memorandum

**TO:** Electronic Transactions Association

**FROM:** Venable LLP 202.344.4000

**DATE:** November 20, 2014

**RE:** Summary of CFPB Proposed Rule for Prepaid Financial Products

On November 13, 2014, the Consumer Financial Protection Bureau (the “Bureau” or “CFPB”) issued a notice of proposed rulemaking (“NPRM”) proposing comprehensive consumer protections for prepaid financial products under Regulation E, which implements the Electronic Fund Transfer Act (“EFTA”) and Regulation Z, which implements the Truth in Lending Act

(“TILA”).[[1]](#footnote-1) The ***90 day comment period*** is scheduled to close on or about February 19, 2015 (depending on the date the proposed rule is published in the Federal Register).

In sum, the NPRM proposes consumer protections for a range of prepaid products, including plastic cards, general-purpose reloadable cards, payroll cards, mobile prepaid accounts, peer-to-peer payment products, and others. Some of the key proposals include:

|  |  |
| --- | --- |
| **Prepaid Account Protections***Access to Account Information*: Requires consumers receive periodic statements or that account information be easily accessible online for free. *Error Resolution and Fraud Protection*: Requires investigation of errors reported by consumers for registered cards. Limits consumer losses to no more than $50 of reported unauthorized charges.*Disclosures*: Requires two forms of disclosures about an account’s fees. | **Prepaid Credit Requirements***Ability to Pay / Timing to Repay*: Requires confirming that consumers can repay existing debt before offering credit, and that consumers have 21 days to repay before incurring late fees.*Limited Fees/Interest*: Limits maximum fees to 25% of the credit limit during the first year. *Limited Credit Options*: Prohibits offering a credit product until 30 days after the consumer registered the prepaid account.*No Automatic Withdrawal*: Prohibits moving funds from a prepaid account to pay a debt without consumer authorization.  |

The final rule ***becomes effective*** nine months after publication in the Federal Register (except for the disclosure requirements for certain packaging printed prior to the effective date). Please refer to the attached Table of Contents to assist your review of the proposed rule.

**Summary of Key Points of the Proposed Rule**[[2]](#footnote-2)[[3]](#footnote-3)

# A. Scope of Coverage

The CFPB’s proposed rule brings “prepaid accounts” within the scope of Regulation E, which establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.3 The proposal includes prepaid products that are “cards, codes, or other devices capable of being loaded with funds and usable at unaffiliated merchants or for person-toperson transfers, and are not gift cards (or certain other related types of cards.” Thus, the proposal will cover traditional plastic prepaid cards, general-purpose reloadable cards, payroll cards, government benefits cards (distributing such child support and pension payments), mobile and other electronic prepaid accounts, tax refund cards, campus prepaid cards for students, peerto-peer payment products, and new products that store virtual currencies.[[4]](#footnote-4)[[5]](#footnote-5)

One of the main prepaid products discussed in the proposed rule is the “general purpose reloadable (GPR) card,” a type of reloadable, open-loop prepaid product, which is often a network-branded card issued by one of the major card brands. The CFPB noted that GPRs were not previously included within the scope of Regulation E because the Federal Reserve Board (“FRB”) found that “consumers would derive little benefit from receiving full Regulation E protections for a card that may only be used on a limited, short-term basis and which may hold minimal funds, while the costs of providing Regulation E initial disclosures, periodic statements, and error resolution rights would be quite significant for the issuer.”5 However, now, the CFPB states that many consumers “may depend entirely on their prepaid cards to meet their payment account needs,”[[6]](#footnote-6) thus forming a basis for including prepaid products under Regulation E and the

EFTA.

The proposed rule defines prepaid accounts broadly, and includes cards or accounts that are issued with a zero balance but can be loaded by the consumer at a later time.[[7]](#footnote-7) The prepaid accounts covered by the proposed rule need not be reloadable.[[8]](#footnote-8) A prepaid account is limited to accounts that can store funds—and so does not include pass-through accounts:

[T]he prepaid account must be capable of holding funds, rather than merely acting as a pass-through vehicle. For example, if a product is only capable of storing a consumer’s payment credentials for other accounts but is incapable of having funds stored on it, such a product would not be a prepaid account. However, if a product allows a consumer to transfer funds, which can be stored before the consumer designates a destination for the funds, the product would satisfy proposed § 1005.2(b)(3)(i)(A).

. . .

To the extent that a digital wallet, for example, merely stores payment credentials (e.g., a consumer’s bank account or payment card information), rather than storing the funds themselves, the digital wallet would not be considered a prepaid account under the proposed rule. If, however, a digital wallet allows a consumer to store funds in it directly, then the digital wallet would be a prepaid account if the other criteria of the proposed definition are also met.[[9]](#footnote-9)

The CFPB’s proposed rule will also likely apply to accounts accessible by mobile products and accounts that store or transfer virtual currencies.[[10]](#footnote-10) Although these aspects of the rule are not yet fully formed, the NPRM notes that “prepaid products may not be tied to a physical card or device, and instead may be accessible and usable online or at a physical location through a mobile device such as a smartphone.”[[11]](#footnote-11) Only certain mobile products may fall under the final rule. For example, the NPRM highlights the difference between “digital wallets” that store a consumer’s bank account, debit card, credit card, and/or prepaid card credentials and facilitate transfers and digital/mobile wallets that maintain a positive balance of funds. Products that can never store funds, such as a digital wallet that only holds payment credentials for other accounts, is not currently covered under the proposed rule.[[12]](#footnote-12)

Finally, the proposed rule excludes electronic gift certificates, store gift cards, and general-use prepaid cards marketed and labeled as gift cards or gift certificates.[[13]](#footnote-13) The CFPB is seeking comments on other types of prepaid products that may warrant exclusion from the final rule.

# B. Proposed Consumer Account Protections (Regulation E)

*Account History and Monthly Statements:* The proposed rule would require that consumers are provided with free monthly statements to review account balances, transactions, and fees. Alternatively, companies offering prepaid products would be required to make the account balance available to the consumer through a readily available telephone line and provide electronically at least an 18-month account history and a similar written history upon request.[[14]](#footnote-14)

*Disclosures:* The proposal includes “Know Before You Owe” prepaid product disclosures that require disclosure of certain information to consumers, in two forms. A shortform and long-form disclosure of fees and other information must generally be given before a consumer acquires a prepaid account. The proposal includes model templates for short and long form disclosures.[[15]](#footnote-15)[[16]](#footnote-16)

However, if the consumer acquires the account in person in a retail store, short-form disclosures are visible through the card’s packaging, and certain other conditions are met, the long-form disclosure can be given post-acquisition. The long-form disclosure can be given postacquisition in the event that the prepaid account is acquired by telephone.

The proposal expands the existing Regulation E account opening disclosure for prepaid accounts to require the disclosure of all fees, not just fees for electronic funds transfers. The fees discussed include:

o Periodic Fees o Per Purchase Fees o ATM Withdrawal Fees o Cash Reload Fees o ATM Balance Inquiry Fees o Customer Service Fees o Inactivity Fees o Incidence-Based Fee Disclosures16

The short form is designed to highlight key prepaid account information and fees, while the long form would contain all of the information on the short form, plus any other potential fees that could be imposed in connection with the account.

*Preauthorized Electronic Fund Transfers:* The compulsory use provision under Regulation E would be amended so that prepaid account issuers would be prohibited from requiring consumers to set up preauthorized electronic fund transfers to repay credit extended through an overdraft service or credit feature.[[17]](#footnote-17) In particular, the Bureau proposes not to extend the provision’s exception for overdraft credit plans to such plans offered on prepaid accounts. By not extending the exception for overdraft credit plans in the current Regulation E compulsory use provision—and consistent with the statutory compulsory use provision (EFTA section 913(1))—creditors would be required to offer prepaid account consumers a means to repay their outstanding credit balances other than by automatic repayment (such as by means of a transfer of funds from the asset account to the credit account that the consumer initiates on the prepaid account’s online banking website).

*Internet Posting of Prepaid Account Agreements:* The proposal would require prepaid account issuers to provide the Bureau with terms and conditions for prepaid accounts, which it would post on a website maintained by the Bureau. Relatedly, issuers would also be required to post the terms and conditions on their own websites or make them available upon request. These rules are intended to “facilitate comparison shopping” by ensuring that consumers are able to review and compare issuer agreements.[[18]](#footnote-18)

*Limited Consumer Liability:* The CFPB’s proposal limits consumer liability for unauthorized withdrawals or purchases, including when a registered card is lost or stolen.[[19]](#footnote-19) However, as long as the “risks of not registering a prepaid account” are disclosed, “a financial institution is not required to comply with the liability limits and error resolution requirements under §§ 1005.6 and 1005.11 for any prepaid account for which it has not completed it collection of consumer identifying information and identity verification.”[[20]](#footnote-20)

*Error Resolution:* The proposal would require companies to investigate errors promptly. The proposed rule extends Regulation E’s dispute resolution requirements to prepaid accounts so that issuers would be required to investigate and resolve disputes within 10 business days of receiving notice of an alleged error from a consumer.[[21]](#footnote-21) If an investigation cannot be completed within that time frame, the issuer would have up to 45 days to complete the investigation, so long as the consumer is provided a provisional credit for the disputed amount during the investigation.[[22]](#footnote-22)

Companies would not be required to follow Regulation E requirements for unregistered prepaid accounts, provided the risk of non-registration has been disclosed. Section 1026.13(i) provides guidance on whether billing error provisions under Regulation E or Regulation Z apply in certain overdraft related transactions”:[[23]](#footnote-23)

[i]f an extension of credit is incident to an electronic fund transfer, under an agreement between a consumer and a financial institution to extend credit when the consumer’s account is overdrawn or to maintain a specified minimum balance in the consumer’s account, the creditor must comply with the requirements of

Regulation E, § 1005.11 governing error resolution rather than those of § 1026.13(a), (b), (c), (e), (f), and (h).[[24]](#footnote-24)

*FDIC Insurance:* Regarding pass-through share or deposit insurance, the proposed rule would require financial institutions to disclose a statement if a prepaid account is not set up to be eligible for pass-through insurance.[[25]](#footnote-25)

# Credit Options on Prepaid Products (Regulations Z and E)

*Open-ended (not home-secured) Credit:* According to the CFPB, prepaid providers offer a range of credit features in connection with prepaid accounts, including features structured as overdraft services, which should be subject to regulation as credit cards under TILA, EFTA, and their implementing regulations. Specifically, the CFPB believes that “overdraft lines of credit, overdraft services, and similar credit features offered in connection with a prepaid account satisfy the definitions of (1) credit; (2) open-end (not home-secured) credit plan; and (3) credit cards under TILA and Regulation Z.”[[26]](#footnote-26)

Thus, the CFPB’s proposed rule generally treats advances accessed by a prepaid card as “open-end credit” under Regulation Z. This includes overdraft features whereby fees are imposed for overdrafts (whether in the form of discretionary overdraft payments or an overdraft line of credit)—“prepaid cards that access overdraft services or credit features for a fee would generally be credit cards subject to Regulation Z and its credit card rules.”[[27]](#footnote-27) Accordingly, Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) credit card requirements would be applied to prepaid products: “[t]he Bureau proposes that by virtue of treating credit features offered on prepaid accounts as open-end credit accessed by a credit card, other protections of the Credit CARD Act, mostly implemented in subpart G of Regulation Z, would also apply.”[[28]](#footnote-28)

*Ability to Pay:* The proposed rule would require companies offering prepaid products to determine a customer’s ability to repay a debt before offering credit. Prepaid companies would be required to give consumers at least 21 days to repay debt tied to a prepaid card before charging a late fee that must be “reasonable and proportional” to the violation of the account terms.[[29]](#footnote-29)

*Credit-Option Waiting Period:* Companies offering a credit option for prepaid products would be required to wait 30 days after a consumer registers a prepaid account to solicit the consumer for a linked overdraft or credit feature or to allow access to such a feature.[[30]](#footnote-30)

*Automatic Debit:* Companies offering prepaid products would be restricted from automatically moving funds from a prepaid account to repay another debt unless the consumer has affirmatively allowed such withdrawals. Companies would be prevented from withdrawing funds more than once per month—the proposed rule provides that companies may “move funds automatically from the asset account . . . to the credit card account . . . no more than once per month.”[[31]](#footnote-31) Further, the total fees for a prepaid credit product would not be allowed to exceed twenty-five percent of the credit limit during the first year an account is open.[[32]](#footnote-32) The interest rate on new purchases could be increased, but companies would be required to give consumers 45 days advance notice during which the consumer could cancel the account.

*Opt-In for Automatic Debit:* Creditors would not be able to require consumers to repay amounts advanced on a prepaid account through automatic payments. Under the proposed rule, the consumer must affirmatively opt-in for a creditor to use funds loaded on a prepaid account to repay advances. Companies would be required to offer consumers an alternative means of paying outstanding credit balances.[[33]](#footnote-33)

*Reporting and Marketing Rules for College Student Open-End Credit:* The proposed rule would provide that Regulation Z’s rules governing the marketing of credit to college students would apply to prepaid accounts that do not contain a credit card feature at the time the prepaid account is issued, so long as a credit card feature could be added to the prepaid account.[[34]](#footnote-34)

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Please let us know if you have any questions.

Attachment: Table of Contents for the NPRM

1. CFPB, Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act

(Regulation Z), RIN 3170-AA22 (Nov. 10, 2014) [hereinafter NPRM], *available at* http://files.consumerfinance.gov/f/201411\_cfpb\_regulations\_prepaid-nprm.pdf. [↑](#footnote-ref-1)
2. The proposed rule is accompanied by a CFPB study of prepaid products. CFPB, Study of Prepaid Account Agreements (Nov. 2014), *available at* http://files.consumerfinance.gov/f/201411\_cfpb\_study-of-prepaid-accountagreements.pdf. [↑](#footnote-ref-2)
3. C.F.R. § 1005.1 *et seq.* [↑](#footnote-ref-3)
4. NPRM at 117 (Recognizing that the proposed rule may apply to virtual currency and related products). [↑](#footnote-ref-4)
5. Fed. Reg. 1473, 1475 (Jan. 10, 2006). [↑](#footnote-ref-5)
6. NPRM at 97. [↑](#footnote-ref-6)
7. *Id.* at 102. [↑](#footnote-ref-7)
8. *Id.* at 103. [↑](#footnote-ref-8)
9. *Id.* at 102. [↑](#footnote-ref-9)
10. The CFPB notes, however, that its analysis of mobile financial products and services, virtual currencies, and related products and services is ongoing. *Id*. at 117. The NPRM refers to the Bureau’s Request for Information regarding the opportunities and challenges associated with the use of mobile financial products and services (Mobile RFI), 79 Fed. Reg. 33731 (June 12, 2014), and its review of comments received in conjunction with this request. *Id.* at 72–73. [↑](#footnote-ref-10)
11. *Id*. at 9. [↑](#footnote-ref-11)
12. *See id*. at 102; *see also id.* at 103 (“[t]he Bureau seeks to make clear that it does not intend to extend the proposed definition of prepaid account to a product that can never store funds. To the extent that a digital wallet, for example, merely stores payment credentials (*e.g.*, a consumer’s bank account or payment card information), rather than storing the funds themselves, the digital wallet would not be considered a prepaid account under the proposed rule”). [↑](#footnote-ref-12)
13. *Id.* at 111. [↑](#footnote-ref-13)
14. *See id.* at 280–81 [↑](#footnote-ref-14)
15. *Available at* http://files.consumerfinance.gov/f/201411\_cfpb\_prepaid-model-sample-disclosure-forms.pdf. [↑](#footnote-ref-15)
16. C.F.R. § 1005.1818(b)(2)(i). [↑](#footnote-ref-16)
17. NPRM at 117. [↑](#footnote-ref-17)
18. *Id*. at 331–75, 561–63, proposing to amend 12 C.F.R. § 1005.19 (Internet Posting of Prepaid Account Agreements) and 12 C.F.R. § 1026.58 (Internet Posting of Credit Card Agreements). [↑](#footnote-ref-18)
19. *See id.* at 297. [↑](#footnote-ref-19)
20. *Id*. at 309. [↑](#footnote-ref-20)
21. *Id*. at 158–59. [↑](#footnote-ref-21)
22. *Id*. [↑](#footnote-ref-22)
23. *Id.* at 533. [↑](#footnote-ref-23)
24. *Id.* [↑](#footnote-ref-24)
25. *Id.* at 239, proposing to amend 12 C.F.R. § 1005.18(b)(2)(i)(B)(*13*). [↑](#footnote-ref-25)
26. *Id.* at 387. [↑](#footnote-ref-26)
27. *Id.* at 1. [↑](#footnote-ref-27)
28. *Id.* at 401. [↑](#footnote-ref-28)
29. *Id.* at 549–50. [↑](#footnote-ref-29)
30. *Id.* at 401. [↑](#footnote-ref-30)
31. *Id.* at 522. [↑](#footnote-ref-31)
32. *Id*. at 401–02. [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Id*. at 551. [↑](#footnote-ref-34)