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August 14, 2017

By electronic delivery to: www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1275 First Street, N.E.,
Washington, DC 20002

Re: **Docket No. CFPB-2017-0015**
Proposed amendments concerning prepaid accounts
Electronic Fund Transfer Act (Regulation E)
Truth in Lending Act (Regulation Z)
82 FR 29630 (June 29, 2017)

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (Bureau) request for public comment[2] to amend Regulation E (Electronic Fund Transfer Act) and Regulation Z (Truth in Lending Act) regarding the final rules related to prepaid accounts, published on November 22, 2016 (Final Rule).[3] The Bureau proposes amendments to several aspects of the Final Rule, including: error resolution and limitations on liability for prepaid accounts when the financial institution has not completed its consumer identification and verification process; application of the rule's credit provision regarding the ability of prepaid card issuers, under certain circumstances, to offer credit card issued by a related entity; certain other clarifications; and the effective date of the rule.

We commend the Bureau for its efforts to address these issues. We generally support the proposal and offer recommendations to exclude certain products from the definition of prepaid account. We also have concerns about the proposed comment that requires credit card issuers to "treat" a prepaid card (when it is used to access credit from the credit card account) as if it is a credit card in order not to be considered a hybrid card under certain conditions. We respectfully request that the Bureau staff meet with us and appropriate other parties to discuss the purpose and implications of this proposed comment.

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[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

[2] Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 12 C.F.R. § 1005 & 1026 (2016).

[3] Amendments to Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 Fed. Reg. 29630 (June 29, 2017).

REGULATION E

1. Definition of prepaid: Exclusion of certain cards. (§1005.2(b)(3)(ii))

The Final Rule excludes from the definition of prepaid cards certain cards, such as gift certificates and loyalty, award, or promotional gift cards. We believe that the Bureau should add to the exclusion certain other cards, specifically those that—

- Are not marketed to the general public;
- Have no fees;
- Cannot be registered; and
- Disclose on the card or device the expiration date.

The prepaid card regulatory regime under Regulation E simply is not suited to cards with these features. Jury duty cards would be an illustrative case in point. For example, Regulation E's short form disclosure is limited to fee information, overdraft features, and FDIC insurance coverage, none of which apply to cards with these features. Yet, consumers will receive notices showing lists of fees that do not apply and explanations of overdraft features and FDIC insurance that are not applicable and are a distraction from other more important information related to the product. Moreover, under the proposal, if the card cannot be registered, the error resolution provisions would not apply. Imposing unnecessary regulatory requirements will increase the costs to provide such products and discourage their use, notwithstanding their efficiency and value to both recipients and issuers.

2. Limitations on liability and error resolution requirement: Unverified cards. (§1005.18(e)(3))

In §1005.18(e)(3) of the 2014 proposal, unverified prepaid accounts were excepted from the error resolution and liability provisions if disclosures explained the risks of not registering. The Final Rule narrowed the provision so that unverified accounts are generally subject to the liability provisions, except they are not required to provide provisional credit.

Due to potential fraud concerns, the Bureau is proposing to revert to its original proposal; the liability protections would not apply to unverified accounts, provided the issuer has disclosed the risks of not registering. It further provides that the liability provisions would not apply if the issuer does not have a verification process and provides the notice explaining that there are no protections for unauthorized transactions.

We support the proposal and agree that the current liability protections could make the industry a bigger target or focus for fraudsters who purchase a card and do not register, spend the funds, make a claim that the transactions were not authorized, and then obtain a credit. Yet, absent registration, the issuer has no means to determine the validity of the claim nor to identify, investigate, or stop further unauthorized transactions on the remaining funds.

Some issuers, under the current rule, allow immediate access to funds loaded on the account at purchase. They allow purchasers who do not wish to register or who fail registration to spend the amount loaded on the account at the time of purchase but do not allow reloads and restrict other functionalities. To avoid fraud and recrediting accounts for claims that transactions were unauthorized (that the issuer cannot investigate), issuers may issue check refunds rather than allow the customer to

spend down the funds. These consumers may have to wait days for their check refund and pay a check-cashing fee. Moreover, issuers limiting functionality in this manner would have to pull and replace existing cards, not just in the stores, but those in distribution facilities, to reflect the change. The result of the reduced functionality to consumers and additional costs may lead issuers to eliminate the product, to the detriment of consumers who value and need these accounts. The proposed revision could help obviate this problem.

The Bureau has asked about error resolution practices for unregistered cards. Bank practices vary depending on the type of card and how it is used. It is important that banks have flexibility in those practices and the ability to modify them in response to changing environments, including the fraud experiences. In addition, while currently the proposed change appears primarily to impact prepaid cards sold in retail stores, there may be other temporary accounts developed in the future for which the proposed change will be valuable and appropriate.

3. Compulsory use where card is the only choice. (§1005.18(b)(1)(i) and Comment §1005.18(a)-1)

Generally, under Regulation E, access devices may only be issued unsolicited under certain circumstances. The proposal seeks to address the conditions for issuing unsolicited cards when consumers are not offered alternatives to certain prepaid products, for example, jury duty cards, prison release cards, and certain types of refund cards. Specifically, in cases where an access device is provided on an unsolicited basis and the financial institution or third party does not offer an alternative means for the consumer to receive funds, the proposal provides that in order to satisfy the requirement to explain that the card is not validated and explain the means of card disposal, the financial institution must inform consumers that they have no other means by which to receive funds if they dispose of the access device.

We agree that this provision is helpful for the reasons the Bureau notes. A prohibition against compulsory use would threaten the viability of such accounts, which offer an efficient and convenient means to distribute and receive funds. Absent compulsory use, issuers may revert to checks, which may not only be inconvenient and costly to recipients, but also limit issuers' ability to control proper use of the funds.

4. Accounts acquired in retail locations. (§1005.18(b)(1)(ii))

Under the regulation, the long-form does not have to be provided in retail locations prior to acquisition of the account if the following conditions are met:

- The prepaid account device is contained in the packaging material;
- The short form disclosures are visible;
- The short form provides a phone number and internet address for access to long form disclosures; and
- The long from is provided after acquisition of the account.

The rule does not set forth a specific time when the long form must be provided, but the Bureau explained that, in practice, it expected that the long form would typically be provided as part of initial disclosures. However, §1005.18(f)(1) only requires that the information in the long form be included in the initial disclosure. It does not require it to be formatted in accordance with the long form formatting requirements.

Some issuers believe that including the formatted long form with the required initial disclosures in the packaging material may necessitate a substantial increase in the size of the packages, thus requiring retooling of retail store J-hook packaging. Instead, financial institutions might send the long form disclosure by mail. To avoid this, the Bureau is proposing to allow financial institutions to provide the long form disclosure electronically, without E-Sign Act consent. Specifically, the Bureau proposes to revise §1005.18(b)(1)(ii)(D) to provide that if the institution does not provide the long form inside the packaging material and is not otherwise mailing written account-related communications within 30 days of obtaining the consumer's contact information, then the institution may provide the long form disclosure in electronic form without regard to the notice and consent requirements of Section 101(c) of the E-Sign Act. The Commentary would explain that, for accounts offered in retail locations, an institution that has not obtained the consumer's contact information is not required to provide the long form after the consumer acquires the account in order to comply with §1005.18(b)(1)(ii)(D).

We agree with the proposal. Some issuers offering prepaid accounts at retail stores obtain E-Sign consent at the time the customer registers online. However, customers who go online but decline to register or fail to register may not provide E-sign consent and thus cannot obtain the disclosures electronically. Under the proposal, those customers are more likely to get and read the long form because neither registration nor E-Sign consent is necessary to obtain them.

Moreover, the proposal would add flexibility and lower costs without harm to consumers. Both options under the current regulation, either increasing the size of card packaging or mailing the long form, are expensive. Yet, there is little if any benefit to consumers, as they will receive the long form information in the initial disclosure accompanying the card. Thus, consumers will still receive all the long form information with the card, just not in the long form format.

5. Disclosure of third party fees and print on demand. (§1005.18(b)(3)(v))

Under §1005.18(b)(3)(v) of the regulation, any third-party fee included in the cash reload fee disclosed in the short form must be the highest fee "known by the financial institution at the time it prints, or otherwise prepares the short form disclosure." It further provides, "A financial institution is not required to review its short form disclosure to reflect a cash reload fee change by a third party until such time that the financial institution manufactures, prints, or otherwise produces new prepaid account packaging material or otherwise updates the short form disclosure." Similarly, under §1005.18(b)(4)(ii), the financial institution must revise the long form to reflect a fee change by a third party at such time that "the financial institution manufactures, prints, or otherwise produces new prepaid account packaging materials or otherwise updates the long form disclosures."

Issues with these provisions arise with print-on-demand disclosures that are printed just prior to account acquisition. Print-on-demand is efficient and limits wasted printed disclosures. However, there is necessarily a time lapse, which may be substantial, between when the bank "knows" about the change and when its systems supporting the print-on-demand feature are updated. We recommend that the Bureau adopt a rule similar to the one applied to pre-printed disclosures and provide in the appropriate sections related to the short and long form disclosures that, "A financial institution that prints the short form (and long form) disclosure on demand must reflect a fee change by a third party at the time that it otherwise updates its print-on-demand system."

6. **Form of Pre-Acquisition Disclosures: Providing paper disclosures when accounts acquired electronically or by phone.** (§1005.18(b)(6)(i)(B))

Generally, under §1005.18(b)(6)(i), the pre-acquisition disclosures must be provided "in writing." The disclosures must be provided in electronic form for accounts acquired through electronic means and orally for accounts acquired by phone.

The Bureau is concerned about situations when providing electronic or oral disclosures is not practicable or convenient, for example, where an employer or government agency might provide printed disclosures but require the consumer to go online or call a customer service line to acquire the account. Accordingly, the Bureau is proposing to allow institutions to provide the disclosures in "written form" prior to acquisition rather than having to give the disclosures electronically or orally by telephone. The proposed comment offers an example of employees receiving "printed" copies of the disclosure with a payroll card with instructions to complete the payroll card account acquisition process online.

We agree with the Bureau that it is appropriate to allow issuers to provide printed pre-acquisition disclosures when accounts are acquired by telephone or online. As the Bureau notes, "[C]onsumers can best review the terms of a prepaid account before acquiring it when seeing the terms in written form…"[4] Written disclosures may be more effective and accurate than oral disclosures, particularly if they are lengthy. Moreover, consumers typically will have more time to review them and to do so without distractions. Similarly, there is no reason that disclosures should not be permitted to be provided in printed form rather than electronically.

To avoid confusion, we suggest that the final rule not use the term "written" to distinguish printed disclosures from electronic disclosures and instead refer to printed disclosures as "printed" or "paper" disclosures. Electronic disclosures are, in fact, written disclosures, as recognized under numerous regulations, including Regulation E. Electronic writing is a form of writing, distinct from the printed or paper form. Written disclosures (both electronic and printed) are a form of communication, distinct, for example, from oral communication. The proposed language that equates "written" with paper form only, to the exclusion of the electronic form, will create confusion, not only with prepaid cards under Regulation E, but with other provisions of that regulation, as well as numerous other regulations that require disclosures be "in writing" and permit those written disclosures to be provided electronically.[5] For these reasons, we suggest that the final rule provide that unless disclosures are provided in "printed" (or "paper") form prior to acquisition, they must be provided in electronic form if the account is acquired electronically or orally if acquired by telephone.

7. **Prepaid accounts acquired in foreign languages for payroll card and government benefit cards.** (§1005.18(b)(9)(i)(C))

The Final Rule requires institutions to provide disclosure in a foreign language if they use that language in connection with the acquisition of a prepaid account in certain circumstances, specifically, if they—

1. Principally use a foreign language on the packaging material;

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[4] *Id.* at 29639.

[5] For example, see §1005.5(a)(1) of Regulation E. "Disclosures required under this part shall be…in writing…The disclosures required by this part may be provided to the consumer in electronic form…"

2. Principally use a foreign language to advertise, solicit, or market a prepaid account and provide a means in the advertisement, etc. that the consumer uses to acquire the account by telephone or electronically; or

3. Provide a means for the consumer to acquire a prepaid account by telephone or electronically, principally in a foreign language.

This third condition may present challenges, for example, when employers and government agencies, as a customer service, contract with third parties to provide real-time oral language interpretation service for a variety of situations, including acquisition of a prepaid account. Because the employer or agency may not know that it will need interpretation services in a particular language until requested, it may not be feasible to provide the written disclosures in every foreign language that might be requested, especially if the service offers interpretation of tens of languages. Nor can the issuer control the accuracy of the interpretation or monitor compliance.

For these reasons, the proposal provides an exception for payroll card and government benefit accounts where the foreign language is offered by telephone only, using a real-time language interpretation service provided by a third party. We support this amendment. Otherwise, the costs and compliance risk of providing useful interpretive services will cause them to be unavailable, to the detriment of non-English speakers.

8. Short and long forms as addenda to agreements submitted to the Bureau. (§1005.19(b)(6)(ii))

The regulation requires issuers to submit prepaid account agreements to the Bureau. Fee information must be provided either in the agreement or in a single addendum to the agreement. This means that issuers cannot provide the short form and long form in two addenda to the agreement. Because many issuers will likely create two separate documents, they will be forced to combine the documents into the agreement or into a single addendum, unnecessarily complicating the task. Thus, the Bureau proposes to permit issuers to submit fee information in the agreement or in "addenda to that agreement" rather than a "single addendum." We agree with this common sense amendment that reflects practical considerations.

REGULATION Z

9. Hybrid cards: definition of business partner. (§1026.61(a)(5)(iii))

Under the Final Rule, a prepaid account that may access a separate credit feature in the course of a transaction is a hybrid account if the separate credit feature is offered by the prepaid account issuer, its affiliate, or its business partner. Hybrid cards are subject to both Regulations E and Z. In addition, prepaid card issuers must wait until 30 days after a prepaid account is registered before soliciting or opening a new credit feature or linking the prepaid account to an existing credit feature that would be accessible by a hybrid card.

The Bureau proposes to add an exception to the definition of "business partner." Specifically, the proposal would provide that a person that can extend credit through a credit card account would not be a business partner of a prepaid account if certain conditions are met under proposed (§1026.61(a)(5)(iii)(D):

(1) The credit card is a credit card account that a consumer can access through a traditional credit card (i.e., it is not a hybrid card);

(2) The prepaid account issuer and the card issuer will not allow the prepaid card to draw, transfer, or authorize the draw or transfer of credit from the credit card account in the course of authorizing, settling, or otherwise completing transactions conducted with the card, except where the card issuer has received the consumer's written request;

(3) The prepaid account issuer and the card issuer do not condition acquisition or retention of the prepaid account or the credit card account on whether a consumer authorizes the prepaid account as described above;

(4) The prepaid account issuer applies (a) the same terms, conditions, or features regardless of the consumer authorizing linkage and (b) applies the same fees to load funds from the linked credit card account as it charges for a comparable load on the prepaid account to access a credit feature that is not the prepaid account issuer, its affiliate, or a person with which it has a business arrangement;

(5) The credit card issuer applies the same terms and conditions to the credit card account when a consumer authorizes linking the prepaid card to the credit card (with which it has a business arrangement) as it applies to the consumer's credit card account when the consumer does not authorize such a linkage. In addition, the card issuer applies the same specified terms and conditions to extensions of credit from the credit card account made with the prepaid cards as with the traditional card.

The Bureau explains that it is responding to comments that the current rule restricts the ability of digital wallet providers that offer prepaid cards from offering customers credit cards from their business partners. Under the current rule, consumers may link their prepaid account to any credit card account for such purposes, but they may not add one related to the digital wallet provider until 30 days after opening the prepaid account. In addition, if the digital wallet provider has multiple credit card business partners, consumers will receive lengthy and confusing disclosures. Finally, such digital wallets would not be able to take advantage of the "incidental form of credit because the account is linked to a separate covered credit account."

We support the proposed amendments generally as they encourage competition, innovation, and consumer convenience and choice. Consumers may wish to have their prepaid cards connected to a credit card to ensure important transactions are not returned, much as they may choose to connect a checking account to a credit card to prevent overdrafts, especially with regard to bill payments. They should not have to wait to use a card offered through a prepaid card issuer's arrangement with a credit card issuer if the terms and conditions remain the same regardless of linkage.

However, we are concerned about proposed language that may make the proposed exception meaningless as a practical matter and prevent innumerable arrangements that might benefit consumers, specifically—

- The condition in §1026.61(a)(5)(iii)(D)(5), above, that to qualify for the exception the card issuer must apply "the same specified terms and conditions to *extensions of credit* from the credit card account *made with the prepaid cards* as with the traditional card," (Emphasis added):

- Proposed comment 3.ii to §1026.61(a)(5)(iii)(D)(5):

  To apply the same rights under §1026.12(c) regarding claims and defenses applicable to use of a credit card to purchase property or service, *the [credit] card issuer must treat the prepaid card* when it is used to access credit from the credit card account…*as if it is*

a credit card and provide the same rights under 1-26.12(c) as it applies to property or services purchased with the traditional credit card. (Emphasis added)

- Proposed comment 3.iii to §1026.61(a)(5)(iii)(D)(5):

  To apply the same limits on liability for unauthorized extensions of credit from the credit card account using the prepaid card as it applies to unauthorized extensions of credit from the credit card account using the traditional credit card, the *card issuer must treat the prepaid card as if it were an accepted credit card* for purposes of the limits on liability for unauthorized extensions of credit…and impose the same liability under §1026.12(b) as it applies to unauthorized transactions using the traditional credit card. (Emphasis added)

Section 1026.12(c) relates to cardholder disputes regarding property or services purchased with a credit card and allows the cardholder to withhold payment up to the amount of credit outstanding for the property or service that gave rise to the dispute with the merchant.

First, the proposed text treats the prepaid card as the credit card. The language in the proposed regulation, "extension of credit…made with the prepaid card" suggests that the prepaid account is extending the credit, when in fact the credit card account is providing the credit. Moreover, it is not clear how, as the proposed comments 3.ii and 3.iii require, a credit card issuer can "treat" a prepaid card offered and maintained by another company as a credit card or anything else. It has no control over a product offered and controlled by a different company, even one with whom it has a business arrangement.

Second, modifying the language in the proposed comments and regulation to require the credit card issuer to consider "transactions" (as opposed to the cards) using the prepaid account to access credit from the credit card account to be credit card transactions does not solve the problem. For example, how will customers and the credit card issuer identify such transactions if credit is used for only a portion of the transaction, as the amount of the prepaid account transaction is different from the amount shown on the credit card account? Using the merchant name to identify the transaction – assuming that it is feasible for the credit card issuer to obtain and provide the information – is inadequate, because there could be multiple transactions with that merchant.

Third, rules regarding responsibility for customer inquiries about transactions and terms tend to impose responsibility on the party that is most able to assist the customer and that is the most natural choice for the consumer to contact.[6] In the case of a transaction made with a prepaid card, a customer who has used the prepaid card or card number for the transaction, and who has a receipt reflecting the prepaid account number and the amount of the purchase transaction, will naturally address inquiries about the transaction to the prepaid card issuer. The regulation should so reflect.

We recommend that the Bureau delete proposed comments 3.ii and 3.iii to §1026.61(a)(5)(iii)(D)(5) and revise §1026.61(a)(5)(iii)(D)(5) to eliminate any suggestion that the prepaid account transactions are credit transactions. The provision is confusing, does not reflect customer expectations, and imposes requirements that may not be feasible as a practical or technical matter. We request that the Bureau staff meet with us and appropriate other parties to discuss the purpose and implications of these proposed changes.

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[6] See, for example, §1005.14 of Regulation E, which imposes responsibilities related to disclosures and error resolution on entities that provide an electronic fund transfer service to a consumer but that do not hold the account.

10. Effective dates

On April 20, 2017, the Bureau announced its extension of the general mandatory compliance date from October 1, 2017 to April 1, 2018, an extension ABA supported. However, the extension may now be insufficient given that the proposed amendments, while beneficial, are more expansive than anticipated, and we anticipate that there may be insufficient time between adoption of the final rule and April 1, 2018.

Some issuers already have adopted the pre-acquisition disclosures and many will implement all or parts of the regulation prior to the mandatory compliance date because the proposed changes do not affect them. However, depending on the business model and individual product, others will need to make adjustments to their implementation plans based on the final amendments. They will have to review and analyze the final rule, coordinate with multiple internal and external parties before approving a compliance plan, and then implement that plan, none of which can begin until the rule is finalized. A final is unlikely to be published until October or November, leaving insufficient time before the April 1, 2018 deadline.

Issuers of prepaid accounts sold in the retail environment have special challenges, because they must make core product decisions, including whether to "pull and replace" existing card packages – e.g., if the rule is not changed and the existing disclosures become significantly inaccurate – which is a major project given the number of cards, not just on store racks, but in their back rooms and in distribution centers. In addition, these issuers need a lengthy lead time to distribute new cards.

Assuming that the final rule is released by November 1, 2017, we recommend that the Bureau adopt an October 1, 2018 deadline, the date issuers must begin to submit agreements to the Bureau. This will allow sufficient time to implement the amendments but also avoid the confusion the Bureau has acknowledged that arises from the three effective dates that currently exist—the original general mandatory compliance date, the revision to that date, and the separate date to submit agreements to the Bureau.

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ABA appreciates the Bureau's efforts to respond to industry concerns about aspects of the Final Rule related to prepaid accounts and generally supports the proposed amendments. We look forward to meeting with Bureau staff regarding uncertainty about the implications of the language related to the proposed exception to the definition of business arrangement in connection with hybrid cards.

Sincerely,

Nessa Feddis