
ACI'S 6TH NATIONAL FORUM ON
PREPAID CARD COMPLIANCE

The New "A" in UDAAP, Privacy, Third Party Relationships, and Marketing: Regulatory and Compliance Considerations for Prepaid Cards

October 11-12, 2012
San Francisco, California

Panel Participants

Andrew Lorentz

Partner

Davis Wright Tremaine LLP

Christina Hunt-Fuhr

Chief Compliance Officer

Green Dot Corporation

Branan Cooper

Senior Vice President, Director of Third Party Risk

The Bancorp Bank

Overview / Objectives

Objectives of this panel discussion include:

- Identify the key regulators;
- Explain the key points of regulatory guidance for third-party relationships;
- Summarize the principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services, including prepaid cards;
- Summarize other key regulations that govern prepaid card marketing activities;
- Highlight the risks of poor marketing practices;
- Highlight industry best practices to mitigate risks related to marketing activities;
- Provide examples from recent enforcement actions



Key Regulators

Key regulators include:

- The Consumer Financial Protection Bureau (“CFPB”)
 - For depository institutions, the CFPB’s supervision authority applies to banks with total assets of more than \$10 billion and their affiliates. The CFPB also has primary supervisory and enforcement authority over certain non-depository institutions, including prepaid card companies and large providers of consumer financial services.
- The Federal Trade Commission (“FTC”)
 - The FTC is the nation's consumer protection agency and has authority to create and enforce industry-wide trade laws. Within the FTC, the Bureau of Consumer Protection aims to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace and its principal areas of concern are advertising and marketing practices, financial products and practices, and privacy and identity protection.
- The Federal Banking Agencies (e.g., the Federal Reserve Board and the Federal Deposit Insurance Corporation)
 - The federal banking agencies directly regulate the issuing banks that provide prepaid cards.
- The State Banking Agencies and State Attorney General Offices
 - The state banking agencies regulate state-chartered issuing banks and any entities licensed as Money Service Businesses.

Regulatory scrutiny of prepaid card companies has increased significantly in the past year!

Regulating Third Party Relationships

Key agency guidance on third party service providers and recent enforcement actions involving third party service providers:

- CFPB Bulletin on Service Providers
- FDIC “Financial Institution Letter” on Managing Third-Party Risks
- FFIEC Handbooks on Outsourcing Technology Services and Supervising Technology Service Providers
- Enforcement actions
 - Capital One Bank (CFPB)
 - The Bancorp Bank (FDIC)
 - American Express (CFPB, FDIC, Federal Reserve, OCC)

CFPB Authority Over Third Party Service Providers

CFPB jurisdiction includes a “covered person”

- Defined as “any person that engages in offering or providing a consumer financial product or service” and
- “[A]ny affiliate of a [covered] person ... if such affiliate acts as service provider to such [covered] person”

CFPB jurisdiction extends to a covered person’s “service provider”

- A “service provider” is defined as “[a]ny person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service...”
- “A service provider...shall be subject to the authority of the Bureau under this section, to the same extent as if such service provider were engaged in a service relationship with a bank, and the Bureau were an appropriate Federal banking agency under section 7(c) of the Bank Service Company Act (12 U.S.C.1867(c)).”

CFPB Bulletin 2012-03 (Apr. 13, 2012) re: Service Providers

The CFPB clarifies that service providers need to comply with Federal consumer financial law, and that the bank/non-bank is responsible for supervising its third parties.

- “[T]he mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with Federal consumer financial law to avoid consumer harm.”
- “Depending on the circumstances, legal responsibility may lie with the supervised bank or nonbank as well as with the supervised service provider.”

CFPB Bulletin 2012-03 (Apr. 13, 2012) re: Service Providers

CFPB “expectations” regarding the bank or nonbank’s relationship with its service provider:

- Due diligence to verify provider’s understanding and compliance with Federal consumer financial law;
- Review provider’s policies, procedures, internal controls and training materials;
- Include clear contractual expectations regarding provider’s compliance and enforceable consequences for non-compliance;
- Establish internal controls and monitoring of provider’s legal compliance;
- Take prompt action to address problems, including termination of the provider relationship when appropriate.

FDIC Authority Over Institution-Affiliated Parties

- “Institution-affiliated party” means
 - An “agent for” the insured depository institution;
 - “[A]ny other person...who participates in the conduct of the affairs of an insured depository institution;”
 - “[A]ny independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in
 - any violation of any law or regulation;
 - any breach of fiduciary duty; or
 - any unsafe or unsound practice,which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.”

FIL-44-2008, Managing Third-Party Risk (June 6, 2008)

- Institution's board of directors and senior management are responsible for managing activities conducted through third-party relationships and related risks to the same extent as if the activity were handled within the institution.
- Guidance applies to “significant third-party relationships”, which include relationships that:
 - Are new
 - Involve implementing new bank activities
 - Have a material effect on revenues or expenses
 - Involve a third party performing critical functions
 - Involve a third party storing, accessing, transmitting, or performing transactions on sensitive customer information

- “Significant third-party relationships” (cont’d)
 - Involve the third party marketing bank products or services
 - Involve products or services related to subprime lending or card payment transactions
 - Pose risks that the third party’s activity could significantly affect earnings or capital

FIL-44-2008, Managing Third-Party Risk (June 6, 2008)

Potential third party risks

- Strategic -- adverse business decisions, failure to implement appropriate business decisions consistent with strategic goals.
- Reputation – negative public opinion.
- Operational – risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events
- Transaction – problems with service or product delivery
- Credit – risk that third party or other creditor necessary for third party relationship is unable to meet terms of contract with institution, or otherwise to financially perform as agreed
- Compliance – violation of laws, rules, or regulations, or noncompliance with internal policies or procedures or with institution's business standards

FIL-44-2008, Managing Third-Party Risk (June 6, 2008)

Four elements of an effective third party risk management process:

- Risk Assessment – strategic planning and overall business strategy, cost-benefit, ongoing oversight and management, long-term financial effects.
- Due Diligence – address qualitative and quantitative aspects of third parties, directly related to the importance and magnitude of the relationship.
- Contract Structuring and Review – scope, cost/compensation, performance standards, reports, auditing, confidentiality, complaints, default and termination, dispute resolution, ownership and licensing, indemnification, and liability limits.
- Oversight of third-party activities – quality control over products and services and compliance with law, through initial as well as ongoing periodic reviews.

FFIEC Handbook: Outsourcing Technology Services (June 2004)

Explains how bank regulators review risk management processes when considering or executing an “outsourced” third-party technology relationship for critical banking functions (*e.g.*, origination, processing, settlement, account maintenance, information transaction processing).

- Board and management responsibilities
- Risk management
- Service provider selection process (due diligence)
- Contract terms, SLAs, pricing, bundling, contract inducements
- Monitoring (service levels, provider’s financial condition, audits and reporting, market or industry changes)
- Other matters include: business continuity planning, information security/safeguards, multiple service provider relationships, outsourcing to foreign service providers.

FFIEC Handbook: Supervision of Technology SPs (March 2003)

After selecting a service provider, regulators will examine the process for on-going, risk-based supervision of service providers, including:

- Identifying existing or potential service provider risks that could adversely affect the institution
- Evaluate service provider's risk management system and controls
- Determine compliance with applicable laws and regulations that affect institution's services
- Communicate findings, recommendations and corrective actions to service provider
- Obtain commitments to correct deficiencies, verify effectiveness of corrective measures
- Monitor significant changes in service provider's products, services, practices

FFIEC Handbook: Supervision of Technology SPs (March 2003)

Regulators will evaluate several categories of risk:

- Transaction (operational) risk: fraud, error, inability to deliver goods or services, mismanagement of information
- Reputation risk: errors, delays, omissions that become known to public that adversely affect FI's reputation
- Strategic risk: inaccurate information that can lead to poor strategic decisions by FI
- Compliance (legal) risk: inaccurate, untimely data related to consumer disclosures, unauthorized disclosure of confidential information, leading to civil penalties and litigation
- Interest rate, liquidity, and price (market) risk: processing errors related to investment income or repayment assumptions that increase interest rate risk for FI

In re: Capital One (2012-CFPB-0001, July 18, 2012)

- First public enforcement action by the CFPB to settle charges that Capital One's third party call-center vendors used "deceptive marketing tactics" to pressure or mislead consumers into paying for ancillary credit card products, such as payment protection and credit monitoring services.
- Capital One required to pay \$140 million restitution and \$25 million civil monetary penalty; also required to do the following:
 - Develop written policy governing management of service providers, analysis of provider's capacity in performing marketing, sales, delivery, servicing and fulfillment in compliance with applicable law;
 - Ensure that service contract sets forth service provider's specific responsibilities and duties regarding internal compliance controls, training, audits, and termination.
- Parallel OCC consent order required Capital One to pay a \$35 million civil monetary penalty for FTC Act violations and \$10 million in restitution.

In re: The Bancorp Bank (FDIC-11-703k, Aug. 7, 2012)

- FDIC found that Bancorp Bank engaged in unsafe and unsound banking practices, and deceptive and unfair acts and practices, in connection with a deposit account product offered in conjunction with its “institution-affiliated party” Higher One, Inc. Bancorp directed to pay \$172,000 civil monetary penalty (Higher One ordered to pay \$11 million in restitution).
- Bancorp Board of Directors directed to do the following:
 - Increase oversight of bank’s affairs (approve third-party products and services, require products and services to comply with law)
 - Implement risk-based compliance management system to ensure provider’s practices and products and services comply with law
 - Review and revise audit program, internal audit of third parties
 - Develop and implement third party risk management program (citing to FIL-44-2008)

In re: American Express (12-066-B-HC *et al*, Oct. 1, 2012)

- Multi-agency enforcement action (incl. CFPB, FDIC, Federal Reserve and OCC) against American Express Centurion Bank, American Express Bank, FSB, and American Express Travel Related Services Company, Inc.
- Allegation of deficient management oversight of service providers.
 - Required to maintain effective monitoring, training, record-keeping, and audit of service provider agreements and performance.
- Other alleged violations include:
 - Deceptive debt collection and marketing practices
 - Excessive late fees
 - Ineffective board and management oversight
 - Discrimination
 - Credit reporting failures
 - Deficient compliance program and staffing, internal audit
- American Express parties required to pay \$85 million in restitution, approximately \$27 million in civil penalties

Key Issues / Importance

Risks related to companies with inadequate third party practices are similar to the risks of those with poor marketing practices. These marketing risks include:

- Reputation risk;
- Financial risk resulting from litigation and settlements/fines;
- Enforcement actions; and
- Cease and desist orders.

Examples of specific consequences will be highlighted later.



Key Marketing-Related Regulations

Key consumer laws and regulations relevant to prepaid card marketing practices include:

- Unfair, Deceptive or Abusive Acts or Practices
 - Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice (“UDAAP”).
 - UDAAP is an expansion of the FTC’s “UDAP” provisions – unfair or deceptive acts or practices.
 - An unfair, deceptive, or abusive act or practice may also violate other federal or state laws.
- The Credit Card Accountability Responsibility and Disclosure Act of 2009 (“the CARD Act”)
- Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act of 2003
- The Telephone Consumer Protection (“TCPA”) Act
- Various additional State laws and regulations (covering UDAP, gift cards, etc.)



Unfair Acts or Practices

An act or practice is unfair when:

- It causes or is likely to cause substantial injury to consumers.
 - Substantial injury usually involves monetary harm. Monetary harm includes, for example, costs or fees paid by consumers as a result of an unfair practice. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.
- The injury is not reasonably avoidable by consumers.
 - Consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury. If material information about a product, such as fees, is modified after, or withheld until after, the consumer has committed to purchasing the product, the consumer cannot reasonably avoid the injury.
 - The key question is whether an act or practice hinders a consumer's decision-making. For example, not having access to important information could prevent consumers from comparing available alternatives, choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory.
 - The actions that a consumer is expected to take to avoid injury must be reasonable.
- The injury is not outweighed by countervailing benefits to consumers or to competition.
 - To be unfair, the act or practice must be injurious in its net effects. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.

Deceptive Acts or Practices

A representation, omission, act or practice is deceptive when:

- The representation, omission, act, or practice misleads or is likely to mislead the consumer.
 - It is necessary to evaluate an individual statement, representation, or omission not in isolation, but rather in the context of the entire advertisement, transaction, or course of dealing, to determine whether the overall net impression is misleading or deceptive.
 - Written disclosures may be insufficient to correct a misleading statement or representation, and fine print disclosures may be insufficient to cure a misleading headline or a prominent written representation. Similarly, a deceptive act or practice may not be cured by subsequent accurate disclosures.
 - Acts or practices that may be deceptive include: making misleading cost or price claims; using bait-and-switch techniques; omitting material limitations or conditions from an offer; or failing to provide the promised services.
 - The FTC's "four Ps" test can assist in the evaluation of whether a representation, omission, act, or practice is likely to mislead:
 - Is the statement **prominent** enough for the consumer to notice?
 - Is the information **presented** in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?
 - Is the **placement** of the information in a location where consumers can be expected to look or hear?
 - Finally, is the information in close **proximity** to the claim it qualifies?

Deceptive Acts or Practices (continued)

A representation, omission, act or practice is deceptive when:

- The consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances.
 - Whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the representation. When representations or marketing practices target a specific audience, such as older Americans, young people, or financially distressed consumers, the communication must be reviewed from the point of view of a reasonable member of that group.
 - Advertisers are responsible for all reasonable interpretations of a statement, not just the most likely interpretation. A representation may be deceptive if the majority of consumers in the target class do not share the consumer’s interpretation, so long as a significant minority of such consumers is misled.
 - Exaggerated claims or “puffery” are not deceptive if the claims would not be taken seriously by a reasonable consumer.
- The misleading representation, omission, act, or practice is material.
 - A representation, omission, act, or practice is material if it is likely to affect a consumer’s choice of, or conduct regarding, the product or service. Certain categories of information are presumed to be material. In general, information about the central characteristics of a product or service – such as costs, benefits, or restrictions on the use or availability – is presumed to be material.
 - Claims made with knowledge that they are false are presumed to be material. Omissions are presumed to be material when the company knew or should have known that the consumer needed the omitted information to evaluate the product or service.

Abusive Acts or Practices

An abusive act or practice:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of –
 - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
 - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Although abusive acts also may be unfair or deceptive, the legal standards for abusive, unfair, and deceptive each are separate.



CFPB Bulletin 2012-06 (July 18, 2012) re: Credit Card Add-Ons

Clarifies regulatory compliance requirements for the marketing of credit card add-on products, such as debt protection, identity theft protection, credit score tracking and other products supplementary to the underlying credit.

- Although specific to credit cards, clarifies that institutions should apply guidance to similar products in connection with other forms of credit or deposit services.

CFPB Bulletin 2012-06 (July 18, 2012) re: Credit Card Add-Ons

Applicable consumer protection laws and regulations highlighted by the Bulletin:

- UDAAP, including liability of any person that “knowingly or recklessly provide[s] substantial assistance to a covered person or service provider.”
- Truth in Lending Act / Regulation Z, *e.g.*, account-opening disclosures, periodic statements, advertising, fees for debt cancellation and suspension plans.
- Equal Credit Opportunity Act / Regulation B, *e.g.*, using race or age to require purchase of add-on products as condition of obtaining credit.
- CFPB expectations regarding marketing materials, employee incentive or compensation programs, customer service scripts and manuals, compliance management programs.

Example of Consequences

In addition to enforcement actions against Capital One, The Bancorp Bank and American Express, Discover Bank was also subject to civil and enforcement action resulting from allegations of unfair or deceptive acts or practices.

- In January 2012, a class action settlement was reached in several class action lawsuits against Discover Bank and certain other companies affiliated with Discover Bank.
- The settlement alleged that Discover engaged in various wrongdoing in connection with four fee-based products offered by Discover Bank including, but not limited to:
 - Enrolling consumers in Products without their consent;
 - Misrepresenting and omitting material facts regarding the cost of the Products;
 - Hiding the true nature of telemarketing calls and misrepresenting that consumers would receive promotional materials prior to enrollment;
 - Misrepresenting the date of enrollment for Products;
 - Improperly/inaccurately assessing fees and assessing unconscionably high fees.
- Under the Settlement, Discover agreed to create a Settlement Fund of \$10,500,000 to fund the payment of claims as well as the costs of the litigation.

In re: Discover Bank (FDIC-11-548b, 11-551k, 2012-CFPB-0005)

- In September 2012, the FDIC and CFPB found that Discover Bank's marketing, sales, and operation of payment, identity and credit protection credit card services were deceptive acts and practices, unsafe and unsound banking practices
- Discover Bank was ordered to pay approx. \$200 million in restitution, \$14 million in civil money penalty

State Investigation – Florida Attorney General

In addition to federal enforcement actions, state AGs also have authority to investigate and prosecute for unfair and deceptive practices.

- In May 2011, Florida AG investigated five prepaid debit card companies for potential unfair and deceptive practices.
 - Subpoenas focused on the possibility of hidden fees on prepaid cards
 - Some subpoenas inquired about alleged misrepresentations promising to improve credit scores
 - Investigated companies included First Data Corp., Green Dot Corp., Account Now, Inc., Netspend Corp., and Unirush Financial Services, LLC

The Card Act

The final rules implementing the CARD Act became effective August 22, 2010.

The final rules require specific disclosures and include restrictions on fees and expirations dates for certain prepaid products, primarily gift cards.

The final rules provide an exclusion for cards that are reloadable and not marketed or labeled as gift cards.

- The term marketed or labeled as a gift card means directly or indirectly offering, advertising, or otherwise suggesting the potential use of a card as a gift for another person.
- Whether the exclusion applies generally does not depend on the type of entity that makes the promotional message.
 - A card may be deemed to be marketed or labeled as a gift card if anyone, including the issuer, the retailer, and the program manager, promotes the use of the card as a gift card.

The exclusion for cards that are reloadable and not marketed or labeled as gift cards applies if the reloadable cards are not marketed or labeled as gift cards and if persons subject to the rules, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing.

The Card Act – Disclosures for and Restrictions on Gift Cards

Dormancy, inactivity or service fees are not permissible unless:

- There has been no activity on the Gift Card for 12 consecutive months prior to the date on which the fee is imposed;
- The dormancy, inactivity, or service fee is clearly disclosed prior to purchase (e.g., on the Gift Card packaging) and on the Gift Card itself.
- Not more than one dormancy, inactivity, or service fee is imposed in any given month.

Expirations dates are not permissible unless:

- Consumers have a reasonable opportunity to purchase a Gift Card with at least five years remaining until the Gift Card expiration date;
- The expiration date of the underlying funds is the later of: i) five years after the date the Gift Card was initially issued or the date on which funds were last loaded to the Card; or ii) the Gift Card expiration date, if any.
- No fee is imposed for replacing the Gift Card prior to the funds expiration date, unless such Gift Card has been lost or stolen.

Looking at the above requirements and prohibitions on Gift Cards, it is very important that general purpose reloadable cards are not marketed as gift cards!

The Card Act – Exclusion for Reloadable and Not Marketed/Labeled as Gift Cards

The term “reloadable” includes temporary non-reloadable cards, but only if they are issued solely in connection with a reloadable card.

The term “marketed or labeled as a gift card” means directly or indirectly offering, advertising or otherwise suggesting the potential use of a card as a gift for another person and includes:

- Use of the words “gift” or “present” or other gift-related terms, themes, or images (e.g., bows or candles) within or on product ads, in-store displays, or other in-store signage.
- Ambiguous placement of products in ads or in-store displays near over-arching gift-related themes (e.g., on a website that displays a banner ad or graphic that prominently states “gift cards” or gift giving”).
- Use of category signage or labels that identify the entire display as a “gift card” set.
 - Stand-alone placement of products is preferable.
 - If separate displays cannot be used, segregation of the products from gift cards (using, for example, colors, design, and/or signage) to clearly differentiate between the two products is critical.
 - Particular attention should be paid to marketing on or around ads and in-store displays during key “gift” holiday seasons.

The Card Act – Exclusion for Reasonable Policies and Procedures

Policies and procedures reasonably designed to avoid the marketing of reloadable cards as gift cards include:

- Contractual provisions
 - Provisions should prohibit reloadable cards from being marketed or labeled as gift cards.
- Merchandising guidelines
 - Guidelines should outline how the products may be displayed in retail outlets.
- Controls
 - Controls should include regular monitoring to verify that the cards are not being marketed as gift cards.

The Card Act- Important Considerations

Actions of any party that may be involved in the distribution or promotion of a card that are inconsistent with the CARD Act can nullify the exclusion.

To the extent that more than one party may be liable under the final rule, those parties may contract among themselves to ensure compliance.

- If a party that has contractually agreed to satisfy a compliance obligation fails to do so, however, each of the parties is potentially accountable under the final rule.
- The parties can allocate among themselves the financial obligation for any liability resulting from the failure, but reputation risks and other risks (e.g., the risks associated with the potential for being subject to an order to cease and desist from the sale of certain products) remain.

The Card Act – Example where Exclusion Applies

The following example illustrates the application of the Card Act:

- An issuer or program manager of prepaid cards agrees to sell general-purpose reloadable cards through a retailer. The contract between the issuer or program manager and the retailer establishes the terms and conditions under which the cards may be sold and marketed at the retailer. The terms and conditions prohibit the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and require policies and procedures to regularly monitor or otherwise verify that the cards are not being marketed as such.
- The issuer or program manager sets up **one promotional display at the retailer for gift cards and another physically separated display for excluded products**, including general-purpose reloadable cards and wireless telephone cards, such that a reasonable consumer would not believe that the excluded cards are gift cards.
- **The exclusion applies** because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

The Card Act – Another Example where Exclusion Applies

The following example provides another illustration of the application of the Card Act:

- Same facts as noted on the prior slide, except:
- The issuer or program manager sets up **a single promotional multi-sided display** at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards are sold. Gift cards are segregated from excluded cards, with gift cards on one side of the display and excluded cards on a different side of a display. **Signs of equal prominence at the top of each side of the display clearly differentiate** between gift cards and the other types of prepaid cards that are available for sale. **The retailer does not use any more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating “Gift Cards” at the top of the display or located near the display.**
- **The exclusion applies** because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

The Card Act – Example where Exclusion Does Not Apply

The following example provides another illustration of the application of the Card Act:

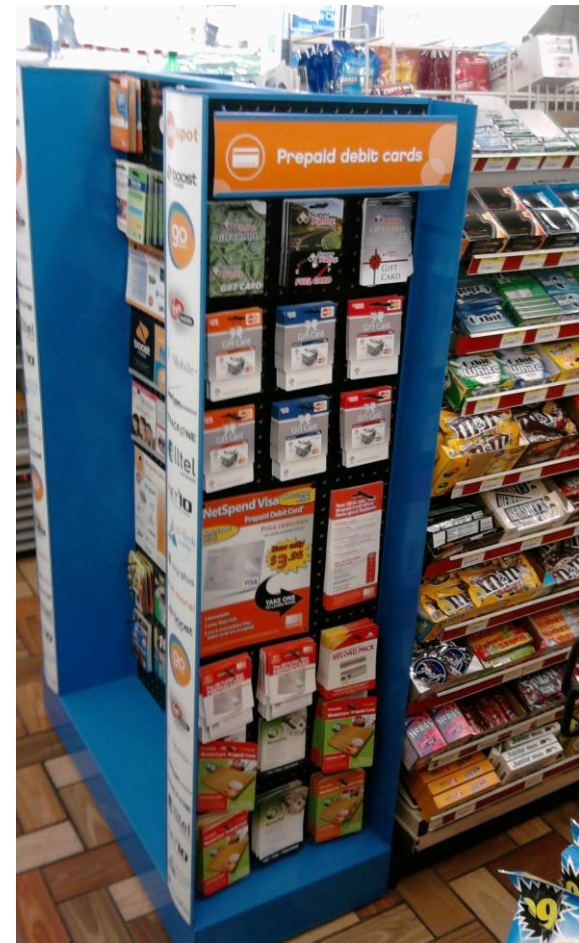
- Same facts as noted on the prior slide, except:
- The issuer or program manager sets up **a single promotional display** at the retailer on which a variety of prepaid cards are sold, including store gift cards and general-purpose reloadable cards. **A sign stating “Gift Cards” appears prominently at the top of the display.**
- **The exclusion does not apply** with respect to the general-purpose reloadable cards because policies and procedures reasonably designed to avoid the marketing of excluded cards as gift cards or gift certificates are not maintained.

The Card Act – Examples of Compliant Displays

Display has clear delineation between gift and prepaid debit cards, with signs of equal prominence to clearly differentiate between the two.



While gift and prepaid debit cards are on same section of the display, display does not have any signage or other affirmative indication of the availability of gift cards.



CAN-SPAM: Marketing via Email

The following guidance applies when sending commercial advertisements or promotions of a commercial product or service via email:

- The header information (e.g., the “From” information) must be accurate and identify the sender as initiating the message;
- The subject line must accurately reflect the content of the message;
- The fact that the message is an advertisement must be clearly and conspicuously disclosed;
- The message must include a valid physical postal address;
- The message must include a clear and conspicuous explanation of how the recipient can opt-out of getting email from the sender;
- The opt-out mechanism must be able to process opt-out requests for at least 30 days after the message is sent; and
- The opt-out request must be honored within 10 business days.
- You cannot send messages to consumers who have previously opted out.

TCPA: Marketing via Text

With regard to mobile service commercial messages (“MSCMs” or texts) sent to a wireless device, the following requirements apply:

- MSCMs may only be sent if “express prior authorization” has been received either orally or in writing (this authorization will likely be in the form of an “opt-in” from customers who wish to receive messages sent to their wireless devices or cell phones);
- The opt-in process must clearly state who the messages are from;
- Recipients must be given the opportunity to revoke authorization or “opt out” of receiving future messages and must be given the opportunity to opt out the same way the recipient “opted in”, including by dialing a short code;
 - There is no requirement that every text message contain opt-out information, but Mobile Marketing Association guidelines require that opt-out information be presented at the outset and on a regular basis (e.g., weekly).
- The opt-out request must be honored within 10 business days.
- Mobile Marketing Association (“MMA”) and mobile carriers impose additional requirements.
 - As an example, marketing materials for text message programs must include MMA and carrier-required disclosures, such as “Message & Data rates may apply.”

Company Policies, Practices, and Controls

Written policies should be in place to address all key regulatory and internal requirements relevant to prepaid card activities.

Policies should be:

- Overseen by senior management and/or the Board of Directors.
- Updated no less than annually.
- Communicated to all relevant employees.

Policies should require marketing materials to:

- Draw attention to key terms, including limitations and conditions, that provide a customer all relevant information before they select a product or service (“informed decision”);
- Avoid fine print or separate statements (e.g., footnotes) to clarify less than informative, potentially misleading, or contradictory headlines;
- Use particular care with words such as “free;” and
- Consider the sophistication and experience (or lack thereof) of the target audience.



Company Policies, Practices, and Controls

Key policy provisions and actual practices should require:

- Review and approval of all marketing materials and disclosures by Legal and/or Compliance, as well as by all relevant external stakeholders (e.g., relevant product partners, issuing banks, and associations)
- Review of marketing materials by someone in a Customer Advocacy role
 - The consumers point of view must be considered so someone who has a good understanding of the sophistication of the customer base should be involved
- Inclusion of all marketing materials in the review process (e.g., product packaging, point of purchase materials, displays, and circular advertisements, as well as email, text, web, television, or radio advertisements)
- Inclusion of all relevant consumer facing touch points in the review process (e.g., IVR scripts and call center agent training materials)
 - If your company is actively using social media (e.g., Facebook and Twitter), don't forget to include those touch points!
- Documentation of all reviews and approvals

Company Policies, Practices, and Controls

Key policy provisions and actual practices should also require:

- Training of relevant employees on the regulatory requirements and internal practices
 - Employees in departments subject to increased UDAAP-related risk (e.g., Marketing, Customer Service, Customer Advocacy, Call Center Administration, Servicing, etc.) should be covered by the training
- Monitoring of any third party email marketing activities using internal and/or external tools
 - Note: The use of third parties and their affiliates in email marketing campaigns can significantly increase risks!
- Reviewing and evaluating new or modified products and services for potential UDAAP concerns
- Reviewing complaints from all sources (e.g., not only from the CFPB, state attorney generals, and the Better Business Bureau, but also from social media sources such as Facebook)
- Timely remediating issues (including providing restitution, if necessary) when issues are identified
- Reporting to senior management and the Board

Company Policies, Practices, and Controls

With regard to the Card Act, to protect everyone in the distribution chain, key policy provisions and actual practices should also require:

- Retailers to execute amendments to agreements that outline prohibitions relating to the marketing or labeling of general purpose reloadable (“GPR”) as gift cards;
- Distribution of appropriate Card Act compliance guidelines, as well as advertising and merchandising guidelines, to retailers that outline how GPR products may (and may not) be advertised or displayed by retailers;
- Retailers to provide copies of their own Card Act-related policies and procedures, or alternatively, to provide certifications with regard to the adoption of the company’s Card Act compliance materials as part of the retailer’s Card Act-related policies and procedures;
- Legal and/or Compliance to review and approve planograms and/or pictures of displays that will be used by retailers to market and sell GPR products; and
- Routine monitoring, with visits to stores to verify that GPR reloadable products are not being marketed as gift cards and are being marketed consistent with approved planograms.

Company Policies, Practices, and Controls

With regard to complaints, key considerations include:

- Considering each and every complaint as an opportunity to improve
- Reviewing complaint volume and trends with senior management and the Board
- Identifying complaints that allege or may have resulted from unclear practices/potential UDAP concerns
 - Confusion may result not only from specific marketing materials, but also from call center/agent communications with customers.
- Quickly assessing the root cause, identifying the scope and impact of the issue, and taking appropriate corrective action
 - Appropriate correction action could include having to modify marketing materials or fully reset displays.



Issuing Bank Considerations

Specific considerations for a third-party risk management include:

- Development and formal adoption of a plan, with regular reporting to senior management and the Board
 - Identification/inventory of third parties used by the company (note: this is often a seemingly endless process)
 - Institution of strong service level agreements and contractual obligations
 - Implementation of risk based assessments
 - Consider all facets of risk laid out in FDIC FIL 44-2008
 - Consider both business risk threshold and regulatory risks
 - Appropriate due diligence standards based on role the third party plays
 - Ongoing monitoring
 - Examples include mystery shopping, website testing, monitoring of the news
 - The goal is to try to have clear view from company to consumer
 - Review and approval of materials with representation from Compliance, Legal, Marketing, and Technology
-

Questions

