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March 23, 2015

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection Bureau
1700 G. Street, NW
Washington, D.C. 20552

Prepaid Accounts Under the Electronic Fund Transfer Act
(Regulation E) and the Truth in Lending Act (Regulation Z)
Consumer Financial Protection Bureau
RIN 3170-AA22
79 Federal Register 77102 (December 23, 2014)¹

Dear Ms. Jackson:

The American Bankers Association² (ABA) is pleased to submit its comments to the Bureau of Consumer Financial Protection (Bureau) regarding its proposed changes to Regulation E (Electronic Fund Transfer Act) and Regulation Z (Truth in Lending Act) regarding consumer protections for prepaid accounts.³ The proposals would treat prepaid cards as credit cards subject to Regulation Z if they may be linked to overdraft services or credit. Prepaid cards would also be treated as credit cards if any fee, including a “regular” prepaid account fee, is imposed on the account when the account is in overdraft status, even when the overdraft status is unavoidable. In addition, the proposal would impose specific disclosure and account information access requirements and provide an alternative to periodic statements otherwise required under Regulation E.

I. Summary

We appreciate the opportunity to comment on this important proposal regarding prepaid cards. These products offer an important opportunity for people who might not otherwise qualify for or manage well a full-service bank checking account. While it is important that consumers understand the terms and conditions of such accounts, the regulation should not stifle their availability, development, or improvement.

Historically, ABA has enthusiastically supported simple, easy-to-understand, consumer-tested disclosures that facilitate the ability of consumers to understand the terms, conditions, and fees of a financial account before they become committed to the account. We support Bureau’s efforts to create a simple disclosure that highlights the terms most important to consumers in a format that

¹ 79 Fed. Reg. 77102 (December 23, 2014).

² ABA represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees. The majority of ABA’s members are banks with less than \$165 million in assets.

³ Prepaid accounts will also be referred to as prepaid cards.

makes them easy to notice and digest, though we offer recommendations for some important changes. Our primary concerns relate to the need for clarity in the definition of the term “prepaid account” and the proposed treatment of overdrafts and credit and the continued ability of banks of all sizes to be able to offer prepaid accounts.

The regulation must make crystal clear the differences between accounts that are prepaid accounts and those that are not, given the vastly different regulatory schemes applicable, the consequences for violations, and the need to facilitate the access of customers to convenient and innovative payments tools. As currently proposed, the differences in the draft regulation between a “covered account” and “prepaid account” are blurred at best, which would subject banks to second-guessing by examiners and plaintiffs’ attorneys, while offering no new value to users of the products. The Bureau has a responsibility to promulgate a clear rule that does not expose banks to vague, meritless challenges and duplicative compliance efforts that ultimately will negatively affect customer access to these products. We recommend that the Bureau narrow the definition of prepaid account to cover an account whose underlying funds are only accessed through the card (or card number) that is processed through the card networks. Such a definition reflects the regulatory history and treatment of prepaid cards and the definition used in the research, including the consumer testing ICF International (ICF) conducted for the Bureau that the Bureau relied on in developing the proposal.

In addition, the banking industry is very concerned about the proposed treatment of overdrafts and credit accessible through prepaid cards. First, the proposed treatment of overdraft is contrary to the plain meaning and intent of the Truth in Lending Act (TILA). Treating as a finance charge a fee that is also imposed on a “cash” transaction turns the entire concept of measuring the cost of credit on its head. Similarly, TILA’s definition of credit clearly excludes overdrafts, which convey no “right to defer” payment, the essential characteristic of credit under the TILA. Simply put, the proposed treatment of overdrafts is contrary to law.

Second, the proposal amounts to an effective ban on offering overdraft services or credit through a prepaid card because of the operational and compliance costs and risks. While we support the Bureau’s goal to protect consumers, the proposal will harm consumers by limiting consumer access to overdraft services and credit. Moreover, as the Bureau’s own consumer testing demonstrates, the proposal will sacrifice the preferences of those who are interested in overdraft services. The interests of those who prefer and those who do not prefer to have overdraft services can both be accommodated through clear and prominent disclosure and conscious “opt-in.” The effective prohibition also further hobbles efforts of banks to offer small-dollar affordable credits as an alternative to nonbank small-dollar loan options such as payday loans.

Moreover, even prepaid cards that do not offer overdraft services will be affected because the proposal transforms prepaid cards into credit cards if *any* fee, including fees imposed when there are funds in the account, is charged when the account is in overdraft status—even if the overdraft is unavoidable, for example, when a deposited check is returned unpaid or the final card transaction exceeds the amount authorized. ABA member banks that offer prepaid cards generally do not offer overdraft or credit services with their prepaid cards, yet the proposal will expose these banks to new operational and compliance risks associated with application of the proposed credit

and overdraft rules to these current products. These banks may be compelled to withdraw from the market because of these new regulatory risks and costs. In addition, we anticipate that the proposal will make other banks, particularly community banks, reluctant to enter the market. The cumulative costs of such proposed provisions, including those for which less onerous alternatives are available, would make offering a prepaid account unsustainable or the hurdle too high for a bank to begin to offer prepaid products. Yet, prepaid cards offer a promising “bank account” alternative for low-income customers or others who do not have bank accounts. Thus, the proposal will significantly limit the opportunities to improve access to banking.

It surely must not be an underlying goal of the Bureau to create an account that absolves consumers from responsibility or accountability for monitoring or managing their finances. And yet, under the proposal, holders of the envisioned account would be able to overdraw their account and then avoid not just overdraft fees, but potentially *any* fee, including those regularly assessed on the account. Rather than encouraging customers to improve their financial management skills, the prepaid account resulting from the Bureau’s proposal would send a message that there are few adverse consequences to overspending or not managing finances. Long term, this message will weaken consumers and lead to poor financial decisions, not only with regard to bank accounts, but with regard to other financial products. Prepaid cards will lose their usefulness as a starting ramp to greater financial responsibility and increased access to banking services.

In short, the cumulative operation and compliance costs and risks of the proposal will significantly hinder banks’ ability to offer prepaid cards. The result will be the suppression of a promising option to move people without bank accounts into financial products offered by insured depository institutions. Thus, rather than creating guardrails, the proposed overdraft services treatment, coupled with other onerous provisions, will create regulatory potholes and barriers to needed and valuable financial products.

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II. Highlights of the Proposals

1. Definition of prepaid account

Under the proposal, a prepaid account is defined as a “card, code, or other device, not otherwise covered” under the definition of “account” which is “either issued on a prepaid basis to a consumer in a specified amount or not issued on a prepaid basis but capable of being loaded with funds thereafter” and is redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines, or usable for person-to-person transfers. The definition also includes payroll cards and certain government benefit accounts, which Regulation E defines separately. Government benefit cards are treated in a separate section. Excluded from the definition are gift certificates, store gift cards, loyalty, award, or promotional gift cards, general-use prepaid cards that are both marketed and labeled as a gift card as those products are elsewhere defined in the regulation. Also excluded are health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement arrangements. (Proposed §1005.2(b) of Regulation E)

2. Requirements for prepaid accounts

Pre-acquisition disclosures. The proposal requires certain “pre-acquisition” disclosures, that is, a “short form,” that highlights important fees and features, and a “long form,” that repeats the information contained in the short form and includes additional fee information. The short form must include seven static disclosures as well as three “incidence” fees, i.e., the three fees that “were incurred most frequently in the prior 12-month period by consumers of that particular prepaid account product” and that are not already required to be disclosed. (Proposed §1005.18 (b) of Regulation E)

For prepaid accounts provided in bank branches, both disclosures must be provided before the consumer acquires an account. For prepaid cards acquired in retail stores, the short form must be provided before the account is acquired, but the long form may be provided after acquisition if certain other conditions are met: the prepaid card is inside of packaging materials; the short form is visible through the package; and information on the short form includes a means of accessing the long form by telephone and a website.

If a financial institution “principally” uses a foreign language with regard to any channel with which a consumer may acquire a prepaid card, then the short and long forms must be provided in that same foreign language. Under the proposed Commentary, if a consumer “speaks with a customer service agent in a foreign language in a bank branch or credit location, a consumer must receive the short form disclosure and long form disclosure in that foreign language.” (Proposed §1005.18(b)(6) of Regulation E)

Access to prepaid account information. Financial institutions are not required to furnish periodic statements if they meet certain conditions (Proposed §1005.18 (c) and (d) of Regulation E):

- The account balance is available;

- An electronic history of the consumer’s account transactions is available (e.g. through a website) that covers at least 18 months preceding the date the consumer electronically accesses the account; and
- A written history of the account transactions is provided promptly in response to an oral or written request that covers at least 18 months preceding the date the financial institution receives the request.

The “history” of the account must include all the information the regulation requires for periodic statements and the amount of any fees assessed. Any periodic statement or written history (whether electronic or paper) for a prepaid account must also include a summary of the amount of all fees assessed against the account, the total amount of all deposits to the account, and the total amount of all debits from the account, for the prior calendar month and for the calendar year-to-date. The initial disclosures must contain information related to accessing account information and error resolution.

Modified limitations on liability and error resolution requirements. If the financial institution elects to provide information in a manner permitted as an alternative to the periodic statement, the 60-day period for reporting unauthorized transfers begins the earlier of the date the consumer electronically accesses the account and the date the financial institution sends a written history of the account transactions as requested by the consumer. In the alternative, the financial institution may limit liability for any transfer reported within 120 days after the transfer was credited or debited to the consumer’s account. Similar adjustments are made for error resolution. Unless the prepaid account is for payroll or government benefits, if the financial institution discloses the risks of not registering the account, the institution is not required to comply with the liability limits or error resolution requirements for any prepaid account for which it has not completed customer identification. (Proposed §1005.18(e) of Regulation E)

Initial disclosures of fees and other key information. In addition to providing any fees related to electronic fund transfers, the financial institution must disclose all other fees imposed on the prepaid account. (Proposed §1005.18(f) of Regulation E)

3. Treatment of “credit” linked to prepaid accounts and related prohibitions

Proposed provisions in Regulations Z and E would establish that a prepaid card that can be used to access overdraft services or any form of committed credit is deemed to be a credit card under Regulation Z and thus subject to the various credit card provisions, including those related to “ability to repay,” limitations on certain fees, issuance limitations, disclosure requirements, and periodic statement requirements, including the requirement to mail or deliver periodic statements 21 days before the due date. With regard to the general prohibition against offsetting credit card debt against funds held on deposit with the card issuer, if agreed by the consumer in writing, funds may be deducted from a deposit account held by the card issuer to pay debt under the prepaid card, but no more than once per month.

Proposed Regulation E §1005.18(g) imposes prohibitions and restrictions with regard to credit linked to prepaid accounts. Financial institutions may not open a credit card account or provide a credit card solicitation or application to a prepaid account holder that would be accessed by the

prepaid card prior to 30 calendar days after the prepaid card has been registered. In addition, proposed §1005.17(a)(1) would provide that the opt-in requirements for certain debit card overdrafts do not apply to a credit plan that is accessed by a prepaid card where the prepaid card is a credit card.

4. Compliance dates

Generally, the pre-acquisition disclosures and initial disclosures must be provided on prepaid account packaging, access devices, and other physical materials that are manufactured, printed, or otherwise prepared, nine months after publication of the final rule. All prepaid accounts sold twelve months after publication of the final rule must comply with the regulations. Thus, existing noncompliant prepaid cards would have to be removed no later than twelve months after the effective date of the final regulation. (Proposed §1005.18(h) of Regulation E)

5. Posting of prepaid account agreements

Issuers must make quarterly submissions to the Bureau containing information about the issuer and the program manager (if applicable), the prepaid account agreements offered, any prepaid account agreement previously submitted that was amended since the last quarter, and notification regarding any prepaid account previously submitted that is being withdrawn. Submissions are not necessary during periods when there have been no changes. Issuers who had fewer than 3,000 open prepaid accounts are not required to make submissions. Changes must be integrated into the text of the agreement. The Bureau will post the agreements on its website. Issuers must post the agreements on their websites. (Proposed §1005.19 of Regulation E)

III. Discussion

1. Definition of prepaid account

- *The differences between “covered account” and “prepaid account” are blurred. Given the drastically different regulatory schemes, the Bureau should narrow and make clear the meaning of prepaid account.*

Currently, Regulation E applies comprehensive protections to consumer asset accounts, with special and separate provisions for payroll cards, gift cards, and certain government benefits electronic fund transfers. The proposal creates a new and distinct set of rules for “prepaid accounts,” which as noted, have particular attributes and are “not otherwise an account” under the regulation’s definition of account. The requirements, including the treatment of credit and overdraft services linked to the card and the disclosure and statement requirements for “accounts” and “prepaid accounts” are markedly different.

As proposed under §1005.2(b), the difference between the definition of “account” subject to one set of requirements and the definition of “prepaid account,” which are subject to a distinct and different set of requirements, is blurred at best. Given the radical differences in the proposed regulatory schemes for each, coupled with the consequences for violation, it is imperative that the regulation draw a bright line distinction between “account” and “prepaid card.” Failure to do so would impose on the Bureau the necessity to readjust the requirements for prepaid cards to mirror more closely the current Regulation E requirements in order to minimize the differences and

reduce the regulatory risks. Otherwise, depository institutions would be crippled in their ability to comply and would be subject to second-guessing by plaintiff's lawyers and examiners. Depository institutions need clear and workable regulatory construction, not regulatory dead ends.

We recommend that the Bureau adopt a definition consistent with the approach in the Federal Reserve Board's (Board) Regulation II, which implements the Electronic Funds Transfer Act's provisions related to interchange fees and routing. Specifically, it should clarify that "prepaid accounts" are those accounts that are only accessible through the card (or card number), that are processed through the card network (limited-access prepaid card). This definition is supported by the research, studies, and consumer testing the Bureau cites to support the proposed regulation and the regulatory history and treatment of prepaid cards.

An "account" under current Regulation E §1005.2 (b)(1) means: "[A] demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes." It also includes certain payroll accounts subject to special provisions.

Under the proposal, a prepaid account is a—

[C]ard, code, or other device, *not otherwise an account under paragraph (b)(1) of this section...*which

(A) is either issued on a prepaid basis to a consumer in a specified amount or not issued on a prepaid basis but capable of being loaded with funds thereafter;

B) is redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines; or usable for person-to-person transfers; and

(C) is not: (1) A gift certificate...store gift card...loyalty, award, or promotional gift card...or general-use prepaid cards...marketed and labeled as a gift card or gift certificate. (Emphasis added.)

Confusion with the proposal arises because, coupled with the vague proposed definition of prepaid account, the proposed model disclosures and the Supplementary Information suggest that certain accounts, which we believe clearly fall within the current general account definition, could be considered prepaid accounts. For example, the model A-10(e)—Sample Form for Long Form Disclosures for Prepaid Accounts, lists as a "fee" a fee for "online bill pay service by check." Similarly, the Bureau notes that "GPR [general purpose reloadable] card functionality has been expanding. For example, some GPR card programs have started to offer checking account-like features such as *check-writing* using pre-authorized checks, the ability to send direct deposits via an ACH to the GPR, and in some limited cases, the ability of third parties to *debit...the GPR card account via ACH.*"⁴ (Emphasis added.) It notes that a "number of programs also offer an online bill

⁴ 79 Fed. Reg., *supra* note 1 at 77106.

pay function, which sometimes has a fee associated with it.”⁵ It might be argued that the ACH routing number or an online passcode could be considered a “code” and therefore a prepaid card under the proposed definition of prepaid account. Thus, it appears that based on the proposed definition, the model form, and the Supplementary Information, an account with all the traditional means of access (ACH, online non-card network bill-pay), except checks, might be considered a prepaid account. These include “checkless” checking accounts, such as the FDIC’s “[Model Safe Accounts](#),”⁶ as they offer online bill pay (including those made by check) and ACH debits, though no check-writing.

While we believe that such accounts clearly fall within the general definition of “account” and have always been subject to Regulation E, plaintiffs’ attorneys or examiners may wish to take advantage of the ambiguity and assert otherwise, putting depository institutions in a position of having to defend a decision to comply with the comprehensive provisions of Regulation E rather than those for prepaid accounts. Depository institutions should not be compelled to defend such actions based on a vague regulation. Nor should they have to invest twice in regulatory compliance, first by complying with one set of requirements and then making major adjustments to comply with a second set of requirements. Simply put, financial institutions subject to this regulation are entitled to a clear rule that does not unfairly ensnare them in litigation and conflicting supervisory actions.

A review of the regulatory history as well as the Bureau’s research supports a definition that adds a qualifier that to be a prepaid account, the sole means of access to the account is through the card. This definition is also consistent with the approach found in Regulation II, related to the Electronic Fund Transfer Act’s interchange fees provisions.

The question of the applicability of Regulation E to prepaid cards began with application of the regulation to “stored-value systems,” as discussed in the Board’s proposal to apply Regulation E to “stored-value cards,” published in the *Federal Register* on May 2, 1996. Initially, these new systems were typically designed to store value on the actual card. The Board noted that the stored value cards were “also referred to as prepaid or value-added cards.”⁷ The Board then described the wide range of products that could be characterized as stored value, noting, “In their simplest form, stored-value systems are targeted at low-value uses (public transit, pay telephones, or photocopiers, for example); the amount that can be stored on the card is limited; and the card is disposed of once its value has been used up.”⁸ The most sophisticated systems it described as “online stored value systems.” A key distinction between these accounts and traditional bank accounts was that “the value associated with the card is *accessible only through use of the card*

⁵ *Id.* at 77104.

⁶ Under the Model Safe Account Template, core features include “online and mobile banking/bill pay, check cashing and ‘auxiliary service and fees,’” lines of credit, and small-dollar loans (less than \$2500). “Safe Accounts are checkless, card-based electronic accounts that allow withdrawals only through automated teller machines, point-of-sale terminals, automated clearinghouse preauthorizations, and other automated means.” FDIC Model Safe Accounts Pilot Final Report, (April 2012) *available at* <https://www.fdic.gov/consumers/template/template.pdf>.

⁷ 61 Fed. Reg. 19697 (May 2, 1996).

⁸ *Id.* at 19697-98.

itself (in contrast to deposit accounts accessible by debit card, which typically may be accessed through various means, including check, withdrawal slip, ACH, or telephone bill payment.”⁹ (Emphasis added.)

In its “Report to Congress on the Application of the Electronic Fund Transfer Act to Electronic Store-Value Products” of March 1997, the Board again reviewed the broad spectrum of stored-value products under development, ranging from single purpose cards, to cash replacement cards, to travel cards. In describing such products, the Board noted that one of the three characteristics ascribed to stored-value cards was that “*the device is the only means of routine access to the funds.*”¹⁰ (Emphasis added.) The Board’s testimony regarding new banking and payment products on June 4, 1998, before a Congressional subcommittee offered a similar view and described stored-value cards and electronic cash collectively as “electronic money,” where the funds were “recorded on a magnetic strip, smart card chip, or the consumer’s personal computer,” a model which envisions that access is solely through the card.¹¹

In the January 10, 2006, interim final rule and request for public comment regarding application of Regulation E to payroll cards¹² and again in the August 30, 2006, final rule applying Regulation E to pay roll cards,¹³ the Board discussed whether “other stored-value products, or prepaid cards,” should be covered. It suggested in the Supplementary Information to both actions that it was not intending to cover them, but offered few details on how “other” stored valued products, or prepaid cards, were defined. However, it would appear, as discussed above, that based on its comments prior to the 2006 final rule on payroll cards, that the Board believed that means of access to funds in prepaid accounts was limited to the card (or card number).

Moreover, it is impossible that the Board envisioned a definition of prepaid card that was not, at the very least, limited to accounts only accessible through the card. A broader reading would mean that consumer asset accounts that do not permit check writing, but permit a variety of electronic means of access to the underlying funds are exempt from Regulation E today and that the regulation can be avoided entirely by simply eliminating one feature, check access.

We believe that in interpreting the proposal, an investigation into the history of Regulation E and prepaid cards leads to a conclusion that (1) prepaid accounts for which the card is the sole means of access are not currently covered by Regulation E and thus are covered by the proposed definition of “prepaid card,” and that (2) an account that offers other means of access is not a “prepaid account” under the proposed definition. However, depository institutions should not have to rummage through twenty years of uncertain guidance sprinkled throughout the Supplementary Information of various proposals and final rules, Congressional testimony, and reports to reach

⁹ *Id.* at 19699.

¹⁰ “Report to Congress on the Application of the Electronic Fund Transfer Act to Electronic Stored-Value Products” March 1997, pp. 1 and 20.

¹¹ Governor Roger W. Ferguson, Jr., Statement to the House, Before the Subcommittee on Finance and Hazardous Materials of the Committee on Commerce. *Implications of developments in electronic commerce*, Hearing, June 4, 1998. Available at <http://www.federalreserve.gov/boarddocs/testimony/1998/19980604.htm>.

¹² 71 FR 51437 (August 30, 2006) and 71 FR 1475 (January 10, 2006).

¹³ *Id.*

such a conclusion (that might still be challenged). The regulation should be clear and unambiguous. In the alternative, depository institutions should be able to choose to treat a product as an “account” (rather than a prepaid account) and comply fully with the general provisions of Regulation E.

This definition limiting prepaid cards to those solely accessed through the card is consistent with the research, studies, and consumer testing the Bureau relies on to support the proposal. For example, ICF International (ICF), when conducting its qualitative consumer testing for the Bureau, described prepaid cards as cards that consumers can use “to withdraw funds at ATMs or make purchases in stores.”¹⁴ Participants in that testing had a similar view, indicating that they used them for general shopping purposes and to make online purchases. They also indicated they used them to pay bills. However, as bill pay is a common transaction available through the card networks, participants may have been referring to bill payments made through the card networks.¹⁵ Moreover, no non-network related payments were on the list of the reasons for selecting a prepaid card, and the second most often mentioned reason for selecting a particular prepaid card was “convenience (e.g., wide acceptance of a card at *stores or ATMs*).”¹⁶ (Emphasis added.) This list of reasons for selecting a card further indicates that prepaid cards are considered those whose sole means of access is through the card.

Further, the Bureau in its “Study of prepaid account agreements”¹⁷ of November 2014 indicated that it compiled account agreements for general purpose reloadable prepaid card programs listed on the Visa, MasterCard, and NerdWallet websites advertising such cards. We note that on their websites, both Visa and MasterCard define prepaid cards as those that are only usable where the network brand is accepted, that is, the cards are only usable through the card (or card number). The Visa website explains, “Use: Use your card anywhere Visa Cards are accepted.”¹⁸ The MasterCard website states, “You can use MasterCard Prepaid cards wherever Debit MasterCard is accepted.”¹⁹

In addition, the Bureau observes in the Supplementary Information to the proposal that “consumers can typically make purchases with their GPR cards wherever the payment network brand appearing on the card is accepted.” The Bureau further states that some offer an “online bill pay function.” However, it notes that only “a number of programs” offer such a function,

¹⁴ ICF International, “Summary of Findings: Design and Testing of Prepaid Card Disclosures.” pp. I and 1. Available at: http://files.consumerfinance.gov/f/201411_cfpb_summary-findings-design-testing-prepaid-card-disclosures.pdf

¹⁵ *Id.* at 5 and 7.

¹⁶ *Id.* at 5 and 6.

¹⁷ Consumer Financial Protection Bureau, “Study of Prepaid Account Agreements” (November 2014).

¹⁸ See <http://usa.visa.com/personal/personal-cards/prepaid-cards/how-to-use-a-prepaid-card.jsp> and <http://usa.visa.com/personal/personal-cards/prepaid-cards/buy-online.jsp>.

¹⁹ See <http://www.mastercard.us/prepaid-card.html>.

suggesting this is not common. It also does not indicate whether those programs currently comply with Regulation E.²⁰

Also, the Bureau, in describing the fees that might be assessed on prepaid cards, cites a 2012 Federal Reserve Bank of Philadelphia Study, “Consumers’ Use of Prepaid Cards: a Transaction-Based Analysis.”²¹ That Study considered prepaid cards to include those usable only through the card network: “This study focuses primarily on a specific segment – *open-loop reloadable* prepaid cards. These are prepaid cards that carry one of the major payment card network brands and can be used to make purchases at any merchant that accepts that card brand. They can also be used to obtain cash at an ATM or as part of a PIN debit purchase point of sale.”²²

Similarly, Mercator Advisory Group, which the Bureau references with regard to prepaid card growth,²³ includes in its definition of prepaid card: “The device/password/authorization process is the only means of routine access to the account holding said funds.”²⁴

Finally, the Bureau in the Supplementary Information cites the Government Accountability Office report regarding distribution of student aid through debit cards and prepaid cards. That report draws distinctions between debit cards (which are associated with a bank account) and prepaid cards. It describes prepaid cards as being usable for “withdrawals or purchases,”²⁵ suggesting that means of access is limited to the card.

Thus, prepaid cards are generally considered to be accounts that make the card the sole means of access to the account. Indeed, the sources of research the Bureau has relied on in developing the proposal typically include this qualifier.

Moreover, for purposes of the regulation, this type of bright line test makes the most sense. First, the proposed prepaid account provisions are more tailored to the “limited-access” account than they are to accounts that offer a broader array of access channels. “Checkless” checking accounts such as the FDIC’s Model Safe Account, which allow withdrawals through automated teller machines, point-of-sale terminals, automated clearinghouse preauthorizations, and other automated means, are more akin to traditional checking accounts in terms or features, pricing, and terminology and are more likely to be compared to full-service checking accounts. To illustrate, one of the four items in the top line of the short disclosure is the “cash reload” fee. We do not believe that the fee—or lack of a fee—for a cash deposit is likely to be one of the top four critical items for people opening accounts that are essentially traditional checking accounts minus the check-writing

²⁰ 79 Fed. Reg., *supra* note 1 at 77104. Moreover, most participants in the ICF focus group reported that they receive periodic statement, suggesting that some card issuers may believe that they are subject to Regulation E. See ICF International, *supra* note 14 at 10.

²¹ 79 Fed. Reg., *supra* note 1 at 77105.

²² Stephanie Wilshusen et al., Fed. Reserve Bank of Phila., *Consumers’ Use of Prepaid Cards: A transaction-Based Analysis*, at 3 (2012).

²³ See <http://www.mercatoradvisorygroup.com/>.

²⁴ Mercator Advisory Group, “I Want to Launch a Prepaid Card. Now What?” (2011), p. 10, available at <http://www.sourcemediaconferences.com/ATMDebit12/Jackson.pdf>.

²⁵ U.S. Gov’t Accountability Office, GAO-14-91, *College Debit Cards* at 3 (February 2014).

feature. Accordingly, the emphasis on the cash-reload fee on the short form would be inappropriate for an account that is essentially more akin to a checking account.²⁶

Second, as already discussed, it appears the prepaid account disclosure design and content were based on research involving accounts that are solely accessed through the card. That would account for the poor fit of the proposal's design for accounts for which the means of access is not limited to the card itself.

Regulation II, which implements the interchange fee provisions of the Electronic Fund Transfer Act, adopts a narrow view of general-purpose prepaid cards for purposes of the exemption from aspects of that regulation.²⁷ The Bureau reports in the Supplementary Information that it examined Regulation II's definition of prepaid card.²⁸ It notes later, in a discussion about the debit card exemption from Regulation II's interchange fee cap, that the definition of debit card under §920(c) of the EFTA includes a general-use prepaid card.²⁹ However, in neither discussion does the Bureau mention Regulation II's qualifier (that only prepaid cards whose means of access is solely through the card are exempt from the interchange fee provision), or whether it considered a similar qualifier, or if it was considered, why it was excluded.

We believe that the Bureau should add to the definition of prepaid accounts such a qualifier to remedy the dangerous vagueness of the proposal. The Bureau's and others' research has primarily been focused on accounts for which the card is the only means of access to the funds. Moreover, such a qualifier provides a rational bright line rule that is critical to allow depository institutions to comply in good faith without the risk and significant expense of being second-guessed by examiners or plaintiffs' lawyers.

- *The proposal should exclude certain nonreloadable prepaid products.*

The proposed definition includes nonreloadable cards, including for example, disaster/emergency relief cards and refund/rebate cards, which function as substitutes for checks. We believe the final regulation should exempt them as the regulation's provisions are simply inappropriate for such cards.

²⁶ The FDIC's Model Safe Account also anticipates and encourages "auxiliary services" such as a line of credit and small-dollar loans (less than \$2,500). In contrast, the proposal imposes strict and onerous rules on *any* link between the prepaid card and credit, treating a prepaid card that accesses such credit as a credit card under Regulation Z. Thus, if covered under the definition of prepaid account, important credit features of the FDIC model safe account would become unavailable as a practical matter.

²⁷ The Regulation II definition of "general-use prepaid card" (§235.2(i)) is similar to the proposed Regulation E definition, but for purposes of the "general-use prepaid card" exemption from the interchange fee provisions (§235.5(c)) includes the additional qualifier that the card can be "the only means of access to the underlying funds, except when all remaining funds are provided to the cardholder in a single transaction." In other words, under Regulation II, prepaid cards exempt from the interchange fee provisions of the regulation are those whose underlying funds are generally only accessible through the card (or card number) and not through other channels such as ACH and check.

²⁸ 79 Fed. Reg., *supra* note 1 at 77128.

²⁹ 79 Fed. Reg., *supra* note 1 at 77116.

With these cards, consumers have no choice in how they receive the underlying funds. If they wish to receive a rebate or emergency assistance funds, they must agree to receive them through a prepaid card. The cards may have a short life-cycle. For example, disaster relief cards may expire after 60 days. Typically, consumers may no fees. These card are not marketed nor are they available to the general public. Therefore, people cannot “shop” for them or select a different card as a substitute. In addition, holders of such cards receive general information and instructions with the card.

Neither Regulation E nor the proposed revisions to the regulation are suitable for these types of cards. For example, the “acquisition” disclosures are not useful for their purpose, which is to inform consumers about fees and allow consumers to compare. First, the forms are not designed for these types of cards. To illustrate, the focal points of the short form, the periodic fee, transaction fees, and “cash reload” fees, which must be disclosed even if they are \$0, do not apply to these cards. Nor are other short form items, such as the balance inquiry fee, customer service fee, inactivity fee, and the three most frequently incurred “incidence” fees, relevant to the user of the card. Second, as noted, the customer cannot select the card, so there is nothing with which to compare. Equally, because of the short life-cycle, there is no justification for the expense of sending periodic statements or setting up sophisticated expensive systems to provide transaction information in the manner the regulation would require. Furthermore, the card network rules protecting cardholders from unauthorized transactions apply to such cards.

Adding the costs of unnecessary regulation simply increases the cost of providing these types of cards and reduces their availability. For example, rebate cards are typically check substitutes and are particularly useful to those without a bank account who might otherwise have to pay to cash checks. The cost of regulations may create an incentive at the margin to revert to checks. Finally, users of these cards are adequately protected without need for Regulation E protection. As a practical matter, they will still receive receipts for transactions and will be protected from unauthorized transactions through the card network rules.

- *The proposal should exempt certain research prepaid cards*

We are concerned about the impact of the proposal on a specific type of prepaid card that is used to pay medical research participants. Pharmaceutical and other medical researches conducting trials rely on participants to report their experiences and to visit clinics for tests and various procedures. The participants are paid per report or visit. Providing the payments through a prepaid card is more convenient and practical and less expensive for both researchers and participants than cash or check, especially given that the amounts are typically small (\$15 to \$20), irregular, and infrequent. For example, the cost of cutting and mailing a check, especially if the participant’s address has changed, is greater than the amount of the payment. In addition, the company, rather than the card issuer, has the relationship with the participant and for confidentiality reasons may not share information such as the participant’s address.

The costs of complying with Regulation E, including the costs related to the pre-acquisition disclosures, the access to account history, the requirement to provide the total of fees, debits, and credits by period and year-to-date, and the investigation and provisional credit requirements will have a significant impact on whether these cards remain viable and how they are priced and used if

they survive. An exemption from the regulation for such cards could focus on the nature, size, and frequency of the payments. We are happy to discuss further.

2. Treatment of overdrafts and credit accessible through a prepaid account.

- *We object to the Bureau’s proposed treatment of overdrafts, because it effectively prohibits linking prepaid cards to overdraft services or any committed credit feature and prohibits imposing any fee when an account is in overdraft status.*

The Bureau is proposing to expand Regulation Z to include the treatment of overdraft services and other credit features in connection with prepaid cards. Under the proposal, prepaid account issuers that offer overdraft services would be considered creditors under Regulation Z if any fee is charged for the payment of the overdraft or if a fee is charged while the account has a negative balance. Practically, this means any prepaid account with a negative balance would become subject to credit card rules if the issuer assessed any fee, including a fee *unrelated* to the negative balance, while the account had a negative balance. This provision would capture overdrafts, including unavoidable overdrafts, not only if a fee were imposed for the overdraft but if other fees, including fees that would be imposed on a cash transaction or cash account—such as monthly periodic fees or transaction fees—were imposed while the account was in overdraft status.

Under the proposal, prepaid cards with overdrafts would trigger such credit card rules as—

- Limits on the amounts of late payment fees;
- Prohibition against the offset of card debt against funds in asset accounts held by the card issuer;
- Limits on the liability for unauthorized transactions;
- Account-opening and periodic statement disclosures, including the requirement to send the statement at least 21 days prior to the due date;
- Change-in-terms notices; and
- Requirement to credit promptly the account.

The proposal would change various definitions, including those of “finance charge,” “credit card,” and “card issuer.” The proposal would also require an issuer to obtain a customer’s consent before adding overdraft services to a prepaid account and would prohibit the issuer from adding such features or a committed credit feature until at least 30 calendar days after a customer registers the prepaid account. These proposed rule changes related to the connection of any committed credit or overdraft services to prepaid cards amount to an effective ban on those services because of the operational and compliance costs and risks.

We believe that the proposed restrictions are inconsistent with the consumer testing conducted by ICF on the Bureau’s behalf and can limit the preferences of some to match only the preferences of some others, when all could be accommodated by presenting options. The statements about overdraft services in the proposed short form, based on the ICF consumer testing, address any concerns about the ability of consumers to understand overdraft services.

The proposal, however, goes further by removing options that customers might otherwise choose, even though there is the available precedent of using rules similar to Regulation E’s

provisions that require customers to “opt in” to certain debit card overdraft services after clear and conspicuous disclosure. This approach ensures informed choice and availability of a product consumers want and value. The Bureau’s proposal, in contrast, will limit access to credit and chill innovation, especially with regard to affordable small-dollar loans. In effect, it undermines the value of prepaid cards as a vehicle for helping to meet the demonstrated demand for convenient, affordable small dollar loans, when efforts to meet those demands are already constrained by other regulatory pressures as well as practical business considerations.

Finally, we believe that the proposal, in its treatment of overdrafts as credit, and fees imposed for both credit and cash transactions as finance charges, is at odds with the statute and common sense. We strongly object to this approach and recommend its elimination from the proposed rule.

- *The effective prohibition of overdraft services is unsupported by the Bureau’s ICF consumer testing.*

The consumer testing conducted on the Bureau’s behalf does not support effective prohibition against overdraft.³⁰ While some participants in the consumer testing preferred not to have overdraft services, it was a strong sentiment for few. Moreover, some indicated an interest in overdraft services and a willingness to pay for it. The regulation should not allow the preference of some to dictate the choices of all when a rule can easily be structured to accommodate all consumers.

In Round 2 of ICF’s interviews, “most” participants indicated that they would not want their prepaid card to offer an overdraft program. “However, when the interviewer described a hypothetical program in which customers could pay an annual subscription fee for the year and then overdraft[s] an unlimited number of times without being charged any additional fees, *seven [of ten] participants said they would consider signing up for such a program.*”³¹ (Emphasis added.) Thus, while the results are somewhat mixed, a significant number of participants are interested in overdraft services and are willing to pay for it.

The ICF report in a footnote on page 6 of ICF’s Summary of Findings reports that in the focus groups, “a few participants said that they had a prepaid card that allowed them to overdraw their account by a limited amount with no fee if they loaded additional funds within a few days...but that the feature was *now one of the reasons they kept their card rather than purchasing a different one.*”³² The report does not indicate whether those participants in the focus group were willing to pay, but clearly overdraft services are important to them.

Moreover, in Round 2, only a “few” of those who said they did not want overdraft services indicated that it was a critical factor, which is about the same number of participants who liked overdraft services and kept a particular card for that reason.

³⁰ The ICF did not test participants’ interest in credit products.

³¹ *Id.* at 26

³² *Id.* at 6.

Both the consumer focus group and the Round 2 interviews demonstrate that there is a demand for overdraft services. In fact, there was clearly a substantial interest (seven of ten) for some sort of paid overdraft service. This argues for clear, meaningful disclosure, not an effective ban.

Indeed, the consumer testing suggests that if done properly, disclosures would be effective in ensuring consumer understanding. In Round 2 of ICF's interviews, testing of the short form included a statement toward the bottom of the form, "WARNING: this product charges an overdraft fee of \$5 per transaction. Your overdraft fees could total up to \$60 per month." *All* noticed and correctly identified the fee. Most understood it could be up to \$60 per month and that it meant that four overdrafts per month were allowed and after that they would be denied. Two thought that after the fourth overdraft, they would not be charged a fee.³³ While there was some confusion about whether it would apply automatically or it was necessary to opt in, the point is that participants understood they could incur the fee. Further testing could refine the disclosure.

Round 3 of the interviews drew similar conclusions. In that round, "overdraft program" was listed as the fourth of five types of fees appearing below the four "top-line" fees. In some forms, a fee was listed across from the description and in others "not offered" appeared. *All* participants looking at the single service plan correctly understood whether an overdraft program was offered, though fewer (seven of nine) were able to do so in the multiple service plan.³⁴ There was some confusion about whether the customer would have to opt-in.³⁵ However, that could be addressed through a requirement that customers opt-in, much as they must do so under Regulation E for certain debit card overdraft services. In that fashion, they would be consciously choosing the program after clear disclosure of the terms and fees. The Bureau offers no explanation of why this approach that preserves consumer choice and access is not appropriate and effective.

In any case, in the bank branch setting, any potential confusion could be resolved, because, unlike the store setting, the long form must be provided prior to card acquisition. Therefore the space constraints of the short form are not relevant. The long form could include appropriate disclosures, including opt-in and confirmation of opt-in, that ensure that consumers would have meaningful choice and could continue to have access to a product that the ICF consumer testing found people want.

The Bureau, in part, justifies its effective prohibition against prepaid card links to any type of credit, including overdrafts, on the basis that seven of ten participants in the ICF testing indicated that they "preferred" a prepaid card without overdraft services, though "not overspending" was a factor for only a few for using a prepaid card. This approach ignores the preferences and needs of a strong majority who were interested in an "annual" overdraft service, the significant minority who may want a card with overdraft services, and those who *liked* such a service. ***It is not clear why the "preferences" (but not critical preferences) of some trump the preferences of others, when both groups could easily be accommodated through informed choice, especially as the data supporting***

³³ *Id.* at 24-25.

³⁴ *Id.* at 34.

³⁵ *Id.* at 35.

the proposal are based on such a small sample.³⁶ Should regulation do less than the market does, that is, meet the needs and preferences of a variety of consumers rather than just offer a single, plain vanilla option?

The Bureau further suggests that the effective credit prohibition is appropriate, because “many GPR cards are *actively marketed* as ‘safe’ alternatives to checking accounts with opt-in overdraft services, credit cards, or other credit options.³⁷ (Emphasis added.)³⁸ We agree that some prepaid cards are and should be offered and promoted as an alternative to a checking account that can help people manage their spending and budgets, including where the prepaid cards do not include a credit feature. We do not agree that only one form of prepaid card is safe or that consumer choice should be effectively limited to one option.

However, prepaid cards are also advertised and used for a variety of purposes, such as travel and Internet use, and more importantly, will, or at least should, continue to evolve. In effect, the Bureau is taking the position that the market should not change, innovate, or differentiate. In other words, it is moving toward regulatory creation of a “vanilla product,” an approach that Congress specifically rejected.³⁹

- *The proposal will limit access to credit, increase credit costs, and have a negative impact on promoting and developing small dollar affordable loans.*

As evidenced by the disappointing results of the FDIC’s 2007 Affordable Small-Dollar Loan Guidelines,⁴⁰ providing affordable small dollar loans in a sustainable fashion is already very challenging.⁴¹ The proposed limits on offering credit features on prepaid cards will present another serious obstacle to efforts to design and develop affordable small dollar loan products, efforts already hobbled by the OCC and FDIC “Guidance on Supervisory Concerns and Expectations

³⁶ The relatively small sample size may be useful and acceptable in developing disclosures, but would have to be much more robust, if even appropriate at all, for purposes of limiting consumer choice and designing products, as the impact is so much more significant.

³⁷ 79 Fed. Reg *supra* note 1 at 77111.

³⁸ However, to demonstrate how prepaid cards are “actively marketed” as a “safe alternative,” the Bureau does not reference the advertisement or website of even a single actual prepaid card issuer. Its sources are a general descriptive statement of prepaid cards posted on the website of a trade association (the “Network Branded Prepaid Card Association”) and the remarks of the officer of a single prepaid card issuer at a Congressional hearing, whose statement said nothing about how cards are marketed but only that most of the issuer’s customers are “typically working Americans who want to control . . .”

³⁹ An earlier version of the House bill creating the Bureau included a requirement that the Bureau create standardized, “safe” “plain vanilla” products that financial institutions would be required to offer” (See H.R. 3126 originally introduced in the House on July 8, 2009, by Congressman Barney Frank (D-MA), Chairman of the House Financial Services Committee). However, such a provision was deleted from subsequent versions of the House bill and not included in the final Dodd -Frank Wall Street Reform and Consumer Protection Act.

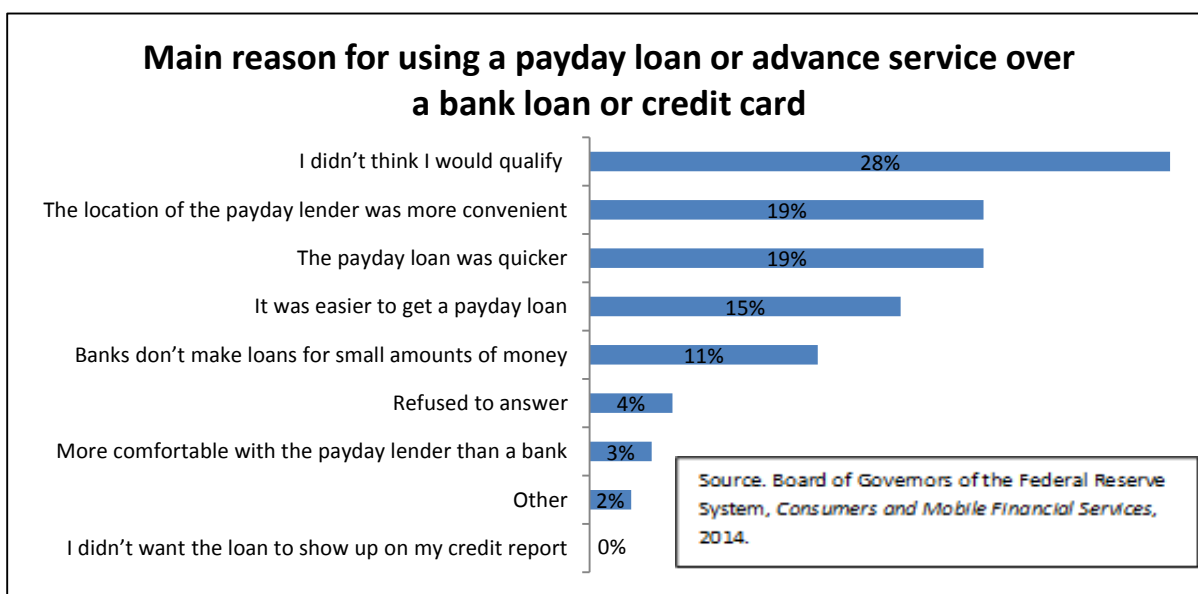
⁴⁰ Federal Deposit Insurance Corporation. “[Affordable Small-Dollar Loan Guidelines](#),” June 2007.

⁴¹ See ABA comment letter on the Department of Defense’s proposed Military Lending Act regulation available at: <http://www.aba.com/Advocacy/commentletters/Documents/clMilitaryLending2014.pdf> p. 50.

Regarding Deposit Advance Products”⁴² and potentially further hobbled by the Department of Defense’s proposed Military Lending Acct proposal.⁴³

Yet, while banks typically do not provide credit features with prepaid cards, they may be a potential vehicle to address the needs of people who use “alternative financial services,” such as payday loans, pawn shops, and auto title loans. Both Board and FDIC research on the reasons people use payday loans rather than bank loans or credit cards suggest that prepaid cards might provide an opportunity to move people away from payday loans and into mainstream bank products.

According to the Board’s data, the primary reason 73 percent of those using a payday loan or advance service used such loans over a bank loan or credit card was, “I didn’t think I would qualify” (28 percent); “The payday loan was quicker” (19 percent); “It was easier to get a payday loan” (15 percent); and “Banks don’t make loans for small amounts of money” (11 percent).

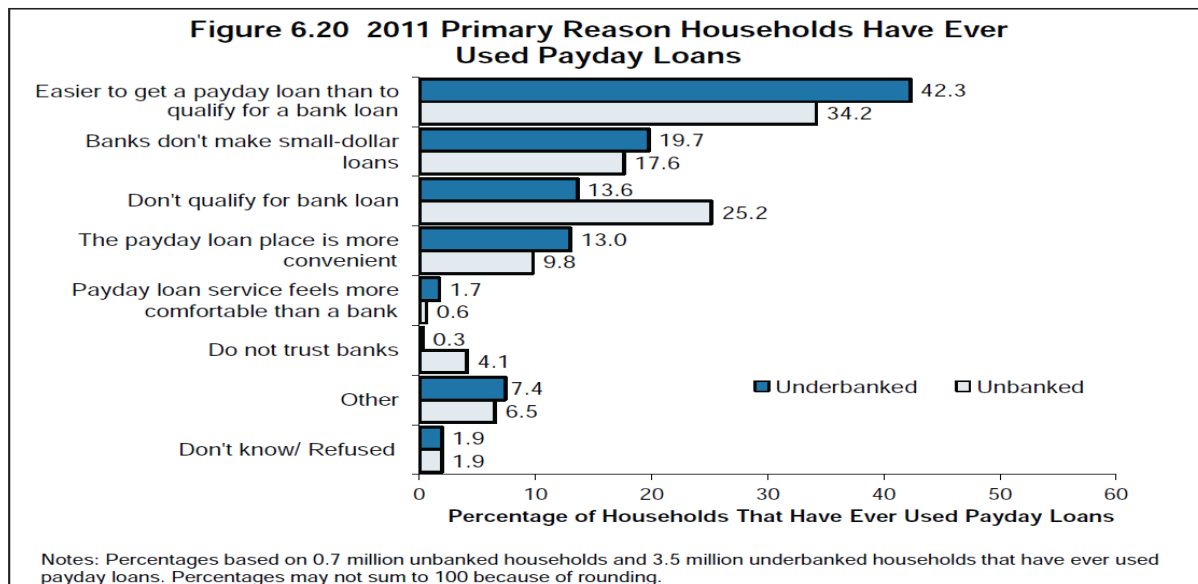


The FDIC survey yielded similar results. It found that the primary reason 86 percent of households without bank accounts used payday loans to be, “Easier to get...than to qualify for a bank loan (43.2

⁴² See [FDIC, OCC](#), “Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products.” That Guidance imposes strict requirements on small dollar loans accessed through a deposit account.

⁴³ The proposed Military Lending Act regulation would impose significant limitations and prohibitions on consumer loans offered to servicemembers, their spouses, and dependents, limitations and prohibitions not limited to a 36 percent “military annual percentage rate.” It would, in effect, prohibit banks from offering small dollar loans to servicemembers and their families, but also inhibit the ability of banks to offer them to the general public. See [ABA comment letter](#), *supra* note 40 at 53

percent); “Banks don’t make small-dollar loans” (17.6 percent); Don’t qualify for bank loan” (25.2 percent).



Source: Federal Deposit Insurance Corporation (FDIC), “2011 FDIC National Survey of Unbanked and Underbanked Households,” September 2012.

Prepaid accounts may present an opportunity to address some of the reasons people use payday loans and provide opportunity for these people to consider bank product options. For example, it might be possible to qualify users of payday loans for small, suitable loans available through a prepaid card that, due to the prepaid card model, have different underwriting criteria than credit cards. This would offer a bank small dollar credit product to those using payday loans who do not yet qualify for other mainstream bank products such as credit cards. Similarly, the current accessibility through the prepaid card could make obtaining the credit “quicker” and “more convenient.” This might be the best and most appealing way to reach this audience, especially those without a traditional checking or savings account. However, the proposal would significantly shrink the possibility of addressing the needs of this population through prepaid cards.

- *The proposed treatment of overdrafts is contrary to the plain language and intent of the Truth in Lending Act and to common sense.*

The proposal treats as a finance charge, in effect, any fee that might be imposed when an account is in overdraft status. Such fees include not only overdraft fees, but *any* fee that would be imposed while the account is in overdraft status, including fees imposed on “cash” transactions, even if the card issuer could not have avoided the overdraft. The Bureau asserts that the TILA definitions of “credit” and “finance charges” allow such treatment.⁴⁴ We believe this view is contrary to the text and purposed of the statute, and contrary to common sense and the essence of the established meanings of credit and finance charges.

⁴⁴ 79 Fed. Reg., *supra* note 1 at 77206.

Treatment of fees imposed on cash transactions. Simply put, treating a fee that is imposed on a cash transaction as a “finance charge,” as proposed, turns the entire concept of measuring the cost of credit on its head. It is not only inconsistent with the statute, it is contrary to the fundamental understanding of credit and the purposes of TILA. It will confuse and mislead rather than inform consumers.

The proposed comments to §1026.4(b) of the regulation provide that finance charges include—

[A]ny service, transaction, activity, or carrying charge imposed in connection with an extension of credit for carrying a credit balance...where that fee is imposed on a prepaid card in connection with credit accessed by a prepaid card...*regardless of whether the creditor imposes the same or greater or lesser charge on the withdrawal of funds from the prepaid account to have access to the prepaid account or when credit is not extended.* (Emphasis added.)

The proposed Commentary then offers the following examples—

A \$15 transaction charge is imposed on the prepaid account each time a consumer uses a prepaid card or an account number described in §1026.4(b)(2)(ii) to access an open-end credit plan. The \$15 charge is a finance charge *regardless of whether the creditor imposes the same, greater or lesser charge to withdraw funds from the prepaid account.* (Emphasis added.)

A \$1.50 transaction charge is imposed on the prepaid account for each transaction that is made with the prepaid card, including when the prepaid card is used to access credit where the consumer has insufficient or unavailable funds in the prepaid account at the time of authorization or at the time the transaction is paid. The \$1.50 transaction charge is a finance charge when the prepaid card accesses credit, *notwithstanding that a \$1.50 transaction charge also is imposed on transactions that solely access funds in the prepaid account.* (Emphasis added.)

The proposed Commentary also provides that daily, weekly, or monthly fees assessed when an account is in overdraft status are also finance charges.

Thus, the proposal treats a fee that is imposed when there are funds in the account—which, in effect, is a “cash” transaction—as a finance charge when that same fee is imposed when the account is in a negative status—which, in effect, is a credit transaction. In other words, a fee is treated as a cost of credit even if it is imposed for both a credit and cash transaction. Simply put, this approach is confused. Moreover, it is contrary to the clear purposes and goals of TILA.

TILA specifically recognizes that a fee that imposed for both credit and cash transaction is not a cost of credit. Under §106 of the statute, “finance charge” specifically excludes charges paid in cash transactions: “The finance charge does not include charges of a type payable in a comparable cash transaction.”

Moreover, the proposed approach contradicts the primary purpose of the statute, which is to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit...”⁴⁵ To understand the cost of credit, consumers must be able to compare the cost of a cash transaction with the cost of a credit transaction. Treating a fee that is imposed on both credit and cash transactions as a cost of credit leaves consumers with the incorrect impression that they will avoid the fee if they pay “in cash” i.e., if there are funds in the account at the time the fee is imposed.

Treatment of overdrafts as credit. The proposal is also inconsistent with the law in its treatment of overdraft fees as finance charges, because overdraft transactions do not meet the TILA definition of credit—contrary to the Bureau’s assertion that “the plain language of the definition of ‘credit’ in TILA covers the situation in that a consumer makes a transaction which exceeds the funds in the consumer’s account and a person elects to cover the transaction by advancing funds to the consumer which the consumer must pay.”⁴⁶ Section 103(f) of TILA defines credit as “the *right* granted by a creditor to a debtor to *defer payment of debt* or to *incur debt* and *defer its payment*.” (Emphasis added.) Overdrafts do not meet the statutory definition of credit as consistently and rationally interpreted by the courts, because there is no “right” “to defer payment of debt” nor any right to incur debt and defer its payment. Overdrafts are due and payable immediately and customers are immediately notified of this obligation. Indeed, the deposit account agreements entitle depository institutions to pay the debt from the next deposit before any other authorized transactions are paid, and that is precisely their practice. The Bureau’s argument, that TILA does not specifically exempt overdrafts by name from the definition of credit and therefore they should be classified as credit,⁴⁷ does not cure the underlying problem that they are clearly outside the plain, black letter statutory definition of credit under TILA. A specific exemption would be needed only if overdrafts would otherwise fall within the definition of credit. Because overdrafts are not credit under the statute, no exemption is needed.

Courts have consistently supported that view and found that a debt is not credit under TILA absent some formal understanding that the person owing the money is entitled to a deferral of payment pursuant to a specific plan.⁴⁸ Otherwise, confusion would reign, as “credit” would embrace a broad swath of debt, including many types of incidental debt – which includes overdrafts – for which the requirements of the statute are unsuited from both consumers’ and businesses’ perspectives.

The Bureau in the Supplementary Information justifies treating overdrafts as credit on the basis that, as a practical matter, banks do not retain discretion to not pay overdrafts and instead pay

⁴⁵ 15 USC § 1601.

⁴⁶ 79 Fed. Reg., *supra* note 1 at 77217.

⁴⁷ *Id.*

⁴⁸ See *Riethman v. Barry*, 287 F.3d 274 (3d Cir. 2002) (Attorneys did not extend credit to their clients because the clients had no right to defer payment); *Shaumyan v. Sidetex*, 900 F.2d 16 (2d Cir. 1990) (Contractor did not extend credit because the contract did not permit clients to defer payment for the work performed); *Rogers Mortuary v. White*, 594 P.2d 351 (N.M. 1979) (Funeral home did not grant credit when it refused to set up repayment plan for an outstanding debt).

them without exception under automated systems “so long as the overdraft transaction is within the overdraft limit that the institution previously established.”⁴⁹ Accordingly, it argues, the customer has a *de facto* “right” to the overdraft, rendering it credit. Critically, it does not explain how this factor fits into the essential component of the statutory definition of credit, that is, the “right to defer payment.” As noted, overdrafts are immediately due and payable and are immediately paid from the next deposit. Thus, the Bureau’s assertion that depository institutions do not retain discretion whether to pay overdrafts, even if it were true, is irrelevant.

In addition to having no relevance to the statutory definition of “credit,” we disagree with the assertion that banks using automated systems lack discretion or fail to exercise that discretion in authorizing a particular transaction. First, the Bureau presents no evidence to support this theory. Second, it assumes that all depository institutions use automated systems, use them in the same fashion, and never exercise and never will exercise discretion or otherwise override the “tolerance.” In fact, not all depository institutions use automated systems, those using them are constantly changing the tolerances and criteria for paying overdrafts, and depository institutions do on occasions override the tolerance.

The Bureau further notes, in its argument to support classifying overdrafts as credit, that the practice of reserving discretion to decline a credit card transaction without prior notice is no different from credit card issuers’ “standard practice of reserving discretion to decline a credit card transaction without prior notice.”⁵⁰ We strongly disagree. There are important distinctions between a bank’s discretion to pay an overdraft and a credit card issuer’s decision to decline a transaction within the customer’s credit limit.

First and primary, credit cards fit squarely into the definition of credit, because they allow payment to be deferred, that is, they offer a repayment schedule. Courtesy overdraft programs do not have this feature. While the vast majority of credit cards have credit limits, even if there are those that do not, *they all allow payment to be deferred* and thus are credit under TILA. The defining and crucial characteristic of overdrafts is that by contract and practice, they are immediately due and payable and are immediately paid from the next deposit unless the customer repays the overdraft before the next deposit. They are therefore not credit under TILA.

Second, there are other characteristics to distinguish overdrafts from credit card limits. Depository institutions using automated systems often rely on “tolerances,” rather than strict “credit limits,” for purposes of paying overdrafts. Unlike credit limits on credit cards, these can change regularly, even daily, based on a variety of factors, including specific account activity and other relationships the customer may have with the bank. Customers are not notified when the tolerance changes or decreases nor are they advised of the reasons for any reduction in the tolerance. Credit card issuers, however, not only must notify customers of a reduction in a credit

⁴⁹ 70 Fed. Reg. 77207 (December 23, 2015).

⁵⁰ 79 Fed. Reg., *supra* note 1 at 77207.

card limit,⁵¹ they must explain the precise reasons for the reduction.⁵² In part, this stems from the statutory approach to credit: by lowering the limit, the creditor is changing the right the creditor granted the borrower to defer payment of debt or to incur debt and defer its payments. As such, the creditor has to notify the borrower of the change. In the overdraft space, there is no such grant.

More importantly, depository institutions have absolute discretion, by contract and as disclosed to customers, not to pay a transaction that will cause an overdraft for any reason, notwithstanding any internal tolerance. In contrast, while credit card issuers may reserve the right not to pay a particular transaction, they may not deny it without cause. Provisions allowing them to deny a transaction are included in credit card contracts so that card issuers may deny a transaction, for example, based on suspicions that it involves illegal activity or is otherwise unauthorized. However, under general contract law, there is an implied duty of good faith and fair dealing. Thus, given the contract clearly granting a right to an expectation of credit, which is not the case with overdrafts, they must exercise the provision in good faith or risk liability for breach of contract. Therefore, credit card issuers must have a rational, articulated, and defensible basis for not paying a particular transaction. For these reasons, even if overdrafts met the statutory definition of credit, the comparison of overdrafts to credit card credit limits does not support treating overdrafts as credit under TILA.

3. Pre-acquisition Disclosures

- *Summary of disclosures.*

As discussed earlier, the proposal requires financial institutions to provide a “short” form that highlights important information and fees and a “long” form that repeats the information in the short form and lists other fees and additional information. When the long form is provided depends on whether the prepaid card is acquired in a retail store or, for example, in the branch of a depository institution. For prepaid cards acquired in a retail store, the long form may be provided after acquisition of the prepaid card if certain conditions are met. For those acquired in branches of depository institutions, both must be provided before the prepaid card is acquired. The proposal provides model forms for various products, including general purpose reloadable cards, payroll cards, and government benefits cards.

We commend the Bureau for investing the time and resources in consumer testing in developing and designing the proposed disclosures,⁵³ an approach ABA has long advocated for consumer protection laws. In addition, ABA’s long-held position has been that required disclosures should focus on the information most important to consumers in a manner that does not overwhelm them by cluttering the notices. Striking that balance, of course, is challenging. While the proposed disclosures go far in reaching this goal, we believe they could be improved significantly to

⁵¹ Under §1002.9(a)(1)(iii) of Regulation B, (Equal Credit Opportunity Act) creditors must notify customers within 30 days of a reduction in the credit limit. Advance notice is not required because customers would be at risk of borrowing money which they might not have the ability to repay. That statute has the same definition of creditor as TILA.

⁵² 12 CFR 1002.9(a)(2).

⁵³ ICF International, *supra* note 14.

enhance consumers' ability to understand the essential terms. First, we believe that the notices should be modified to add information that is critical in making a meaningful decision and omit other less useful information so as to ensure that the notices remain clear, digestible, and useful in the decision process. Second, they appear designed for a retail store environment, which may not be optimal for the consumer in the bank branch and other non-retail environments. Accordingly, the Bureau should make adjustments for disclosures provided in this setting and allow an integrated disclosure form with important terms highlighted. The Bureau should consider specifically testing the model notices in the branch environment to aid in its review.

Short form. Under the proposal, the short form highlights four items on the "top-line"—

- (1) Periodic fees, (with potential asterisk, noting, for example, "Fees can be lower depending on how and where this card is used");
- (2) Per purchase fees (e.g., for "sig." and "with PIN" if fees vary on this basis);
- (3) ATM withdrawals (e.g., in-network and out-of-network, if fees vary on this basis); and
- (4) Cash reload fees.

Below this "top-line" list, short forms must include a statement on whether or not there are credit-related fees or overdraft fees. Below that statement, the notice must list—

- (1) ATM balance inquiry fees (in-network or out-of-network if fees vary on this basis);
- (2) Inactivity fees; and
- (3) Three "incidence-based" fees.

"Incidence fees" are fees other than any already required to be disclosed that "were incurred most frequently in the 12-month period by consumers of that particular prepaid account product."

Following this list the financial institution must disclose—

- A total of the number of other fees not listed;
- A telephone number and the unique URL of a website that a consumer may use to access the long form (if not provided with the short form, e.g. in a retail store);
- A statement that registration is necessary for funds in the account to be protected;
- A statement regarding FDIC insurance; and
- The Bureau's website.

Only one fee may be listed for periodic fees, cash reload fees, customer service fees, inactivity fees, and the three incidence fees. If more than one fee might apply, only the highest fee can be disclosed. An asterisk below the top-line disclosures may advise that the fee may be lower. Two fees may be listed for per purchase fees, ATM withdrawal fees, and ATM balance inquiry fees. All fee categories must be listed, whether or not a particular fee is imposed.

Long form. The long form information must disclose all fees, including those disclosed in the short form. It must list all fees, overdraft services and other credit features, a telephone number, website, and mailing address, a statement regarding FDIC insurance, and the Bureau's website and telephone number. The information in the long form generally must be grouped together and organized by categories of function for which a consumer would utilize the service associated with each fee. Text describing the conditions under which a fee may be imposed must appear in the table directly to the right of the numeric fee amount disclosed.

- *Generally, we agree with the Bureau that it is critical that the information, particularly on the short form, be as "clean" and simple as possible so as to encourage understanding and use and to promote informed choice.*

We believe that the general format of the short form will support those goals. Our concern is that consumers may be confused—or misled—because some information in the proposed models is incomplete and some costs may be overstated or unrealistic. Recognizing that the "real estate" of the short form is limited, we recommend that the Bureau allow some additional information that is potentially critical to the decision process to be included in the short form. To maintain the simplicity of the disclosure, the information added could be offset with the deletion of other proposed disclosures of less value to customers.

- *We agree with the proposed "topline" format.*

We agree with the basic concept that the most important fees should be highlighted in the manner proposed, that is, in bold on a prominent "top line." The Bureau's consumer testing demonstrated that prepaid card users want the critical fees displayed prominently and that the top-line model is an effective means of highlighting them so that they are noticed. We believe that there could be improvement in the content of the top line, as discussed below.

- *The topline should include monthly fees.*

We agree that the monthly fee should be among the items listed in the top line. The ICF consumer testing found that monthly fees are a critical element when evaluating and selecting a prepaid card. Indeed, it found that the monthly fee was among the four fees most mentioned as important to prepaid card users, "by a large margin."⁵⁴

The proposal requires that the highest fee be disclosed and, if it can be waived or lowered, an asterisk and footnote would indicate generally that, "Fees can be lower depending on how and

⁵⁴

Id. at 7.

where this card is used.” The Bureau solicits feedback on “whether only providing the highest fee on the short form disclosures for a given fee type will be misleading to consumers, even when financial institutions include a symbol like an asterisk, to indicate the fee amount could vary.”⁵⁵

We believe that it will and therefore recommend that the Bureau allow additional information that is important to a meaningful prepaid card choice, given the importance of the fee and that, in many cases, it may be waived, e.g., if there are recurring deposits.

The ICF consumer focus groups’ review of sample disclosures found that a disclosure of “\$4.95 or less” and disclosure of fee ranges caused confusion, with several participants commenting that they did not know when the fees would be charged.⁵⁶ A fee disclosing only the highest fee with a footnoted general statement that fees may be lower depending on “how and when the card is used,” as proposed, is likely to encounter the same confusion identified in the consumer focus groups. The confusion would potentially be greater as “how and when the card is used” is not likely to be interpreted to capture the common practice of waiving the fee for making regular direct deposits or maintaining a certain balance, as those actions are unlikely to be viewed as “using” the card. Yet, these conditions for fee waivers are important, because, as consumer testing found, the monthly fee is a key factor in choosing a card, and if it is likely to be \$0, based on potential customers’ intentions or ability to meet the condition, knowing those conditions is very relevant to their purchasing decision.

The challenge, as illustrated by the consumer testing, is informing the customer in an effective way. For example, the interview process found that asterisks and footnotes were not effective with all participants. In Round 1, about half of the participants located the footnote and understood that the monthly fee could be less.⁵⁷ In Round 2, half of participants referenced the asterisk and correctly described when the monthly fee would be waived.⁵⁸

Further and more important, lack of specificity can mislead consumers. In Round 3, when reviewing a model disclosure (with an asterisk placed beside the monthly fee footnoting a general message in language similar to the proposed language), participants understood the monthly fee could vary, but, importantly, could not explain specifically how or why it could vary.⁵⁹ Indeed, the consumer testing indicated that the general language could mislead consumers.

When asked to interpret this text, participants gave a variety of explanations. Most participants thought that the monthly fee might be less depending on how frequently the card was used. Others had different interpretations; for example, one participant thought the monthly fee could be different if the card was used in a different state, while another thought variations in the monthly fee might be related to the “other fees not listed” on the card.⁶⁰

⁵⁵ 79 Fed. Reg., *supra* note 1 at 77158.

⁵⁶ ICF International, *supra* note 14 at 8.

⁵⁷ *Id.* at 14.

⁵⁸ *Id.* at 21.

⁵⁹ *Id.* at 30.

⁶⁰ *Id.*

The results in Round 2 were similar. Participants reviewed forms with general language, “Fees can be less depending on usage” and asked in what circumstances the fee might vary. “The most common response given by participants was that the fees might be lower depending on how often they used their card, or the amount of money involved in their transactions.”⁶¹ Four of the ten participants commented that the text did not provide enough information. “They suggested that more specific information be provided on the forms about the conditions under which fees would be different from the amounts shown.”⁶²

Thus, the consumer testing illustrates that the proposed short disclosure form, which is similar to the one tested in Round 3, is likely to confuse or mislead prepaid card shoppers with regard to the monthly fee and that consumers are interested in details about how this fee might be less. Moreover, how the monthly fee can be avoided or lowered is an important factor in the purchase decision: in addition to being identified as one of the key items in the consumer focus group testing, Round 3 found that half of the participants who used the long form to select a card specifically mentioned as a factor in their choice “using direct deposit could lower their monthly fee.”⁶³

While the proposed text, “fees can be less depending on how and where the card is used,” was better understood than the wording used in previous rounds, testing of the proposed text did not show that consumers actually understood from the text when or under what circumstances the fees could be lower. It also did not demonstrate that they would not be misled as they had been in testing of similar language.⁶⁴ Moreover, ICF cautioned the Bureau about providing only a general statement with regard to variable fees: “While this approach simplified the forms, the tradeoff is that it provides less detailed information to consumers on which to base their decisions. Therefore, the CFPB should continue to consider the tradeoffs between different approaches to describing variable fees.”⁶⁵

As noted, asterisks and footnotes appeared to work for about half of participants. However, this does not necessarily mean footnotes should be abandoned or that the Bureau should not consider other alternatives to convey specific information about the monthly fee and other fees. Rather, it suggests changing the format so the information is more visible or more proximate to the fee or better directing consumers to the information in order to be more effective. For example, the specific information could be provided just below the fee where consumers are likely to see it, as proposed for information about ATM and purchase fees. This may mean that the top line is not as “clean” as might be ideal, but it may be an appropriate trade off, especially if other information is eliminated as discussed below. Another alternative to inserting an asterisk is to place text directly

⁶¹ *Id.* at 22.

⁶² The report does not indicate whether participants specified which fees they wanted more information about but, given that early on in the testing monthly fees were established as key factors in the decision process, it is reasonable to assume that the conditions for avoiding the fee would be critical for many shoppers.

⁶³ ICF International, *supra* note 14 at 33.

⁶⁴ *Id.* at 35.

⁶⁵ *Id.* at 37.

under the fee using language that specifically directs the consumer, such as “See below how to avoid or lower this fee.” This specific direction might be more effective in aiding the consumer to look for the information, much as ICF found that directing consumers to “register your card” was more effective in conveying the need to register the card in order to enjoy certain protections than a simple observation of that fact. The footnote could then be labeled in bold as “monthly fee information” or similar text so that consumers avoid confusing one footnote with another. The potential danger of cluttering the document can be minimized by offsetting the additional information with the deletion of other text as discussed below. In any case, the importance of the information may be a valuable guide for such a trade-off.

- *Incidence fees and total of the number of fees should not be included in disclosures.*

The short form also must contain three “incidence fees,” which are fees other than any already required to be disclosed that “were incurred most frequently in the 12-month period by consumers of that particular prepaid account product.” In addition, the form must provide the number of other fees beyond those not listed in the short form.

We strongly recommend that the Bureau eliminate these disclosures to avoid consumer confusion, promote the form’s simplicity, and allow space for other more important information that consumers need and use when making a prepaid card purchase decision. They certainly do not need to be required for prepaid cards sold in bank branches, where the long form is provided.

We do not believe that the Bureau’s consumer testing supports the inclusion of incidence fees. Indeed, the limited testing suggests these disclosures may confuse customers. Moreover, the disclosures will distort comparisons among prepaid cards, especially if there are only a few obscure fees that are rarely charged. Furthermore, the disclosures are unnecessary in the bank branch setting, where the long form, which contains all fees, is presented simultaneously with the short form and in an environment more conducive to thoughtful review of the account materials. Further, the requirement presents a compliance trap, where prepaid card issuers can be second-guessed on how they categorized fees, even though there is little if any consumer benefit or potential consumer harm. Finally, the cost of compliance, which the Bureau must consider pursuant to §1022(b)(2) of the Dodd-Frank Act,⁶⁶ is not justified given the lack of benefit and potential harm to consumers.

It appears that participants in ICF’s consumer testing understood from the model short form that there were other fees and that they could learn about them elsewhere, suggesting that discussion of incidence fees and the total number of fees on the short form are unnecessary to assist consumers in understanding that there are other fees. “Most of the user testing focused on ‘short forms’ that included a subset of fee information about a given product. When shown short forms, most interview participants understood that they presented only a subset of fee information

⁶⁶ The Dodd-Frank Act requires the Bureau to consider “the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services...and the impact of the proposed rules on covered persons.” (12 USC §5512(A)(i)).

and that they could potentially be charged other fees not shown on the forms.”⁶⁷ In Round 1, the vast majority of participants indicated that they could be charged fees other than the ones listed in the short form.⁶⁸ Similarly, in Round 2, the vast majority of participants understood they could be charged a card replacement fee even though the fee was not listed on the short form.⁶⁹

While about half of those in Round 2 also indicated that they wanted more details about the other fees,⁷⁰ it is clear from the results in Round 3, which tested a model similar to the proposal, that disclosing the incidence fees did not address that want for additional details. In that round, forms tested included those containing two incidence fees below a heading. Participants compared two such forms with different incidence fees. About half understood that they could not know whether they would be charged the fee, but that it was possible. The report does not indicate whether the half of the participants who understood they might be charged a fee understood anything beyond that fact. *That is, there is no indication whether they understood that others frequently paid the fee, whether they themselves were likely to pay it, or that such information mattered to them in the selection process.*⁷¹

In fact, the disclosure is potentially harmful to consumers. When comparing two forms with different incidence fees, some of the participants interpreted the absence of the fee in a form to mean that the service was not offered at all offered or without any fee.⁷² Thus, for example, an issuer might offer a valuable service, such as check cashing, that is designed to attract people who do not have bank accounts. However, if it is not a frequently incurred fee, it will not be listed as an incidence fee and some who may value the service, may overlook this product on the assumption that the service is not offered. Equally, incidence fees may mislead some to believe that there is no charge for a service when in fact there is.

We see even greater danger in consumer misunderstanding that was *not* captured in the testing, that is, how consumers will understand, interpret, and act on the incidence fees that will appear on the short forms. For example, for one issuer, the highlighted fees may be obscure and rarely paid fees (e.g., for paper statements, card replacement, buying a cashier’s check) and for another, they may be fees that are frequently paid. Yet, in the eyes of the consumer, a fee paid by 99 percent of the users of one product will appear to have the same weight as a fee paid by less than 1 percent of users of another product. Given the spectrum of vastly different possibilities, the information will not be useful and, in fact, in many cases, will be misleading.

Also, highlighting a frequent incidence fee when a free alternative for that service is available will mislead consumers. To illustrate, if expedited card replacement is a disclosed incidence fee, customers might not know that card replacement is free if replacement is not expedited. Similarly,

⁶⁷ ICF International, *supra* note 14 at ii.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 22.

⁷⁰ *Id.* at 21.

⁷¹ The heading was eliminated in the proposed form because participants in Round 3, the final round, did not notice it nor could they explain its meaning when asked. See *Id.* at 35.

⁷² *Id.* at 30.

disclosing a fee for certain card reload channels without explaining easy options to avoid that fee will mislead consumers. It certainly will not assist them in selecting or understanding a particular product.

There is further risk of misleading consumers, depending on how fees are classified and added. For example, the regulation would have to make clear how issuers should treat a fee which is imposed for any type of deposit, regardless of type (in-person check deposit, ATM check deposit, mobile check deposit, electronic transfer, cash deposit at ATM, and cash deposit in branch) and how it should add fees if the issuer imposes a fee, but only for some types of deposits. However, it is not clear how disclosing it as a single fee or as six fees enlightens consumers' understanding of prepaid cards or their ability to compare them. What if a card issuer imposes the same fee but only for some types of deposits?

To address the desire of some to have more information about fees not listed in the short form, in addition to listing the most frequently imposed incidence fees, ICF tested and the Bureau included in the proposed short form the total number of additional fees not already listed in the short form. The ICF reported that in Round 3 "some participants indicated that the information was useful to them in choosing between cards."⁷³ However, it also reported that all participants who were asked said that they assumed the higher number "would always be worse than a lower number of additional fees." Four factored the number into their choice and most assumed "a higher number would negatively impact them." However, none had considered that a higher number could also mean the card offered more, potentially beneficial services.⁷⁴ This suggests that while knowing the number of additional fees may have impacted their decision, it may have done so in a *negative* way so that participants made a decision based upon partial information that suggested an erroneous conclusion. Moreover, understanding that people will assume a higher number is worse, the disclosure of the total number of fees will discourage offering additional and beneficial services for prepaid cards that are available with other types of bank accounts, e.g. check cashing or purchase of cashier's checks.

While it is expected that some consumers will want more information than can be contained in the short form, it is clear from the testing that consumers understand from the proposed short form that there are additional fees beyond those disclosed. It also appears that the website address provided on the form offers a practical means of obtaining additional information. Though Round 3 met with more mixed results,⁷⁵ in Round 2 all participants had a smart phone and seven of ten said they would access the website address on the form through their phone while in the store.⁷⁶ Thus,

⁷³ *Id.* at 35.

⁷⁴ *Id.* at 30.

⁷⁵ The report indicates that in Round 3 three of the eight participants with smart phones said they would be likely to seek more information. Five said they would not. However, it is not clear whether those five wanted additional information, as only three of the nine participants commented that they would want the form to describe other fees. See *Id.* at 31.

⁷⁶ *Id.* at 23.

it appears that many consumers would be likely and able to obtain additional information about fees if they wished and that disclosing incidence fees and the total number of fees is unnecessary.

We understand that the reasoning behind disclosing the incidence fees is to eliminate any potential for evasion of the regulation, such as a fee structure that imposes low or no fees on the items listed on the short form and charges other fees that consumers frequently pay.⁷⁷ We believe that those risks are addressed e.g., through access to the website disclosed on the short form that consumers are likely to use.

Not only will the treatment of incidence fees on the short form confuse and mislead consumers, it is unnecessary in the branch setting. These items were added to the form in response to consumer testing of participants' interest in obtaining additional fee information not available on the short form. However, under the proposal, consumers do not have to seek or even ask for this additional information in the branch setting. In the branch setting, all fees must be provided with the long form in an easy-to-read table format before purchase. Thus, participants' desire for more information is addressed. Moreover, branches are more conducive to people reviewing material more thoughtfully. The ability to sit encourages and makes more likely that people will review information more closely and thoughtfully. Unlike the store setting the ICF tested, where people are unlikely to be able to sit, bank branches offer and encourage sitting. Indeed, in the branch setting, the potential customer is often reviewing other products with a bank employee, so they are more likely to review carefully the prepaid card package.⁷⁸ For examination purposes, customers may even have to sign a document indicating they have received disclosures. For these reasons, we believe that a short form with the proposed mention of incidence fees should not apply to the bank branch-setting, as they are unnecessary and potentially distracting and confusing.

In addition to the limits to the potential harm and the limited value of these items, the initial and continuing compliance costs support excluding the incidence fees and total number of fees from the short form. First, card issuers potentially would have to recreate forms every twelve months and then retrieve and replace obsolete ones to update the incidence fees information. While some banks could rely on "print on demand," small institutions that rely on pre-packaged products provided by vendors would have the significant added expense of retrieving and replacing existing disclosures. While the Bureau believes that only about 19 small banks may be affected by the proposal,⁷⁹ one such vendor alone, Convenience, provides services to 450 institutions. Even if those banks offer only some of the prepaid cards in the suite available through a vendor, they represent potential sellers of the card and are therefore impacted as the proposal will make it less likely they will offer them.

Second, even prepaid card issuers that already have systems that capture fee incidence information would have to make adjustments to systems to ensure that every fee is separately

⁷⁷ 79 Fed. Reg. *supra* note 1 at 77160.

⁷⁸ Banks often offer prepaid cards as an option to people who are ineligible for other deposit accounts such as full-service checking accounts. Thus, they are more likely to be seated with a bank employee to review options.

⁷⁹ 79 Fed. Reg. *supra* note 1 at 77284.

categorized and captured because currently, miscellaneous and infrequently imposed fees might be blended into a single category code. Each would now have to be coded. Those imposing only a few additional and rarely imposed fees would endure the associated costs, with no benefit to and potential harm to consumers, as discussed above.

Third, the exercise is a compliance and litigation trap. Card issuers will be second-guessed about how they have categorized fees to determine those most frequently incurred or the sum of the fees. For example, as discussed above, if an issuer imposes the same fee for any type of deposit, (in-person check deposit, ATM check deposit, mobile check deposit, electronic transfer, cash deposit at ATM, and cash deposit in branch) does it consider each type of deposit a separate fee category, and in this situation, treat them as six fees? What if it imposes the same fee but only for some types of deposits?

Fourth, banks, unlike retailers and other nonbanks, must contend with and consider the compliance costs and risks associated with the examination process. They must prove to examiners on a regular basis that they have properly categorized incidence fees and captured their occurrence. Community banks offering vendor-provided products would not be exempt, as bank examiners who will be interpreting the rule tend to treat the community bank selling a vendor-provided card as the “issuer.” They will insist on documentation and evidence that the bank itself has verified that the incidence fees on the short forms have been properly determined and disclosed, even though it is the vendor that holds the information and is responsible for making the determination.

Finally, the compliance costs, including the requirements to categorize and track fees consumers incur and to revise and replace disclosures and the potential costs associated with technical violations discourages banks, especially community banks, from getting into or staying in the market. These additional barriers to entry and reduced competition in an already thin-margin product will be reflected in higher fees and fewer choices for consumers.

- *Purchase fees: Signature and PIN disclosures need further explanation.*

Under the proposal the short forms must indicate the different prices for “PIN” and “signature” purchase transactions. We agree that this is important information because one of the primary uses of prepaid cards is for “shopping” whether online or in person⁸⁰ and it is important to know when fees for purchases will be imposed, given the potential frequency of transactions.

In the consumer testing, some participants registered confusion about the difference between PIN and signature transactions, but in Round 3, most understood the difference.⁸¹ What is not clear from the testing is whether they understood how online transactions, which are not completed using either a PIN or signature, are categorized. Moreover, a card targeted at people looking for an “internet” card, will need to understand how those transactions are treated. We suggest the

⁸⁰ ICF International, *supra* note 14 at 5.

⁸¹ *Id.* at 30.

Bureau consider and test whether “PINless” is a more appropriate label, as it is more accurate and will capture how online transactions are treated.

- *ATM withdrawal fee disclosure may need modification.*

We agree with the proposal to disclose the two types of ATM withdrawal fees, in-network and out-of-network in the topline as it may be an important factor in a meaningful choice. For payroll cards, card issuers should have the ability to explain that there is a limit on free ATM withdrawals, e.g. two per month.

- *Bureau website should be excluded from short form.*

The proposed short form also requires disclosure of the Bureau’s website for additional information. The Bureau plans to develop resources on its website to provide “basic information to consumers about prepaid accounts, the benefits and risks of using them, how to use the proposed disclosures, and a URL to the Bureau’s complaint portal for prepaid products.”⁸² The same information must be provided on the long form.

We recommend that the short form exclude the Bureau’s website. It is clear from the testing that consumers are unlikely to access it or use it when viewing the short form. The limited space on the form would then be available to highlight other information that consumers have indicated they want and find meaningful in selecting a prepaid card. In any case, for branch settings, it is unnecessary because it is contained in the long form that consumers receive at the same time as the short form.

When the disclosure was tested in Round 1 of the consumer testing and participants asked what they would do to obtain more general information, only two participants specifically mentioned the Bureau’s website.⁸³ Moreover, only three of the ten said they would likely seek additional general information. The remainder said accessing general information was not worth the effort.⁸⁴ In contrast, participants clearly understood they could access the card issuer’s website to obtain additional information. Seven of eight who were asked indicated they would go online to do so.

Another reason to omit the Bureau’s website is that, based on the consumer testing, it may confuse people. In Round 2, both the prepaid card issuer’s website and the Bureau’s website were listed. When asked about where they could obtain information about fees for a particular prepaid card, half said they would go to the Bureau’s website, even though the disclosure said only general information would be available.⁸⁵ In effect, they would be misdirected, given that, as a practical matter, they would not be able to obtain specific information about the fees.⁸⁶

⁸² 79 Fed. Reg. *supra* note 1 at 77167.

⁸³ *Id.* at 15.

⁸⁴ *Id.* at 16.

⁸⁵ *Id.* at 22.

⁸⁶ Even if the Bureau were to post all prepaid short and long forms, it is unlikely consumers would attempt to navigate a website containing thousands of agreements on the limited screen of a smartphone, particularly in a store setting.

Because people are unlikely to use this information and may be misdirected, we believe that the valuable space should instead be used to display other information, such as information about how consumers can avoid fees, as discussed above. This will help keep the short form clean and uncluttered so that people are more likely to notice and understand information that is meaningful in shopping and choosing a prepaid card. The Bureau website simply does not reach the level of importance to be highlighted on the short form. In any case, it should be excluded when the short form and the long form are provided together such as in the bank branch, as they are superfluous.

- *The requirement to provide prepaid accounts in foreign languages should be removed.*

Under §1005.18(b)(6) of the proposal, if a financial institution “principally” uses a foreign language with regard to any channel with which a consumer may acquire a prepaid card, then the pre-acquisition disclosures must be provided in that same foreign language. The requirement applies if the account is “acquired” in person. This means, as explained in proposed comment 1 to that section, if a consumer “speaks with a customer service agent in a foreign language in a bank branch or credit location, this would be considered ‘in person,’ and a consumer must receive the short form disclosure and the long form disclosure in that foreign language.” Thus, simply greeting or speaking to a customer in a foreign language may trigger the disclosure requirement.

We appreciate the purpose and goal of this proposed provision, but in the bank environment, it is unworkable and is unfriendly and detrimental to consumers who speak a foreign language. It also presents a huge compliance burden and trap for assertions of violation for banks.

In effect, the proposal is saying that staff of prepaid card issuers may not speak to customers in their language unless they have the prepaid account disclosures in that foreign language. The number of languages spoken in the United States illustrates the potential implications of the proposal. In an August 2013 report, the Census Bureau reported that 21 percent of the 291.5 million people aged 5 and over spoke a language other than English at home. It identified 381 language categories spoken in the United States, which it collapsed into 39 smaller sets of “languages and language groups.”⁸⁷ The sheer number of non-English languages spoken in the United States and the extent of their use demonstrate the potential number of foreign language disclosures that would have to be available if banks allow their employees to greet or respond to a customer or potential customer in the language with which they are most comfortable. It also demonstrates the potential number of people who will not be able to speak to bank employees in their preferred language, even though the bank has the facility to do so.

Banks will have no option but to train staff not to speak in any language other than English and the language for which disclosures are available. It is difficult to see how this helps people who speak no or limited English.

Banks offering prepaid cards would have to train employees, especially front-line employees, to only ever speak to customers and potential customers in English or the foreign language for which there are prepaid disclosures, which clearly would be limited. Moreover, as a practical matter, the limitations on speaking a foreign language would not be limited to prepaid cards, but to all

⁸⁷ See “[Language Use in the United States: 2011](#),” at 2.

interactions in a bank that offers prepaid cards. First, realistically, in the bank branch settings, consumers are likely to be asking about all of the bank's deposit account options of which prepaid would be one option. The employee would have to assume it could come up and would not be permitted to "speak" to the customer except in English and the permitted languages. Second, even if the staff could switch from an unpermitted language to a permitted language if the prepaid topic arose without violating the regulation, it is unrealistic that banks would be able to train (and continue to train) employees about subtle distinctions, e.g., the language limitations only apply if a prepaid card is mentioned. The result would be a general culture of not assisting customers except in English and "permitted" languages. Moreover, banks, as examined institutions, would have to demonstrate compliance to their bank examiners, including how they enforce the prohibition against speaking in foreign languages. It is difficult to see how a bank could monitor, prove compliance, or defend a complaint or lawsuit alleging a violation.

- *The regulation should exemption payroll account and government benefit programs from the proposed pre-acquisition disclosures or create disclosures tailored to those products.*

While we believe that consumers should receive clear information about payroll and government benefit accounts, we believe that the fees, features, and conditions of these accounts are so unlike those for general purposes prepaid cards that they should be exempt from the disclosure requirements. For example, government benefit and payroll cards generally may only be funded through the government agency or employer. Thus, one of the four topline and prominent disclosures "cash reload" is not relevant. The types of fees permitted, if any, on government benefit cards and payroll are largely dictated by state and federal government agencies. For example, based on state and federal laws, payroll and government benefit cards may require a minimum number of free ATM withdrawals after which there may be a fee, which is a different fee model than the one anticipated in the proposed short form. Other differences, as reflected in the model forms, include the prohibition against compulsory use that is only included in the payroll and government benefit model forms.

Moreover, any use as a tool for comparison or shopping purposes is minimal at best. To obtain the card, the customer must be employed by the employer offering the account or be eligible for those particular benefits. Consumers do not select the job or government benefit on the basis of the payment options nor are they likely to conduct advance research on the account. Rather, they review account information in a much more effective and useful time and fashion -- at the time they accept the job or request benefits. While the Bureau may be concerned that consumers in these situations may be distracted by other matters more important than how they receive payment, consumers initially electing the payroll card or government benefit card may always change their minds. Furthermore, there are few benefits from a disclosure that mirrors the format of prepaid cards to allow easier comparison with general purpose prepaid cards, because many employees and government benefit recipients will be making a comparison with a full-service checking account. It is highly unlikely that those looking for job opportunities will be focused on the payroll account option prior to a job offer.

If the Bureau applies to the disclosure requirements to payroll and government benefit cards, it should make the font disclosures less prescriptive for payroll and government benefit cards. Proposed §1005.18(b)(4)(ii) prescribes specific font requirements that vary depending on the particular item. For example, the four top-line short form disclosures must appear in eleven-point font and the other six fees in eight-point font. This very prescriptive, escalating font scheme may create complications with state payroll card disclosure rules. When the state prescriptions are combined with the proposed one, the disclosures will not fit into the line or required document. The options are to squeeze the disclosures into the space by eliminating or shortening spaces between words and letters, making the disclosures less attractive visually and harder to read, or to allow them to spill inappropriately on to the next line or page.

4. Access to account information

- *We support the periodic statement alternative with modifications.*

Under §906(c) of the Electronic Fund Transfer Act, financial institutions must provide customers with a periodic statement for accounts that may be accessed by means of an electronic fund transfer. The regulation currently allows an alternative to the periodic statement for government benefit card accounts and payroll accounts. Pursuant to the regulation, payroll and government benefit card accounts may provide the periodic statement or, alternatively, make available to the consumer: (1) the account balance through a readily available telephone line; (2) an electronic history of account transactions that covers at least 60 days (including all information required in periodic statements under the regulation); and (3) a written history of account transactions that is provided promptly in response to oral or written request and that covers at least 60 days. The Bureau now proposes to adopt a similar, though significantly modified, alternative for all prepaid cards.

Under the proposal, the regulation would allow an alternative to the periodic statement for prepaid cards and payroll cards, (§1005.18(c)) and government benefit cards (§1005.15(e)). Periodic statements need not be furnished if the customer has available—

- The account balance through a readily available telephone line;
- An electronic history of the consumer's account transactions, such as through a website, that covers at least *18 months* (rather than the current 60 days) preceding the date the consumer electronically accesses the account; and
- A written history of the account transactions that is provided promptly in response to an oral or written request and that covers at least *18 months* (rather than the current 60 days) preceding the date the financial institution receives the consumer's request.

We generally support this alternative. In a world where more and more people rely on electronic devices to check balances and activity on a regular basis and overlook periodic statements, the periodic statement may have limited usefulness, not only for prepaid cards, but to a large extent for other deposit accounts. The periodic statement simply no longer fulfills its original primary purpose, that is, to alert customers to their balances and transactions, as effectively as electronic alternatives, including websites, mobile banking, and telephones, which are widely

available, commonly used, and more effective and convenient. Indeed, as the Bureau notes, its testing found that “almost no participants said that they would want to receive a monthly paper statement that they had not requested. Instead, almost all participants stated that free access to account information online and by telephone provided by prepaid issuers and program managers largely met their needs.”⁸⁸ Moreover, for transient account holders, paper is often completely ineffective. Finally, the significant cost savings for financial institutions is reflected in the price customers pay. In a competitive market, they pay less if the cost of production is decreased.

While we support the proposal in general, we question the need to expand from 60 days to 18 months the period for which account information must be available online and by phone and recommend it be reduced to 12 months. Most banks today do not provide 18 months of account history online. Rather, that information is archived and not readily accessible.

The Bureau explains that the reason for the extended period is that it expects that some customers might need to demonstrate on-time bill payment or to compile year-end data for tax preparation purposes.⁸⁹ However, 18 months seems excessive for purposes of demonstrating timely online bill payment and unnecessary for year-end tax preparation, which could be addressed by less expensive alternatives. Claims of unpaid or late bills are typically addressed fairly quickly by the person or entity expecting to be paid and by the customer assessed a late fee. It would be the rare case for a claim to only surface after eighteen months. Those customers wanting a longer history of account activity e.g., for tax preparation purposes, can make a specific request for the information.

The costs of upgrading systems and platforms to provide online access to cover this longer period are not insignificant, and those costs are reflected in the price consumers pay. In essence, the potential wants of the few will be paid for by the many who do not want or need the information. Moreover, if there is sufficient customer demand, financial institutions in a competitive market will respond as appropriate. Finally, the additional compliance costs and risks create one more impediment to entering the market, reducing the number of competitors and thus consumer choice and access, all factors the Bureau must consider under §1022(b)(2) of the Dodd-Frank Act.

- *The proposal should not require that prepaid cards include a summary of totals of fees, deposits, and debits in all electronic or written histories and statements.*

The proposal requires that any periodic statement, any electronic history of accounts transactions, and any written history of account transactions provided include for the month and the calendar year-to-date—

- A summary total of the amount of all fees assessed against the consumer’s prepaid account;
- The total amount of all deposits to the account; and
- The total amount of all debits from the account.

⁸⁸ 79 Fed. Reg. *supra* note 1 at 77177.

⁸⁹ *Id.* at 77178.

The Bureau explains that the provision is intended to address its concerns that “disclosure of a single ‘all-in’ *estimation of fees* on a prepaid product’s packaging or elsewhere in pre-acquisition disclosures would not be feasible and ultimately would not provide useful information to consumers.”⁹⁰ (Emphasis added.) It believes that providing summary information about account usage (including fees incurred) would be useful to consumers in “*understanding their actual costs*” in using a particular prepaid account.⁹¹

While we appreciate that providing a monthly and year-to-date total of fees incurred to use the account will assist customers in understanding their actual costs – which is the Bureau’s stated objective-- requiring that the total deposits and debits does not advance that objective as those items have nothing to do with costs or fees. Nor has the Bureau put forward any evidence or consumer testing to suggest that consumers want or would use such information. This appears to be a “nice to have just in case someone might use it for something,” but goes far beyond the purposes of the Electronic Fund Transfer Act. Moreover, it adds unnecessary costs for financial institutions that will increase what consumers pay and reduce consumer choice and access, factors the Bureau must consider under §1022(b)(2) of the Dodd-Frank Act. For these reasons, we recommend that the Bureau remove this requirement to provide a summary of the deposits and debits on each monthly statement and year-to-date.

5. Submission of agreements to the Bureau and Bureau posting of agreements

Proposed §1005.19 requires that prepaid account agreements be submitted to the Bureau. The Bureau will post them on its website. In addition, prepaid card issuers must post them on their own website.

The stated justification and legal authority relate to the Bureau’s authority to monitor the prepaid card market, assist consumers in understanding their accounts and in shopping for an account, and facilitating analysts in the offering of consumer financial products.⁹² We believe that

⁹⁰ *Id.* at 77180.

⁹¹ *Id.*

⁹² The Bureau explains its justification and authority as follows:

- Posting the agreements on its website will allow it to “effectuate the purposes of EFTA to provide a framework to establish the rights, liabilities, and responsibilities of prepaid account consumers, because the proposed rule will assist consumers’ understanding of and shopping for prepaid accounts based on the terms and conditions of those accounts.” (§905(a) of the Electronic Fund Transfer Act).
- That provision permits the Bureau to prescribe rules “to ensure that the features of any consumer financial product or service, both initial and over the term of the product or service, are fully, accurately, and effectively disclosed to consumer in a manner that permits consumers to understand the costs, benefits, and risk associated with the product or service in light of the facts and circumstances.” (§1032(a) of the Dodd-Frank Act.)).
- Section (§1022(c)(4) of the Dodd-Frank Act it to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and services providers. “Specifically, the Bureau is proposing to receive prepaid account agreements submitted by issuers on a quarterly basis...and *post those agreements on its Web site in order to aid the Bureau’s monitoring for risk to consumer* in the offering or provision of consumer financial products or

the Bureau generally lacks the authority to post the agreements on its website as proposed. While in theory posting agreements may have a limited ability to assist consumers in shopping for or understanding accounts, those goals are easily and more effectively met through other means.

The Bureau cites its authority under the Electronic Fund Transfer Act to help consumers shop for prepaid cards as the basis for posting the agreements. As that statute contains no such specific provision to assist consumer in shopping for accounts, the Bureau relies on its general authority to effectuate the purposes of the act, which it states as being, “to establish the rights, liability, and responsibilities of prepaid account consumers.”

First, the stated purpose of the Electronic Fund Transfer Act is to “provide a framework to establish the rights, liabilities, and responsibilities of participants in *electronic fund and remittance transfer systems*.” The statute is concerned about a particular type of bank account transaction, very specifically, electronic fund transactions. It does not concern itself with bank accounts generally or with non-electronic transactions such as cash and check deposits that are features of prepaid accounts.

Second, the statute is focused on the rights, liabilities, and responsibilities of the participants with regard to these electronic fund transfers, not consumers’ ability to shop for bank accounts or even understand the cost of their accounts. In fact, the only fees that the statute requires to be disclosed are “charges for *electronic fund transfers or for the right to make such a transfer*,” and certain ATM fees.⁹³ (Emphasis added.) If the statute were intended to ensure consumers could understand the total costs of their account and to be able to shop, it would have required disclosures of all fees, not merely electronic fund transfers. Nothing in the statute, either in this general provision or any specific provision supports a conclusion that one of the purposes of the statute was to assist consumers in shopping for bank accounts.

The Bureau quite plainly does not have authority under the Electronic Fund Transfer Act to require prepaid accounts agreements be submitted to the Bureau and posted on its website.

The Bureau additionally relies on its authority under Section (§1022(c)(1) and(4) of the Dodd-Frank Act to monitor risk for consumers in financial products and to gather information regarding financial service markets. However, while gathering the agreements from financial institutions may help to achieve these objectives, posting them on its website does not. Accordingly, these section of the Dodd-Frank Act do not provide the Bureau its authority.

Finally, the Bureau relies on it is authority under 1032(a) of the Dodd-Frank Act. That provision permits the Bureau to prescribe rules “to ensure that the features of any consumer financial product or service, both initial and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risk associated with the product or service in light of the facts and circumstances.”

services under section 10022(c)(1) and (4)I of the Dodd-Frank Act.” (Emphasis added.). See 79 FR 77191.

⁹³ 15 U.S.C. § 1693(c).

First, clearly, consumers will already have the ability to “understand the costs, benefits, and risks” associated with the prepaid cards without having to view account disclosures on the Bureau’s website. Those disclosures must be available on the card issuers’ own websites where they will be available anytime from virtually anywhere. Moreover, in the case of banks, they will receive all information about the costs and risks prior to acquisition through the short and long forms. For prepaid cards sold in retail stores, they will receive important information in the short form with access to full information through the prepaid card issuer’s website.

Second, as the Bureau’s consumer testing found, prepaid card users are very unlikely to access the Bureau’s website to obtain information about prepaid cards, even for general information.⁹⁴ It is simply easier to go directly to the source, either online or in person at a store or branch. Evaluating options by perusing the Bureau’s website would mean parsing through an overwhelming number of agreements, many which would not even be available to them, e.g., payroll and government benefit cards. Thus, posting agreements on the Bureau website would not, as a practical matter, be effective in allowing “consumers to more easily compare terms of the prepaid accounts currently in the marketplace” as the Bureau asserts.⁹⁵

Third, the Bureau states that posting prepaid account agreements will assist consumers by enabling them to compare accounts, much as the publication of credit agreements, as required under TILA, enables them to “more effectively compare credit cards.” However, the Bureau presents no evidence that consumers are, in fact, using that database to compare credit card accounts.

Fourth, the Bureau asserts that posting agreements online will allow third parties to analyze accounts and develop online shopping tools,⁹⁶ which we believe is impractical for the same reasons it is for consumers: the sheer volume will be overwhelming. Moreover, the Bureau has not indicated how the current credit card agreements, which the Bureau notes are posted on the Bureau’s website, are being used for such purposes.

Finally, the Bureau supports its proposal to post prepaid card agreements on the basis that it is required for credit cards under TILA. However, Congress specifically required that card issuers submit credit card agreements to the Bureau (originally the Board) and that the Bureau (originally the Board) post them when it amended TILA in 2009. If it had intended for the Bureau to do so for other types of financial products, it would have specifically required it in the Dodd-Frank Act, which created the Bureau and enumerated its powers and which was passed after the TILA amendments.

In any case, the Bureau should not gather or post government benefit cards and payroll card agreements. They cannot be used for the Bureau’s stated purpose, that is, to allow consumers to compare prepaid card options, because such cards are not available to the general public. Moreover, those who are eligible for such accounts already get account information in a much more effective and useful fashion-- at the time they accept the job or request benefits. It is highly

⁹⁴ ICF International, *supra* note 14 at 1, 16 and 22.

⁹⁵ 70 FR 77191 (December 24, 2014).

⁹⁶ *Id.*

unlikely that those looking for job opportunities will be focused on the payroll account option prior to a job offer. Similarly, the Bureau website is an unlikely source for those receiving government benefits, as consumers are more likely to access databases devoted to those programs, which include not only the fee schedule and agreement, but other important related information, e.g., eligibility for benefits. Moreover, the sheer volume of payroll and government benefit cards will clutter the database. While payroll and government benefit card agreements may share common characteristics and terms, each is negotiated separately and is unique. One bank that is not even among the largest purveyors of payroll accounts reported holding at least 750 payroll agreements. Given the tens of thousands of agreements that would be posted, their lack of practical utility, their potential to obscure other information, the cost of compliance, we recommend that if the Bureau gathers and posts prepaid card agreements on its website, it exempt payroll and government benefit cards.

6. The proposal will thwart efforts to move the unbanked into bank accounts.

The cumulative costs and risks of compliance and potential liability of the proposal will significantly hinder banks' ability to offer prepaid cards. The result will be the virtual elimination of a promising option to move some of the unbanked into financial products offered by insured depository institutions.

The proposed treatment as a finance charge any fee imposed when an account is in overdraft status is a key factor that will drive banks away from prepaid cards. Even accounts that do not offer overdraft services will become "credit cards" and thus become subject to Regulation Z because virtually *all* fees paid on the prepaid account become finance charges if there is an overdraft.

To illustrate the impact, assume that there is a "force payment" situation that creates a negative balance. This may occur when a transaction is authorized before the merchant knows the actual transaction amount, such as in a restaurant, gas station, or hotel situation. In such cases, card network rules guarantee the merchant an amount as set by the card network, which the issuer must pay, even though the final transaction amount is unknown at the time of authorization. There are a number of instances when force-payments may cause the account to go unavoidably into a negative balance—

- The issuer placed a hold based on the card network's guaranteed payment to the merchant, but the final transaction exceeds that amount, and there are insufficient funds in the account to pay the excess;
- The issuer did not place a hold and when the transaction is settled, and there are insufficient funds in the account to pay the transaction; and
- The issuer placed a permissible three-day hold, but the transaction is settled after the three-day hold, and there are insufficient funds in the account to pay the transaction.⁹⁷

⁹⁷ While in some cases, the bank may be permitted to charge back the amount, the cost of the charge-back may not justify returning it.

Another way an account might unavoidably go into a negative position is if a check deposited into the account is returned unpaid after funds are made available and spent. In addition, an overdraft could result when the real-time data file is not available due to communications problems and authorization relies on a back-up data based which may not contain current data (i.e., “stand-in” authorization).

Under the proposal, any fee imposed while the account is in overdraft status is deemed to be a finance charge and the prepaid card transformed into a credit card. This provision alone suffices to dissuade depository institutions from offering prepaid cards. Compliance is impractical, costly, and risky. Other alternatives, such as eliminating fees or absorbing the amount of any unavoidable overdraft, are unsustainable. Consumers would be harmed if overdrawn accounts are promptly closed in order to manage the risk.

Even if that provision was resolved, the cumulative impact of other provisions makes a sustainable, affordable prepaid product challenging. Additional costs under the proposal include those related to the requirements to identify and defend with examiners and potential plaintiffs lawyers the three “incidence” fees required to be on the short form, calculate and provide the month and year-to-date total of fees, deposits, and debits for the account, make available account activity for 18 months, retrieve obsolete disclosure, enforce the restrictions on speaking foreign languages, and post online and submit agreements. These costs and risks are not limited to initial compliance efforts, but become continuing cost and compliance items involving review and revision, audit, staff training, operation and IT, and preparation and discourse in examinations.

Thus, prepaid cards become untenable. Yet, these cards offer promise in helping to move the unbanked into mainstream, insured depository institution products. According to both a Board study⁹⁸ and an FDIC staff paper,⁹⁹ the primary reasons people do not have bank accounts are that they do not have enough money or do not want or need a bank account. While more information is needed to understand better the reasons some people do not want a bank account or do not believe they need one, prepaid cards may be a suitable, attractive solution, especially if they were more widely available and could continue to evolve. However, they will disappear as a potential viable solution if the proposal is adopted, as it is difficult to see a business case, especially for small banks, under such circumstances.

7. Government benefit cards and payroll cards

- *Government benefit cards and payroll cards should be treated separately.*

The proposal maintains a special section in the regulation for government benefit cards. It incorporates payroll cards into the broader “prepaid account” section, but special provisions apply

⁹⁸ Board of Governors of the Federal Reserve System, “Consumers and Mobile Financial Services 2014,” March 2014. Available at: <http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf>.

⁹⁹ Federal Deposit Insurance Corporation (FDIC), “Assessing the Economic Inclusion Potential of Mobile Financial Services,” April 2014, p. 10. Available at: <https://www.fdic.gov/consumers/community/mobile/Mobile-Financial-Services.pdf>.

to payroll cards. In addition, the proposal includes special model disclosure forms for payroll cards and government benefit cards.

We recommend that the Bureau maintain separate sections for both government benefit cards. These products are sufficiently different in terms of features, fees, use, purpose, special protections, and regulatory requirements (including state and federal regulations) to merit distinct sections. Separate sections allow refinement of the regulation so it is more tailored to the product and allow for appropriate differentiations, for example, in the definitions, acquisition disclosures, and periodic statements, especially if they are more likely to be compared to full service checking accounts rather than prepaid cards. Moreover, maintaining separate sections will facilitate compliance. Financial institutions will be able to focus on the section applicable to a particular product without having to parse through sections that blend various provisions that may or may not apply to all products.

8. Impact on small and mid-size banks

The Bureau believes that only about 19 small banks may be affected by the proposal.¹⁰⁰ We disagree. First, there more than 19 small banks offering prepaid cards. Small banks typically offer prepaid cards though a vendor or bankers' bank and one such vendor alone, Convenience, provides prepaid card services to over 450 institutions.¹⁰¹ Second, the proposed regulation will also impact those small banks that currently do not offer prepaid cards, but might wish to in order to remain competitive and provide full-service banking to their customers. While the vendor may manage the prepaid card product, packaging, and processing, the bank will be responsible for retrieving and replacing disclosures every twelve months. "Print on demand," as noted, is not an option for community banks, as a practical matter. Moreover, even though the vendor will be responsible for much of the compliance including the determination of the most often occurring incidence fees, prudential regulators will nevertheless demand proof that the banks have themselves verified compliance including the proper identification of incidence fees.

9. Real-time notification of transactions triggering an overdraft or the accessing of a linked credit feature

The Bureau indicated that it considered the possibility of requiring additional "real-time notifications of transactions triggering an overdraft or the accessing of a linked credit feature, or requiring real-time opt-in by consumer in order to approve each overdraft or other credit transaction..." The Bureau further notes that it "understands that there may be technological, operational, and procedural challenges to the timing and delivery of such a notice or compliance with such an opt-in requirement, particularly in the point of sale environment" and solicits comment.¹⁰²

¹⁰⁰ 79 Fed. Reg. *supra* note 1 at 77284.

¹⁰¹ Even if those banks offer only some of the prepaid cards in the suite available through a vendor, they represent potential sellers of the card.

¹⁰² 79 Fed. Reg. *supra* note 1 at 77178.

While we have not re-investigated this issue recently, previous investigations concluded that real-time notification and opt-in at the point of sale are not feasible as a practical matter.¹⁰³ We believe that the conclusion remains unchanged.

Though providing such a notification might seem simple, from a technical, real world perspective, it is anything but simple. The requirement would impose initial and continuing costs as well as lengthen transaction times. In some cases, it simply would not be feasible.

As the Bureau noted in the Supplementary Information, there are complications related to the necessity of multiple communications among financial institutions, card networks, and merchants. Transmitting the required notice, the amount of the fee, the customers' response, and the final authorization would necessitate significant technical changes. Bandwidths used by point of sale networks and the financial institutions might have to be increased to accommodate additional message traffic. Costs would increase as the point of sale networks would charge the depository institution for the cost of the additional message processing. Software would have to be developed and installed at all points in the system to allow systems to recognize and process related messages. Point of sale terminals and software would have to be installed at locations where there currently are none because terminals are not required for signature transactions. Existing point of sale terminals would have to be changed or replaced in order to comply. It is not clear how depository institutions would know whether the merchants' terminals can convey the notice.

Another impediment is that, depending on the circumstances, the database providing authorization may or may not have updated information about account activity. This includes, for example, the situation where authorization is based on a back-up database with limited information ("stand-in") because communication systems are not available or functioning.

Moreover, the additional time needed to process the transaction creates impediments for quick processing of transactions, especially important for small-dollar transactions in settings where speed of traffic flow is a significant factor. Key to these applications, however, is minimal equipment and minimal processing time. The screen requirement to provide the notice would increase costs, and the time needed to provide and respond to the notice would stall traffic flow, nullifying the benefits of this application. For similar reasons, the notice requirements would make it infeasible to use debit cards at vending machines.

In sum, these requirements would not only incur immediate significant costs and create inconveniences for debit card users, but would significantly curtail new applications under development

10. Effective date

The Bureau is proposing that compliance be mandatory nine months after adoption. We strongly urge the Bureau to permit at least 18 months. As proposed, every prepaid card issuer, vendor providing prepaid products to banks, card network, and merchant acquirer would have to

¹⁰³ Board of Governors of the Federal Reserve System (FRB), "Report to the Congress on the Disclosure of Point-of-Sale Debit Fees," November 2004, *Available at:* <http://www.federalreserve.gov/boarddocs/rptcongress/posdebit2004.pdf>.

make significant operational changes and legal, business, and product decisions. The proposal will demand substantial changes to the payment systems, including how card payments are initiated, validated, settled, and posted. In addition, significant systems changes are necessary to be able to make 18 months of account activity available online, to identify the most frequently incurred incidence fees, and to provide the total of debits, credits, and fees by month and year-to-date. Nine months is simply unrealistic. If the Bureau modified or eliminated these requirements, nine months would be manageable.

11. Conclusion

ABA appreciates the opportunity to comment on the proposed regulatory changes regarding prepaid cards. These products are a vital component of bank account options that offer the opportunity to move the unbanked into insured bank accounts, but also to offer other innovative products that complement checking accounts. The regulation should ensure that consumers understand the terms, features, and costs of prepaid accounts. Equally, it should not be so prescriptive, costly, and risky so as to dissuade banks from offering products that consumers demand and value or from innovating and improving these products. Such innovations include overdraft services and credit. It is also imperative that the definition of prepaid account be clear and unambiguous, especially because of the vastly different regulatory schemes that may apply and the potential enforcement and litigation consequences. We are happy to discuss further any of these matters.

Sincerely,

A handwritten signature in black ink that reads "Nessa E. Feddis". The signature is written in a cursive, flowing style.

Nessa Feddis

Senior Vice President & Deputy Chief
Counsel