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

On May 24, 2012, the Bureau of Consumer Financial Protection (CFPB) issued an advance notice of proposed rulemaking (ANPR), seeking comment, data, and information from the public about general purpose reloadable cards (GPR cards).[1] The CFPB noted that it intends to issue a proposal to extend Regulation E protections to GPR cards, and is interested in learning more about this product, including its costs, benefits, and risks to consumers.[2] The CFPB is focusing on GPR cards in view of the cards' expansive growth; increasing consumer use; and lack of comprehensive federal regulation.[3]

The Federal Trade Commission (FTC or Commission) staff supports the protection of consumers who use GPR cards, and the CFPB's proposal to solicit information about the costs and benefits of alternative protections relating to the costs and terms of GPR cards.[4] Currently, a variety of different payment card options exist including credit cards, traditional debit cards, electronic benefits transfers (EBTs), payroll cards and gift cards that have some form of federal protections regarding costs and terms. Although GPR cards are expanding in usage, consumers who use these cards do not have similar protections,[5] and they may not realize that these protections are lacking. In the discussion below, FTC staff focuses in particular on four protections that have applied to other payment cards: 1) limits on liability for fraud and unauthorized use; 2) disclosure requirements for card fees and expiration dates; 3) error resolution procedures; and 4) authorization standards for recurrent payments.

II. FTC Authority and Experience

The FTC has a long history of being the nation's consumer protection agency, with authority to protect consumers and maintain competition in broad sectors of the economy. It enforces laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, in order to protect the proper functioning and integrity of the marketplace without impeding legitimate business activity. It has law enforcement and other authority over a wide range of practices related to financial services and over most nonbank entities.

The agency enforces Section 5 of the FTC Act,[6] which prohibits unfair or deceptive acts or practices in or affecting commerce, and the Commission has brought many law enforcement actions against those who injure consumers by engaging in such practices in connection with offering, selling, or providing financial services. For example, the FTC has brought a number of actions against defendants engaged in unfair or deceptive practices involving the sale of GPR cards or prepaid cards.[7] In addition, the Commission has challenged as deceptive the failure of sellers of similar products, such as prepaid telephone calling cards and gift cards, to adequately disclose fees that consumers must pay.[8]

In addition to its Section 5 enforcement, the Commission also enforces numerous consumer financial services statutes and regulations, including those that specifically apply to payment cards, such as the Truth in Lending Act (TILA) and Regulation Z (which, among other things, set requirements for credit cards), and the Electronic Fund Transfer Act (EFTA) and Regulation E (which, among other things, set requirements for debit cards).[9] As part of its law enforcement work, the Commission has brought cases alleging that companies failed to provide 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 Act[12] 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 cards[25] 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 EFTA and Regulation E, consumers using traditional debit cards are accorded numerous protections. These protections are not identical to those for credit cards under TILA and Regulation Z but are nonetheless important and include:
1) disclosures about fees and other terms;
2) protections against unauthorized transfers;[28]
3) dispute resolution procedures, with provisional credits to consumers' accounts; and others.[29]

Electronic benefits transfers, payroll cards, and gift cards: Under EFTA and Regulation E (including standards set for gift cards by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act)),[30] consumers using these cards or mechanisms all have some form of coverage.[31]

Consumers who use GPR cards generally are not accorded comparable protections under federal law.[32] For example, GPR cards are not "credit," and are not subject to TILA and Regulation Z, as they do not entitle consumers to defer payment of debt or to incur debt and defer its payment.[33] GPR cards generally are not considered to be subject to EFTA and Regulation E, because they are not considered to be an "electronic fund transfer" or to be tied to an "account"[34] and no special exception exists to cover them. EFTA and Regulation E, however, do cover GPR cards that are specifically marketed as gift cards, for purposes of the gift card rules. Essentially, EFTA and Regulation E's standards cover various types of payment cards (like traditional debit cards) that were available to consumers at the time these standards were developed. These standards were revised later to address new products and services, such as electronic benefits transfers, payroll cards, and gift cards. Even though GPR cards have expanded in function and use over time, Regulation E has not been revised to address them.

In sum, although consumers who use GPR cards are protected from unfair and deceptive practices under the FTC Act, they have less protection under other federal laws regarding the cards' costs and terms than users of other types of payment cards. GPR cards also have been increasing in popularity and use. Providing additional protections to consumers who use GPR cards may instill greater confidence in their use, fostering increased use and competition between GPR cards and other payment methods. Therefore, FTC staff believes that the CFPB's initiative to assess the costs and benefits, including any related data, of according such protections to consumers who use GPR cards is timely and in the public interest.

B. Major Issues for Consideration in the CFPB's Initiative

This comment focuses in particular on four protections that apply to various other 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 transaction[43] 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 consumes 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 to $4.95 at a retail store); 2) monthly charge ($5.95, waived if consumer loads $1,000 in a month or has at least 30 qualifying purchases posted); 3) loading cash at retail locations (up to $4.95); 5) lost or stolen card replacement ($4.95); and 6) second card ($4.95, but free for student card), among others. OmniCard another major seller of GPR cards charges fees for: 1) card issuance ($2.95); 2) monthly maintenance ($2.95); 3) cash advance ($4 each); 4) lost or stolen card replacement ($4.95); 5) express shipment of card ($29.95); 6) printed and mailed statement ($29.95); and 7) card to card transfers ($1), among others.[45] Further, card fee disclosures may vary in medium and format: disclosures may be on card inserts or online, if at all, and they may not be uniform in terminology or information offered. Information about fees is important to consumers, not only because it facilitates their ability to understand the purchase cost, but also because it empowers them to compare: 1) the costs of GPR cards relative to the costs of other payment cards and methods, and 2) the costs of one GPR card versus competing GPR cards.

GPR cards often have a date on which they expire. In many instances, when the card expires, consumers can lose the value of the card and the sellers of the GPR card can retain the amount that consumers placed on the card.[46] Some cards permit consumers to obtain another card at expiration, but the consumer must be in good standing or the account must be "active" and the card received at the address to which it is sent.[47] Because, upon expiration, consumers can lose the amount of funds on the card, and the ability to use the card for which they have paid fees, the expiration date is important to consumers in deciding whether to choose a GPR card or a particular GPR seller.[48]

Consumers may have a difficult time locating information about expiration dates because the information disclosed about them appears to be limited, and even where provided, its presentation varies widely. Some information about expiration dates may be provided with the card's packaging at sale, but it may be either on or adjacent to the card, or instead may be inside the packaging and therefore available only when a consumer purchases the item. Other information may be available online, if at all. Indeed, a review of online information provided with advertisements for GPR cards reveals that: some GPR cards are marketed online as having an expiration date, but with no indication of what the date will be, other than a reference to information on the card itself;[49] some ads provide an exact expiration date;[50] and others state that 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 for credit cards.[54] EFTA and Regulation E likewise require that issuers of traditional debit cards and providers of electronic fund transfers clearly and conspicuously disclose fee information.[55] Regulation E also requires various clear and conspicuous fee disclosures for gift cards,[56] payroll cards,[57] and electronic benefits transfers in some circumstances.[58] Indeed, in response to the confusion that consumers faced when purchasing gift cards that did not adequately disclose expiration dates and other terms, the CARD Act set new standards for gift cards and certain similar products, now part of Regulation E.[59] These rules require that issuers and sellers clearly and conspicuously disclose expiration dates and impose other limitations on expiration dates.[60] Consumers who use GPR cards likely would find similar fee and expiration date information to be valuable in making decisions.

Further, the FTC's law enforcement experience demonstrates that the failure of sellers of payment cards to adequately disclose material information about fees and expiration requirements can deceive consumers and be unlawful under the FTC Act.[61] However, even where consumers may not be deceived, the clear and prominent [62] disclosure of fees and expiration dates can enhance the ability of consumers to understand terms and comparison shop among alternative payment methods and providers. Not only can such information assist consumers in making better-informed decisions, but it also can foster competition and consumer confidence in the marketplace, which benefits consumers and businesses alike.

FTC staff recognizes that clearly and prominently disclosing fee and expiration date information would impose some costs on providers of GPR cards. Some of these disclosures may already be necessary to avoid deceptive marketing of the value of GPR cards, in violation of Section 5 of the FTC Act. In addition, these costs are likely to vary based on the nature and extent of the information that must be disclosed and the medium (*e.g.*, print, online, or mobile device) in which it must be disclosed. FTC staff notes, however, that the costs of making such disclosures do not appear to have been prohibitive for the issuers of some GPR cards and in the context of other payment methods. FTC staff recommends that the CFPB identify and propose for public comment specific disclosure requirements for fees and expiration dates for GPR cards, taking into account the costs and benefits of alternative ways to provide such information to consumers.

3. Error Resolution Procedures

Merchants may unintentionally debit GPR cards for erroneous amounts. For example, a merchant may inadvertently debit a GPR card in an amount that is two or three times the purchase price for an item. A merchant directly or through an erroneous bar code also may misplace a decimal and debit a GPR card for $20 rather than $2. If such errors are not corrected, it clearly causes harm to consumers whose GPR cards have been debited. Although some issuers of GPR cards may provide some form of procedure to assist consumers in disputing such errors, others do not. For example, the "Ralphs/Kroger" reloadable prepaid debit card provides, among other things, "If you want to dispute a purchase you have made using the card, it is best to contact the retailer who accepted your card."[63] As discussed above, unauthorized use can also occur on GPR cards, leading to erroneous debits on the cards.

When such errors occur with debit or credit cards, federal law provides consumers with dispute resolution rights. Currently, EFTA and Regulation E provide consumers using debit cards with important error resolution rights.[64] Generally, financial institutions must take steps to resolve disputes within ten business days of receiving a notice of error; if they need additional time, they must provisionally recredit missing funds within the ten business days, and then they may generally take up to 45 days from receipt of the notice of error to investigate and determine whether an error occurred.[65] These error resolution procedures ensure that consumers have a uniform way to resolve disputes about funds, and also are not left waiting for funds pending a potentially lengthy investigation. These rights enable consumers to challenge many erroneous charges or debits on their accounts, and obtain corrective action.[66] TILA and Regulation Z also provide important billing dispute rights to consumers, including the right to a prompt investigation and to have funds restored that have already been remitted erroneously within no longer than two billing cycles, or 90 days from receipt of a dispute notice.[67] In contrast to users of credit and debit cards, users of GPR cards do not have any right under federal law to dispute errors.

As part of the consideration of these issues, FTC staff believes that the CFPB should explore the issues surrounding GPR card users' access to information about their card balance and transaction history, including the need to notify consumers of their ability to access such information. For example, both TILA and Regulation Z (credit cards) and EFTA and Regulation E (debit cards) require card issuers to provide their customers with periodic account statements and related information.[68] Access to information about their card balance and transaction history can be important to consumers because otherwise, they may find it difficult to exercise their error resolution rights, as well as to manage their financial obligations. As with limits on liability for unauthorized use, some GPR card issuers voluntarily provide their customers access to such information, either online or via automated telephone systems.[69] However, other GPR card issuers may charge fees to check this information or may not make it readily available.

In sum, FTC staff believes there that there appear to be benefits to mandating error resolution procedures, with ready access to card balance and transaction history information, for consumers who use GPR cards. In addition, because some GPR card issuers currently offer some protections voluntarily, and because issuers of other payment cards offer error resolution procedures with ready access to account information,[70] the costs of implementing such procedures for GPR cards might not be prohibitive. FTC staff recommends that the CFPB identify and propose for public comment specific error resolution procedures for GPR cards, taking into account the costs and benefits of alternative ways to offer consumers such protections.

4. Recurrent Payments

In certain circumstances, merchants may make multiple debits to some payment cards that consumers use to purchase goods and services. Merchants often make such recurrent debits pursuant to negative-option plans under which consumers agree to receive periodic shipments of goods or services and have regular charges debited to their payment cards. The payment cards to which merchants may post these debits include GPR cards.

The main consumer protection problem associated with posting recurrent debits is that merchants selling goods and continuity services via negative-option plans could do so without the consumer's authorization.[71] The Commission has brought numerous actions for violations of Section 5 of the FTC Act, among other laws, against merchants that have posted without authorization such recurring debits   involving recurrent payments from consumers' accounts   in connection with job-related scams,[72] and government grant scams,[73] for example. Moreover, many merchants that post such debits add insult to injury by refusing to accede to consumers' demands that the recurring payments cease.[74] Because merchants can drain funds from consumers' accounts quickly through repeated debits to payment cards, consumers face the risk of incurring substantial injury if these debits occur without their consent.

Current law protects consumers from unauthorized recurrent charges to their debit cards. Specifically, EFTA and Regulation E require merchants and others who seek to take recurrent debits from consumers' bank accounts through electronic fund transfers (including debit cards) to obtain consumers' preauthorization for the transactions. The authorization must be in the form of a writing signed or similarly authenticated by the consumer, and the merchant or other person must provide a copy to the consumer.[75] The authorization also must evidence the consumer's identity and assent and must be readily identifiable, with the terms of the authorization clear and readily understandable.[76] Such protections do not apply to GPR cards.

Given the significant consumer risks and potential harms associated with recurrent debits, FTC staff recommends that the CFPB identify and propose for public comment specific authorization requirements for recurrent payments for GPR cards, taking into account the costs and benefits of alternative ways to offer and obtain such authorization.

IV. Conclusion

FTC staff supports the CFPB's effort to solicit and consider information on the issue of extending various consumer protections to users of GPR cards that are accorded to users of other payment methods. FTC staff believes that it is worthwhile to consider such protections in addition to those afforded consumers under Section 5 of the FTC Act. FTC staff hopes that this comment is useful to the CFPB in its assessment, and appreciates the CFPB's consideration of this information. If any other information would be useful regarding these matters, please contact Jessica Rich, Associate Director for Financial Practices, at (202) 326-3224.

Respectfully submitted,

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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*, e.g., *FTC v. VirtualWorks, LLC (VirtualWorks)*, No. C09 03815 (N.D. Cal. filed Aug. 19, 2009), *available at* http://www.ftc.gov/os/caselist/0723241/c0903815.shtm; *FTC v. Swish Marketing, Inc. (Swish Marketing)*, No. C09 03814 (N.D. Cal. filed Aug. 19, 2009), *available at* http://www.ftc.gov/os/caselist/0723241/c0903814.shtm; *FTC v. EdebitPay, LLC (EdebitPay)*, No. 07 4880 (C.D. Cal. filed July 30, 2007), *available at* http://www.ftc.gov/os/caselist/0623125/index.shtm. Generally, the FTC's cases against sellers of GPR cards alleged that marketers duped consumers into buying the cards, baiting them with the ostensible sale of a payday loan or a line of credit.

8. *See*, *e.g.*, *FTC v. Millenium Telecard, Inc.(Millenium)*, No. 2:11 cv 02479 (D.N.J. filed May 2, 2011); *FTC v. Alternatel, Inc. (Alternatel)*, No. 1:08 cv 21433 (S.D. Fla. filed May 19, 2008) (prepaid telephone calling card cases). The FTC has been at the forefront of federal efforts to protect consumers from deceptive practices in the prepaid calling cards business. *See* Prepared Statement of the Federal Trade Commission on Prepaid Calling Cards Before the House Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, Dec. 3, 2009, *available at* http://www.ftc.gov/os/2009/12/P074406prepaidcc.pdf. Prepaid calling cards have some of the same vulnerabilities as GPR cards. The CFPB's ANPR focuses on open loop cards (which can be used any place that accepts payment from a retail electronic payments network, including Visa, MasterCard, American Express or Discover) and prepaid calling cards are generally closed loop mechanisms (which can be used

only at a specific merchant or group of merchants). Nevertheless, some similar issues including confusing and inadequately disclosed fees and terms can occur in both mechanisms. Prepaid calling cards can serve as a convenient and inexpensive lifeline to connect consumers particularly recent immigrants and members of the U.S. armed services to their families. *See In re Darden Restaurants (Darden)*, F.T.C. Dkt. No. C 4189 (2007), and *In re KMart Corp. (KMart)*, F.T.C. Dkt. No. C 4197 (2007) (gift card cases).

9. 15 U.S.C. § 1601 *et seq*. TILA is implemented by Regulation Z; the CFPB's Regulation Z is found at 12 C.F.R. Part 1026. Among other things, TILA and Regulation Z establish disclosure requirements and dispute resolution procedures for open end credit (including for credit cards), limit liability for unauthorized use of credit cards, and set other consumer protections for credit cards, as well as for other types of credit. Among other things, EFTA and Regulation E establish disclosure requirements and error resolution procedures for debit cards and certain other types of electronic fund transfers (EFTs), limit liability for unauthorized EFTs, and set various other consumer protections for EFTs, gift cards, and certain other electronic transactions, including for foreign remittance transfers. *See generally* EFTA and Regulation E, *supra* note 2.

10. *See FTC v. Xpics Publishing, Inc.*, Civ. Action No. 00 7613 (C.D. Cal. filed Jul. 13, 2000), *available at* http://www.ftc.gov/os/caselist/9823541.shtm, *FTC v. Netpliance*, Civ. Action No. A 01 CA 420 SS) (W.D. Tex. filed June 27, 2001), *available at* http://www.ftc.gov/os/2001/07/netpliancecmplaint.pdf, (complaint charging, among other things, failure to provide timely credits regarding consumers' credit accounts).

11. *See*, *e.g.*, *FTC v. Leanspa*, No. 3:11 cv 01715 (D. Conn. filed Nov. 7, 2011), *available at* http://www.ftc.gov/os/caselist/1123135/index.shtm; *FTC v. Willms*, No. 2:11 cv 00828 (W.D. Wash. filed Sept. 2, 2011) (amended complaint), *available at* http://www.ftc.gov/os/caselist/1023012/index.shtm; *FTC v. Grant Connect, LLC (Grant Connect),* 2:09 cv 01349 (D. Nev. filed July 27, 2009), *available at* http://www.ftc.gov/os/caselist/0923108/index.shtm; *FTC v. Johnson (Johnson)*, No. 2:10 cv 02203 (D. Nev. filed Dec. 21, 2010), *available at* http://www.ftc.gov/os/caselist/1023015/index.shtm; *FTC v. Central Coast Nutraceuticals, Inc*., No. 10 cv 4931 (N.D. Ill. filed Aug. 5, 2010), *available at* http://www.ftc.gov/os/caselist/1023028/index.shtm. The FTC has brought scores of negative option cases involving credit or debit cards, over many years.

12. The Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act"), Pub. L. 111 203, 124 Stat. 1376 (2010). Under the Dodd Frank Act, the Commission has the authority to continue to enforce many consumer financial statutes and regulations, including TILA and Regulation Z, and EFTA and Regulation E, and also enforce any CFPB rules applicable to entities within the FTC's jurisdiction.

13. *See* Dodd Frank Act, *id.*, § 1075. The Federal Reserve Board implemented some of these requirements through new final and interim regulations, including new Regulation II, 12 C.F.R. Part 235, for the debit card interchange fee and routing provisions of the Dodd Frank Act. *See* Debit Card Interchange Fees and Routing, Final Rule, 76 Fed. Reg. 43394 (July 20, 2011), and Interim Final Rule, 76 Fed. Reg. 43478 (July 20, 2011), *available at* http:www.federalreserve.gov/newsevents/press/bcreg/20110629a.htm. Regulation II implements parts of EFTA. The FTC enforces Regulation II for nonbank entities, including payment networks, issuers, and merchants. The FTC also enforces related statutory requirements that were self effecting without regulatory implementation, which restrict payment card networks from limiting merchants and others in establishing terms for acceptance of payment cards. *See* Dodd Frank Act, *id*.

14. For example, the FTC also enforces the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq*.; the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq*.; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.; and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.

15. *See*, *e.g.*, FTC, NEW RULES ON ELECTRONIC PAYMENTS LOWER COSTS FOR RETAILERS, *available at* http:business.ftc.gov/documents/bus78 new rules electronic payments lower costs retailers.

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/thrift.shtm.

18. *See supra* note 16.

19. 77 Fed. Reg. 30923. S*ee also* American Banker, "Consumer Finance, Prepaid Industry Expects Pressure to Simplify Fees," May 31, 2012 ("Prepaid cards appeal to a diverse and growing consumer base . . .").

20. Federal Reserve System, *The 2010 Federal Reserve Payments Study*, Apr. 5, 2011 at 68, *available at* http://www.frbservices.org/files/communications/pdf/research/2010 payments study.pdf. Prepaid cards or general purpose reloadable cards are being marketed as attractive alternatives to check cashiers and traditional bank accounts. *See generally* Consumers Union, *ConsumerReports Prepaid Cards: Loaded with Fees, Weak on Protections* (*Consumers Union Report),* Mar. 2012, *available at* http://www.consumersunion.org/pdf/Prepaid Cards Report 2012.pdf.

21. *See* Federal Reserve Bank of Philadelphia, *A Prepaid Case Study: Ready Credit's General Purpose & Transit Fare Programs*, Apr. 2012, *available at* http://www.phil.frb.org/consumer credit and payments/payment cards center/publications/discussion papers/2012/D 2012 April Ready Credit.pdf.

22. Banks and financial firms now control or influence federal financial aid disbursement to over 9 million students by linking prepaid debit cards to student id cards; some of these cards involve prepaid reloadable (open loop) cards. *See* U.S. PIRG Education Fund, *The Campus Debit Card Trap*, May 2012, *available at* http://www.uspirgedfund.org/sites/pirg/files/reports/USPIRG Debitcardtrap may2012final 2 0.pdf.

23. Federal Reserve System, *Consumers and Mobile Financial Services*, Mar. 2012, at 19.

24. Also, more mobile service providers are focusing on underbanked consumers, who tend to use general purpose reloadable prepaid accounts as bank account substitutes. *See generally* Center for Financial Services Innovation, *Reaching Underbanked Consumers Through Mobile Services*, 2011, *available at* http://www.ftc.gov/os/comments/mobilepayments/00018 82915.pdf (submitted as a comment to the FTC's Workshop, *Paper, Plastic or Mobile*), *see supra* note 16.

25. Both gift cards and GPR cards are forms of prepaid cards, where consumer place value in advance on or through the card. GPR cards are reloadable, and can be used to add value. Regulation E applies to GPR cards that are marketed as gift cards, but does not generally apply to GFR cards. *See* 12 C.F.R. § 1005.20.

26. All users of credit cards, not solely consumers, have limited liability for unauthorized use of these cards. *See* 12 C.F.R. § 1026.12 1, CFPB Official Staff Commentary to Regulation Z.

27. *See*, *e.g.,* 12 C.F.R. §§ 1026.5, 1026.6, 1026.12(b), and 1026.13.

28. The limits on consumers' liability vary, depending on how quickly consumers report the loss or theft of the card. *See generally* 12 C.F.R. § 1005.6.

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 may wish to consider the example of payroll cards, as one possible approach in this area. In 2006, payroll cards were increasing in popularity and use. Littler, *Debunking Myths about Payroll Debit Cards*, Nov. 3, 2010 *available at* http://www.littler.com/publication press/publication/debunking myths about payroll debit cards ("Payroll debit cards work similar to a credit card or bank debit card.") In August 2006, the Federal Reserve Board amended Regulation E's definition of "account" to include a "payroll card account," with the result that Regulation E's substantive and disclosure protections applied, albeit with certain specific provisions designed for payroll card considerations. *S*ee generally 71 Fed. Reg. 51437 (Aug. 30, 2006). Regulation E's unauthorized use and error resolution protections are now among the protections afforded to consumers for payroll cards. *Id*.

36. Although GPR cards do not generally provide for overdraft usage, some cards permit consumers to opt in to such a program. *See* 77 Fed. Reg. 30923 (May 24, 2012). Thus, some consumers using GPR cards could experience overdrafts for fraudulent use, thereby increasing their potential loss.

37. Some entities may offer voluntary contractual coverage to protect consumers, to some degree, from fraud or unauthorized use. Although these protections may be helpful to consumers, they could be rescinded at any time, and they are not uniform or enforceable under federal law. They also have specific limitations in application. *See*, *e.g.*, Visa and MasterCard's "zero liability" programs, *available at* http://usa.visa.com/personal/security/visa security program/zero liability.html and http://www.mastercard.us/zero liability.html.

38. *See* 12 C.F.R. § 1026.12.

39. *See* 12 C.F.R. § 1005.6. The consumer's liability is limited to $50, if reported within two business days of discovery, and up to $500 for charges thereafter; however, if the loss is not reported within sixty days after the consumer's periodic statement is mailed that includes the loss, the consumer can face unlimited liability for charges

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.consumer action.org/downloads/press/2012 Prepaid Card Survey.pdf; *see also* Consumer Action, *Prepaid Card News*, Spring 2012, *available at* http://www.consumer action.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* http://www.omnicard.com/terms conditions ("Your Card is valid until the date embossed on the front of the card ("the expiration date") or until the Card has been inactive for over 120 days and has a $0 balance an which time the Card will automatically expire. 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." "If your card is active, you will automatically be issued a new Card a few weeks prior to its expiration date. If the new Card is returned to us due to an invalid address, it will become an "expired" Card . . .").

48. As noted, because the imposition of fees on cards can cause the card balance to decline over time, consumers may not actually have an "active" card at expiration, and hence may not receive another card. A similar issue arose in the FTC's gift card cases; the complaints charged that, although the cards were marketed as having no expiration dates, dormancy fees were deducted from the card's balance during months of inactivity, causing cards that previously had value to expire. *See Darden*, and *KMart*, *supra* note 8 (complaints charged that, although the cards were marketed as having no expiration dates or as permitting consumers to redeem the cards' value, dormancy fees were deducted from the cards' balance during months of inactivity, causing cards that previously had value to expire or have little or no value). Similarly, in the FTC cases against marketers of prepaid calling cards, the FTC alleged deception where the defendants failed to disclose fees that would be applied to the balance on the card. *See supra* note 8.

49. *See*, *e.g.,* OmniCard, FAQs, *supra* note 46.

50. For example, TransCard has a 36 month expiration. *See* TransCard, Reloadable Cards, *available at* http://corp.transcard.com/en/Products/Reloadable Cards.aspx.

51. The American Express PASS Card (described by American Express as a "reloadable prepaid card parents give to teens and young adults") states in an online ad that "[a]vailable funds on the Pass Card do not expire." *See* American Express, FAQs, *available at* https://www.americanexpress.com/us/content/prepaid/pass/faqs.html?vgnextchannel 95ddb81e8482a110VgnVCM100000defaad94RCRD&appInstanceName default&vgnextnoice 1&name pass markup faq&type intbenefitdetail.

52. *See, e.g.,* TransCard, Reloadable Cards, *available at* http://corp.transcard.com/en/Products/Reloadable Cards.aspx.

53. *See, e.g.,* OmniCard, FAQs, *supra* note 46; Green Dot, Reloadable Prepaid Cards, Help, *available at* http://www.greendot.com/greendot/help#expire.

54. *See, e.g.,* 12 C.F.R. §§ 1026.5 and 1026.6. Various substantive limits on credit card accounts are found in 12 C.F.R. 1026, Subpart G.

55. *See*, *e.g.*, 12 C.F.R. §§ 1005.7, and 1005.9.

56. *See* 12 C.F.R. § 1005.20. It also includes limitations on expiration dates, and disclosures of those features.

57. *See* 12 C.F.R. § 1005.18.

58. *See* 12 C.F.R. § 1005.15.

59. *See* 12 C.F.R. § 1005.20. As noted, those rules exclude GPRs that are not marketed as gift cards.

60. *See id*.

61. *See*, *e.g.*, *Millenium Telecard* and *Alternatel*, *supra* note 8; *see also Edebitpay*, *VirtualWorks*, and *Swish Marketing*, *supra* note 7, and *Darden* and *KMart*, *supra* note 8. Generally, the FTC's cases against sellers of GPR cards alleged that marketers duped consumers into buying the cards, baiting them with the ostensible sale of a payday loan or a line of credit. *See Editpay*, *VirtualWorks*, and *Swish Marketing*, *id.*

62. In enforcing the FTC Act, the Commission has generally required that, if information must be disclosed to consumers, the disclosure must be clear and prominent so that consumers will both notice and understand it. *See generally*, FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 84.

63. *See* Ralphs/Krogers "Frequently Asked Questions," *available at* http://www.ralphs.kpfprepaid.com/faq.asp.

64. *See* 12 C.F.R. § 1005.11. Consumers have up to 60 days from the transmittal date of the statement containing the error, to notify the financial institution. *Id.* Electronic benefit transfers and payroll cards also have some error resolution procedures, tailored to these particular payment mechanisms. *See* 12 C.F.R. §§ 1005.15 and 1005.18.

65. *See* 12 C.F.R. § 1005.11.

66. *See, e.g.*, 12 C.F.R. § 1005.11.

67. *See* 12 C.F.R. § 1026.13. Consumers have up to 60 days from the mailing date of the statement containing the error, to notify the creditor of the error.

68. *See*, *e.g.*, 12 C.F.R. § 1026.7, 12 C.F.R. § 1005.9, respectively.

69. For example, GreenDot provides online or telephone access to account balance or activity information, at no charge to the consumer. *See* GreenDot, Your Balance and Transaction History, *available at* http://www.greendot.com/greendot/help#sure.

70. *See Consumers Union Report* at 16, *supra* note 20.

71. *See* FTC, *Negative Options, A Report by the staff of the FTC's Division of Enforcement*, Jan. 2009, at i, *available*.

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.