
CFPB Releases Long-Awaited Proposal on Prepaid Account Products

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On November 13, 2014, the Consumer Financial Protection Bureau (“CFPB”) issued a proposed rule¹ to extend certain federal consumer protections to the prepaid market. This proposed rule marks the CFPB’s first discretionary rulemaking with respect to consumer financial products and services, after the completion and implementation of the Dodd-Frank Act required rulemakings over the past few years. Although the CFPB understands that a significant number of prepaid card issuers and program managers already voluntarily comply with Regulation E to a substantial degree, the CFPB believes that comprehensive federal protections in this market are needed.

The most significant aspect of the proposed rule is that it would apply a number of specific federal consumer protections to broad parts of the prepaid market for the first time. The proposed rule would do so by establishing a new definition of “prepaid account” within Regulation E, along with comprehensive consumer protection rules for such accounts.² The proposed rule would thereby cover traditional plastic prepaid cards, many of which are general purpose reloadable cards (“GPR cards”).³ In addition, the proposal would cover:

- mobile and other electronic prepaid accounts that can store funds;
- payroll cards;
- certain federal, state, and local government benefit cards such as those used to distribute unemployment insurance, child support, and pension payments;
- student financial aid disbursement cards;
- tax refund cards; and
- peer-to-peer payment products/person-to-person (“P2P”) transfers.

The CFPB suggests that the proposed rule may apply to mobile wallets, virtual currency, and related products and services.⁴

According to CFPB Director Richard Cordray, “[c]onsumers are increasingly relying on prepaid products to make purchases and access funds, but they are not guaranteed the same protections or disclosures as traditional bank accounts.” The Bureau’s proposed rule “would close the loopholes in this market and ensure prepaid consumers are protected whether they are swiping a card, scanning their smartphone, or sending a payment,” he stated.

Background

In May 2012, the CFPB issued an advance notice of proposed rulemaking (“ANPRM”) to seek comment, data, and information from the public about GPR cards to determine how best to implement consumer protection rules for this product and set the contours of any proposed rulemaking concerning GPR cards.⁵ In its ANPRM, the CFPB expressed its intent to issue a proposal to extend the Regulation E protections to GPR cards and noted three factors in particular that warrant greater attention: (i) the growth of the market for GPR cards; (ii) consumer use; and (iii) the lack of comprehensive federal regulation.

With respect to consumer use, the CFPB noted in the ANPRM its concern that some consumers may view and use GPR cards as an alternative to traditional checking accounts, as is reflected in the increased number of GPR cards that consumers are loading through direct deposit. The CFPB also observed that some GPR cards are marketed as a substitute for a checking account. According to the CFPB, “[w]hile consumers may be using GPR cards as a substitute for checking accounts, GPR cards do not carry the same protections given to checking accounts and electronic transactions involving checking accounts under federal law.”⁶ The CFPB also noted its concern that the lack of a comprehensive federal regulatory regime may contribute to “market distortions, misaligned incentives, or consumer confusion,” as GPR card consumers “may mistakenly assume that they possess rights enforceable under federal law.”⁷ Unlike some other “general-use prepaid cards”⁸ such as payroll cards, Regulation E generally does not currently apply to GPR cards. When the ANPRM was issued, Director Cordray stated that the rulemaking would focus on two key issues: safety and transparency.⁹

Highlights

Prepaid Protections

The proposed rule would expressly bring prepaid financial products within the scope of Regulation E as “prepaid accounts” and create new provisions specific to such accounts. The proposal would extend certain protections under the Electronic Fund Transfer Act (“EFTA”) to prepaid accounts after the cardholder registers his or her account. These proposed protections are generally similar to those checking account consumers already receive and include:

- **Easy and free access to account information:** The proposed rule would require financial institutions to either provide periodic statements (which is generally an existing Regulation E requirement) or make account information free and easily available online. The statements or online information would have to include account balances and a history of consumers’ transactions and fees.
- **Error resolution rights:** The proposed rule would require financial institutions to investigate errors that consumers report on registered accounts and resolve those errors in a timely and efficient fashion. If the financial institution is unable to resolve an alleged error within a certain period of time, it would be required to temporarily credit the disputed

amount to the consumer to use while the institution finishes its investigation.

- **Fraud and lost-card protection:** The proposed rule would add protections against unauthorized, erroneous, or fraudulent withdrawals or purchases, including when registered cards are lost or stolen. If consumers lose their prepaid card or find erroneous or fraudulent charges on their prepaid account, the proposed rule would limit their responsibility for transactions they did not authorize to \$50 (if they promptly notify the financial institution) and create a timely method for them to get their money back.

Disclosures

The CFPB is concerned that it is currently difficult for consumers to tell what fees apply to their prepaid cards before purchasing them because such disclosures are inside the packaging or hard to find online. The proposed rule would modify Regulation E to establish standard disclosure requirements specific to prepaid accounts. These standards would require financial institutions to provide certain disclosures to consumers prior to and after the acquisition of a prepaid account. With certain modifications, the CFPB is proposing to extend to all prepaid accounts the existing Regulation E requirements regarding the provision of transaction information to accountholders that currently apply to payroll card accounts, federal government benefit accounts, and non-needs tested state and local government benefit accounts. Under the proposed rule, prepaid consumers would have access to:

- **Standard disclosures upfront:** The CFPB's proposed rule includes two required forms, one short and one long.¹⁰ The short form would highlight key prepaid account information, including common costs like the monthly fee, fee per purchase, ATM withdrawal cost, and fee to reload cash onto the account. The long form would contain all of the fees on the short form, plus any other potential fees that could be imposed in connection with the account. The short and long forms would also have to include disclosures about overdraft services or credit features that could be linked to prepaid accounts. In addition, under the CFPB's proposed rule, consumers would have to receive or have access to a full set of the account's fees and related information before acquiring the account. To facilitate compliance, the CFPB is additionally proposing model forms and sample forms, and the use of the model forms would establish a safe harbor for compliance with the short form disclosure requirement.
- **Foreign language disclosures:** Regulation E generally permits, but does not require, that disclosures be made in a language other than English, provided that where foreign language disclosures are provided the disclosures are made available in English upon a consumer's request. The CFPB proposes to modify the general Regulation E foreign language requirement for prepaid accounts such that if a financial institution principally uses a foreign language on prepaid account packaging material, by telephone, in person, or on the website a consumer utilizes to acquire a prepaid account, the short form and long form disclosures would have to be provided in that same foreign language. A financial institution would also have to provide the

long form in English upon a consumer's request and on any part of the website where it provides the long form disclosure in a foreign language.

- **Publicly available card agreements:** The proposed rule would require that prepaid account issuers post their account agreements on their websites and submit those agreements to the CFPB for posting on a public, CFPB-maintained website.

Credit Protections

The proposed rule would also contain amendments to Regulations Z and E to regulate prepaid accounts with overdraft services or credit features. While the Federal Reserve Board exempted overdraft services (but not other types of credit) from regulation under TILA and Regulation Z with respect to deposit accounts, as long as they are provided pursuant to an agreement that does not obligate the financial institution to cover any particular transaction, the CFPB has proposed not to extend existing exemptions under Regulation Z and Regulation E's compulsory use provision for overdraft services on deposit accounts to prepaid accounts. Among other things, prepaid cards that access overdraft services or credit features for a fee (such as interest, transaction fees, annual fees, or other participation fees) would generally be deemed credit cards subject to Regulation Z and its credit card rules. The CFPB is proposing to extend the following Truth in Lending Act ("TILA") and Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act") protections to prepaid credit products:

- **Ability-to-pay requirement:** Under the proposed rule, companies would be prohibited from opening a credit card account or increasing a credit line related to a prepaid card unless they consider the consumer's ability to make the required payments.¹¹
- **Monthly credit billing statement:** The proposed rule would require prepaid companies to give consumers the same monthly periodic statement that credit card consumers receive and that would detail consumers' fees, and if applicable, interest rate, the amounts borrowed and owed, and other key information regarding debt repayment.
- **Reasonable time to pay and limits on late fees:** Prepaid companies, like credit card issuers, would be required to give consumers at least 21 days to repay their debt before they are charged a late fee. Additionally, late fees must be "reasonable and proportional" to the violation of the account terms in question.
- **Limits on fee and interest charges:** The proposed rule would require that the total fees for prepaid credit products not exceed 25 percent of the credit limit during the first year a credit account is open. Card issuers generally are prohibited from increasing the interest rate on an existing balance unless the cardholder has missed two consecutive payments, although card issuers may increase the interest rate prospectively on new purchases after generally giving 45 days advance notice (during which time the consumer may cancel the account).

The CFPB's proposed rule also includes some additional protections to ensure that the prepaid account and the credit product are distinct, including:

- **30-day waiting period:** The proposed rule would require companies to wait 30 days after a consumer registers the prepaid account before they could formally offer credit to the consumer.
- **Wall between prepaid funds and credit repayment:** Under the proposed rule, prepaid companies could not automatically demand and take credit repayment whenever the consumer loads his or her prepaid account with funds. In addition, prepaid companies would be prohibited from taking funds loaded to the prepaid account to repay the credit when the bill is due unless the consumer has affirmatively opted in to allow such a repayment (and even then companies would only be permitted to take funds no more than once per calendar month). Consumers would also have to consent to overdraft services.

Payroll Cards

The CFPB is generally proposing to adapt existing payroll card account rules to prepaid accounts, but certain provisions of Regulation E would remain specific to payroll card accounts. The CFPB believes that payroll cards may provide some consumers a more suitable, cheaper, and safer method of receiving their wages, as compared to other methods, if the consumer does not have a checking account. However, the CFPB uses the proposed rule as an opportunity to voice some concerns about payroll cards, with specific focus on potentially harmful fees and practices associated with payroll cards. The CFPB also notes that concerns persist as to whether current payroll card disclosures are adequate; whether and how employers and financial institutions are complying with the compulsory use provision and other provisions of Regulation E; and the extent to which payroll card providers share program revenue with employers. In response to some of these concerns, the proposed rule would require financial institutions to include above the top-line on their short form disclosure a statement that the consumer does not have to accept the payroll card account and that other methods are available by which the consumer may choose to receive his wages or salary from the employer instead of receiving them on the payroll card account.

Key Differences from ANPRM

The proposed rule's scope is broader than that contemplated in the ANPRM. Key differences include:

- **A broader coverage of the prepaid market.** The CFPB's ANPRM sought comment about GPR cards, and the CFPB expressed its intent to issue a proposal to extend Regulation E protections to GPR cards. While the proposed rule would cover traditional plastic prepaid cards, many of which are GPR cards, it would also cover mobile and other electronic prepaid accounts that can store funds; payroll cards; certain federal, state, and local government benefit cards such as those used to distribute unemployment insurance, child support, and pension payments; student financial aid disbursement cards; tax refund cards; and peer-to-peer payment products.
- **Extensions of other consumer protections besides EFTA.** The CFPB's ANPRM focused

on whether, and to what extent, the CFPB should extend certain EFTA protections to GPR cards. The proposed rule, however, also includes disclosure requirements and extensions of certain consumer protections under TILA and the CARD Act to prepaid credit products.

Public Comments

The proposed rule and disclosures will be open for public comment for 90 days after its upcoming publication in the *Federal Register*. We expect numerous comments from various industry participants and other observers.

For example, the sweeping breadth of the proposed rule would likely invite comments, as the CFPB anticipates that the proposed rule will cover P2P transfers, may apply to certain mobile wallets, virtual currency, and related products and services, and does not exclude non-reloadable cards from the definition of “prepaid account.”

The proposed rule would impose a number of costs on prepaid card issuers. While the proposed rule provides an alternative to expensive periodic statements, issuers will incur website development and hosting expense needed to provide consumers with online account information. In addition, the extension of Regulation E’s liability and error resolution provisions will increase costs related to fraud and loss. There are more costs still to issuers to implement the proposed disclosure requirements, including changes to packaging material and printing, and to produce monthly credit billing statements for consumers who choose to use a credit product related to their prepaid account. Lastly as with any rule of this length and complexity, issuers will also require increased compliance resources to ensure they do not run afoul of the manifold requirements and restrictions.

Effective Date

To give financial institutions adequate time to comply with all aspects of the proposed rule, the CFPB has proposed, with certain exceptions, an effective date of nine months from the date the final rule is published in the *Federal Register*. The one exception proposed is that for a period of 12 months after the final rule is published in the *Federal Register*, financial institutions would be permitted to continue selling prepaid accounts that do not comply with the final rule’s pre-acquisition disclosure requirements, if the account and its packaging material were printed prior to the proposed effective date.

Comments on the NPRM will likely be due sometime in February 2015 (90 days after the NPRM is published in the *Federal Register*). Once the comment period closes, the CFPB will review and analyze the comments received and decide whether any adjustments are needed before issuing a final rule. Because we anticipate that it will likely take the CFPB about several months to a year to finalize the rule, which will likely become effective 9-12 months later, it appears that the earliest implementation date would be mid-to-late 2016.

¹ Consumer Financial Protection Bureau, *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)* (November 13, 2014), available at http://files.consumerfinance.gov/f/201411_cfpb_regulations_prepaid-nprm.pdf. We also note that the CFPB began accepting consumer complaints about prepaid products in July 2014.

² The proposed rule would extend Regulation E protections to prepaid products that are: cards, codes, or other devices capable of being loaded with funds; not otherwise accounts under Regulation E and redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at either automated teller machines or for person-to-person (P2P) transfers; and are not gift cards (or certain other types of limited purpose cards), by bringing these products under the proposed definition of “prepaid account.”

³ GPR cards are a prepaid financial product that have been increasing in popularity and that some consumers now use in a manner similar to a debit card that is linked to a traditional checking account. A GPR card is issued for a set amount in exchange for payment made by a consumer and is reloadable. Both depository and non-depository institutions participate in the GPR card market.

⁴ The CFPB states that, as a general matter, its analysis of mobile financial products and services, virtual currencies, and related products and services, including the applicability of existing regulations and this proposed rule to such products and services, is ongoing. In short, the proposed rule does not specifically resolve such issues.

⁵ 77 Fed. Reg. 30,923 (May 24, 2012).

⁶*Id.* at 30,924.

⁷*Id.*

⁸ “General-use prepaid card” means a card, code, or other device that is: (i) issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines. 12 C.F.R. § 1005.20(a)(3).

⁹ Consumer Financial Protection Bureau, Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Prepaid Cards Field Hearing, Durham, NC (May 23, 2012), available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-by-richard-cordray-at-prepaid-cards-field-hearing/>.

¹⁰ When certain conditions are met, the proposed rule would provide an exception for financial institutions that offer prepaid cards for sale over the phone or in retail stores that would allow such institutions to provide consumers with access to the long form by telephone or internet, but

otherwise not make the long form available until a consumer has acquired the prepaid account.

¹¹ For consumers under 21, the companies would be required to assess these consumers' independent ability to pay the credit.

Authors



**Franca Harris
Gutierrez**

PARTNER

Chair, Financial Institutions
Practice

✉ franca.gutierrez@wilmerhale.com

☎ +1 202 663 6557