

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB-2012-0019]

RIN 3170-AA22

Electronic Fund Transfers (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or the Bureau) is seeking comment, data, and information from the public about general purpose reloadable (GPR) prepaid cards (GPR cards). GPR cards are a prepaid financial product that have been increasing in popularity and that some consumers now use in a manner similar to a debit card that is linked to a traditional checking account. The Bureau is particularly interested in learning more about this product, including its costs, benefits, and risks to consumers. The Bureau intends to issue a proposal to extend the Regulation E protections to GPR cards. Your comments, in conjunction with other outreach and analysis, will help the Bureau better understand and evaluate any potential consumer protection issues raised by the current design, marketing, and use of this product. This advance notice of proposed rulemaking (ANPR) asks ten broad questions about GPR cards.

DATES: Comments on this ANPR must be received by [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-20120019 or Regulatory Identification Number (RIN) 3170-AA22, by any of the following methods:

- Electronic: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.
- Hand Delivery/Courier in Lieu of Mail: Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by calling (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Dan Quan, Financial Analyst; Gregory Evans, Counsel; Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552, at (202) 435-7700.

SUPPLEMENTARY INFORMATION:

I. Background

A. General Purpose Reloadable Prepaid Cards

Prepaid cards are one of the fastest growing payment instruments in the United States. The prepaid card market consists of a wide variety of products. Some cards are “closed-loop cards,” which a consumer can use only at a specific merchant or group of merchants. Other cards are “open-loop cards,” which a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover. A prepaid card also may or may not be “reloadable,” meaning that the consumer, or other authorized party, can add money to the card after the card is issued.

This ANPR is seeking information about a specific type of prepaid card known as a general purpose reloadable (GPR) card (GPR card). According to projections by the Mercator Advisory Group, the total dollar value of amounts loaded onto GPR cards is expected to reach \$167 billion in 2014, far in excess of the amount for 2007 of \$12 billion.¹ A GPR card is issued for a set amount in exchange for payment made by a consumer. A GPR card is reloadable, meaning the consumer can add funds to the card. While this ANPR refers to a “card,” these devices may include other mechanisms, such as a key fob or cell phone application, that access a financial account. This ANPR does not seek information about “closed loop” cards, debit cards linked to a traditional checking account, non-reloadable cards, payroll cards, electronic benefit transfers (EBTs), or gift cards.

¹ Mercator Advisory Group, Prepaid Card Market Forecast, November 2011.

The GPR card market is one of the fastest growing segments of the overall prepaid market. According to the Mercator Advisory Group, the total dollar value of funds loaded to GPR cards is expected to grow at an average annual rate of 42% from 2010 to 2014.² Both depository and non-depository institutions participate in the GPR card market. Recently, the GPR card market has benefited from competition and economies of scale, leading many market participants to voluntarily provide some protections for consumers. The Bureau is gathering information about GPR cards, however, in order to ensure that consumers are protected regardless of the economic environment. Three factors in particular command greater attention to GPR cards: the growth of the market for GPR cards, consumer use, and the lack of comprehensive federal regulation. First, the number of GPR card users is growing rapidly, as the two largest issuers report that the number of active GPR cards more than doubled from nearly 3.4 million cards active as of the first quarter of 2009 to over 7.0 million active cards as of the first quarter of 2012.³ Given this rapid growth and projections for continued growth, the need to evaluate and address potential risks to consumers will increase.

Second, some consumers may view and use GPR cards as an alternative to traditional checking accounts. This possibility is reflected in the increase in the number of GPR cards that consumers are loading through direct deposit. The second largest GPR card program manager reported that nearly 42% of its cardholders had direct deposit as of December 31, 2011, as compared to about 14% as of December 31, 2007.⁴ The largest

² *Id.*

³ NetSpend Holdings, Inc. Form 10-Q, filed May 8, 2012 for the period ending March 31, 2012; NetSpend Holdings, Inc. Form S-1, filed July 15, 2010; Green Dot Corporation Form 10-Q, filed May 10, 2012 for the period ending March 31, 2012; Green Dot Corporation Form S-1/A, filed June 2, 2010.

⁴ NetSpend Holdings, Inc. Form 10-K, filed February 4, 2012 for the period ending December 31, 2011, available at <http://files.shareholder.com/downloads/ABEA-56BIQV/1684506713x0xS1047469-12->

GPR card program manager reported a 69% year-over-year increase in the funds loaded via direct deposit during the fourth quarter of 2011.⁵ The Bureau has also observed some GPR cards marketed as a substitute for a checking account. While consumers may be using GPR cards as a substitute for checking accounts, GPR cards do not carry the same protections given to checking accounts and electronic transactions involving checking accounts under federal law.

Third, the lack of a comprehensive federal regulatory regime may contribute to market distortions, misaligned incentives, or consumer confusion, as GPR card consumers may mistakenly assume that they possess rights enforceable under federal law. Unlike some other “general-use prepaid cards” such as payroll cards, Regulation E generally does not apply to GPR cards. Many GPR card market participants offer contractual protections similar to those provided in Regulation E for payroll cards, though such provisions may vary, and are subject to unilateral change.

Given the growth in the GPR card market and risk of consumer harm, the Bureau is seeking information to determine how best to implement consumer protection rules for this product. This information will help inform the Bureau as to the contours of any proposed rulemaking concerning GPR cards.

B. Current Regulation

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) (EFTA), enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities

1472/1496623/filing.pdf; NetSpend Holdings, Inc. Form 10-K, filed March 2, 2011 for the period ending December 31, 2010, available at <http://files.shareholder.com/downloads/ABEA-56BIQV/1684506713x0xS1047469-11-1638/1496623/filing.pdf>.

⁵ Green Dot Corporation, Q4 2011 Earnings Conference Call Supplemental Materials, January 26, 2012, available at <http://ir.greendot.com/phoenix.zhtml?c=235286&p=irol-EventDetails&EventId=4701441>.

of participants in electronic fund transfer (EFT) systems. Historically, the EFTA was implemented in Regulation E of the Board of Governors of the Federal Reserve System (Board), 12 CFR Part 205. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended a number of consumer financial protection laws, including the EFTA. Pub. L. 111–203, 124 Stat. 1376 (2010). In addition to certain substantive amendments, the Dodd-Frank Act generally transferred the Board’s rulemaking authority for the EFTA to the Bureau, effective July 21, 2011.⁶ See sections 1061 and 1084 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and EFTA, as amended, in December 2011 the Bureau republished Regulation E as an interim final rule, 12 CFR Part 1005. 76 FR 81020 (Dec. 27, 2011).

Regulation E generally applies to electronic fund transfers authorizing a financial institution to debit or credit a consumer’s account. Examples of types of transfers covered by the Act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH) transactions, telephone bill-payment plans, and remote banking service. Regulation E defines an “account” as “a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.” 12 CFR 1005.2(b)(1).

⁶ The Dodd-Frank Act generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. See Dodd-Frank Act, sections 1029, 1084(3). The Dodd-Frank Act also leaves to the Board rulemaking authority under section 920 of EFTA, which deals with debit card interchange fees, network arrangements, and routing restrictions. See Dodd-Frank Act, sections 1002(12)(C), 1084(3); 12 CFR Part 235.

In March 1994, the Board amended Regulation E to extend coverage to electronic benefit transfers (EBTs) issued by government agencies. 59 FR 10678 (March 7, 1994). The Board also amended Regulation E to deem a government agency an “institution” for purposes of the regulation. 12 CFR 1005.15(a). While EBTs became subject to most of the requirements of Regulation E, the Board exempted government agencies providing EBTs from the requirement of providing a periodic statement, so long as the agency makes the consumer's account balance readily available by telephone line and electronically, and the agency provides a written sixty day account history upon request. In response to the Work Opportunity Reconciliation Act of 1996, the Board published a final rule in August 1997 to exempt needs-tested benefits, those based on a person or family's income, from Regulation E. Pub. L. 104–193, 110 Stat. 2105 (1996); 62 FR 43467, 43468 (Aug. 14, 1997).

In August 2006, the Board published a final rule amending Regulation E to address payroll card accounts. 71 FR 51437 (Aug. 30, 2006); 12 CFR 1005.2(b)(2). The Board's final rule generally did not define employers and third-party service providers as “financial institutions.” The Board's final rule limited Regulation E's applicability to payroll card accounts to those established directly or indirectly through an employer. 12 CFR 1005.2(b)(2). While the Board received comments from consumer groups “urg[ing] the Board to initiate a separate rulemaking to cover additional cards used to deliver important household funds, such as emergency benefit payments, income tax refunds, or loan proceeds, as well as other cards marketed or used as deposit account substitutes,” the Board elected not to do so. The Board was of the view that GPR cards “may only be used for limited purposes or on a short-term basis, and ... may hold minimal funds” and

based on that premise the Board reasoned that “[c]onsumers would derive little benefit from receiving full Regulation E protections for cards... , while the issuer’s costs of compliance with Regulation E might be significant.” 71 FR 51437, 51440–41. Thus, GPR cards were not included within the definition of “account.”

On May 22, 2009, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) was signed into law. Pub. L. 111–24, 123 Stat. 1734 (2009). The CARD Act amended the EFTA to impose restrictions on a person’s ability to impose dormancy fees, service fees, or expiration dates on gift cards, which might take the form of a gift certificate, store gift card, or what was termed a general-use prepaid card. In April 2010, the Board published a final rule to implement these provisions. 75 FR 16580 (Aug. 22, 2010). The Board defined the term “general-use prepaid card,” as a “a card, code, or other device that is: (i) [i]ssued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) [r]edeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines.” EFTA Section 915(a)(2)(A); 12 CFR 1005.20(a)(3)(i)–(ii). Because the CARD Act restrictions applied only to gift cards, however, the Board was careful to note that a general-use prepaid card did *not* include a device that was “[r]eloadable and not marketed or labeled as a gift card or gift certificate.” 12 CFR 1005.20(b)(2). Thus, the CARD Act restrictions regarding dormancy fees, service fees, or expiration dates on gift cards applied solely to general-purpose cards intended as gifts, not to those used more generally as replacement products for checking or deposit accounts. Moreover, the definition of “account” in Regulation E remained unaltered.

II. Request for Comment

The Bureau is seeking information from the public with respect to GPR cards, including their costs, benefits, and risks to consumers. These comments, in conjunction with other outreach and analysis, will help the Bureau better understand and evaluate potential consumer protection issues for this product. The Bureau will carefully consider the public's input as it formulates a proposal to regulate GPR cards. The Bureau's goals are to ensure that consistent minimum standards apply across similar consumer financial products, to allow consumers to easily compare financial products by ensuring transparent fee disclosure, and to allocate the risks of fraud or loss appropriately. In pursuing these goals, the Bureau will be mindful of avoiding any unnecessary burden on industry.

The Bureau has grouped questions on GPR cards into four broad categories: (A) regulatory coverage of products by some or all of Regulation E, (B) product fees and disclosures, (C) product features, and (D) other information on GPR cards.

A. *Regulatory Coverage of Products*

1. 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?

2. Should only certain aspects of Regulation E be applied to GPR cards? For example, as Regulation E is currently applied to payroll cards, consumers are not guaranteed a periodic paper statement. If possible, please explain why a GPR card's use or structure makes any such modification appropriate. If the

Bureau were to propose modifications to the Regulation E protections, what alternative protections or requirements, if any, should the Bureau propose?

B. Product Fees and Disclosures

3. What steps could the Bureau take to most effectively regulate these products to provide the consumer with transparent, useful, and timely fee disclosures? Should market participants be required to provide disclosure pre-sale, post-sale, or both?
4. How can the Bureau best enable a consumer to compare various GPR cards, or other payment products, that may have different fee structures or be offered through various distribution channels? Many GPR cards offer limited space to disclose contract terms. How should market participants convey the most important contractual terms to consumers to enable them to make educated purchase decisions?
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).⁷ 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?

C. Product Features

⁷ See FDIC General Counsel's Opinion Number 8, 74 Fed. Reg. 67155, available at <http://www.fdic.gov/regulations/laws/rules/5500-500.html>.

6. Currently, most GPR cards do not offer credit features, such as an “overdraft” feature that may be offered with a debit card that is 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 or build credit. The Bureau also seeks information on whether regulatory provisions should address how such services are marketed to consumers.

D. Other Information on GPR Cards

9. Through what methods, and under what circumstances, do market participants communicate a change of contract terms, or other information, to cardholders? Are there inventory replacement cycles that drive the printing of cards to stock distribution outlets? Do market participants conduct periodic maintenance of systems during which updating compliance systems would impose less of a burden? If so, how often does this maintenance occur? Are there other issues with respect to the cost of regulatory compliance about which the CFPB should be aware?
10. Is there any other information relevant to GPR cards that will help inform the Bureau as it considers how best to address these products or other issues the Bureau should consider in this regard?

[THIS SIGNATURE PAGE PERTAINS TO THE ADVANCE NOTICE OF
PROPOSED RULEMAKING TITLED, “ELECTRONIC FUND TRANSFERS
(REGULATION E)”]

Dated: May __, 2012

Richard Cordray

Director, Bureau of Consumer Financial Protection.