

Client Alert.

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Senators Request CFPB Issue Guidance and Rulemakings, Bring Enforcement Actions Relating to Payroll Card Programs

By Rick Fischer, Obrea O. Poindexter, M. Sean Ruff and Matthew W. Janiga

Last week, 16 Democratic Senators sent a letter on regulation of payroll cards to Consumer Financial Protection Bureau (“CFPB”) Director Richard Cordray and Department of Labor (“DOL”) Acting Secretary Seth Harris. The letter urges the CFPB to clarify through rulemaking or guidance the types of federal requirements with which employers must comply when offering payroll cards. Since the current Electronic Fund Transfer Act (“EFTA”) and its implementing Regulation E already contain requirements for payroll cards that apply to the bank partners of employers who use such cards, any future rulemaking or guidance will likely clarify or add to these requirements.

OVERVIEW OF THE LETTER

The Senate letter focuses on three perceived problematic issues with payroll cards: employer-mandated use of payroll cards, fees associated with card usage and coercive tactics by employers to encourage card acceptance. To address these perceived issues, the letter requests that the CFPB issue guidance or conduct additional rulemaking to clarify how the EFTA and Regulation E apply to payroll cards. The Senators also urge the CFPB to bring enforcement actions “[w]here systematic abuses are clear.”

Employer-Mandated Use

With respect to mandated use of payroll cards, the Senate letter asserts that employers who deliver all salaries through a single payroll card, without providing an alternative payment method, are in violation of Regulation E. The Senate letter also questions whether opt-out programs, where employees would have to “affirmatively remove themselves from a payroll card service,” are permissible under Regulation E.

While Section 1005.10(e)(2) of Regulation E does prohibit employers from requiring employees to establish an account with a specific financial institution, it should not—as the Senate letter suggests—require employers to provide payroll card services on an opt-in basis. That is, so long as an employee and employer come to an agreement on the payroll card terms and conditions, the employer does not prevent an employee from opting out of a payroll card program, and the employer provides an alternative means for the employee to receive his or her pay upon opting out, the employer should be in compliance with Regulation E.

Fees on Card Usage

The Senate letter also requests that the CFPB and DOL review whether employees understand the fees associated with payroll cards and whether the fees being imposed violate Regulation E. The letter provides examples of fees the Senators believe may cause consumer harm, including ATM, balance inquiry, use, overdraft and inactivity fees. While

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elsewhere the Senate letter acknowledges that employees may use payroll cards as a more affordable alternative to check cashing services, the letter only requests that the CFPB and DOL provide information about the effect that payroll card fees have on employee income. The letter also asks the CFPB and DOL to identify in their response the tools the EFTA and Fair Labor Standards Act (“FLSA”) provide to protect consumers from harmful fees. To the extent that the CFPB and DOL conclude they do not have appropriate data to assess whether there is consumer harm, the letter suggests the two agencies engage in further study.

Coercive Enrollment Tactics

The letter identifies practices the Senators believe inappropriately incentivize employers to steer employees into payroll cards. In addition to the “opt-out” issue discussed above, the letter references practices whereby an employer will receive a financial incentive from the card issuer for enrolling employees in a payroll card program.

CURRENT REGULATION E REQUIREMENTS FOR PAYROLL CARDS

While not addressed in the Senate letter, Regulation E currently imposes disclosure and enrollment requirements for financial institutions offering payroll cards. For example, financial institutions may only issue payroll cards in response to a consumer request or pursuant to the requirements for unsolicited issuances detailed in Section 1005.5 of Regulation E.

With respect to disclosures, an issue that is raised in the Senate letter, financial institutions are required to provide initial disclosures in accordance with Section 1005.7(b) of Regulation E, including basic account information, such as a telephone number the consumer can call to obtain his or her balance information, and information concerning the resolution of errors associated with the account. Financial institutions also must provide an annual error resolution notice in a form substantially similar to that found in appendix A to Regulation E.

RECOMMENDATIONS FOR PAYROLL CARD ISSUERS PROGRAM PARTICIPANTS

The CFPB’s recently announced regulatory agenda includes notice of an upcoming proposed rule for general-purpose reloadable prepaid cards. As a result, card issuers and other market participants are likely to see additional proposed requirements and clarification for general-purpose reloadable prepaid cards and payroll cards by the end of 2013.

In the meantime, given the recent media and Congressional attention, payroll card issuers may wish to assess their compliance with the federal requirements under the EFTA and Regulation E. Payroll card issuers also could consider conducting routine diligence and audits of third-party service providers that play a role in their payroll card programs, as the CFPB continues to express a strong interest in vendor management.

For the Senate letter, see <http://blumenthal.senate.gov/download/?id=c04c7ff7-0380-4bc3-b2f0-a50b1a7cf377>.

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