

Client Alert

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CFPB Proposes Changes to Prepaid Accounts Rule

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On June 15, 2017, the Consumer Financial Protection Bureau (“CFPB”) released proposed revisions to its final Prepaid Accounts Rule (“Final Rule”).¹ The Final Rule was published in November 2016 and was subsequently amended to delay the general effective date by six months, to April 1, 2018. The CFPB is seeking comments on proposed revisions to the Final Rule, as well as on two additional items related to a further delay in the effective date and a safe harbor for early compliance. Comments will be due 45 days after the proposed revisions are published in the *Federal Register*.

At the same time, the CFPB published an updated version of its Prepaid Rule Small Entity Compliance Guide (“Guide”). The Guide was updated to reflect the delayed general effective date, as well as to provide other clarifications that the CFPB determined would not require changes to the Final Rule and, thus, would not trigger the notice and comment process. The updated Guide does not address the content of the CFPB’s most recent proposed revisions.

The proposed revisions and updates to the Guide are discussed below.

PROPOSED REVISIONS TO THE FINAL RULE

In response to input from industry participants as part of the CFPB’s outreach programs, as well as unsolicited comments the CFPB received in connection with its request for comment on the effective date delay, the CFPB has proposed the following revisions to the Final Rule.

- **Error resolution on unverified accounts.** Under the Final Rule, financial institutions must provide error resolution and limited liability for prepaid accounts, even if the financial institution had not successfully completed its consumer identification and verification process. Industry stakeholders expressed concern that requiring error resolution and limited liability for unverified accounts would increase fraudulent error claims, and, as a result, some financial institutions were considering limiting functionality on unverified accounts to reduce fraud exposure. Specifically, a number of financial institutions currently allow consumers to spend down the balances on their prepaid accounts prior to completing the verification process, but do not permit reloads and restrict other functionalities. To reduce the potential risk of fraud, several financial institutions indicated that they may stop allowing consumers with unverified accounts to spend down their remaining funds and instead issue refund checks to such consumers.

In response to these concerns, the CFPB is proposing to revise the Final Rule to provide that, if a financial institution has not successfully completed the consumer identification and verification process for a prepaid account, the financial institution would not be required to comply with the liability limitations and error resolution requirements of Regulation E. Consumer identification or verification for prepaid accounts may not be successfully completed where, for example, the consumer did not complete the process, the consumer’s identity could not be verified, or the account is in a program that did not have an identification or verification process.

¹ Our alert on the Final Rule is available [here](#).

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However, for an account where the consumer's identity is later verified, financial institutions would be required to resolve errors and limit liability with regard to disputed transactions that occurred prior to verification. Accordingly, for accounts where an error was asserted on a previously unverified account, the time limits for investigation would begin on the day after the date the financial institution successfully completed its consumer identification and verification process.

The CFPB is also proposing changes to the model disclosure language and, for programs where there is no verification process, to require that financial institutions explain in their initial disclosures their error resolution process and limitations on consumers' liability for unauthorized transfers, or explain that there is none, and comply with the process that they disclose.

- **Digital wallet exception to hybrid prepaid-credit card provisions.** Under the Final Rule, digital wallets that are capable of both (i) storing payment credentials for other accounts and (ii) being loaded with funds would be covered by the Final Rule's hybrid prepaid-credit card provisions. The hybrid prepaid-credit card provisions were intended to address the CFPB's concerns related to overdrafts; however, the CFPB acknowledged that these provisions may create unintended challenges for digital wallets. Accordingly, the proposed revisions would create a limited exception to the hybrid prepaid-credit card provisions for a credit card account linked to a prepaid account where the credit card account is already covered by Regulation Z. Subject to certain conditions being met, this proposal would exempt credit cards that are linked to digital wallets that can store value from the credit-related provisions of the Final Rule because the credit card accounts would already be subject to Regulation Z's open-end credit card rules.

Specifically, the CFPB is proposing to amend the definition of "business partner" to exclude business arrangements between prepaid account issuers and issuers of traditional credit cards, if certain conditions are satisfied:

- The parties do not allow the prepaid card to access credit from the credit card account in the course of a transaction with the prepaid card unless:
 - the consumer has submitted a written request to authorize linking the two accounts that is "separately signed or initialized,"² and
 - the parties do not condition the acquisition or retention of either account on whether the consumer authorizes such a linkage.
- In addition, the parties do not vary certain terms and conditions based on whether the two accounts are linked. Specifically:
 - the prepaid account issuer applies the same terms, conditions, features, and fees to load funds as it would if the accounts were not linked; and
 - the credit card issuer applies the same specified terms and conditions to the credit card account and to any extensions of credit from the credit card account made with the prepaid card as it would if the accounts were not linked.

² The proposed revisions do not address whether this new "written request" requirement would be subject to the E-SIGN Act, including the Act's signature and record retention requirements.

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- **LAP card exclusion from the definition of prepaid account.** The Final Rule purports to exclude all loyalty, award, or promotional (“LAP”) cards, but the exclusion is tied to the Gift Card Rule LAP card disclosure requirements. Therefore, it is ambiguous whether LAP cards that did not provide the Gift Card Rule disclosures would be exempt from the Final Rule. The proposed revisions would clarify that the exclusion from the Final Rule for LAP cards applies both to (i) LAP cards that provide the disclosures required for “loyalty, award, or promotional gift cards” and (ii) LAP cards that are not marketed to the general public, even if they do not provide the disclosures required for “loyalty, award, or promotional gift cards.” However, the CFPB does not address whether the exclusion would cover other programs not marketed to the general public (e.g., incentive-based programs).
- **Unsolicited issuance provisions.** The Final Rule requires a financial institution to provide a consumer 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. Some industry participants expressed concern that this provision could be interpreted to require a financial institution to provide an alternative means for a consumer to access funds for certain programs for which an alternative means of access is not otherwise required and the prepaid account is distributed by a financial institution on an unsolicited basis. The proposed revisions would clarify that the Final Rule does not, in and of itself, require a financial institution to offer an alternative means for a consumer to receive disbursement payments, where the consumer is not given an option other than to receive the disbursement via a prepaid account (e.g., prison release cards, jury duty cards, and certain types of refund cards).

However, if a prepaid account is provided on an unsolicited basis and the financial institution does not offer alternative means to receive funds, the financial institution would be required to inform the consumer that there are no other means to receive any funds in the prepaid account if the consumer disposes of the access device.

Additionally, if a financial institution does not offer an alternative means for the consumer to receive disbursement payments, the proposed revisions would permit the financial institution to provide short-form and long-form disclosures at the time a consumer receives the prepaid account.

- **Short-form and long-form disclosure requirements.** The proposed revisions would include the following changes to the short-form and long-form disclosure requirements.
 - Financial institutions offering prepaid accounts that qualify for the retail location exception would be able to satisfy the long-form disclosure requirement by allowing the long-form disclosure to be delivered electronically without receiving consumer consent under the E-SIGN Act if 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.
 - Financial institutions disclosing additional fee types with three or more fee variations could consolidate these variations into two categories and allow those two categories to be disclosed on the short-form disclosure.
 - Foreign language disclosures would not be required 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.
- **Modification of the prepaid account agreement submission requirement.** The Final Rule requires 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. Under the Final Rule, an agreement would need to be submitted to the CFPB even if the only changes to the agreement were the relevant parties to the agreement.

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In the case of payroll card programs, changes to employers as relevant parties may occur frequently and, under the Final Rule, would require frequent amended submissions.

The proposed revisions would permit issuers to delay submitting a change in the names of other relevant parties to a prepaid account agreement (e.g., employers for a payroll card agreement) until the issuer is submitting other agreement changes to the CFPB. The proposed revisions would also permit issuers to submit short-form and long-form disclosures as separate addenda to the agreement, rather than as an integrated agreement or a single addendum.

The proposed revisions do not address other open questions with respect to the Final Rule. For example, the CFPB has yet to clearly distinguish prepaid accounts from certain checking account products (e.g., checkless checking accounts).

REQUEST FOR COMMENT ON POSSIBLE ADDITIONAL CHANGES

In addition to the proposals detailed above, the CFPB requested comment on two additional issues, without proposing specific language changes.

- **Effective date.** The CFPB requested comment on whether an additional extension of the effective date is necessary and appropriate in light of the specific proposed revisions. Given the proposed revisions, including those related to the requirements for written authorization to link a prepaid account with a traditional credit card account and the model disclosure language describing the error resolution process and limitations on consumer liability, it seems likely that financial institutions will require additional implementation time and a further delay in the effective date.
- **Safe harbor for early compliance.** The CFPB also requested comment on whether there are any conflicts between the Final Rule and existing regulations governing prepaid accounts and, to the extent such a conflict exists, whether a safe harbor for early compliance is necessary and appropriate.

CFPB UPDATES TO SMALL ENTITY COMPLIANCE GUIDE

The updates to the Guide provide clarifications that the CFPB determined would not require changes to the Final Rule and, thus, not trigger the notice and comment process. The updates clarify:

- that a reload pack is not covered by the Final Rule, even if it is marketed or labeled as “prepaid”;
- that the Final Rule does not require a financial institution to use consistent fee terminology across all of its prepaid account programs;
- when a financial institution is required to provide foreign language pre-acquisition disclosures;
- the requirements for providing a meaningfully named URL;
- that where a financial institution makes 12 months of account transaction history available through its website and also offers a mobile app through which history is available, the mobile app need not provide a full 12 months of history; and
- that reversing a provisional credit does not otherwise trigger Regulation Z coverage under the Final Rule.

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