

**COMMENTS**  
to the  
**Department of the Treasury**  
**Financial Management Service**  
31 CFR Part 210  
RIN 1510-AB 24  
Docket Number FISCAL-FMS-2009-0001  
by  
**Consumer Federation of America**  
**Consumers Union**  
**the National Consumer Law Center**  
on behalf of its low-income clients  
and the  
**National Senior Citizens Law Center**  
July 13, 2010

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DOTHAN, Ala. -- *One recent morning, dozens of elderly and disabled people, some propped on walkers and canes, gathered at Small Loans Inc. Many had borrowed money from Small Loans and turned over their Social Security benefits to pay back the high-interest lender. Now they were waiting for their "allowance" -- their monthly check, minus Small Loans' cut.* Excerpt from Ellen E. Schultz and Theo Francis "Social Insecurity -- High-Interest Lenders Tap Elderly, Disabled," Wall Street Journal at A1, February 12, 2008.<sup>1</sup>

Unless significantly changed, Treasury's proposed rules in this docket will facilitate the *expansion* of these practices. While this is unquestionably an unintended consequence of Treasury's goal of facilitating direct deposit for all federal payees, the transfer away from paper checks must not be at the expense of elderly and disabled federal benefit recipients who are currently the most vulnerable.

**Consumer Federation of America (CFA),<sup>2</sup> Consumers Union,<sup>3</sup> the National Consumer Law Center<sup>4</sup> ("NCLC")** on behalf of its low-income clients, and the

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<sup>1</sup> Available at <http://online.wsj.com/article/SB120277630957260703.html>.

<sup>2</sup> **Consumer Federation of America** is a nonprofit association of about 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy and education.

<sup>3</sup> **Consumers Union of United States, Inc.**, publisher of *Consumer Reports*<sup>®</sup>, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid

**National Senior Citizens Law Center** (“NSCLC”)<sup>5</sup> jointly submit the following comments on the Treasury Department’s proposal to change the types of accounts into which federal payments can be directly deposited.

The primary goal of these comments is to encourage Treasury to –

- 1) tighten its rules to prevent deposits to inappropriate master-subaccount arrangements that do not give benefits recipients full ownership of, control over and access to the funds;
- 2) prohibit direct deposit onto prepaid cards that are tied to payday-like loans secured by the deposit of federal benefits in evasion of EFTA rules and rule protecting such funds from garnishment;
- 3) prohibit prepaid accounts from being eligible for direct deposit if they charge unreasonable or inappropriate fees for the recipient’s access to the funds;

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circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union’s own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect Consumer welfare. Consumers Union’s income is solely derived from the sale of *Consumer Reports*<sup>®</sup>, its other publications and services, fees, noncommercial contributions and grants. Consumers Union’s publications and services carry no outside advertising and receive no commercial support.

<sup>4</sup> The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Banking and Payments Law* (4d ed. 2009), which has several chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with the electronic delivery of government benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and were very involved in the development of rules implementing EFT-99 after its enactment in 1996. NCLC’s attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. NCLC’s portions of these comments are written by NCLC attorneys Margot Saunders and Lauren Saunders.

<sup>5</sup> Since its founding in 1972 the mission of the National Senior Citizens Law Center (NSCLC) has been to promote the independence and well-being of low income older Americans. In pursuit of that mission, NSCLC advocates for economic and health security for low-income older persons and individuals with disabilities, with a special emphasis on problems affecting older women and people of color. NSCLC has placed a special emphasis on the Old Age, Survivors and Disability Insurance (OASDI) and Supplemental Security Income (SSI) programs since these programs provide more than half the income for a clear majority of older Americans.

- 4) ensure that funds deposited on prepaid cards have, by law, first class, not substandard, Regulation E protection;
- 5) give funds deposited on prepaid cards the same protections against garnishment and account freezing as bank accounts soon will have; and
- 6) build in an enforcement mechanism to ensure compliance with the protections in Treasury's rules in practice and not merely on paper.

Treasury's proposed changes to the rules governing eligible accounts for direct deposit of federal payments appear to be intended to accomplish several goals, including closing loopholes in the current regulations which have permitted dangerous master-sub account relationships, and to expressly authorize the use of direct deposit onto Treasury's Direct Express card. In addition to expressly permitting the deposit of federal funds into some specifically authorized master-sub account arrangements, as well as the Direct Express card, however, the proposed rule also authorizes the delivery of federal payments to prepaid and stored value card accounts provided certain conditions are met. *We have significant concerns about the authorization for the deposit of federal benefit payments onto prepaid, stored value cards or similar products which are only subject to the conditions outlined in the proposed rule. More substantial protections are essential before these transactions should be authorized and sanctioned by Treasury.*

The potential ramifications of the changes proposed in this docket are closely related to the changes Treasury has proposed in the separate docket which will mandate direct deposit for all federal payments by March 1, 2013.<sup>6</sup> Comments for this latter NPRM are due August 16, 2010. We will file comments at that time discussing –

- the ongoing need for waivers of the direct deposit requirement in certain situations such as the disability of the recipient, access to ATM machines, and expense;
- the need for Treasury to provide some protections for federal benefit recipients against predatory and expensive credit arrangements tied to the direct deposit of federal payments rather than based on underwriting for their affordability; and
- the limitations of the Direct Express card and the ways in which its features must be improved before it becomes the default mechanism for receipt of federal payments.

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<sup>6</sup> See Department of the Treasury, Fiscal Service, 31 CFR 208, RIN 1510-AB26, 75 Federal Register 34394 (June 17, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-06-17/pdf/2010-14614.pdf>.

*These comments are provided in the following parts:*

- 1) Part 1 will explain the problems with the master-sub account arrangements currently used to receive federal payments.
- 2) Part 2 will explain why the proposed rule fails to close existing loopholes and instead opens additional venues for inappropriate master-sub account arrangements.
- 3) Part 3 will describe the problems with permitting direct deposit to some prepaid cards currently in the marketplace, including the risk of exposing recipients to predatory lending, exorbitant fees, and substandard protections.
- 4) Part 4 will explain why prepaid cards need protection against garnishment and freezing of funds.
- 5) Part 5 will explain how enhanced protections can be implemented and enforced without burdening Treasury.
- 6) Part 6 will summarize changes to the rules proposed by Treasury.

Given the interrelationship between the two sets of proposed rules, our August comments may contain additional information that bears on the current rulemaking. Therefore, we urge Treasury to consider both sets of comments together before finalizing either set of rules.

### **Part 1 – Master-Sub Account Arrangement: Illegal Already and Still Operating.**

The proposed rule will expand the master-sub account arrangements under which federal benefits may be directly deposited. Thus, the current problems with these arrangements are very relevant. The illegal seizures, the high costs, and the improper handling of benefits that are all currently occurring with these arrangements should be instructive to Treasury. Treasury must ensure that current problems are addressed before it expands the opportunities for these arrangements.

In 2008, a Wall Street Journal story reported instances in which the Social Security Administration would direct deposit Social Security and SSI benefits into a bank account controlled by a loan company, not by the recipient, permitting the lender to deduct fees and loan payments from benefits before providing the residual to the beneficiary.<sup>7</sup> This delivery of exempt benefits through master/sub account arrangements can include a bank, an intermediary, and the outlet where consumers

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<sup>7</sup> *High-Interest Lenders Tap Elderly, Disabled*, Wall Street Journal, February 12, 2008; Page A1. Available at <http://online.wsj.com/article/SB120277630957260703.html>.

go to pick up their “checks.” Fees for handling direct deposit, check printing and cashing or loading of funds onto a card are withheld from the delivery of funds to the recipient. Loan companies also use the master-sub account arrangement to collect loan payments from exempt funds.

As a result of this publicity, the Social Security Administration requested public comment on whether it should terminate master-sub account arrangements. In addition, the House Ways and Means Subcommittee on Social Security held a hearing on this issue in June 2008. CFA and NCLC filed comments<sup>8</sup> and testified<sup>9</sup> at the hearing, urging that recipients’ exempt funds be protected from high fees and loss of control over exempt funds. We also shared our testimony with the Federal Deposit Insurance Corporation, which pledged to investigate the banks under its jurisdiction for any violations or unfair practices involving third-party direct deposit arrangements.

The Inspector General of the Social Security Administration reported in 2008 that the SSI payments to at least 63,065 individuals were deposited into accounts established and controlled by non-bank financial service providers at five banks.<sup>10</sup> The report noted that Section 207 of the Social Security Act (42 U.S.C. § 407) prohibits the transfer or assignment of benefits and that SSA policy states that “Any arrangement in which the claimant shares control of the funds from his or her benefit with a person or entity that has an interest in charging or collecting money from the claimant is an assignment-like situation that violates SSA’s policy.”<sup>11</sup>

However, both the Social Security Administration and the Treasury Department have failed to repeal procedures by which they continue to permit exempt funds to be direct deposited into accounts that are not owned or controlled by recipients. Specific SSA rules permit direct deposit through non-bank financial service providers, such as check cashers or loan companies (financial service providers or FSPs). The

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<sup>8</sup>Comments by the Consumer Federation of America, the National Consumer Law Center, on behalf of its low-income clients and Consumers Union to the Social Security Administration Regarding the Use of Master and Sub Accounts and Other Account Arrangements for the Payment of Benefits Docket No. SSA 2008-0023, June 20, 2008. Available at [http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/banking\\_comments\\_june08.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/banking_comments_june08.pdf).

<sup>9</sup>June 24, 2008, Subcommittee on Social Security Hearing on Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices,

<http://waysandmeans.house.gov/Hearings/hearingDetails.aspx?NewsID=10354>; Comments by Consumer Federation of American and National Consumer Law Center, available at <http://waysandmeans.house.gov/Hearings/Testimony.aspx?TID=1998>.

<sup>10</sup> Office of Inspector General, Social Security Administration, *Congressional Response Report: Social Security Administration Payments Sent to Payday Loan Companies*, (A-06-08-28112), June 2008.

<sup>11</sup> SSA, Program Operations Manual System (POMS), GN 02410/001/D/2 *Assignment of Benefits*.

SSA procedures even recognize that the FSP may deduct loan payments from deposited funds before giving the recipient access to the deposit.<sup>12</sup>

Late last year, the Office of Inspector General of the Social Security Administration examined OASDI payments electronically deposited into accounts at nine banks known to be used by non-bank FSPs to receive Social Security and SSI payments and found OASDI payment to at least 35,705 individuals totaling \$25 million per month deposited into accounts controlled by non-bank FSPs at five of the banks.<sup>13</sup> The report noted that, in most cases, it appeared that the SSA was not aware that OASDI payments were deposited into these accounts and had taken no steps to prevent direct deposit to non-bank FSP accounts.

Vulnerable consumers are at risk of paying high fees and losing control over payments out of exempt funds in these arrangements. The Inspector General reviewed the demographic information for the 35,705 recipients with payments sent to non-bank FSPs and found that 63 percent were minorities. More than half suffered from disabilities, with 45 percent of the disabled suffering from a mental disorder. Over a third of payments were made in Illinois; other high-volume states were California, Georgia, New York, and Pennsylvania.<sup>14</sup>

Two of the banks that formerly handled master-sub account arrangements for FSBs have left the market. In 2009, the FDIC issued a cease and desist order against the Bank of Agriculture and Commerce in Stockton, CA, which partnered with Petz Enterprises, Inc. to solicit SSA/SSI beneficiaries for direct deposit into a master account. The FDIC discovered instances where check cashers, payday lenders, and retailers withheld all or a significant part of beneficiaries' payments by deducting transaction fees, cashing fees, short-term loans, and repayment of loans, leaving recipients without funds for basic living expenses.<sup>15</sup> The bank was required to shut down this program.

FDIC-supervised Republic Bank and Trust (RBT) in Kentucky discontinued its Currency Connection Direct Deposit program, effective February 5, 2010. RBT handled about 50,000 Title II and Title XVI beneficiaries' payment through a master

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<sup>12</sup> SSA, POMS, GN 02402.030.B.4, *Acceptable Types of Financial Institutions and Accounts*.

<sup>13</sup> Office of Inspector General Social Security Administration, *Quick Response Evaluation: Old-Age, Survivors and Disability Insurance Benefit Payments Sent to Non-Bank Financial Service Providers*, A-06-09-29090, at 5, May 2010 ("OASDI Report").

<sup>14</sup> OASDI Report, at 7, 8.

<sup>15</sup> Social Security, Policy Instruction, EM-09039, Effective May 15, 2009.

account, with funds accessed at check cashers and other businesses.<sup>16</sup> RBT also operated a private-branded program for ACE Cash Express. As our testimony in 2008 described, RBT's Currency Connection program touted its service to loan companies to "enhance(s) collection efforts for in-house lending." The contract signed by benefit recipients with RBT authorized both the bank and the third party Electronic Funds processor to withdraw funds from the deposit to repay obligations to either the bank or the check casher/loan company.<sup>17</sup>

The Inspector General reported that nine banks continue to operate master-sub account arrangements for direct deposit of SS and SSI benefits. One of these is the Kentucky-based River City Bank Dollars Direct program, which permits check cashers to charge up to \$9.99 for each check printed out for recipients.<sup>18</sup> FSPs can also charge \$2.95 for a "Cashier's Check Fee" and \$1.95 for each additional deposit into the account.<sup>19</sup>

First Citizens Bank in Elizabethtown, KY operates FirstNet Electronic Funds Transfer Program to facilitate payments directly from a customer's bank account to a business, principally for installment loan payments.<sup>20</sup> According to the Inspector General, a bank in Elizabethtown, KY handled direct deposit of funds for 3,544 OASDI beneficiaries as of late 2009.<sup>21</sup> This bank also operates the FirstNet Military Allotment Program, described in a complaint filed this year by the New York Attorney General.<sup>22</sup> The New York case involves financing for over-priced electronics with payments deducted from Service members' pay by allotments. The New York complaint alleges that lenders opened a "savings" account in the soldier's name at First Citizens Bank of Kentucky to receive the military payroll allotments and required borrowers to execute transfer authorizations for monthly allotment payments to automatically be made to the lenders.<sup>23</sup> This case illustrates that Service

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<sup>16</sup> FDIC Order to Cease and Desist, Bank of Agriculture and Commerce, FDIC-08-408b at 3, February 19, 2009.

<sup>17</sup> Testimony, CFA and NCLC, Before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, "Hearing on Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices," June 24, 2008, <http://waysandmeans.house.gov/Hearings/Testimony.aspx?TID=1999>

<sup>18</sup> Dollars Direct "Now You Can Offer Direct Deposit to Your Customers," [www.dollarsdirect.us/](http://www.dollarsdirect.us/) last visited May 5, 2010.

<sup>19</sup> Dollars Direct Pricing, [www.dollarsdirect.us/pricing.html](http://www.dollarsdirect.us/pricing.html), last visited May 5, 2010.

<sup>20</sup> FirstNet Electronic Funds Transfer (EFT) Program, <http://www.first-citizens.com/eft.asp>, last visited May 5, 2010.

<sup>21</sup> OASDI Report, at 5.

<sup>22</sup> Supreme Court of the State of New York County of Jefferson, *State of New York v. Frisco Marketing of NY LLC d/b/a SmartBuy, et. al*, filed May 18, 2010

<sup>23</sup> SmartBuy Complaint at 10.

members' pay as well as SS and SSI recipients' funds are at risk from master-sub account direct deposit programs.

The dangers of finalizing this rule without addressing the current problems are clear from a recent issue of the trade magazine for check cashers and payday lenders. The magazine featured Treasury's decision to discontinue issuance of Social Security checks and spelled out two responses check cashers and payday lending stores can take to replace the income from cashing those checks: participating in bank sponsored master-sub account arrangements whereby the store functions as an "Electronic Funds Distributor," or through the sale of prepaid debit cards.<sup>24</sup> *Clearly the industry intends to use the Treasury decision as a way to impose more expenses on benefit recipients unless Treasury tightens up its rules.*

We have been informed that the SSA procedures permitting deposit to accounts controlled by non-bank financial service providers are being reviewed. However, no docket has been announced and we are unable to evaluate whether future changes will be sufficient to safeguard exempt funds. Until the existing problems with master-sub accounts are resolved (and the proposal is tightened up to ensure that it does not make the problems worse), it is premature to propose expanding this method of delivering federal benefits to unbanked recipients.

## **Part 2 – Treasury's Changes Do Not Close Loopholes; They Open More**

Given that SSA procedures authorize the direct deposit of exempt funds to bank accounts controlled by non-bank financial service providers and SSA is apparently unable to identify these accounts, the obvious question is how SSA and Treasury can make sure that recipients of exempt funds are protected and funds are only direct deposited into accounts owned by and controlled by recipients. Apparently this NPRM is expected to resolve the SSA's failure to prevent deposits to accounts not controlled by the beneficiary. However, the proposal does not repeal the SSA procedures that currently authorize payment through FSPs; expands authorization for such payments with few additional protections; and provides no enforcement or compliance procedures to ensure that accounts are owned and controlled by the beneficiary.

In these proposed regulations, Treasury proposes to add some additional exceptions to the pre-existing rule requiring the deposit of federal benefit payments into an

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<sup>24</sup> Richard B. Kelsky, "Debit Cards: It's in The Way That You Use It." *Cheklis*, Summer 2010, page 22.



account in the name of the recipient.<sup>25</sup> We have no quarrel with any of the proposed exceptions except one: the proposal to permit deposit of federal payments into accounts which will distribute the benefits through prepaid, debit or stored value cards.

We strongly object to Treasury's proposal to permit the delivery of federal benefits through prepaid debit or stored value cards (other than through the Direct Express card)<sup>26</sup> for two reasons. First, this proposal permits distribution of federal benefits through a system which we – and Treasury – already know is highly problematic and expensive for recipients. Second, we see nothing in these proposed regulations or any other pronouncements from federal agencies that will ensure that any consumer protections of recipients – whether pre-existing, proposed in this docket, or proposed in future rule-makings – will be enforced by Treasury or any other agency.

The proposed rule adds the following new exception to the rule that an account eligible for direct deposit be in the name of the beneficiary:

- (7) Where a Federal payment is to be deposited to an account accessed through a stored value card, prepaid card or similar card that bears the cardholder's name and meets the following requirements:
- (i) The account accessed by the card is held at an insured depository institution and meets the requirements for pass through insurance under 12 CFR part 330 such that the cardholder's balance is FDIC insured to the extent permitted by law; and
  - (ii) The card account constitutes an "account" as defined in 12 CFR 205.2(b) such that the consumer protections of Regulation E apply to the cardholder.<sup>27</sup>

The rule *expands* the ability to directly deposit federal benefits to master-sub account arrangements while adding minimal protections that do not address either the current problems with those arrangements or new problems with prepaid cards. The mere fact that an account carries FDIC insurance on a pass-through basis or is covered by Regulation E does not address the problems discussed above: arrangements over which the beneficiary loses control over the account and is subject

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<sup>25</sup> These exceptions include allowing payments into master-sub agreements in nursing homes and religious orders.

<sup>26</sup> We will provide suggestions in the August 16, 2010 to Treasury's Docket on 31 CFR 208, RIN 1510-AB26 regarding how the Direct Express card system can be improved. However, we have no objections to the basic proposal in that docket that the default delivery of federal benefits when a recipient does not have a bank account will be through the Direct Express card.

<sup>27</sup> 75 Fed. Reg. at 27247.

to a cascade of expensive fees before being able to access his or her money. The rule apparently allows any type of “stored value card,” “prepaid card” or “similar card” to be used for direct deposit, even if the card can only be used to access funds in one location after outrageous fees or if the beneficiary has no control over the funds.

In the preamble to this proposed rule, Treasury points out:

[Treasury’s] long-standing interpretation of the words [currently in the regulations] “in the name of the recipient,” has been that the payment recipient’s name must appear in the account title.”<sup>28</sup>

We agree that – as Treasury also points out – the “in the name of the recipient” requirement is a consumer protection policy. Yet, Treasury acknowledges that it has had concerns “in the past that Federal benefit payment recipients could enter into master/sub account relationships in which they have little control over the account to which their benefit payments are directed.”<sup>29</sup> Treasury has not been alone in these concerns. As discussed above, the Inspector General of the Social Security Administration has on several occasions issued reports examining problematic issues relating to receipt of federal benefits through master-sub account arrangements.<sup>30</sup>

Here is the problem: If Treasury has had a long-standing requirement *already in the regulations* prohibiting these types of arrangements, and these arrangements have proliferated without restraint to date, what is Treasury proposing to do *now* that will enforce either these old rules, or the new rules proposed in this docket? There is nothing in this Notice of Proposed Rulemaking that discusses enforcement, or a change in the method of delivering payments into bank accounts that would ensure that any of the protections discussed will be enforced.

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<sup>28</sup>75 Federal Register 27239, 27243 (May, 14, 2010).

<sup>29</sup>75 Federal Register 27239 (May, 14, 2010) at 27243.

<sup>30</sup> According to a recent Inspector General’s report, which performed a “limited analysis” of the use of non-bank repositories, 35,705 individuals received their SSA payments through non-bank providers. These SSA payments, totaling approximately \$25 million, were deposited into accounts held in the name of the provider in nine different banks, and then distributed the funds to the recipients. OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMIN., OLD-AGE, SURVIVORS AND DISABILITY INSURANCE BENEFIT PAYMENTS SENT TO NON-BANK FINANCIAL SERVICE PROVIDERS, A-06-09-29090, at 5 (2010), available at <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-06-09-29090.html>.

Congress<sup>31</sup> as well as consumer groups<sup>32</sup> have had long-standing concerns about the inappropriate nature of facilitating the high charges to unbanked recipients of federal benefits which result from the master-sub account agreements recently studied by the Inspector General of the Social Security Administration. Treasury itself has expressed concerns, and issued an Advance Notice of Proposed Rulemaking back in 1999 regarding the question.<sup>33</sup> Despite the expressed concerns, *and despite the clear illegality of the arrangements* – given the wording of 31 CFR 210.5(a) as it has existed for some years – nothing has been done to stop these dangerous arrangements.

As detailed above, the master-sub account agreements currently used by fringe financial service providers bleed precious funds from Social Security and SSI recipients. Yet, according to the language of the *existing* regulation this arrangement is already illegal, and has been for some time:

**§ 210.5 Account requirements for Federal payments.**

(a) ... For all payments other than vendor payments, the account at the financial institution shall be in the name of the recipients, except as provided in paragraph (b) of this section (permitting exceptions for an investment accounts, travel reimbursements, and payment card program *established by the Treasury*).<sup>34</sup>

Treasury's proposed change to this section will *expand* permission for master-sub account arrangements, making them harder to stop than the weak enforcement under existing regulations. Under the terms of the rule, the current master-sub account arrangements would now be *legal* as long as the providers brought their cards within the minimal terms required in the new Treasury regulations. We have no doubt

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<sup>31</sup> June 24, 2008, Subcommittee on Social Security Hearing on Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices,

<http://waysandmeans.house.gov/Hearings/hearingDetails.aspx?NewsID=10354>. Comments by the Consumer Federation of America, the National Consumer Law Center, on behalf of its low-income clients and Consumers Union to the Social Security Administration Regarding the Use of Master and Sub Accounts and Other Account Arrangements for the Payment of Benefits Docket No. SSA 2008-0023, June 20, 2008. Available at [http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/banking\\_comments\\_june08.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/banking_comments_june08.pdf).

<sup>32</sup> Including the authors of these comments. See, NCLC and other consumer and community groups on Treasury' proposal to regulate the delivery of federal benefits through check cashers, April, 1999; available at:

[http://www.nclc.org/images/pdf/other\\_consumer\\_issues/exempt\\_public\\_benefits/regulation\\_access\\_payment\\_service\\_providers.pdf](http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/regulation_access_payment_service_providers.pdf).

<sup>33</sup> See, NCLC and other consumer and community groups on Treasury' proposal to regulate the delivery of federal benefits through check cashers, April, 1999; available at:

[http://www.nclc.org/images/pdf/other\\_consumer\\_issues/exempt\\_public\\_benefits/regulation\\_access\\_payment\\_service\\_providers.pdf](http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/regulation_access_payment_service_providers.pdf).

<sup>34</sup> 31 CFR §210.5(a).

whatsoever that this is exactly what will happen. To the extent that there might be actual enforcement of the current law which does not permit master-sub agreements, the providers of those agreements will simply switch delivery mechanisms.

Accordingly, proposed § 210.5(b)(7) should be revised to specify that the *only* stored value card subaccounts to which federal benefits may be direct deposited are *general spending prepaid card accounts or similar accounts in which the funds are fully owned, controlled and accessible by the cardholder* (in addition to meeting the other requirements discussed below). A card account would not be eligible if the recipient's access was limited to a particular institution or store; instead, the card must be network-branded in order to ensure that the funds can be accessed independently of the card provider.

### **Part 3 –Direct Deposit to Prepaid Debit and Stored Value Card Accounts Pose Similar Problems Unless Additional Protections are Added**

In addition to expanding, rather than closing, opportunities for inappropriate master-sub account arrangements, the proposed rules also authorize direct deposits to prepaid cards. These cards can carry similar problems with loss of control, deduction of steep fees, and withdrawals from exempt funds to repay extremely expensive loans. Direct deposit should not be authorized without significant additional protections. Prepaid cards, prepaid debit cards or “general purpose reloadable cards,” are marketed as sensible, attractive alternatives to check cashers and traditional bank accounts.<sup>35</sup> But these cards are fast becoming the foundation of a second-tier banking system, filled with traps and dangers for consumers. The proposed rules partially address some of the current problems, but not all.

Prepaid cards are being marketed by payday lenders and check cashers that target vulnerable consumers. As master-sub account arrangements have been terminated at some banks, some non-bank financial service providers have switched to marketing prepaid debit cards as the vehicle to handle direct deposit of federal benefits. The largest chain of payday loan outlets, Advance America, promotes its Visa Prepaid Card as a way to get free direct deposit for disability and Social Security payments.<sup>36</sup> ACE Cash Express, whose Currency Connection program through Republic Bank and Trust has been discontinued, now sells a prepaid card and promotes the card for

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<sup>35</sup> “The prepaid card industry refers to prepaid cards as “general purpose reloadable cards.” Michelle Jun, Consumers Union, *Prepaid Cards: Second-Tier Bank Account Substitutes*, (August 2009), available at <http://www.defendyourdollars.org/Prepaid%20WP.pdf>.

<sup>36</sup> Advance America brochure, “More Choice Means More Convenience,” on file with CFA, obtained on July 8, 2010.

direct deposit of public benefits.<sup>37</sup> Unless the rules are amended, the very same problems seen in master/subaccount arrangements will resurface on prepaid cards.

Payday lenders and check cashers are aware of and are preparing to exploit Treasury's move to eliminate paper checks. These institutions see Social Security and SSI recipients today when they come in to take out loans or cash their paper checks. They can use that position to warn recipients about the looming elimination of paper checks and convince them to convert to direct deposit to cards with features far worse than the Direct Express Card.

The requirements of FDIC coverage to the individual and the extension of Regulation E to prepaid cards alone will not be enough to ensure that federal payment recipients will be adequately protected. A number of prepaid cards charge exorbitant fees and provide outrageous credit features secured by exempt funds that evade legal protections for federal benefit recipients. In addition, the proposed rule should ensure that the Regulation E protections are not substandard.

#### **A. Prepaid Cards Should Not Be Eligible for Direct Deposit if Exempt Funds Will Be Assigned to Lenders**

The Direct Express Card appropriately does not carry any line of credit, overdraft or other credit feature. Nor are lines of credit a feature on the prepaid cards offered by mainstream institutions like WalMart, which offers its MoneyCard prepaid card. However, more and more prepaid cards offered by fringe financial service providers are being used as a vehicle for predatory payday loans.

One example is the iAdvance line of credit on prepaid cards, such as the AccountNow Gold Visa Prepaid Card. Cardholders are incentivized to sign up for direct deposit to get higher limits on all deposits and withdrawals. Instructions explain how to arrange to have Social Security benefits direct deposited to the card.<sup>38</sup> Cardholders can sign up for the iAdvance line of credit which operates like a payday loan, with repayment from the next direct deposit to the card. MetaBank charges an Advance Fee equal to 12.5% of the amount of each advance. The example given is a \$2.50 fee for every \$20 borrowed, with no mention of the APR for this extension of credit.<sup>39</sup> The APR for an open-end line of credit with this fee is 150%, assuming that the loan is outstanding for 30 days. As loans are most likely taken out at the end of

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<sup>37</sup> See <http://www.acecashexpress.com/prepaid-debit-cards.aspx> (last visited July 12, 2010).

<sup>38</sup> <http://www.accountnow.com/help/help-directdeposit.aspx>, visited July 6, 2010.

<sup>39</sup> <http://www.myiadvance.com/accountnow/>, visited July 6, 2010.

the pay cycle, the equivalent APR is 650% for a loan taken out a week before payday, and over 1800% if the loan is taken out only for a few days.

As Arizona's payday loan law sunset on July 1, 2010, CheckSmart, a chain of payday loan-check cashers began selling the "Insight" prepaid card, issued by Urban Trust Bank, FSB. In Arizona, CheckSmart also sells a BridgeAccount via the Insight Prepaid Black Card, which includes an explicit line of credit from a third-party lender that can also be used to cover overdrafts. An open-end line of credit extended by Infinity Specialty Finance of Arizona, LLC (ISF) is delivered via the prepaid card serviced by Insight LLC in Birmingham, AL and issued by Urban Trust Bank, FSB.

The card encourages users to set up direct deposit from benefit providers, including Social Security payments. Consumers are charged (and borrow) a \$3.50 load fee to have \$25 from the line of credit loaded onto the card.<sup>40</sup> These fees are taken up-front, so if a borrower wanted \$100 in her pocket, she would need to borrow \$114. ISF discloses an APR of 35.9%, which does not include the fees charged to load the loan proceeds in increments of \$28.50 onto the Insight Card.<sup>41</sup> The total cost of a one month \$100 net cash advance includes about \$3.41 in interest to ISF, \$14 to Insight Card (\$3.50 for four \$25 net transfers) for a total cost of \$17.41 for a \$100 loan to the Social Security recipient. If this were a two-week closed end payday loan, the fee-inclusive APR would be approximately 454% and for a one-month repayment term, the APR would be about 209%.

The Insight BridgeAccount line of credit contract states that payments may be debited from the borrower's bank account or stored value card. A Social Security recipient's contract for this line of credit provides the Urban Trust Bank's routing number for Treasury to direct deposit his benefits to the Insight prepaid card.<sup>42</sup> That is, direct deposit of Social Security funds is being encouraged as a way of facilitating this triple-digit loan, with those exempt funds immediately deducted before the recipient sees the money.

Prepaid cards with credit features permit the card issuer to deduct the loan fee and payment from any federal benefits that are deposited immediately, before those funds are available to the recipient. The recipient has no control over when or whether to make loan payments. While payday lenders hold personal checks or in some states

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<sup>40</sup> BridgeAccount MasterCard Frequently Asked Questions, acquired in 2010 at a CheckSmart location in Arizona, on file with CFA.

<sup>41</sup> Loans can be delivered by check five days after the loan is approved. Loading to the prepaid card is immediate.

<sup>42</sup> CheckSmart Insight Debit Card information and ISF Line of Credit Contract on file with CFA.

take an authorization to debit the borrower's bank account to secure the loan, banks that extend credit through prepaid cards have even more direct access to the next deposit of exempt benefits loaded to the card.<sup>43</sup>

Prepaid cards that are effectively turned into a credit card through a line of credit or other overdraft or credit feature violate or evade several important protections for public benefit recipients:

- The recipient loses control over the funds, and has effectively assigned them, and thus such loans are an arrangement “in which the claimant shares control of the funds from his or her benefit with a person or entity that has an interest in charging or collecting money from the claimant [and] is an assignment-like situation that violates SSA’s policy.”<sup>44</sup>
- The lender is able to evade federal and state laws that protect public benefits from garnishment by collectors.
- The loans are usually set up as single payment loans that fail to comply with Regulation E protections for preauthorized transfers, including a prohibition on conditioning credit on electronic payment and the right to stop payment.<sup>45</sup>
- Lines of credit on prepaid cards issued by banks may also not be limited by state payday loan laws due to preemption and interest rate exportation.

A more detailed explanation of the dangers of loans or lines of credit that are tied to automatic payment from an asset account can be found in NCLC’s recent report on payday loan alternatives.<sup>46</sup>

We strongly recommend that federal funds only be permitted to be disbursed on prepaid cards that do not carry lines of credit or credit features that evade these and other important protections for Social Security and SSI recipients. It is important to note that these credit features are the exception, not the norm, for prepaid cards. Most prepaid cards are purely asset accounts and do not include lines of credit.

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<sup>43</sup> For an extensive discussion of the dangers of these bank provided payday loans, see National Consumer Law Center, *Runaway Bandwagon: How the Federal Government’s Push for Direct Deposit of Social Security Benefits has Exposed Seniors to Predatory Bank Loans*, forthcoming July, 2010, available at [www.nclc.org](http://www.nclc.org).

<sup>44</sup> SSA, Program Operations Manual System (POMS), GN 02410/001/D/2 *Assignment of Benefits*.

<sup>45</sup> 15 U.S.C. §§ 1693e(a), 1693k.

<sup>46</sup> See Lauren Saunders, Leah Plunkett, Carolyn Carter, National Consumer Law Center, *Stopping the Payday Loan Trap: Alternatives that Work, Ones that Don’t* at 15-17 (June 2010), available at [http://nclc.org/images/pdf/high\\_cost\\_small\\_loans/payday\\_loans/report-stopping-payday-trap.pdf](http://nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf).

Treasury would hopefully never authorize direct deposit of federal benefits to a credit card, where the funds could be used to repay a loan before buying food. It should also not permit direct deposit to blended prepaid/credit cards. Prepaid cards should be just that: a “prepaid” card, not a credit card.

### **B. Federal Benefit Payments Should Be Delivered Only to Prepaid Cards that Charge Only the Fees Authorized by the Direct Express Prepaid Card**

Unless the proposed rule is strengthened to prohibit inappropriate fees, many federal benefit recipients will be enticed into having funds directly deposited onto cards that bleed away scarce funds through numerous fees. Treasury has already seen this phenomenon through the fees for acceptance of deposits and withdrawing cash charged through the master-sub account arrangements. Notably, a large number of those subjected to those arrangements had disabilities. Prepaid cards should not be eligible for direct deposit of federal benefit payments unless they carry fee structures as favorable as, or better than, the Direct Express Card.

Prepaid cards in the marketplace range widely in fees. In a report conducted in August 2009 on prepaid cards,<sup>47</sup> numerous fees were identified, including:

- Initiation or activation fees;
- monthly fees;
- point of sale transaction fees;
- cash withdrawal fees;
- balance inquiry fees;
- transaction statement fees, including paper and other;
- customer service fees;
- bill payment fees;
- fees to add or “load” funds;
- dormancy fees;
- overdraft/shortage fees; and
- fees to obtain a balance after closure.

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<sup>47</sup> 18 prepaid cards’ terms and conditions and cardholder agreements were assessed. Michelle Jun, Consumers Union, *Prepaid Cards: Second-Tier Bank Account Substitutes*, (August 2009), available at <http://www.defendyourdollars.org/Prepaid%20WP.pdf>.



Costs can vary widely depending on which prepaid card a consumer uses. These three prepaid cards illustrate how costs vary significantly from card to card for a consumer: the Direct Express Card, the WalMart Money Card, and the AccountNow Card.

Assuming that the consumer makes the following transactions in a month:<sup>48</sup>

- Three ATM withdrawals<sup>49</sup>
- Three Bill Payments (Rent, Utilities, and Phone)<sup>50</sup>
- Eight Point of Sale Purchases (Groceries and Meals once a week)
- Weekly balance inquiry by phone or text
- Deposit (limited to federal benefit payment deposit)<sup>51</sup>

For the second or any subsequent month of use given the above usage pattern, the consumer would pay \$5.10 to use the Direct Express Card, \$11.64 for the WalMart Money Card, and \$20.75 for the AccountNow Prepaid Card.

<i>Card</i>	<i>Monthly Fee</i>	<i>Monthly Total for 3 ATM withdrawals</i>	<i>Monthly Total for 8 purchases</i>	<i>Monthly Total for 3 bill payments</i>	<i>Total Monthly Cost for 2<sup>nd</sup> Month</i>
Direct Express Card	\$0	\$1.80 (1 <sup>st</sup> withdrawal free; \$0.90 thereafter)	\$0	\$3.30 (\$1.10 for each Money Order from the Post Office)	\$5.10
WalMart MoneyCard	\$3	\$6 (\$2 each)	\$0	\$2.64 (\$0.88 each WalMart Bill Pay)	\$11.64

<sup>48</sup> In our example, the consumer has already obtained the prepaid card and is enrolled in the program.

<sup>49</sup> Based on findings from a PULSE study of active debit cardholders. *Despite Recession, Card Issuers Expect Debit Growth* in 2009 Press Release June 4, 2009.

<sup>50</sup> We assume that the consumer does not have readily available access to the internet and opts for other low cost bill pay options.

<sup>51</sup> We assume that federal funds are directly deposited to the prepaid card, which waives any fees to depositing these funds. If consumers wish to deposit additional funds from other sources, there are usually additional fees assessed by the issuer and may be assessed by a third party assisting in uploading additional funds.

AccountNow Prepaid Card (available at many check cashing and payday loan stores)	\$9.95	\$7.50 (\$2.50 each)	\$0	\$3.30 (\$1.10 for each Money Order from the Post Office)	\$20.75
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Notably, both the WalMart and Account Now cards charge the consumer for every cash withdrawal, even the first one following a deposit. Federal benefit recipients should not have to pay fees to access their money. As the table above shows, monthly fees can also be a serious problem on prepaid cards.

Other prepaid card issuers charge even more pernicious fees. Some prepaid cards label their overdraft fees as “shortage fees” or “negative balance fees.”<sup>52</sup> For example, the MoneyTree Premier Cash Solution Visa Prepaid Card agreement lists a \$4.95 “Shortage Fee” in its chart of fees and charges.<sup>53</sup> Rent-A-Center’s VIP Select card charges users a \$25 “negative balance fee” if transactions exceed the balance on the card.<sup>54</sup> These fees and the line of credit associated with them are inappropriate for the same reasons discussed above under lines of credit.

Many cards make it very difficult for the cash-strapped recipients to use every dollar on the card. ATMs typically only permit withdrawals in even \$20 increments. Though the Direct Express and some other cards permit free teller withdrawals, others charge steep fees. The CashCard from MetaBank charges a \$10 **cash withdrawal/bank fee/non-ATM fee. It also charges a \$10 card draft fee to have the balance on the card paid via check.**

Many cards charge fees to check a balance, even when doing so at an ATM or through automated telephone customer service. The AccountNow Prepaid Card charges a \$1 for each ATM balance inquiry.<sup>55</sup> The CashCard from MetaBank charges \$0.50 for automated telephone balance or other inquiries. Recipients should never be charged for finding out how much money they have. Balance inquiry fees are particularly inappropriate in light of the fact that prepaid cards generally do not come with

<sup>52</sup> It is unclear whether “shortage” fees, like overdraft fees, are associated with a hidden line of credit that permits overdrawn transactions, or rather whether they are charged when delayed batch processing results in an overdraft on a card that does not deliberately authorize such transactions. In either case, the fee is inappropriate.

<sup>53</sup> MoneyTree Premier Cash Solution Visa Prepaid Card Cardholder Agreement, accessed July 8, 2010 at [http://www.moneytreeinc.com/documents/9811\\_ENG\\_Apr09.pdf](http://www.moneytreeinc.com/documents/9811_ENG_Apr09.pdf)

<sup>54</sup> VIP Select Terms and Conditions Cardholder Agreement, [www.myvipselect.com/site/page/pg3069.html](http://www.myvipselect.com/site/page/pg3069.html), visited May 3, 2010.

<sup>55</sup> AccountNow Terms and Conditions, [www.accountnow.com](http://www.accountnow.com), last visited July 12, 2010.

statements, make it difficult to use every dollar, and some charge overdraft fees or declined transaction fees that recipients are attempting to avoid by checking their balances.

Balance inquiry fees are dangerous for Social Security and SSI recipients, who are often living check to check and need to know precisely when their money has arrived. One Social Security recipient whose funds were deposited to a prepaid card went to an ATM at the time that he knew his check was normally deposited. He checked his balance and saw the funds were not there. He waited a minute and checked again, incurring a second fee. This went on for several minutes until he had incurred 10 or more balance inquiry fees and finally his check arrived. Comerica, which administers the Direct Express Card, has experience with the anxiety of recipients who check their balances regularly. But those recipients are protected by the fee structure on the Direct Express Card. They could unwittingly incur numerous fees on other cards if those cards are permitted to charge balance inquiry fees.<sup>56</sup>

Declined transaction fees are another inappropriate fee. The MoneyTree card charges \$0.75 to decline a cash advance. Bank debit cards do not charge declined transaction fees. Similarly, the Credit CARD Act of 2009 prohibited declined transaction fees on credit cards. Public benefit recipients who need every last dollar off of their cards should not be penalized if they miscalculate and try to use a card for more than is left.

Load fees are also inappropriate on cards that accept direct deposit of public benefits. They are a means of charging a recipient for access to their funds. Though mainstream prepaid cards like the WalMart MoneyCard typically waive load fees for those who sign up for direct deposit, that may not be true on all cards. For example, the CashPass Card from Meta Bank, available at many check cashers, charges \$2 per deposit on its Premier \$9.95 card and 1.5% of the directly deposited amount, up to \$50, on its Premier card.

The Direct Express card has a more appropriate – though not perfect – fee structure.<sup>57</sup> The card charges *no* fees for:

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<sup>56</sup> One famous recipient, for example, has apparently called approximately 1800 times to check his balance. The Comerica representative who related that story acknowledged that the recipient likely has a mental disability. We shudder to think about that recipient being charged \$1800 if there were a \$1 fee for each inquiry.

<sup>57</sup> We will address the Direct Express Card in our August comments.

- Monthly maintenance;
- Loading funds;
- Cash withdrawals through tellers;
- Purchases;
- One free ATM cash withdrawal for each deposit;
- Denied transactions;
- Overdrafts or shortages;
- Balance inquiries at ATMs, by phone or online;
- Customer service by phone, automated or by person; and
- One free replacement card per year.

Prepaid cards should not be eligible for direct deposit of federal benefits if they charge any of these fees.<sup>58</sup>

The only fees on the Direct Express Card are:

- \$0.90 for ATM withdrawals after the first each deposit;
- \$0.75 cents for automatic monthly paper statement;
- \$1.50 for automated telephone (IVR) transfers to another U.S. account;
- \$0.50 per bill for online bill payment;
- \$4 for a replacement card after the first one each year;
- \$13.50 for expedited delivery of a replacement card;
- \$3 for international ATM withdrawals;
- 3% for purchases or withdrawals in an international currency

Eligible prepaid cards should not be allowed to charge any other fees.<sup>59</sup>

The most important element of protection for new accounts that accept direct deposit is a ban on inappropriate fees. However, we also provide the following suggestions for how prepaid cards which accept or hold federal benefit payments may provide simpler fee structures and provide better fee information to recipients:

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<sup>58</sup> We discuss below the way in which such a rule can be enforced.

<sup>59</sup> As we will discuss in our August comments, we believe that the Direct Express Card fee structure could be improved, especially the limited number of free ATM withdrawals.

- All prepaid card fees should be displayed in a simple comprehensive chart, much like the Schumer Box for credit cards, which displays important fees with clear explanations for the purpose of the fees;
- Fee information should be provided in plain sight: on the outside of prepaid card packages; prominently on prepaid card website homepages; and, in other places consumers find prepaid cards;
- Fee advertising that creates an impression of low cost by touting the absence of one fee without disclosing other fees should be prohibited;
- Paper Statements should be provided to consumers monthly for no fee or a nominal fee.

### **C. Prepaid Cards Must Be Protected From Garnishment**

Treasury recently proposed important protections for consumers whose federal benefits are directly deposited into their bank accounts when debt collectors attempt to garnish those accounts.<sup>60</sup> Any rule permitting direct deposit of federal benefits to other accounts must specify that accounts are only eligible if they comply with the same protections against garnishment that apply to bank accounts.

As detailed at length in earlier comments, Social Security and SSI recipients routinely have exempt funds in their bank accounts frozen and even garnished by debt collectors, in violation of laws protecting these vital funds. Though debt collectors have not yet targeted funds on prepaid cards, it is only a matter of time. Treasury should not wait for the problem to develop, but should instead act now to ensure that direct deposited funds receive the same protections no matter where they are deposited.

### **D. Prepaid Cardholders Must, By Law, Have First Class Regulation E Protections**

The proposed rules would prohibit the delivery of Federal benefit payments to cards that are not considered “accounts” covered by Regulation E. This is an essential step for the delivery of benefits through the card mechanism. However, the rule should be amended to ensure that card accounts receive, by law, first class Regulation E protection and not substandard protection.

We first would like to ensure that Treasury reads its proposed rule in the same way

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<sup>60</sup> Dep’t of Treasury et al., Notice of Proposed Rulemaking re Garnishment of Accounts Containing Federal Benefits, 75 Fed. Reg. 20299 (Apr. 19, 2010).

that we do. The rule states that funds may only be deposited to a stored value, prepaid or similar card if “[t]he card account constitutes an ‘account’ as defined in 12 CFR 205.2(b) such that the consumer protections of Regulation E apply to the cardholder.”<sup>61</sup>

We read this requirement to prohibit direct deposits to these cards *unless and until Regulation E is amended to cover these cards in the definition of “account.”* Voluntary compliance with Regulation E is not sufficient. Consumers are not sophisticated enough to understand whether or to what extent an issuer might decide to comply with Regulation E, and voluntary agreements do not give consumers the full remedies of the Electronic Fund Transfer Act.

The Federal Reserve Board has yet to determine whether Regulation E applies to prepaid cards other than payroll cards. Consumer advocates have urged the Board since June 2004 to extend Regulation E’s consumer protections to all types of stored value cards.<sup>62</sup> At that time, the Board limited its action to payroll cards.<sup>63</sup>

In a recent response to a letter from consumer advocates in February 2010, the Board stated it anticipated it would “review the applicability of EFTA and Regulation E to prepaid cards beginning later this year.”<sup>64</sup> However, in light of the number of new rulemakings imposed on the Board under the financial reform bill about to pass Congress, that schedule for even beginning the rulemaking may be in jeopardy. That is, it will certainly be well into 2011 and most likely 2012 or beyond before a Regulation E rulemaking covering prepaid cards is finalized.

Voluntary compliance with Regulation E is not sufficient to make an account eligible for direct deposit. The vast majority of prepaid cards marketed to vulnerable consumers do not provide the same guaranteed protections provided by Regulation E as traditional debit cards. Most prepaid cardholders are subject to the terms and conditions of prepaid card issuers which are not as strong as those under Regulation E, and are not privately enforceable. These voluntary terms and conditions may also be rescinded or altered at any time.

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<sup>61</sup> 75 Fed. Reg. at 27247 (proposed § 210.5(b)(7)(ii)).

<sup>62</sup> Letter from Consumers Union to Chairman Alan Greenspan (June 23, 2004), *available at* [http://www.consumersunion.org/pub/core\\_financial\\_services/001205.html](http://www.consumersunion.org/pub/core_financial_services/001205.html).

<sup>63</sup> Electronic Fund Transfers, 71 Fed. Reg. 1473, 1475 (Jan. 10, 2006) (interim final rule) (codified at 12 C.F.R. § 205).

<sup>64</sup> Letter from Sandra F. Bernstein, Director of Consumer and Community Affairs, Board of Governors of the Federal Reserve System to Michelle Jun, Consumers Union (February 25, 2010) *available at* [http://www.defendyourdollars.org/2010/02/letter\\_to\\_federal\\_reserve\\_aski.html](http://www.defendyourdollars.org/2010/02/letter_to_federal_reserve_aski.html).

General use reloadable prepaid cardholders should have the same protections that debit cardholders enjoy, including but not limited to:

- Protections against loss, theft or unauthorized charges, with dispute times starting *only after the consumer has notice of the loss, theft or unauthorized charge*.
- Right to prompt recrediting of missing funds not later than 10 business days.
- Right to statements or equivalent forms of account information.
- Protections against overdraft fees.<sup>65</sup>

To the extent that prepaid cards incorporate Regulation E protections into their agreements voluntarily, they tend to adopt the substandard protections of the payroll card rules that do not provide consumers with full protection and are particularly inappropriate for lower income underbanked consumers. Prepaid cards:

- Do not offer statements automatically, as required by regular Regulation E, and many do not even give the consumer the ability to sign up and pay for a statement for a nominal \$1/month charge, as the Direct Express Card does;
- Start the clock running for disputing unauthorized charges once transaction information is “made available” online, despite the fact that unbanked consumers who sign up for prepaid cards likely have less internet access or experience than other consumers.<sup>66</sup> Regular Regulation E, by contrast, starts the clock with mailing of the statement,<sup>67</sup> and even the government benefits rule starts with “transmittal” of a statement or other information to the consumer; and<sup>68</sup>
- May have overdraft fees that violate new Regulation E rules.

In order to be eligible for direct deposit of federal benefits, a prepaid card account should provide full Regulation E protection.

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<sup>65</sup> As discussed above, we strongly urge Treasury to go beyond the Regulation E overdraft requirements and to ban any accounts that charge overdraft or shortage fees, or that have credit features that essentially are secured by or take an assignment of exempt funds, from being eligible for direct deposit.

<sup>66</sup> See, e.g., 12 CFR § 205.18(c)(4)(A) (payroll card rule).

<sup>67</sup> 12 CFR § 205.6(b)(3).

<sup>68</sup> 12 CFR § 205.15(d)(3).

### **E. Funds on the Cards Must be Held in Ways to Ensure Individual Cardholders are Protected from both Bank Failure and Provider Failure.**

The proposal to change Section 210.5 to a permit prepaid card program to receive federal payments requires that the accounts *either* be set up as individual accounts in the name of the cardholder or be held in pooled accounts that meet the FDIC’s “pass-through” requirements. In the latter case, the proposal requires that:

- 1) the account records at the insured depository institution must disclose the existence of a custodial relationship;
- 2) the records of the insured depository institution or records maintained by the custodian or other party must disclose the identities of the actual owners of the funds and the amount owned by each such owner; and
- 3) the funds are owned by the cardholders.

All of these requirements are important to ensure that the cardholders are protected against both the failure of the bank as well as the failure of the provider, if the provider is not an FDIC insured financial institution.

Currently there is uncertainty in the marketplace about how the prepaid card issuers and their underlying banks are structuring the accounts for FDIC insurance. For example, when a prepaid card issuer states it is FDIC insured, there is no guarantee that this insurance runs to the individual subaccount holders, as opposed to the issuer that holds the master account. This poses two problems: first, whether the insurance covers the issuer or the consumer, and second, whether the funds are fully insured if the aggregated account exceeds the threshold for FDIC insurance.<sup>69</sup>

As stated in the proposed rule, the FDIC has clarified that funds underlying prepaid cards, or stored value cards, qualify for deposit insurance on a pass-through basis to the consumer when held in a pooled account. The FDIC’s General Council Opinion No. 8 (GC8) issued on October 31, 2008, lays out the criteria for pass-through coverage.<sup>70</sup> Any prepaid card that accepts or holds Federal benefits must structure

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<sup>69</sup> For example, the Account Now Prepaid Visa Card’s homepage states that “Funds are insured up to \$250,000 by the Federal Deposit Insurance Corporation (FDIC)” but there is no clarity as to whether the individual will be made whole in the event of a bank failure if the funds are pooled. [www.accountnow.com](http://www.accountnow.com) (last visited July 6, 2010).

<sup>70</sup> *Stored Value Cards and Other Electronic Payment Systems*, 61 Fed. Reg. 150 (Aug. 2, 1996). The FDIC’s “pass-through” requirements are: 1) the account records at the insured depository institution must disclose the existence of a custodial relationship; 2) the records of the insured depository institution or records maintained by the custodian or other party must disclose the identities of the actual owners of the funds and



its accounts so that the individual cardholder will be insured by the FDIC to the fullest extent, by either placing funds in individual accounts or fulfill the pass-through requirements for pooled accounts.

The requirement that the funds be held in such a way that it is clear that the federal recipients are the *actual owners* is also essential to protect the funds from seizure in the event of the bankruptcy of the provider. If the ownership of the pooled account is in the name of the non-bank provider of the debit card, there is a risk that the funds in the account might be considered to be assets owned by the provider in a bankruptcy proceeding.

Theft or misuse of the funds by the provider is still a risk, even with FDIC insurance. *We recommend that when the card provider is not an FDIC insured financial institution, that a bond be required to be posted to protect against loss of these funds through provider malfeasance.* This could occur even when the funds are held in FDIC insured accounts with the recipients identified as the owners of the funds.

#### **Part 4 -- The Rules Must Be Enforceable**

The protections that Treasury adopts for the direct deposit of funds to accounts other than individually owned accounts at financial institutions are no better than the paper they are written on if they are not enforceable. As described above, some banks and non-bank FSPs are already flouting existing rules against deposit to accounts that are not individually owned and controlled by beneficiaries. As more subaccount relationships are authorized, it is essential that the limitations on authorized accounts be enforceable not only by federal agencies but also by the beneficiaries themselves.

Some enforcement mechanism is essential even for the minimal FDIC and Regulation E requirements in the proposed rules and also for the more essential protective measures that we recommend in these comments. We recommend several enforcement mechanisms that must be added to the rules, none of which require Treasury to scrutinize the terms of each individual account.

First, the rules themselves must specify that no institution (bank or nonbank) may accept direct deposit of federal benefits to an account that does not meet the requirements set forth in the rules. That is, the rules should not only be

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the amount owned by each such owner; and 3) the funds are owned by the cardholders. Currently, a prepaid card issuer's choices will determine whether these requirements are met.

requirements for Treasury, limiting where it can send funds, but also requirements for the recipient (direct and indirect) of the funds.

Second, any bank that accepts direct deposit of federal benefits to a prepaid card should be required to sign an agreement, on its own behalf and on behalf of any partner that issues the prepaid card, with the Treasury Department that certifies that the account meets the requirements of the rules. That agreement should provide that federal benefit recipients are third party beneficiaries of the agreement and may enforce it. Treasury could thus maintain a list of institutions that have signed such agreements and could identify the institutions whose prepaid cards are, and are not, eligible for direct deposit. (The institution to which the funds are being deposited is readily identifiable through the routing number of the prepaid card number)

Third, the rules should provide that any agreement with a consumer in connection with an account that improperly accepts direct deposit of federal benefits in violation of the rules is void and unenforceable against the consumer. The consumer could thus take direct action to avoid any improper fees. This last protection is essential because, at the end of the day, only the consumer is going to know if the rules are violated, and the consumer is in the best position to protect him or herself.

These provisions would be simple for Treasury to administer, requiring no more than a standard form agreement and simple revisions to the proposed rules. Treasury would merely have to (1) identify that the account is a prepaid card account, and (2) ensure that the bank to which the funds are ultimately being deposited is one that has signed an agreement pledging to ensure that public benefit recipients could take steps to protect themselves. Treasury could easily revise its direct deposit forms – as it will need to in any event – to ask the person filling out the form to identify which type of account it is (i.e., checking, savings, prepaid).

## **Part 5 – Summary of Important Improvements to these Regulations**

The current problems with both master-sub account arrangements and existing prepaid-debit cards must be eliminated before Treasury moves forward with mandatory direct deposit. To ensure this, Treasury's proposal to allow deposit of federal payments on prepaid debit or stored value cards should only proceed if *in addition* to the two consumer protections currently in the proposed rule – that FDIC insurance apply to the funds, and that Regulation E apply – the following additional protections apply:

- 1) The only stored value card accounts that should be eligible for direct deposit should be general spending (i.e., network branded) prepaid card accounts in which the funds are fully owned, controlled and accessible by the consumer independent of the institution holding the subaccount or issuing the card.
- 2) Eligible cards should not have a credit feature, which effectively evades protections for exempt funds.
- 3) Only those prepaid cards with the same or better costs as the Direct Express Card should be permitted as conduits for federal payments. In particular, eligible cards should not be permitted to charge fees for an overdraft, shortage, load, participation, balance inquiry, automated or live customer service, purchase or transaction, denied transaction, ATM cash withdrawal for each deposit, or for one replacement card per year. The only fees permitted should be those permitted on the Direct Express Card.
- 4) Eligible cards must ensure that the funds receive the same protections against garnishment and freezing of the funds as bank accounts will under the proposed Treasury rules.
- 5) Full Regulation E protection must be required by law before prepaid cards are eligible for direct deposit, including a right to statements or equivalent account information, dispute rights tied to the consumer's receipt of information regarding the disputed item, and no overdraft features.
- 6) FDIC insurance and full ownership rights in the funds must be provided to the individual beneficiary to provide protection not only against insolvency of the bank but also insolvency of the prepaid card provider.
- 7) These protections must be enacted in such a way as to provide an enforcement mechanism that will ensure that the regulations and requirements of both the Department of Treasury and the Social Security Administration protecting recipients are enforced.
- 8) Treasury should not finalize the changes proposed in this docket until the expected proposed changes to SSA POMS regulations delete procedures for direct deposit of exempt funds to non-bank financial service providers and until comments are considered in the August 16 proposal to require direct deposit of Social Security payments.