

Client Alert

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Sweeping Prepaid Card Proposal Issued by CFPB

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Today, the Consumer Financial Protection Bureau (“CFPB”) issued its long-awaited proposed rule to further regulate prepaid card products (the “Proposed Rule”).¹ The Proposed Rule was the topic of discussion at a field hearing in Wilmington, Delaware, which featured remarks from CFPB Director Richard Cordray and testimony from consumer groups, industry representatives, and members of the public. The CFPB also issued a study on prepaid account agreements.²

In May 2012, the CFPB published an Advance Notice of Proposed Rulemaking (“Advance Notice”) on what the CFPB then described as “general-purpose reloadable prepaid cards.”³ However, the Proposed Rule released today is much broader in scope.

The summary below discusses key provisions of the Proposed Rule regarding disclosures, fees, error resolution and liability, and provisions regarding so-called “credit features,” or “credit plans,” associated with prepaid cards, as well as the scope of the Proposed Rule. The provisions of the Proposed Rule regarding credit features, which include proposed amendments to Regulation Z, represent a significant departure from the prior regulatory treatment of overdraft services for other accounts subject to Regulation E. For example, under the Proposed Rule, it appears that a prepaid account that accesses an overdraft service or a credit feature could, under certain circumstances, be deemed a “credit card” under Regulation Z.

The CFPB’s Proposed Rule is complicated and amends a number of provisions not only in Regulation E, but also several provisions in Regulation Z. The interrelationship between these proposed amendments, and how they will impact existing prepaid card products and programs, will require further study.

PRE-ACQUISITION DISCLOSURES, BILLING STATEMENTS AND POSTING CARDHOLDER AGREEMENTS

Initial Disclosures. The Proposed Rule includes standardized “Know Before You Owe” disclosures that the CFPB is referring to as “pre-acquisition” disclosure requirements, meaning that the consumer must receive these disclosures “before a consumer acquires a prepaid card account,” unless certain conditions exist. The CFPB has proposed seven different model forms (the “Model Forms”) for complying with these requirements that consist of both short- and long-form examples, presented in tabular format.⁴ The Model Forms differ slightly depending on the type of prepaid card, its features and how the card is marketed (e.g., in retail stores or orally by telephone). For example, for payroll cards, the disclosure must include a statement a consumer does not have to accept the payroll card account and that a consumer can ask about other ways to receive their salary or wages.

¹The Proposed Rule has not yet been published in the Federal Register. All cites herein are to the unformatted version of the Proposed Rule posted to the CFPB’s website, available at http://files.consumerfinance.gov/f/201411_cfpb_regulations_prepaid-nprm.pdf.

²The CFPB’s “Study on prepaid account agreements” is available at http://files.consumerfinance.gov/f/201411_cfpb_study-of-prepaid-account-agreements.pdf.

³77 Fed. Reg. 30,923 (May 24, 2012).

⁴The Model Forms are available at http://files.consumerfinance.gov/f/201411_cfpb_prepaid-model-sample-disclosure-forms.pdf.

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- *Short Form.* The proposed short form must “concisely and clearly” highlight certain prepaid account fee and other information, including:
 - Periodic fees, such as monthly or annual fees;
 - Transactional fees, such as point-of-sale fees, together with an indication about whether the fee relates to PIN- or Signature-based transactions;
 - ATM fees, including the difference between an in-network fee and an out-of-network fee;
 - Cash reload fees;
 - Customer service fees;
 - Inactivity fees;
 - Up to three “incidence-based” fees, which includes fees that were “incurred most frequently in the prior 12-month period by consumers” using that type of prepaid card;
 - A statement regarding whether “credit-related fees” may apply;
 - A statement regarding the number of “other fees” (*i.e.*, other than fees listed above) that could be imposed under the terms of the prepaid account;
 - A telephone number and Web site address that the consumer can use to access the information that must be disclosed in the long form, unless the issuer provides the long-form notice before account acquisition;
 - A statement that the consumer must register the card with the issuer (or service provider) in order to fund the account;
 - A statement if funds underlying a prepaid account do not qualify for FDIC or NCUSIF pass-through insurance; and
 - A link to the CFPB’s Web site where the CFPB plans to post information about prepaid cards.
- *Long Form.* The long form would require the disclosure of the same information required under the proposed short form, except that the long form must include “all fees that may be imposed” by the issuer in connection with a prepaid account. And, for each fee type, the disclosure must include the amount of the fee and the conditions, if any, under which the fee may be imposed, waived or reduced. Any third-party fees that may be imposed, to the extent known, must also be disclosed. If third-party fees may be imposed, but the amount of those fees are not known, the issuer must disclose this fact.

Billing Statements. With respect to billing statement requirements, the Proposed Rule would require either periodic statements or “easily accessible” online statements, which must be provided at no cost to the consumer. Notably, the Proposed Rule would expand to 18 months, from 60 days under the Payroll Card Rule, the account history that must be available to consumers in online statements.

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Posting of Cardholder Agreements. Prepaid card issuers also would be required to post their account agreements on their Web sites and submit those account agreements to the CFPB, similar to the credit card agreement database that the CFPB maintains pursuant to the Credit Card Accountability Responsibility and Disclosure Act, and similar to legislative proposals on campus cards.

DISPUTE RESOLUTION AND CONSUMER LIABILITY

Dispute Resolution. With some modification, the Proposed Rule would extend the requirements for dispute resolution under Regulation E to prepaid accounts. Issuers of prepaid cards subject to the Proposed Rule would be required to investigate and resolve disputes within 10 business days of receiving notice from a consumer regarding an alleged error. If a prepaid card issuer is unable to complete its investigation within that time frame, the issuer would have up to 45 days to complete the investigation, so long as the issuer provides the consumer with a provisional credit for the disputed amount while the issuer completes its investigation. And, if the dispute cannot be resolved within the extended time, the issuer would be required to temporarily credit the disputed amount to the consumer while the issuer finishes its investigation.

Consumer Liability. The consumer liability rules under the Proposed Rule generally parallel the existing limitations and thresholds under Regulation E for debit cards. Specifically, the Proposed Rule would retain three tiers of liability for unauthorized transfers, depending on when the consumer learned of the loss or theft of a prepaid card, when the financial institution received notice of such loss or theft, and when the financial institution transmitted or made available to the consumer the periodic statement showing the first unauthorized transaction.

Consumers with “unregistered” prepaid products would not have the same dispute resolution rights or liability limitations.

CREDIT FEATURES

The discussion of credit features in the Advance Notice was limited to a discussion of opt-in protection, and recognition that overdraft protection was not a common feature of prepaid cards. Nevertheless, the CFPB has proposed sweeping and broad protections in connection with any so-called “credit feature” or “credit plan” available in connection with a prepaid card. Specifically, the press release accompanying the Proposed Rule indicates that Regulation Z credit card protections would apply if the prepaid product allows “consumers to pay to spend more money than they have deposited into the prepaid account.”⁵

The Proposed Rule would modify the definition of “credit” under Regulation Z such that it includes “an authorized transaction on a prepaid account where the consumer has insufficient or unavailable funds in the prepaid account at the time of authorization,” as well as “a paid transaction on a prepaid account where the consumer has insufficient or unavailable funds in the prepaid account at the time the transaction is paid.” The definition of “credit” would also include “a transaction where the consumer has sufficient or available funds in the prepaid account to cover the amount of the transaction at the time the transaction is authorized but insufficient or unavailable funds in the prepaid account to cover the amount of the transaction at the time the transaction is paid.”

⁵ CFPB Press Release, CFPB Proposes Strong Federal Protections for Prepaid Products (Nov. 13, 2014), available at <http://www.consumerfinance.gov/newsroom/cfpb-proposes-strong-federal-protections-for-prepaid-products/>.

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Under the Proposed Rule, it appears that overdrafts are permissible, but an issuer is not permitted to charge for them without treating the overdrafts as “credit” under a credit card plan. The Proposed Rule appears to cover so-called “force pay” transactions where the card issuer has not authorized the transaction, but the transaction has been posted to the account. As a result, to control force pays, issuers may need to consider turning off the card.

On the whole, the scope of “credit features” or “credit plans” that would be subject to the requirements of the Proposed Rule is far from clear.

The credit provisions under the Proposed Rule, which in some cases exceed existing Regulation Z protections applicable to credit card accounts, would include:

- Performing an ability-to-repay analysis;
- Providing monthly periodic statements;
- Requiring a least 21 days to repay amounts associated with a credit feature prior to assessing any late fees, together with a requirement that such fees be “reasonable and proportional” to the account violation;
- Limiting total fees to no more than 25 percent of the credit feature amount;
- Restricting increases on interest rates applicable to use of a credit feature, unless the cardholder has missed two consecutive payments; and
- Requiring 45-day advance notice of any interest rate increases so that the consumer may cancel the credit feature.

The CFPB also has proposed to revise the compulsory use provision of Regulation E. Specifically, under the Proposed Rule, the CFPB would not extend the provision’s exception for overdraft services to overdraft features associated with prepaid accounts. These proposed changes, together with the CFPB’s proposed amendments to Regulation Z, would:

- Require prepaid card issuers to wait 30 days from the time that the consumer registers the prepaid account before offering credit features to the consumer;
- Limit the ability of an issuer to use prepaid funds to repay credit feature amounts; and
- Prohibit issuers from requiring payment within 21 days from the time the periodic statement is mailed.

SCOPE OF THE PROPOSED RULE

Notwithstanding the significant differences in the business models and consumer usage associated with various prepaid card products, the Proposed Rule covers prepaid products beyond conventional network-branded general-purpose prepaid cards, including: payroll cards; certain federal, state and local government benefit cards; student financial aid disbursement cards; tax refund cards; and peer-to-peer payment products.

The Proposed Rule would revise the definition of “account” under Regulation E to include a “prepaid account.” Under the Proposed Rule, the term “prepaid account” includes a card, code or other device, established primarily for personal, family or household purposes, and not already an “account” under Regulation E, which is (1) either issued on a prepaid basis to a consumer in a specified amount or not issued on a prepaid basis, but capable of

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being loaded with funds thereafter; and (2) redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines, or usable for person-to-person transfers. The term does not include a gift card, gift certificate, or loyalty, award or promotional gift card as defined in Section 1005.20 of Regulation E, or payroll cards that are used to disburse solely “incentive-based payments” such as employee bonuses.

Moreover, the definition of a prepaid account under the Proposed Rule is not limited to physical cards; the Proposed Rule also would cover mobile and other electronic prepaid accounts that can store funds. Under the Proposed Rule, however, a payment product that is only capable of storing a consumer’s payment credentials, such as digital wallet, is not covered, provided the digital wallet is incapable of storing funds.

NEXT STEPS

The CFPB has allowed a 90 day comment period on the Proposed Rule, which means that comments are due in mid-February 2015.

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