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Unfair, Deceptive, and Abusive: Prison Release Cards and the Protection of Captive Consumers

I. INTRODUCTION

In October 2021, the Consumer Financial Protection Bureau (“CFPB”) announced a \$6 million settlement with JPay,¹ a leading provider of financial services in prisons and jails.² The consent order detailed how JPay’s prepaid debit cards took advantage of justice-involved people³ as they were released from carceral facilities.⁴ As the CFPB’s first enforcement action under Director Rohit Chopra, the action signaled the Bureau’s concern about incarcerated people’s unique vulnerabilities to exploitative financial products.⁵

1. JPay LLC, CFPB No. 2021-CFPB-0006 at 27–28 (Oct. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_jpay-llc_consent-order_2021-10.pdf [<https://perma.cc/TJ9P-HVF5>]; *Statement of CFPB Director Rohit Chopra on the JPay Enforcement Action*, CONSUMER FIN. PROT. BUREAU (Oct. 19, 2021) [hereinafter CFPB, *Rohit Chopra on JPay*], <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-the-jpay-enforcement-action> [<https://perma.cc/42T9-P28C>].

2. Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 602–03; Daniel Wagner, *Prison Bankers Cash in on Captive Customers*, CTR. FOR PUB. INTEGRITY (Sept. 30, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/prison-bankers-cash-in-on-captive-customers> [<https://perma.cc/U7RF-USKF>].

3. A note on language: While many of the sources referenced in this note may refer to people in prisons or jails as “inmates,” “offenders,” or “prisoners,” these terms carry and reinforce stigma against people who are held in custody. The CFPB report on the topic uses “justice-involved individuals,” and this note will use “justice-involved people,” “justice-involved consumers,” “incarcerated people,” and “formerly incarcerated people,” as appropriate, to refer to the consumers impacted by prison banking and financial systems through municipal jails, state prisons, or federal prisons. See CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE (2022) [hereinafter CFPB, JUSTICE-INVOLVED INDIVIDUALS], https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf [<https://perma.cc/JK9D-GS6T>]. Similarly, while the accounts created for incarcerated people during their incarceration are often referred to as “inmate trust accounts,” this note will use the term “prison accounts.” See *infra* note 52 for additional discussion of prison accounts.

4. JPay LLC, CFPB No. 2021-CFPB-0006 at 10–22 (Oct. 19, 2021).

5. Evan Weinberger, *Chopra’s First CFPB Actions Send Warning on Unfair Competition*, BLOOMBERG L. (Oct. 25, 2021, 12:10 PM), <https://news.bloomberglaw.com/banking-law/chopra-sends-warning-on-unfair-competition-in-first-cfpb-actions> [<https://perma.cc/U4LS-DQ76>].

When someone is released from prison or jail, release funds may include any wages earned during their incarceration, any remaining balances in their prison accounts, or any “gate money” benefits.⁶ Gate money programs aid re-entry by providing people with modest funding to cover basic transportation, housing, and food expenses in the first hours after release.⁷ While these release funds were traditionally available by cash or check, in the mid-2000s many departments of corrections started contracting with financial technology companies to offer prepaid debit cards.⁸ Over time, some departments of corrections eliminated the cash or check options and started to require that incarcerated people receive funds on prepaid debit cards.⁹

As part of a CFPB rulemaking process that culminated in a final rule on prepaid cards in 2016, a variety of civil rights organizations raised concerns about the predatory nature of prepaid cards in American prisons and jails.¹⁰ In response, the CFPB’s final rule noted that certain

6. Stephen Raher, *Insufficient Funds: How Prison and Jail “Release Cards” Perpetuate the Cycle of Poverty*, PRISON POL’Y INITIATIVE (May 3, 2022) [hereinafter Raher, *Insufficient Funds*], <https://www.prisonpolicy.org/blog/2022/05/03/releasecards/> [<https://perma.cc/673V-43BR>]; Mia Armstrong & Nicole Lewis, *What Gate Money Can (and Cannot) Buy*, MARSHALL PROJECT (Sept. 10, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/09/10/what-gate-money-can-and-cannot-buy> [<https://perma.cc/MP8K-AM5U>].

7. Armstrong & Lewis, *supra* note 6.

8. See Wagner, *supra* note 2 (“In 12 years [from 2002 to 2014], JPay says it has grown to provide money transfers to more than 1.7 million offenders in 32 states, or nearly 70 percent of the inmates in U.S. prisons.”); see also Prison Pol’y Initiative, Comment Letter on Proposed Rule on Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) at 1 (Mar. 18, 2015), <https://static.prisonpolicy.org/releasecards/CFPB-comment.pdf> [<https://perma.cc/79TC-QW73>] (describing prison release cards as a “relatively new phenomenon” that was “being adapted by an increasing number of agencies” in 2015).

9. Stephen Raher, *Will the Consumer Financial Protection Bureau Protect the Public from High-Fee “Release Cards”?*, PRISON POL’Y INITIATIVE (Feb. 6, 2015), [hereinafter Raher, *Protect the Public*] <https://www.prisonpolicy.org/blog/2015/02/06/release-cards> [<https://perma.cc/LZQ9-96G3>] (“Facilities used to issue checks or give refunds in cash. But an increasing number of jurisdictions are now giving people their money in the form of prepaid debit cards . . .”).

10. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E), 81 Fed. Reg. 83934, 83984 (Nov. 22, 2016); see, e.g., Press Release, Hum. Rts. Def. Ctr., Sixty-Eight Organizations Urge Federal Consumer Agency to Protect Former Prisoners from Excessive Release Debit Card Fees (Mar. 24, 2015), <https://www.humanrightsdefensecenter.org/action/news/2015/hrdc-files-joint-comment-cfpb-re-release-debit-cards/> [<https://perma.cc/MSX6-8HWM>] (urging the CFPB to ban all fees on release cards in a comment drafted by the Human Rights Defense Center and joined by organizations including All of Us or None, National Lawyers Guild, National Police Accountability Project, Southern Center for Human Rights, and Southern Poverty Law Center).

prison release cards were already subject to consumer financial protection laws about prepaid cards, and stated that the CFPB was “continuing to monitor financial institutions’ and other persons’ practices relating to consumers’ lack of choice.”¹¹

A few years later, this commitment to monitor prison release cards came to fruition in the 2021 enforcement action targeting JPay,¹² which identified a variety of consumer protection law violations.¹³ According to the CFPB, JPay’s prison release cards took advantage of incarcerated people in several ways, including “[i]llegally requir[ing] consumers in certain states to receive protected government benefits on debit release cards,” “abus[ing] its market dominance,” “[c]harg[ing] fees without authorization,” and “[m]isrepresent[ing] fees to consumers.”¹⁴

The bulk of the violations involved either prohibitions on forcing consumers to use specific financial products to receive wages or government benefits, or prohibitions against unfair, deceptive, and abusive practices.¹⁵ While the order was specific to JPay’s conduct, it significantly clarified legal limits on prepaid debit release cards and can be seen as one step in a broader effort to develop the CFPB’s ability to hold companies accountable for abusive conduct that takes advantage of vulnerable consumers, especially justice-involved consumers.¹⁶

This Note proceeds in six parts and examines how the JPay consent order fits into broader CFPB efforts to protect justice-involved people from predatory financial products. Part II provides context for how preloaded debit cards fit into the broader landscape of prison banking.¹⁷ Part III assesses the statutory and regulatory landscape that applies to prepaid debit cards, including the Electronic Fund Transfer

11. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E), 81 Fed. Reg. at 83985.

12. See Wagner, *supra* note 2 (“JPay has become a critical financial conduit for an opaque constellation of vendors that profit from millions of poor families [I]t has grown to provide money transfers to more than 1.7 million offenders in 32 states, or nearly 70 percent of the inmates in U.S. prisons.”).

13. JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2 (Oct. 19, 2021).

14. *CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-Enter Society After Incarceration*, CONSUMER FIN. PROT. BUREAU (Oct. 19, 2021) [hereinafter CFPB, *CFPB Penalizes JPay*], <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration> [<https://perma.cc/CT3F-SWH5>].

15. *Id.*; JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2, 14–16.

16. JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2, 14–16; see *infra* Part IV.

17. See *infra* Part II.

Act (“EFTA”), its implementing rules under Regulation E, and the CFPB’s standard for assessing unfair, deceptive, and abusive practices.¹⁸ Part IV explores the steps that the CFPB has taken under President Biden to expand protections for justice-involved people using existing statutes and regulations.¹⁹ Part V suggests potential next steps for protecting the rights of justice-involved consumers.²⁰ Part VI summarizes and concludes this Note.²¹

II. PREPAID DEBIT CARDS IN A PRISON INDUSTRIAL CONTEXT

A. *The Scale and Disparities of the Carceral System*

The United States continues to incarcerate a larger share of its population than any other country in the world, and maintains the highest overall number of people behind bars.²² Across local jails, state prisons, federal prisons, and other detention facilities, around two million people are confined at a time in the United States, over a million of whom are held in state prisons.²³ At any given time, over 800,000 people are on parole and almost three million people are on probation.²⁴ However, even these numbers fail to capture the scope of incarceration, because point-in-time statistics fail to account for jail “churn,” the number of people entering and leaving jail each year.²⁵ In 2021, “about

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

22. *See* NAT’L INST. OF CORR., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014), <https://nicic.gov/resources/nic-library/all-library-items/growth-incarceration-united-states-exploring-causes-and> [<https://perma.cc/XS8E-EFJL>] (“The U.S. penal population of 2.2 million adults is by far the largest in the world The U.S. rate of incarceration, with nearly 1 out of every 100 adults in prison or jail, is 5 to 10 times higher than . . . other democracies.”); *see also* John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/RM7Y-5C73>] (“The U.S. incarceration rate fell in 2019 to its lowest level since 1995 Despite this decline, the United States incarcerates a larger share of its population than any other country for which data is available.”).

23. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [perma.cc/89AD-4ZBU].

24. *Id.*

25. *Id.*; *see also* *Local Jails: The Real Scandal is the Churn*, PRISON POL’Y INITIATIVE (2022) [hereinafter PRISON POL’Y INITIATIVE, *Local Jails*], https://www.prisonpolicy.org/graphs/pie2022_jail_churn.html [<https://perma.cc/M8PC-5PE6>] (“[J]ail churn . . . measures

421,000 people entered prison gates, [and] people went to jail almost seven million times.”²⁶ Overall, around seventy-seven million people in the United States have a criminal record.²⁷

Further, people of color are disproportionately caught up in carceral systems.²⁸ Compared to White adults, “Black adults are over five times more likely to be incarcerated in prison, Hispanic adults are 2.5 times as likely, and American Indian and Alaska Natives are about twice as likely.”²⁹ In seven states, Black adults are nine times more likely to be in prison than White adults.³⁰

The racialized disparities in the criminal-legal system are driven by a variety of factors, including an “enduring legacy of racial subordination, biased policies and practices that create or exacerbate disparities, and structural disadvantages that perpetuate disparities.”³¹ One revealing conclusion from social science research is that “a sizable proportion of disparity in prison cannot be explained by patterns in

the number of times people are booked into a facility in a year. Churn is especially important for local jails, where the population is constantly changing.”)

26. Sawyer & Wagner, *supra* note 23 (emphasis omitted).

27. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 4.

28. *See id.* at 3–4 (describing racial disparities in prison systems).

29. *Id.* (first citing E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2019 (2020), bjs.ojp.gov/library/publications/prisoners-2019 [<https://perma.cc/M25B-ZGGB>]; and then citing *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, PRISON POL’Y INITIATIVE (Apr. 22, 2020), <https://prisonpolicy.org/blog/2020/04/22/native> [<https://perma.cc/BN6W-WQL8>]).

30. ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/G26U-WCCJ>].

31. *Id.* at 12–15. *See also* Valeria Vegh Weis, *Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DEPAUL J. FOR SOC. JUST. 1 (2017) (providing an analytical framework to examine disparate impact throughout the criminal-legal process); Jesse J. Norris, *State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action*, 47 GONZAGA L. REV. 493 (2012) (examining the impacts of state level efforts to reduce racial disparities in the criminal-legal system); Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473 (2019) (scrutinizing the way that law and social science elide the devastating impact of racialized dehumanization in the criminal-legal system); Katherine M. Backer, *Racial Bias and Prison Discipline: A Study of North Carolina State Prisons*, 43 N.C. CENT. L. REV. 1 (2021) (finding that, on top of racial disparities in who is incarcerated, Black and Indigenous people in state prisons in North Carolina received disproportionate disciplinary write-ups, and disproportionate disciplinary sanctions).

criminal offending”³²—for example, despite similar rates of drug activity among Black people and White people,³³ Black people are far more likely to be arrested for drug offenses.³⁴ These disparities in incarceration rates are driven by bias in the policies and practices of the criminal-legal system such as racialized differences in community surveillance,³⁵ prosecutorial discretion over charging decisions and diversion programs,³⁶ and sentencing determinations.³⁷ Thus, not only

32. NELLIS, *supra* note 30, at 23 (“The totality of the research literature on race and ethnic differentials in imprisonment leads to a similar conclusion: a sizable proportion of disparity in prison cannot be explained by patterns in criminal offending.”).

33. *See, e.g.*, SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 28 (2022), <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf> [<https://perma.cc/T8S6-N7HA>] (“The most recent survey . . . found that about 11.7% of the population over 12 years of age had used illegal drugs in the previous year, and that white and Black Americans did so at comparable rates, 12.0% and 13.7% respectively [with] similar patterns for earlier years.”); Alana Rosenburg et al., *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. DRUG ISSUES 132 (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5614457/> [<https://perma.cc/LWF4-Y85F>] (“[W]hile Blacks were significantly more likely than Whites to have been arrested most recently for drug sales, we found no statistical race difference in self-reports of ever having sold drugs.”); Leah J. Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based Study of the Differential Impact of Substance Use on Involvement in Drug Trade*, 36 AM. J. DRUG & ALCOHOL ABUSE 87, 88 (2001) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2871399> [<https://perma.cc/L7D4-ZFL3>] (“The sample included 13,706 White and Black youths between 12 and 17 years of age . . . Rates of drug dealing did not differ across race.”).

34. *Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019*, PEW CHARITABLE TRS. (Feb. 15, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> [<https://perma.cc/L868-CFLU>] (“Black people made up 12% of the U.S. adult population but more than twice that share of adult drug arrests in 2019.”); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 288 (2015), <https://files.nc.gov/governor/Examining-Racial-Disparities-in-Drug-Arrests-Justice-Quarterly-32-no.-2-288-313-2013-2015.pdf> [<https://perma.cc/F9SB-B72D>] (“[R]acial disparities in drug arrests cannot be explained by differences in drug offending, nondrug offending, or residing in the kinds of neighborhoods likely to have heavy police emphasis on drug offending.”).

35. *See, e.g.*, NAT’L CONF. OF STATE LEGISLATURES, RACIAL AND ETHNIC DISPARITIES IN THE JUSTICE SYSTEM 1–3 (2022), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Racial-and-Ethnic-Disparities-in-the-Justice-System_v03.pdf [<https://perma.cc/7QYW-QYAH>] (summarizing research on racial disparities in traffic stops).

36. *See id.* at 5–8 (providing examples of disparities in diversionary programs, including a program in Cook County, Illinois where Black defendants were 6% less likely to be diverted).

37. *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* (U. of Mich. L. & Econ., Empirical Legal Stud. Ctr. Paper No. 12–002, 2012), <http://dx.doi.org/10.2139/ssrn.1985377> [<https://perma.cc/6Z9K-BQ7W>] (“On average, [B]lacks receive almost 10% longer

does mass incarceration impact a huge number of Americans,³⁸ but the criminal-legal system, and its financial consequences, drive ongoing racial subordination in the United States.³⁹

B. *The Financial Consequences of Incarceration*

The American system of mass incarceration has significant financial implications.⁴⁰ While incarcerated, justice-involved people cannot personally manage their finances outside of the prison system, which often means getting behind on bills, mortgages, and credit card payments, all of which can impact future financial security.⁴¹ Further, the wages that incarcerated workers earn are often too low⁴² to cover

sentences than comparable whites arrested for the same crimes. At least half this gap can be explained by initial charging choices, particularly the filing of charges carrying mandatory minimum sentences.”); *see also* NELLIS, *supra* note 30, at 14–15, 17 (finding significant racial sentencing disparities in state prisons and recommending reforms); NAT’L CONF. OF STATE LEGISLATURES, *supra* note 35, at 11 (examining federal drug sentencing disparities).

38. *See Half of Americans Have Family Members Who Have Been Incarcerated*, EQUAL JUST. INITIATIVE (2018), <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated> [<https://perma.cc/274X-C83B>] (“[A]bout 113 million American adults have an immediate family member who is formerly or currently incarcerated.”); Sawyer & Wagner, *supra* note 23 (“In 2021, about 421,000 people entered prison gates, but people went to jail almost 7 million times.”); CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 3 (“In 2019, 2.1 million adults in the United States were in jail or prison, and another 4.4 million people were under community supervision . . .”).

39. *See* NELLIS, *supra* note 30, at 23 n.24 (compiling social science research on criminal offence rates and rates of imprisonment); *see also supra* note 29 and accompanying text.

40. *See* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. 4 (2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> [<https://perma.cc/SX6P-3UP3>] (“This report demonstrates that more people than previously believed have been caught up in the system, and it quantifies the enormous financial loss they sustain as a result; those who spend time in prison miss out on more than half the future income they might otherwise have earned.”); Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 J. CRIME & DELINQ. 562, 562 (February 12, 2009) (“[G]rowing incarceration has significantly increased poverty, regardless of which index is used to gauge poverty.”). Financial pressures also impact case outcomes—for example, during pretrial detention, detainees and their families have little choice on accepting the terms of bond agreements, and this economic pressure has been shown to impact not only the terms of such agreements, but also legal outcomes. *See* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L., ECON., & ORG. 511, 512 (2018) (finding that “pretrial detention leads to a 13% increase in the likelihood of being convicted on at least one charge”).

41. *See* CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 2, 21–26 (describing the challenges that people face managing debt and accessing credit while they are incarcerated).

42. The average nominal daily wage paid to incarcerated workers actually fell from \$0.93 in 2001 to \$0.86 in 2017. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each*

even the most basic costs incarcerated people face, including medical care,⁴³ hygiene items,⁴⁴ and communicating with their families.⁴⁵ Given the challenges of reentry, justice-involved people face significant barriers in attempting to make up for lost wages or recover from the detrimental impact of incarceration after their release.⁴⁶ Due to the disparities in the carceral system discussed above, justice involvement deepens and entrenches not only economic inequality, but also racial inequality.⁴⁷

State?, PRISON POL'Y INITIATIVE (Apr. 10, 2017), www.prisonpolicy.org/blog/2017/04/10/wage [<https://perma.cc/4EZN-T8KP>]; *see also* Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, GUARDIAN (June 15, 2022, 1:00 PM), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited> [<https://perma.cc/E4RF-2KFK>] (“[W]orkers make an average of 13 cents to 52 cents an hour according to the report. Seven states – Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina and Texas – pay nothing for the vast majority of prison work.”).

43. *See* Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [<https://perma.cc/69F3-VP9K>] (“A \$2–5 medical co-pay in prison or jail may not seem expensive on its face. But . . . they can be cost-prohibitive . . . In West Virginia, a single visit to the doctor would cost almost an entire month’s pay for an incarcerated person who makes \$6 per month.”).

44. *See* Rhea Soni, *The True Cost of Periods in Prison*, WOMEN’S MEDIA CTR. (Dec. 6, 2022), <https://womensmediacenter.com/fbomb/the-true-cost-of-periods-in-prison> [<https://perma.cc/96RW-STXZ>] (“Adequate sanitary supplies cost nearly a month’s pay.”); *see also* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018) [hereinafter Raher *Prison Commissaries*], <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/XRF5-TBK5>] (“In FY 2016, people in Massachusetts prisons purchased over 245,000 bars of soap, at a total cost of \$215,057. That means individuals paid an average of \$22 each for soap that year, even though [Massachusetts Department of Corrections] policy supposedly entitles them to one free bar of soap per week.”).

45. *See* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L. J. 3, 16–17 (2020) [hereinafter Raher, *Literally Captive Market*] (describing prison telecommunications, video messaging, and e-messaging services as “known for high prices and unfair terms”); *see also* sources cited *infra* note 51.

46. *See* Craigie et al., *supra* note 40, at 2 (“This report demonstrates that more people than previously believed have been caught up in the system, and it quantifies the enormous financial loss they sustain as a result; those who spend time in prison miss out on more than half the future income they might otherwise have earned.”).

47. *See* sources cited *supra* notes 28–39, 46; Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, PRISON POL'Y INITIATIVE (Apr. 26, 2016), <https://www.prisonpolicy.org/blog/2016/04/26/wealth/> [<https://perma.cc/3BAV-HGP8>] (“White men that never experience incarceration will accumulate the most wealth compared to Black and Hispanic men regardless of incarceration status Black men that are incarcerated at some point in their lifetime accumulate less wealth compared to all other groups regardless of incarceration status.”).

C. *The Privatization of Prison Banking and Prison Retail*

While this Note focuses on prepaid debit release cards, the consumer protection implications of prison banking and prison retail systems are much broader. The prison financial system includes the fees associated with money transfers to prison accounts,⁴⁸ the prices of basic hygiene and food items through prison commissary,⁴⁹ the fees associated with basic media access,⁵⁰ and the fees on mechanisms for communication with the outside world.⁵¹ This Section will explain how

48. Evan Weinberger, *Inmate Families Face Cash-Transfer Fees ‘Just to Stay Connected’*, BLOOMBERG L. (Jan. 11, 2022, 6:00 AM), <https://news.bloomberglaw.com/banking-law/inmate-families-face-cash-transfer-fees-just-to-stay-connected> [<https://perma.cc/M8MH-6UTA>]; *How Far Does \$120 Go When Sent to a Virginia Prison Inmate* (infographic), THE CTR. FOR PUB. INTEGRITY (2019), https://publicintegrity.org/wp-content/uploads/2019/01/virginaFinal_5-1024x597.png [<https://perma.cc/8FXR-89AS>].

49. Much of the little money justice-involved people have is spent on basic necessities, like food, hygiene products, and over the counter medication. Raheer, *Prison Commissaries*, *supra* note 44. In fact, the policies around qualifying for free hygiene items are so stringent as to be basically meaningless. Tiana Herring, *For the Poorest People in Prison, It’s a Struggle to Access Even Basic Necessities*, PRISON POL’Y INITIATIVE (Nov. 18, 2021), <https://www.prisonpolicy.org/blog/2021/11/18/indigence/> [<https://perma.cc/GX47-KUZZ>]; see also Jazmen Howard, *Unjustly Enriched Prisons: The Problem with Capitalizing on Captivity*, 72 FLA. L. REV. 127, 133–34, 133 n. 24 (2020) (examining the limited options and inflated prices for toothpaste in a prison contract).

50. See Wanda Bertram & Peter Wagner, *How to Spot the Hidden Costs in a “No-Cost” Tablet Contract*, PRISON POL’Y INITIATIVE (July 24, 2018), <https://www.prisonpolicy.org/blog/2018/07/24/no-cost-contract/> [<https://perma.cc/677Q-V5YK>] (analyzing the fees in a JPay contract with the New York Department of Corrections); *How Much Does It Cost to Read a Free Book on a Free Tablet?*, APPALACHIAN PRISON BOOK PROJECT (Nov. 20, 2019), <https://appalachianprisonbookproject.org/2019/11/20/how-much-does-it-cost-to-read-a-free-book-on-a-free-tablet/> [<https://perma.cc/J6RJ-NWQG>] (discussing a tablet vendor contract that charged incarcerated people three cents per minute to read books through a free online library program); Howard, *supra* note 49, at 128–29 (explaining how prison contracts with media vendors may unjustly enrich both vendors and departments of corrections, at the expense of incarcerated people).

51. See Bertram & Wagner, *supra* note 50 (describing a JPay contract with the New York Department of Corrections, in which incarcerated people had to buy \$0.35 “stamps” to send emails); Stephen Raheer, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL’Y INITIATIVE (Jan. 21, 2016), <https://www.prisonpolicy.org/messaging/report.html> [<https://perma.cc/X42H-D2NP>] (providing an overview of emails, phone calls, video visit programs, and associated fees); see generally Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 HARV. L. & POL’Y REV. 205, 205–08 (2019) (examining attempts by the Federal Communications Commission to regulate “exorbitant” rates charged by telecommunications companies operating in prisons); Damilola Onifade, *The Exploitation of a Captive Market Through the Prison Telecommunication Industry*, 16 RUTGERS BUS. L. REV. 233, 238–44 (2020) (providing an overview of the prison telecommunications industry, and the “astronomical” prices charged for phone calls from prison).

JPay and JPay’s prison release cards fit into the context of the prison financial system.

The term “prison banking” refers to financial products and services associated with incarceration.⁵² When people are incarcerated, they are assigned a prison account.⁵³ The application of the word “banking” to prison accounts is “a bit of a legal misnomer” since the incarcerated person “has no direct customer relationship with the depository institution.”⁵⁴ Instead, the department of corrections or a financial technology firm serves as an intermediary to allow incarcerated people to purchase items from “prison retail,” which may include commissary items, access to books or music, and payment for phone calls and emails to stay in touch with their communities.⁵⁵ Depending on the facility, incarcerated people may accrue money in their prison accounts through transfers from family or friends outside the carceral system and through work assignments⁵⁶ or sales of hobby work.⁵⁷

52. Other terms used for prison financial services include “correctional banking,” “inmate banking,” or “offender banking.” *See, e.g.*, Stephen Raher & Tiana Herring, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People*, PRISON POL’Y INITIATIVE (Nov. 9, 2021), <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers> [<https://perma.cc/75QX-DYNA>] (“This ‘correctional banking’ industry includes specialized services like release cards, but at its core the industry makes money off the simple (but highly lucrative) business of facilitating transfers from friends and family members to incarcerated recipients.”); *Inmate Money & Banking*, COLO. DEP’T OF CORR., <https://cdoc.colorado.gov/resources/inmate-money-banking> [<https://perma.cc/H6CR-KFLV>] (last visited Jan. 1, 2024); *Offender Banking System*, OKLA. CORR., <https://oklahoma.gov/doc/organization/administrative-services/business-services/offender-banking-system.html> (last visited Oct. 16, 2022) [<https://perma.cc/UDK4-XSX8>].

53. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., No. 4500.12, TRUST FUND/DEPOSIT FUND MANUAL 10 (2018), <https://www.bop.gov/policy/progstat/4500.12.pdf> [<https://perma.cc/N5NT-625Y>] (defining a “trust fund” as the “[a]ccount designated by the U.S. Treasury for programs, goods, and services for the benefit of inmates (e.g., Commissary)”); COLO. DEP’T OF CORR., *supra* note 52 (“Each individual incarcerated in the Colorado Department of Corrections has an inmate account which they can use to purchase canteen items including phone time, stamps and writing materials, food, clothing, and hygiene items.”).

54. Raher, *Literally Captive Market*, *supra* note 45, at 58.

55. Raher, *Prison Commissaries*, *supra* note 44; *see also* Sean Kolkey, *People Over Profit: The Case for Abolishing the Prison Financial System*, 110 CALIF. L. REV. 257, 268 (2022) (describing increasingly privatized prison industrial complex as “a uniquely insidious and exploitative manifestation of capitalism” that “shift[s] many of the expenses of incarceration on to the very individuals they incarcerate, along with their loved ones and communities”).

56. *See* Kolkey, *supra* note 55, at 270–71 (outlining the ways justice-involved people can get money transferred into their accounts); Raher, *Insufficient Funds*, *supra* note 6 (“When a

While prison banking and prison retail options were traditionally administered directly by carceral institutions, the growth in financial technology companies in the mid-2000s⁵⁸ provided an opportunity for government actors to cut costs by privatizing⁵⁹ these services.⁶⁰ Today, three private equity firms control large swaths of the prison telecommunications and prison account markets.⁶¹ Tens of

person leaves a correctional facility, they often receive their funds — wages earned while behind bars, support from family members, or money the person had in their possession when arrested . . .”).

57. Some correctional institutions allow incarcerated people to sell art for profit. *See, e.g.*, 28 C.F.R. § 544.35 (2023) (regulations pertaining to art and hobby craft programs, including opportunities for sales); Anne Hillman, *Prison Art Market Has Its Limitations*, ALASKA PUB. MEDIA (Aug. 12, 2018), <https://www.ktoo.org/2018/08/12/prison-art-market-has-its-limits/> [<https://perma.cc/XF4R-HEGL>] (interviewing incarcerated people who participate in a prison art program); Lucia Davis, *Inside the Angola Prison Hobbycraft Sale, Where Inmates Sell Their Creations*, ATLAS OBSCURA (Jan. 14, 2016), <https://www.atlasobscura.com/articles/inside-the-angola-prison-hobbycraft-sale-where-inmates-can-sell-their-creations> [<https://perma.cc/UAY8-C4YS>] (describing a sale of art by incarcerated people in Louisiana).

58. *See, e.g.*, Wagner, *supra* note 2 (“In 12 years [from 2002-2014], JPay says it has grown to provide money transfers to more than 1.7 million offenders in 32 states, or nearly 70 percent of the inmates in U.S. prisons.”); Raheer, *Protect the Public*, *supra* note 9 (“Facilities used to issue checks or give refunds in cash. But an increasing number of jurisdictions are now giving people their money in the form of pre-paid debit cards . . .”).

59. *See* Sydney Young, *Capital and the Carceral State: Prison Privatization in the United States and United Kingdom*, HARV. INT’L REV. (Sept. 23, 2020), <https://hir.harvard.edu/us-uk-prison-privatization/> [<https://perma.cc/636B-6RZU>] (“[P]rison privatization is simple: companies . . . agree to manage correctional facilities in return for a payment from the state. They profit by charging more than the cost of running the facility but less than it would cost the government to run its own public facilities.”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1392–93 (2003) (“Over the last two decades, pressures on governments to house expanding prison populations and improve prison conditions without substantially increasing costs kindled a rebirth of interest in private prisons. Governments turned to private entities not only to build prison facilities but to operate them.”).

60. *See* Arun Gupta, *The Financial Firm that Cornered the Market on Jails*, NATION (Aug. 1, 2016), <https://www.thenation.com/article/archive/the-financial-firm-that-cornered-the-market-on-jails> [<https://perma.cc/BM3H-BQS6>] (“Hundreds of private-sector contractors now provide food, clothing, riot gear, phone service, computers, and health care, in addition to directly operating many correctional facilities.”); Catherine Akenhead, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224, 1229–35 (2017) (connecting historical prison privatization with modern patterns).

61. Platinum Equity owns Securus Technologies, JPay, and AllPaid through its subsidiary Aventiv; HIG Capital owns TKC Holdings and Access Corrections; and American Securities owns GTL and TouchPay, now, ViaPath, a telephone and communications provider. *See* Weinberger, *supra* note 48 (describing the relationship between Securus Technologies/JPay and Platinum Equity Partners, as well as the relationship between Access Corrections and H.I.G. Capital); Raheer & Herring, *supra* note 52 (providing a snapshot of which money-transfer vendors were used by different departments of corrections across the United States, and noting that Jpay, GTL, and Access

billions of dollars flow to private companies each year through prison and jail contracts for services like healthcare, commissary, facilities management, and construction of new prisons and jails.⁶² In addition to collecting direct government funds, many vendors collect fees from incarcerated individuals or their families related to carceral services.⁶³ And “[w]hen companies contract with the best interests of a business in mind, the rights, fair treatment, and rehabilitation of [justice-involved people]—wards of the state—take a back seat.”⁶⁴

Further, because of the lack of choice inherent in prison banking, incarcerated people “are the ultimate ‘captive market.’”⁶⁵ Without any choice of whether to engage with the prison financial system or any choice of which financial products to use, incarcerated people are uniquely vulnerable to exploitative and abusive products and

Corrections “dominate the correctional money-transfer market”); Press Release, GTL, GTL Becomes ViaPath Technologies, Launches Expanded Reentry Services (Jan. 4, 2022), <https://www.gtl.net/about-us/press-and-news/gtl-becomes-viapath-technologies> [<https://perma.cc/R8UV-B39H>] (“GTL is now ViaPath Technologies.”); *Platinum Equity Still Owns Prison Phone Company Securus as it Embarks on Fundraising*, PRIV. EQUITY S’HOLDER PROJECT (Mar. 25, 2022), <https://pestakeholder.org/news/platinum-equity-still-owns-prison-phone-company-securus-as-it-embarks-on-fundraising-2/> [<https://perma.cc/3VMR-M9WH>] (“Private equity firm Platinum Equity owns Aventiv Technologies, the parent company of prison and jail phone and communications company Securus, as well as JPay and AllPaid, which provide money transfer services for incarcerated people and their families.”).

62. See WORTH RISES, *THE PRISON INDUSTRY: MAPPING PRIVATE SECTOR PLAYERS 1* (May 2022), <https://worthrises.org/theprisonindustry2020> [<https://perma.cc/EG43-UW8Y>] (“Every year, the U.S. spends more than \$80 billion incarcerating 2.3 million people Of that, tens of billions are then funneled into the private sector through vendor contracts with healthcare providers, food suppliers, commissary merchants, prison contractors, and countless others.”).

63. See sources cited *supra* notes 48–51, 55, 60, 62.

64. See Howard, *supra* note 49, at 132–33. For example, companies that dominate the prison phone market have been at the forefront of lobbying efforts to criminalize the cell phone possession in prisons, since the elimination of personal cell phones leads to more income for official prison telecom contractors. *Private Prison Phone Companies Lobbied for Criminalization of Cell Phones in Prisons*, EQUAL JUST. INITIATIVE (Feb. 8, 2016), <https://eji.org/news/private-companies-lobbied-to-criminalize-cell-phones-in-prisons> [<https://perma.cc/8KYX-M6N3>]; see also Appleman, *supra* note 2, at 604 ([P]rison telephone providers have helped pass legislation to ban prisoners from possessing cell phones”).

65. Howard, *supra* note 49, at 133; see also Raher, *Literally Captive Market*, *supra* note 45, at 58–59. A “captive market” is one in which “potential consumers face a severely limited amount of competitive suppliers; their only choices are to purchase what is available or to make no purchase at all.” LAW DICTIONARY, <https://thelawdictionary.org/captive-market> [<https://perma.cc/NKD3-VDFM>] (last visited Jan. 1, 2024).

services.⁶⁶ Because the vendors, like JPay, that facilitate access to prison accounts are financial technology firms instead of traditional banks, they are not covered by the established banking regulatory framework.⁶⁷

Over the last 20 years, financial technology companies like JPay have largely taken over management of transfers to prison accounts and the disbursement of release funds.⁶⁸ While JPay is only one of many companies involved in prison financial and retail systems, this Note focuses on JPay because it was the prison financial company targeted by the CFPB for its violations of consumer protection law in 2021,⁶⁹ and because JPay is a significant player in the prison financial system.⁷⁰ JPay was founded in 2002, and by 2014 the company was providing prison money transfer services to “more than 1.7 million [people] in 32 states, or nearly 70% of the [people] in U.S. prisons.”⁷¹ In fact, JPay founder Ryan Shapiro takes credit for the model of profiting off of prison financial services.⁷² In 2014, Shapiro stated, “[w]e invented this business Everyone else tries to imitate what we did, and they don’t do it as well.”⁷³

66. See Press Release, Hum. Rts. Def. Ctr., *supra* note 10 (Released prisoners have no choice but to use the card ‘The companies that provide release debit cards literally have a captive market, and prisoners . . . must pay to access their own money’ (quoting Paul Wright, Exec. Dir., Hum. Rts. Def. Ctr.)).

67. See Lauren S. Pless, Note, *The FDIC’s Investigation of Voyager Digital and What That Means for Crypto-Fintechs*, 27 N.C. BANKING INST. 186, 186–87, 196–200 (2023) (examining the challenges in adapting regulations to fintechs, and the risks fintechs may pose to consumers).

68. See discussion *supra* notes 58–62 and accompanying text.

69. JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2 (Oct. 19, 2021).

70. Alongside JPay, various subsidiaries of the company Global Payments, Inc., (Heartland Payment Systems, NetSpend, Skylight Financial, TSYS) are the main financial technology companies that provide prison release cards. WORTH RISES, *supra* note 62. JP Morgan Chase exclusively issues release funds for people incarcerated in federal prisons. Andrew Thompson, *Chase Bank Accused of Gouging Ex-Inmates*, COURTHOUSE NEWS (Sept. 14, 2015), <https://www.courthousenews.com/chase-bank-accused-of-gouging-ex-inmates/> [<https://perma.cc/Z5E3-W8S4>]. JPay “dominates” the state level release card market, and Numi Financial is a “big player” in county jails. Gupta, *supra* note 60.

71. Wagner, *supra* note 2.

72. See *id.* (“Shapiro was the first entrepreneur to see how financial services might provide another stream of revenue.”); Akenhead, *supra* note 60, at 1231 (“Instead of relying solely on money orders sent by mail, which had previously been the primary way to deposit funds, Shapiro proposed an electronic system”).

73. Wagner, *supra* note 2.

D. *The Problem with Prepaid Prison Release Cards*

When people are released from prison, they receive any remaining funds in their prison account⁷⁴ and any gate money benefits offered in their area.⁷⁵ While these funds were traditionally available by cash or check, many correctional systems began requiring that incarcerated people receive release funds on prepaid debit cards.⁷⁶ Release card vendors tout the cards as a convenient and secure option for carceral facilities and for justice-involved people.⁷⁷ If they use the cards, carceral facilities do not have to bother with the traditional release money mechanisms of checks or cash.⁷⁸ For consumers, the cards may be more secure than cash, and may be more convenient than a check, especially for justice-involved people without an existing bank account.⁷⁹

As the Prison Policy Initiative has emphasized, “[t]he real problem here isn’t release cards themselves; it’s the abusive fees and practices that are common in the industry today.”⁸⁰ The fees charged on release cards are disproportionately higher than fees on debit cards that are not associated with the carceral system.⁸¹ One release card user

74. See Raher, *Insufficient Funds*, *supra* note 6 (“When a person leaves a correctional facility, they often receive their funds—wages earned while behind bars, support from family members, or money the person had in their possession when arrested—on fee-laden prepaid debit cards.”).

75. Gate money programs aid re-entry by providing people with modest funding upon their release. See Armstrong & Lewis, *supra* note 6 (“At the highest end, California and Colorado provide \$200 and \$100, respectively. At the lowest end, people in Alabama and Louisiana often leave prison with as little as \$10 or \$20 in their pockets, and people in states such as New Hampshire may leave with no money.”).

76. See Raher, *Protect the Public*, *supra* note 9 (“Facilities used to issue checks or give refunds in cash. But an increasing number of jurisdictions are now giving people their money in the form of pre-paid debit cards (often called ‘release cards’).”).

77. See, e.g., JPay, Release Card Advertisement 2014 (on file with author) (“Release the power of Progress: The new JPay Release card is here.”); JPay, FACEBOOK, <https://www.facebook.com/JPayLLC> [<https://perma.cc/27VL-4NXV>] (“JPay is the most trusted source for connecting incarcerated individuals with family and friends.”) (last visited Jan. 1, 2024).

78. Raher, *Protect the Public*, *supra* note 9.

79. See Raher, *Insufficient Funds*, *supra* note 6 (“If someone . . . accumulates a balance in their ‘trust account,’ a prepaid debit card may be a convenient way to give someone their money, especially if there are few (or no) fees and cardholders have free and easy-to-use options to transfer the balance or turn it into cash.”).

80. *Id.*

81. See Kolkey, *supra* note 55, at 272 (“The fees charged by release card issuers for routine usage vary wildly between providers, but they all follow a central theme: they are

reported that he was only able to spend \$70 of his original \$120 balance due to previously undisclosed fees.⁸² In another example, “[f]rom the moment [the cardholder] received her release card, she had only five days to either spend the money or retrieve the card’s cash value before being charged a \$5.95 monthly service fee.”⁸³ Thus, while release money received in cash could sit unused for years, the cardholder’s entire original balance of \$30 could be entirely eclipsed by fees within six months.⁸⁴ In *Brown v. Stored Value Cards*, a formerly incarcerated person alleged that the actions of one release card issuer had violated the EFTA, the Fifth Amendment of the Constitution, and Oregon state law.⁸⁵ The Ninth Circuit found that the release card fees “changed the simple government function of returning confiscated money to a [formerly incarcerated person] into a venture in which the released [person’s] money can be eroded or lost by the charge of profit-oriented fees.”⁸⁶ Despite the Ninth Circuit’s disapproval of the compulsory prison release card fees in *Brown*,⁸⁷ the pattern of unreasonable and unlawful fees on prison cards has persisted in the industry.⁸⁸

disproportionately larger than the fees associated with ‘standard’ debit cards, and they serve to extract wealth from unwilling and often unwitting users.”)

82. Amadou Diallo, ‘Release Cards’ Turn Inmates and Their Families into Profit Stream, AL-JAZEERA AM. (Apr. 20, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/4/20/release-cards-turn-inmates-and-their-families-into-profit-stream.html> [<https://perma.cc/2VM6-2RSM>].

83. *Brown v. Stored Value Cards*, 953 F.3d 567, 576 (9th Cir. 2020).

84. *Id.*

85. *Id.* at 567–77 (reversing and remanding, finding that the plaintiff’s lawsuit should not have been dismissed for failure to state a claim); see also Debra Cassens Weiss, *Can Jails Return Inmate Cash in the Form of Fee-Laden Debit Cards? 9th Circuit Allows Suit*, ABA J. (Mar. 26, 2020, 12:44 PM), <https://www.abajournal.com/news/article/can-jails-return-inmate-cash-in-the-form-of-fee-laden-debit-cards-9th-circuit-allows-suit> [<https://perma.cc/RPW2-WTM5>] (exploring the context and holding of the decision in *Brown*).

86. *Brown*, 953 F.3d at 576.

87. See *id.* (“[The company] is entitled to fair compensation for its services, but that does not mean that it should be able without restriction to provide cards to released inmates who have not asked for them and who are likely to end up with less money than was taken from them.”).

88. See Pub. Citizen et al., Comment Letter on Statement of Policy Regarding Prohibition on Abusive Acts or Practices at 23 (July 3, 2023), <https://www.regulations.gov/comment/CFPB-2023-0018-0009> [<https://perma.cc/9BL6-MW3T>] (“We applaud the CFPB’s action against JPay Unfortunately, JPay is far from the only release-card company engaged in abusive practices.”).

III. STATUTORY AND REGULATORY PROTECTIONS FOR PREPAID CARDS

The Electronic Fund Transfer Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act provide the statutory backdrop for the CFPB's regulation of prepaid debit cards, including prison release cards.

A. *The Electronic Fund Transfer Act's "Compulsory Use" Provision*

Congress passed the Electronic Fund Transfer Act of 1978 ("EFTA")⁸⁹ to address the rise in electronic fund transfers and strike a balance between "essential consumer protection and the creation of an atmosphere conducive to the rapid spread of [electronic fund transfer] systems."⁹⁰ The Act focuses on assessing liability for unauthorized transfers, and on providing consumer protections around electronic fund transfer cards.⁹¹ Under the EFTA's compulsory use provision, "no person may . . . require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit."⁹²

While the Federal Reserve Board was the original agency responsible for implementing the EFTA,⁹³ that rulemaking authority shifted to the CFPB in 2011 under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").⁹⁴ In 2016, the Bureau released a final rule, "Regulation E," implementing the EFTA

89. Electronic Fund Transfer Act, Pub. L. 95-630, 92 Stat. 3641 (1978) (codified as amended at 15 U.S.C. §§ 1693–1693r).

90. 124 CONG. REC. 21231 (1978) (statement of Rep. John LaFalce).

91. *See* 124 CONG. REC. 25729 (1978) (statement of Rep. Morgan Murphy) ("Since this new payment mechanism of electronic fund transfer lacks established rules and regulations, this legislation attempts to correct this situation and protect the consumer . . . [A] crucial problem . . . [is] who should bear liability for unauthorized transfers.").

92. 15 U.S.C. § 1693k.

93. *See Electronic Fund Transfers (Regulation E); Amendments*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/rules-policy/final-rules/electronic-fund-transfers-regulation-e> [<https://perma.cc/D2FR-GZPB>] (last visited Jan. 1, 2024) ("Rulemaking authority under EFTA generally transferred from the Federal Reserve Board to the CFPB in July 2011 pursuant to the Dodd-Frank Wall Act.").

94. *Id.*

and the Truth In Lending Act.⁹⁵ The rule addressed how the EFTA's protections apply to prepaid accounts,⁹⁶ and detailed a variety of disclosure and transparency requirements.⁹⁷

Further, the rule clarified that certain prison release cards were already subject to these requirements.⁹⁸ The Bureau noted that several commenters described “prison release cards as a particularly troubling example of a prepaid account product . . . with high fees and terms and conditions that limit consumers’ ability to access their own funds.”⁹⁹ In response to these concerns, “[t]he Bureau note[d] that to the extent that . . . prison release cards are used to disburse consumers’ salaries or government benefits . . . such accounts [were] already covered” by the compulsory use provision.¹⁰⁰ The Bureau also emphasized that it was “continuing to monitor . . . practices relating to consumers’ lack of choice (including with respect to prepaid accounts that are not subject to the compulsory use prohibitions).”¹⁰¹

B. The Dodd-Frank Act, and the CFPB’s Protections Against “Unfair, Deceptive, or Abusive” Practices

In 2010, Congress reacted to the 2008 Global Financial Crisis by passing the Dodd-Frank Act, which sought “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices.”¹⁰² Among many reforms of

95. *Id.* at 83934; *see also* Electronic Fund Transfer Act, Pub. L. 95-630, 92 Stat. 3641 (1978) (codified as amended at 15 U.S.C. §§ 1693–1693r); Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 U.S.C.).

96. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E), 81 Fed. Reg. at 83934–36.

97. *See id.* (providing a summary of the final rule).

98. *Id.* at 83968 (“[T]he final rule’s definition is broad enough to cover prepaid accounts used by consumers in various scenarios and for various purposes This would include, for example, student loan disbursement cards and prison release cards . . .”).

99. *Id.* at 83934, 83984; *see, e.g.*, Press Release, Hum. Rts. Def. Ctr., *supra* note 10 (“[R]equest[ing] that the CFPB . . . extend[] the ban on compulsory use to prepaid debit cards given to released prisoners that contain the funds remaining in their prison accounts, ban[] all fees associated with such cards and provide[] other protections as needed.”).

100. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E), 81 Fed. Reg. at 83985.

101. *Id.*

102. *Wall Street Reform: The Dodd-Frank Act*, NAT’L ARCHIVES: OBAMA WHITE HOUSE ARCHIVES, [https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-](https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall)

the financial system, the Dodd-Frank Act created the CFPB as an independent agency and tasked the CFPB with “implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions.”¹⁰³ Further, while the Federal Trade Commission Act (“FTCA”) already prohibited “unfair or deceptive acts or practices in or affecting commerce,”¹⁰⁴ the Consumer Financial Protection Act, (“CFPA”), which was one part of Dodd-Frank, empowered the CFPB to take action to protect consumers from “unfair, deceptive *or abusive* acts or practices.”¹⁰⁵ Each term refers to a different aspect of consumer protection, and has its own standards for analysis:

- Practices are unfair if they cause or are likely to cause “substantial injury to consumers” that consumers cannot “reasonably avoid” and that is not “outweighed by countervailing benefits to consumers or to competition.”¹⁰⁶
- Practices are deceptive when a material “representation, omission, or practice misleads or is likely to mislead the consumer” and the “consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances.”¹⁰⁷

street-reform [<https://perma.cc/9UDT-NQBN>] (last visited Jan. 1, 2024); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., 7 U.S.C., 11 U.S.C., 12 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 19 U.S.C., 20 U.S.C., 22 U.S.C., 25 U.S.C., 26 U.S.C., 28 U.S.C., 29 U.S.C., 30 U.S.C., 31 U.S.C., 41 U.S.C., 42 U.S.C., 44 U.S.C., 49 U.S.C., 112 U.S.C.).

103. Dodd-Frank § 1012(a)(10), 12 U.S.C. § 5492(a)(10).

104. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

105. Dodd-Frank § 1031(a), 12 U.S.C. § 5531(a).

106. CONSUMER FIN. PROT. BUREAU, SUPERVISION AND EXAMINATION MANUAL UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES (UDAAPS) at UDAAP 1–2 (2012), <https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures> [<https://perma.cc/D2CL-R46Y>].

107. *Id.* at UDAAP 5. While the quoted language comes from 2012, it mirrors the Federal Trade Commission’s original policy statement on deception from 1983. *See* Fed. Trade Comm., Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf

- Practices are abusive if they “materially interfere[] with the ability of a consumer to understand a term or condition of a consumer financial product or service.” Practices can also be considered abusive if they “take[] unreasonable advantage of a [consumer’s] lack of understanding” or a consumer’s inability protect their interests “in selecting or using a product or service” or a consumer’s “reasonable reliance” that “a covered person” will act “in the interests of the consumer.”¹⁰⁸

Because the unfair, deceptive, and abusive acts or practices (“UDAAP”) provisions center on the “harmful or distortionary” impacts of conduct, they are necessarily subject to more agency interpretation and contextual analysis than regulations that prohibit specific financial practices.¹⁰⁹ Before recent guidance,¹¹⁰ the provisions were criticized as “an overly broad and impressively vague area of compliance”¹¹¹ that requires financial institutions to “read the tea leaves” to understand how the CFPB will enforce UDAAP violations.¹¹² However, these concerns

[<https://perma.cc/3A2B-7NNW>], as reprinted in *Cliffdale Assocs., Inc.* 103 F.T.C. 110, 174–84 (1983).

108. Dodd-Frank § 1031(d), 12 U.S.C. § 5531(d).

109. See CONSUMER FIN. PROT. BUREAU, POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES 3–4 (April 3, 2023) [hereinafter CFPB, POLICY STATEMENT], https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf [<https://perma.cc/SWE5-GSNY>] (“The CFPB is issuing this Policy Statement to . . . explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.”).

110. See discussion *infra* Section IV.D. (discussing the CFPB’s April 2023 Policy Statement on Abusive Acts or Practices).

111. Suzie Higbee, *Never Tell Me the Odds: UDAAP Strikes Back*, AFFIRM X (Apr. 27, 2015), <https://www.affirmx.com/2015/04/27/never-tell-me-the-odds-udaap-strikes-back/> [<https://perma.cc/W5YW-2SUY>].

112. Nancy R. Thomas & James Nguyen, *The CFPB & UDAAP: A “Know It When You See It” Standard?*, BLOOMBERG L. (July 15, 2014 12:00 AM), <https://news.bloomberglaw.com/banking-law/the-cfpb-udaap-a-know-it-when-you-see-it-standard> [<https://perma.cc/MTP2-DZ8T>]; see also Stephen T. Middlebrook et al., *Tea Leaves and Tarot Cards: Developments in the Laws Affecting Electronic Payments and Financial Services*, 78 BUS. LAW. 293, 297, 304 (2022) (“Careful readers of the JPay Consent Order . . . may be left wondering what, if anything, debit card providers can do to avoid incurring liability The failure to establish clear regulatory frameworks . . . will stifle innovation, create costly uncertainty in the marketplace, and generate unnecessary litigation.”).

may simply be inherent to what Congress was attempting to do with the CFPA: “ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers”¹¹³ through “a more flexible standard.”¹¹⁴

As discussed further in Part IV, the CFPB utilized provisions on unfairness and abusiveness in its enforcement action against JPay in 2021, and released guidance on how the CFPB interprets abusiveness in 2023.¹¹⁵

IV. CFPB ENFORCEMENT AND GUIDANCE RELATED TO PREPAID RELEASE CARDS

Under the Biden Administration, the CFPB has continued to establish and clarify protections for justice-involved people through enforcement actions, policy research, and policy guidance, but has stopped short of additional formal rulemaking.¹¹⁶

As discussed above, the Bureau’s first enforcement action under Director Rohit Chopra resulted in a consent order with JPay over prepaid release cards in October 2021.¹¹⁷ The Bureau can initiate an investigation “merely on suspicion that any person has violated any provision of Federal consumer financial law,”¹¹⁸ and suspicions can be drawn from a wide array of sources: “informants, news media, market observation, supervisory examinations, and law enforcement partners.”¹¹⁹ It is possible that comments the CFPB received about prepaid debit release cards during the 2012–2016 rulemaking process

113. S. Rep. No. 111-176, at 172 (2010) (“Current law prohibits unfair or deceptive acts or practices. The addition of ‘abusive’ will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers.”).

114. *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 16 (2007) (statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation).

115. See discussion *infra* Sections IV.A., IV.D.

116. Middlebrook et al., *supra* note 112, at 296–97.

117. CFPB, *Rohit Chopra on JPay*, *supra* note 1; JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2 (Oct. 19, 2021).

118. CONSUMER FIN. PROT. BUREAU, ENFORCEMENT POLICIES AND PROCEDURES MANUAL 2-14 (2012) (obtained by Venable LLP through a Freedom of Information Act request), https://www.venable.com/files/upload/CFPB_Enforcement_Policies_and_Procedures_Manual.pdf [<https://perma.cc/9QRW-5AB7>].

119. *Id.* at 2-13.

for Regulation E increased the Bureau’s interest in examining prison banking practices.¹²⁰

A few months after the consent order, in January 2022, the CFPB released a report examining the many financial challenges that justice-involved people face.¹²¹ In February of 2022, the Bureau released a Compliance Bulletin explaining the application of the EFTA’s compulsory use provision to government benefit accounts, including prepaid release cards.¹²² Finally, in April 2023, the Bureau released a policy statement that “explain[s] how the CFPB analyzes the elements of abusiveness.”¹²³ Below, this Part describes each development in turn, analyzes how the actions fit together, and explains how the cumulative impact may lay the groundwork for further action on behalf of justice-involved consumers.

A. *JPay Consent Order*

Between 2011 and 2018, JPay provided approximately 1.2 million release cards through various departments of corrections.¹²⁴ According to the CFPB, “consumers being released from a Secure Facility had no choice but to receive the funds owed to them at the time of their release on a Debit Release card.”¹²⁵ In most instances, the departments of corrections eliminated previous check or cash options, which meant the only way for someone to receive their release funds was a JPay card.¹²⁶ From May 2011 to June 2017, over 500,000 consumers received funds through JPay’s prepaid cards, and JPay collected three million dollars in fees on release cards.¹²⁷

120. See, e.g., Prison Pol’y Initiative, Comment Letter on Proposed Rule on Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) at 1 (Mar. 18, 2015), <https://static.prisonpolicy.org/releasecards/CFPB-comment.pdf> [<https://perma.cc/79TC-QW73>] (describing prison release cards as a “relatively new phenomenon” that was “being adapted by an increasing number of agencies” in 2015).

121. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 2.

122. Electronic Fund Transfer Act’s Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10297–98 (Feb. 24, 2022).

123. CFPB, POLICY STATEMENT, *supra* note 109, at 3.

124. JPay LLC, CFPB No. 2021-CFPB-0006 at 8.

125. *Id.* at 10.

126. *Id.*

127. *Id.* at 12; Emily Flitter, *JPay, a Prison Contractor, Was Fined Over Fees It Charged to Former Prisoners*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/10/19/business/jpay-prison-card-fees.html> [<https://perma.cc/SE84-2ATF>] (“Since

The CFPB found that JPay pursued release card contracts, not because of consumer demand for the product, but to increase their competitive edge for other department of corrections contracts.¹²⁸ In some states, JPay’s card holder agreements for prison release cards did not include information on how to close the account or how to access the funds in cash.¹²⁹ In other states, JPay’s card holder agreements for prison release cards stated that the only option to close the account and access the balance by check involved a fee.¹³⁰ By 2016, JPay amended these agreements to allow card holders to close an account by requesting a mailed check—but even then, card holders could only close the account without a fee within seven days of card activation.¹³¹ By 2018, JPay agreements stated that cardholders could close the accounts without paying a fee by requesting closure of the account within seven to ten days of activation.¹³² However, as the CFPB noted, seven to ten days was not long enough to provide a reasonable option to avoid fees, given the reality of reentry logistics.¹³³ In order to close the account in time to avoid a fee, consumers would have to promptly read the “small-print disclosure[s],” gain access to a phone to make the request, and supply a mailing address where they could receive a check.¹³⁴ While these steps might seem straightforward to someone who already has stable housing and reliable telephone access, the CFPB acknowledged that these steps could present “significant obstacles” to newly released consumers.¹³⁵

The CFPB found that JPay collected fees from 160,000 consumers before there was ever any money on the cards, despite explicit statements in cardholder agreements that no fees would be

2011, more than 500,000 of the 1.2 million people who received prepaid cards from JPay were forced to pay fees to retrieve their money.”).

128. JPay LLC, CFPB No. 2021-CFPB-0006 at 10–11 (“[JPay] believed that entering into contracts with DOCs for the Debit Release Card could help it compete for additional DOC contracts pertaining to additional services [JPay’s] ability to gain additional DOC contracts was not derived from consumers’ demand for the Debit Release Card product.”); *see also*, Bertram & Wagner, *supra* note 50 (describing how offering a variety of services impacts a prison vendors competitiveness for contracts).

129. JPay LLC, CFPB No. 2021-CFPB-0006 at 11.

130. *Id.*

131. *Id.*

132. *Id.* at 12.

133. *Id.*

134. *Id.*

135. *Id.*

incurred before the cards were loaded.¹³⁶ Further, many of JPay’s “green sheets,” which summarized card agreements, were inaccurate.¹³⁷ Some green sheets inaccurately stated that fees would not be charged, some inaccurately stated when fees would be charged, and others provided incomplete lists of the various fees associated with the cards.¹³⁸ At least 176,000 consumers received inaccurate or incomplete green sheets from 2014–2017.¹³⁹

Ultimately, JPay violated the EFTA and Regulation E by “requiring consumers to establish a Prepaid Account as a condition of receipt of a government benefit.”¹⁴⁰ Further, the JPay violated the CFPA by engaging in unfair, deceptive, and abusive acts and practices when it charged fees to consumers who were required to use the prepaid cards, when it charged fees not authorized by cardholder agreements, and when it misled consumers about the card fees.¹⁴¹ The consent order required JPay to pay four million dollars to compensate consumers, and two million dollars in civil penalties.¹⁴²

1. The Application of the EFTA’s Compulsory Use Provision to Prison Release Cards

The CFPB warned, as part of the 2016 rulemaking process for Regulation E, that “to the extent that . . . prison release cards are used to disburse consumers’ salaries or government benefits . . . such accounts [were] already covered” by the compulsory use provision.¹⁴³ However, at the time, the CFPB indicated the need to engage in “additional public

136. *Id.* at 17.

137. *Id.* at 6. (“[A] ‘Green Sheet’ [is] a disclosure provided to consumers in some jurisdictions, typically on green-colored paper, and which states various Debit Release Card terms, including certain fees . . .”).

138. *Id.* at 18–20.

139. *Id.* at 20.

140. *Id.* at 1. First, JPay “violated the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693k(2), and its implementing Regulation E, 12 C.F.R. § 1005.10(e)(2), by requiring consumers to establish a Prepaid Account as a condition of receipt of a government benefit.” Second, because of this violation of the compulsory use provision, the CFPB found that JPay “offered or provided a consumer financial product or service that is not in conformity with Federal consumer financial law,” which constituted its own violation.

141. *Id.* at 2.

142. *Id.* at 27–28.

143. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E), 81 Fed. Reg. 83934, 83985 (Nov. 22, 2016).

participation and information gathering about the specific product types at issue” before taking further action on prison release cards.¹⁴⁴

In the JPay settlement, the CFPB finally carried through on that warning.¹⁴⁵ The invocation of the compulsory use provision in the consent order is significant because it more emphatically demonstrates that gate money is a government benefit that triggers the compulsory use provision.¹⁴⁶ More broadly, the consent order stakes out the CFPB’s claim of regulatory authority over EFTA violations by release card providers, and signals its willingness to enforce EFTA protections on behalf of justice-involved consumers.¹⁴⁷

2. The Application of Unfair, Deceptive, and Abusive Practices Protections to Prison Release Cards

In addition to the violations related to the compulsory use provision, the CFPB identified several violations related to unfair, deceptive, or abusive acts or practices (“UDAAP”).¹⁴⁸ While the compulsory use provision prohibits a specific practice, the CFPA’s UDAAP provisions require more interpretation of whether a violation has occurred by examining practices in context and considering the impact on consumers.¹⁴⁹

First, JPay “engaged in unfair and abusive acts and practices by providing fee-bearing prepaid cards to consumers who were required to receive the money owed to them at the time of their release from prison

144. *Id.*

145. See Wanda Bertram, *The CFPB’s Enforcement Order Against Prison Profiteer JPay, Explained*, PRISON POL’Y INITIATIVE (Oct 28, 2021), <https://www.prisonpolicy.org/blog/2021/10/28/cfpb-jpay/> [<https://perma.cc/XRG2-7BZ8>] (“The order affirms that the CFPB has the jurisdiction . . . to oversee JPay and other release-card issuers and take enforcement action when necessary. (In 2016 . . . the Prison Policy Initiative brought the growing use of release cards to the agency’s attention.)”).

146. See *id.* (“The order clarifies that under the Electronic Fund Transfer Act, people being released from prison cannot be forced to receive ‘gate money’ (stipends for reentry) on prepaid debit cards. Instead, people must be given multiple options for receiving gate money, such as a paper check or cash.”).

147. See *id.* (“The order affirms that the CFPB has the jurisdiction to regulate release cards under the Electronic Fund Transfer Act, basically staking a claim for the Bureau to oversee JPay and other release-card issuers and take enforcement action when necessary.”).

148. JPay LLC, CFPB No. 2021-CFPB-0006 at 1–2, 14–16.

149. *Id.* at 15 (“An act or practice is abusive if it, among other things, takes unreasonable advantage of the inability of a consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.”).

or jail on a prepaid card.”¹⁵⁰ Second, JPay “engaged in unfair acts and practices” by collecting fees that “were not authorized by their cardholder agreements.”¹⁵¹ Third, JPay “engaged in deceptive acts and practices by making false or misleading representations about the existence, nature, or amount of fees.”¹⁵²

As discussed in Section III.B., these violations are not based on specifically prohibited practices, like the compulsory use provision, but instead on broader language in the CFPB that enables the CFPB to examine the impact of practices on consumers.¹⁵³ Thus, the CFPB’s interpretation of UDAAP provisions in the consent order is not only relevant to understanding JPay’s violations but can also be seen as serving a signaling function of how the CFPB is likely to interpret UDAAP in the future, especially related to abusiveness. While “unfair or deceptive acts or practices” have been prohibited since 1938, Congress added the abusiveness provision in 2010.¹⁵⁴ In the CFPB’s first decade of operation before JPay, it only pursued twenty-two enforcement actions mentioning abusiveness.¹⁵⁵ In contrast, the Biden CFPB has filed eleven enforcement actions mentioning abusiveness in just two years since the release of the consent order.¹⁵⁶

150. *See id.* (noting that these actions were “in violation of sections 1031(a) and 1036(a)(1)(B) of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B)”).

151. *Id.*

152. *See id.* (noting that these actions were “in violation of sections 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B). Under §§1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565”).

153. *See* discussion *supra* Section III.B.

154. FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL VII-1.1 (2022), <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/vii-1-1.pdf> [<https://perma.cc/ZZ3F-GYQV>]; Bertram, *supra* note 145 (“Dodd-Frank prohibits unfair, deceptive, or abusive practices, but these are broad terms that need refinement, and the CFPB’s order provides that kind of refinement so that advocates can hone their strategies.”).

155. *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/enforcement/actions> [<https://perma.cc/XUG2-ZTNS>] (showing the filtered results from clicking on “Filter enforcement actions,” adding a date range of July 21, 2011 to October 18, 2011 and keyword filter of “abusive,” and then clicking “apply filters”).

156. *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/enforcement/actions> [<https://perma.cc/7SKM-4DYA>] (showing the filtered results from clicking on “Filter enforcement actions,” adding a date range of October 20, 2021 to January 2, 2024 and keyword filter of “abusive,” and then clicking “apply filters”).

In the JPay consent order, the CFPB focused on the second prong of the abusiveness criteria, which defines an act or practice as abusive if it takes unreasonable advantage of “the inability of the consumer to protect [their] interests . . . in selecting or using a product or service.”¹⁵⁷ The CFPB found that JPay “took unreasonable advantage of [consumers’] inability to protect their interests in selecting or using a consumer financial product or service” when it charged fees to “vulnerable consumers who were deprived of the ability to select another means to access and use their money at the time of release.”¹⁵⁸

Further, JPay took “unreasonable advantage of consumers’ inability to protect their interests” “by entering into contracts with [the departments of corrections] for the Debit Release Card—thereby enabling the [departments] to eliminate cash or check options they previously offered—under the belief that doing so could help [JPay] compete for additional [corrections] contracts.”¹⁵⁹ This point is especially notable because it shows the CFPB’s willingness to hold financial institutions accountable for “enabling” governmental decisions to eliminate consumers’ other options in favor of a financial product.¹⁶⁰ However, the reach of this potential extension of liability may be tempered by the emphasis on JPay’s “belief” that the product would increase their competitiveness for other contracts.¹⁶¹ This language focuses the enforcement action on how JPay, not the government actors, benefited from the lack of consumer choice.¹⁶²

157. Consumer Financial Protection Act, 12 U.S.C. 5531(d)(2)(B). For a discussion of the prongs of the abusiveness standard see *supra* notes 106–09 and accompanying text and *infra* Section IV.D.

158. JPay LLC, CFPB No. 2021-CFPB-0006 at 16 (Oct. 19, 2021); *Director Rohit Chopra’s Prepared Remarks at University of California Irvine Law School*, CONSUMER FIN. PROT. BUREAU (Apr. 04, 2023) [hereinafter CFPB, *UC Irvine Remarks*] <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/> [https://perma.cc/CX6K-QPCU] (“In other words, consumers were captive to JPay, and JPay illegally used this to gain an unreasonable advantage to extract fees from these individuals.”).

159. JPay LLC, CFPB No. 2021-CFPB-0006 at 15–16.

160. *Id.* at 16; see also Middlebrook et al., *supra* note 112 at 297 (“Careful readers of the JPay Consent Order and the CFPB bulletin may be left wondering what, if anything, debit card providers can do to avoid incurring liability if a government agency fails to comply with its obligation to offer alternative disbursement methods to its benefits recipients.”).

161. JPay LLC, CFPB No. 2021-CFPB-0006 at 16.

162. *Id.*

3. Consequences for JPay

The CFPB ordered JPay to pay four million dollars in compensatory damages to consumers and an additional two million dollars to the CFPB in the form of a civil penalty.¹⁶³ In addition to the compensatory and punitive damages, the consent order laid out specific compliance and reporting requirements for JPay.¹⁶⁴ The order specifies that JPay must affirmatively ensure that consumers have options to receive gate money by some method other than JPay's debit release cards, such as cash or check, before loading any gate money onto a release card.¹⁶⁵ Further, JPay disclosures must “[c]learly and [p]rominently” inform consumers of other mechanisms to receive gate money and comply with consumer protections about fee disclosures.¹⁶⁶ Under the consent order, the only fee that JPay can collect is “a reasonable inactivity fee charged no sooner than 90 days after the last consumer-initiated transaction on the Debit Release Card.”¹⁶⁷

While these requirements only directly apply to JPay, and will only be in place until JPay is compliant with the order for five years, the order provides clarity for at least some of the practices that the CFPB finds unacceptable for release card issuers.¹⁶⁸

B. *January 2022: CFPB Report on Justice-Involved Individuals in the Consumer Financial Marketplace*

In January 2022, the CFPB released its “first study of the criminal justice financial ecosystem,” in a report entitled “Justice-Involved Individuals in the Consumer Financial Marketplace.”¹⁶⁹ The

163. *Id.* at 27–28; CFPB, *CFPB Penalizes JPay*, *supra* note 14.

164. JPay LLC, CFPB No. 2021-CFPB-0006 at 27–37.

165. *Id.* at 22.

166. *Id.* at 22–24.

167. *Id.* at 5; Bertram, *supra* note 145 (“The order prevents JPay from charging any fees on release cards in the future, other than an ‘inactivity fee’ that can only be triggered after someone does not use their account for 90 days.”).

168. JPay LLC, CFPB No. 2021-CFPB-0006 at 27–37; *see also* Middlebrook et al., *supra* note 112 at 297 (expressing the view that the CFPB failed to provide enough guidance for prepaid card providers operating in the same market as JPay).

169. *CFPB Report Shows Criminal Justice Financial Ecosystem Exploits Families at Every Stage*, CONSUMER FIN. PROT. BUREAU (Jan. 31, 2022) [hereinafter CFPB, *Criminal Justice Ecosystem*], <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-shows-criminal-justice-financial-ecosystem-exploits-families-at-every-stage/>

report examines the “financial challenges families encounter at every stage of the criminal justice process” and concludes that the criminal justice financial ecosystem is “rife with burdensome fees and lack of choice.”¹⁷⁰ Further, the report criticizes companies that “leverag[e] a lack of consumer choice and their own market dominance to impose hefty fees at families’ expense.”¹⁷¹ The report emphasizes the intense vulnerability of justice-involved people by demonstrating the barriers to financial stability at each step of the carceral process.¹⁷² For example, the report discusses pretrial challenges (such as paying for bail), financial challenges during incarceration (such as keeping up with loan payments) and financial challenges during reentry (such as release card fees, access to banking and credit, and criminal justice debt).¹⁷³ By connecting the variety of ways incarceration can imperil financial security, the report contextualizes the lack of agency that justice-involved people have in navigating financial products.¹⁷⁴

As seen below in the discussion of the CFPB’s 2023 Policy Statement on Abusiveness,¹⁷⁵ consumer vulnerability is a crucial component to determining whether practices are prohibitively abusive.¹⁷⁶ By taking the time to detail and contextualize the many factors and experiences that contribute to the financial vulnerability and lack of agency of justice-involved people,¹⁷⁷ the CFPB may be teeing up further enforcement actions based on abusiveness in the prison financial system.

[<https://perma.cc/GKR8-H6W3>]; CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 1–5.

170. CFPB, *Criminal Justice Ecosystem*, *supra* note 169.

171. *Id.*

172. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 1–2.

173. *Id.* at 1–2, 8–13, 21–25, 27–30, 34–41.

174. *Id.* at 2; CFPB, *Criminal Justice Ecosystem*, *supra* note 169.

175. CFPB, POLICY STATEMENT, *supra* note 109.

176. *Id.*

177. *See* CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 2 (“From arrest to incarceration and reentry, people who come into contact with the justice system are confronted with numerous financial challenges, including financial products and services that too often contain exploitative terms and features [and] offer little or no consumer choice.”); CFPB, *Criminal Justice Ecosystem*, *supra* note 169 (“[The report] walks through the financial challenges families encounter at every stage of the criminal justice process, and the ways in which providers – often for-profit private companies – are leveraging a lack of consumer choice and their own market dominance to impose hefty fees at families’ expense”).

C. *February 2022: CFPB Compliance Bulletin*

A few weeks after releasing the Justice-Involved Individuals report, the CFPB released a Compliance Bulletin to reiterate that the compulsory use provision in the EFTA applies to non-needs-tested government benefits,¹⁷⁸ including “certain prison and jail ‘gate money’ benefits.”¹⁷⁹ The Bulletin went on to state the CFPB’s understanding that consumers do not have a real “choice” when they are “required to receive the first payment of government benefits on a prepaid card . . . even if the consumer can later re-direct the payment to an account of their choice.”¹⁸⁰ Thus, companies cannot avoid their products being classified as “compulsory” simply because they allow consumers to cash out at some later date.

Further, the Bulletin spelled out disclosure requirements for financial products that distribute government benefits.¹⁸¹ The disclosures mirror some of those laid out in the JPay consent order, such as the requirement that consumers be notified that they have “several options to receive benefit payments” and they “do[] not have to accept the [cards] . . . to receive government benefit payments.”¹⁸²

While the Compliance Bulletin largely restated aspects of the 2016 Final Rule for Regulation E, it focused in on the compulsory use provision.¹⁸³ In the context of the broader arc of the CFPB’s engagement with prison release cards, the Compliance Bulletin can be understood as an attempt to more clearly put companies involved in

178. The Bulletin explained that the compulsory use provision does not apply to some needs-tested government benefits, like Temporary Assistance for Needy Families (“TANF”) and Supplements Nutrition Assistance Program (“SNAP”), but it does apply to all federally administered benefit accounts, like Social Security. Electronic Fund Transfer Act’s Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10297–98 (Feb. 24, 2022) (to be codified at 12 C.F.R. pt. 1005).

179. *Id.* at 10298.

180. *Id.*; see Richard K. Vaske, *CFPB Issues Compliance Bulletin on Application of EFTA Compulsory Use Prohibition to Government Benefits*, BALLARD SPAHR, LLP: CONSUMER FIN. MONITOR (Feb. 21, 2022), <https://www.consumerfinancemonitor.com/2022/02/21/cfpb-issues-compliance-bulletin-on-application-of-efta-compulsory-use-prohibition-to-government-benefits> [<https://perma.cc/L49D-U9NG>] (explaining alternative ways for companies/agencies to provide enough consumer choice to avoid violating the compulsory use provision).

181. Electronic Fund Transfer Act’s Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10298–99 (Feb. 24, 2022) (to be codified at 12 C.F.R. pt. 1005).

182. *Id.* at 10298.

183. *Id.* at 10297–98.

disbursing government benefits on notice of their obligations and the rights of consumers.

D. April 2023: Policy Statement on Abusive Acts or Practices

Finally, in April 2023, the CFPB released a Policy Statement on Abusive Acts or Practices, which sought to summarize the CFPB's enforcement actions under the abusiveness provision, and to "explain how the CFPB analyzes the elements of abusiveness . . . with the goal of providing an analytical framework . . . for how to identify violative acts or practices."¹⁸⁴ The current Policy Statement came two years after the Biden CFPB rescinded a narrower Trump-era statement on abusiveness in 2021.¹⁸⁵ Consumer advocacy groups applauded the 2023 Policy Statement as demonstrating "the agency's steadfast commitment to protecting consumers from ongoing abusive practices," and recommended additional ways that "the Bureau, consumers, and service providers may identify violative acts and practices."¹⁸⁶ Consumer groups specifically detailed ongoing concerns about prison release cards and prison money transfer services.¹⁸⁷ In contrast, industry groups expressed concern that the Statement was "too broad and general to provide guidance as to whether any specific market practice is 'abusive'" and "indicate[d] potential liability beyond the bounds set by Congress."¹⁸⁸

184. CFPB, POLICY STATEMENT, *supra* note 109, at 3; CFPB, *UC Irvine Remarks*, *supra* note 158.

185. The CFPB explained that the previous guidance not only failed to "deliver clarity to regulated entities," but also had "a negative effect on the on the Bureau's . . . objective of protective consumers" because the statement "declin[ed] to apply the full scope of the statutory standard." CFPB, POLICY STATEMENT, *supra* note 109, at 4 (citing 2020 Policy Statement, 85 Fed. Reg. 6733 (Feb. 6, 2020), *rescinded by* 86 Fed. Reg. 14808 (Mar. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf [<https://perma.cc/3BM7-VGMG>]).

186. Pub. Citizen et al., Comment Letter on Statement of Policy Regarding Prohibition on Abusive Acts or Practices at 2, 37 (July 3, 2023) <https://www.regulations.gov/comment/CFPB-2023-0018-0009> [<https://perma.cc/9BL6-MW3T>] (representing the views of American Association for Justice, Consumer Federation of America, National Consumer Law Center, Prison Policy Initiative and Public Citizen).

187. *Id.* at 22–23 ("[T]he CFPB notes that consumers may be unable to protect their interests if they 'lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.' All of these features characterize the financial products and services forced upon incarcerated people and their families.").

188. Bank Pol'y Inst. et al., Comment Letter on Statement of Policy Regarding Prohibition on Abusive Acts or Practices at 2 (July 3, 2023), <https://bpi.com/wp->

Notably, unlike the unfairness provision, which requires a “substantial injury” the abusiveness provision does not require that injury be substantial.¹⁸⁹ Thus, utilizing “even a relatively small advantage [over consumers] may be abusive if it is unreasonable.”¹⁹⁰ The CFPB summarized the provision as a prohibition on “obscuring important features of a product or service” and a prohibition on leveraging “gaps in understanding, unequal bargaining power, and consumer reliance” to take unreasonable advantage of consumers.¹⁹¹ As discussed below, the Policy Statement is relevant to any future enforcement activity in the prison banking sector.

First, the Policy Statement discusses abusive actions that “obscur[e] important features of a product or service.”¹⁹² While these actions must “materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service” to be considered abusive, interference is defined broadly: “actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide” relevant information.¹⁹³ This definition includes hiding or de-emphasizing important disclosures, and using digital interfaces that require consumers to look at pop-ups, drop-down boxes, or multiple click-throughs.¹⁹⁴ While the JPay action did not apply this understanding of abusiveness, the consent order’s requirement of clear and prominent disclosures gets at the issue of obscuring important information.¹⁹⁵

content/uploads/2023/06/BPI-Comment-response-to-CFPB-Abusiveness-Policy-Statement-2023.07.03.pdf [https://perma.cc/X2YD-D56F] (representing Bank Policy Institute, American Financial Services Association, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, Consumer Bankers Association, Credit Union National Association, and Mortgage Bankers Association).

189. CFPB, POLICY STATEMENT, *supra* note 109, at 4.

190. *Id.* at 9.

191. *Id.* at 4; *see also* CFPB, *UC Irvine Remarks*, *supra* note 158 (“One important way that Congress made a value judgment is by banning conduct that essentially tricks people. It shouldn’t be controversial to say that honest business conduct shouldn’t rely on trickery.”).

192. CFPB, POLICY STATEMENT, *supra* note 109, at 4.

193. *Id.* at 5 (noting that interference could include “use of fine print, complex language, jargon, or the timing of the disclosure”).

194. *Id.*; *see also* CFPB, *UC Irvine Remarks*, *supra* note 158 (“While trickery and manipulation can often run into the prohibitions on unfair or deceptive practices, an abusive practice [is] situated in the context of the transaction. Did a human or digital interface engage in other ways to distract or shift the attention of the consumer to obscure key terms?”).

195. JPay LLC, CFPB No. 2021-CFPB-0006 at 22 (Oct. 19, 2021).

Next, the Policy Statement explains that the prohibition on leveraging “gaps in understanding” can apply even if an entity did not cause “the person’s lack of understanding,” but instead applies regardless of how a consumer’s lack of understanding arises.¹⁹⁶ Further, the consumer’s gaps in understanding do not have to be reasonable, nor do the gaps in understanding have to be widely shared by consumers.¹⁹⁷ Again, the JPay action did not invoke this definition of abusiveness. However, given that prison financial products may be explained or contextualized by government employees of carceral institutions when they are made available to the consumer, there is a real possibility that a company could be held accountable for taking advantage of a justice-involved person’s misunderstanding of terms even if the misunderstanding was caused by a government actor.¹⁹⁸

The prohibition on taking unreasonable advantage of a consumer’s inability to protect their interests includes concerns about “unequal bargaining power.”¹⁹⁹ Here, “inability” refers to a wide variety of barriers to protecting one’s interests, including “when the steps a person would need to take are unknown . . . or are especially onerous,” “when [a person] do[es] not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor,” when entities have “outsized market power,” and “when entities use form contracts” where the terms are non-negotiable.²⁰⁰ The Policy Statement emphasizes that low-income consumers may be “unable to protect their interests if the only practical method for doing so requires payment of money.”²⁰¹ This understanding of abusiveness most closely tracks the discussion of abusiveness in the JPay consent

196. CFPB, POLICY STATEMENT, *supra* note 109, at 11–12; *see also* CFPB, *UC Irvine Remarks*, *supra* note 158 (“[C]oming out of the financial crisis . . . Congress recognized that gaps in understanding or unequal bargaining power were circumstances that law-breaking companies could exploit.”).

197. CFPB, POLICY STATEMENT, *supra* note 109, at 12–13.

198. *See* Middlebrook et al., *supra* note 112, at 297 (“Careful readers of the JPay Consent Order and the CFPB bulletin may be left wondering what, if anything, debit card providers can do to avoid incurring liability if a government agency fails to comply with its obligation to offer alternative disbursement methods to its benefits recipients.”).

199. CFPB, POLICY STATEMENT, *supra* note 109, at 14 (citing CFPB section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B)); *see* CFPB, *UC Irvine Remarks*, *supra* note 158 (using JPay as an example of a company taking unfair advantage of consumers).

200. CFPB, POLICY STATEMENT, *supra* note 109, at 14–16.

201. *Id.* at 15; CFPB, *UC Irvine Remarks*, *supra* note 158 (“Congress prohibited companies from leveraging unequal bargaining power . . . includ[ing] [companies] who use the fact that their customers are captive to force people into less advantageous deals.”).

order, where JPay wielded its significant market power to collect fees from consumers who did not have any choice in the departments of corrections selection of a mandatory JPay product.²⁰²

Finally, the Policy Statement explains that covered entities are prohibited from taking unreasonable advantage of a consumer's "reasonable reliance" that the entity will make decisions or provide advice in the consumer's interest.²⁰³ Here, reasonable reliance can arise from a company's claims of acting in consumer's best interests, or when a third party acts as an intermediary to select financial service providers.²⁰⁴ In the prison banking setting, this type of abusiveness could potentially be used in an enforcement action against carceral institutions, which act as intermediaries for incarcerated people in selecting prison financial services.

V. NEXT STEPS IN PROTECTING CAPTIVE CONSUMERS

While the settlement with JPay was an important step in a broader trend of the CFPB's focus on the prison banking sector, justice-involved consumers remain vulnerable to potentially abusive financial products. While, in theory, incarcerated people can no longer be forced into fee-ridden release cards as the only option to receive their funds,²⁰⁵ the cards still serve a deeply vulnerable population with limited ability make truly autonomous choices while incarcerated.²⁰⁶ Based on the

202. See JPay LLC, CFPB No. 2021-CFPB-0006 at 15–16 (Oct. 19, 2021) ("Respondent took unreasonable advantage of [consumers'] inability to protect their interests in selecting or using a consumer financial product or service . . .").

203. *Id.* at 17 (citing 12 U.S.C. 5531(d)(2)(C)); see also CFPB, *UC Irvine Remarks*, *supra* note 158 (using ITT Educational Services, a for-profit college whose financial aid advisors "pushed students into unaffordable loans that simply served ITT's bottom line," as an example of a company's exploitation of reasonable reliance).

204. CFPB, POLICY STATEMENT, *supra* note 109, at 17–18; see also CFPB, *UC Irvine Remarks*, *supra* note 158 ("Intermediary relationships like these involving trusted advisors are important for helping people to make difficult financial decisions.").

205. JPay LLC, CFPB No. 2021-CFPB-0006 at 22–24 (Oct. 19, 2021) (explaining that JPay must "take steps to ensure that, before non-needs-tested Gate Money is loaded onto a Debit Release Card . . . the consumer is provided the option to receive such non-needs-tested Gate Money through a mechanism other than the Debit Release Card"); see also CFPB, POLICY STATEMENT, *supra* note 109, at 10 n.42, 17 n.72 (explaining that it was a violation of consumer protection law for JPay "to charge fees even if consumers did not want to do business with the company because consumers were denied a choice" "as a single-source government contractor for prepaid cards").

206. See Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10298 (Feb. 24, 2022) (discussing constraints on "choice" in prison and jail settings related to receipt of government benefits); see also

CFPB’s Policy Statement on Abusive Acts or Practices, there are additional steps that the CFPB, and other government actors, can take to protect justice-involved consumers.

First, the “unequal bargaining power” prong of the abusiveness analysis could arguably be invoked to ban all fees on all prison release cards, including reimbursements for seized property and commissary account balances, not just those disbursing wages and gate money.²⁰⁷ Second, even if the CFPB does not entirely prohibit fees on prison release cards, the Bureau could require inactivity fees to align with standards in the Credit Card Accountability Responsibility and Disclosure Act (“CARD Act”).²⁰⁸ Third, as the CFPB explored in its report on justice-involved people in the criminal justice system, there are many additional areas of concern in the prison financial system.²⁰⁹ Given the unique vulnerability of justice-involved people, the CFPB must carefully monitor prison financial products and services, with an eye towards abusive conduct.²¹⁰ Finally, carceral departments themselves—including federal, state, and municipal agencies—have a role in protecting justice-involved consumers.²¹¹

A. No Fees on Prison Release Cards

Under the “unequal bargaining power” prong of the abusiveness provision, the Bureau could determine that no fees can be charged on any prison release cards, whether they fall squarely under the compulsory use provision or not. As discussed in the Introduction, release funds may include gate money, wages, or reimbursements from

CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 43 (“Even when people do have a choice over which product or service to use, the stresses that arise from involvement with the justice system may limit their ability to seek out alternatives. Even then, the available alternatives may not be meaningful.”).

207. *See supra* notes 199–202 and accompanying text (exploring the CFPB’s application of the “unequal bargaining power” prong of the abusiveness analysis in a prison context).

208. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.). *See* discussion *infra* Section V.B.

209. *See* discussion *supra* Section IV.B., *see also infra* Section V.C.

210. *Id.*

211. *See* Middlebrook et al., *supra* note 112, at 296–97 (“Under Regulation E, a government agency that directly or indirectly issues a card to a consumer to make a government benefits payment is deemed a covered financial institution”) (citing Regulation E, 12 C.F.R. § 1005.15(a)(1) (2022)); *see also infra* Section V.D.

unspent funds in prison accounts.²¹² It is clear from the language of the EFTA and the Compliance Bulletin that the compulsory use provision applies to gate money,²¹³ and wages.²¹⁴ However, the compulsory use provision likely does not include reimbursements for money confiscated when someone enters a facility or reimbursements for unspent funds in prison accounts.

Thus, in the current state of prison release card regulation, it is not clear whether justice-involved consumers would be protected from compulsion to use a specific financial product to receive reimbursement funds.²¹⁵ This issue is especially relevant for justice-involved consumers who are incarcerated in areas without gate money programs or opportunities to earn wages while incarcerated.²¹⁶

Even if the compulsory use provision does not directly prohibit requiring that people use a specific financial product to access their reimbursements, the logic of the consent order and the Policy Statement on Abusiveness suggest that companies should not be able to restrict choice or charge fees on those funds either.²¹⁷ The policy justifications for protecting justice-involved people from being forced into using predatory consumer products should apply to all release cards.²¹⁸ The

212. *See supra* Part I.

213. *See supra* Sections IV.A., IV.C.

214. 15 U.S.C. § 1693k (“No person may . . . require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit.”); Bertram, *supra* note 145 (“The CFPB has previously noted that the same protection applies to wages earned in prison, but it’s not entirely clear how this works with accumulated wages that are paid out in a lump sum when someone leaves custody.”).

215. *See* Press Release, Hum. Rts. Def. Ctr., *supra* note 10 (“[R]equest[ing] that the CFPB . . . extend[] the ban on compulsory use to prepaid debit cards given to released prisoners that contain the funds remaining in their prison accounts, ban[] all fees associated with such cards and provide[] other protections as needed.”).

216. Armstrong & Lewis, *supra* note 6 (“At the highest end, California and Colorado provide \$200 and \$100, respectively. At the lowest end, people in Alabama and Louisiana often leave prison with as little as \$10 or \$20 in their pockets, and people in states such as New Hampshire may leave with no money.”); Anguiano, *supra* note 42 (“Seven states – Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina and Texas – pay nothing for the vast majority of prison work.”).

217. *See supra* notes 199–202 and accompanying text (exploring the CFPB’s application of the “unequal bargaining power” prong of the abusiveness analysis in a prison context).

218. *See* CFPB, *UC Irvine Remarks*, *supra* note 158 (“Congress made the value judgment to prohibit entities from leveraging circumstances where people have no choice but to deal with a specific company. In most markets, this can only happen when a firm has a monopoly—but in many consumer finance markets it is embedded in the market structure.”).

vulnerability is the same, and the lack of choice is the same. Even without a specific legislative provision that prohibits forcing people to use a particular financial product for carceral reimbursements, the abusiveness standard arguably empowers the CFPB to fill that gap.²¹⁹

B. At a Minimum, Inactivity Fees Should be Limited on Prison Release Cards

If the CFPB does not entirely eliminate fees on prison release cards, the Bureau should at least place additional limits on inactivity fees. The consent order prohibits JPay from charging any fees on prepaid debit release cards for the duration of the consent order, except that it allows for a reasonable inactivity fee after 90 days since the last consumer-initiated transaction.²²⁰ While this limited fee is an improvement, it falls short of the protections that are applied to analogous products marketed to the general public, even though the general public has much more agency. The CARD Act's provisions for preloaded cards marketed to the general public provides a minimum baseline for when dormancy or inactivity fees might be appropriate for prison release cards.²²¹

In 2009, the CARD Act amended the protections provided by the EFTA.²²² The CARD Act prohibits charging dormancy fees, inactivity charges, or service fees on general-use prepaid gift cards unless the cards are dormant for 12 months and unless the fees were clearly and conspicuously disclosed before consumers bought them.²²³ Additionally, the CARD Act requires that no more than one dormancy fee, inactivity fee, or service fee be charged in any particular month.²²⁴

The CARD Act's limitations on dormancy fees for general use prepaid cards do not directly apply to release cards, since release cards are "not marketed or labeled as [] gift card[s]."²²⁵ However, the

219. *See id.* ("Congress prohibited companies from . . . us[ing] the fact that their customers are captive to force people into less advantageous deals, extract excess profits, or reduce costs by providing worse service than they would provide if they were competing in an open market.").

220. JPay LLC, CFPB No. 2021-CFPB-0006 at 27–28 (Oct. 19, 2021).

221. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

222. *Id.*

223. 15 U.S.C. § 16931-1.

224. *Id.*

225. *Id.* at § 16931-1(D)(2).

provision provides a benchmark for Congressional understandings of how long a card should hold its value before it starts to erode. The CARD Act applies to general use prepaid gift cards, like the ones you might purchase at a grocery store or a pharmacy.²²⁶ When consumers pay for a card—and when formerly incarcerated people receive a release card—they anticipate that the card will retain the value that they paid for it, at least for a while.²²⁷ While justice-involved people are not “buying” a release card, release cards can function as reimbursements for money paid into prison accounts, and for any money taken from people as they enter a carceral facility.²²⁸

Thus, the legislation provides a baseline for when fees might be fairly charged on release cards—after twelve months of inactivity, with no more than one reasonable inactivity fee per month.²²⁹ At least some consumer advocates support this twelve-month time frame: in 2022, the “one release card in the CFPB database that st[ood] out in a good way” in a review by the Prison Policy Initiative collected an inactivity fee after twelve months.²³⁰

C. *Continued CFPB Monitoring of Prison Banking Products Under the Abusiveness Standard*

While the CFPB has taken significant steps to clarify and emphasize the regulatory protections that apply to prison release cards, consumer groups have expressed ongoing concerns about the products, emphasizing that “JPay is far from the only release-card company

226. *Id.*; see Rebecca Reagan et al., *Credit CARD Act Requirements for Gift Certificates, Store Gift Cards, and General-Use Prepaid Cards*, CONSUMER COMPLIANCE OUTLOOK, 1st Quarter 2013, at 4–5, <https://www.consumercomplianceoutlook.org/2013/first-quarter/credit-card-act-requirements-gift-certificates-gift-cards-prepaid-cards> [<https://perma.cc/Z3L6-9FLV>] (“The final rule applies to gift certificates, store gift cards, and general-use prepaid cards that are sold or issued primarily for personal, family, or household use.”).

227. See *Brown v. Stored Value Cards*, 953 F.3d 567, 576 (9th Cir. 2020) (“There is at least one crucial difference between the release card and cash: the ticking clock. From the moment Brown received her release card, she had only five days to either spend the money or retrieve the card’s cash value before being charged a \$5.95 monthly service fee.”).

228. Raheer, *Insufficient Funds*, *supra* note 6; Armstrong & Lewis, *supra* note 6.

229. 15 U.S.C. § 16931-1.

230. Raheer, *Insufficient Funds*, *supra* note 6.

engaged in abusive practices.”²³¹ A survey of the terms of 48 release cards “revealed widespread abusive conduct,” including “problematic” fees that take “unreasonable advantage of consumers’ lack of choice.”²³²

As discussed in the CFPB’s report on Justice-Involved Individuals, incarcerated people face significant barriers to their ability to act in their own financial interests as they move through the criminal-legal system.²³³ According to the Policy Statement on Abusiveness, “even a relatively small advantage [over consumers] may be abusive,” if it takes “unreasonable advantage of consumers’ inability to protect their interests.”²³⁴ Despite the requirement that justice-involved people be given “several options” to receive release funds, incarcerated consumers may not actually be able to make informed and autonomous choices between these options due to the power dynamics at play in carceral settings.²³⁵ More broadly, the Policy Statement on Abusiveness could potentially be applied to a variety of prison financial products and services, such as prison money transfer fees²³⁶ and bail services.²³⁷ In a sector that is inherently built to profit on the fundamental lack of choices afforded to justice-involved people, prison financial service providers are on notice that the abusiveness prong regarding “unequal bargaining power” has potential for much broader applicability.

231. Pub. Citizen et al., Comment Letter on Statement of Policy Regarding Prohibition on Abusive Acts or Practices at 23 (July 3, 2023) <https://www.regulations.gov/comment/CFPB-2023-0018-0009> [<https://perma.cc/9BL6-MW3T>].

232. *Id.* (citing Prison Pol’y Initiative, Comment Letter on Fees Imposed by Providers of Consumer Financial Products or Services at Ex. 2 (Apr. 11, 2022), <https://www.regulations.gov/comment/CFPB-2022-0003-2517> [<https://perma.cc/SD3X-D9CB>]).

233. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 43; CFPB, *Criminal Justice Ecosystem*, *supra* note 169.

234. CFPB, POLICY STATEMENT, *supra* note 109, at 9, 14 n.61.

235. Compliance Bulletin on the Electronic Fund Transfer Act’s Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10298 (Feb. 24, 2022).

236. *See* CTR. FOR PUB. INTEGRITY, *supra* note 48 (depicting fees on a money transfer to a person incarcerated in Virginia).

237. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3, at 8–13; *see also* Stevenson, *supra* note 40, at 511 (“[T]he use of money bail contributes to a ‘poverty trap’: those who are unable to pay bail wind up accruing more court debt.”).

D. *Carceral Agencies Role in Protecting Incarcerated Consumers*

While some of the violations found in the JPay consent order are limited to JPay’s responsibilities and obligations under consumer protection law, the compulsory use provision is effectively a regulation of how departments of corrections disburse gate money and wages. As one critic of the CFPB’s consent order and Compliance Bulletin noted, “[c]areful readers . . . may be left wondering what, if anything, debit card providers can do to avoid incurring liability if a government agency fails to comply with its obligation to offer alternative disbursement methods.”²³⁸ Departments of corrections are the ones who determine the options available for release money, oversee the disbursement of release money, and sign contracts with private companies. And when departments of corrections take these obligations seriously, it can make a significant difference for justice-involved consumers.²³⁹ When the North Dakota Department of Corrections worked “with other state agencies that use prepaid debit cards” they were able to successfully “negotiate a group contract with decent consumer protections.”²⁴⁰ This example demonstrates the role that carceral administrators can play in preventing violations of consumer protection law in connection with government programs and services.

Additionally, the Prison Policy Initiative has drafted model state legislation that would entirely “ban[] release card fees and require[] that incarcerated people be given the option to have their funds returned by cash or check.”²⁴¹ Moving forward, both administrative and legislative actors can take proactive steps to ensure that carceral institutions are not entering into private agreements that risk violating the rights and protections afforded to incarcerated people.

VI. CONCLUSION

The JPay consent order is fundamentally an application and enforcement of consumer protection law, but it also represents a broader

238. Middlebrook et al., *supra* note 112, at 297.

239. Raheer, *Insufficient Funds*, *supra* note 6.

240. *Id.*

241. *Model Release Card Legislation*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/releasecards/model.html> [<https://perma.cc/9TUU-US46>] (last visited Jan. 1, 2024).

recognition by the CFPB of how vulnerable incarcerated people are to predatory financial products. Taken together, the consent order, the report by the CFPB on Justice-Involved Individuals and the Consumer Financial Marketplace,²⁴² the Compliance Bulletin regarding Regulation E,²⁴³ the Policy Statement on Abusive Acts or Practices,²⁴⁴ and statements by CFPB Director Rohit Chopra²⁴⁵ all suggest that the CFPB plans to continue to monitor prison banking systems for further intervention on behalf of incarcerated people. The JPay investigation and consent order were a significant step in protecting incarcerated people from abusive financial products. But a six-million-dollar settlement is relatively minor in a sector rife with exploitative practices that capitalize on justice-involved people's lack of agency.²⁴⁶ It is critically important that the CFPB continues to enforce consumer protection laws on behalf of justice-involved people, especially because of the barriers to success in individual claims against prison profiteers.²⁴⁷

As discussed in Part V, the CFPB and other government entities must take additional steps to protect consumers, especially due to the lack of choice inherent in the prison banking sector. But the JPay example also emphasizes the need for additional clarity about how financial technology companies fit into the broader banking regulatory structure, and emphasizes the role of governmental actors in protecting people in custody. Unless and until prison financial companies face additional accountability mechanisms or different incentives, there is no reason to expect that this predatory pattern of behavior will change.²⁴⁸

242. CFPB, JUSTICE-INVOLVED INDIVIDUALS, *supra* note 3.

243. Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10297, 10297–98 (Feb. 24, 2022).

244. CFPB, POLICY STATEMENT, *supra* note 109.

245. CFPB, *UC Irvine Remarks*, *supra* note 158.

246. *See* Kolkey, *supra* note 55, at 268–69 (“With an estimated \$1.8 billion transferred into prisons and jails each year by the families and friends of incarcerated individuals, and another \$1.4 billion spent within prisons on telecommunication services, these contracts can be immensely profitable for both prison operators and private companies.”).

247. *See id.* at 273–78 (noting that litigation is limited by restrictive contract provisions, such as mandatory arbitration clauses and class action waivers); *see also* Akenhead, *supra* note 60, at 1242–48 (summarizing the obstacles to relief through litigation, such as pleadings-stage dismissals, the Prison Litigation Reform Act, inability to afford counsel, and the lack of transparency in prison contracts).

248. Some government programs in Australia and the United Kingdom have attempted to shift the incentives of prison vendors to improve outcomes for formerly incarcerated people.

SUNNY KHAN FROTHINGHAM*

See Hanna Kozłowska, *In Australia, a Private Prison Company Gets A Bonus for Every Freed Inmate Who Does Not Come Back*, QUARTZ (Dec. 3, 2016), <https://qz.com/849774/in-australia-sodexo-owned-private-prison-company-melaleuca-will-get-cash-for-every-freed-inmate-who-does-not-come-back> [<https://perma.cc/53HL-9HVT>] (“For every former inmate who stays out of prison more than two years, the private company that ran the prison will get a cash bonus.”); see also Alys V. Brown, *Are the U.K.’s Payment-by-Results Programs Right for U.S. Prisons?*, 33 EMORY INT’L L. REV. 175, 176 (2018) (arguing that the United Kingdom’s “payment by result” programs, which compensate private contractors based on reductions in recidivism, are appropriate for U.S. prisons).

* Attending the University of North Carolina School of Law, I am never far from the institution’s ghosts. A mile northeast of my law school, the Barbee-Hargraves Cemetery holds the bodies of dozens of people who were trafficked and enslaved here. A mile west, Carolina’s Archeology Labs hold the unrepatriated remains of hundreds of Indigenous people, despite decades of federal legislation requiring federally-funded institutions to return them to their families. After forcing enslaved people to raise its facades on Indigenous land, my school excluded Black students from its classrooms for 162 years, and Indigenous students for 140. Last year, litigation over Carolina’s policies became a vehicle to dismantle the current, comparatively brief period of integration at schools across the country. My degree and this note cannot be separated from Carolina’s violent legacies.

This note is dedicated to all of us who have had to pay fees to Securus, JPay, and their confederates to feed and contact our incarcerated loved ones. In particular, I send my grief, my anger, and my hope to all of those unjustly charged and unjustly imprisoned for their opposition to Cop City.

Thanks to the staff of the Prison Policy Institute for your research and advocacy. Thanks to Prof. Gabriel Rosenberg, Prof. Maxine Eichner, Prof. Osamudia James, Prof. Gene Nichol, and Tomas Lopez for encouraging me to write. Thanks to my editors Prof. Lissa Broome, Joshua Almond, Kacie England, Elizabeth Nelson, and especially Adam Gillette, for helping me make the idea for this note a reality. Thanks to Carolina OutLaw and the National Lawyers Guild for being my community here. Thanks Zarak, always, and for everything.