

May 9, 2014

Director Richard Cordray
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20006

Secretary Thomas E. Perez
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Payroll card protections

Dear Director Cordray and Secretary Perez,

The undersigned labor, consumer, and civil rights organizations write to ask the Consumer Financial Protection Bureau (CFPB) and Department of Labor (DOL) to adopt rules and take other measures to protect employees who are offered their pay on payroll cards.

We are especially concerned about obstacles to employee choice of payment method, overdraft fees and credit features, other inappropriate fees, and barriers to account and wage information. Some employers frustrate the ability of employees to choose payment by check or by direct deposit to an account of their choice. Payroll cards may come with numerous fees that erode already low wages. Some cards even offer predatory forms of credit through overdraft fees or other devices. Employees do not always have free and convenient access to information about their payroll card accounts or their earnings and deductions.

We urge you to address these problems so that employees can easily choose their payment method and, if they choose payroll cards, use those cards safely and with confidence. Establishing fair, basic rules of the road for all payroll cards will not only protect employees but also benefit responsible employers, payroll card providers and the payroll card industry overall. Many employers do not have the experience in financial services to navigate among different options. Payroll card providers that offer simple, transparent products are undercut by those that encourage back end fees and by bad press about problematic cards. Basic minimum standards for payroll cards will be a win-win for all concerned.

1. Ensure Choice of Payment Method

We thank the CFPB for the Bulletin issued last year reminding employers that they may not use payroll cards as the sole method of paying wages. The Electronic Fund Transfer Act (EFTA) and Regulation E promote employee choice by prohibiting employers from requiring employees to have an account, including a payroll account, at a particular institution as a condition of receipt of wages. Some state

laws go further and require the choice of a check or affirmatively consent to payment through a payroll card. We support those laws.

Though some employers directly violate Regulation E by requiring payment by payroll card, many others obscure or impede employee choice of payment method. Employers may default employees into the payroll card and force them to disenroll to select another method. Employees do not always receive clear, early information about their choices or opt-out information after being issued a payroll card. Employees may be forced to follow cumbersome procedures to choose direct deposit or a check.

At some workplaces, the only alternative to a payroll card is a paper check. While we support a paper check option, a payroll card should not be the only method of electronic pay offered. Employees should not have to use the payroll card in order to enjoy the benefit of early access to pay that comes with direct deposit. Some employers may also claim that the ability to transfer funds from a payroll card to another account is the equivalent of direct deposit; it is not.

As part of the CFPB's work to enforce, clarify and enhance the protections of Regulation E, we urge the CFPB to enact rules providing:

- *Clear early choice*: Employers must offer employees a clear, conspicuous and early choice of all payment methods offered by the employer and required by state and federal law. The employee should not be defaulted into a payroll card and forced to opt out, a process that inhibits employee choice.¹ A clear fee schedule for the payroll card should be provided at the same time.
- *Easy method of exercising choice*: Employers must provide an easy method to select payment by direct deposit or, if available, by check. While completing employment forms, the employee should be able to indicate payment choice. If the employer does not wish to permit supervisors at the job site to take direct deposit information, the employer should provide a phone number and paper forms where the employee can provide that information.
- *No issuance of payroll card for 30 days*: If enrollment in a payroll card is permitted by state law without affirmative choice by the employee, the payroll card issuer should not be permitted to issue a card unless the employee has had at least 30 days to make a choice of payment method. This may mean that the first month's wages must be paid by check even if the state otherwise permits purely electronic pay.

¹ The National Consumer Law Center's research on unemployment compensation prepaid cards shows the impact of opt-in versus opt-out on consumer choice. States that first issue a prepaid card and require the worker to opt out had much lower rates of direct deposit than states that offered the choice up front. For example, Arizona, which requires workers to opt out of the card after receiving it, has only a 16% direct deposit rate compared to the median of 57% and the high of 82%. See Lauren Saunders & Jillian McLaughlin, NCLC, 2013 Survey of Unemployment Prepaid Cards at 7-9 (January 2013), available at <http://www.nclc.org/images/pdf/pr-reports/report-prepaid-card-2013.pdf>.

- *Require the choice of direct deposit:* Employers are not required to pay wages electronically. But if they choose to do so through a payroll card, then they should also be required to offer direct deposit to an account of the employee’s choice without fees. Otherwise, employees who do not wish to wait for a check to arrive in the mail could be coerced to use a card they would not otherwise choose.
- *Clear ability to opt out:* When a payroll card is issued, it should be accompanied by clear and conspicuous information telling the employee about her right to choose another payment method and how to exercise it.
- *Help small employers comply with the law by making clear that payroll card providers, not just employers, must comply with EFTA rules governing employee choice.* Payroll card issuers are in the best position to understand Regulation E and ensure its compliance. The EFTA is a banking law with which many of the nation’s millions of employers are unfamiliar. But the small handful of companies in the payroll card business know the law well. The CFPB should amend Regulation E to make clear that a payroll card provider may not issue a payroll card unless the employee has been offered the choices required by law. It is not difficult to determine whether the employer has a system in place to offer and implement direct deposit and, if offered, the choice of a check.

The Department of Labor can also support these efforts by issuing guidance and taking other measures to educate employers.

2. Ban Overdraft Fees and Credit Features

Fortunately, overdraft fees and credit features are not common on payroll cards. But one significant provider of payroll cards, the NetSpend Skylight card, encourages employees to opt in to services that offer misnamed “overdraft protection” – the ability to keep spending after the paycheck is gone. But that “protection” comes with \$25 overdraft fees that just put the employee in a hole at the beginning of the next paycheck, leading to a cycle of debt.²

A recent study by the Federal Reserve Board of Kansas City of NetSpend’s general purpose reloadable (GPR) prepaid card confirms the cycle of debt and increased cost created by overdraft programs on prepaid cards. The NetSpend GPR card offers a \$15 overdraft fee program – lower than the \$25 overdraft fees charged on NetSpend’s Skylight cards (which also may not have the same monthly fee caps). The Kansas Fed study found that, *on average*, consumers who opted in to the overdraft program paid almost \$15 more per month for their cards.³ That is, over the course of twelve months, consumers

² For example, Netspend’s Skylight payroll card, used by the State of Kansas, charges \$25 overdraft fees. See <http://www.da.ks.gov/ar/payroll/SOKChFeeSched.pdf>.

³ Consumers who opted in to the overdraft protection paid on average \$27.24 per month, and those who used only the free overdraft buffer paid \$12.62, a difference of \$14.62 per month. See Fumiko Hayashi & Emily Cuddy, Fed. Res. Bd. Of Kansas City, “General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees and Fraud Risks” at 68 (Feb. 2014), available at <http://www.kc.frb.org/publicat/reswkpap/pdf/rwp14-01.pdf>.

overdrafted and incurred an overdraft fee on average every single month, began every month with a gap in income, and overdrafted again at the end of the month to partially make up the gap. Some consumers paid far more, up to \$45 in some months.

Permitting overdraft fees also creates unfair competition among card providers. Providers that push employees into incurring overdraft fees have a revenue stream that they can use to reduce fees on the front end, offer free services to employers, or enhance their cards in other ways. These cards may be attractive to employers, and payroll card providers that make money off overdraft fees may have an advantage in procuring contracts, even if in the end their cards are harmful for a number of employees. It will be difficult for many payroll card providers to ignore the lucrative overdraft fee revenue stream, and pernicious practices will spread, as they have in the bank account market.

We have also started to see programs that promote employer-sponsored loans, potentially tied to payroll cards, as an employee “benefit.” These loan programs can have very high rates and can require the employee to pledge access to the paycheck, permitting the lender to skim every wage payment as it comes in before the employee pays for rent, food and other necessities.

Employer payroll cards are no place to promote overdraft fees or dangerous loan programs. Payroll cards should be used as a safe and free method to receive wages, not a vehicle for steering employees toward irresponsible lending. Consequently, the CFPB should ban overdraft fees and credit features on payroll cards.

3. Limit Other Inappropriate Fees

Many employees who are paid by payroll card are low wage workers who may not even have a full time job. Every penny counts for those workers. Even with better rules to ensure employee choice, many employees will end up being steered to the payroll card offered by the employer. In addition to clear fee charts provided when the employee selects a payment method, the CFPB and DOL can take other measures to protect the scarce wages needed by these employees and their families.

- *Ensure free and clear access to wages and full minimum wages:* Payroll cards should offer free and clear access to wages without fees. In particular, payroll cards should provide:
 - *Free network ATM withdrawals.* ATMs are the most convenient method of accessing wages, and a single withdrawal does not permit the employee to access her full wages. Moreover, ensuring unlimited network ATM withdrawals will actually encourage employees to keep money on the card and to use the card at the point of service, since the employee will not feel compelled to empty the card all at once.
 - *One free transfer* of the entire paycheck to another account.
 - *One free withdrawal* of each entire paycheck at *a bank teller window or through a check.* For employees without another account, either a teller withdrawal or a form of check is essential to ensure that the employee can access her full wages without fees.

- Free use of the account without *maintenance, application, initiation, loading or participation* fees.

Offering free access to cash at ATMs, through transfers, and by a teller withdrawal or check will help to enforce the requirement that employees truly be able to access their pay without fees.

Employees who find payroll cards useful will keep funds on them and use them at the point of sale, but they will not be inhibited from accessing their wages as required by law.

- *Ban fees for basic account information:* The CFPB should ban fees for balance inquiries through ATMs or text messages, for information provided through automated telephone systems, for online transaction information, and for customer service. Employees should not be nicked and dimed for getting the information they need to manage their accounts. Even small fees can inhibit workers from accessing information. Providing account information is part of the overhead of providing a payroll card, and employees should not have to pay for it.
- *Discourage other inappropriate fees:* We are also concerned about point of sale, PIN debit, inactivity, declined transaction, closing, and replacement card fees, among others.

Employees do not get the chance to shop among payroll card providers. The better cards have virtually no fees, but not all employers can negotiate the best deal, and some are focused more on the cost to the employer rather than the cost to the employee. Preventing inappropriate fees will protect employees and enhance fair competition among payroll card providers.

4. Provide Better Access to Statements and Transaction Histories

Regulation E currently exempts payroll cards from the EFTA requirement that consumers be provided with periodic paper statements. Payroll card programs must only provide balance information by telephone, transaction information online for the past 60 days, and paper transaction information for the past 60 days upon request. Under the current regulation employees do not have a right to monthly statements even if they are willing to pay for them. Nor do payroll cards have to provide official statements that contain fee summaries and other information typically provided on statements but not necessarily on a document that merely lists transactions.

The Regulation E payroll card rule is also unclear as to whether employees can be charged fees for the information that Regulation E requires. For example, most payroll card providers do not charge for occasionally ad hoc requests for a transaction history, but some do. Some also charge for providing balance information by telephone, even when the employee only accesses the automated system rather than a live person.

The requirement for transaction information going back only 60 days is also inadequate. Employees who are doing tax returns, looking at their annual spending, concerned about how many fees they are incurring, or looking for proof of a payment or charge may well need to go back farther than 60 days.

The payroll card rule must be improved to ensure that all employees have free and convenient access to balance and transaction information, including employees who do not have or are not comfortable with electronic account access. It is ironic that, under the current rules, employees who do not have bank accounts – and are less likely to have full internet access – are expected to manage their accounts online. In particular, the CFPB should:

- Ban fees for electronic account access and ad hoc requests for paper statements.
- Require online information to be available for the previous two years and paper transaction histories for seven years.
- Require that fee summaries, and not just recent transactions, be prominently and conveniently provided in electronic form.
- Require that employees have the option to opt-in to monthly paper statements for free or at most a minimal fee of about \$1 per month.

Employees must have free access to transaction information, and the option of paper statements if they prefer. Longer account histories are necessary to ensure that employees have full and easy access to their account information, and can access information when they need it to manage their lives, apply for mortgages and other forms of credit, and file tax returns and respond to tax audits.

5. Ensure Access to Paper Paystubs with Clear Information

Along with the movement in some states toward purely electronic pay, some employers are also eliminating paper paystubs. Employees who wish to review their earnings and leave statements must either access them online or sometimes at a terminal provided by the employer. This can be highly problematic for many employees who do not have convenient internet access, are not computer fluent, and must go through cumbersome procedures to see what deductions have been made from their pay and ensure that they were paid for the correct number of hours.

The lack of paper paystubs is especially troubling for employees who have irregular work schedules and in industries that have had problems with wage theft or failure to pay overtime hours. Impeding access to earnings statements can make it harder for employees to discover or remedy these problems. Convenient access to paper paystubs can also be important for renting an apartment, accessing free or low cost medical care, or other services that require proof of income.

In 2010, DOL had a Clear Paystubs proposal on its regulatory agenda. The problem then and now is that some employers cheat workers of their wages by not paying them for all hours, making unauthorized deductions or calling workers independent contractors when they are really employees. These issues were supposed to be addressed in the regulation. The problem of lack of transparency is exacerbated with payroll debit cards.

Thus, DOL should issue a regulation requiring employers to give employees clear paystubs that explain how they are paid and easy choice of how to receive their paystub information. That information is too important to be left to electronic defaults for all employees. While the CFPB does not directly regulate employment issues, it could encourage employers to offer an easy choice of paystub delivery method to be used along with the form used to select payment method. Together, DOL and the CFPB should ensure that choice of paystub method has the same protections as those outlined above for choice of payment method:

- *Clear early choice.*
- *Easy method of exercising choice.*
- *Paper paystub for the first 30 days or until the employee chooses a method.*
- *Clear ability and notice about the right to opt out of electronic pay stubs.*

Moreover, employees who elect paper paystubs should never be charged for them.

6. Ban Revenue Sharing

We have heard disturbing rumors that some payroll card providers provide revenue sharing or other incentives to employers to adopt their cards. Other providers feel that they have lost out on contracts because they were unwilling to pay such incentives.

Monetary incentives have led to significant problems in the college debit card market. Some colleges, lured by millions of dollars in revenue, have adopted debit cards for distribution of financial aid that steered students to high fee cards and frustrated their ability to choose direct deposit into their own account.

Revenue sharing or other monetary incentives in the payroll card market could easily lead some employers to choose the card that provides them with revenue over a card with lower fees for employees. Revenue sharing also provides an incentive for the employer to steer employees to the payroll card and frustrate access to direct deposit or a check if that is the method the employee prefers.

In order to prevent unfair, deceptive or abusive practices and violations of the Regulation E rule against mandatory accounts, the CFPB or DOL should ban monetary incentives to employers for use of a payroll card. We do not object to payroll card providers that provide marketing materials and other assistance in implementing a payroll card program. But any monetary payments or incentives should be banned.

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Payroll cards must be built around the principles of employee choice, free access to wages, minimal fees, convenient free access to information, clear paystub information and absence of overdraft fees or credit features. Clear basic standards and rules will protect employees, employers, and payroll card providers alike.

Thank you for your attention to this issue and for all of your work to protect consumers and employees.

Yours very truly,

Americans for Financial Reform

California Reinvestment Coalition

Consumer Action

Consumer Federation of America

Consumers Union

Economic Fairness Oregon

National Consumer Law Center (on behalf of its low income clients)

National Employment Law Project

New Economy Project (New York)

Public Justice Center (Maryland)

Texas Legal Services Center

U.S. PIRG

Virginia Citizens Consumer Council

Woodstock Institute (Illinois)