ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

March 5, 2014

Office of Postsecondary Education
U.S. Department of Education
ATTN: Carney McCullough & Pamela Moran

RE: Consumer Banking Protections Applicable to Campus Debit Cards

Dear Ms. McCullough & Ms. Moran:

This memo explains the varying consumer protections that apply to debit cards and prepaid cards under federal banking and payments laws. It is crucial for the Department to understand the existing legal framework that applies to these cards, in order to appreciate gaps in current laws and craft an appropriate standard via regulation for all campus debit cards receiving Title IV funds.

As a general matter, Consumers Union urges the Department to write rules that ensure all students using campus debit cards – whether the cards themselves are structured as "debit" cards or as "prepaid" cards – have strong payment protections, and no fees for ordinary use of the card. Lines of credit should be prohibited, and funds underlying the cards should have FDIC or NCUA deposit insurance applied to the individual cardholder. To achieve these goals, the Department should consider two approaches: (1) creating a Department-administered card with consumer-friendly features, and (2) drafting a rule that requires all campus debit cards arranged by schools to have certain protections in order to be eligible to receive Title IV funds.

Legal Framework Under the Electronic Fund Transfer Act

The Electronic Fund Transfer Act (EFTA)[1] regulates electronic fund transfers in and out of demand deposit (i.e. checking), savings or "other asset accounts" held by financial institutions and used primarily for personal, household or family purposes.[2] The term "account" is left to be further defined by regulation,[3] as discussed below.

Some types of accounts are clearly exempted from EFTA coverage, such as electronic benefit fund (EBT) accounts delivering needs-tested benefits.[4] However, non-needs-tested benefits such as pension, retirement, unemployment, or disability insurance are exempted from the exemption – in other words, they *are* covered by EFTA protections.[5] EFTA's implementing regulation, Regulation E,[6] further refines which types of accounts are granted EFTA protections by law, and provides additional specific protections.

[1] 15 U.S.C. §§ 1693—1693r (2012 & Supp. I).
[2] 15 U.S.C. § 1693a(2). A "financial institution" is broadly defined to include banks, credit unions, savings associations, or "any other persons" directly or indirectly holding the account. § 1693a(9).
[3] *Id.*
[4] 15 U.S.C. § 1693b(d)(2)(A-B). "Needs-tested" benefits would include funds distributed under the supplementary nutritional assistance (SNAP) program, for example.
[5] 15 U.S.C. § 1693b(d)(2)(A)(ii).
[6] 12 C.F.R. § 1005 (2013).

EFTA and Regulation E protect consumers' funds in a number of important ways, relating primarily to account disclosures, dispute resolution, and overdrafts.

Who EFTA/Regulation E Covers

The definition of "account" under Regulation E generally mirrors the statutory language, referring to individual checking and savings accounts as well as "consumer asset accounts." Government-administered accounts for the delivery of non-needs-tested public benefits, as discussed above, are explicitly covered by EFTA and Regulation E.[7] The regulation was amended in 2006 to explicitly add employer-arranged payroll card accounts to the definition of an "account" subject to the regulation.[8] However, it exempts funds that are held pursuant to a "bona fide trust agreement."[9]

Prepaid cards fall through the definitional cracks of Regulation E, because funds sitting in pooled accounts and managed by third parties are interpreted as examples of trust agreements exempt from the definition of a "consumer asset account."[10] As a result, prepaid cards linked to funds sitting in pooled accounts are technically exempt from the regulation.

Some prepaid card companies provide protections to their cardholders voluntarily, by contract, which mirror the language of Regulation E. Card network rules (e.g., Visa or Mastercard "zero liability" policies) also provide voluntary protections to limit consumer liability for unauthorized transactions, but those protections are more limited in scope.[11] In any case, such policies are not mandated by law and can be changed or rescinded at any time.

The Consumer Financial Protection Bureau (CFPB) is expected to amend Regulation E, with proposed rules likely coming this year. In its advanced notice of proposed rulemaking published in April 2012, the CFPB indicated that it is considering the extension of Regulation E protections to some or all prepaid cards.[12] While this rulemaking is pending, it is crucial for the Department to stay in regular contact with the CFPB and ensure that any new Department regulations pertaining to cash management function in harmony with updated versions of Regulation E.

What EFTA/Regulation E Protections Provide to Consumers

Consumers who use debit cards linked to EFTA-regulated accounts receive important legal protections. First, financial institutions must provide disclosures to consumers at

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[7] 15 U.S.C. § 1693b(d)(2)(A)(ii); *see also* 12 C.F.R. § 1005.15 (2013) (clarifying that government agencies are covered "financial institutions," and that government-arranged accounts are subject to Regulation E protections).
[8] 12 C.F.R. § 1005.2(b)(2) (2013).
[9] 12 C.F.R. § 1005.2(b)(3).
[10] *See* Official Staff Interpretation of 12 C.F.R. § 1005.2(b)(3), 12 C.F.R. § 1005, Supplement I.
[11] Visa Zero Liability Policy, http://usa.visa.com/personal/security/zero-liability.jsp?ep=v_sym_security&symlinkref=https%3A%2F%2Fwww%2Egoogle%2Ecom%2F(last visited Mar.4, 2014) (does not cover PIN transactions – see footnote at bottom of page); MasterCard Zero Liability Policy, http://www.mastercard.us/zero-liability.html (last visited Mar. 4, 2014) (does not cover PIN transactions; only covers two disputed transactions per 12-month period).
[12] Electronic Fund Transfers (Regulation E), 78 Fed. Reg. 30923 (May 24, 2012).

account opening that show fees and other important terms and conditions.[13] Consumers must also be notified of any fee increases at least 21 days before they take effect.[14] In addition, consumers have the right to receive periodic statements showing monthly account activity – an important tool for monitoring transactions and catching fraud or errors.[15]

Second, consumers receive important protections against unauthorized or erroneous transactions posted to their accounts. If a consumer's account experiences fraud due to a lost or stolen debit card, the consumer has limited liability so long as the incident is promptly reported.[16] If the card is not lost or stolen, but the consumer discovers a potentially fraudulent or erroneous transaction listed in the periodic statement or transaction history, the consumer has no liability as long as the consumer reports it within 60 days.[17] Furthermore, once a consumer disputes such a transaction, the financial institution must resolve the issue or provisionally credit any missing funds back to the account within 10 business days.[18]

Finally, consumers cannot be assessed overdraft fees for point-of-sale or ATM debit transactions unless they affirmatively opt into an overdraft service offered by their financial institution.[19]

Payroll cards receive almost all of the same protections discussed above. However, there are two differences written into Regulation E for payroll cards: first, financial institutions are not required to send periodic statements to payroll card accountholders so long as consumers are provided access to balance information by telephone, web-based electronic transaction history of the past 60 days, and a written history of transactions upon request.[20] Second, a consumer using a payroll card has 120 days to dispute a transaction – from the date of the transaction itself, regardless of when (or whether) the consumer discovers it.[21] The standard for payroll cards is relevant for understanding the protections afforded to prepaid cards receiving Treasury payments, as discussed below.

It is important to note that EFTA and Regulation E are generally silent on account fees. Existing law requires disclosures at account opening and prior to an increase in fees, and requires opt-in by the consumer before an institution can charge an overdraft fee for

[13] 15 U.S.C. § 1693c(a), 12 C.F.R. § 1005.7 (2013).
[14] 15 U.S.C. § 1693c(b), 12 C.F.R. § 1005.8 (2013).
[15] 15 U.S.C. § 1693d(c), 12 C.F.R. § 1005.9 (2013).
[16] 15 U.S.C. § 1693g(a), 12 C.F.R. § 1005.6(b)(2) (2013). Liability is limited to no more than $50 if the consumer reports the lost or stolen card within two business days, and no more than $500 if reported within 60 days. 12 C.F.R. § 1005.6(b)(2). However, in practice, card issuers will typically waive all liability. In any case, delays in reporting the problem can be forgiven due to extenuating circumstances. 12 C.F.R. § 1005.6(b)(4).
[17] 12 C.F.R. § 1005.6(b)(3). Delays in reporting the problem can be forgiven due to extenuating circumstances. 12 C.F.R. § 1005.6(b)(4).
[18] 15 U.S.C. § 1693f(c), 12 C.F.R. §§ 1005.11(c)(1-2) (2013).
[19] 12 C.F.R. § 1005.17(b) (2013).
[20] 12 C.F.R. § 1005.18(c) (2013). Access to a 60-day transaction history in lieu of monthly periodic statements is also permitted for government-issued cards. 12 C.F.R. § 1005.15(c) (2013).
[21] 12 C.F.R. § 1005.18(c)(4)(ii).

one-time debit transactions at the point of sale or at an ATM.[22] However, EFTA and Regulation E do not otherwise place substantive caps or restrictions on fees for account usage, such as maintenance fees, ATM fees or swipe fees.

Treasury Department Rules and Card Program

In 2010, the Treasury Department announced plans to mostly eliminate paper checks for the disbursement of federal benefits such as Social Security and VA pensions.[23] Treasury promulgated a rule requiring federal virtually all benefit recipients to receive their funds via direct deposit to an existing account of the recipients' choosing, or to Treasury's "Direct Express" card.[24] The Direct Express Card is a prepaid card arranged by Treasury in partnership with Comerica Bank, which issues the cards and holds the funds.

The Direct Express card has very few fees. There are no monthly maintenance fees, and there are no fees for basic activities such as making purchases or checking balances.[25] Direct Express users can make one free ATM withdrawal per deposit period (usually every 2 weeks), using a network of approximately 50,000 surcharge-free ATMs.[26] Any subsequent withdrawals are subject to a $.90 fee from Direct Express.[27]

The Direct Express card was developed several years ago, at a time when prepaid cards available on the retail market frequently came with monthly fees, ATM withdrawal fees, and swipe fees.[28] By today's standards, the Direct Express card's allowance for only one free ATM withdrawal per deposit appears outdated, as many prepaid cards now offer unlimited in-network ATM withdrawals.[29] Nonetheless, we believe that the introduction of the Direct Express card to the prepaid card market helped move trends in the right direction for consumers.

Treasury also issued an interim final rule in 2010 to set minimum standards for retail prepaid cards receiving direct deposit of federal (non-tax) payments.[30] The interim final rule requires that any retail prepaid card receiving such payments have the following

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[22] The "opt-in" rule for overdraft fees does not apply, however, to preauthorized transactions (e.g., scheduled bill payments) or to bounced checks that overdraw the account. *See* 12 C.F.R. § 1005.17(b).
[23] Management of Federal Agency Disbursements, 75 Fed. Reg. 80315 (Dec. 22, 2010).
[24] *Id.* at 80315.
[25] *See* Direct Express, Frequently Asked Questions, https://www.usdirectexpress.com/edcfdtclient/docs/faq.html (last visited Mar. 4, 2014) (click on "How much do I have to pay to use the Direct Express® card?").
[26] *See* Direct Express, Frequently Asked Questions, https://www.usdirectexpress.com/edcfdtclient/docs/faq.html (last visited Mar. 4, 2014) (click on "How do I find a Direct Express® card surcharge-free network ATM?").
[27] *See supra* note 22.
[28] *See* CONSUMERS UNION, PREPAID CARDS: SECOND-TIER BANK ACCOUNT SUBSTITUTES 5-6 (2010), *available at* http://defendyourdollars.org/pdf/2010PrepaidWP.pdf (includes scan of widely-used prepaid cards at the time of publication, with information about common fees at Appendix A).
[29] *See* CONSUMER REPORTS, PREPAID CARDS: HOW THEY RATE 7-9 (2013), *available at* http://consumersunion.org/wp-content/uploads/2013/07/Prepaid_Report_July_2013.pdf (noting changes in common fees).
[30] Federal Government Participation in the Automated Clearinghouse, 75 Fed. Reg. 80335 (Dec. 22, 2010) (codified at 31 C.F.R. § 210). The rule has not been revisited since and remains in effect despite being an "interim" rule.

features: (1) FDIC or NCUA “pass-through” insurance to the individual cardholder;[31] (2) no lines of credit that trigger repayment upon the next deposit of a federal payment;[32] and (3) protections by contract that are at least as strong as the protections afforded to payroll cards under Regulation E.[33] This rule ensures that even if a consumer requests direct deposit of funds onto a retail prepaid card of their choosing, that card will have substantive protections and federal oversight.

<u>What the Department Should Do</u>

The Department should consider negotiating a contract to create a government-issued card that students can choose for financial aid delivery. A government-issued card would be covered automatically by the important protections of EFTA and Regulation E. As for the terms and conditions of such a card, the Department should improve upon the Direct Express example and negotiate terms that ensure there are no usage fees associated with the card, including ATM fees.

Whether or not the Department chooses the path of a centrally-negotiated card, the Department should issue rules that set minimum standards for any campus debit cards arranged by schools and offered to students for delivery of Title IV funds. Whether arranged as debit cards linked to individual accounts or prepaid cards linked to pooled accounts, all campus debit cards should have protections that are at least as strong as those outlined in the Treasury interim final rule: (1) full FDIC or NCUA insurance for the individual cardholder; (2) no lines of credit that trigger repayment using Title IV funds; and (3) guaranteed protections that mirror Regulation E. Furthermore, the Department should prohibit fees for most if not all uses of the card. Any fees in connection with a negative balance should be prohibited, as well as fees for account maintenance and ordinary uses of the card. To facilitate free and convenient access to Title IV funds, the Department should also require all cards to come with widespread fee-free ATM access, or prompt reimbursement for any ATM fees the student incurs to access funds.

Thank you for your attention to these important issues. Please do not hesitate to contact me with any questions.

Sincerely,

Suzanne Martindale
Staff Attorney

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[31] 31 C.F.R. § 210.5(b)(5)(i)(B) (2013). “Pass-through” insurance means that the institution holding funds from multiple cardholders in a pooled account must keep records identifying individual cardholders and the amount of funds they own, so that in the event that a bank or credit union fails, each individual cardholder will receive full deposit insurance. Both the Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) insure individual deposit accounts up to $250,000. *See* 12 C.F.R. § 330 (2013) (FDIC insurance); 12 C.F.R. § 745 (2013) (NCUA insurance).

[32] 31 C.F.R. § 210.5(b)(5)(i)(C). This prevents incoming federal payments from being immediately offset to repay a negative balance.

[33] 31 C.F.R. § 210.5(b)(5)(i)(D).