

BEFORE THE
CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of
Request for Comment on Advance Notice of Proposed Rulemaking
Electronic Fund Transfers (Regulation E) and General Purpose Reloadable Prepaid Cards

Docket No. CFPB-2012-0019

Comments of the Staff of the Bureau of Consumer Protection*

July 23, 2012

*These comments represent the views of the staff of the Bureau of Consumer Protection. They are not necessarily the views of the Commission or any individual Commissioner. The Commission has, however, voted to authorize the staff to submit these comments.

I. Introduction

timely credits as required by TILA and Regulation Z,¹⁰ or used negative-option plans that violated EFTA and Regulation E, through unauthorized recurrent debiting of bank accounts.¹¹

The Dodd-Frank Act¹² assigned the FTC new enforcement authority for payment cards by adding new Section 920 to EFTA.¹³ Among other things, Section 920 restricts certain practices related to debit and credit card transactions; it also restricts certain debit card interchange fees. The FTC also has enforcement authority for numerous other financial services statutes and regulations.¹⁴

The Commission engages in many activities other than law enforcement to protect consumers of payment cards. For example, the FTC issues consumer and business education,¹⁵ conducts workshops to inform the public and itself about developing consumer protection issues,¹⁶ and responds to requests for information about consumer financial issues from consumers, industry representatives, state law enforcement agencies, and the media. Commission staff also has filed public comments with information and views to assist other agencies, including to assist in their promulgation of rules to implement financial services statutes.¹⁷ The Commission also is focusing increasingly on consumers' use of mobile products and services, which sometimes use GPR cards as a payment method.¹⁸

Drawing on its experience with payment cards, FTC staff offers the information and views below in response to the CFPB's ANPR seeking comment on extending protections to users of GPR cards that are currently afforded to users of other payment cards.

III. Major Payment Card Areas for Consideration

A. Current Regulation of Payment Cards

As noted above, GPR cards have been increasing in popularity and usage.¹⁹ They are one type of prepaid card, which is the fastest growing major payment type.²⁰ Some sellers of GPR cards also are offering them for general retail use, and for transit system use.²¹ Students and the underbanked are among the greatest users of GPR cards.²² Moreover, 91% of underbanked consumers have a mobile phone,²³ and, as noted above, mobile service providers often encourage their customers to use GPR cards as a payment method.²⁴

Consumers are increasingly using GPR cards as an alternative to other payment cards and methods in the marketplace. In addition to the FTC Act's protection against unfair and deceptive practices, consumers who use credit cards, traditional debit cards (linked to a bank or other consumer asset account), electronic benefits transfers, payroll cards, and gift cards²⁵ all are provided some protections relating to their costs and terms under other federal laws. In brief, these protections are:

Credit cards:

Under TILA and Regulation Z, consumers using credit cards can rely on longstanding and substantial protections related to the costs and terms of these cards. These protections include:

- 1) disclosures about fees and other terms;
- 2) limitations on liability for unauthorized use;²⁶
- 3) dispute resolution procedures; and others.²⁷

Debit cards:

Under E

payment cards, such as credit cards, debit cards, electronic benefit transfers, payroll cards, and gift cards:³⁵ 1) liability limits for fraud and unauthorized use; 2) disclosure requirements for fees and expiration; 3) error resolution procedures; and 4) authorization standards for recurrent payments. FTC staff recommends that, in assessing these protections, the CFPB consider specific problems experienced by consumers absent these protections and available data about the costs and benefits of them, including any differences between GPRs and other payment cards that may affect these costs and benefits.

1. Liability Limits

At present, federal law does not limit the liability of users of GPR cards for fraudulent or unauthorized use. Thus, federal law does not protect a consumer who loses the card to a thief or otherwise, and an unauthorized person could use the full amount of any remaining balance on the card to make purchases or, with some cards, to obtain the funds themselves.³⁶ Under federal law, consumers who use GPR cards thus bear the entire risk of loss from fraud or unauthorized use.³⁷

In the FTC's experience, liability limits for credit and debit cards under TILA and EFTA have provided important consumer protections against fraud and unauthorized use. As noted above, under TILA and Regulation Z, a consumer's liability is capped at a maximum of \$50, for unauthorized transactions involving credit cards.³⁸ Under EFTA and Regulation E, a consumer is liable for an unauthorized transfer involving a debit card only if the financial institution has provided certain disclosures, and the amount of liability depends on how quickly the consumer notifies the financial institution of the problem.³⁹ By contrast, gift cards have no liability limits.⁴⁰

Based on its experience with payment cards, FTC staff believes that consumers face significant risk of loss through the use of GPR cards. The issue of liability limits for GPR cards was recently considered at the FTC's Mobile Workshop. Panelists considered the issue of liability protection for prepaid cards, including GPR cards, in view of the expanding mobile market.⁴¹ Consumers Union also has explained that "with prepaid cards [which include GPR cards], consumers might be out of all their money due to an unauthorized transaction regardless of how quickly the loss is reported, and may not have access to missing money when money is needed to pay bills and for daily essentials."⁴² Moreover, because underbanked consumers, students, and others of limited means often use GPR cards as a payment mechanism, these losses may have a greater impact on them than they would on more affluent consumers.

Extending liability limits, however, also may impose costs on consumers. Credit and debit card issuers currently are responsible for the difference between the cost of a fraudulent or unauthorized transaction⁴³ and the legal limit on liability. These issuers also may incur costs in administering systems to address fraudulent and unauthorized transactions. Issuers of GPR cards who do not screen potential customers may incur higher marginal costs in developing new systems to prevent fraudulent and unauthorized transactions to comply with a regulation. Credit and debit card issuers who screen card holders presumably have been able to recoup these costs through increases in the cost of cards, such as the interest rate or fees they charge consumers. If issuers of GPR cards are legally responsible for the difference between the cost of a fraudulent

or unauthorized transaction and the legal limit of liability, and they do not currently engage in screening their customers, they too may seek to recoup these costs through increases in the cost of cards. Such cost increases may affect consumers' choice of payment methods, including their choice between GPR cards and cash, which could cause consumers to lose the convenience of GPR cards.

Thus, FTC staff recommends that the CFPB identify and propose for public comment specific requirements governing limitations on consumer liability for GPR cards, taking into account the costs and benefits of alternative ways to limit consumers' liability.

2. Disclosure of Fees and Expiration Dates

GPR cards often involve a variety of fees, which can vary widely by type and amount.⁴⁴ For example, Green Dot – a major seller of GPR cards – charges fees for: 1) card purchase (up

there is no expiration date.⁵¹ Some cards provide this information on the landing page of the online advertisement;⁵² for others, consumers must search through numerous “FAQs,” “Help,” or “Terms and Conditions” pages – often themselves provided with links in fine print – to reach the information.⁵³

To foster consumer understanding of card features and comparison shopping, federal law currently mandates that issuers disclose to consumers information about fees and other terms of certain payment cards other than GPR cards. As noted, TILA and Regulation Z require that issuers and others provide consumers with clear and conspicuous disclosures of fees and terms

1. Electronic Fund Transfers (Regulation E) ANPR, 77 Fed. Reg. 30923 (May 24, 2012). A GPR card is issued for a set amount and is reloadable, meaning the consumer can add funds to the card. *Id.*
2. *Id.* Regulation E is one of the regulations implementing the Electronic Fund Transfer Act (EFTA). The CFPB's Regulation E is found at 12 C.F.R Part 1005. EFTA is found at 15 U.S.C. § 1693 *et seq.* EFTA and Regulation E generally apply to electronic fund transfers (EFTs) that authorize a financial institution to debit or credit a consumer's "account," which is a demand deposit, savings, or other consumer asset account held directly or indirectly by a financial institution and established primarily for personal, family or household purposes. *See* 77 Fed. Reg. at 30924 and 12 C.F.R. § 1005.2(b)(1).
3. *See supra* note 1.
4. *See* 77 Fed. Reg. at 30925.
5. As discussed below, Section 5 of the FTC Act protects consumers who use these cards from unfair or deceptive acts or practices. *See infra* note 6 and accompanying text. However, there are no federal regulations or protections pertaining to the costs and terms of GPR cards comparable to the provisions for other payment cards.
6. 15 U.S.C. § 45(a).
7. *See*

16. The FTC recently held two workshops that also pertain to financial services, including payment cards. *See, e.g.*, FTC Workshop, *Paper Plastic . . . or Mobile?* (Apr. 26, 2012), available at <http://www.ftc.gov/bcp/workshops/mobilepayments>, and FTC Workshop, *In Short: Advertising & Privacy Disclosures in a Digital World* (May 30, 2012), available at <http://www.ftc.gov/bcp/workshops/mobilepayments>.

17. *See, e.g.*, FTC, Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning, Before the Board of Governors of the Federal Reserve System, In the Matter of Request for Comments on Truth in Lending, Proposed Rule (Apr. 8, 2008), available at <http://www.ftc.gov/opa/2008/04/frb.shtm>; FTC, Comment of the Staff of the Bureau of Consumer Protection, In the Matter of the Office of Thrift Supervision's Advance Notice of Proposed Rulemaking Regarding Unfair or Deceptive Acts or Practices (Dec. 12, 2007), available at <http://www.ftc.gov/opa/2007/12/ots-07-137-ov>. Se-11.52 676144(c)-16-200

29. *See, e.g.*, 12 C.F.R. §§ 1005.7, 1005.10, and 1005.11.

30. Pub. L. 111 24, 123 Stat. 1734 (2009).

31. *See generally* 12 C.F.R. §§ 1005.15, 1005.18, and 1005.20.

32. *See* 77 Fed. Reg. 30924 25. GPR cards that are marketed as gift cards are subject to the gift card rules under Regulation E. *See* 12 C.F.R. § 1005.20. These requirements include, among other things, disclosures about gift card features and terms pertaining to fees and expiration dates, and restrictions on fees and expiration. However, as noted, Regulation E generally does not apply to GPR cards that are not marketed as gift cards.

As noted above, Regulation II, under EFTA, applies in some respects to GPR cards. These rules impose limits on interchange transaction fees, and prohibit network exclusivity and routing limits. *See generally* 12 C.F.R. Part 235; *see also* Debit Card Interchange Fees and Routing, Final Rule, 76 Fed. Reg. 43394 (July 20, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR_2011_07_20/pdf/2011_16861.pdf, and Debit Card Interchange Fees and Routing, Interim Final Rule; Request for Comment, 76 Fed. Reg. 43478 (July 20, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR_2011_07_20/pdf/2011_16860.pdf.

33. *See, e.g.*, Regulation Z, 12 C.F.R. § 1026.2(a)(14).

34. *See* Regulation E definition of “electronic fund transfer,” including “any transfer of funds . . . for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account.” 12 C.F.R. § 1005.3. *See also* definition of “account,” as a “demand deposit (checking), savings, or other consumer asset account . . . held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.” 12 C.F.R. § 1005.2(b)(1). Although the cards’ funds may be accessible by consumers through various entities, they may be held in some form of aggregate or “pooled” arrangement with other funds, rather than in a consumer asset account itself.

35. The CFPB:(e)14aE1247 1035s(0)-13(eix(of)2e4(B).5 9 Tf0.5 4 T(y)13(13(e5D9(heamp16(ams)22(e)13(.p)13()-17(14(pol)2

incurred thereafter.

40. *See* 12 C.F.R. § 1005.20.

41. *See generally* FTC Workshop Transcript, Paper, Plastic . . . or Mobile, Session 2, *available at* http://htc.01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/042612_FTC_sess2.pdf.

42. *See Consumers Union Report at 17, supra note 20.*

43. Issuers also may incur the costs of voluntarily adopting and implementing measures (such as the use of personal identification numbers (PINs)) to prevent fraudulent or unauthorized transactions.

44. *See generally id.* *See also* Consumer Action, *Prepaid Card Survey*, April 2012, *available at* http://www.consumeraction.org/downloads/press/2012_Prepaid_Card_Survey.pdf; *see also* Consumer Action, *Prepaid Card News*, Spring 2012, *available at* http://www.consumeraction.org/downloads/english/CA_News_Spring_2012.pdf.

45. Green Dot and OmniCard disclose some fee information in some media. *See, e.g.*, “Green Dot Card Fees,” *available at* www.greendot.com/greendot/about_our_products; Omni Card Fees Schedule, *available at* http://www.omnicard.com/fees_schedule.

46. *See, e.g.*, OmniCard FAQs, *available at* <http://www.omnicard.com/faqs>. (“After the Card has expired, it is no longer valid, you will not be able to add funds to the Card and all transactions will be declined.”)

47. *See, e.g.* OmniCard, FAQs, *available at* <http://www.omnicard.com/faqs>, and Terms & Conditions, *available at*

72. *See FTC v. National Sales Group*, No. 11 cv 01230 (N.D. Ill, filed Feb. 22, 2011), available at <http://www.ftc.gov/os/caselist/1023246/index.shtm>.

73. *See Grant Connect and Johnson*, *supra* note 11.

74. *See, e.g., FTC v. United States Benefits, LLC*, Civ. No. 3:10 cv 0733 (M.D. Tenn. filed Aug. 3, 2010), available at <http://www.ftc.gov/os/caselist/1023084/index.shtm>.

75. *See* 12 C.F.R. § 1005.10(b).

76. *See* 12 C.F.R. §§ 1005.10(b) 5 and 6, CFPB Official Staff Commentary to Regulation E.