HARVARD LAW SCHOOL | The Case Studies

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Employee Benefits — Emergency Savings Account

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Memorandum

TO: Junior Associate
FROM: Senior Partner
DATE: February 2020
RE: Emergency Savings Accounts – Commonwealth

Introduction

I just learned about a great *pro bono* opportunity from the Executive Director of Commonwealth, an organization dedicated to improving the financial stability and opportunity of people in the United States.[1] She told me about an exciting project they are working on around emergency savings accounts. I would like your help analyzing the legal and policy issues that arise from their three options. So that Commonwealth can better advise potential partners, the goal is to recommend whether to proceed with any of the options and provide recommendations for how to navigate the legal and policy challenges associated with each of the three options.

This memo includes the following:

- Background on Commonwealth
- Background on Financial Insecurity in the United States
- Current FinTech Solutions
- Commonwealth's Design Options
- Legal and Policy Considerations
- Briefing Questions
- Appendices

[1] *Our Story*, COMMONWEALTH, https://buildcommonwealth.org/about/our_story (last visited Nov. 4, 2019).

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Background on Commonwealth

Commonwealth is a nonprofit that works "to build solutions to financial challenges faced by financially vulnerable people."[2] To do so, Commonwealth identifies challenges, such as uncertain income and expenses, debt, savings, and financial capabilities. Commonwealth then advises on projects that "demonstrate the real-world application of a specific solution," such as Children's Savings Accounts, Prize-Linked Savings, and SaveYourRefund.[3] The majority of Commonwealth's projects relate to increasing savings for low-income Americans. This new project involves emergency savings accounts as an employee benefit and, therefore, fits right into their portfolio of projects. Your analysis of the possible proposals will be incredibly helpful as Commonwealth thinks about where to allocate its resources and, if they decide to pursue this project, how to make it as effective as possible.

Background on Financial Insecurity in the United States

In its 2017 Report on the Economic Well-Being of U.S. Households, the Federal Reserve Board found that four in ten adults self-reported that they would borrow money or sell something in order to cover a $400 emergency payment.[4] A study of the expenses of low-income households found that low-income households spent 41% of their income on housing and then the next 30% on food and transportation.[5] With health care and clothing accounting for another 10% of income, low-income households have limited earnings left over for savings or emergency expenses.[6]

The rise of income variability compounds the problem faced by those with low income, with those households experiencing a 10% increase or decrease in half the months of the year.[7] This income volatility, combined with a very small or no asset cushion, can lead to severe financial stress when households are faced with an unexpected expense.[8] The Federal Reserve Board found that the major causes of income volatility are irregular work schedules, payment through bonuses or commissions, temporary unemployment, and seasonality of work.[9]

Most products available to low-income households dealing with financial insecurity are what Todd Baker of Columbia Law School refers to as "high-cost, short-term, small-dollar credit" products.[10] These include payday loans, auto title loans, and bank overdraft protection.[11] These products are usually available to people who have little or no credit history but tend to come with high fees.[12]

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2 *Our Work*, COMMONWEALTH, https://buildcommonwealth.org/work (last visited Nov. 4, 2019).

3 *Id.*

4 BOARD OF THE FEDERAL RESERVE SYSTEM., REPORT ON ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, 1–56, 2 (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

5 *See* Diane Whitmore Schanzenbach, Ryan Nunn, Lauren Bauer and Megan Mumford, *Where Does All the Money Go: Shifts in Household Spending Over the Past 30 Years,* Brookings Institute: The Hamilton Project. Fig. 1. (Jun. 2, 2016), https://www.hamiltonproject.org/papers/where_does_all_the_money_go_shifts_in_household_spending_over_the_past_30_y.

6 *Id.*

7 Todd Baker, *FinTech Alternatives to Short-Term Small-Dollar Credit—Helping Low-Income Working Families Escape the High-Cost Lending Trap*, Working Paper, HARVARD KENNEDY SCHOOL: MOSSAVAR-RAHMANI CENTER FOR BUSINESS AND GOVERNMENT, 1-89, 7 (May 18, 2017), https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp75.

8 *Id.*

9 BOARD OF THE FEDERAL RESERVE SYSTEM., REPORT ON ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, 1–155, 19 (May 2016) https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf.

10 Baker, *supra* note 7, at 8.

11 *Id.*

12 *Id.* at 17.

Current FinTech Solutions

For customers with little or no credit history, there have been, until recently, limited alternatives to high-cost, short-term, small-dollar credits. A number of FinTech solutions have recently appeared which aim to lessen income volatility and high-cost credit options.[13] These FinTechs focus on one or more of the interlocking problems affecting low-income Americans, including: Savings Solutions, Income/Expense Variable Management, Financial/Cash Flow Management, and Digital Credit Access/Cost Improvement Lenders, to name a few.[14] Some FinTech solutions, like Qapital, use behavioral economics to gamify saving and encourage Americans to save more.[15] Other solutions, like PayActiv, allow early access to already-earned wages in advance of payday for a small fee.[16] Still other FinTechs, like Brightside, provide a combination of services, including checking and savings accounts.[17] Most importantly, Brightside offers conversations with live financial assistants to advise customers about their financial choices.[18]

Qapital markets its services directly to consumers and offers a full-service banking app along with investing and savings features, charging between $3-$12 per month for a suite of services.[19] It offers its services through third party banks and brokers. In contrast, PayActiv is embedded in a company's payroll system.[20] It allows employees to access in their periodic paycheck up to $500 of the money they have earned but have not yet received.[21] Specifically, if an employee is paid every two weeks, they can borrow the money they have earned over the course of the two weeks through PayActiv before they receive their paycheck.[20] PayActiv charges a $5 fee for each pay period an employee uses the service, which would be a high APR depending on the amount of pay accessed, although less than the typical $25 fee charged by payday lenders.[21] PayActiv is repaid through automatic payroll deductions, making defaults much lower than defaults for payday lenders.[22] PayActiv allows for automatic payroll deductions to be sent directly to a savings account to help employees save or cover emergency expenses.[23] Brightside also works with employers to provide their solutions to employees.[24]

SalaryFinance, a U.K.-based and employer-sponsored FinTech now operating in the U.S., found that its employee installment lending, savings programs, and financial management "significantly increases financial system access for many employees who would be forced to rely on payday loans, bank overdrafts and other very high-cost and unattractive alternatives."[25] The same study also looked at the impact of PayActiv and its $5 fee-lending model, and concluded that it should also have similar effects because it

[13] Baker, *supra* note 7 at 42.
[14] *Id.*
[15] QAPITAL, https://www.qapital.com/ (last visited Nov. 4, 2019) ("[S]aving for something special is fun. Qapital helps you get there with Goals and Rules — two clever ways to supercharge your saving with little effort.").
[16] Anne Tergesen, *Some Companies Offer a New Benefit: Payroll Advances and Loans*, WALL STREET JOURNAL, Sept. 2, 2019, https://www.wsj.com/articles/some-companies-offer-a-new-benefit-payroll-advances-and-loans-11567416601.
[17] *Why Choose Us*, BRIGHTSIDE, https://www.gobrightside.com/#why-choose-us (last visited Nov. 4, 2019).
[18] *Id.*
[19] *About Us*, QAPITAL, https://www.qapital.com/about-us/ (last visited Nov. 4, 2019).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] EVEN, https://even.com/ (last visited Jan. 4, 2020).
[24] Brightside, *supra* note 17.
[25] Todd H. Baker and Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored FinTech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers*, Working Paper, HARVARD KENNEDY SCHOOL: MOSSAVAR-RAHMANI CENTER FOR BUSINESS AND GOVERNMENT, 1-19, 9 (May 9, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf.

was offering credit at lower rates than the high-cost alternatives.[26] Some academics have argued that employers should use some of these new products to do more to help their employees deal with financial insecurity.[27]

Helping employees deal with financial instability may be valuable for an employer's bottom line.[28] One of the largest costs for employers can be employee turnover, with turnover costs estimated at 16% of annual salary for high-turnover, low-paying jobs.[29] Many consumer-facing industries struggle immensely with high employee turnover, with estimates of annual turnover rates of 59% for retail generally and 30-45% for call-center employees.[30] It is also expected that improving the financial stability of employees would reduce absenteeism and improve employee performance.[31]

The SalaryFinance study also found evidence suggesting that a FinTech firm that combats the financial instability of workers can reduce the turnover rate of employees.[32] The study compared employer's historical turnover rate with their turnover rate when partnered with SalaryFinance and found a reduction in turnover.[33] Moreover, the study found that employees who used SalaryFinance were less likely to leave the employer than employees who did not use SalaryFinance.[34] While the study did not have perfect controls and other possible explanations cannot be ruled out, the findings suggest that helping employees combat financial instability can reduce turnover, thereby improving an employer's bottom line. Similar results were found in the study when looking at the FinTech PayActiv.[35]

Therefore, an emergency savings program may be appealing to employers because of the potential reduction in turnover and decreased costs, and to employees because of an increased ability to save for emergencies and unexpected expenses.

Commonwealth's Design Options

Commonwealth is an advisor and consultant to employers and FinTechs as they try to provide emergency savings for employees. In that role, Commonwealth is looking to stimulate market solutions to these issues, not attempting to subsidize an emergency savings program on a long-term basis. The potential economic incentives for each of the three design options, therefore, will be discussed briefly along with the description of the option. Commonwealth would like to better understand the legal and policy challenges associated with emergency savings accounts, including both the legal and regulatory environments, as well as the potential effectiveness of its strategy. This is particularly important because FinTechs generally do not have the resources and expertise to work through the relevant legal issues and convince management at large companies to take up emergency savings accounts. Commonwealth, then, can play an important role in overcoming barriers for both entities to stimulate a market solution to this

26 *Id.* at 10-11.
27 Timothy Ogden and Jonathan Morduch, Too Many Americans Suffer from Financial Instability. Their Employers Can Help Fix It. HARVARD BUSINESS REVIEW, Dec. 14, 2017, https://hbr.org/2017/12/too-many-americans-suffer-from-financial-instability-their-employers-can-help-fix-it.
28 Baker, *supra* note 25, at 13.
29 *Id.* at 11.
30 *Id.* at 10–11.
31 Baker, *supra* note 7, at 57.
32 Baker, *supra* note 25, at 12.
33 *Id.*
34 *Id.*
35 *Id.* at 16.

issue. With that goal in mind, Commonwealth is currently considering three different design options, with distinct positives and negatives.

Highly-Integrated FinTech

The first option would be a highly-integrated FinTech. A highly-integrated FinTech would be integrated into the employer's payroll system and would allow employees to sign up to automatically deduct a certain percentage of their income to be invested and held in an emergency savings account.[36] The funds would be held in an FDIC insured account.[37] One large benefit of the highly-integrated FinTech solution is the ability for automatic payroll deductions for deposit into the employee savings account. The benefit of automatic savings would mean that employees do not have to consciously decide each month to save. Savings would increase, just as the percentage of employee enrollment and investment increases when 401(k) retirement accounts require employee opt-out instead of employee opt-in.[38] However, this design option would likely require the most investment of time and resources from an employer to integrate its system with a FinTech. Additionally, employers may not control their own payroll system and may, instead, use a company such as ADP.[39] This means that companies like ADP would have the opportunity to integrate an emergency savings option into their system, which would allow employers to then add it as a component of their payroll system. Although the technical costs and hurdles to this sort of integration are likely high, research has shown that there are significant benefits for both employees and employers when employees have increased financial stability and savings.[40] It might be difficult to convince employers that the benefits outweigh the costs in the event that the costs of implementation are high. However, because many employers use the same large payroll companies, getting a large payroll company to integrate a savings account into its system could reach a large number of employees.

The long-term economic viability of this plan would likely be driven by banks' desire for stable deposits. While individual emergency savings accounts may fluctuate in value, a bank having a large number of emergency savings accounts would likely result in a relatively large pool of stable deposits. Banks may then have an incentive to support the development and maintenance of the emergency savings program. Separately, a payroll company like ADP would likely have an interest in innovating to provide new features to employers in order to compete with other payroll companies for business.

[36] Tergesen, *supra* note 16 (describing how PayActiv is able to provide lower cost loans because it has access to payroll information and can automatically deduct the required payments from the following paycheck).

[37] The FinTech would partner with a bank to offer and hold the savings account, ensuring that the account has deposit insurance. Another method is to hold the account as a Brokerage Cash Management Account, which has a more complicated set of contracts and partnerships to provide the standard suite of banking services and deposit insurance. Another method is to hold funds in a non-deposit account that can be accessed with a debit card which, however, would not provide deposit insurance.

[38] Dan Kadlek, *These Simple Moves By Your Employer Can Drastically Improve Your Retirement*, MONEY (May 12, 2015), http://money.com/money/3854692/retirement-401k-simple-choices-merrill-lynch/.

[39] ADP, https://www.adp.com/ (last visited Jan 2., 2020).

[40] Baker, *supra* note 25, at 2–3.

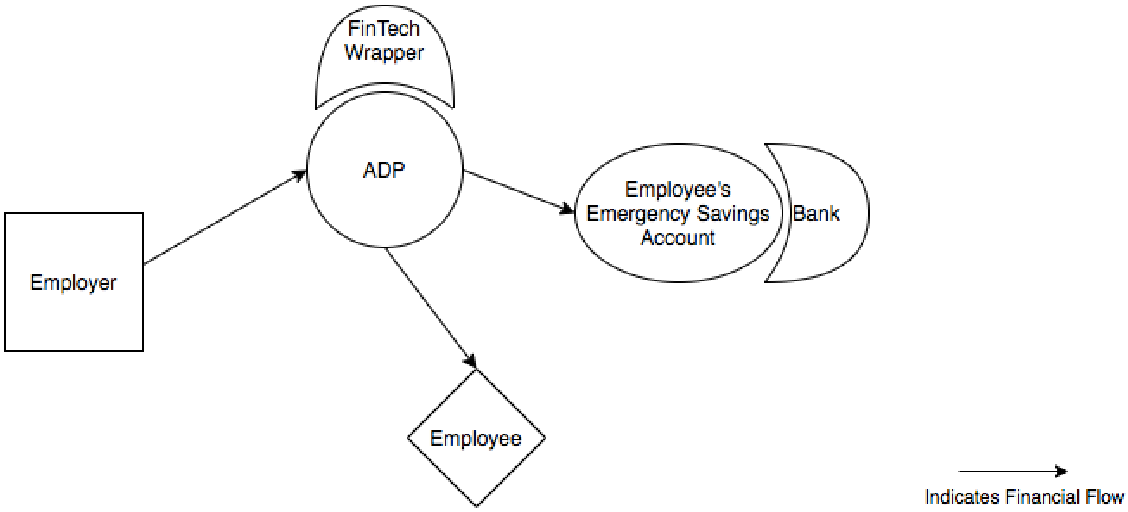

Figure 1: Highly-Integrated FinTech Diagram

Retirement Account Sidecar Savings Account

The second option would be to add an Emergency Savings Account sidecar to current employer-sponsored retirement plans and have the plan be administered by retirement account administrators such as John Hancock. This option would still allow for high-integration and automatic payroll deductions, but would impose an additional burden on retirement account administrators. The plan would allow an employee to fund the savings account with after-tax income and then, when that account reached a set amount with which the employee is comfortable, the income stream would be directed into the employee's retirement savings account.[41] The "sidecar" option would be limited to employees of employers who have an employer-sponsored retirement plan.

The long-term economic viability of this option would likely be driven by the incentives of the retirement administrators. Retirement administrators have an interest in attracting more employees to open retirement accounts, including younger and lower-income workers who are less likely than older and higher-income employees to have retirement accounts. By offering emergency savings programs, more employees would be using accounts with retirement administrators, providing more customers for the retirement account administrators.

[41] Amanda Umpierrez, *Mechanics of Implementing a Sidecar Savings Account: Keeping retirement plan contributions rolling in while also allowing employees to save for emergencies*, PLAN SPONSOR (Oct. 22, 2019), https://www.plansponsor.com/in-depth/mechanics-behind-implementing-sidecar-savings-account/.

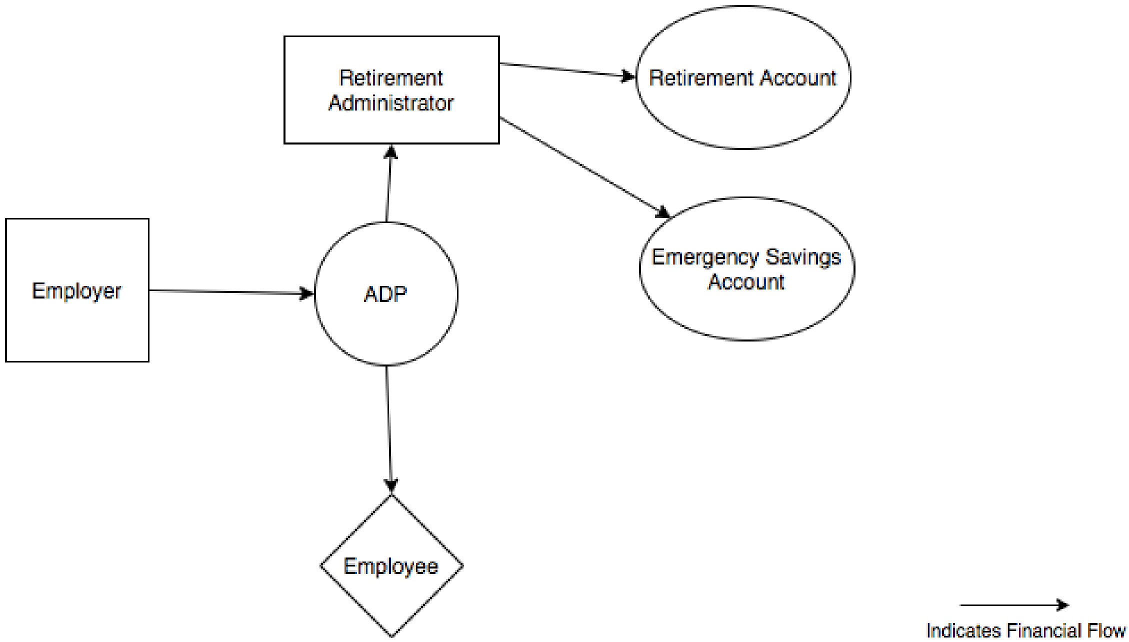

Figure 2: Retirement Account Sidecar Savings Account Diagram

Low-Integration FinTech

The third option would be for employers to recommend a low-integration FinTech, such as Qapital, to their employees. Because the service would not be fully integrated, the technical costs of this option would be much lower. It is possible that employees could still make automatic payroll deductions to a Qapital savings account, but that would depend on each employer's—and Qapital's—willingness to do so. At the very least, employers would function as a method of informing employees of the services of FinTechs and how they can help improve an employee's financial wellbeing. Nevertheless, because the costs of implementation for employers would be relatively low, more employers may be willing to participate in this type of program. Costs to employees would likely be higher with this option because savings apps tend to charge user fees for their services.

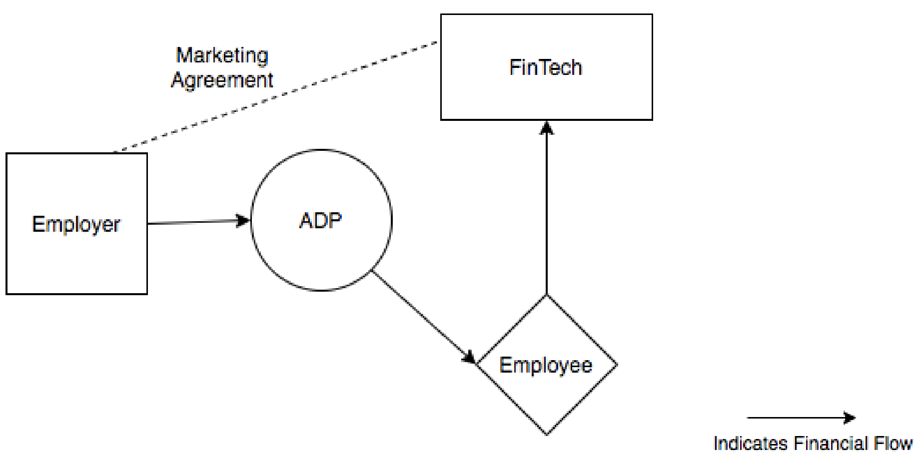

Figure 3: Low-Integration FinTech Diagram

Summary

Commonwealth wants a proposal that will maximize the effectiveness of any savings program and will reach the greatest number of low-income Americans. The option of using retirement account administrators may not be able to reach as many low-income Americans because it requires employers to be offering retirement plans. There are benefits to that approach, however, because these potential partners already have the infrastructure to automatically deduct income from payroll and direct it to a savings account, particularly retirement account administrators such as John Hancock. The other two options would not be limited to the employees who work for employers that already provide retirement plans.

Commonwealth Design Options Summary:

- High-Integration between FinTech and employer's payroll system;
- Sidecar Savings Account Integrated with Retirement Account Administrator like John Hancock; and
- Low-Integration with FinTech (such as Qapital) where the employer encourages employees to sign up but provides little or no additional integration. The employer effectively "sponsors" a FinTech for its employees.

Key Legal Considerations

The following legal considerations arise when reviewing Commonwealth's proposal. For each of the legal considerations that follow, Commonwealth wishes to learn the pros and cons of each of the three design options that Commonwealth is considering, and how they can advise partners about the legal issues involved, including any legal or regulatory uncertainty. A comprehensive understanding of each of the potential legal benefits or hurdles would allow Commonwealth to provide the best guidance to employer and FinTech partners. The legal issues that need consideration include:

- Federal Reserve Board's Regulation D;
- State and Federal Money Transmitter Laws;
- Electronic Funds Transfer Act;
- ERISA;
- Student Loan Payment IRS Private Letter Ruling;
- Wage Garnishment; and
- Asset Limits for Eligibility for Certain Public Benefits.

Regulation D

The Federal Reserve Board is required under Section 19 of the Federal Reserve Act to impose reserve requirements on certain deposits and other liabilities of depository institutions.[42] Regulation D implements this reserve requirement and defines which institutions and deposits are subject to reserve requirements.[43] The regulation identifies transaction accounts, which are accounts from which the account holder is permitted to "make transfers or withdrawals by negotiable or transferable instrument,

[42] Compliance Guide to Small Entities: Regulation D: Reserve Requirements of Depository Institutions, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, https://www.federalreserve.gov/supervisionreg/regdcg.htm (last visited Nov. 4, 2019).

[43] *Id.*

payment order of withdrawal," or by certain other means.[44] These types of accounts (and certain others) are subject to reserve requirements, the level of which depends on the amount of a depository institution's transaction accounts.[45]

In contrast, savings accounts are not subject to reserve requirements.[46] However, savings accounts have a monthly limit of six "convenient" transfers and withdrawals.[47] Any transfer or withdrawal made by check or debit card, or any automatic withdrawal, count against the limit of six transfers.[48] Withdrawals made in person at a bank, by mail, from an ATM, or withdrawal requests initiated by telephone but disbursed by mailed check, do not count against the limit.[49]

It is an important design priority for Commonwealth to call the accounts savings accounts and to allow unfettered access for employees. This fits with Commonwealth's mission of encouraging savings by Americans and having those funds be available to employees in an emergency, however often one arises. In addition, as a marketing matter, less complexity associated with the account could increase adoption of emergency savings accounts by employees. Further, some psychology studies have shown that savings increases peace of mind and overall well-being.[50] Calling it a savings account may also have additional benefits.

There are a number of provisions that regulate advertising and other information that is provided to customers of depository institutions. These provisions are known as Regulation DD, which are promulgated by the Consumer Financial Protection Bureau in order to implement the Truth in Savings Act.[51] A key concern is whether the account may be associated with the term "savings" if the account is designed as a transaction account.[52] It is not clear what the relationship between Regulation D, which regulates depository institutions, and Regulation DD, which regulates advertising and disclosures to customers of depository institutions actually is, but it is an important consideration for this project.

Questions related to Regulation D:

1. Should the Emergency Savings Account be a transaction account or a savings account?
2. If it should be a transaction account, can it still be called an "emergency savings account"?

Money Transmitter Laws

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44 *Id.* (citing 12 CFR § 204.2).
45 Compliance Guide, *supra* note 42.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 Cory Stieg, *Millennials who buy less and save more are happier*, CNBC (Oct. 10, 2019), https://www.cnbc.com/2019/10/10/study-millennials-who-buy-less-and-save-more-are-happier.html.
51 12 CFR § 1030.1(a).
52 One interesting puzzle related to this issue is Wal-Mart's prepaid card that offers a prize-linked "savings Vault account" along with the card. Based on the cardholder agreement, the money loaded onto the prepaid card is held at a custodial account at Green Dot Bank. The account is a transaction account. But owners of the card also get a "savings Vault account" that allows the user to set aside a portion of the card's balance. This portion of the balance cannot be accessed from the card directly. The Service Agreement for the MoneyCard Vault notes that the account "is not an independent account or card. It is a separate part of your card that is set aside and cannot be accessed by your card directly. The Vault is not a savings account, and it does not pay interest." It is not clear how Wal-Mart is able to use the word "savings" for what appears to be a transaction account.

Federal money transmitter laws and regulations are overseen by the Financial Crimes Enforcement Network (FinCen) of the U.S. Treasury.[53] Each state, except Montana, has its own version of a money transmitter law.[54] The goal of the Federal money transmitter laws and FinCen is to "safeguard the financial system from illicit use, combat money laundering, and promote national security."[55] Commonwealth wants to know if any part of this project could make the employer a money transmitter, which would require registering with FinCen under the Money Laundering Suppression Act of 1994[56] and obtaining a state license.[57]

Questions related to money transmitter laws:

1. By creating an emergency savings account for employees, would employers become subject to money transmitter laws and, therefore, need to register with FinCen and state regulators?
2. Is it sufficient that employer's payroll processors, such as ADP, are already registered as money transmitters?

Electronic Fund Transfer Act

The Electronic Fund Transfer Act of 1978 was designed to protect consumers who engage in electronic funds transactions.[58] These services include "transfers through automated teller machines, point-of-sale terminals, automated clearinghouse systems . . . and remote banking programs."[59] It creates a number of penalties for, among other things, unauthorized transfers of funds.[60]

For our purposes, regulations were adopted governing how employers use direct deposit and electronic transfers.[61] We want to determine whether we would run afoul of these provisions by how we design the emergency savings account.

The Consumer Financial Protection Bureau (CFPB) is responsible for overseeing the Electronic Fund Transfer Act.[62] The CFPB has two programs that might be useful for us to resolve any regulatory uncertainty surrounding the EFTA: the Compliance Assistance Sandbox and the No-Action Letter Policy.[63] The Compliance Assistance Sandbox allows companies to obtain a safe harbor for innovative products when it is not clear whether three laws apply: the Electronic Fund Transfer Act, the Truth in Lending Act, and the Equal Credit Opportunity Act.[64] The No-Action Letter policy is a bit broader and allows companies to get a commitment that the CFPB will take no enforcement action against a company for a particular

53 *Mission*, FINANCIAL CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/about/mission (last visited Jan. 4, 2020).
54 FinTech Survey: Money Transmission, George Washington Center for Law, Economics, and Finance, http://www.fintechsurvey.org (last visited Jan. 4, 2020).
55 FINANCIAL CRIMES, *supra* note 52.
56 *Fact Sheet on MSB Registration Rule*, FINANCIAL CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/fact-sheet-msb-registration-rule (last visited Jan. 4, 2020).
57 FinTech Survey, *supra* note 53.
58 Fed. Res. Sys., *Electronic Fund Transfer Act*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 1 (2018), https://www.federalreserve.gov/boarddocs/caletters/2008/0807/08-07_attachment.pdf.
59 *Id*.
60 *Id.* at 12.
61 12 C.F.R. 1005.10(e).
62 CFPB, *Electronic Fund Transfers (Regulation E); Amendments*, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/ (last visited Nov. 4, 2019).
63 *Innovation*, CFPB, https://www.consumerfinance.gov/about-us/innovation/ (last visited Nov. 4, 2019) (providing overview of both programs).
64 CFPB, *Policy on the Compliance Assistance Sandbox*, CFPB (Sept. 10, 2019), at 3, https://files.consumerfinance.gov/f/documents/cfpb_final-policy-on-cas.pdf.

potential violation of a consumer law.[65] To date, there has been at least one No-Action Letter provided by the CFPB.[66] Two years later, the CFPB provided a report on the success of the No-Action Letter and their monitoring of Upstart, the company that requested and received the No-Action Letter.[67]

Questions related to the Electronic Fund Transfer Act:

1. Would any of the three options be at risk of violating the Electronic Fund Transfer Act?
2. If so, should we apply to the CFPB to resolve any potential regulatory uncertainty?

ERISA

The Employee Retirement Income Security Act of 1974 sets "minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans."[68] ERISA establishes a number of requirements on plans and "provides fiduciary responsibilities for those who manage and control plan assets."[69] Being a fiduciary creates a number of requirements, including to "run the plan solely for the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses."[70] Moreover, "[f]iduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses."[71]

In sum, the costs of being a fiduciary for an employer would be high. If it seemed likely that participation in an employee benefit plan that created emergency savings accounts would lead to fiduciary responsibilities, Commonwealth is concerned that some employers might not participate at all to avoid the potential legal risks. We will want to figure out if this plan is subject to ERISA, and if it is, how we might be able to structure it so that employers won't become fiduciaries, or risk becoming fiduciaries.

Questions related to ERISA:

1. Would creating an emergency savings account for employees subject an employer to fiduciary responsibilities under ERISA?
2. If it might, is there a way to structure the account so that does not happen? If so, how?

Student Loan IRS Private Letter Ruling

Recently, a private company asked the Internal Revenue Service (IRS) for a Private Letter Ruling to pursue an innovation in its retirement plan.[72] The company wanted to allow employees to make Student Loan Payments but not lose out on the employers' 401(k) matching contribution.[73] Under the plan, if an

65 *Id.*

66 CFPB, *CFPB Announces First No-Action Letter to Upstart Network*, CFPB, Sept. 14, 2017, https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/.

67 CFPB, *An update on credit access and the Bureau's first No-Action Letter*, CFPB, Aug. 6, 2019, https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/.

68 Dep't of Labor, *Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/erisa (last visited Nov. 4, 2019).

69 *Id.*

70 *Id.*

71 *Id.*

72 Camilo Maldonado, *IRS Ruling Allows Company to Match Employees' Student Loan Payments Into Their 401(k)*, FORBES (Aug. 29, 2018), https://www.forbes.com/sites/camilomaldonado/2018/08/29/irs-ruling-allows-company-to-match-employees-student-loan-payments-into-401k/#34ce72e62861.

73 *Id.*

employee made student loan payments in the amount of at least 2% of the employee's salary, the company would provide a matching payment of 5% of salary to the employee's 401(k) account.[74] If the employee does not meet the 2% threshold, she can meet the threshold by making contributions to her 401(k) account.[75] Moreover, enrolling in this version of the plan does not prevent the employee from making payments to her 401(k) account generally.[76]

Commonwealth is interested in whether employers can possibly build on this innovative scheme by providing an employer matching contribution to a 401(k) plan if the employee contributed to the emergency savings account, which might create additional incentives for employees to enroll in an emergency savings account. This, in turn, might give employers reason to invest in setting up a program because this extra incentive might give the employer enough enrollees for the program to be valuable in reducing turnover.

The program would be somewhat similar to the plan described in the IRS Private Letter Ruling. If employees contribute some percentage of their income to an emergency savings account, an employer would then make matching payments to the employees 401(k) account. This possibility might be easier if we integrate with retirement account administrators, but it could still be done through a FinTech integrated into an employer's payroll system. It is even possible, theoretically, to engineer this program through a low-integration FinTech, although the monitoring of savings actually made would be more difficult.

There are a number of ways to go in this direction. First, Commonwealth could rely on the existing IRS Private Letter Ruling as permitting experimentation with 401(k) plans, and then employers could create the program to allow matching if an employee puts funds toward the employee's emergency savings account. Second, employers could apply to the IRS for a Private Letter Ruling to resolve any uncertainty around whether the proposed plan would pass muster. Third, it is possible that the whole idea might be overly complicated and run afoul of the law.

Questions about IRS Private Letter Ruling:

1. Could the IRS Private Letter Ruling be relied upon by employers to structure their own twist on a 401(k) matching contribution?
2. Would it be appropriate for each employer to apply to the IRS for a Private Letter Ruling about the specifics of its plan?
3. Should employers be encouraged to pursue a 401(k) matching contribution for the emergency savings account

This question brings an additional complication, which may be a complication with the creation of any emergency savings account offered to employees. To qualify for various tax deductions and credits, the IRS requires that a company's 401(k) plan does not discriminate in favor of high-income workers.[77] To do so, the IRS employs a number of non-discrimination tests.[78] In its Private Letter Ruling, the IRS noted that

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74 *Id.*
75 *Id.*
76 *Id.*
77 401(k) Nondiscrimination Tests Explained, PLAN SPONSOR, Dec. 1, 2014, https://www.plansponsor.com/401k-nondiscrimination-tests-explained/.
78 *Id.*

student loan payment matching contributions would not be considered for 401(m) non-discrimination testing purposes.[79] However, what it called the true-up matching contribution (matching for an employee's contribution to a 401(k) plan) was considered matching contributions for 401(m) testing.[80]

This treatment of true-up matching could create a potential problem for employers. If they implement a matching program and too many low-income employees opted-in to it, the employer's 401(k) plan may appear to be discriminating in favor of high-income employees because, as low-income employees divert funds to emergency savings, the pool of employees left in the 401(k) plan would be high-income employees who would not be inclined to take advantage of the emergency savings accounts. This possibility could scare off employers from participating in any program that Commonwealth proposes if a program would encourage low-income employees to drop out of an employer's 401(k) plan. It is not clear how much of an effect the creation of an emergency savings account employee benefit would have on the nondiscrimination issue, but Commonwealth would like your input on the question.

Questions about 401(m) non-discrimination testing:

1. Should employers be concerned about whether the creation of an emergency savings account could jeopardize their non-discrimination tests for their 401(k) plans?
2. Is there a way that employers might be able to avoid this issue?

Wage Garnishment

Employers have certain responsibilities when one of their employee's wages are being garnished due to a court order.[81] These include withholding the amount that is being garnished.[82] Both state and federal laws regulate the percentage of a person's income that can be garnished for wages, usually depending on the purpose of the wage garnishment, *e.g.*, child support, student loans.[83] Diverting some of an employee's income to an emergency savings account could pose a problem if that means the money is no longer being held for wage garnishment. It could create a clash between claims to income.

Question about Wage Garnishment:

1. Will creating an emergency savings account program worsen the issues faced by employers relating to wage garnishment?

Asset Limits for Eligibility for Certain Public Benefits

Finally, the target population for this innovation is low-income Americans. There are a number of public benefit programs in the United States that have asset limits (on top of the income limits necessary to qualify for the programs) that can prevent Americans with assets greater than a particular threshold from

79 I.R.S. Priv. Ltr. Rul. 2018-33012 (May 22, 2018), at 2.
80 *Id.*
81 *Employers Responsibilities for Wage Garnishment*, BENEFIT MALL, https://employers.benefitmall.com/blog/employer-responsibilities-wage-garnishment (last visited Nov. 4, 2019).
82 *Id.*
83 Dep't of Labor, *Fact Sheet #30, Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III*, U.S. DEP'T OF LABOR, (Oct. 2019), https://www.dol.gov/whd/regs/compliance/whdfs30.htm.

receiving benefits.[84] Because our target population might be eligible for these programs, we do not want the creation of an emergency savings account to jeopardize the benefits upon which some low-income Americans rely. As an added complication, states can impose their own asset limits.[85] There is no federal asset limit for Temporary Assistance for Needy Families (TANF), but states can impose one.[86] For Supplemental Nutrition Assistance Program (SNAP), there is a federal asset limit of $2,250 in liquid assets or $3,250 if the household includes an elderly individual or individual with disabilities.[87] However, states can relax the federally imposed asset limit, and many have.[88]

Questions about Asset Limits for Public Benefits:

1. How can an employer's emergency savings program avoid jeopardizing an employee's asset limits?
2. How can we prevent fear of reaching the asset limit from reducing the number of employees who are interested in signing up for the program?

Briefing Questions

Before sending you off to research, I just wanted to reiterate the two main objectives of this assignment. There are a number of questions related to each of the legal considerations described above and you should endeavor to answer them. Those answers should inform your advice for the two most important questions to which Commonwealth would like answers. These answers will help them better advise employers, FinTechs, and other partners on this project. The two broad questions are:

1. Should Commonwealth move forward with encouraging employers to provide emergency savings accounts as a benefit to their employees?
2. What are the legal and policy benefits and complications for each of the three options? Which seems to be the best option to choose?

Attached to this memorandum, you will find a number of appendices provided to aid your analysis. Thank you for taking on this assignment. I am looking forward to your proposal.

84 Maureen Pirog, Edwin Gerrish and Lindsey Bullinger, *TANF and SNAP Asset Limits and the Financial Behavior of Low-Income Households*, PEW CHARITABLE TRUSTS, 1–30, 2, Sept. 2017, https://www.pewtrusts.org/-/media/assets/2017/09/tanf_and_snap_asset_limits_and_the_financial_behavior_of_low_income_households.pdf.

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87 *Id.*

88 *Id.*

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