

# Client Alert

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## CFPB Amends Prepaid Accounts Rule and Delays its Effective Date

By **Obrea O. Poindexter, Jeremy R. Mandell, and Amanda J. Mollo**

On January 25, 2018, the Consumer Financial Protection Bureau (CFPB or “Bureau”) finalized amendments (“2018 Amendments”) to its final Prepaid Accounts Rule (“Final Rule”), which was published in November 2016. The Bureau stated that the 2018 Amendments finalize revisions proposed in June 2017 (“2017 Proposal”) “generally as proposed, with certain modifications.”<sup>1</sup> The 2018 Amendments came quickly on the heels of an announcement from Acting Director Mick Mulvaney seeking public input on Bureau operations and the leaked memo from the Acting Director calling for more targeted regulation, which specifically referred to prepaid accounts. Nonetheless, industry stakeholders needed greater certainty on the Final Rule, which was slated to take effect on April 1, 2018. The 2018 Amendments address some of the issues raised by industry and delay the effective date for all provisions of the Final Rule until April 1, 2019.

The CFPB also released an executive summary of the amendments and an “unofficial, informal” redline showing the changes made by the 2018 Amendments to the 2016 Final Rule.

The 2018 Amendments address specific issues identified as industry prepared to implement the requirements of the Final Rule. Because of the complexity and ambiguity of certain provisions of the Final Rule, industry stakeholders requested clarifications from the Bureau. Despite the 2018 Amendments, the complexity and ambiguity persist, particularly as they relate to the scope of application of the Final Rule. Industry stakeholders continue to struggle with implementation, as reflected by the many comments received in response to the 2017 Proposal and the *ex parte* meetings and communications after the close of the comment period, which the Bureau also considered in promulgating the 2018 Amendments.

### THE 2018 AMENDMENTS

As a result of the 2018 Amendments, the Final Rule has been amended in the following ways:

- **Effective date.** In the 2017 Proposal, the CFPB requested comment on whether it was necessary and appropriate to further delay the effective date of the Final Rule. In response, industry commenters argued for an additional extension based on the need to review and analyze the finalized 2018 Amendments once published, coordinate with internal and external parties to create a compliance plan, and implement the plan. Some commenters specifically noted that a “freeze” period during the winter holiday season that could hamper efforts to implement changes quickly, while others argued that the original effective date had not provided enough time for implementation. The Bureau indicated that the most persuasive arguments for extension were the error resolution and limited liability protection changes to packaging materials and disclosures contained therein that may need to be recalled and replaced, and general concerns regarding the amount of time needed to comply.

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<sup>1</sup> For additional information on the Proposed Amendments, see our alert [here](#).

# Client Alert

The 2018 Amendments also unify the effective date for all provisions of the Final Rule. According to the Supplementary Information to the 2018 Amendments, the Bureau “does not believe it is warranted” to have earlier effective dates for portions of the rule. The Bureau exercised its discretion under section 105(d) of the Truth in Lending Act to lengthen the effective date because of changes to disclosures required by Regulation Z.

- **Error resolution and limited liability.** The Final Rule, as published, required financial institutions to provide error resolution and limited liability for prepaid accounts, even if the financial institution had not successfully completed its consumer identification and verification process. The original provision led to concerns about fraudulent error claims, and, as a result, some financial institutions reportedly considered limiting functionality on unverified accounts to reduce fraud exposure.

The 2018 Amendments finalize an exception for unverified prepaid accounts (not including payroll card accounts or government benefit accounts) under which the error resolution and limited liability provisions of the Final Rule exclude accounts for which the consumer identification and verification process has not been successfully completed or for which the consumer identification and verification process has been completed but the consumer’s identity could not be verified, provided that the required notice is given in a form substantially similar to Model A–7(c). Prepaid account programs for which there is no consumer identification and verification process are also excluded from the Final Rule’s specific error resolution and limited liability requirements, provided that the financial institution describes its error resolution process and limitations on consumer liability for unauthorized transfers or, if none, states that there are no such protections.

In addition, the 2018 Amendments provide that even where a consumer’s identity is later verified, a financial institution is not required to limit liability and resolve errors with regard to disputed transactions that occurred prior to successful completion of the verification process for that account.

- **Exclusion for loyalty, award, or promotional (LAP) cards.** The 2018 Amendments finalize a proposed clarification to the exclusion for LAP cards. The LAP card exclusion was previously tied to making the disclosures required for LAP cards under the Regulation E gift card rule (12 C.F.R. § 1005.20(a)(4)(iii)). The 2018 Amendments clarify that the Final Rule excludes prepaid accounts that otherwise satisfy the definition of “loyalty, award, or promotional gift card” under the Regulation E gift card rule, but do not make the disclosures, as long as the card is not marketed to the general public. Cards that include the required LAP card disclosures will continue to be excluded from the definition of a prepaid account, regardless of whether they are marketed to the general public; however, cards that do not include the required LAP card disclosures and are marketed to the general public will not be excluded from coverage under the Final Rule as amended by the 2018 Amendments.
- **Notice regarding unsolicited issuance.** As published, the Final Rule required a financial institution to provide consumers with an explanation that an unsolicited access device is not validated and that the consumer may dispose of the access device if validation is not desired. This raised industry concerns that the provision could be interpreted to require a financial institution to provide an alternative means for a consumer to access funds for certain programs where the prepaid account is distributed by a financial institution on an unsolicited basis. The 2018 Amendments clarify that if (i) an access device for a prepaid account (other than a payroll card account or government benefit account) is provided on an unsolicited basis for disbursing funds to a consumer, and (ii) the financial institution or third party disbursing the funds via the prepaid account does

## Client Alert

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not offer any alternative means for the consumer to receive those funds, the financial institution must inform the consumer that there are no other means by which the consumer can initially receive the funds and of the consequences of disposing of the access device.

The 2018 Amendments also clarify that, where a financial institution or third party disburses funds to a consumer via a prepaid account (other than a payroll card account or government benefit account) without offering any alternative means for the consumer to receive those funds, the pre-acquisition disclosures may be provided at the time the consumer receives the funds.

- **Disclosure delivery.** The 2018 Amendments also create an exception to the Final Rule requirement that pre-acquisition disclosures be provided in electronic form if the consumer acquires a prepaid account through electronic means or orally if the consumer acquires the prepaid account by telephone. Pursuant to the exception, a financial institution is not required to provide the pre-acquisition disclosures (i) in electronic form to a consumer who obtains a prepaid account electronically, or (ii) orally to a consumer who acquires a prepaid account by telephone, if the financial institution provides written pre-acquisition disclosures to the consumer prior to acquisition of the prepaid account.

The 2018 Amendments also provide additional flexibility regarding the delivery of the long-form disclosure under the retail location exception. Specifically, a financial institution can provide the long-form disclosure electronically, without regard to the E-SIGN Act consent requirements, if the financial institution meets the following requirements: (i) the financial institution does not provide the long-form disclosure inside the prepaid account packaging material; and (ii) the financial institution is not otherwise mailing or delivering to the consumer written account-related communications within 30 days of obtaining the consumer's contact information.

In addition, the 2018 Amendments clarify that a financial institution that has not obtained the consumer's contact information for a prepaid account is not required to provide the long-form disclosure after the consumer acquires the prepaid account. However, consumers must still be able to access the information on the long-form disclosure by telephone and online.

- **Disclosure of additional fee types with more than two variations.** Moreover, the 2018 Amendments provide an alternative for disclosing additional fee types with more than two fee variations. Specifically, a financial institution may consolidate the fee variations into two categories and disclose the names of those two categories and the fee amounts, similar to the way the two-tier fees for ATM balance inquiry fees and customer service fees are disclosed. However, if there are three or more fee variations that cannot be consolidated, or if doing so would cause consumer confusion, the CFPB expects that a financial institution will not avail itself of this new alternative.
- **Limitation on foreign language disclosures.** The 2018 Amendments also create an exception to the requirement for financial institutions to provide foreign language pre-acquisition disclosures for payroll card accounts and government benefit accounts where the foreign language is offered by telephone only via a real-time language interpretation service provided by a third party and under certain other limited circumstances.

# Client Alert

- **Submission of agreements to the CFPB.** As published, the Final Rule required issuers to submit prepaid account agreements to the CFPB no later than 30 days after an issuer offers, amends, or ceases to offer a prepaid account agreement. This requirement raised industry concerns because it appeared to require issuers to submit agreements to the CFPB even in the frequent circumstance where the only changes to the agreement were the relevant parties.

Instead, the 2018 Amendments permit issuers to delay updating the list of names of other relevant parties to an agreement (e.g., employers for a payroll card program or agencies for a government benefit program) until the earlier of (i) the time the issuer submits an amended agreement or changes to other identifying information; or (ii) May 1 of each year, for any updates to the list of names of other relevant parties that occurred between the issuer's last submission of relevant party information for that agreement and April 1 of that year.

In addition, the 2018 Amendments also permit issuers to submit the short-form and long-form disclosures as separate addenda to the agreements they submit to the CFPB.

- **Clarification of credit-related provisions.** Under the Final Rule, digital wallets that are capable of both (i) storing payment credentials for other accounts offered by the digital wallet provider or its business partners, and (ii) being loaded with funds, would be covered by the Final Rule's hybrid prepaid-credit card provisions. However, in the 2017 Proposal, the CFPB acknowledged that these provisions could create unintended challenges for digital wallets.

The 2018 Amendments finalize a limited exception from the definition of "business partner" to exclude from the hybrid prepaid-credit card rules certain arrangements between companies that offer credit card accounts that are subject to traditional credit card rules under Regulation Z and companies that offer prepaid accounts, including digital wallet providers. Specifically, the exception applies where:

- The credit card account is accessible through a traditional credit card;
- Prior to accessing credit from a linked credit card account, the consumer has authorized, by written request separately signed or initialized, the prepaid card to access the credit card account (under the 2018 Amendments, this condition applies only for credit card accounts linked to prepaid accounts on or after the April 1, 2019 effective date);
- The prepaid account issuer and the card issuer do not condition the acquisition or retention of the prepaid account or the credit card account on obtaining the above-described authorization (under the 2018 Amendments, this condition also applies only for credit card accounts linked to prepaid accounts on or after the April 1, 2019 effective date);
- The prepaid account issuer applies the same terms, conditions, or features to the prepaid account—including fees to load funds—to consumers that authorize linking the prepaid card to the credit card account as it applies to the consumer's prepaid account when the consumer does not authorize such a linkage; and
- The card issuer applies the same "specified terms and conditions"—i.e., terms and conditions required to be disclosed under § 1026.6(b), any repayment terms and conditions, and the limits on

## Client Alert

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liability for unauthorized credit transactions—to the credit card account when the consumer authorizes linking the prepaid card to the credit card account as it applies to the consumer's credit card account when the consumer does not authorize such a linkage.

The 2018 Amendments also expand the exception that permits prepaid account issuers to provide certain incidental forms of credit structured as a negative balance on the asset feature of prepaid accounts without triggering Regulation Z and the other protections for hybrid prepaid-credit cards.

### OUTLOOK

The delayed effective date provides industry additional time to implement the amended Final Rule. Nonetheless, fundamental questions about the Bureau's approach to regulating prepaid accounts remain. In this regard, even though the Bureau, under the leadership of Acting Director Mulvaney, is taking a fresh look at the full scope of Bureau operations, including the focus of its rulemakings, it is not clear whether this effort will affect the Prepaid Accounts Rule. Since the Final Rule has previously survived Congressional Review Act review, it would be prudent for industry to manage toward implementing the requirements of the Final Rule, as amended by the 2018 Amendments, by the April 1, 2019 effective date, unless the Bureau provides a clearer signal that it may reconsider the amended Final Rule in the interim.

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# Client Alert

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