Developments in the Laws Governing Electronic Payments Made Through Gift Cards, Debit and Prepaid Cards, Credit Cards, and Direct Deposits of Federal Benefits

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Developments in the Laws Governing Electronic Payments Made Through Gift Cards, Debit and Prepaid Cards, Credit Cards, and Direct Deposits of Federal Benefits

By Sarah Jane Hughes* and Stephen T. Middlebrook**

1. Introduction

The past thirteen months—from May 15, 2009, to June 15, 2010—have been remarkable in the field of electronic payments. First, Congress passed a massive overhaul of credit card laws that included the first federal law governing the issuance and marketing of gift cards and electronic gift certificates.1 It directed the Board of Governors of the Federal Reserve System ("Board") to promulgate rules, respectively, for credit cards by July 22, 2009 (to become effective by February 22, 2010)2 and for gift cards and electronic gift certificates by February 22, 2010 (to

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become effective on August 22, 2010). Then, the Board adopted a final rule in November 2009 requiring consumers to opt in to overdraft fees on checking accounts and debit and prepaid cards, effective July 1, 2010. On June 15, 2010, it also announced new final rules for credit card late-payment fees and related interest rate increases. In addition, 2010 brought two significant settlements by federal bank regulatory agencies involving financial institutions' assessment of credit card over-limit fees, requiring payment of roughly $10 million each in restitution to cardholders, in addition to civil penalties.

Finally, this survey introduces a recently proposed regulation that will implement amendments to the Social Security Act and offer recipients of federal benefits substantial new protections against garnishment if benefits are deposited directly into accounts, rather than issued in check form and then deposited. This proposal demonstrates that huge changes in payments law sometimes come from unexpected places.

II. A Whole New Card Game: Federal Reserve Board Regulation to Implement the Credit CARD Act of 2009’s Prepaid Debit and Gift Cards Provisions

On May 22, 2009, President Obama signed the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"), which prohibits unfair credit card rate increases, bans certain fees, requires plain language disclosures, and creates additional protections for students and young people. The new law also addresses concerns about fees and expiration dates related to gift cards.

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11. Id.
More specifically, section 401 of the Act adds a new section 915 to the Electronic Fund Transfer Act ("EFTA"). This new section limits the ability of card issuers to impose dormancy, inactivity, and other service fees on gift certificates, store gift cards, and general-use prepaid cards. It also generally prohibits the sale of such products if they expire within five years of the date of issuance or the date on which funds were last loaded to the card. Finally, the Act directs the Board to amend Regulation E to implement the new law. In response, the Board issued a proposed gift card rule in November 2009, followed by a final rule in April 2010. Most provisions of the final rule became effective on August 22, 2010, although in response to industry complaints, Congress amended the law to move two disclosure compliance deadlines to January 31, 2011.

A. NEW FEDERAL RULES ON DORMANCY, INACTIVITY, AND SERVICE FEES

The new section 205.20 in Regulation E establishes a general rule that dormancy, inactivity, or service fees may not be assessed against covered gift cards and general-use prepaid cards unless:

1. There has been no activity with respect to the certificate or card, in the one-year period ending on the date on which the fee is imposed;

2. The following are stated, as applicable, clearly and conspicuously on the gift certificate, store gift card, or general-use prepaid card:
   a. The amount of any dormancy, inactivity, or service fee that may be charged;
   b. How often such fee may be assessed; and
   c. That such fee may be assessed for inactivity; and

3. Not more than one dormancy, inactivity, or service fee is imposed in any given calendar month.

A threshold condition for the imposition of fees is one year without activity, which is defined as "any action that results in an increase or decrease of the funds underlying a certificate or card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction." After one year, the issuer

\[\text{13. Id.}\]
\[\text{14. Id. at 1753.}\]
\[\text{15. Id. at 1753-54.}\]
\[\text{18. 12 C.F.R. § 205.20(g) (2010).}\]
\[\text{19. Pub. L. No. 111-209, § 1, 124 Stat. 2254, 2254 (2010) (extending the deadline, in certain circumstances, for compliance with the disclosure provisions of sections 915(b)(3) and (c)(2)(B) of the Electronic Fund Transfer Act); see also Andrew Johnson, For Prepaid Cards, 'Gift' Label No Longer Welcome, AM. BANKER (May 15, 2010), http://www.americanbanker.com/issues/175_95/prepaid-gift-1019426-1.html.}\]
\[\text{20. 12 C.F.R. § 205.20(d) (2010).}\]
\[\text{21. Id. § 205.20(a)(7).}\]
may assess fees if it properly discloses them and so long as it charges only one fee per month.22

“Dormancy fee” and “inactivity fee” receive rather standard definitions of “a fee for non-use of or inactivity on a card.”23 “Service fee,” on the other hand, means any periodic fee assessed for “holding or use”24 of a card and thus could include a monthly maintenance fee, a reload fee, an ATM fee, or other transaction fee.25 “Service fee,” however, would not include a “one-time fee or a fee that is unlikely to be imposed more than once”—such as a card activation or replacement charge.26 Drawing these definitions together and assuming proper disclosures and a year of inactivity, a cardholder who makes a withdrawal at an automated teller could be charged a monthly maintenance fee or an ATM fee, but not both. A similar cardholder who made twenty ATM withdrawals also presumably could be charged only a single ATM fee.

B. NEW FEDERAL RULES ON EXPIRATION DATES FOR CARDS AND UNDERLYING FUNDS

The revised Regulation E also prohibits the sale of gift cards and general-use prepaid cards that carry an expiration date unless four specific conditions are met.27 First, with regard to expiration dates, the Board required issuers to establish policies and procedures to provide consumers with a reasonable chance of purchasing a card with at least five years remaining before expiration.28 Sellers must take affirmative steps to provide consumers with a reasonable chance of purchasing a card with five or more years remaining, but the rule would not penalize them if one errant card with less than five years remaining were to slip through.29 Second, if the issuer wants an expiration date, that date must be the greater of five years from either the date of issuance or, for a reloadable card, five years from the date funds were last added to the card.30 Because the expiration date on a reloadable card is a moving target—extending each time the card is reloaded—it is not possible to provide a precise calendar date on which the underlying funds will expire. Recognizing this fact, the Board allows the expiration date to be expressed in words like “five years from the date funds were last added to the card.”31

22. Id. § 205.20(d).
23. Id. § 205.20(a)(5).
24. Id. § 205.20(a)(6).
25. Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16617. Comments filed by industry representatives asked the Board to limit the term “service fee” to monthly maintenance fees and to exclude activity based charges such as ATM, balance inquiry, and reload fees from the definition, but the Board chose not to limit the term in this way. See id. at 16582–83, 16617.
26. Id. at 16617.
27. See 12 C.FR. § 205.20(e) (2010).
28. Id. § 205.20(e)(1).
30. 12 C.FR. § 205.20(e)(2)(i).
31. “[T]he Board would be sufficient to disclose, for example, that ‘Funds expire 5 years from the date funds last loaded to the card’; ‘Funds can be used 5 years from the date money was last added to the card’; or ‘Funds do not expire.’” Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16605.
Third, except in certain circumstances, a card must disclose "with equal prominence and in close proximity" to the expiration date that while the card expires, the underlying funds do not expire or expire later than the card and that the "consumer may contact the issuer for a replacement card." 32 "Close proximity" in this context means the statement must appear on the same side of the card as the expiration date. 33

Finally, a card with an expiration date must provide a toll-free telephone number through which a consumer may obtain a replacement card if the current card expires and funds are still remaining. 34 If the issuer maintains a website address, that also must be disclosed. 35 The telephone number and web address are required so that a consumer may "obtain a replacement certificate or card more easily if the certificate or card expires before the underlying funds." 36

C. DISCLOSURE REQUIREMENTS

Gift cards and general-use prepaid cards also must disclose each type of fee that may be imposed (other than dormancy, inactivity, or service fees that are covered by subdivision (d)(2), discussed above). 37 The disclosure must indicate the type of fee, amount of the fee, and conditions under which it will be imposed. 38 A toll-free telephone number and, if one is maintained, a website address must be provided through which the consumer may obtain information about fees. 39 The same toll-free number and website used for card replacement inquiries may be used for fee information. 40

Revised Regulation E also requires that gift card disclosures be "clear and conspicuous." 41 In order to be "clear and conspicuous," a disclosure need not be located on the front of the card unless otherwise required, 42 but disclosures should be "readily noticeable" and in a print "that contrasts with and is otherwise not obstructed by the background on which they are printed." 43 Disclosures on the back of a card in which the print is on top of the indentations from embossed type on the front of the card are likely to be difficult to read and thus would not qualify as "clear and conspicuous." 44

Disclosures may be given in written or electronic form. 45 Electronic disclosures are not subject to the consumer consent requirements of the Electronic Signatures

32. 12 C.F.R. § 205.20(e)(3)(iii). These requirements do not apply to a non-reloadable card that bears an expiration date that is at least seven years from the date of manufacture. See id.
34. 12 C.F.R. § 205.20(e)(3)(ii).
35. Id.
38. Id.
39. Id. § 205.20(f)(2).
43. Id.
44. Id.
in Global and National Commerce Act.\(^\text{46}\) Such disclosures, however, must be provided in a form that the consumer can retain.\(^\text{47}\) Providing the ability to print or download a copy of the disclosure complies with this requirement,\(^\text{48}\) but providing a hyperlink to a website where the disclosure is stored does not.\(^\text{49}\)

Certain disclosures related to loyalty, award or promotional cards, fee disclosures, expiration dates, and telephone access for fee information are required to be made on the card, code, or device.\(^\text{50}\) In these situations, notices provided on packaging or card carriers, on accompanying terms and conditions, or on stickers placed on the card are not acceptable means of disclosure.\(^\text{51}\) If no physical card or certificate is issued, the disclosures must be on the confirmation or electronic document provided to the consumer at the time the gift code is provided.\(^\text{52}\) For example, if a $50 gift code redeemable online is e-mailed to a consumer, the required disclosures should be provided in the same e-mail document in which the gift code is transmitted.\(^\text{53}\) If the gift card takes an unusual shape or size that prevents the disclosures from being printed on it, the product should be accompanied by a gift card or certificate that is capable of bearing the required disclosures.\(^\text{54}\)

**D. CARDS NOT ISSUED PRIMARILY FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES ARE NOT COVERED**

Although the CARD Act did not explicitly restrict the new rules regarding prepaid and gift cards to consumers, the Board retained the existing scope of EFTA and Regulation E as consumer protection laws and limited the application of the new rules to cards issued to consumers for personal, family, or household purposes.\(^\text{55}\) The Board explained:

\[](\text{The rule does not apply to cards, codes, or other devices where the end use is for business purposes, such as to pay for business travel expenses or office supplies. However, the fact that a person may sell cards, codes, or other devices to a business does not by itself exclude the cards, codes, or other devices from the scope of the rule.\(^\text{56}\)\n
Consequently, in the final rule, the phrase “issued on a prepaid basis primarily for personal, family, or household purposes to a consumer”\(^\text{57}\) has been included

\[^{46}\text{Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16619.}\]
\[^{47}\text{12 C.F.R. § 205.20(c)(2).}\]
\[^{48}\text{See Final Gift Card Rule, 75 Fed. Reg. at 16619.}\]
\[^{49}\text{See id.}\]
\[^{50}\text{See 12 C.F.R. § 205.20(c)(4)(ii) (2010); id. § 205.20(c)(4)(iii) (listing the disclosures required for loyalty, award, and promotional gift cards); see also id. § 205.20(d)(2) (allowing certain fees when disclosed); id. § 205.20(c)(3) (listing disclosures required for cards with expiration dates); id. § 205.20(f)(2) (requiring telephone number for fee information).}\]
\[^{51}\text{Id. § 205.20(c)(4).}\]
\[^{52}\text{Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16620.}\]
\[^{53}\text{See id.}\]
\[^{54}\text{See id.}\]
\[^{55}\text{See id. at 16582.}\]
\[^{56}\text{Id. (footnote omitted).}\]
\[^{57}\text{Id. at 16587.}\]
in the definitions for "gift certificate,"58 "store gift card,"59 "general-use prepaid card,"60 and "loyalty, award, or promotional gift card."61 This limitation removes cards that are used for non-consumer purposes from the jurisdiction of the new rule. However, the fact that a retailer may have sold gift cards to a corporate entity does not necessarily mean that the cards are not subject to Regulation E. In such a case, the retailer would need to know the purpose the purchaser has in mind for the cards. If they will be used to buy office supplies, then the revised Regulation E does not apply. If, however, they will be given as rewards to employees or passed out to loyal customers, then they may not be exempt.

E. ADDITIONAL CARDS EXCLUDED FROM REGULATION E COVERAGE

In addition to the general carve-out for cards that are not sold or issued to consumers, the amendments to Regulation E provide six categories of cards that are excluded from coverage.62

1. Used solely for telephone services: Products that are issued solely for the purpose of providing prepaid long-distance and wireless services, or similar services such as Voice over Internet Protocol (VoIP) services, are excluded.63 When such cards are marketed as an alternative to a bank account or as a budgetary tool for teenagers, they are exempted from the rules.64 If the advertising campaign for a reloadable card starts to suggest the product could be given as a gift, however, the product may cease to be exempt.65 The Board's commentary includes a long list of marketing slogans and designs that might cause an otherwise excluded product to lose protection, including using the word "gift or "present" on the card or accompanying materials; including congratulatory phrases such as "token of thanks"; incorporating gift-giving imagery such as bows, wrapped boxes, candles, Christmas trees, etc.66 In addition, it does not matter who in the distribution chain disseminates the promotional message.67 If a card issuer, program manager, and distributor have all taken steps to ensure that a card is not marketed as a gift but a retailer displays a sign next to the card

59. Id. § 205.20(a)(2)(i).
60. Id. § 205.20(a)(3)(i).
61. Id. § 205.20(a)(4)(i).
62. See id. § 205.20(b).
63. Id. § 205.20(b)(1).
64. Id. § 205.20(b)(2).
66. Id.
67. Id.
68. Id.
69. See id. at 16618 (providing an example of a retailer displaying and promoting the card as a gift, contrary to its contract with the issuer).
that says "makes the perfect stocking stuffer," then the card (at least at that retailer) has been marketed as a gift.\textsuperscript{70}

Many retailers currently display gift cards and reloadable general-use prepaid cards together in a single display that may be marked "gift cards" or "prepaid cards" or both. Intermixing exempt reloadable cards with gift cards on a display that suggests the reloadable cards could be used as gifts could jeopardize their exempt status. The prudent business lawyer should review not only the card designs and promotional materials prepared by his or her client, but also the materials and marketing practices of the client's business partners.

3. A loyalty, reward, or promotional card: A "loyalty, reward, or promotional gift card" is a card that is "issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program."\textsuperscript{71} "Loyalty, award, or promotional program" is defined by example, and includes consumer retention programs, sales promotions offered by retailers or manufacturers, rebate programs, sweepstakes, referral programs, and incentive programs.\textsuperscript{72}

To qualify as a loyalty, reward, or promotional exemption, the card must meet additional disclosure requirements. First, the card must indicate on the front that it is for "reward" or "promotional" purposes.\textsuperscript{73} Second, the card must indicate on the front the expiration date of the underlying funds.\textsuperscript{74} Third, the amount of any fees and the conditions under which they may be imposed must be provided on or with the card.\textsuperscript{75} Fourth, a toll-free telephone number and, if one is maintained, a website address where a consumer may obtain fee information must be included on the card.\textsuperscript{76}

Many retailers issue both gift cards sold to consumers, which must comply with all of Regulation E, and reward cards, which need only to comply with the limited disclosure requirements noted above. Again, the prudent business lawyer will recommend not only that gift cards be labeled "gift" and reward cards be labeled "reward," but that the two categories of cards have different designs and use different color schemes, be kept in different locations in the store, be distributed under different procedures—whatever is necessary to enable both consumers and employees to distinguish the easily confusable pieces of plastic.

4. Not marketed to the general public: Cards that are not marketed to the general public are exempt from the new requirements of Regulation E.\textsuperscript{77} Again, the Board relies primarily on examples to explain this exemption. For example, a card used by an insurance company to distribute insurance proceeds to a customer is not marketed to the general public.\textsuperscript{78} Similarly, if a merchant provides store credit to

\begin{footnotes}
\item[70] Id. at 16617–18.
\item[71] 12 C.F.R. § 205.20(a)(4) (2010).
\item[72] Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16616.
\item[73] 12 C.F.R. § 205.20(a)(4)(ii)(A).
\item[74] Id. § 205.20(a)(4)(ii)(B).
\item[75] Id. § 205.20(a)(4)(ii)(C).
\item[76] Id. § 205.20(a)(4)(ii)(D).
\item[77] See id. § 205.20(b)(4).
\item[78] Final Gift Card Rule, supra note 17, 75 Fed. Reg. at 16618.
\end{footnotes}
a customer via a card, that card is not marketed to the general public.79 A retailer that markets its cards only to members of its loyalty program, but that would allow any member of the general public to become a member of the loyalty program, would not qualify for the exemption.80

5. Issued in paper form only: If a gift card or code is issued solely in paper form, it is exempt from these rules.81 This exemption generally applies to certificates and codes issued in paper form where only the paper item itself may be redeemed.82 Old-fashioned paper gift certificates fall within this exemption.83 So would paper certificates printed by a cash register or attached printer that can be redeemed on a future visit, even if the receipt has a bar code that is scanned by a retailer's register or point-of-sale device.84 As long as the bar code is not issued in a form other than paper, it qualifies.85 If a retailer sent its customers a code by e-mail that could be printed out and redeemed at the store, the exemption would not apply because the code was issued to the consumer in electronic form even though it may be printed and redeemed in paper form.86

6. Redeemable solely for events or admission: The final exemption to the prepaid and gift card rules is for cards, codes, and certificates redeemable only for "admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events."87 A card that entitled the holder to admission to an amusement park or for a ride on the rollercoaster would qualify for this exemption.88 A card that entitled the holder to admission to the park and to a certain dollar amount of food and beverages would also qualify.89 In contrast, a card that could be redeemed for $25 toward admission or food and beverages at the amusement park would not qualify for the exemption because it is not redeemable solely for admission or admission and related goods and services.90


In 2009, the economic research firm Moebs Services projected a record $38.5 billion in annual overdraft fee revenues.92 The Board issued rules in November

79. Id.
80. Id.
83. Id.
84. Id.
85. Id.
86. Id.
89. Id.
90. Id.
92. Id.
2009 and May 2010 narrowing card-issuer authority in charging overdraft fees. In May 2010, the Office of Thrift Supervision ("OTS") proposed guidance on overdraft practices. It also severely penalized a small Texas thrift for alleged unfair and deceptive overdraft practices.

A. THE FEDERAL RESERVE BOARD'S NEW REGULATION E OVERDRAFT SERVICE FEES/OPT-IN REQUIRED REGULATION

Beginning on July 1, 2010, financial institutions may not assess fees for paying ATM and one-time debit card transactions without the consumer's affirmative consent to the payment. In February 2010, the Federal Reserve Board proposed certain clarifications to the rule, which it promulgated as a clarification of the final rule on May 28, 2010. The clarified rule's effective date was July 6, 2010.

B. THE OFFICE OF THRIFT SUPERVISION'S PROPOSED SUPPLEMENTAL GUIDANCE ON OVERDRAFT FEE PRACTICES

The OTS's original Overdraft Guidance document presented as "best practices" a range of activities and charges for operating overdraft loans or advances among savings associations. The April 29, 2010, proposed supplemental guidance explains that "the legal landscape [applicable to overdraft charges] has changed considerably" since 2005, citing two Federal Reserve Board amendments of Regulation DD (12 C.F.R. pt. 230) and one amendment of Regulation E. Thus, the OTS concluded that some of its 2005 Best Practices "are now required by law." Specifically, the proposed guidance directs savings

93. See Final Overdraft Fees Rule, supra note 4, 74 Fed. Reg. at 59033 (amending Regulation E and limiting "the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in").
103. Id.
104. Id. (emphasis added).
associations to take three additional steps to implement its 2005 risk management advice: (1) "avoid promoting poor account management," (2) "train staff to explain program features and other choices," and (3) "alert consumers before a transaction triggers any fees."  

C. THE OFFICE OF THRIFT SUPERVISION PURSUES WOODFOREST BANK

On April 23, 2010, the OTS announced that Woodforest Bank of Refugio, Texas, had agreed to settle charges that its overdraft-related fee practices failed to comply with section 5 of the Federal Trade Commission Act. The order required repayment of preauthorized electronic fund transfers and accurate advertising of fees. Woodforest Bank agreed to pay a civil money penalty of $400,000 and to make restitution of more than $12,000,000 to existing and past bank depositors.

IV. WATCH THOSE LATE FEES! NEW FEDERAL RESERVE BOARD RULE ON CREDIT CARD LATE-PAYMENT PENALTIES AND ASSOCIATED RATE INCREASES

On June 15, 2010, the Federal Reserve Board announced its additional amendments to Regulation Z to implement the CARD Act by limiting the late-payment penalties and associated rate increases that issuers could impose on credit card account holders. The amendments, among other things, generally prohibit credit card issuers from charging a penalty of more than $25 for paying late or violating the account's terms, or "from charging penalty fees that exceed the dollar amount associated with the consumer's violation." In addition, credit card issuers may not charge "inactivity fees" on cards not used with sufficient frequency or "mul-
multiple penalty fees based on a single late payment or other violation.”

And, finally, the rule requires issuers that have increased interest rates since January 1, 2009, to “evaluate whether the reasons for the increase[s] have changed, and, if appropriate, to reduce the rate[s]” being charged. If the other aspects of the final rule were not expected, no doubt that last provision is causing lots of people today to utter the words “ouch,” or “hooray,” respectively.

V. Watch Those Over-Limit Fees! The FDIC Brings a Section 5 Enforcement Action

On January 29, 2010, the FDIC announced its settlement with 1st Financial Bank USA that requires the bank to pay roughly $10 million in restitution and a civil penalty of $140,000. The FDIC charged that 1st Financial’s practice of charging customers an over-limit fee in one billing cycle and, if they were over their credit limit on the last day of that billing cycle, a second over-limit fee on the first day of the subsequent billing cycle violated section 5 of the FTC Act. It also asserted that 1st Financial: (1) did not give customers either appropriate notice or an opportunity to bring their card accounts current before it assessed the second fee, and (2) failed to disclose its over-limit fee assessment policy in a manner that was meaningful to consumer account holders. The Consent Order requires notice and restitution to roughly 283,000 customers, with account credits for the excess charges to be made to cardholders with open accounts and checks to be mailed to those who do not owe 1st Financial money on the calculation date. Restitution awards are expected to average $37 per customer; any restitution unclaimed after 362 days from the Consent Order’s effective date will be deemed unclaimed and donated to a non-profit consumer financial education organization.

VI. (Almost) A Whole New Garnishment Game: Treasury Proposes to Protect Consumers and Banks from Garnishment and Other Claims of Creditors Against Direct Federal Benefits Deposits

In April 2010, the U.S. Department of the Treasury proposed procedures to protect direct deposits of federal benefits from garnishment or other process. Various federal laws protect federal benefits from garnishment and claims of judg-

114. Id.
115. Id.
117. Id.
118. Id.
120. FDIC Announces Settlement, supra note 116.
Section 407 of the Social Security Act, for example, provides that funds paid as benefits under the Old-Age, Survivors, and Disability Insurance (“OASDI”) programs generally are not “subject to execution, levy, attachment, garnishment, or other legal process.” Financial institutions, on the other hand, are required by law to comply with garnishment orders and may find themselves subject to contempt of court orders, or may be liable for amounts withdrawn by the account holder after service of the garnishment order.

Financial institutions’ compliance with garnishment orders and other forms of legal process often results in freezes on the accounts of federal beneficiaries. This causes significant hardships for beneficiaries, especially those for whom the federal benefit is the sole or the primary source of income. Litigation to establish the exempt status of the benefits or the protected account balance also is likely to be “confusing, protracted, and expensive” for consumers. These difficulties grow—for banks and consumers—because some accounts contain both exempt (protected) and non-exempt funds and there has been no “single, consistently applied accounting standard to determine the proportion of the commingled funds that should be protected from garnishment.”

The proposal requires depository institutions to “lookback” sixty days prior to the service of the garnishment order or other process to determine if exempt federal benefits were deposited by Automated Clearing House transfers. If so, the financial institution must allow the account holder “access” to an “amount equal to the lesser of the sum of such exempt payments or the balance of the account on the date of the account review (the ‘protected amount’).” In addition, the

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125. Id. at 20300.

126. Id.

127. Id.

128. Id.

129. Id. at 20301.

130. Id. To simplify the process for identifying exempt federal benefits, the Treasury Department will encode in a designated position in the “Company Name” field of the “Batch Header Record” of Automated Clearing House (“ACH”) payments an “X” to designate federal benefits sums. Id. at 20302. In addition, the sponsoring agencies will publish a list of unique “Entry Detail Description” fields in the Batch Header Records for each agency’s exempt benefit payments. Id. Exempt Supplemental Social Security Income benefits will have a unique identifier and so will exempt VA Vocational Rehabilitation & Education benefits. Id. These new procedures should enable financial institutions to identify exempt federal benefits from other incoming ACH payments by automated means. Id. Bank statements also typically show both the “Company Name” and “Entry Detail Description” fields so that a visual inspection using a customer service screen, etc., will allow personnel to identify federal benefits credits to consumers’ accounts. Id. Finally, Treasury will reflect these verification procedures in the Green Book, A Guide to Federal Government ACH Payments and Collections. Id.

131. Id. at 20301.
financial institution must notify the account holders of the protections that the regulation would afford them and of the protected amounts.\textsuperscript{132}

The proposed rule's bright-line "lookback" period is not intended to apply, however, to four specific situations in which: (1) a federal entity is the account holder's creditor,\textsuperscript{133} (2) the garnishor is the beneficiary of a child support or alimony order registered with the Department of Treasury,\textsuperscript{134} (3) certain other exemptions apply,\textsuperscript{135} or (4) the exempt benefits are deposited by check.\textsuperscript{136} The proposal protects beneficiaries' access to funds while garnishment orders are "complied with, adjudicated, or otherwise resolved."\textsuperscript{137} It also provides financial institutions with defenses to liability to judgment creditors, including potential contempt of court sanctions and financial liability for ignoring garnishment orders and the like, to the extent that the financial institutions abide by the procedures spelled out in the final rule.\textsuperscript{138}

The proposal also would (1) preempt state or local government-allowed sanctions for non-compliance up to the protected amount, while allowing garnishment of funds exceeding the protected amount, if state law allows garnishment in such cases;\textsuperscript{139} (2) freeze authority that might be discretionary in some jurisdictions;\textsuperscript{140} and (3) prohibit so-called "continuing" garnishment orders that a minority of states allow to run until satisfied.\textsuperscript{141} The proposal also prohibits banks' assessments of garnishment fees against protected amounts otherwise authorized by the bank-customer agreement.\textsuperscript{142} Moreover, financial institutions would not be able to assess or impose garnishment fees after the date of the account review, so institutions could not defer fees until new deposits arrive.\textsuperscript{143}

This anti-garnishment/bank-safe-harbor proposal represents a rare case in which interests of financial institutions and consumer account holders align against the interests of third parties. Once promulgated, non-complying banks should expect enforcement actions. The Federal Deposit Insurance Act and the Federal Credit Union Act give federal banking agencies power to initiate enforcement actions against financial institutions that fail to comply with federal statutes.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 20302.

\textsuperscript{134} Id. (explaining that beneficiaries of child support and alimony payments orders may still garnish benefits prior to the time the relevant federal agency issues the payments if the beneficiaries follow special procedures for serving the Social Security Administration, Veterans' Administration, Railroad Retirement Board, or Office of Personnel Management with notice of their rights to the payments pursuant to 42 U.S.C. § 659 (2006)).

\textsuperscript{135} Id. at 20303-04.

\textsuperscript{136} Id. at 20302, 20306.

\textsuperscript{137} Id. at 20307.

\textsuperscript{138} Id. at 20312 (to be codified at 31 C.F.R. §§ 212.10(b), (c)).

\textsuperscript{139} Id. at 20303, 20306, 20312.

\textsuperscript{140} Id. at 20303, 20311.

\textsuperscript{141} Id. at 20303 n.13.

\textsuperscript{142} Id. at 20305-06 (to be codified at 31 C.F.R. § 212.6(g)).

\textsuperscript{143} Id. at 20303.
and regulations.¹⁴⁴ Agencies also might employ their authority under section 5 of the Federal Trade Commission Act.¹⁴⁵

VII. CONCLUSION

The developments since May 2009 suggest not only significant changes but also the beginnings of an extraordinary push to protect consumers from charging practices pertaining to credit cards, prepaid cards, and direct deposits to deposit accounts. Looking just over the horizon, we see a new year with a new Bureau of Consumer Financial Protection and new authority and, accordingly, more to cover in next year's survey.

¹⁴⁴ Id. at 20304; see also 12 U.S.C. § 1818 (2006) (authorizing the termination of an institution’s insured status); id. § 1786 (authorizing the termination of a credit union’s insured status).