to banks for managing risks with third party relationships).

135. See King, *supra* note 30, at 6-7.

136. See generally Fairfax Leary, Jr. & Patricia B. Fry, *A "Systems" Approach to Payment Modes: Moving Toward a New Payments Code*, 16 UCC L.J. 283, 289, 312-21 (1984) (summarizing the loss allocation rules under Articles 3 and 4 of the Uniform Commercial Code).

137. Cordray, *supra* note 9.

C. *Money Transmitter Laws serve a different purpose*

Many states attempt to provide protections for their residents by requiring issuers of GPR prepaid cards to obtain money transmitter licenses.¹³⁸ State money transmitter laws were enacted as a means to govern businesses that serve as an intermediary in the transfer of money between two parties. Importantly, the business model is based on accepting money for the sole purpose of transmitting it to another person. The state laws were designed to prevent the loss of the consumer's funds by ensuring the safety and soundness of the business.¹³⁹ Thus, state money transmitter laws, aimed at monitoring the industry participants, establish net worth requirements, bond requirements, criminal background checks and reporting requirements, may also provide for safety and soundness examinations. However, money transmitter laws do not offer a consistent level of protection for consumers.¹⁴⁰ Under most money transmitter laws, the business obtains a license after posting a surety bond. The amount of the bond differs by state and by the size of the business. Surprisingly, bond amounts range from \$1000 to \$500,000.¹⁴¹ Other varying requirements for the license relate to the size and type of investments the business may make under state law.¹⁴²

138. See generally THE PEW CHARITABLE TRUSTS, IMPERFECT PROTECTION: USING MONEY TRANSMITTER LAWS TO INSURE PREPAID CARDS 1-2 (2013) [hereinafter PEW, IMPERFECT PROTECTION], http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2013/Pewprepaidmoneytransmitterpdf.pdf (observing general procedures and trends associated with state money transmitter laws); see also Judith Rinearson & Kristine M. Andreasen, *Developments in the Regulation of Prepaid Payment Products Under State Money Transmitter Licensing Laws*, 65 BUS. LAW. 271, 274-76 (2009) (detailing the numerous differences in the state money transmitter laws with respect to the types of businesses and product offerings that might make a nonbank subject to the state law).

139. Tu, *supra* note 18, at 85-86 (2013); see also Ramasastry, *supra* note 26, at 819 (suggesting that state licensing laws fill the gap for error resolution procedures until federal regulators evaluate the role of prepaid card issuers and other payment intermediaries in the payment industry).

140. See PEW, IMPERFECT PROTECTION, *supra* note 138, at 2 (displaying how money transmitter laws lack certainty and security); see also Tu, *supra* note 18, at 109-12 (highlighting the uncertainty and costs associated with the "patchwork" of state money transmitter regulatory environment and calling for a new solution).

141. PEW, IMPERFECT PROTECTION, *supra* note 138, at 2. Three states, Montana, New Mexico and South Carolina, do not require a money transmitter license. *Id.* Thus, prepaid programs are subject to many different types of money transmitter laws. For example, Green Dot's 2013 annual report indicates that it has a money transmitter license in "39 states, Puerto Rico and Washington, D.C." GREEN DOT CORP., 2013 ANNUAL REPORT 9 (2013), <http://phx.corporate-ir.net/phoenix.zhtml?c=235286&p=irol-reportsAnnual>.

142. Most litigation under state money transmitter laws involves entities that have failed to obtain a money transmitter license.

As many have observed, money transmitter laws are not designed to protect cardholder funds for two reasons. First, the state laws impose few limits on the investments a card issuer may make with the funds received from cardholders. In contrast, traditional banking regulators require banks to hold a certain percentage of funds on reserve and investments are strictly limited and reviewed.¹⁴³ As Sheila Bair, former Chairman of the FDIC observed: “[P]repaid card companies can take customers’ money and invest it in any investment-grade securities, which may or may not be readily convertible to cash.”¹⁴⁴ Second, state money transmitter laws require bonds that are issued in amounts inadequate to cover the millions of dollars underlying the GPR prepaid cards held by a single issuer. Any consumer seeking to recover under a bond would have to engage in a time-consuming claim process. Upon a determination of insolvency, a non-bank entity would file a petition for bankruptcy, causing consumers to have to navigate the bankruptcy claim process. Even if priority status were possible, the claims process would take months. Clearly, the money transmitter laws, while adequate to monitor the participants in the industry, are not designed to serve the needs of those who depend on the sums loaded on the GPR prepaid card for everyday expenses. In contrast, up to \$250,000 would be available to each prepaid cardholder with federal deposit insurance in the event of an issuer’s insolvency.

State money transmitter laws were designed for a different type of business. The law anticipates a business that holds the funds for a short period of time and gives the funds to the intended beneficiary. In contrast, the funds underlying the GPR prepaid card are held for indefinite periods of time and are directed to recipients who are not identified or anticipated at the time the funds are deposited.

While no GPR prepaid program has suffered a significant loss to date, three companies participating in prepaid program filed bankruptcy in recent years. In 2009, the OCC closed Silverton Bank, a national bank in Atlanta, GA due to its deteriorating financial condition. At the time of Silverton Bank’s closure, the failed bank did not issue any prepaid cards, but it provided a variety of supports for its programs.¹⁴⁵ The FDIC established a bridge bank to take over the operations of the failed institution, so the support services were not interrupted. Springbok Services, Inc., a non-bank program manager for a prepaid card program

143. See generally RICHARD S. CARNELL ET. AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 49-50 (4th ed. 2009).

144. Sheila Bair, *Be Wary of Prepaid Card Protection*, USA TODAY (Apr. 7, 2013, 7:00 AM), <http://www.usatoday.com/story/opinion/2013/04/07/prepaid-cards-shelia-bair-column/2050235/>.

145. Keitel, *supra* note 32, at 4-5.

filed bankruptcy in 2010. Once again, consumers did not suffer significant losses because the banks that issued Springbok's cards agreed to process and service all the outstanding cards.¹⁴⁶ These cases involved the insolvency of a servicing or supporting entity in the prepaid card chain and demonstrate that the risk of insolvency is present in the industry. Without a doubt, if other entities in the prepaid card chain are unavailable to mitigate loss, consumers could suffer significant losses if only money transmitter laws are in place.¹⁴⁷

A more recent case illustrates other types of issues that might arise in a GPR prepaid card program.¹⁴⁸ The case involves NetSpend, a seller of GPR prepaid cards, which contracts with FDIC insured banks to issue its cards. The case involved an insurer's responsibility to protect NetSpend from certain losses in a related matter. The court ruled that due to NetSpend's failure to report a claim in a timely manner, the insurer was not required to defend NetSpend in the other litigation.¹⁴⁹ Thus, a contractual attempt to prevent a loss was negated due to actions taken by entities within the prepaid program. This is just one example of a situation where one entity in a prepaid card program was unable to use private insurance to manage a risk. If deposit insurance is not required, the funds underlying a prepaid card are at risk if a prepaid card program suffers a loss not covered by private insurance. Once again, no consumer suffered a loss, but together, the three cases, highlight the close relationship between all entities in the prepaid chain. There is real risk of insolvency or loss with a GPR prepaid card program and the possibility that contractual arrangements and state money transmitter laws could be inadequate to protect all customers in a particular program is present. Deposit insurance would protect consumers from these risks.

Clearly, consumer confidence in these changing times would be advanced by requiring that funds underlying general reloadable prepaid cards are protected by deposit insurance. With the payments industry undergoing significant change, steps must be taken to ensure the continued protection of consumer funds in transaction accounts.

IV. THE CFPB'S AUTHORITY TO REGULATE GPR PREPAID CARDS

Three statutes provide the basis for the CFPB's regulatory authority over the GPR prepaid card industry and accordingly, its ability to

146. *Id.* at 5-6.

147. *Id.* at 6-7. The Keitel report also references comments by Terrence Maher, general counsel to the Network Branded Prepaid Card Association (NCPCA). *Id.* at 6-11.

148. *NetSpend Corp. v. Axis Ins. Co.*, No. A-13-CA-456-SS, slip op. at 5 (W.D. Tex. July 18, 2014).

149. *Id.* at 8.

ensure the protection of consumer funds placed in a GPR prepaid program. First, the EFTA's definition of "account" includes the GPR prepaid card, so the CFPB has the power to adapt Regulation E's consumer protections for the prepaid cards. Second, Dodd-Frank authorizes the CFPB to ensure that consumer financial products are regulated consistently without regard to the issuer of the product. Thus, Dodd-Frank provides authority for the CFPB to require deposit insurance for GPR prepaid cards and support for the extension of Regulation E protections to GPR prepaid cards. Finally, the CFPB may use its power under the Dodd-Frank Act to declare the issuance of a GPR prepaid card without important consumer protections as an unfair, deceptive or abusive practice and take enforcement actions against industry actors who issue prepaid cards without necessary consumer protections. If the CFPB determines for some reason that statutory authority to provide any particular consumer protection feature is unclear, Congress should act swiftly to extend important consumer protections for the GPR prepaid card.

A. *Extending Regulation E protections*

Section 904 of the EFTA provides:

(d) APPLICABILITY 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 [CFPB] *shall* by regulation *assure that the disclosures, protections, responsibilities, and remedies* created by this subchapter are made applicable to such persons and services.¹⁵⁰

150. Electronic Fund Transfer Act, 15 U.S.C. § 1693b(d) (2012) (emphasis added). Professor Mark Budnitz outlined a legal framework for regulating "stored value cards" almost seventeen years ago in an article explaining the various designs for a consumer product very similar to today's GPR prepaid card. See Mark E. Budnitz, *Stored Value Cards and the Consumer: The Need for Regulation*, 46 AM. U. L. REV. 1027, 1038-39 (1997) (outlining the legislative history illustrating Congressional intent that the Federal Reserve, then the sole administrative agency charged with implementing the Act, had broad powers to regulate electronic-based consumer financial products); see also *id.* at 1039 ("Most significantly for consumers, the Senate Banking Committee stated that the EFTA defined 'financial institution' and 'account' broadly 'so as to assure that all persons who offer equivalent EFT services involving any type of asset account are subject to the same standards and consumers owning such accounts are assured of *uniform protection*.'").

Under this section, the CFPB has clear authority to regulate prepaid cards issued by both insured depository institutions and non-bank entities. Congress anticipated that technology would bring changes to the consumer financial product industry, so the EFTA's language assures that the relevant federal agency has the authority to adapt to the changing marketplace.¹⁵¹ Thus, the CFPB may regulate electronic transfer services offered to consumers by banks and nonbanks alike.

Section 903(2) defines an account as "a demand deposit, savings deposit, or other asset account . . . established primarily for personal, family, or household purposes."¹⁵² This statutory definition is broad enough to encompass the GPR prepaid card issued by banks and non-banks. In short, when a consumer loads a GPR prepaid card, she is creating an asset account under the EFTA. Therefore, the definition of "account" in the EFTA or Regulation E does not need to be amended.¹⁵³

151. See NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS, EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS IN THE PUBLIC INTEREST (1977), available at <http://babel.hathitrust.org/cgi/pt?id=umn.31951d00830509f;view=1up;seq=3>; see also Peter D. Schellie, *Electronic Fund Transfer Act*, 34 BUS. LAW. 1441, 1443-44 (1979) (explaining how the Act will be subject to "continuous refinement and reinterpretation" because Congress defined terms more broadly than their common usage).

152. Electronic Fund Transfer Act § 903(2), 15 U.S.C. § 1693a(2) (2012).

153. Sen. Robert Menendez (D-N.J.), along with co-sponsor Sen. Richard Blumenthal (D-Conn.), introduced the "Prepaid Card Consumer Protection Act of 2013." S. 1867, 113th Cong. (2013). This Act is similar to legislation introduced in 2009, 2010, and 2011. The proposed legislation extends Regulation E to prepaid cards by amending the definition of "account" to include a "spending account," which is defined as:

[A] deposit account—

(A) (i) that is established by a consumer or on behalf of a consumer at an insured depository institution or an insured credit union; (ii) that contains the funds of a consumer; (iii) to which payments are to be made by a consumer, or at the direction of a consumer; (iv) to which recurring electronic fund transfers may be made, at the direction of a consumer; or (v) from which payments may be made at the direction of a consumer through the use of a card, code, or device;

(B) includes a deposit account described in subparagraph (A)— (i) that is operated or managed by a financial institution, or any other person; and (ii) the funds of which are (I) pooled with funds of a person other than the person who established the account; or (II) held in a name other than that of the person who established the account

Proposed S. 1867. Using a similar approach, on January 9, 2014, Sen. Mark Warner (D-Va.) introduced the "Prepaid Card Disclosure Act of 2014," which requires fuller disclosures for prepaid cards. S. 1903, 113th Cong. (2014). Although narrower in scope, the legislation expands the application of the Electronic Fund Transfers Act by adding an identically defined "spending account" term describing a prepaid card. Thus, both bills take the same approach — amending the definition of "account" as a mechanism to extend regulatory authority. Arguably, however, this approach is unnecessary.

However, the CFPB elected to clarify the meaning of “account” with its proposed regulation by creating a new subsection to define a “prepaid account.” Specifically, the CFPB proposed to add § 1005.2(b)(3), which defines a prepaid account as “a card, code, or other device, that is not otherwise an account under § 1005.2(b)(1), that is established primarily for personal, family, or household purposes, and that satisfies three additional criteria as laid out in proposed § 1005.2(b)(3)(i)(A) through (C)”¹⁵⁴

In addition to clarifying the expanded scope of the EFTA, the CFPB’s proposed rule also adapts Regulation E’s protections for notices, including fee disclosures and statement information. Error resolution procedures and liability limitation provisions could be adopted for the GPR prepaid product.¹⁵⁵

1. Disclosures

Several provisions in Regulation E require disclosures to cardholders. Section 205.7 requires a number of disclosures at the time the consumer “contracts for an electronic fund transfer service.”¹⁵⁶ The list of disclosures includes information about the consumer’s liability for unauthorized electronic fund transfers, limits on transfers, fees, rights to receipts and periodic statements, and error resolution procedures.¹⁵⁷ Even before the issuance of the proposed rules in November 2014, the CFPB had taken significant steps to create clear disclosures for consumers.¹⁵⁸ The proposed rule requires a disclosure that is very similar to the disclosure box developed by the Pew Charitable Trusts.¹⁵⁹ This disclosure box has proven to be very effective with consumers and represents a marked improvement for marketplace.¹⁶⁰

154. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77,102, 77,128__ (Dec. 23, 2014) (to be codified at 12 C.F.R. Parts 1005 and 1026).

155. VLADECK, *supra* note 76, at 4 n.35 (suggesting that because payroll cards are the type of payment card most similar to GPR prepaid card accounts, it may be appropriate to use the payroll card model for applying Regulation E to GPR prepaid accounts).

156. 12 C.F.R. § 205.7 (2006).

157. 12 C.F.R. § 205.7(b)(1)-(10) (2006).

158. See Goldberg, *supra* note 12.

159. *The Need for Improved Disclosures for General Purpose Reloadable Prepaid Cards*, THE PEW CHARITABLE TRUSTS (Feb. 26, 2014), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/02/26/the-need-for-improved-disclosures-for-general-purpose-reloadable-prepaid-cards>.

160. *Id.*

2. Transaction Statements

Similarly, Regulation E's current requirements for account history were adapted to the prepaid product under the CFPB's proposed rule. Under the rule, transaction data must be made available electronically or via a phone call without cost to the cardholder.¹⁶¹

3. Error Resolution Procedures

Currently, consumers using debit cards and credit cards have error resolution rights that may not be available to users of GPR prepaid cards. Both the EFTA and Regulation E, for debit cards, and the TILA and Regulation Z, for credit cards, require the issuing financial institution to promptly investigate any error and to recredit the consumer account within a specific period of time. Under the CFPB's proposed rule, the error resolution procedure for GPR prepaid cards closely follows the procedures for debit cards, and therefore, should not surprise industry participants.¹⁶²

4. Liability Limitation Provisions

The proposed rules also extend Regulation E's loss limitations to the prepaid product. Most cardholders of GPR prepaid cards expect to be protected against loss in the event of theft or unauthorized use of the card. Some might argue that a cardholder carrying a card funded with his own funds should exercise care to prevent loss or unauthorized use. However, not only do consumers generally not understand how cards are protected against loss, but oftentimes, a loss may occur despite the cardholder's

161. Consumers often consult their checking account history to confirm payments or to prepare income tax returns. Thus, the sixty day transaction history required by § 205.18 for payroll card accounts is not sufficient for GPR prepaid cards. One commentator to the ANPR suggested that the period for electronic history should be extended for one year. *See* Comments of Nat'l Law Ctr., Ctr. for Responsible Lending and Consumer Fed'n of Am., July 23, 2012 at 68 (on file with author). This longer period may be sufficient if it is combined with the ability to obtain a written history of the consumer's transaction for a slightly longer period of eighteen months. This modification for GPR prepaid cards attempts to recognize the minor differences between the GPR prepaid card and a payroll card account.

162. Under Regulation E, a consumer reporting an error must provide certain types of information to the financial institution. Thereafter, the financial institution has ten business days to investigate and determine whether an error occurred. If the financial institution needs additional time to investigate, it must re-credit the missing funds upon the expiration of a ten-day period. Upon providing the provisional credit, a financial institution may take up to forty-five calendar days from the receipt of the original notice to complete the investigation. If the investigation confirms the error, the financial institution has one business day after determining that an error occurred to correct it.

careful practices. Accordingly, like the TILA provisions,¹⁶³ GPR prepaid cardholders should be limited to a loss of \$50 for theft or unauthorized use of the card. Adoption of the more protective credit card limit for GPR prepaid cards is appropriate because it would avoid the confusion that existed before contractual provisions instituted \$0 liability provisions into debit card contracts in the late 1990s.¹⁶⁴

Overall, Regulation E protections are properly extended to the prepaid product under the Proposed Rule. Nevertheless, the Proposed Rules are inadequate in that they fail to ensure that deposit insurance will be available to holders of GPR prepaid cards. Because the EFTA does not address the provision of federal deposit insurance, the CFPB must use its powers under Dodd-Frank to compel GPR prepaid card issuers to provide deposit insurance for consumers.¹⁶⁵

163. 15 U.S.C. § 1643 (2013).

164. David J. Morrow, *Handy? Surely, But Debit Card Has Risks, Too: Popular Bank Feature Has Hidden Expenses*, N.Y. TIMES, July 13, 1997, at 1, 9 (describing the experiences of consumers, at a time when debit cards were a new innovation, as consumers came to realize that the unlimited liability provisions in the debit card law were different from the \$50 limitation in the credit card law).

165. A number of questions in the ANPR request information about the appropriateness of several other features for a prepaid card. The questions mention arbitration terms, credit features, and overdraft fees. Separately, the CFPB is assessing arbitration practices with regard to these features on consumer financial products, so this study will undoubtedly influence the Bureau's evaluation of these features for the GPR prepaid card. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM & CONSUMER PROTECTION ACT § 1028 (2015). While a full evaluation of all the features mentioned in the ANPR is beyond the scope of this paper, one recent study concerning overdraft fees on checking accounts is directly related to the GPR prepaid cards that serve as a substitute for a checking account. Effective in 2010, § 205.17 of Regulation E provides that checking account customers must affirmatively opt-in to overdraft coverage for ATM withdrawals and debit card point-of-sale transactions. A recent CFPB report details the overdraft fees paid by bank customers "opting in" to overdraft protection for debit card and ATM transactions and concludes that the majority of overdraft fees are incurred on overdrafts of \$24 or less. CONSUMER FIN. PROT. BUREAU, DATA POINT: CHECKING ACCOUNT OVERDRAFT 5 (2014), available at http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf; see also Press Release, Consumer Prot. Fin. Bureau, CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges (July 31, 2014), available at <http://www.consumerfinance.gov/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/>. While it is too soon to anticipate the steps the CFPB will take to address this finding, the report should support a determination that overdraft coverage should not be a feature for the GPR prepaid card. As indicated earlier, consumers elect to use the GPR prepaid card, in part, to avoid overspending. Herbst-Murphy & Weed, *supra* note 38. Allowing an overdraft feature on a GPR prepaid card would eliminate this feature and significantly increase the costs of this popular checking account alternative. Recent experiences with a credit feature on a GPR prepaid card may provide sufficient evidence of the problems that might arise if the product is burdened with too many features.

B. The CFPB's authority to supervise "covered persons" offering consumer financial products

Section 1024 of Dodd-Frank grants the CFPB broad supervisory and enforcement authority over "covered persons,"¹⁶⁶ which includes a person who:

[T]he Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected through the system . . . or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services¹⁶⁷

Interpreting this section, the CFPB issued a final rule in July 2013 establishing a procedure for determining when the CFPB might exercise authority over a person under Section 1024.¹⁶⁸ When explaining the background for the rule, the CFPB noted that one of Congress' objectives for the CFPB is to ensure that consumer financial products are regulated consistently without regard to the issuer of the product.¹⁶⁹

Accordingly, Section 1024(a)(1)(C) could be used to exercise supervisory and enforcement authority over banks and nonbanks issuing GPR prepaid cards. By opening the complaint system to consumer reports about their experience with prepaid cards on July 2014,¹⁷⁰ the CFPB has established an avenue for gathering complaints and other information needed to exercise its authority under § 1024(a)(1)(C). In order to act, the

166. "Covered persons" are defined as "any person that engages in offering or providing a consumer financial product or service" and "any affiliate of a person described [above] if such affiliate acts as a service provider to such person." 12 U.S.C. § 5481(6) (2013). See generally Dylan J. Castellino, Note, *A Spotlight on Shadow Banking: The CFPB Finalizes Procedures to Supervise Risky Nonbanks*, 18 N.C. BANKING INST. 333, 336-40 (2014) (explaining that the CFPB also is authorized to supervise (1) nonbank covered persons that offer (a) origination, brokerage or serving of loans secured by real estate used as a personal residence, (b) private education loans, (c) payday loans; and (2) larger participants in the market for other types of consumer financial products).

167. Dodd Frank § 1024(a)(1)(C), *codified at* 15 U.S.C. § 5514(a)(1)(C).

168. Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40,352 (July 3, 2013) (to be codified at 12 C.F.R. pt. 1091).

169. *Id.*

170. *CFPB Begins Accepting Consumer Complaints on Prepaid Cards and Additional Nonbank Products*, CONSUMER FIN. PROT. BUREAU, (Aug. 1 2014, 11:21 PM), <http://www.consumerfinance.gov/newsroom/cfpb-begins-accepting-consumer-complaints-on-prepaid-cards-and-additional-nonbank-products/>.

CFPB must find that the product causes a “risk to consumer[s].”¹⁷¹ The CFPB refused to define this phrase in its final rule.¹⁷² However, the Bureau indicated that when providing notice to a “covered person” it would consider whether the product or conduct was “potentially unfair, deceptive or abusive” or “potentially violates applicable Federal consumer financial law.”¹⁷³ Accordingly, assuming the CFPB extends Regulation E to GPR prepaid cards, the focus turns to whether the distribution of a prepaid card without deposit insurance is an “unfair, deceptive or abusive” practice.¹⁷⁴

C. *The CFPB’s UDAAP Authority*

Determining whether distribution of a GPR prepaid product, with a maximum load of \$10,000, without deposit insurance constitutes an “unfair, deceptive or abusive” practice is based on whether a consumer can truly appreciate the significance of FDIC protection. The CFPB may use its authority under Section 1031(d) of Dodd-Frank to prevent unfair, deceptive or abusive acts or practices (UDAAP) to regulate the GPR prepaid card product. Section 1031(d) provides:

The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the

171. Dodd Frank § 1024(a)(1)(C), *codified at* 15 U.S.C. § 5514(a)(1)(C).

172. Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40,357 (July 3, 2013) (to be codified at 12 C.F.R. pt. 1091) (reporting that the CFPB determined that defining “risks to consumers” was “beyond the scope of the final rule”).

173. *Id.* Section 1022’s broad language, allowing the agency to issue rules, orders and guidance, could also be used by the Bureau to signal the type of product or services that are acceptable before any formal enforcement steps are taken. 12 U.S.C. § 5512(b)(1) (2013).

174. Ongoing supervision of non-bank GPR prepaid card issuers pursuant to Section 1024 may not be necessary in light of enactment of the “Money Remittances Improvement Act” sponsored by Senator Keith Ellison. Money Remittances Improvement Act of 2014, H.R. 4386, 113th Cong. (2013) (enacted). This legislation allows federal regulators to rely on reports on money service businesses from state regulators. As stated above, some states regard a non-bank issuer of prepaid cards as subject to the money transmitter license statute. *See Cordray, supra* note 137 and accompanying text. Once it receives a license, the entity will be subject to periodic examination by state regulators. Whether or not the entity is subject to state law, the business is also deemed to be a money services business (MSB) subject to regulation by FinCEN for compliance with money laundering rules. *See Gregory, supra* note 75. Thus, the new law simply allows FinCEN and other federal regulators to rely on the examinations conducted by state regulators. The legislation will ease the regulatory burden on both the businesses and eliminate duplicative efforts by government agencies. Thus, while the “day-to-day” oversight of non-bank entities could be addressed in this manner, the CFPB’s authority under Section 1024 could be more limited.

offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.¹⁷⁵

The language of the statute suggests that the focus is on products and services directed at consumers and thus includes the GPR prepaid card. While Senator Menendez' proposed legislation clearly requires deposit insurance for all spending accounts and eliminates the need to engage in any analysis of the CFPB's UDAAP authority,¹⁷⁶ Congressional action is painstakingly slow and could derail agency action directed at closing the current regulatory gap as Congress did eighteen years ago when the Federal Reserve attempted to regulate stored value cards.¹⁷⁷

Federal agencies have utilized their power to prohibit "unfair or deceptive acts or practices" for a number of years.¹⁷⁸ GPR prepaid programs, however, have been subject to federal enforcement actions on only a few occasions. Notably, in May 2013, the FDIC, a banking regulator, issued Consent Orders involving Achieve Financial Services and First California Bank. Without admitting or denying any violation of law, the entities consented to the issuance of separate consent orders. Under the orders, certain compliance steps were initiated, a \$1.1 million restitution fund was set up and a civil money penalty was levied.¹⁷⁹ The orders mentioned unfair and deceptive practices in violation of Section 5 of the FTC Act and violations of the Treasury rule concerning the delivery of federal benefit payments to a prepaid card.¹⁸⁰ The FDIC also mentioned a

175. 12 U.S.C. § 5531(b) (2013).

176. Section 3 of Sen. Menendez' bill expressly requires FDIC (or NCUA) deposit insurance for the funds underlying the spending account. It also requires that the funds underlying the prepaid account be placed in an insured depository institution within one day of receipt, stating:

TRANSFER OF FUNDS – Any person that receives funds in connection with an electronic fund transfer to a spending account shall promptly, and in no event later than 1 business day after the funds are activated— (A) transfer such funds to an account at an insured depository institution or an insured credit union, as applicable; and (B) credit the spending account in an amount equal to the amounts of such funds.

See *supra* note 153 and accompanying text.

177. See *supra* notes 104-106 and accompanying text.

178. Section 5 of the Federal Trade Commission Act grants the FTC authority to bring enforcement actions against those that engage in "unfair or deceptive acts or practices." Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2006). A summary of the FTC's enforcement actions is available on the agency's website. See generally *Enforcement*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement> (last visited May 8, 2015).

179. See *infra* note 180 and accompanying text (discussing restitution and civil penalty consent orders).

180. Both parties agreed to the Consent Orders without admitting or denying any viola-

prepaid card program when it issued a Consent Order against The Bancorp Bank for engaging in unsafe and unsound practices in matters related to the bank's compliance with the Bank Secrecy Act.¹⁸¹ As a part of the Consent Order, the bank could not establish any new contractual relations for prepaid card programs until specific compliance matters were addressed.¹⁸² In 2009, the FTC settled with VirtualWorks, LLC for deceptively enrolling customers in their GPR prepaid program without their consent,¹⁸³ and in 2007, using its UDAAP authority, the FTC agreed to a \$2.2 million settlement in an action against EDebitPay for deceptively advertising its GPR prepaid card as "no cost" when it was charging \$9.95 per month for the card.¹⁸⁴ Although the agencies used different statutory authorities in these enforcement actions, they provide some insights about the ability of the CFPB to utilize its UDAAP authority.

Based on these proceedings, the CFPB could initiate a UDAAP enforcement action if it finds that a GPR prepaid card is mislabeled—assuring the customer that FDIC insurance is available when no steps or improper steps have been taken to comply with the FDIC's requirements in the FDIC's General Counsel's Opinion No. 8.¹⁸⁵ Under these circumstances, the facts would be very similar to any situation involving a material misrepresentation. This approach would be less intrusive to prepaid card businesses. Yet, it would allow a second-class consumer financial product to exist in the marketplace. As long as the product was properly labeled as lacking deposit insurance, no enforcement action would be pursued. Arguably, this approach does not seem to be the best way to offer this consumer protection feature.

The CFPB's UDAAP authority, however, is broader than the powers extended to the FTC. In contrast to the FTC's power, the CFPB may take action against practices that are "unfair", "deceptive" or "abusive." While there is little understanding in the consumer finance

tion of federal law. *In re* First Cal. Bank, Westlake Vill., Cal., No. FDIC-13-046b, FDIC-13-047k (May 28, 2013) (Consent Order for Restitution and Order to Pay Civil Money Penalty) (the order included a \$600,000 civil money penalty against the bank); *In re* Achieve Fin. Servs., No. FDIC-13-048b, FDIC-13-049k (May 28, 2013) (Consent Order for Restitution and Order to Pay Civil Money Penalty) (including a \$110,000 civil money penalty).

181. *In re* Bancorp Bank, Wilmington, Del., No. FDIC-13-0479b, at 5 (June 5, 2014) (Consent Order).

182. *Id.*

183. Press Release, Fed. Trade Comm'n, FTC Settlement Bars Deceptive Online Marketing Tactics; Payday Loan Applicants Were Charged for Unwanted Debit Cards (Aug. 20, 2009) (on file with author).

184. *FTC v. EDebitPay*, No. CV-07-4880, 2008 U.S. Dist. LEXIS 122126, at *7, *11 (C.D. Cal. Jan. 17, 2008), *aff'd*, 2012 U.S. App. LEXIS 18206 (9th Cir. Cal. Aug. 28, 2012).

185. *Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms*, 73 Fed. Reg. 67,155 (Nov. 13, 2008).

industry about the meaning of the term “abusive” the authority could be used to craft the essential features of a GPR prepaid card product. “Abusive” is defined in Dodd-Frank as an act or practice that:

- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) takes unreasonable advantage of—
 - (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.¹⁸⁶

CFPB offered a few insights about its interpretation of this provision in a July 2013 Bulletin.¹⁸⁷ The Bulletin describes conduct that might constitute a UDAAP, but advises that additional guidance will be provided as it exercises its UDAAP power through enforcement proceedings.¹⁸⁸ The CFPB’s use of this authority in enforcement proceedings to date has been limited.¹⁸⁹

When applying the statutory definition of “abusive,” the CFPB must focus on the ability of the consumer to understand and take steps to avoid the risks associated with the lack of deposit insurance. The analysis begins by recognizing that the “unbanked and underbanked” are a key market for the new product. Hayashi and Cuddy mapped the penetration rates of prepaid cards in NetSpend’s program and found that “the shares of unbanked and underbanked households and prepaid card penetration rates

186. 12 U.S.C. § 5531(d) (2013).

187. CONSUMER PROT. FIN. BUREAU, CFPB BULL. NO. 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS (2013).

188. *Id.*

189. Recently, the CFPB invoked this power, declaring action by a predatory lending collection agency as “abusive” and fining the organization \$10 million. Jim Puzanghera, *Payday Lender Will Pay \$10 Million to Settle Consumer Bureau’s Claims*, L.A. TIMES, July 10, 2014, <http://www.latimes.com/business/la-fi-payday-lender-settlement-20140711-story.html>. In early July 2014, the CFPB settled litigation against ACE Cash Express for “abusive” practices in connection with payday loans. *Id.* The complaint alleged that the company used abusive practices when making collection efforts against delinquent borrowers. *Id.* Under the settlement, the company will pay \$10 million. *Id.*

are positively correlated.”¹⁹⁰ Thus, it seems counterintuitive to the efforts to assist millions of unbanked Americans to permit widespread distribution of a consumer financial product that is not protected with federal deposit insurance. Applying the statute, the CFPB could find that a GPR prepaid card without deposit insurance would be “abusive” because it is affirmatively marketed, at least in part, to those who face obstacles to selecting an alternative financial product for routine expenses.

Any “abusive” analysis must also recognize, as outlined above,¹⁹¹ that the average consumer is unable to effectively evaluate or monitor a GPR prepaid card program. Information about the program’s compliance with the FDIC’s guidelines for assuring deposit insurance would not be available at the time the card is purchased, so the consumer could not reasonably avoid the risks by simply reading the packaging. In fact, it is unlikely that the consumer could thoroughly identify and assess the potential risks in a GPR prepaid program. Since 1886, federal and state governments have worked to protect the savings and “hard earned” income of Americans. Technological changes in the way consumer financial products are delivered to consumers do not change the underlying rationale for this important consumer protection. Consumer experiences to date support a determination that consumers are at significant risk if a consumer financial product designed as a checking account on a card lacks deposit insurance, a feature that has protected the earnings and savings of Americans for decades. Thus, under either the “unfair” prong or the “abusive” prong, an entity offering an unsafe consumer financial product without deposit insurance would be subject to oversight pursuant to Section 1024(a)(1)(C) or an enforcement proceeding pursuant to Section 1031(d).

The Consumer Product Safety Commission (“CPSC”) and the Occupational Safety and Health Administration (“OSHA”) repeatedly take actions against companies for failure to install safety devices or to require safety procedures. Even the current privacy debate is focused, in part, on the affirmative steps merchants must take to design computer systems that prevent or reduce harms to consumers. Accordingly, the CFPB may use its UDAAP authority to prevent an unsafe product without important consumer protections from becoming a mainstream consumer financial product. In other words, if the CFPB amends Regulation E to incorporate GPR prepaid cards, the CFPB could initiate a UDAAP enforcement action against any GPR prepaid card issuer offering a product that does not offer deposit insurance. However, enforcement actions against non-conforming prepaid card issuers would be time-consuming and costly. Therefore,

190. Fumiko Hayashi & Emily Cuddy, *General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees and Fraud Risks* 11 tbl. 3.1 (Fed. Res. Bank of Kan. City, Working Paper No. 14-01, 2014), available at <http://ssrn.com/abstract=2398607>.

191. See *supra* Part III.A-B.

although a single enforcement would likely provide sufficient motivation to impact the architecture of all GPR prepaid card programs, the CFPB has the ability to issue guidance bulletins.¹⁹² Accordingly, the CFPB should issue a guidance requiring all “covered persons” to structure GPR prepaid card programs in a manner that ensures deposit insurance for all consumers.¹⁹³

CONCLUSION

General purpose reloadable prepaid cards are part of a larger trend toward a cashless society. This market offers significant benefits to both traditional depository institutions and the new non-bank entrants in the payments industry. Electronic transfers significantly reduce the costs associated with paper-based payment systems. However, GPR prepaid cards must offer consumer protections so consumers do not become the sole bearers of the risks inherent in any payment system. Simple protections, like those traditionally afforded to mainstream banking clients using checking accounts and debit cards, must be adopted for the GPR prepaid product to ensure long-term product safety for consumers. Current law, including both the EFTA and Dodd-Frank, gives the CFPB the authority to ensure that the GPR prepaid product offers the same consumer protections, deposit insurance and Regulation E protections, as similar products.

192. See, e.g., CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2014-02, BULLETIN ON MARKETING OF CREDIT CARD PROMOTIONAL APR OFFERS (2014) (offering guidance to lower the risk of deceptive or abusive practices by all industry participants).

193. Alternatively, the CFPB could use its broad supervisory powers over larger non-bank participants in financial markets to establish consumer protections for GPR prepaid cards. 12 U.S.C. § 5514(a)(1)(B), (a)(2). To date, the CFPB has identified debt collectors and credit reporting agencies as entities subject to its “larger participant” authority. 12 C.F.R. § 1090. Arguably, this power to regulate larger participants could extend to nonbank payment service providers, including participants in the GPR prepaid card programs. While it is too early to predict the movement of the payments industry, if payment activities are broken away from the traditional banking system, this supervisory power might be necessary for non-bank participants in the payments industry.