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Re: Electronic Fund Transfers (Regulation E) Advance Notice of Proposed Rulemaking
Docket No. CFPB-2012-0019

AARP¹ appreciates the opportunity to provide comments to the Bureau of Consumer Financial Protection (“Bureau”) concerning the Advance Notice of Proposed Rulemaking on Electronic Fund Transfers (Regulation E) related to prepaid cards, 77 Fed. Reg. 30923 (May 24, 2012).² Many consumer groups including AARP have reported previously on the potential pitfalls of unregulated general purpose reloadable (“GPR”) prepaid cards.³ Generally, significant concerns have been raised regarding high fees, hidden costs, and inadequate disclosures of many GPR prepaid card, among other problems.⁴ AARP applauds the Bureau’s efforts to solicit

¹ AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. We produce AARP The Magazine, AARP Bulletin, AARP Viva, NRTA Live and Learn, and provide information via our website, www.aarp.org. AARP publications reach more households than any other publication in the United States. AARP advocates for policies that enhance and protect the economic security of individuals.

² Regulation E implements the Electronic Fund Transfer Act of 1978, which specifies the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems.

³ Neal Walters, PREPAID CARDS: PROMISE AND PITFALLS FOR CONSUMERS, AARP Pub. Pol. Inst., Insight on the Issues 47 (Nov. 2010) (finding “GPR cards can carry an expansive array of fees []. Depending on what fees apply and the cost of each fee, GPR cards may actually be an expensive alternative to traditional banking services. An analysis of several GPR cards sold at retail locations concluded that while monthly usage costs varied widely depending on the product, the cards were generally expensive to use.”) (citing M. Jun, PREPAID CARDS: SECOND-TIER BANK ACCOUNT SUBSTITUTES, Consumers Union (Aug. 2009)).

⁴ *Id.* See also Consumer Reports, PREPAID CARDS: LOADED WITH FEES, WEAK ON PROTECTIONS (Mar. 2012), available at http://www.consumersunion.org/pdf/Prepaid_Cards_Report_2012.pdf; Key Focus Group Findings on Prepaid Cards, Pew Health Group, Apr. 11, 2012, available at <http://www.pewhealth.org/reports-analysis/issue-briefs/focus-group-findings-on-prepaid-credit-cards-85899380984>; Report to the Congress on Government-Administered, General-Use Prepaid Cards, Fed. Res. Bd. (July 2011); M. Saunders & L. Plunkett, RUNAWAY BANDWAGON, HOW THE GOVERNMENT’S PUSH FOR DIRECT DEPOSIT OF SOCIAL SECURITY EXPOSES SENIORS TO PREDATORY BANK LOANS, Nat. Cons. Law Cntr. (JULY 2010); N. Trejos, *Prepaid Cards Are a Convenient Alternative to Debit or Credit, But They Can Come with Hefty Fees*, Wash. Post, Oct. 25, 2009.

the viewpoints of the providers and potential users of GPR prepaid cards to assist it in formulating reasonable regulation to protect consumers' financial security that is flexible enough to permit continuing innovations in payment systems.

The protections that inure to GPR prepaid cards have the potential to impact a significant number of consumers, including older Americans. AARP strongly urges the Bureau to fully protect all consumers of electronic transactions rather than to subject those without bank accounts to the unregulated alternative financial services market, high costs, hidden fees and the absence of essential consumer protections.⁵ To better limit older Americans' exposure to the potential pitfalls associated with some GPR prepaid cards, including predatory marketing, hidden fees, and high costs, AARP urges the Bureau to:

1. Extend Regulation E coverage to GPR cards;
2. Protect against risk of loss by requiring pass-through FDIC Insurance;
3. Require the availability of free paper statements;
4. Prohibit credit and credit building products, including direct deposit advances, linked to prepaid cards;
5. Prohibit offset of exempt federal benefits deposited to GPR prepaid cards;
6. Prohibit terms and conditions in a prepaid card contract that waive jury trials and participation in class actions, require challenges to be brought in inconvenient venues, truncate remedies or otherwise limit enforcement of strong state consumer protection laws; and
7. Require clear and adequate disclosure of fees and costs in a standardized format.

I. High costs and hidden fees with GPR prepaid cards significantly threaten the financial security of millions of older Americans.

AARP recognizes that electronic payment systems, including GPR prepaid cards, provide a variety of economic benefits. Their rising popularity confirms their importance: industry projections forecast that \$353.8 billion will be loaded onto GPR prepaid cards by 2014 and 90 different federal and state benefits programs distributed \$34 billion in electronic payments via 20 million prepaid cards.⁶ Increasingly, GPR prepaid cards function as primary

⁵ Sharon Hermanson & George Gaberlavage, *The Alternative Financial Services Industry*, AARP Pub. Pol. Inst. Issue Br. 51 (Aug. 2001), available at http://assets.aarp.org/rgcenter/consume/ib51_finance.pdf.

⁶ THE EIGHTH ANNUAL PREPAID FORECAST, Mercator Advisory Group 51 (Nov. 2011), available at http://www.mercatoradvisorygroup.com/index.php?doc=Prepaid&action=view_item&id=670&catid=16; See Fed. Res. Sys., THE 2010 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2006-2009 17 (2010) (updated Apr. 5, 2011), available at http://www.frb-services.org/files/communications/pdf/press/2010_payments_study.pdf (finding "the use of prepaid card is the fastest growing" non-cash payment method); REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS, Bd. of Gov., Fed. Res. Bd. 2 (July 2011) (reporting, "In 2010, depository institutions provided cardholder use information for 90 federal, state, and local programs operating in 36 states.

payment systems for many unbanked and underbanked Americans.⁷ Despite serving the essential functions of a bank account for many people, GPR prepaid cards are not subject to consumer protection requirements applicable to comparable electronic payment systems, such as debit and credit cards.⁸ Although a GPR card looks no different from a bank debit card or credit card, and it can be used on the same payment terminals, consumers have completely different legal rights and protections when they use a GPR prepaid card rather than a debit or credit card.⁹

Unfortunately, consumers do not necessarily understand the significant differences between various forms of electronic payments. As a result, the use of GPR prepaid cards expose the oldest, most disabled, lowest income, and minority persons to the risk of paying predictably high fees and costs and being relegated to a second-tier financial services system.¹⁰ There is a solution to the disparities: extend adequate consumer protections to GPR prepaid cards and require full disclosure of fees and costs in a standardized format.

A. Older Americans are particularly vulnerable to hidden fees and high costs of GPR prepaid cards.

Older Americans are among those who are particularly vulnerable in the rapidly changing and increasingly high-tech financial services market. Historically older consumers have trailed younger age ones in adopting evolving payment technologies.¹¹ Others may have impaired numeracy skills and reduced financial decision-making capacity, which limits their ability to understand disclosures and financial transactions generally, or make decisions based thereon.¹²

These programs employed 20 million cards, representing more than one billion transactions that were valued at \$34.8 billion.”).

⁷ Ann McLarty Jackson, Donna V.S. Ortega, Elizabeth Costle, George Gaberlavage, Naomi Karp, Neal Walters, & Vivian Vasallo, A PORTRAIT OF OLDER UNDERBANKED AND UNBANKED CONSUMERS: FINDINGS FROM A NATIONAL SURVEY, 5, AARP Foundation and AARP Pub. Pol. Inst. (Sept. 2010) (discussing “The term unbanked typically refers to an individual, family, or household without a checking or savings account. Underbanked refers to an individual, family, or household that has an account but chooses or needs to also use alternative financial services offered by providers operating outside of federally insured banks and credit unions—for example, check-cashing outlets, money transmitters, car title lenders, payday loan stores, pawnshops, and rent-to-own stores.”).

⁸ See Walters, *supra* note 3; Cons. Rept., *supra* note 4.

⁹ See Cons. Rept., *supra* note 4., at 14 (comparing differences in protection applicable to debit and GPR prepaid cards, in areas such as loss protection, recredit, and error resolution).

¹⁰ *Id.*

¹¹ See Ron Borzekowski, Elizabeth K. Kiser, & Shaista Ahmed, *Consumers’ Use of Debit Cards: Patterns, Preferences, and Price Responses*, Fed. Res. Bd. (Apr. 2006) (finding that the older a checking account holder is, the less likely he or she is to use a debit card).

¹² See Naomi Karp & T. Ryan Wilson, *Protecting Older Investors: The Challenge of Diminished Capacity*, 11, AARP Pub. Pol. Inst. (Nov. 2011) (finding that “[w]ith age, adults experience substantial diminution in cognitive function that affects financial decision making. Evidence indicates that, after peaking in middle age, the ability to make effective financial decisions declines.”).

There are, of course, many older people who are accustomed to and successful at using electronic payments systems. Indeed, as of 2010, approximately forty-eight million Americans received federal benefits via direct deposit to either a bank account or the Direct Express card.¹³ But there nevertheless remain millions of older people who currently receive federal benefits via a paper check and who are unbanked.¹⁴ They will soon have no choice but to receive their benefits via electronic disbursement, prepared or not.¹⁵ Unbanked beneficiaries are likely to be particularly vulnerable to hidden fees, confusing terms, and high costs of GPR prepaid cards. AARP urges the Bureau to take timely steps to ensure that the GPR environment will not threaten the financial security and overall well-being of millions of older Americans as they transition to paperless benefits.

Lack of familiarity with new payment systems, discomfort navigating new systems, and financial decision-making capacity challenges compound the reality that many older Americans survive primarily on very limited income. Federal retirement benefits, averaging only about \$1,200 per month,¹⁶ constitute a large share of, or are the only source of, income sustaining millions of older people in their retirement.¹⁷ Despite the fact that Social Security keeps thirty percent of older Americans out of poverty,¹⁸ approximately six million older individuals suffer

¹³ Notice of Proposed Rulemaking, Management of Federal Agency Disbursements, 75 Fed. Reg. 34394 (June 17, 2010).

¹⁴ *See id.* Efforts to encourage recipients of paper checks to switch voluntarily have been unsuccessful for approximately 2.1 million who receive Social Security benefits and 1.8 million who receive Supplemental Security Income benefits via paper check and are unbanked.

¹⁵ Final Rule, Management of Federal Agency Disbursements, 75 Fed. Reg. 80315 (Dec. 22, 2010) (to be codified at 31 C.F.R. pt. 208) (Current recipients of federal benefits who receive a paper check will be required to choose an electronic disbursement option before March 1, 2013. Those who began receiving federal benefits on or after March 1, 2011, are already required to receive their benefit funds electronically.).

¹⁶ Joint Center for Political and Economic Studies, AFRICAN AMERICANS AND SOCIAL SECURITY: A PRIMER, http://assets.aarp.org/www.aarp.org/_build/templates/issues/advocacy/socsec/SSPrimer02011.pdf (African American men received an average \$1,109 monthly benefit compared with \$1,334 on average for white men in 2008. Black women averaged \$946, less than the \$1,015 average for white women that year.).

¹⁷ Joint Notice of Proposed Rulemaking, Garnishment of Accounts Containing Federal Benefit Payments, 75 Fed. Reg. 20299, 20300 (Apr. 19, 2010) (noting "Recent statistics show that 32 percent of Social Security beneficiary married couples or nonmarried persons age 65 or older reported receiving 90 percent or more of their income from Social Security. In addition, Social Security benefits are the primary source of income (representing 50 percent or more of total income) for 64 percent of beneficiary married couples or nonmarried persons age 65 or older.") (citing Annual Statistical Supplement to the Social Security Bulletin, 2008 Social Security Administration Office of Retirement and Disability Policy Office of Research, Evaluation, and Statistics SSA Publication No. 13-11700. Released: Mar. 2009).

¹⁸ Carole Fleck, *Social Security a Barrier to Poverty for Many: Benefits crucial for minorities and women*, AARP says, AARP Bulletin (Nov. 1, 2010), http://www.aarp.org/work/social-security/info-10-2010/social_security_barrier_to_poverty.html.

from hunger, and thirteen million cannot afford adequate housing.¹⁹ As many as one in four African Americans, one in five Hispanics, one in six women, one in eight white adults, and one in ten Asian Americans relied exclusively on Social Security for their retirement income in 2008.²⁰

High fees and hidden costs should not deplete an older or low-income person's limited income. With so many people depending on Social Security as their sole source of income, it is especially important to protect these benefits from high costs and hidden fees. Indeed, in interim rules issued by the Treasury Department to protect exempt funds from garnishment,²¹ the Department expressly recognized the importance of protecting a beneficiary's access to this limited income. Equally important is the zealous protection of funds deposited onto prepaid cards. In addition to extending greater consumer protections to GPR prepaid cards generally, the Bureau should work with other federal agencies, states, and employers to further improve protection available to such beneficiaries.

B. Permitting providers of unregulated prepaid debit cards to offer inferior, more expensive products to older, lower income, and minority recipients of federal benefits perpetuates an unfair, two-tiered financial services system.

AARP urges the Bureau to take all appropriate actions to prevent providers of unregulated prepaid debit cards from offering inferior, expensive products to older, lower income, and minority consumers, thereby perpetuating an unfair, two-tiered financial services system.²² Consumers who either are unbanked or underbanked will benefit the most from strong consumer protections. As African American and Hispanic households are more likely to be unbanked or underbanked than the population as a whole, these groups are also more likely to be harmed by hidden fees and high costs of unregulated prepaid cards.²³ Based upon historical evidence of significant disparities in the financial services available to such populations,²⁴ it is clear that an unregulated financial services industry does not adequately protect consumers.

Unregulated alternative financial service providers specifically target the working poor, minorities, and people who depend on Social Security benefits or who have blemished credit histories. This population faces numerous systemic barriers to accessing mainstream banking institutions.²⁵ The Treasury Department has acknowledged that bank accounts generally have

¹⁹ Individual State Fact Sheets, AARP Foundation, http://www.aarp.org/aarp-foundation/info-2010/foundation_fact_sheets.html.

²⁰ Carole Fleck, *Social Security a Barrier to Poverty for Many*, *supra* note 9.

²¹ Interim Final Rule, Garnishment of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939 (Feb. 23, 2011).

²² See Hermanson et al., *supra* note 5.

²³ 2009 Fed. Dep. Ins. Corp., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 10, http://www.fdic.gov/householdsurvey/full_report.pdf (hereinafter "FDIC Survey").

²⁴ See Walters, *supra* note 3; Hermanson et al., *supra* note 5.

²⁵ Madhubalan Viswanathan, Jose Antonio Rosa, & Julie A. Ruth, *Emerging Lessons: For Multinational Companies, Understanding the Needs of Poorer Consumers Can Be Profitable and Socially Responsible*,

not met the banking needs of many Americans, including federal benefit recipients.²⁶ Additionally, consumers may have limited or no access to bank facilities of any type in either urban or rural areas.²⁷ The FDIC has found that among previously banked households who closed their accounts, 5.2 percent did so because there was no bank near work or home.²⁸ In addition, significant non-pecuniary costs in time, transportation, and safety may be associated with accessing a mainstream financial institution that is not convenient for a person to use. In comparison, most lower-income and minority neighborhoods contain high numbers of alternative financial services providers, including payday lenders, check cashers, auto title lenders, pawn shops, and rent-to-own services, strategically located near shopping centers, Social Security offices, and other businesses frequented by low-income people.²⁹

The inadequate provision of banking services to low-income and minority and rural communities, and corresponding proliferation of such fringe banking alternatives has resulted in a two-tiered economy in which middle-income and affluent consumers are served by federally insured and regulated banks and other lenders, and the poor and near-poor are relegated to expensive and, in many cases, poorly regulated alternatives.³⁰

Such banking services actually worsen the financial situation of low- and moderate-income consumers.³¹ In particular, AARP has found:

Frequent refinancing of debt, such as rollovers and flipping, often results in the accumulation of debt far beyond the consumer's ability to pay and, in some cases, foreclosure. Geographic isolation and a lack of alternative services, income volatility, a lack of savings, and a lack of consumer information reduce the ability of many low-income consumers to be price-driven. [Alternative financial services (AFS)] businesses are acutely aware of these factors and structure their products and advertising accordingly. The results can be misleading in some cases. For example, the terms "fees or charges" may be used rather than "interest." As a result of the factors cited

Wall St. J. Online, Oct. 20, 2008 (noting that low-income individuals, who often need more protection, often lack the analytical skills to make cost calculations); FDIC SURVEY, *supra* note 24 (finding that the unbanked are more likely to have lower levels of education).

²⁶ Joint Notice of Proposed Rulemaking, Garnishment of Accounts Containing Federal Benefit Payments, 75 Fed. Reg. 20299, 20300 (Apr. 19, 2010).

²⁷ See Celent, LLC, *Where the Banks Aren't: Nontraditional/Nonbank Advances in Branded Prepaid Cards* 24 (2007).

²⁸ FDIC Survey, *supra* note 24.

²⁹ Hermanson et al., *supra* note 5, at 5 (finding low-income and minority households are significantly more likely to have AFS located within one mile of their homes than higher-income and nonminority households).

³⁰ See Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 591 (2000).

³¹ Hermanson et al., *supra* note 5, at 5.

previously, low- and moderate-income persons often rely on the more expensive and less-regulated AFS industry for financial services.³²

AARP believes it is as unacceptable to charge poor and minority consumers of financial services more than their wealthier counterparts as it is for insurance companies and lenders to redline communities of color or target them for marketing of more expensive products. Permitting inferior and unregulated products to be peddled to low-income and minority persons is simply unfair. AARP urges the Bureau not to permit, in effect, a government-sanctioned form of redlining by permitting lesser protection over payment systems used disproportionately by lower income or unbanked consumers. The Bureau should ensure that older people and other consumers who do not have sufficient choice or experience with electronic payment systems are fully protected.

II. Specific Recommendations to Protect Consumers of GPR Prepaid Cards

A. Full Regulation E protection should be extended to GPR prepaid cards.

AARP strongly supports extending full Regulation E protection to GPR prepaid cards. Doing so will help eliminate the disparities in payments systems, and will help eliminate the significant confusion consumers have regarding their rights, thereby significantly simplifying the disclosures necessary to protect consumers. It will also help prevent evasion of consumer protections by unscrupulous providers.

Although some GPR prepaid card providers voluntarily comply with standards similar to those required by Regulation E, voluntary compliance is insufficient to protect consumers. Not all providers comply voluntarily or in all respects. This results in spotty protection and increased consumer confusion. Moreover, the consumers who are most likely to use GPR prepaid cards are the ones least likely to be able to advocate for themselves if there is a problem and the provider refuses to live up to its promises.³³

Many GPR prepaid cards already claim to comply voluntarily with numerous Regulation E standards as best practices.³⁴ AARP believes that it will not be difficult for providers to comply fully with Regulation E protections. Indeed, it will permit those providers who already voluntarily offer protections similar to those required by Regulation E to compete more fairly because it will eliminate unscrupulous competition in the marketplace. If it turns out that it would be difficult to comply with the provisions many providers claim to follow voluntarily, the Bureau

³² Hermanson et al., *supra* note 5, at 11 (citations omitted).

³³ See Gail Hillebrand, *Before the Grand Re-thinking: Five Things to Do Today With Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, 83 Chi.-Kent L. Rev. 769, 790 (2008) (noting “A voluntary policy is subject to the risk of uneven application and to the discretion of employees about how and when to apply the policy, which may disadvantage consumers whose primary language is not English, who are less able to spend time on the phone with customer service due to the nature of their jobs, or who are less able to write a persuasive letter describing the problems—in many cases, the very consumers to whom prepaid debit cards are being marketed as account substitutes.”).

³⁴ See Cons. Rept., *supra* note 4, at 13 (detailing the significant differences between marketing claims and actual policies regarding voluntary compliance with Regulation E).

should investigate their advertising and claims resolutions practices to determine whether they are engaged in deceptive business and marketing practices.

B. Consumers of GPR prepaid cards must be protected against loss of their funds in the event of failure of a financial institution.

AARP urges the Bureau to require that funds stored on GPR prepaid cards be held in an insured depository institution in individual accounts that meet the requirements for pass-through insurance under 12 C.F.R. part 330, such that the cardholder's balance is FDIC- or National Credit Union Share Insurance Fund-insured to the extent permitted by law. The Treasury Department has already proposed requiring pass-through insurance as a prerequisite to permitting the deposit of federal benefits onto a GPR prepaid card.³⁵ All users of such cards deserve the same protection regardless of the source of their funds.

C. Paper statements must be made available.

AARP strongly urges the Bureau to require paper statements be made available to users of GPR prepaid cards. Most bank accounts provide free written statements. This is important for many reasons, not the least of which is that time limits to claim Regulation E protections are triggered by the receipt of notice of an unauthorized transaction. In contrast, if only the protection applicable to payroll cards is available, a person will have only two days to report an unauthorized transaction after it is transmitted before they are forced to bear the loss. While eliminating paper statements may help eliminate certain costs for vendors of prepaid cards, there are wide ranging implications to eliminating such statements.

Notice of transactions only by voice mail or text message is inadequate, particularly if an unauthorized user also has access to the person's voice mail or text messages and is able to erase the messages. It is also insufficient to provide only electronic access to a statement. A person who has access to a computer printer may be able routinely to print transactions in order to save such records, but many low-income and older Americans may be unable to do so. The ability to receive a written statement is therefore an important safeguard.

Additionally, written statements must be made available for free. If a person is required to pay high costs for such statements, they may forego receiving important notice of unauthorized transactions and ultimately be forced to bear the burden of the loss. Moreover, consumers may not fully appreciate the importance of having access to paper statements.³⁶ For example, a myriad of regulations, laws, and court procedures, among other examples, necessitate the continuing availability of paper statements. Written account statements are important to substantiate account details and to protect consumers from financial fraud and abuse.³⁷ They are also needed in the event that a police report must be filed to substantiate

³⁵ Final Rule, Management of Federal Agency Disbursements, 75 Fed. Reg. 80315 (Dec. 22, 2010).

³⁶ See *Key Focus Group Findings on Prepaid Cards*, Pew Health Group, Ap. 11, 2012, available at <http://www.pewhealth.org/reports-analysis/issue-briefs/focus-group-findings-on-prepaid-credit-cards-85899380984> (finding most participants check their balances over the phone or online).

³⁷ Experts predict "[t]he growing popularity of prepaid cards presents ample opportunities for fraudsters and likely will lead to the next wave of card fraud." *Fair Isaac: Prepaid Cards Spread Fraud*, Am. Banker, July 15, 2009.

unauthorized use, to submit records to lenders, vendors, merchants, or courts, or to apply for public benefits or verify eligibility for income or asset restricted programs, including SSI. Written account statements are also necessary to dispute whether a debt is owed or a report on a credit report is accurate. While it may one day be possible to dispense with paper statements, it is premature to do so at this time.

Paper statements should remain available for an adequate period of time, even if not automatically delivered, because the need for a paper statement may not be known until much later. Especially for those with limited capacity to manage their funds or who are victims of financial fraud and abuse, it may take months for an unauthorized transaction to be recognized, and months or years longer to complete a fraud investigation or resolve the problem. Moreover, people who assist or seek to protect persons with limited capacity will better be able to do so if a written statement is available.

The advent of paperless statements, electronic delivery of transactions, and other technology-enabled efficiencies is relatively new. AARP believes it is important to consider not merely the cost to vendors of prepaid cards in providing a paper statement (or at a minimum retaining data for seven years so a statement can be provided if needed), but more importantly the ripple effect that the rapid transition to electronic transmission of transactions will have overall. Many public and private institutions that have long relied upon written statements and documents have not yet transitioned to electronic-only transactions. Before abandoning deeply engrained procedures, AARP believes it is necessary to ensure that consumers will not be disadvantaged by a shift to electronic-only transaction records.

D. Credit products linked to GPR prepaid cards should be prohibited.

AARP strongly urges the Bureau to prohibit lines of credit or account advances, such as to cover transactions when insufficient funds are available, or to “build credit” on GPR prepaid cards. It is understandable that consumers and advocates alike would like to improve access to credit for vulnerable populations and to assist them to build better credit. But GPR prepaid cards are an inappropriate vehicle to do so and may in fact drive consumers further into a two-tiered financial services system.³⁸ First, there is no clear indication that use of prepaid cards predicts creditworthiness as a credit score is intended to do. Second, a consumer may pay a fee to a provider of a prepaid card in exchange for the reporting of the use of the card, but such reporting may not actually impact a person’s credit score.³⁹ Finally, a wide variety of credit repair scams already cause consumers significant harm. AARP believes that prohibiting credit products linked to GPR prepaid cards will prevent their use to falsely promise to be able to repair credit.

Additionally, like overdraft fees, the credit that typically is associated with GPR prepaid cards is very expensive, and consumers are ill equipped to understand the cost of credit they access via prepaid card advances. Permitting a person to “overdraw” a GPR prepaid card for

³⁸ James McGrath, Fed. Res. Bank of Phil., *The Cost Effectiveness of Stored-Value Products for Unbanked Consumers* (May 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927073 (concluding “[s]imply put...they [stored-value cards] will necessarily be an imperfect vehicle for building a credit history.”).

³⁹ Cons. Rept., *supra* note 4, at 18.

what is essentially an overdraft fee, with the understanding that it will be repaid immediately upon the next direct deposit, is a high cost form of credit. Financial institutions have charged customers billions of dollars in overdraft fees ranging from \$25 to \$39 per check or transaction presented for payment. By manipulating the order of transactions and refusing to provide debit card users notice or an option to decline a transaction that will result in an overdraft, financial institutions have maximized such penalty charges. Such fees can dramatically reduce, or wipe out entirely, an individual's exempt benefits, which a financial institution will seize through set-off immediately upon receipt of the next direct deposit. Considering the huge profit center overdraft fees have become to financial institutions, there is good cause to protect consumers of GPR prepaid cards from similarly being subjected to such high cost fees.

E. Offset of exempt federal benefits deposited onto GPR prepaid cards should be prohibited.

To the extent a credit product of some form is permitted, or in those rare cases in which a prepaid card does become overdrawn, offset of exempt federal benefits directly deposited onto GPR prepaid cards should be prohibited. AARP consistently has urged the Department of Treasury to end the practice of allowing set-offs from exempt funds. Most bank account agreements include terms permitting seizure of funds in the account for debts owed to the financial institution, even if the funds are exempt. AARP supports prohibiting set-offs against exempt funds for all types of fees, consistent with a number of cases that have held it is not legal for financial institutions to seize exempt funds.⁴⁰

F. Terms and conditions in a prepaid card agreement that waive jury trials or participation in class actions, require challenges to be brought in inconvenient venues, truncate remedies or otherwise limit enforcement of strong state consumer protection laws should be prohibited.

AARP further urges the Bureau to prohibit contract terms that waive a consumer's statutory and/or constitutional rights, including the right to a jury trial and to participate in class action lawsuits. Currently, the terms of the Direct Express card contract and the account agreements of most financial institutions require such waivers.

In addition, the Bureau should ensure that the consumer protections applicable in the state in which a person lives are not preempted, eliminated, or truncated by the terms of a GPR prepaid card agreement. For example, the Direct Express card limits to one year the statute of limitations for all disputes, which is less than would otherwise apply to some disputes. Many prepaid contracts require consumers to raise all challenges in a particular venue that is not

⁴⁰ *Tom v. First Am. Credit Union*, 151 F.3d 1289 (10th Cir. 1998) (noting that there is no relevant difference between set-off and garnishment and prohibiting set-off against exempt funds); *Hambrick v. First Sec. Bank*, 336 F. Supp. 2d 890 (E.D. Ark. 2004) (Social Security's anti-assignment provision prohibited application of bank's set-off provisions in bank customer's agreements with bank); *Marengo v. First Mass. Bank, N.A.*, 152 F. Supp. 2d 92, (D. Mass. 2001) (Bank's set-off against Social Security funds violated Social Security Act); *In re Brewer*, 2002 WL 32917680 (Bankr. S.D. Ill., Aug. 15, 2002) (42 U.S.C. § 407(a) prohibits credit union from taking debtor's Social Security funds regardless of the prior agreement of the debtors that the subject funds would act as collateral for their loans from the credit union).

necessarily that of the consumer. AARP believes such provisions, which truncate remedies or otherwise limit the ability of a consumer to seek a remedy, should be eliminated. No GPR prepaid card should be permitted to contractually eliminate statutory protections. At a minimum, the federal government should renegotiate the terms of the Direct Express card to eliminate such waivers.

G. Disclosures must be improved to assist consumers to understand and compare GPR prepaid card features.

Among the many fees that may be associated with GPR prepaid cards are:

- 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;
- Fees to get your remaining funds when closing the account; and
- Overdraft or “shortage” fees.⁴¹

Currently, it is very difficult for consumers to find information on the range of fees that may be charged or other important information about features prior to purchase and use of a GPR prepaid card. Retail displays provide only limited information. Web sites may not display such information prominently, and even if they do, the information is not necessarily available at the point of service. The Bureau should establish a standardized format for disclosures, and require clear disclosure of all fees and costs.

Standardized disclosure forms make it much easier for consumers to compare cards prior to purchase and use. Full disclosure of all fees and costs in a standardized format may also help curb abuses in the marketplace, because the transparency will force card providers to compete with each other without withholding key information that might make their card more expensive or less desirable. A card provider may – and should – be embarrassed to disclose the full range of fees and costs typically charged in today’s marketplace, and choose instead to limit the number and types of fees.

Standardized formats for full disclosure of fees and costs will also help consumers and regulators evaluate whether the cards are living up to the marketing claims of their providers. It may also help alleviate to an extent the hotly debated claims that imposing regulation on the type and amount of fees charged may hamper innovation. AARP believes it is appropriate to prohibit unreasonable, abusive, or deceptive fees. For example, consumers should not be charged to talk to a customer service representative, receive a statement, or inquire about a balance. Apart from the role of regulation, consumers may be able to influence the market

⁴¹ Consumer Reports, *supra* note 4 at 4-5.

⁴⁴ Keitel at 11.