

Dodd-Frank Wall Street Reform and Consumer Protection Act: What It Means for the Prepaid Card Industry

BRYAN CAVE WEBINAR
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Agenda

- Introductions and Background - - Judie Rinearson
- Consumer Financial Protection Bureau - - Linda Odom, Margo Strahlberg, Lilyanne McClean
- Preemption - - John ReVeal
- The “Durbin Interchange Amendment” - - Judie Rinearson and Jennifer Crowder
- Remittances (and the FinCEN Notice of Proposed Rulemaking) – Kris Andreassen
- Looking forward – what this means for the Prepaid Industry – Judie Rinearson and Lilyanne McClean
- Additional Questions submitted

Prior to 2009

- Federal Regulation - -
 - Anti-Money Laundering Laws on “stored value”
 - Regulation E – Limited to “payroll” cards
 - FDIC – General Counsel’s Opinion No. 8
 - Federal Trade Commission – Some actions about deceptive practices
- State Regulation - 88 different state laws specifically address Prepaid Cards:
 - 35 Consumer Protection Laws
 - 25 Abandoned Property Laws
 - 28 Money Transmitter Licensing Laws
- Simon Mall Gift Card Litigation – Federal Preemption over state consumer protection laws

But that was as of the
BEGINNING OF 2009...

The prepaid payment industry has been undergoing extraordinary regulatory change.

- **MAY 2009** – FinCEN MSB regulations and “stored value” questions
- **MAY 2009** - The Credit Card Accountability, Responsibility Disclosure Act of 2009 (the CARD Act)
- **NOVEMBER 2009** – CARD Act Proposed Regulations
- **MARCH 2010** – CARD Act Final Regulation
- **JUNE 2010** – FinCEN Notice of Proposed Rulemaking (“Prepaid Access”)
- **JULY 2010** – The ECO Gift Card Act
- **JULY 2010** - Dodd-Frank Wall Street Reform Act

Dodd-Frank Act – Why Now? Why Us?

- Negative Perceptions of Prepaid
 - “Second Tier” Bank Accounts
 - “Preying” on the unbanked – those who are “most vulnerable”
 - Consumers are misled - fees too high and not fully disclosed
 - Prepaid card links with payday lenders and other high-interest short-term loan providers
- How Congress works: Legislation versus Regulation
- The Good News – Prepaid is still a SMALL PART
 - Consumer Financial Protection Bureau
 - Limitations on federal preemption
 - Under the “Durbin Amendment,” limits interchange and imposes restrictions on payment network exclusivity and routing restrictions.
 - Remittances

Bureau of Consumer Financial Protection (BCFP)

- Why Establish the BCFP?
- Creates a new Consumer Protection Agency for financial services including prepaid cards
- Authorized to determine what are abusive and unfair practices, and prohibit such practices
- How we think it will work
- Q: How does this new legislation align with or harmonize with the new Gift Card Act?

Bureau of Consumer Financial Protection (BCFP)

Who are Covered Entities ?

- Any person who engages in *offering or providing* a consumer financial product or service.
- Specifically includes selling, providing or issuing “stored value”
- Retailers who sell cards only covered if they have substantial control over the terms
- Entities that provide a *material service* to a *covered person* in connection with the offering or provision of the product or service (processors, program managers)

Bureau of Consumer Financial Protection (BCFP)

What Are The BCFP's Powers?

- Empowered to prohibit a *covered person or service provider* from committing or engaging in an unfair, deceptive or abusive act or practice
 - An “**unfair**” activity is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers, and the substantial injury is not outweighed by countervailing benefits.
 - An “**abusive**” activity either (a) materially interferes with a consumer’s ability to understand a term or condition of a stored value product or service or (b) takes unreasonable advantage of a consumer’s lack of understanding, inability to protect his/her interests, or reasonable reliance on a covered person.

Bureau of Consumer Financial Protection (BCFP)

Timing and Procedures

- To be led by a director nominated by the President, subject to Senate approval; Staffed by existing consumer protection personnel from various federal agencies; All of the consumer financial protection functions of certain agencies will be transferred.
- The “designated transfer date” is expected to take place sometime between Dec. 22, 2010 and June 25, 2011 (but may be extended by 6 months).
- Until then, the Secretary of the Treasury is authorized to perform the functions of the BCFP and the Dept. of the Treasury may provide administrative services to support the BCFP.
- Once the Bureau is established, new proposed regulations will need to be issued. Given other higher risk and higher priority concerns, it will likely be at least another 18 months to 2 years before new final regulations on prepaid card products will be issued.

Bureau of Consumer Financial Protection (BCFP)

- The Washington Perspective – Who's the likely Director of the BCFP
- Possible Candidates
 - Elizabeth Warren
 - Eugene Kimmelman
 - Michael Barr
 - Bill McDonough

Preemption

- Why Limit Preemption?
- The Historical Standard (before 2004).
 - Federal thrifts “occupied the field.”
 - National banks preempted on a case-by-case basis if the State law prevented or substantially interfered with national bank powers.
 - Supported by the 1996 U.S. Supreme Court Case, Barnett Bank v. Nelson.
- The 2004 Standard.
 - The OCC refrained from occupying the field, but its actual regulation seems to have a very similar effect.

- **Back to Barnett – Or Something Like It.**

- A state “consumer financial law” is preempted if either:
 - the law would have a discriminatory effect on national banks as compared to state banks or
 - in accordance with the legal standard for preemption in Barnett, the State consumer financial law prevents or substantially interferes with the exercise by the national bank of its powers.
- Occupation of the field is expressly eliminated.

- **What About Post-Barnett Court Decisions?**

- Probably will be relevant, at least if issued prior to 2004.

- **What About Post-Barnett OCC Rulings?**

- Probably will be relevant, at least if limited to the “prevent or significantly interfere” standard of Barnett.

- **Maybe Limited to Consumer Financial Laws.**

- **Preemption of State Prepaid Card Laws.**
 - National banks and thrifts can still preempt, but the standard is now Barnett.
- **Time To Roll Up Your Subs.**
 - Subsidiaries and other affiliates will have no federal preemption, unless they are banks or the federal law otherwise provides for preemption.
- **Exportation Was Saved.**
 - All banks and thrifts, state or federal, will still be able to export interest rates and related fees from the State where the bank or thrift is located.

Preemption Questions

- Q: Is there no longer federal preemption for gift cards issued by a national bank?
- Q: How do you envision the escheatment rules (between the Fed and States) will be dealt with?
- Q: How do we anticipate the changes to pre-emption to affect the ability of national banks to export cardholder fees?

The “Durbin Amendment” – Part “a”

- Why regulate “interchange”?
- Under the “Durbin Amendment,” Fed to establish standards for “reasonable and proportionate” interchange for debit and open loop (general use) prepaid cards (not credit)
- Standards to be based on actual costs of transaction authorization, processing and settlement
- A “fraud prevention increment” may apply to entities that have invested in fraud prevention processes and systems
- Key Question: What is covered by term “interchange”?

The “Durbin Amendment” – Part “a”

- Exclusions
 - Cards issued by small banks with less than \$10 billion in assets
 - Government benefit cards and reloadable general use prepaid cards (not positioned for gift –giving)
 - (i) without overdraft fees and
 - (ii) that allow 1 free ATM transaction a month are excluded.
- Next Steps – Industry Surveys
- Timing – Prior to BCFP

The “Durbin Amendment” – Part “a”

Qs & As

- Q: Do you have an idea of the expected interchange rate in the final rules?
- Q: Do you have an expected impact on prepaid cards due to them riding the debit rails (greater or less acceptance)?
- Q: I am particularly interested in how the legislation on debit card interchange effects the players within the delivery chain (Specifically ISOs and MSPs).

The “Durbin Amendment” – Part “b”

- Why regulate payment network processing and routing?
- Exclusivity Restrictions
 - Prohibits an issuer or payment card network from restricting the number of payment networks through which an electronic payment transaction can be processed to less than two (and the second network cannot be owned or operated by or affiliated with the first payment network)
 - For example, a Visa Branded debit card must have access to at least one Electronic Funds Transfer (EFT) Network *other than Plus or Interlink*
 - Should not apply to prepaid cards that don’t have ATM access – but that needs to be clarified.
- *NOTE – exclusion in Part a do NOT apply to Part b - - all prepaid and debit cards are covered.*

The “Durbin Amendment” – Part “b”

- Routing Restrictions
 - Prohibits any issuer or payment network from inhibiting the ability of any merchant to direct the routing of electronic debit transactions over any available payment card network
 - For example, an issuer of a Visa Branded debit card which has access to both *Plus (Visa-owned)* and *STAR (owned by First Data)* cannot impose fees or procedures that would inhibit the merchant from processing the debit transaction over the STAR network.

The “Durbin Amendment” – Part “b”

- Why regulate Card minimums and maximums?
- Minimum Restrictions – *Credit Cards Only*
 - Allows merchants to set “minimums” of no more than \$10 for card purchases
- Maximum Restrictions - *Credit Cards Only*
 - Prohibits Federal agencies and institutions of higher learning from capping maximum transactions.

Remittances

- Why regulate remittances?
- DFA section on Remittance Transfers amends the EFTA, imposing disclosure and error resolution requirements.
- Who and what is covered?
 - "Remittance transfer" is an "electronic ... transfer of funds requested by a sender located in any State to a designated recipient [in a foreign country] that is initiated by a remittance transfer provider ..."
 - EXCLUSION: Small-value transactions, excluded by FRB rule.
 - "Remittance transfer provider" is "any person or financial institution that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person or financial institution."

Remittances

- Remittances to foreign countries **requested** by a consumer and **initiated** by a remittance transfer provider.
- Impact on prepaid card programs:
 - Card-based transfers requested by the cardholder through the bank, program manager or other party – likely covered.
 - Two-card remittance programs where the sender and receiver each have a card that accesses the same account – may not be covered, because the remittance transfer provider does *not* initiate those transfers.

Remittances

- Clear and conspicuous disclosures required, in writing and in a form the sender may keep:
 - In advance of the transaction: amount the recipient will receive, amount of the transfer and fees, and the exchange rate used.
 - At the time the sender pays:
 - Receipt showing those transaction amounts; the promised delivery date; name of recipient; and address or phone number of the recipient (if provided by the sender).
 - Statement containing information on error resolution rights, and contact information for the remittance transfer provider, its state regulator and the FRB.
 - Disclosures to be made in English and in **each of the foreign languages** principally used by the provider, or any of its agents, to advertise/market/solicit, in writing or orally, at that office.

Remittances

- FRB may require storefront and internet notices:
 - Prominent posting and updating of model remittance transfer(s) with transaction amounts, at storefront locations, and
 - Comparable notice on remittance transfer provider's home page.
- Liability of remittance transfer provider for its agents:
 - A remittance transfer provider is liable for agent's violations of these provisions.
 - FRB to issue rules to implement appropriate standards or conditions of liability of a remittance transfer provider, including a provider who acts through an agent.

Remittances

- Error resolution requirements:
 - Sender has 180 days from the delivery date to report an error.
 - Remittance transfer provider has 90 days to resolve the error.
- FRB to issue rules within 18 months with clear and appropriate standards on error resolution for remittance transfers, to protect senders from such errors, including standards on recordkeeping.
- FRB to issue rules within 18 months on remittance transfer cancellation and refund policies for consumers.

Remittances

- Other provisions:
 - This section does not affect applicability of certain other laws, including the Bank Secrecy Act and implementing regulations – these remittance transfers are still subject to the Funds Transfer Rule and Travel Rule recordkeeping requirements.
 - Expansion of the ACH system – FRB to work with the Federal Reserve Banks and Treasury to expand the use of the ACH system and other payment mechanisms for remittance transfers to foreign countries, with a focus on countries that receive significant remittance transfers.
 - FRB to submit reports to Congress for 10 years on the status of the ACH system and its progress in complying with these requirements.

Remittances

- Other provisions:
 - Federal banking agencies to provide guidelines to financial institutions regarding offering low-cost remittance transfers and no-cost or low-cost basic consumer accounts, as well as agency services to remittance transfer providers.
 - The Director must submit a report to the President and Congress, within one year, on –
 - The manner in which the remittance history of a consumer could be used to enhance his credit score.
 - The current legal and business model barriers and impediments that impede such use of remittance history.
 - Recommendations on the manner in which maximum transparency and disclosure to consumers of exchange rates for remittance transfers may be accomplished, whether or not exchange rates are known at the time the transfer is originated or paid for by the consumer.

FinCEN Notice of Proposed Rulemaking: Anti-Money Laundering Regulations for Prepaid Access

Major Concerns:

- Requirement for sellers to collect and retain customer identification data
- Designating a nonbank “provider” for all programs, based on a range of factors – and then imposing all BSA obligations on that party
- Unfavorable treatment of non-bank reloads (e.g., on payroll cards)
- Permitting a carve-out for Flexible Spending Accounts but not for Health Savings Accounts and other employee benefit programs
- Designating prepaid cards as “monetary instruments” when crossing borders? (Comments requested.)
- **Regulations are not final. Comments due August 27, 2010.**

- Extension of Reg E to Other Prepaid cards
- Dodd-Frank Durbin Amendment Regulations
- Dodd-Frank Bureau of Consumer Financial Protection Regulations
- Final FinCEN Anti-money laundering regulations
- Guidance re: Inexpensive Bank Accounts
- Other possible federal regulation: cross-border restrictions, personal data protection, government benefits cards, “Menendez Bill”
- Increasing state laws
 - Abandoned Property laws, such as New Jersey A3002
 - Money transmitter licensing laws, such as California A2789
 - Payroll card laws, rebate card laws, cash-back laws, etc.

What does this mean for global prepaid card industry?

- The US is moving from successful reasonably free market to increasing restrictions regarding fees, expiration dates, and disclosures
- Significant contraction of "federal preemption" - increasing impact of non-uniform state laws (compare to the EU and the PSD)
- *Be ready for change – impact on business models, pricing, functionality, distribution networks, systems ...*

Additional Qs & As

- Q: Are closed-loop cards covered by the new law? What about rewards cards? Decoupled debit?
- Q: Does Reg E apply to reloadable prepaid cards (not payroll/gift) because they are deposits for FDIC purposes if the underlying funds are on deposit at an insured institution?
- Q: What effect, if any, do you see the Dodd Frank legislation having on the Treasury's initiative to increase EFT payments by mandating benefit payments on prepaid debit cards to recipients who don't opt for a direct deposit transaction at a bank?
- Q: How long to we think it will be before we actually have to change processes at the point of sale to capture any required information?

Thank You

and please provide us your feedback!

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