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March 18, 2015

Richard Cordray, Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2014-0031
RIN 3170-AA22
Proposed Amendments to Regulation E: Curb exploitation of people
released from custody

Dear Mr. Cordray:

Pursuant to the rulemaking notice issued in the above-referenced proceeding (the “Notice”),¹ Prison Policy Initiative (“PPI”) respectfully submits the following comments concerning the need for clarification of Regulation E’s applicability to correctional facility “release cards.” As discussed in more detail below, release cards are open loop prepaid cards (which may or may not be reloadable) that are branded as debit cards by a major payment-card network (usually MasterCard). Release cards are issued on behalf of jails or prisons that owe money to people who are released from the facility. While release cards are a relatively new phenomenon, they are being adapted by an increasing number of agencies and often carry complicated and exorbitant fees.

People being released from correctional facilities are forced to use prepaid cards that come with oppressive terms and conditions. Accordingly, PPI believes that the Bureau should take immediate steps to address this issue by clarifying that release cards are deemed to be government benefit payments for purposes of proposed section 1005.15 of Regulation E. In addition, because of the broader problems with financial services inside correctional facilities, the Bureau should conduct an additional rulemaking proceeding to promulgate specific regulations applicable to correctional facility trust accounts.

I. Introduction and Background

With a total incarcerated population of more than 2.4 million people,² the United States sees millions of people released from prison or jail each year.

¹ 79 Fed. Reg. 77102, *et seq.* (Dec. 23, 2014).

² Peter Wagner & Leah Sakala, “[Mass Incarceration: The Whole Pie](#)” (Mar. 12, 2014).

For example, 623,337 people were released from prison in 2013,³ and the year before nearly 12 million people were released from local jails.⁴

When people leave a correctional facility, they are often owed money by the correctional authority. The nature of these debts can vary, but as a general matter, a person is usually entitled to a refund of his or her “inmate trust account” balance.⁵ Money in a trust account may consist of funds that a person had in his or her possession when originally taken into custody,⁶ funds that a person earns while working inside a prison or jail,⁷ or money sent by friends and relatives.

A. Release Cards Are Becoming More Prevalent

In 2014, the Association of State Correctional Administrators conducted a survey of thirty-three state corrections agencies, which asked about the agencies’ use of release cards.⁸ According to the survey, seventeen responding agencies (52%) use prepaid debit cards as a method of refunding trust account balances.⁹ Of those agencies, most report that fees are imposed on cardholders,¹⁰ and nine report that the agency implemented the use of release cards within the last three years.¹¹

Use of release cards is also growing in local jails,¹² where population turnover is higher than in prisons. Although the prevalence of release-card use by jails

³ U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2013* (NCJ No. 247282) (rev. Sept. 30, 2014), at 10.

⁴ Wagner & Sakala, *supra* note 2.

⁵ See e.g., N.Y. Corr. Law § 500-c(7) (sheriff’s duty to maintain inmate trust accounts); 37 Tex. Admin. Code § 269.1(2)(L) (jail operator must keep a record of all receipts and expenditures of inmate accounts).

⁶ See e.g., Cal. Gov. Code § 26640 (sheriff’s duty to account for “all money and valuables found on each prisoner when delivered at the county jail”).

⁷ Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. Tol. L. Rev. 791, 792 (2008) (“[I]n furtherance of security within U.S. prisons, many states prohibit inmates from possessing money while incarcerated. Yet, at the same time, states compensate prisoners for labor performed while incarcerated and deposit those payments into interest-bearing ‘trust’ or ‘spend’ accounts, which are established and maintained for each prisoner.” (footnotes omitted)).

⁸ Detailed responses to the ASCA Survey are available at <http://www.webcitation.org/6WSoQ5hDf> (the “Detailed Response Analysis”); a summary report is available at <http://www.webcitation.org/6WSoalJpb> (the “Summary Report”).

⁹ Summary Report, *supra* note 8, at 1.

¹⁰ *Id.* Although only eleven agencies responded “yes” to the question asking whether there were fees imposed in connection with release cards, of those states responding “no,” three (Arkansas, Florida, and Michigan) provided narrative responses indicating that fees are actually imposed, but for various reasons the respondents did not answer in the affirmative. Of the four states responding “no” without a narrative explanation, two (Indiana and Virginia) report using Jpay as a vendor. As discussed *infra*, note 19, Jpay does not make its fee schedules publicly available; however, PPI has no evidence of any Jpay release cards that are *not* subject to substantial fees. Thus, it is highly likely that fees are imposed on the release cards issued in all (or nearly all) of the seventeen systems that utilize cards.

¹¹ *Id.* at 2.

¹² See generally Amirah Al Idrus, “[Debit cards slam released prisoners with sky-high fees, few protections](#),” Center for Public Integrity (Sept. 30, 2014).

is not centrally tracked, at least three lawsuits have been filed challenging the practice.¹³

Some correctional agencies manage release-card programs in-house, while others outsource management to third party contractors.¹⁴ However, even agencies that manage programs in-house must contract with another entity to issue the cards and process transactions. In fact, a review of publicly available contracts reveals a variety of firms involved with issuance and management of release cards. This confusing array of entities (generally referred to here as “vendors”) creates an environment ripe for consumer exploitation, by allowing various contractors and subcontractors to evade responsibility for error resolution and other customer service through diffusion of accountability.¹⁵

B. Release Card Fees Are Complex and Costly

Vendors frequently charge predatory fees that do not appear to be based on actual costs. The chart on the following page summarizes some release-card fees found in publicly-available sources.

¹³ *Adams v. Craddock*, U.S. Dist. Ct., W.D. Ark. Case No. 13-cv-5074-jlh (Benton County Arkansas); *Mickelson v. County of Ramsey*, U.S. Dist. Ct., D. Minn. Case No. 13-CV-2911 (SRN/FLN) (Ramsey County, Minnesota); *Regan v. Stored Value Cards*, U.S. Dist. Ct. N.D. Ga. Case No. 14-cv-1187-AT (Rockdale County, Georgia).

¹⁴ Summary Report, *supra* note 8, at 3.

¹⁵ For example, the Ramsey County Contract and Benton County Contract (*see infra*, note 16) used by Keefe Commissary Networks (“Keefe”), both state that release cards “will be issued by First California Bank . . . and transactions [will be] processed by a third-party company called Outpay Systems, L.L.C.” (§ 2). The same contract states that Keefe “shall provide technical support and coordination . . . for processing inmate trust fund balances to Client inmates at the time of release.” *Id.* While the identity of the issuer (First California Bank) seems somewhat clear, it is not apparent what the respective roles of Keefe and Outpay Systems, L.L.C (“Outpay”) are. Although it appears that Outpay acts as a “third party processor,” it is not clear whether Keefe itself is a third party processor, an “independent sales organization,” or some other type of service provider (as such terms are defined in [MasterCard Rule § 7.1](#)). Of particular concern is the fact that the sole point of contact with both correctional facilities and cardholders appears to be the entity that markets the program (in this instance, Keefe), even though MasterCard rules *prohibit* that type of third-party service provider from being a party to the actual cardholder agreement. MasterCard Rule § 7.7.2. Thus, holders of release cards are forced to enter into a contractual relationship with a financial institution with which neither the cardholder nor the correctional facility has any meaningful interaction.

		V E N D O R			
		Keefe Commissary ¹⁶	Numi Financial ¹⁷	ReleasePay ¹⁸	Jpay ¹⁹
FEE TYPE	Account maintenance	\$1.50/week	\$3.50/week	\$2.50/week	\$2/week (NJ) \$6/month (NC) \$0.50/week (TN)
	Per transaction	none	\$0.95 for PIN-based	none	\$0.70 (CO, GA & TN)
	Balance inquiry	\$1.50 at ATM	\$1.50 at ATM \$0.50 - \$3.95 by phone	\$1.50 at ATM	\$0.50 (TN & MI)
	Inactivity	none	none	\$2 after 90 days	\$2.99 after 90 days (TN and MI)
	Refund & close account	\$30	\$9.95	\$25	\$9.95 (TN & MI)
	Other cash withdrawal fees	\$6 for ACH \$2.75 for ATM	\$3.50 for ATM \$0.95 for cash-back at merchant	not specified	\$2 at ATM (CO, GA, TN, MI)
	Declined transaction	not specified	\$0.50	none	\$0.50 (TN)

The above list of fees (which is not comprehensive) illustrates the complexities that cardholders face when trying to maximize the value of their money. It is no secret that those who are incarcerated are disproportionately low-income.²⁰ Thus the impact of such fees will be felt even more acutely by those with low balances on prepaid cards. A cardholder incurs a maintenance fee (usually charged *weekly*) which is levied whether or not there is account activity. As an example, if someone is released with \$125,²¹ a \$2-per-week maintenance fee is

¹⁶ The same fee schedule is used in Ramsey County, Minnesota and Benton County, Arkansas, as disclosed in the respective litigation referenced in note 13, *supra*. The relevant contracts are attached hereto as **Exhibit 1** (“Ramsey County Contract,” which was filed as Exhibit A to the Second Amended Complaint (ECF No. 14) in *Regan v. County of Ramsey*), and **Exhibit 2** (“Benton County Contract,” which was filed as Exhibit 2 to the Plaintiff’s Statement of Undisputed Material Facts (ECF No. 34) in *Adams v. Craddock*. See *supra*, note 13 for additional details about the aforementioned litigation.

¹⁷ Cardholder agreement (attached hereto as **Exhibit 3**) was filed as Exhibit 2 to the Declaration of Brad D. Golden (“Golden Declaration,” ECF No. 7) filed in *Regan v. Stored Value Cards* (see *supra*, note 13).

¹⁸ Cardholder agreement is attached hereto as **Exhibit 4**, and is available at <http://releasepay.com/docs/008%20T&Cs%20E-S.pdf>

¹⁹ Jpay is a leading provider of release cards, however it does not make its fee schedule available online unless a user creates an account linked to a particular prepaid card. This lack of transparency is another reason why Regulation E (including proposed § 1005.19) should cover release cards. Jpay fees in this table are gathered from the following sources: Detailed Response Analysis, *supra* note 8 (Colorado, Georgia, North Carolina, and Tennessee); Idrus, *supra* note 12 (Michigan); N.J. Dept. of Corr., “[The new JPay Release card is here](#)” (New Jersey).

²⁰ See, e.g., U.S. Dept. of Justice, Bureau of Justice Statistics, [Survey of State Prison Inmates, 1991](#) (NCJ No. 136949) (Mar. 1993), at 3 (out of 521,765 survey participants, 86% had annual income less than \$25,000 after being free for at least a year); Bruce Western, “Invisible Inequality,” in *Punishment and Inequality in America* (2006), at 85-107 (about a third of incarcerated individuals were not working when they were admitted to prison or jail).

²¹ The hypothetical figure of \$125 is based on average release-payment amounts reported by Nevada, Ohio, and Virginia. As part of the MCPA RFP (see *infra*, note 52 and accompanying text), the states of Nevada, Ohio, and Virginia reported that the average trust account refund upon release was, respectively, \$176.92, \$103, and \$105. [MCPA Amendment No. 1](#) (Apr. 13, 2011), at 5-6. The average of those three amounts is \$128.31, which is rounded to \$125 for purposes of this example.

equivalent to a finance charge of 77% per year. If that same hypothetical cardholder makes ten purchases of \$12 each, then a \$0.50 per-transaction-fee would amount to \$5, or 4% of the entire card balance (on top of maintenance fees). If the cardholder wishes to convert a prepaid card into cash, he or she must pay \$10 to \$30 (i.e., 8% to 24% of the entire deposit amount) merely to close the account. Alternatively, if the cardholder simply tries to spend the card balance by using it for payments, he or she will likely end up with a residual unspent amount that is either consumed by fees or forfeited to the vendor,²² thereby inflating the vendor's profits,²³ despite the fact that card vendors incur no credit risk, because all card transactions are prepaid by the consumer.

As indicated in the previous table, some vendors may charge different cardholder fees under different contracts. This variation indicates that consumer fees are not cost-based, but instead are merely a profit mechanism that is undisciplined by either regulatory oversight or an efficient marketplace.

In addition to the monetary fees extracted by vendors, cardholders are often forced by into contracts with binding arbitration provisions²⁴ notwithstanding the fact that the consumer has been coerced into the contract and thus has not voluntarily agreed to arbitrate.²⁵ Cardholders who are forced waive their right to access the courts also effectively relinquish their right to enforce their already diluted contractual rights and remedies; therefore, regulation that ensures fair terms, meaningful consumer choice, and meaningful dispute resolution is acutely needed.

²² One release card provider even boasts that facilities benefit from release cards because the cards “eliminate unclaimed property reporting.” Golden Decl., *supra* note 17 ¶ 3. This appears to be a common practice among prison-related vendors, *see also* [Comments of Prison Policy Initiative](#), Fed. Communications Comm’n, WC Dkt. No. 12-375 (Jan. 21, 2015) (describing similar account-forfeiture practices by providers of inmate telecommunications service companies).

²³ *See generally*, Tim Barker, “[Prison services are profitable niche for Bridgeton company](#),” St. Louis Post-Dispatch (Feb. 15, 2015) (“In 2012 . . . Keefe Commissary Network, along with two other subsidiaries, recorded a robust \$41 million net income on \$375 million in sales.”).

²⁴ Both Numi Financial and ReleasePay include arbitration clauses in their cardholder agreements (see Exhibits 3 and 4, respectively). Cards issued by Keefe Commissary also appear to be subject to mandatory arbitration, based on website [Terms and Conditions](#). As noted in note 19, *supra*, Jpay does not make its cardholder agreements publicly available.

²⁵ When courts enforce arbitration provisions contained in adhesive contracts, they typically do so under the theory that even a contract offered on a “take-it-or-leave-it” basis allows the party with less bargaining power to walk away. *E.g.*, *Montgomery v. Applied Bank*, 848 F.Supp. 2d 609, 616 (S.D.W.Va. 2012) (holding arbitration provision in credit agreement enforceable because “Plaintiff puts forth no evidence of a pressing need and the record is devoid of any evidence that she had no other alternative but to enter into a credit card agreement with this particular Defendant.”). The same cannot be said of release cards (at least in facilities that do not offer other payment methods), because a consumer must agree to the cardholder agreement in order to receive *their own money*.

C. The Promised Benefits of Release Cards Are Dubious

Release-card vendors often claim that such cards provide a variety of benefits to cardholders and correctional facilities, although both types of benefits are dubious. Typically, release cards are promoted as more convenient for cardholders than receipt of a paper check.²⁶ Such promotional claims overlook several important details. First, while prepaid cards can be used at many retail outlets, they cannot be used to pay some critical expenses that are incurred by people recently released from prison. For example, few landlords accept payment cards for payment of rent or security deposits. Recently released people may also be required to pay fines or user fees to various government agencies (such as probation offices), many of which do not accept payment cards. Second, while it is true that cashing a check can be an expensive proposition for unbanked consumers, that does not necessarily mean that release cards are a less costly option. Again, suppose someone is released from prison with \$125. A fee at a retail check-casher could realistically be one payment of three to four dollars.²⁷ If the same amount is loaded onto a prepaid card, the cardholder is more likely to make a series of smaller withdrawals.²⁸ Assuming two ATM withdrawals with a \$2.75 ATM fee (the average ATM fee reported on the chart above), the cardholder would end up paying \$5.50 in fees—more than the average cost of cashing a check. Moreover, for cards with large balances, a cardholder may be forced to make multiple ATM withdrawals, since some ATMs cap withdrawals at \$400 per transaction.²⁹

Release-card vendors claim that the cards are “more secure” than cash or checks.³⁰ This assertion overlooks the fact that many release cards (especially in the high-turnover jail environment) are issued without the cardholder’s name embossed on the card.³¹ Accordingly, there is no way for merchants to effectively ensure that a card user is the rightful holder, and lost or stolen cards can easily be used by an unauthorized party. Moreover, while a releasee who

²⁶ *E.g.*, ReleasePay, [Promotional Flier](#).

²⁷ *E.g.*, Jean Ann Fox & Patrick Woodall, [Cashed Out: Consumers Pay Steep Premium to “Bank” at Check Cashing Outlets](#), Consumer Federation of America (Nov. 2006), at 6 (survey conducted in 2006 reported average cost to cash a government-issued check (other than Social Security) at retail check cashing stores was 2.78% of the face amount); Walmart, [MoneyCenter – Check Cashing webpage](#) (cashing a check up to \$1,000 at Walmart incurs a maximum fee of \$3).

²⁸ *See e.g.*, Helmut Stix, “[The Impact of ATM Transactions and Cashless Payments on Cash Demand in Austria](#),” *Monetary Policy and the Economy* (2004, 1st qtr), 90, 99 (“[T]he use of ATMs is associated with higher frequencies of withdrawal and thus with lower cash holdings.”); *see generally* Bd. of Governors of the Fed. Reserve System, [Report to Congress on Government-Administered, General-Use Prepaid Cards](#) (Jul. 2014), at 1-2 (“Although the prepaid cards provided under government-administered programs usually offer cardholders one or more free automated teller machine (ATM) cash withdrawals per month, ATM withdrawal fees constitute 58 percent of all card-holder fee revenue that issuers collected in 2013.”)

²⁹ *See* “Prestige Prepaid MasterCard Cardholder FAQ,” *Regan v. Stored Value Cards* (*see supra*, note 13), Class Action Complaint (ECF No. 1), Exhibit B, at 14.

³⁰ *E.g.*, Golden Decl., *supra* note 17 ¶ 3 (release cards “offer released persons immediate access to their money in a medium that is . . . more secure than cash”); ReleasePay, *supra* at 26.

³¹ Golden Decl., *supra* note 17, Exh. 1; *Mickelson v. County of Ramsey* (*see supra*, note 13), Declaration of Erik Mickelson (ECF No. 70), Exh. 1.

receives cash can decide to carry only a portion of his cash on his person, a cardholder cannot similarly reduce the risk of loss of a prepaid card—if he carries the card and loses it, then the entire balance is at risk.³²

As for jails and prisons themselves, vendors typically promise “reduce[d] accounting department costs and resources.”³³ It is unclear how significant such cost reductions are, since facilities still bear the ultimate responsibility for maintaining inmate trust accounts and determining how much money a person is owed upon his or her release.³⁴ In reality, the true “benefit” that facilities receive is the ability to shift follow-up customer service issues to a contractor that was not selected by the customer/cardholder, and which therefore has no economic incentive to provide quality service to cardholders.³⁵ In addition, many facilities have structured their contracts with release card vendors so that all costs of the service are borne entirely by consumers, instead of the contracting agency.³⁶ The federal Bureau of Prisons has awarded a release card contract (covering the sizeable federal prison system) to JPMorgan Chase on a non-competitive basis.³⁷ Such procurement methods do not promote competition or incentivize awarding contracts based on value to the cardholder, but instead reward those vendors that most effectively shift financial liabilities from the facility to the cardholder.

D. Incarcerated People Are Particularly In Need of the Protections of the EFTA

The primary purpose of the Electronic Fund Transfer Act (“EFTA”) “is the provision of individual consumer rights.”³⁸ As lower income people—most of whom have experienced (by virtue of their incarceration) a disruption in their

³² See generally, Fumiko Hayashi & Emily Cuddy, “[General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees, and Fraud Risks](#),” Fed. Reserve Bank of Kansas City Working Paper No. RWP 14-01 (Feb. 2014), at 36-39 (discussing fraud risks and prepaid cards). Notably, MasterCard’s protections for cardholder liability in the event of unauthorized charges do not apply until the cardholder’s “identity is registered by or on behalf of the Issuer in connection with such issuance and/or sale.” MasterCard U.S. Rule § 6.3. In the context of release cards, it is not clear whether such “registration” occurs in the facility (upon card issuance) or if the cardholder must register after release by establishing an online account at the vendor’s website. If the latter, then there is reason for concern because people leaving prison or jail are more likely than the population at large to lack reliable and convenient internet access.

³³ Golden Decl., *supra* note 17, ¶ 3.

³⁴ See Ramsey County Contract and Benton County Contract (*supra*, note 16), both at § 13 (“Client [i.e., the correctional facility] agrees that it shall . . . assume all liability for any Client related job functions that lead to discrepancies/deficiencies associated with any funding, Card loss, improper storage, etc. expressly attributed to the loading, inventorying and distribution of the Cards to the Client inmates.”).

³⁵ See e.g. JPay, [Former release card promotional webpage](#) (“The release card . . . effectively outsources any post-release service issues from the agency to JPay”).

³⁶ E.g., Ramsey County Contract and Benton County Contract (*supra*, note 16), both at § 6 (“All fees shall be assessed to the card holder/inmate.”).

³⁷ Daniel Wagner, “[Megabanks have prison financial services market locked up](#),” Center for Public Integrity (Oct. 2, 2014). The lack of competitive bidding appears to be based on the provisions of 12 U.S.C. § 90.

³⁸ 15 U.S.C. § 1693(b).

ability to earn a living—people leaving prison and jail are likely to need timely access to their funds, and thus are particularly susceptible to abusive provisions contained in adhesive contracts. If someone is released from a facility that mandates the use of release cards, then that person is also forced into a financial relationship with an unfamiliar financial entity whose customers (correctional facilities) are not its account holders (releasees).

Consumers who leave prison or jail are acutely in need of the fundamental protections of Regulation E. For example, release cards are frequently used to pay accumulated wages that a person has earned while incarcerated. Yet vendors appear to have exploited Regulation E's definition of "payroll card account"³⁹ by arguing that even though wages were accumulated incrementally over time, the one-time payout upon the wage-earner's release from custody vitiates the regulatory protections applicable to payroll cards. Accordingly, PPI hereby requests that the Bureau issue an official interpretation stating that the prohibition on compulsory issuance of payroll cards⁴⁰ applies any time a release card contains earned wages.

II. The Bureau Should Address Release Cards As Part of the Current Rulemaking

In light of the widespread unfair practices in the release card industry, the Bureau should take this opportunity to apply Regulation E to all release cards.

A. The Bureau Should Classify Release Cards as Government Benefit Cards

The Bureau has proposed a revised § 1005.15 that provides more detailed protections to recipients of government benefits.⁴¹ Although proposed § 1005.15(a)(2) defines "government benefit account" in broad terms, the Bureau should expressly affirm that this definition applies to release cards.

Neither existing Regulation E nor the proposed revisions define "government benefit," and because release cards often hold money that a person earned, received as a gift, or possessed upon their incarceration, one could argue that the funds on such cards are not government benefits. Nonetheless, release cards are used exclusively for the purpose of making government-to-consumer payments and the rationale for protecting recipients of government benefits applies with particular force to people who are leaving correctional facilities.

³⁹ 12 C.F.R. § 1005.2(b)(2) (defining a payroll card account as an account to which "electronic fund transfers of the consumer's wages . . . are made *on a recurring basis*" (emphasis added)).

⁴⁰ See Proposed § 1005.18(b)(2)(i)(A), Notice, *supra* note 1, at 77299.

⁴¹ Notice, *supra* note 1, at 77140-77145.

Accordingly, PPI respectfully suggests that the Bureau make the following changes⁴² to the proposed § 1005.15(a):

(2) Definitions. For purposes of this section, the following definitions apply:

(i) ~~term “account”~~ “Account” or “government benefit account” means an account established by a government agency for distributing government benefits to a consumer electronically, such as through automated teller machines or point-of-sale terminals, but does not include an account for distributing needs-tested benefits in a program established under state or local law or administered by a state or local agency.

(ii) “Government benefit” is deemed to include payment of funds by or on behalf of a government agency to a consumer in connection with the consumer’s release from a prison, jail, detention center, or other correctional facility, regardless of the original source of such funds.

Such language would clarify the applicability of Regulation E to release cards and would provide much-needed consumer protections for people who are released from prison or jail. For over a decade, the federal government has recognized that “*all* consumers using EFT services should receive substantially the same protection under the EFTA and Regulation E, absent a showing that compliance costs outweigh the need for consumer protections.”⁴³ In the case of release cards, there is absolutely no evidence that Regulation E compliance would impose significant costs, and the need for consumer protection is particularly strong—a person leaving a correctional facility should not be compelled to use a complex and costly financial product to access funds in which he or she holds an unconditional ownership interest.

B. The Bureau Should Adopt Other Proposals to Strengthen Regulation E’s Prepaid Card Provisions

PPI understands that other commenters have, or will soon, propose additional modifications to the Regulation E amendments contained in the Notice. PPI supports the following proposals and asks that such provisions apply to release cards:

- Balance inquiries should be free and convenient. Consumers will not be empowered to responsibly use prepaid cards until they are able to easily verify current account balances. Although Regulation E generally requires account statements, both the current and proposed versions of Regulation E relax these protections in the context of

⁴² Insertions and deletions are shown as compared to the version of § 1005.15 that was published in the Notice. Insertions are denoted by underlining and deletions are denoted by ~~striketrough~~.

⁴³ 59 Fed. Reg. 10680 (Mar. 7, 1994) (emphasis added) (Federal Reserve’s announcement of final rule applying Regulation E to government benefit payments).

government benefit cards.⁴⁴ Although it is understandable that the Bureau may want to allow additional flexibility for government agencies, PPI believes that the Bureau should remain consumer-focused. Specifically, consumers should be able to access their account balance for free, by a method of the consumer's own choosing—either by ATM inquiry, telephone, internet, or by receiving regular paper statements.

- Mandatory arbitration and class-action bans should be prohibited. As noted previously,⁴⁵ people leaving correctional facilities have little or no meaningful choice when they are issued release cards. The prevalent use of arbitration provisions in take-it-or-leave-it cardholder agreements is troublesome. If vendors violate applicable laws or contractual requirements, then they should be held accountable in court (absent truly voluntary consumer consent to arbitration). The Bureau should use its authority under 12 U.S.C. § 5518(b) to prohibit mandatory arbitration provisions in prepaid card contracts.
- Certain types of fees should be categorically prohibited. Most prominently, fees for customer service should be banned, as this is a cost of doing business that should not be imposed on cardholders who need help deciphering the maze of confusing terms and conditions that so often accompany prepaid cards. Additionally, declined transaction fees appear to be a simple case of rent-seeking, as it is unclear how vendors or issuers incur costs to decline a transaction authorization.
- Cardholder funds should be held in insured accounts. The proposed amendments require a warning if a prepaid card is not protected by deposit insurance.⁴⁶ If a release-card vendor becomes insolvent and cardholder funds are not in an insured account, the impacts for cardholders could be catastrophic.⁴⁷ A reference to deposit insurance buried in voluminous disclosures is unlikely to provide meaningful consumer protection. PPI supports proposals to require that all prepaid cards fund be held in an insured deposit account.
- Fee schedules and cardholder agreements should be publicly available. As noted previously,⁴⁸ one of the largest release-card vendors in the country does not make cardholder agreements publicly available. This lack of transparency makes it difficult (if not impossible) for cardholders (as well as cardholders' caregivers and attorneys) to understand their contractual rights. Although the proposed rule requires public posting account agreements,⁴⁹ PPI supports proposals to require that agreements be searchable by the name of the entity (or entities) that brand the card and provide customer support.

⁴⁴ 12 C.F.R. § 1005.15(c); Proposed § 1005.15(d)(1), Notice, *supra* note 1, at 77298.

⁴⁵ *Supra*, text accompanying notes 24-25.

⁴⁶ Proposed § 1005.18(b)(2)(i)(B)(13), Notice, *supra* note 1, at 77300.

⁴⁷ *See generally*, James Steven Rogers, *Unification of Payments Law and the Problem of Insolvency Risk in Payment Systems*, 83 Chi. Kent L. Rev. 689, 715-718 (2008) (discussing insolvency of non-bank payment providers).

⁴⁸ *Supra* note 19.

⁴⁹ Proposed § 1005.19, Notice, *supra* note 1, at 77304.

III. The Bureau Should Convene a New Rulemaking Proceeding to Further Address Consumer Protection Issues Related to Correctional Facility Trust Accounts

Because incarcerated people have no meaningful consumer choice and are particularly susceptible to victimization by abusive business practices, the Bureau should conduct a more comprehensive review of financial services in correctional facilities. As an initial step, the Bureau should exercise its authority under the EFTA⁵⁰ to directly regulate release card fees. Specifically, the Bureau should prohibit fees for inactivity, swipe transactions, declined transactions, customer service inquiries, balance inquiries, and non-ATM cash withdrawals. The Bureau should also cap all other permissible fees at amounts that resemble vendors' actual costs.

The Bureau should also address larger issues beyond release cards. There is a growing industry of payment service providers who specialize in correctional facility trust account management.⁵¹ In 2011, the Multi-State Corrections Procurement Alliance issued a request for proposals (the "MCPA RFP")⁵² seeking bids from companies for management of inmate trust accounts. Two contracts were awarded (to Keefe Group and Jpay). The contents of the MCPA RFP and the proposals received by the successful bidders indicate that there are many questionable practices in the correctional-facility financial services industry. Robust oversight by the Bureau is warranted.

Among the troublesome practices in the correctional facility financial services industry are:

- Correctional facilities claim to be reducing their own costs by outsourcing management of trust accounts. Yet both Keefe Group and Jpay agree to provide contracting facilities with a "commission" (kickback) for each deposit received into a trust account.⁵³ These fees, paid by families and friends sending money to loved ones in prison, provide a revenue stream to the same agencies who claim to be cutting expenses through outsourcing.
- Even though service providers appear to be engaging in money transmission, some have suggested that "few" companies in this niche industry comply with state money transmitter regulations.⁵⁴
- Vendors boast that they can provide automated electronic processing of credit and debit transactions to and from trust accounts,⁵⁵ but never even mention compliance with EFTA and Regulation E.
- Vendors may not comply with unclaimed property laws.⁵⁶

⁵⁰ 15 U.S.C. § 1693l-1(d)(1).

⁵¹ See generally, Daniel Wagner, "[Prison bankers cash in on captive customers](#)," Center for Public Integrity (Sept. 30, 2014).

⁵² Available at <http://www.webcitation.org/6WUcrjHwy>.

⁵³ [Keefe Group Cost Proposal](#) at 8, 16; [Jpay Cost Proposal](#) § 3.10.

⁵⁴ [Jpay Technical Proposal](#), at 21.

⁵⁵ E.g., *id.*, at 18-27.

⁵⁶ See *supra*, note 22.

- Regulation E's consumer protections are premised on financial institutions providing account holders with periodic statements,⁵⁷ but incarcerated account holders appear to only be able access their account history from shared kiosks in public areas (which may be subject to usage restrictions and/or fees), thus limiting the consumer's ability to verify accurate account activity.

The growth in outsourcing means that end-user customers of correctional facility banking systems (i.e., incarcerated people and their friends and families) are forced to do business with financial middlemen that are incentivized to charge non-cost-based fees. Even worse, the middlemen frequently extract revenue through fees, and then split that fee revenue with the correctional facilities that award the exclusive contracts. This situation will never result in fair treatment of consumers without the oversight of the Bureau.

IV. Conclusion

For the reasons stated herein, PPI asks that the Bureau modify the proposed amendments to Regulation E as detailed in Section II, and conduct a further rulemaking proceeding to address the widespread problems in the correctional facility financial services market.

Respectfully submitted,



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⁵⁷ See generally, 12 C.F.R. § 1005.9(b).