



# **NBPCA presents Prepaid Regulations**

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# Presenters



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# Agenda

- Consumer Financial Protection Bureau authority over prepaid
- CARD Act
- State unclaimed property laws
- State regulation of fees and expiration dates
- State cash redemption requirements
- State licensing requirements
- Federal prepaid access regulations



# CFPB Regulations

- Under Dodd-Frank, CFPB has authority to:
  - Write rules
  - Conduct examinations
  - Undertake enforcement actions
- CFPB can regulate the “selling, providing, or issuing” of “stored value or payment instruments”
  - Selling stored value only falls under CFPB jurisdiction to the extent that seller “exercises substantial control” over terms and conditions
  - Non-reloadable closed loop cards exempt from definition of “stored value”



# CFPB Regulations – Who May Be Regulated

- Depository institutions
  - Depository institutions with more than \$10B in assets (including affiliates)
- Non-bank issuers of financial services/products
  - “Larger participants” in non-bank consumer financial product/service market
- Service providers to large depository institutions/“larger participants”
  - Provides “material service” in connection with offering/provision of prepaid product
  - Both depository institutions and service providers are subject to examination/enforcement for conduct of service providers
  - CFPB expects covered depository institutions to oversee service providers to prevent risks to consumers



# CFPB Regulations— Focus on Prepaid Cards

- CFPB held field hearing on May 23, 2012 regarding prepaid cards
  - Primary focus was on GPR cards
  - Top CFPB officials heard testimony from industry, consumers, and civil rights organizations
- On same day as field hearing, CFPB released Advance Notice of Proposed Rulemaking (ANPR) seeking public comment on forthcoming regulation of GPR cards under Regulation E
  - ANPR and CFPB officials imply that GPR rules will focus on making sure that consumers understand the products they use (i.e., disclosures), rather than on specific limitations of certain products and the features that are included with these products
    - Fee limitations
    - FDIC insurance
    - Overdraft/savings/credit?



## CFPB Regulations – ANPR on GPR Cards (Topics)

- Regulatory Coverage of Products
- Product Fees and Disclosures
- Product Features
- Other Information on GPR cards



## CFPB Regulations – ANPR on GPR Cards (Key Issues Raised)

- How should a GPR card be defined?
  - What products should fall outside GPR card regulation?
- What current consumer protections in Regulation E should apply to GPR cards?
  - Periodic statement
- What disclosures should be required regarding fees?
- 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?
- Should the existence, or lack thereof, of FDIC pass-through insurance associated with a GPR card be disclosed to the consumer?





## CFPB Regulations – ANPR on GPR Cards (Key Issues Raised) (cont'd)

- Costs, benefits, and consumer protection issues related to any credit features that may be offered by GPR cards
- Costs, benefits, and consumer protection issues related to savings features offered with GPR cards
- Efficacy of credit reporting features on GPR cards in enabling consumers to improve or build credit
- Regulatory compliance
  - Compliance with new rules during inventory replacement cycles
  - Cost of system maintenance
- Other information?



## CARD Act – Applicability

- Credit Card Accountability Responsibility and Disclosure Act (“CARD Act”) enacted in 2009
- Imposes restrictions on fees and expiration dates on most prepaid products (cards, codes and other devices)
  - Gift certificates
  - Store gift cards
  - General-use prepaid cards
- Applies to issuers, distributors, program managers, merchants/retailers, site owners → Most anyone in supply chain

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## CARD Act– General Restrictions

- Prohibits dormancy fees, inactivity fees and service fees unless a card, code or other device has been inactive for 12 consecutive calendar months
- Permits only one fee per month
- Minimum expiration date of 5 years from date of last load
- Clear and conspicuous disclosures are required
- Does NOT preempt state law if state laws provide greater consumer protection (federal floor)



## CARD Act– Fee Restrictions

- Service, dormancy and inactivity fees are PROHIBITED UNLESS:
  - No activity for 12 consecutive calendar months
  - Only 1 fee/charge per calendar month (e.g., maintenance or activity based)
  - Disclosure requirements are met
- The scope of these fees is interpreted broadly (e.g., monthly maintenance, balance inquiry, per transaction, usage, ATM, POS, reload, and foreign currency transaction fees)



# CARD Act– Expiration Date Restrictions

- NO PERSON may sell/issue cards that expire in less than 5 years from DATE OF PURCHASE
- 4 Requirements:
  - (1) Policies and procedures that give consumer REASONABLE OPPORTUNITY to buy card w/expiration date at least 5 years:
    - Procedures must either PREVENT sale/initial issuance of cards w/ expiration date of less than 5 years, OR
    - Cards made available with at least 5 ½ years remaining on cards (e.g., on display)



## CARD Act– Expiration Date Restrictions (cont'd)

- (2) Expiration of funds – may not occur until the later of 5 years AFTER date of last load or expiration date on card (if any)
  - If card is reloadable, trigger from date of last load
  - Distinguishes between expiration date of plastic card and underlying funds
  - Required regardless of whether there is an expiration date on card
- (3) Required disclosures
- (4) No replacement fee for expired card
  - Issuer can send replacement card OR choose to send check for balance (but no fee allowed)



# CARD Act– Disclosure Requirements

- Prior to purchase disclosures
  - One-time fees and dormancy, inactivity and service fees
  - Expiration dates
- On the card disclosures
  - Dormancy, inactivity and service fees
  - Expiration dates
  - Toll-free number and, if one is available, website
- With the card disclosures
  - One-time fees
  - Cards sold via telephone, a website, etc.



# CARD Act– Exclusions

- If ANY exclusion applies, card, code or other device is EXCLUDED from the CARD Act
- Cards, codes and other devices that are:
  - (1) used solely for telephone services
  - (2) reloadable and not marketed or labeled as a gift card
  - (3) a loyalty, award, or promotional card
  - (4) not marketed to the general public
  - (5) issued in paper form only
  - (6) redeemable solely for admission at events or venues (e.g., sporting venues) or to obtain goods and services in conjunction with admission to such events or venues

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*Statutory exclusions are to be narrowly construed*





# CARD Act – Liability

- Private right of action by individuals
- Governmental agencies may also enforce (FTC, AG)
- Reg E penalties for willfulness or negligence
- EFTA – No preemption of contrary state laws unless state law is inconsistent with CARD Act or Reg E; not deemed inconsistent if more protective
  - State laws prohibiting fees/expiration dates still apply
- Recent CFPB Preemption Determination
  - Maine
  - Tennessee

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# State Unclaimed Property Laws – Overview

- In general, state unclaimed property laws provide that a holder of property that belongs to another party and remains unclaimed for a specified period of time must escheat the property to the state
- Supreme Court priority rules
  - If the holder has in its records the name and last known address of the owner, the property escheats in accordance with the unclaimed property laws of the state of the owner’s last known address
  - If the unclaimed property laws of the state of the owner’s last known address do not require escheat of the property or if the holder does not have in its records the name and last known address of the owner, the property escheats in accordance with the unclaimed property laws of the holder’s state of domicile
- Some state unclaimed property laws include a transaction test as a basis for escheat

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## State Unclaimed Property Laws – Overview (cont'd)

- Some states exempt gift certificates from escheat
  - California – Exempts closed loop gift certificates from escheat (but cannot impose expiration dates on them)
- Some states require escheat of gift certificates regardless of whether they have expiration dates
  - Delaware – Dormancy period is shorter of 5 years or 1 day before any applicable expiration date
- Dormancy period for prepaid cards may trigger from the date of issuance, date of last use, or date of expiration
- Some companies elect to incorporate gift card subsidiaries in escheat friendly states



# State Unclaimed Property Laws – New Jersey

- New Jersey: New Law Enacted June 29, 2012
  - Abandoned Property
    - For cards issued after July 1, 2010, card is considered abandoned after 5 years, extended from 2 years
  - Data collection obligation (effective July 1, 2016)
    - Issuer will be required to obtain name and address of cardholder and, at a minimum, maintain a record of the zip code of that cardholder
  - Small Remaining Balances (effective 9/1/12)
    - Cardholder may request cash refund for card with balance of less than \$5
    - Refund requirement does not apply to any “open-loop” cards



## State Unclaimed Property Laws – New Jersey (cont'd)

- Expiration of funds
  - General presumption that funds associated with cards sold on/after 12/01/12 shall be valid until redemption and shall not expire
  - Cards may contain an expiration date to the extent that federal law permits that the date only applies to the card itself, not the funds underlying the card
  - Exception for gift cards: Underlying funds may not expire within the 24 months immediately following the date of sale
  - Disclosure: Terms of any expiration date, as well as a telephone number, must be disclosed on card/packaging/sales receipt



## State Unclaimed Property Laws – New Jersey (cont'd)

- Fees
  - General prohibition on fees imposed on card sold on/after 12/01/12
  - Fee prohibition does not apply to GPR cards
  - Permitted fees (must be disclosed)
    - (1) Activation, issuance, or purchase fee
    - (2) Reload fee
    - (3) Fee for replacement of a lost, stolen, or damaged card
  - Gift cards
    - No dormancy fee within 24 months after sale or within 24 months of the last activity on the card
    - Dormancy fee cannot exceed \$2.00 per month
    - Terms of any fee must be on card/packaging/sales receipt



## State Unclaimed Property Laws – New Jersey (cont'd)

- Exempt from escheat/data collection/fee/expiration date restrictions
  - Cards donated or sold below face value to a non-profit, a charitable, or an educational organization
  - Cards issued under promotional, incentive, rewards or customer loyalty programs for which no direct monetary consideration is paid by the owner
  - Cards redeemable for admission to events or venues or for purchases of goods and services in conjunction with such events/venues
  - Cards issued by any issuer that, in the past year, sold stored value cards with a collective face value of \$250,000 or less.
  - State Treasurer authorized to exempt a business/class of businesses for “good cause”
- On the horizon: Bill related to GPR fees/disclosure

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## Expiration Dates and Fees – State Laws

- Approximately 35 states ban or otherwise restrict expiration dates on gift cards
- Some states prohibit the imposition of an expiration date on gift cards and mandate that they remain valid until redeemed or replaced
- Other states prohibit an expiration date earlier than one or more years from the date of issuance (e.g., Kentucky (1 year); Louisiana (5 years); and Massachusetts (7 years))
- Still other states require only that an expiration date be clearly and conspicuously printed on the gift card in at least 10-point bold type
- Some states may require verbal disclosure of the expiration date to the purchaser before the purchase, as well as signage at points of sale and on the Internet





## Expiration Dates and Fees – State Laws (cont'd)

- Even where expiration dates allowed, escheat may still be required
- California prohibits expiration dates on closed loop gift certificates, except those:
  - (1) Distributed by issuers to consumers pursuant to an awards, a loyalty, or a promotional program without any money or other thing of value being given in exchange by the consumers
  - (2) Donated or sold below face value at a volume discount to employers or to nonprofit and charitable organizations for fundraising purposes if the expiration date is not more than 30 days after date of sale
  - (3) Issued for perishable food products

Any permissible expiration date must appear in capital letters in at least 10-point font on the front of the gift certificate



## Expiration Dates and Fees – State Laws (cont'd)

- Some states prohibit or limit the imposition of any fees on certain prepaid cards
- Some states require specific fee disclosures
  - Verbal disclosures of service fees to the purchaser before the purchase
  - Signage to be clearly and conspicuously posted at each point of sale or Internet site displaying the fees so that they are obvious at a point in time before the sale
- Some states specifically prohibit the issuer from charging fees that are “unconscionable” in amount



## Expiration Dates and Fees – State Laws (cont'd)

- In some states, prohibitions on imposition of dormancy fees may also appear in the unclaimed property laws (and not just in the laws specifically referring to gift cards or gift certificates)
  - Prohibit inactivity fees unless a valid and enforceable written contract exists between the issuer and card owner pursuant to which the issuer regularly imposes such fees and does not regularly reverse or otherwise cancel them
- Payroll cards – some states prohibit imposition of fees to cash payroll checks
- New York – May not impose service fees on any card before the 13<sup>th</sup> month after the date of issuance, and fees must be conspicuously disclosed on the card itself



## Expiration Dates and Fees – State Laws (cont'd)

- California – It is unlawful for any person or entity to sell a closed loop gift card that contains a service or dormancy fee, except where all of the following occur:
  - Remaining value on gift card is \$5.00 or less each time the fee is assessed;
  - The fee does not exceed \$1.00 per month;
  - No activity on card for 24 consecutive months, including, but not limited to, purchases, the adding of value, or balance inquiries;
  - The holder may reload or add value to the gift card; and
  - A statement is printed on the gift card in at least 10-point font stating the amount of the fee, how often it occurs, that it is triggered by inactivity of the gift card, and at what point the fee will be charged. Statement may be on the front or back of the card, but must be visible to purchaser prior to purchase.



# State Cash Redemption Requirements

- Certain states require cash redemption for gift certificates with a remaining balance below a certain threshold
  - California – Any gift certificate with a cash value of less than \$10.00
  - Massachusetts – Any non-reloadable gift certificate that has been redeemed for 90% or more of face value or any reloadable gift certificate with remaining value of \$5.00 or less



# State Licensing Requirements

- States may require a money transmission, sale of checks, or other money services license to issue or sell open loop prepaid cards
- California Money Transmission Act
  - Money transmission definition includes issuing or selling stored value
  - Definition of “stored value” – “monetary value representing a claim against the issuer that is stored on an electronic or digital medium and evidenced by an electronic or digital record, and that is intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services” but does not include “stored value that is only redeemable by the issuer for goods or services provided by the issuer or its affiliate, except to the extent required by applicable law to be redeemable in cash for its cash value”



## State Licensing Requirements (cont'd)

- States generally exclude from their licensure requirements prepaid cards issued by banks
  - Several states do not exclude out-of-state banks from their licensure requirements
  - Some states take away the exclusion from their licensure requirements for bank-issued cards distributed by non-exempt third parties (e.g., merchants)
- Few states require licensure for sales of closed loop cards issued by third parties



# Federal Prepaid Access Regulations – Overview

- Financial Crimes Enforcement Network (“FinCEN”) issued final rule regarding prepaid access on July 26, 2011
  - Most requirements for providers of prepaid access effective September 27, 2011
  - All requirements for sellers of prepaid access effective March 31, 2012
- Final rule amends the Bank Secrecy Act regulations
  - Replaced “stored value” with “prepaid access” and defined a number of new terms
  - Extends reporting and recordkeeping requirements to apply to providers and sellers of prepaid access
  - Imposes registration requirement on providers of prepaid access





## Federal Prepaid Access Regulations – Overview (cont'd)

- **Broad definition of “prepaid access”** – *“Access to funds or the value of funds that:*
  - *have been paid in advance and*
  - *can be retrieved or transferred at some point in the future*
  - *through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number”*



## Federal Prepaid Access Regulations – “Provider of Prepaid Access”

- **Definition of “provider of prepaid access”** – *“the participant within a prepaid program that agrees to serve as the principal conduit for access to information from its fellow program participants”*
- Agreement approach
  - Participants within a prepaid program must determine single participant to be the provider of prepaid access
- “Facts and circumstances” standard
  - If no participant registers as the provider of prepaid access, FinCEN will determine the provider of prepaid access as the person that exercises “principal oversight and control” over the prepaid program



## Federal Prepaid Access Regulations – “Provider of Prepaid Access” (cont’d)

- Factors that indicate “principal oversight and control” include
  - Organizing the prepaid program
  - Setting the terms and conditions and determining they have not been exceeded
  - Deciding the other program participants (e.g., issuing bank, payment processor, or distributor)
  - Controlling or directing the appropriate party to initiate, freeze, or terminate prepaid access
  - Engaging in activity that demonstrates oversight and control



## Federal Prepaid Access Regulations – “Prepaid Program” Exclusions

- **Definition of “prepaid program”** – *“an arrangement under which one or more persons acting together provide(s) prepaid access”*
- Some limited exclusions from definition of “prepaid program”
  - \$1,000 maximum value exclusion
    - Prepaid access to funds not to exceed \$1,000 maximum value, from which no more than \$1,000 can be initially or subsequently loaded, used, or withdrawn on any day through a device or vehicle and that does not permit:
      - (1) international transfers of funds or value,
      - (2) transfers between users of prepaid access within a prepaid program, or
      - (3) loads of additional funds or value from non-depository sources



## Federal Prepaid Access Regulations – “Prepaid Program” Exclusions (cont’d)

- \$2,000 maximum value closed loop exclusion
  - Closed loop prepaid access to funds not to exceed \$2,000 maximum value associated with a prepaid access device or vehicle on any day, but:
    - (1) Cannot be used for cash withdrawals (other than for de minimis redemptions of cash value required by law)
    - (2) Cannot be used to transfer value to third parties

NOTE: The \$2,000 limit applies to the sum of all loads, usage, and reloads on a card in a single day – it’s not just a “cap”
  - **Definition of “closed loop prepaid access”** – “Prepaid access to funds or the value of funds that can be used only for goods or services in transactions involving a defined merchant or location (or set of locations), such as a specific retailer or retail chain, a college campus, or a subway system”

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# Federal Prepaid Access Regulations – “Prepaid Program” Exclusions (cont’d)

- Other exclusions from the definition of “prepaid program” include:
  - Prepaid access only to funds provided by a governmental agency
  - Prepaid access only to funds from pre-tax flexible spending arrangements for health care or dependent care expenses or health reimbursement arrangements (HSAs are not excluded)
  - Prepaid access only to employment benefits, incentives, wages or salaries and that does not permit
    - (1) international transfers of funds or value
    - (2) transfers between users of prepaid access within a prepaid program, or
    - (3) loads of additional funds or value from non-depository sources



# Federal Prepaid Access Regulations – Obligations of “Provider of Prepaid Access”

- Serve as principal conduit of information for other program participants
- Serve as central source of information for law enforcement
- Must develop and implement effective AML program
- Must obtain the following identifying information for each person that obtains prepaid access:
  - Name
  - Date of birth
  - Address
  - Identification number
- Must establish procedures to verify the identity of the person
- Must retain access to the identifying information for 5 years after the last use of the prepaid access device or vehicle



## Federal Prepaid Access Regulations – Obligations of “Provider of Prepaid Access” (cont’d)

- Must maintain for 5 years access to transactional records generated in the ordinary course of business necessary to reconstruct activations, loads, reloads, purchases, withdrawals, transfers, or other transactions of prepaid access
  - Type of transaction (e.g., ATM withdrawal or POS purchase)
  - Amount and location of transaction
  - Date and time of transaction
  - Any other unique identifiers related to transaction
- Must file with the Treasury Department a report of any suspicious transaction relevant to a possible violation of law or regulation (“SAR”)
- Must register as a money services business with FinCEN
  - Must identify each prepaid program for which it is the provider of prepaid access
  - Must maintain a list of its agents





# Federal Prepaid Access Regulations – “Seller of Prepaid Access”

- **Definition of “seller of prepaid access”** – Any person that receives funds or value for an initial or a subsequent loading of prepaid access will be deemed a “seller of prepaid access” if that person
  - Sells prepaid access under a prepaid program that can be used before verification of customer identification
  - or
  - Sells prepaid access (including closed loop prepaid access) to funds that exceed \$10,000 to any person during any day and has not implemented policies and procedures reasonably adapted to prevent such a sale



# Federal Prepaid Access Regulations – Obligations of “Seller of Prepaid Access”

- Must develop and implement effective AML program
- Must obtain the following identifying information for each person that obtains prepaid access in excess of \$10,000 during any one day:
  - Name
  - Date of birth
  - Address
  - Identification number
- Must establish policies and procedures to verify the identity of the person
- Must retain identifying information for 5 years from the date of the sale of the prepaid access device or vehicle
- Must file SARs with the Treasury Department



# Federal Prepaid Access Regulations – Possible Consequences

- Collection and maintenance of records of identifying information may impact unclaimed property obligations
- Unwillingness of sellers of prepaid access to obtain and verify identifying information may affect distribution channel
- Required adoption and implementation of robust AML program and additional obligations for recordkeeping, reporting, monitoring, oversight, etc.



# Questions?



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