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Federal Payroll, Gift, and Prepaid Card Developments: FDIC Deposit Insurance Eligibility and the Credit CARD Act of 2009

By Sarah Jane Hughes*

I. INTRODUCTION

Prepaid and other stored-value products have grown rapidly as tools for making payments in retail situations and wage payments to employees.¹ Previous cyberspace surveys have covered the development of these products and their growing use by consumers.² Despite the current economic downturn, the attractiveness of these products and their places in our economy have been demonstrated. Since the writing of the November 2008 Survey of the Law of Cyberspace, there have been two major federal developments pertaining to stored-value products: the November 2008 revision of the primary guidance from the Federal Deposit Insurance Corporation (“FDIC”) on the scope of deposit insurance for such products³ and Congress’s enactment of the CARD Act.⁴ This Survey discusses both of these developments, which have profound implications for the future of stored-value products, particularly for security in payroll and general-purpose prepaid cards

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1. See generally FED. RESERVE SYS., THE ELECTRONIC PAYMENTS STUDY: A SURVEY OF ELECTRONIC PAYMENTS FOR THE 2007 FEDERAL RESERVE PAYMENTS STUDY (2008), available at http://www.frbervices.org/files/communications/pdf/research/2007_electronic_payments_study.pdf; FED. RESERVE SYS., THE 2007 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2003–2006 (2007), available at http://www.frbervices.org/files/communications/pdf/research/2007_payments_study.pdf.

2. See, e.g., Patricia Allouise, Sarah Jane Hughes & Stephen T. Middlebrook, *Developments in the Laws Affecting Electronic Payments and Stored-Value Products: A Year of Stored-Value Bankruptcies, Significant Legislative Proposals, and Federal Enforcement Actions*, 64 BUS. LAW. 219, 219–21 (2008); Sarah Jane Hughes, Stephen T. Middlebrook & Broox W. Peterson, *Developments in the Law Concerning Stored-Value Cards and Other Electronic Payments Products*, 63 BUS. LAW. 237, 237–40 (2007) [hereinafter *Developments in the Law 2007*]; Sarah Jane Hughes, Stephen T. Middlebrook & Broox W. Peterson, *Developments in the Law Concerning Stored Value and Other Prepaid Payment Products*, 62 BUS. LAW. 229, 229–30 (2006) [hereinafter *Developments in the Law 2006*].

3. See Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms, 73 Fed. Reg. 67155 (Nov. 13, 2008).

4. Credit Card Accountability, Responsibility and Disclosure Act (CARD Act) of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.) [hereinafter CARD Act].

and the terms and conditions that apply to gift and some general-purpose prepaid cards.

Part II of this Survey covers the deposit insurance clarification published by the FDIC in November 2008.⁵ Part III covers the second development—the May 2009 CARD Act. The Act changes the landscape for prepaid products in some ways that many readers might not anticipate. Part IV contains conclusions and asks fresh questions about deposit insurance eligibility and the CARD Act's requirements for prepaid and other stored-value products.

II. DEPOSIT INSURANCE AND PREPAID AND OTHER STORED-VALUE PAYMENTS PRODUCTS

As banks began to fail in 2008, the question of what types of accounts would be eligible for deposit insurance loomed large in the minds of those familiar⁶ with the FDIC's August 2005 proposed rule⁷ and the FDIC General Counsel's Opinion No. 8 that the rule was designed to revise.⁸ This is a significant issue given that the numbers of payroll cards issued have been rising steadily with a projection for 17.5 million payroll cards to be in circulation by 2010.⁹

A. THE AUGUST 2008 REQUEST FOR PROMPT ACTION

After several bank failures in August 2008,¹⁰ consumer advocates requested that the FDIC clarify the extent to which individual, beneficial owners of payroll cards would be covered by deposit insurance in the event that a bank handling payroll card account funds should fail.¹¹ A major concern was that a decision not to pay deposit insurance to the holders of payroll cards or other stored-value products, for which the underlying funds were in the hands of banks, might spark a crisis of

5. See *supra* note 3. See also Obrea Poindexter & Sean Ruff, *Electronic Banking and Prepaid Card Developments*, 64 *BUS. LAW.* 593, 600–03 (2009).

6. At the August 2008 American Bar Association Annual Meeting, Gail Hillebrand of Consumers Union asked Sarah Kelsey, then General Counsel of the FDIC, about the status of the August 2005 proposed rule, which would clarify the requirements for deposit insurance coverage for prepaid value products, including payroll cards, that had not been finalized in the interim. Am. Bar Ass'n, Section of Bus. Law, *Banks in Crisis—Are the Government Safety Nets Working?* (Aug. 10, 2008), <http://www.abanet.org/buslaw/meetings/audio/2008/annual/newyork/1623.mp3> (audio recording). See also *FDIC May Revisit Insurance Coverage for Bank-Issued Electronic Pay Cards*, 91 *BANKING REP.* (BNA) 283 (2008) (describing the Hillebrand-Kelsey exchange).

7. *Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms*, 70 *FED. REG.* 45571 (proposed Aug. 8, 2005) (to be codified at 12 *C.F.R.* pt. 330).

8. General Counsel's Opinion No. 8; *Stored Value Cards*, 61 *FED. REG.* 40490 (Aug. 2, 1996).

9. See, e.g., John Antos, *Payroll Cards Generate Efficiencies for Businesses: Emerging as a Financial Services Tool for Today's Companies*, *FRANCHISING WORLD*, Oct. 1, 2008, at 12(3); Alina Tugend, *The Gift Card Comes Wrapped in Growing Risk*, *N.Y. TIMES*, Nov. 22, 2008, at B6.

10. See Federal Deposit Insurance Corporation, *Failed Bank List*, <http://www.fdic.gov/bank/individual/failed/banklist.html> (last visited Aug. 26, 2009) (showing all bank failures since Oct. 1, 2000).

11. See Letter from Consumers Union et al. to Hon. Sheila Bair, Chair, Fed. Deposit Ins. Corp. (Aug. 25, 2008), available at http://www.consumersunion.org/pub/core_financial_services/006033.html.

confidence in the nation's deposit insurance programs. Loss of access was a possibility under the 1996 General Counsel's Opinion No. 8 if a major bank holding such funds were to fail and the FDIC elected to sell only that bank's "deposits" as opposed to selling the whole bank as a going concern.¹²

Opinion No. 8 did not recognize funds underlying prepaid cards as "deposits" under the FDIC Act's definition,¹³ and, accordingly, holders of stored-value or prepaid cards for which the underlying funds had been deposited in an insured bank would have been deprived of access to monies they thought were available, such as wages or commissions that they had earned from their employers.¹⁴ Concerned about the human costs of employees being locked out of their wages and the effects of a lack of confidence that others might have about a bank that did not pay the claims of payroll cardholders, which could lead to a run on other banks, the consumer advocates requested that the FDIC issue the final regulation based on the FDIC's August 2005 proposal¹⁵ as quickly as possible.¹⁶

B. THE 2008 GENERAL COUNSEL'S OPINION ON PREPAID AND OTHER STORED-VALUE PRODUCTS

On October 31, 2008, the FDIC issued a new General Counsel's opinion that replaced the prior General Counsel's Opinion No. 8.¹⁷ The new opinion announced that "all funds underlying stored value products will be treated as 'deposits' if they have been placed at an insured depository institution."¹⁸ The FDIC also explained the mechanics of how it would determine whether the holders of the access mechanisms (that is, the stored-value cards) or the distributors of the access mechanisms would be entitled to deposit insurance payments,¹⁹ which are the "standard requirements for obtaining 'pass-through' insurance coverage."²⁰ Only funds deposited with insured depository institutions are eligible for pass-through

12. A sale limited to the "deposits" of a failing bank transfers the assets of the failing bank, but not liabilities such as loans. Compare Federal Deposit Insurance Corporation, Failed Bank Information for IndyMac Bank, F.S.B., and IndyMac Federal Bank, F.S.B., Pasadena, CA (2009), <http://www.fdic.gov/bank/individual/failed/IndyMac.html> (last visited Aug. 17, 2009) (selling only the deposits of IndyMac), with Federal Deposit Insurance Corporation, Bank Acquisition Information for Washington Mutual Bank, Henderson, NV and Washington Mutual Bank, F.S.B., Park City, UT, <http://www.fdic.gov/bank/individual/failed/wamu.html> (last visited Aug. 17, 2009) (selling assets and liabilities of Washington Mutual to JPMorgan Chase Bank). A sale of deposits only would have been problematic for the holders of stored-value products, which would have been classed as liabilities under the 1996 General Counsel's Opinion No. 8. See General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40490, 40491 (Aug. 2, 1996).

13. 12 U.S.C. § 1813(f) (2006).

14. General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. at 40494.

15. Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms, 70 Fed. Reg. 45571 (proposed Aug. 8, 2005) (to be codified at 12 C.F.R. pt. 330).

16. See Letter from Consumers Union et al., *supra* note 11.

17. See Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms, 73 Fed. Reg. 67155 (Nov. 13, 2008).

18. *Id.* at 67155.

19. *Id.*

20. *Id.*

insurance, which leaves funds paid to merchants issuing store cards without deposit insurance.²¹ The FDIC's rationale for the distinction is that funds paid to merchants for stored-value cards "do not provide access to money at a depository institution."²² This approach also follows Federal Deposit Insurance Act ("FDI Act") precedent: new Opinion No. 8 explained that "[i]n the absence of money at a depository institution, no insured 'deposit' will exist under section 3(l) of the FDI Act [12 U.S.C. § 1813(l)(3)]."²³

New Opinion No. 8 next addresses the issue of who is eligible to receive deposit insurance payouts in the event of bank failure—the holder of the access mechanism (that is, the payroll card or other prepaid card) or the person who opened the account or deposited the funds. It explains that under its "existing insurance regulations at 12 C.F.R. part 330, the FDIC is entitled to rely upon the account records of the failed insured depository institution in determining the owners of deposits."²⁴ Accordingly, if the holder of the access mechanism has a separate account in his or her own name, the FDIC will "recognize the holder as the owner of the deposit."²⁵ However, if the bank holds the funds in "pooled accounts" established by an agency or custodian,²⁶ the FDIC will provide "pass-through" insurance coverage under the terms of 12 C.F.R. § 330.7,²⁷ which requires satisfaction of each of the following:

(1) the account records must disclose the existence of the agency or custodial relationship pursuant to 12 C.F.R. § 330.5(b)(1), which requires an account title such as "ABC Company as Custodian for Cardholders";²⁸

(2) either the records maintained by the depository institution or by the custodian or other third party must disclose the identities of "actual owners and the amount owned by each such owner" pursuant to 12 C.F.R. § 330.5(b)(2);²⁹ and

(3) the "funds in the account actually must be owned (under the agreements among the parties or applicable law) by the purported owners and not by the custodian (or other party)" pursuant to 12 C.F.R. § 330.3(h) and 12 C.F.R. § 330.5(a)(1).³⁰

The Opinion also "encourages" that stored-value cards display accurate information about FDIC insurance coverage.³¹ In particular, it recommends that the name of the insured depository institution holding the underlying funds and, "when appropriate," the fact that the funds are FDIC-insured be disclosed to the cardholder.³²

21. *Id.* at 67156.

22. *Id.*

23. *Id.* (citing *FDIC v. Phila. Gear Corp.*, 476 U.S. 426 (1986)).

24. *Id.* at 67157 (citing 12 C.F.R. § 330.5 (2008)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

General Counsel's Opinion No. 8 perpetuates the distinction between bank-based prepaid cards and merchant-based prepaid cards. Although the opinion does not specify the nature of the access mechanism a person may use to access funds in a depository institution or to make a payment to a third party from such funds, it continues to treat differently those transactions in which a consumer draws down a credit held by the merchant.³³

III. THE CREDIT CARD ACCOUNTABILITY, RESPONSIBILITY AND DISCLOSURE ACT

Signed into law on May 22, 2009, Title IV of the Credit Card Accountability, Responsibility and Disclosure Act³⁴ (colloquially known and hereinafter referred to as the "CARD Act") also covers gift cards and gift certificates in ways that some issuers of both products may not have anticipated. The Act, which operates as an amendment to the Electronic Fund Transfer Act ("EFTA"),³⁵ becomes effective on August 22, 2010.³⁶ The Board of Governors of the Federal Reserve System (the "Board") has until February 22, 2010, to adopt regulations implementing the CARD Act, including the requirements of Title IV for gift and other prepaid cards.³⁷ Many cards with which consumers are familiar are covered by new CARD Act requirements; these include so-called "general-use prepaid cards," such as those branded by VISA, MasterCard, Discover, and American Express.³⁸ In addition, cards valid at individual merchants or at affiliated groups of merchants, as well as electronic gift certificates, will be subject to the CARD Act.³⁹ Title IV does not cover prepaid telephone cards, reloadable prepaid cards not marketed as gift cards, cards used for customer award or other promotional purposes or otherwise not marketed to the general public, and gift certificates issued solely in paper form.⁴⁰

A. GENERAL PROHIBITIONS ON GIFT CARDS AND ELECTRONIC GIFT CERTIFICATES

Title IV establishes federal standards for most prepaid cards in areas on which state laws have varied widely—as reported in the 2006, 2007, and 2008 cyberspace law surveys.⁴¹ It covers electronic gift certificates, gift certificates, and "general-use"

33. See *id.* at 67156.

34. CARD Act, *supra* note 4, §§ 401–403, 123 Stat. at 1752–54.

35. 15 U.S.C. §§ 1693–1693r (2006).

36. CARD Act, *supra* note 4, § 403, 123 Stat. at 1754 (stating that it will be effective fifteen months after the date of enactment, May 22, 2009).

37. *Id.* § 401, 123 Stat. at 1753–54 (to be codified at 15 U.S.C. §§ 1693d, 1693m).

38. See Press Release, Mark J. Furlletti, Ballard Spahr Andrews & Ingersoll, LLP, CARD Act Affects Many Gift Cards Issued by Retailers and Banks; May Lead the Fed to Extend Deposit-Account-Like Protections (June 2, 2009) (on file with *The Business Lawyer*).

39. CARD Act, *supra* note 4, § 401, 123 Stat. at 1751–52 (to be codified at 15 U.S.C. § 1693l-1(a)(2)).

40. *Id.*, 123 Stat. at 1752 (to be codified at 15 U.S.C. § 1693l-1(a)(2)(D)).

41. See Allouise, Hughes & Middlebrook, *supra* note 2, at 221–24; *Developments in the Law 2007*, *supra* note 2, at 240–43; *Developments in the Law 2006*, *supra* note 2, at 239–43.

prepaid cards.⁴² The Act's new standards prohibit dormancy, inactivity, and service fees on gift cards and electronic gift certificates unless the issuer discloses the fees conspicuously on the card or certificate,⁴³ brings the fees on the card or certificate to the purchaser's attention,⁴⁴ and begins to assess them only after twelve consecutive months of inactivity on the card or certificate.⁴⁵ In addition, the CARD Act prohibits issuance of gift cards or electronic gift certificates that expire less than five years from their issue date.⁴⁶

B. PREEMPTION OF STATE LAWS ON GIFT CARD AND ELECTRONIC GIFT CERTIFICATE TERMS AND CONDITIONS

The 2006, 2007, and 2008 surveys on prepaid cards included extensive coverage of state laws that prescribed detailed limits on the terms and conditions applicable to gift cards and electronic gift certificates.⁴⁷ Section 402 of the CARD Act preempts some of the terms and conditions to the extent of inconsistency by amending the re-designated section 920 of the Electronic Fund Transfer Act (Relation to State Laws) by inserting after the prior section's mention of "electronic fund transfers" the following: "dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards."⁴⁸

For issuers of stored value, one of the more important issues with the CARD Act is the limited scope of federal preemption of widely divergent state gift card and gift certificate laws.⁴⁹ The CARD Act preempts state laws "only to the extent of the inconsistency."⁵⁰ Because the Act is silent on many subjects that are covered by state gift card and gift certificate laws, it would appear that the Act does not preempt those laws. However, the CARD Act prohibits dormancy fees and charges except when the issuer makes certain disclosures,⁵¹ as well as sales of cards with expiration dates of less than five years,⁵² so that state laws governing those subjects may now give way to the CARD Act's provisions. Preemption is not dependent on Board action. For example, the Board has explained that:

42. CARD Act, *supra* note 4, § 401, 123 Stat. at 1751–52 (to be codified at 15 U.S.C. § 1693l-1(a)(2)).

43. *Id.*, 123 Stat. at 1752–53 (to be codified at 15 U.S.C. § 1693l-1(b)).

44. *Id.* (requiring that dormancy, inactivity, or service fees not only be disclosed on the card, but that the issuer or vendor inform the purchaser of the fees prior to purchase).

45. *Id.*

46. *Id.*, 123 Stat. at 1753 (to be codified at 15 U.S.C. § 1693l-1(c)).

47. See Allouise, Hughes & Middlebrook, *supra* note 2, at 224; *Developments in the Law 2007*, *supra* note 2, at 240–43; *Developments in the Law 2006*, *supra* note 2, at 238–41.

48. CARD Act, *supra* note 4, § 402, 123 Stat. at 1754 (to be codified at 15 U.S.C. § 1693r).

49. See *Developments in the Law 2006*, *supra* note 2, at 243–50.

50. 12 C.F.R. § 205.12(b) (2009).

51. CARD Act, *supra* note 4, § 401, 123 Stat. at 1752–53 (to be codified at 15 U.S.C. § 1693l-1(b)(1), (b)(4)).

52. *Id.*, 123 Stat. at 1753 (to be codified at 15 U.S.C. § 1693l-1(c)).

A state law that is inconsistent may be preempted even if the Board has not issued a determination. However, nothing in [12 C.F.R.] § 205.12(b) provides a financial institution with immunity for violations of state law if the institution chooses not to make state disclosures and the Board later determines that the state law is not preempted.⁵³

As of June 15, 2009, the Board has preempted only some provisions of Michigan law under its pre-CARD Act EFTA preemption authority.⁵⁴

C. BOARD OF GOVERNORS RULEMAKING AUTHORITY FOR EFTA EXTENDED TO GIFT CARDS, GENERAL-USE PREPAID CARDS, AND ELECTRONIC GIFT CERTIFICATES

At this time, neither gift cards nor electronic gift certificates are covered by the EFTA⁵⁵ or Regulation E.⁵⁶ The CARD Act requires that the Board determine anew whether gift cards and electronic gift certificates, together with payroll cards to which the Board extended the EFTA in 2006,⁵⁷ should be subject to the special consumer protection provisions of the EFTA, such as those limiting the consumer's liability for unauthorized transfers⁵⁸ and the periodic statement requirement of the EFTA and Regulation E.⁵⁹ These Board regulations will be entitled to "considerable respect" unless Board interpretations underlying those regulations are "demonstrably irrational" under the test articulated in *Ford Motor Credit Co. v. Millhollin*.⁶⁰ The extent to which the Board's new regulations may preempt additional provisions of state laws will not be clear until the Board publishes its proposed regulations for comment.

The Act also extends the Board's authority to exempt states from Regulation E to include gift cards, general-use prepaid cards, and electronic gift certificates in the re-designated section 922.⁶¹ One commentator has already suggested that the CARD Act's direction to the Board to revisit these coverage issues, as well as the FDIC's recent deposit insurance extension (described in Part II of this Survey), may "portend more deposit-account-like protections for prepaid cards."⁶² While

53. 12 C.F.R. pt. 205.12, supp. 1, § 12(b), ¶ 1 (relation to other laws) (2009).

54. *Id.* ¶ 2.

55. 15 U.S.C. §§ 1693–1693r (2006).

56. Electronic Fund Transfers, 12 C.F.R. pt. 205 (2009).

57. Electronic Fund Transfers, 71 Fed. Reg. 51437 (proposed Aug. 30, 2006) (amending 12 C.F.R. pt. 205 (2005)).

58. *See* 15 U.S.C. § 1693g(a) (2006).

59. *See id.* § 1693d(c); 12 C.F.R. § 205.9(b) (2009).

60. 444 U.S. 555, 565, 566 (1980) (holding that the Board interpretation of the Truth in Lending Act's disclosure requirements entitled to considerable deference unless interpretation demonstrably irrational). *See also* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 235 (2004) (finding the Board determination of scope of term "finance charge" reasonable); Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 862, 865 (1984) (finding the EPA regulation entitled to deference when legislative history silent on issue).

61. CARD Act, *supra* note 4, § 401, 123 Stat. at 1753–54 (to be codified in scattered sections of 15 U.S.C.).

62. Furletti, *supra* note 38.

the Board considers its proposed regulations and determines the extent of pre-emption and non-preemption of state laws, card issuers and holders will remain without clear guidance on their rights under these provisions of the CARD Act and state laws.

D. TREASURY AUTHORITY TO ADOPT COMPREHENSIVE REGULATIONS CONCERNING THE ISSUANCE, SALE, REDEMPTION, AND INTERNATIONAL TRANSPORT OF STORED-VALUE CARDS

Section 503 of the CARD Act also imposes on the Secretary of the Treasury, in consultation with the Secretary of Homeland Security, responsibility to promulgate regulations regarding “the sale, issuance, redemption, or international transport of stored value, including stored value cards.”⁶³ These regulations must be promulgated by February 11, 2010.⁶⁴ The Act also authorizes the regulation’s requirements to include reporting requirements pursuant to 31 U.S.C. § 5316,⁶⁵ and consideration of “current and future needs and methodologies for transmitting and storing value in electronic form” in the final regulations.⁶⁶ These requirements are geared toward money laundering concerns.

IV. CONCLUSION

The two federal developments discussed in this Survey may change the landscape for stored-value products. The development allowing for deposit insurance for bank-based stored-value cards does not eliminate the bankruptcy risk from merchant-issued prepaid cards as discussed in last year’s survey.⁶⁷ Issuers of cards that place the underlying funds with insured depository institutions, so that the cards become access mechanisms for “deposits” under the FDI Act,⁶⁸ can protect cardholders from loss by complying with the three requirements set forth in the FDIC’s new General Counsel’s Opinion No. 8, discussed above.⁶⁹ Taking the extra steps to qualify their customers or employees as eligible for deposit insurance has the felicitous effect of protecting the card issuers or funds custodians from being subject to claims that exceed the amount that any single depositor otherwise could obtain from the FDIC, which currently is capped at \$250,000.⁷⁰

63. CARD Act, *supra* note 4, § 503(a), 123 Stat. at 1756 (to be codified at 31 U.S.C. § 5316). For more discussion about the anti-money laundering aspects of the CARD Act’s stored-value card requirements, see Mark Carpenter & Kevin Kelley, *Senate Approves Collins Amendment Restricting Flow of Drug Cartel Money*, GLOBAL NEWS WIRE—EUR. INTELLIGENCE WIRE (May 19, 2009) (on file with *The Business Lawyer*).

64. See CARD Act, *supra* note 4, § 503(a), 123 Stat. at 1756 (to be codified at 31 U.S.C. § 5311).

65. *Id.* § 503(b).

66. *Id.* § 503(c).

67. Allouise, Hughes & Middlebrook, *supra* note 2, at 221–23.

68. 12 U.S.C. § 1813(c)(1)–(3) (2006).

69. See *supra* notes 28–30 and accompanying text.

70. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 136(a), 122 Stat. 3765, 3799 (temporarily providing an uncodified amendment to 12 U.S.C. § 1821(a)(1)(E)).

Without qualifying cardholders for deposit insurance, issuers could find themselves with liabilities to customers or employees that exceed the amount of deposit insurance proceeds they themselves can expect to obtain. Deposit insurance adds yet another reason beyond the bankruptcy risks of merchant issuers for some consumers to choose cards for which the underlying funds are in a depository institution. Thus, the FDIC's new position may cause consumers to move toward certain prepaid products and away from merchant-issued cards.

The CARD Act represents a huge step into the prepaid card arena by the federal government. In addition to providing new federal standards on the terms and conditions applicable to the vast majority of prepaid products in the United States, the Act mandates the promulgation of federal regulations—by both the Board of Governors of the Federal Reserve Board and the Department of the Treasury—governing many prepaid products.⁷¹ In particular, card issuers and their advisors should monitor the Treasury Department's proposals for regulating prepaid products under 31 U.S.C. § 5316 because of the sizeable penalties for violating regulations promulgated thereunder.⁷² The Board's orientation toward consumer protection goals and the Treasury Department's orientation toward deterrence of money laundering could result in conflicting requirements, unless great care is taken by the Board and the Treasury Department to avoid that result.

Issuers of prepaid products and lawyers representing them must become thoroughly conversant with both of the developments described in this Survey. They also must pay very close attention to the difference in scope between the FDIC's General Counsel Opinion No. 8 (which only covers prepaid cards if a depository institution holds funds)⁷³ and the CARD Act (which covers the vast majority of bank- and merchant-issued prepaid cards, as well as prepaid paper-based gift certificates).⁷⁴ Failure to heed the differences could lead to unexpected liabilities.

All told, the developments reported in this Survey are likely to change the regulatory landscape for most prepaid products significantly, and to shift the primary focus from mastery of state laws to mastery of both federal and state laws.

71. CARD Act, *supra* note 4, § 401(d), 123 Stat. at 1753–54 (to be codified at 15 U.S.C. § 1693l-1(d)); *id.* § 503(a), 123 Stat. at 1756 (to be codified at 31 U.S.C. § 5316).

72. See 31 U.S.C. § 5316 (2006) (providing reporting requirements for monetary transactions); 18 U.S.C. app. § 2S1.3 (2006) (providing for a base offense level of 6, enhanced as provided in 18 U.S.C. app. § 2B1.1 (2006), for a minimum fine of \$5,000 or more).

73. See *Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms*, 73 Fed. Reg. 67155, 67157 (Nov. 13, 2008).

74. CARD Act, *supra* note 4, § 401, 123 Stat. at 1751–52 (to be codified at 15 U.S.C. § 1693l-1(a)).