March 20, 2015

Via Electronic Delivery

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

Re: Docket No. CFPB-2014-0031, RIN: 3170-AA22

Dear Ms. Jackson,

The Consumer Bankers Association ("CBA")[1] and the Financial Services Roundtable ("FSR")[2] (together, the "Associations") appreciate the opportunity to submit this comment letter on the Notice of Proposed Rulemaking ("Proposal") published by the Bureau of Consumer Financial Protection ("Bureau") on prepaid financial products ("prepaid products").[3] Prepaid products are affordable and safe financial services products that provide convenience for millions of American consumers who would not otherwise have access to the financial mainstream. The Associations strongly support transparency and strong consumer protections for consumers who use prepaid products and will continue to work with the Bureau to achieve this goal.

INTRODUCTION

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[2] As advocates for a strong financial future™, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[3] 79 FR 77101

Prepaid products are safe financial products that allow financial institutions to meet the needs of a dynamic population and economy. Consumers can obtain prepaid products at a myriad of convenient locations, ranging from traditional bank branches to virtually all types of retailer locations, such as supermarkets, pharmacies and convenience stores. The extraordinary availability of prepaid products at convenient locations has made prepaid an attractive method of conducting financial transactions. Consumers can often reload prepaid products using extensive networks operated through convenient retailer locations, and thus develop an on-going financial services relationship desired by many consumers.

Consumers using prepaid products enjoy the security associated with the use of the electronic payment system. Users of prepaid products can make purchases at thousands of retailer locations nationwide that accept network-branded payment cards, and can withdraw cash or conduct transactions at ATMs nationwide. Perhaps most important, prepaid products deliver convenience and dignity by allowing consumers to engage in the kinds of transactions, such as making online purchases or airline reservations, for which a network-branded payment card is generally required. In fact, along with other segments of the population, consumers who historically have been underrepresented in traditional types of banking relationships have especially benefited from prepaid products.

The explosive growth of the prepaid market over the last several years demonstrates that this product meets a substantial consumer demand. As the Bureau notes in its Proposal, the volume of prepaid products has grown very rapidly in the past several years, and is predicted to expand even further. This robust and competitive market delivers many choices for consumers with respect to product pricing and features.

As we said in our response to the Bureau's 2012 Advance Notice of Proposed Rule Making, the Associations support providing prepaid customers with the same robust Regulation E protections that users of payroll cards receive today, with minor exceptions to ensure that these products maintain the value afforded to consumers by the very nature and design of the product. While most prepaid issuers compete by voluntarily providing consumer protections to their cardholders, a level playing field would benefit consumers and industry competition. Similar to the provisions of the payroll card rule, a consistent regulatory standard for prepaid products would provide consumers and the industry with clarity regarding the protections that apply to all prepaid products to distinguish them from traditional debit cards that are issued in connection with deposit accounts.

The Associations also strongly support the Bureau's adoption of proposed regulations that recognize and preserve the special aspects of prepaid. It is especially important to avoid regulation of prepaid that increases costs and decreases availability because such impacts are likely to be felt most acutely by consumers who are least able to obtain alternative financial services. As written, the Proposal would make comprehensive changes to the regulatory landscape for prepaid accounts that may impose significant cost on issuers. This could impose additional costs for consumers, thus reducing accessibility of prepaid products. In so doing, it could limit the value of prepaid products as a lower-cost alternative to checking accounts, particularly for unbanked and underbanked populations. As such, we believe the Proposal will

stifle the industry's ability to innovate to meet these needs, as it will be prohibitively expensive and complex to offer these products at a competitive and low price.

Accordingly, the Associations believe the core principles for prepaid regulation should be as follows:

- Prepaid products should provide clear and informative disclosure of fees and account terms and features;
- Prepaid product users should be afforded the protections provided by the application of Regulation E with minor exceptions to ensure prepaid products maintain the value afforded to consumers by the very nature/design of the product; and
- Prepaid products should preserve consumer choice and allow for access to short-term liquidity options that are safe and convenient for consumers.

The Associations continue to support the application of regulation that will serve to enhance the consumer experience with prepaid products. In order to preserve the nature of prepaid products and to continue to encourage issuers to provide affordable, safe and convenient offerings, we urge the Bureau to reconsider portions of the Proposal that we believe could serve to inhibit the use and functionality of prepaid products.

DISCUSSION

Definition of "Prepaid Account"

The Proposal would revise the definition of "account" under Regulation E to include a "prepaid account."[4] Under the Proposal, the term "prepaid account" would include a card, code or other device, established primarily for personal, family or household purposes, and not already an "account" under Regulation E, which is either (i) issued on a prepaid basis to a consumer in a specified amount, or (ii) not issued on a prepaid basis, but capable of being loaded with funds thereafter; and (iii) redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines, or usable for person-to-person transfers.[5] The Proposal also outlines specific exclusions for some products, which we appreciate and fully support.[6] However, the Associations are concerned that this overly broad definition could encompass accounts not typically considered prepaid products but happen to incorporate some of the above-referenced functionality characteristics. As such, we urge the Bureau to narrow the definition of "Prepaid Account" to make certain that it excludes from coverage those accounts

[4] § 1005.2(a)(3)

[5] § 1005.2(b)(3)(i)

[6] The term "prepaid account" *would not* include gift cards, gift certificates, or loyalty, award or promotional gift cards as defined in Section 1005.20 of Regulation E ("Gift Card Rule"); payroll cards that are used to disburse solely "incentive-based payments" such as employee bonuses; or health savings accounts, flexible spending accounts, medical savings accounts or health reimbursement arrangements. Flexible spending accounts would be defined to mean cafeteria plans that provide health benefits; however, the Proposed Rule would not expressly exclude, as "flexible spending accounts," dependent care and commuter or transit flexible spending accounts.

with debit cards that link to a savings or demand deposit account. This exclusion should apply regardless of whether the account has checks attached to it. Along those same lines, we ask that the Bureau provide greater clarification on what specifically distinguishes a prepaid account from a bank account, other than marketing distinctions.

Additionally, the Associations urge the exclusion of certain non-reloadable prepaid products. For example, check replacement programs, products that substitute for refund checks, are widely utilized by retailers and other businesses as part of their respective merchandise return/reimbursement procedures. These programs should not be included within the definition of "prepaid account," as consumers do not have a choice but to accept these cards pursuant to a specific return/reimbursement program. As a result, cards distributed as part of a check replacement program are unlike other prepaid accounts in that they are not designed as bank account substitutes, are not marketed to consumers (and thus consumers do not have the ability or the need to comparison shop) and are not subject to fees.

Lastly, there are emerging products that appear covered under the proposal but should not be. For example, financial institutions often partner with charitable institutions (e.g. the Red Cross) to design products intended to distribute relief payments to disaster victims. These cards often have no fees and limited life cycles (e.g. 60-days). The consumer has no choice but to accept the card if he or she is to receive disaster assistance. If there are no costs to the consumer for receiving funds through this type of product, disclosures are unnecessary and are unwanted in the context of a disaster situation as there is no comparison shopping associated with these products.[7]

Application of Regulation E

As previously noted, the Associations support the application of Regulation E to prepaid products with modifications that would permit issuers to offer prepaid products with the same general consumer protections applicable to payroll cards under Regulation E. In advocating for a modified payroll card rule for all prepaid products, we note that the primary difference in Regulation E's application to payroll cards, as opposed to other access devices, relates to the consumer's right to receive a traditional monthly periodic statement. Consumers who do not receive periodic statements for their payroll cards have alternative means of obtaining information about their card balances available over a toll-free telephone number or the internet, and upon request. These alternatives are particularly appropriate for payroll cards, and for prepaid products in general, because they align with the manner in which customers using these products want to obtain account information.[8] As such, we greatly appreciate the Bureau's willingness to allow access to account information via access to online statements. We believe

[7] In some cases, emergency assistance programs are designed to provide an option to reload funds, if necessary. As such, the Associations suggest that all prepaid products issued in connection with disaster relief programs or other emergency situations be excluded from coverage under any final rule.

[8] For example, we note that in promulgating the payroll card rule the Board of Governors of the Federal Reserve System conducted consumer focus groups and found that most focus group participants "rarely" used periodic statements to track transactions or look for errors and attributed their lack of statement use to the fact that account transaction information was obtained by telephone or online. *See* 71 FR 51,437 at 51,443.

the online statement option is an important measure that can help avoid increased costs for prepaid products that could result from a paper statement requirement, especially given the rapid uptick in mobile usage.[9]

Eighteen Month Look Back

The Associations oppose the provisions in the Proposal that would require prepaid issuers to make available an eighteen-month history of a consumer's account transactions.[10] We recommend that the Bureau revise the proposal to provide that the default written transaction history provided in response to a consumer request cover sixty days of transactions (similar to the existing rule for payroll cards) unless the consumer specifically requests a longer period of coverage, in which case the consumer will be entitled to receive up to eighteen months of written transaction history. A statement look back period of eighteen months is excessive and is five times longer than required for demand deposit accounts (DDA). Few prepaid providers currently have eighteen months of history on their current database and costly system changes will be needed in order to comply with this provision. These costs will be difficult to absorb due to already thin margins and will likely have the effect of raising the cost of prepaid products for consumers.

Provisional Credits

As drafted, the Proposal would extend Regulation E's existing investigation and provisional crediting requirement to prepaid accounts. Specifically, if the issuer is unable to complete its investigation of an alleged error within ten business days, the issuer would need to provisionally credit the consumer's account in the amount of the alleged error.[11] We urge the Bureau to reconsider these provisions of the Proposal based squarely on concerns of controlling fraud losses, not on the ability to increase profits.

Issuers have greater risks from re-crediting prepaid products than DDAs. Prepaid relationships, in many instances, may be shorter-term customer relationships than ordinary checking accounts, or even payroll cards where employers regularly deposit payroll to the card. While some consumers frequently reload their prepaid products (*e.g.* General Purpose Reloadable Cards), others may do so only occasionally or not at all. A number of consumers buy a prepaid product, use the initial funds and then discard the card. In these instances, issuers face special risks when they are required to provisionally re-credit funds to a card while investigating an error. It is quite possible that there may not be enough funds on the card when the issuer completes the error resolution process to cover the reversal of amounts provisionally re-credited to the prepaid product.

[9] Pew Research Center - Mobile Technology Fact Sheet http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/

[10] § 1005.18(c)(1)(ii) and (iii)

[11] 12 CFR §1005.11(c)(2)

The provisional re-crediting requirement will also lead to an increase in fraudulent error claims, a common scenario that results in significant losses of provisional credits before investigations can be completed. This is especially true in the case of non-reloadable prepaid products. While a prepaid product would need to be registered when a notice of error is made in order to receive the protections under Regulation E, there would be little time for an issuer to investigate a claim and ample time for a fraudster to abscond with provisional funds. In turn, provisional credit related fraud losses would likely lead to increased account costs and more stringent customer on boarding requirements that will have a significant impact on application processes. Acceptance rates will likely go down and more potential prepaid customers will turn to other, more costly financial services alternatives.

We recommend that the Bureau consider modifying the timing requirement of the error resolution provisions in Regulation E, as applied to prepaid products, to recognize the special risks faced by financial institutions. We urge the Bureau to apply to all prepaid products error resolution time periods applicable to new accounts, since these products present similar risks as new accounts.[12] In addition to the timing modification, we recommend the Bureau consider more tactical, transaction-specific considerations that strongly correlate to fraud. For example, consideration can be made for new accounts (less than 30 days) or ATM claims. Both have high incidence of fraud, are extremely difficult to resolve in ten or twenty days and should not be entitled to a provisional credit. At a minimum, these solutions should not be entitled to the full re-crediting of the total amount in dispute.

Fee Disclosures

Under the Proposal, financial institutions would be required to provide two sets of disclosures to consumers, described as "short-form" and "long-form" disclosure statements, before a consumer acquires a prepaid account.[13] Financial institutions may, however, provide the long-form disclosure after a consumer acquires a prepaid account if the account access device is inside packaging material, short-form disclosures are viewable without opening the packaging, and the long-form disclosures are available to the consumer by telephone number or through accessing a website displayed on the packaging.[14]

The Associations support the disclosure of key price terms (*e.g.* fees to setup, add money, get cash, or spend money, etc.) in a standardized disclosure form and believe the Bureau's proposed short-form disclosure serves this purpose by allowing consumers to shop for prepaid products based on the fees that will have the greatest effect on their daily use. However, requiring issuers to provide both the short-form and long-form disclosures pre-acquisition is unnecessary and may lead to customer confusion. Additionally, we believe the proposed "incidence-based" fees required on the short-form could be misleading and are unnecessary to

[12] *See* 12 C.F.R. § 1005.11(c)(3) - Places an applicable time of 20 business days in place of 10 business days from notice of error and places and applicable time of 90 days in place of 45 days for completing an investigation.

[13] § 1005.18(b)(1)(i)

[14] § 1005.18(b)(1)(ii)

provide consumers with the information needed to make informed decisions about prepaid products.

Pre-acquisition Disclosures

The Associations believe the presentation of multiple disclosures pre-acquisition is duplicative and can lead to customer confusion. Having received the short-term disclosure prior to purchasing a prepaid product, consumers will have pertinent information needed to make adequately informed decisions based on the knowledge of the fees that are most common for use of a specific product.

We strongly support fee disclosures that enable consumers to shop for the product that best suits their needs and that enhance competition in the marketplace. As the Bureau's "Know Before You Owe" program has shown, it is crucial that disclosures be as clear and understandable as possible and focus on key terms. We believe this reflects the notion that price disclosures can be counter-productive if they are excessively long or complicated, or can be disclosed at a more appropriate time later when a consumer is making a decision to obtain an optional incidental service. In this respect, we urge the Bureau reconsider the requirement that long-form disclosures be presented pre-acquisition in order to prevent consumers from being subjected to "information overload," which will likely lead to consumers not obtaining or using the information that is important to the purchasing choice - a situation that will produce a less efficient marketplace.

Additionally, the proposed disclosures – the short-form and the long-form – when coupled with the already-mandated initial disclosures under existing regulation, appear likely to impose additional compliance costs that should be evaluated, given that many of the mandated disclosures are duplicative. This could have an effect opposite to what the Bureau intends by obscuring the provision of clear information to consumers with multiple, varying disclosures, resulting in increased prepaid account costs to the consumer.

The Associations believe pre-acquisition fee disclosures should be limited and tailored around fees that affect informed purchasing decisions – those fees included on the proposed short-form disclosure. This approach would cover the key price terms for core services on prepaid products for which consumers are likely to have interest. Incidental fees that may be charged for optional services (*e.g.* a fee for expedited delivery of a replacement card) are unlikely to affect a consumer's decision to purchase a prepaid product (*e.g.* a fee for expedited delivery of a replacement card).

We recommend that the Bureau consider the approach used by the Board of Governors of the Federal Reserve System (FRB) in the revisions to credit card disclosures under Regulation Z with respect to incidental fees for optional services. Regulation Z allows credit card issuers to disclose fees for optional services (*e.g.* "pay-by-phone" services) at the time the consumer chooses whether or not to use the optional service, rather than requiring the issuer to disclose those fees in an initial disclosure statement. [15] This approach has the advantage of not

[15] 12 C.F.R. § 1026.5(b)(1)(ii)

overloading the initial disclosures with extraneous information that may be less useful to consumers. Moreover, providing the disclosure at the time the consumer is making a choice to use the optional service is likely to be more meaningful than including the information in a disclosure that is provided at the inception of the relationship, which may be many months or years earlier.

In the alternative, we urge the Bureau, as provided in an exception for products sold in retail stores, to allow all prepaid providers to make long-form disclosures accessible by telephone and via a website.[16] This will allow consumers to receive the important information included on the short-form disclosure while still providing access to the long-form disclosure without great additional cost. We believe providing additional disclosures via telephone or website is a reasonable and fair delivery method given the high adoption of mobile and internet usage rates.[17]

Lastly, the Proposal provides that a retailer that is an agent of the prepaid product issuer is not considered to be a retail sale and therefore *not* entitled to the retail exception.[18] The rational for this distinction is unclear and unsubstantiated. The constraints presented by having to providing the long-form disclosure in any retail environment are the same whether the retailer is an agent or not. We urge the Bureau to eliminate this distinction.

Incidence-Based Fees

Under the proposed rule, issuers would need to provide, among other things, up to three "incidence-based" fees on the short-from disclosures.[19] In addition to the fees already required to be listed, the disclosed incidence-based fees would need to be the three fees that were incurred most frequently in the prior 12-month period by consumers using that particular prepaid product. This requirement would also mandate issuers to estimate the three most often incurred incidence-based fees for new products. The Associations believe this could lead to inaccurate information and would be unduly burdensome to issuers. This could also serve as a disincentive to create new prepaid products.

Accordingly, the Associations oppose the requirement to disclose incidence-based fees and urge the Bureau to abandon these disclosures on the proposed short-form. These disclosures would provide little benefit to consumers and would create an ongoing and costly compliance and inventory management process resulting in greater costs to consumers using prepaid products. More importantly, the disclosure of the three incidence-based fees could be misleading and creates an assumption of how a particular consumer will use a particular prepaid product. For example, in some circumstances the listed fees may never be applicable, but a consumer

[16] § 1005.18(b)(1)(ii)

[17] Pew Research Center - Mobile Technology Fact Sheet http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/

[18] § 1005.18(b)(1)(ii)–1

[19] § 1005.18(b)(2)(i)(B)(8)

looking to comparison shop based on price alone could assume that these fees will be charged and, therefore, decline the use of a product that may be well suited to his or her needs. Other fees that are not listed on the short-form disclosure may be more important to a particular consumer when shopping for a prepaid product. Consumers would have already received disclosure of those fees most commonly incurred by the majority of product users in the top-line portion of the short-form.

The requirement to conduct annual reviews and to redesign packaging should incidence-based fees change would be burdensome and greatly outweighs the potential consumer benefits associated with disclosure of such fees. Prepaid issuers would need to undertake an extensive examination of their products yearly to determine whether the incidence-based fees disclosed in the prior 12- month period were the most-frequently incurred fees during that 12-month period for each prepaid account product and, if necessary, revise the incidence-based fees on disclosures provided in written, oral or electronic form within 90 days. Following a reassessment of the most-frequently incurred incidence-based fees, new packaging materials would need to be printed that provide the short-form disclosures reflecting the current incidence-based fee assessments; however, the Proposal would not require issuers to discontinue use of existing inventory. Many issuers of prepaid products, especially smaller issuers, may be unable to absorb these costs and be forced to exit the market. At a minimum, these cost and resource requirements would reduce innovation that could benefit the prepaid consumer.

The Associations also believe the incidence-based fees may discourage consumers from looking at the long-form altogether if they believe they are receiving disclosure of the most applicable fees on the short-form disclosure. Adding a simple statement indicating that other fees may apply and that the consumer should refer to the long-form disclosure for additional possible fees would still allow consumers to receive disclosure of the most important fees without being confused or mislead by how the might use a particular product based on the incidence-based fees.

Third-Party Fees

Under the Proposal, the long-form disclosure must include the amount of third-party fees.[20] The amount of these fees and the timing and frequency of the changes in these fees are not under the control of the issuer. Whenever such fees change, the issuer will be required to update the disclosure and send change-in-terms notices to current cardholders. Furthermore, issuers cannot require such third parties to provide timely notification of such changes, and thus true compliance with such provision is beyond challenging. We urge the Bureau to not require specific disclosure of third-party fees, but rather permit a general disclosure that third-party fees apply with information as to how to obtain the specific fee information.

Foreign Language Requirement

The proposed foreign language requirement included in the Proposal would impose significant burdens on prepaid product providers. Under the Proposal, if an issuer principally

[20] Comment 18(b)(2)(ii)(A)–3

uses a foreign language on prepaid account packaging material, by telephone, in person or on the website a consumer utilizes to acquire a prepaid account, then the short-form and long-form disclosures would need to be provided in that same foreign language.[21]

The foreign language provisions present unique concerns for prepaid issuers that originate prepaid products exclusively through a branch network or have a significant customer service network of branch bankers and telephone bankers who provide material in-person or other types of one-on-one level customer support. Some of our member companies have specially hired staff based on their ability to speak these languages, or deliberately established offices in areas of high non-English speaking consumers. Banking regulators have generally supported efforts to reach out to these communities; so ideally, the Bureau should craft a proposal that allows banks to serve customers without creating undue burdens.

The Associations urge the Bureau to retain the current foreign language standards applicable to deposit accounts where it's permissible, but not required, to provide disclosures in other languages, but that if changes are deemed necessary or appropriate, that clarifying language be added in the commentary to subsection 18(b)(6) that "principally using a foreign language" does not include any of the following:

- Assisting a consumer, in person or via telephone, in another language in response to a consumer-initiated inquiry;
- Contact, whether initiated by the institution or the consumer, with a consumer actually known, based on a prior customer relationship, inquiry or other interaction, to prefer a language other than English; or
- Interactions with consumers through the use of an interpreter, whether provided by the consumer or the financial institution.

Additionally, while financial institutions can train employers and government agencies on how they can or cannot communicate with cardholders, they are ultimately unable to ensure that providers adhere to our guidelines. This requirement will be very difficult to monitor in certain situations, such as places of employment for payroll cards and when cards are provided by government agencies in which case the issuer does not know the language spoken to the employee, or in a branch/retail environment in which the employee may speak multiple languages to the customer when explaining the prepaid product. We urge the Bureau to reconsider the foreign language requirements in these contexts.

Deviation from Model Disclosures

Throughout the Proposal, references are made that disclosures must be "substantially similar" to the various model forms that are provided by the Bureau. However, financial institutions have products in which they will likely need to make changes to the model forms. As such, the Associations are concerned as to how the Bureau will interpret the "substantially similar" language, including how much leeway they will allow for changes, as well as the uncertainly there will be if changes are made and are then later challenged by the Bureau.

[21] § 1005.18(b)(6)

We are also concerned with the very specific size, font, and other format requirements that are outlined in the Proposal and that it does not currently differentiate between website and mobile disclosures. We anticipate that in the near future many financial institutions will market and acquire customers for prepaid products through mobile apps, and it will be a challenge to provide the long and short-form disclosures through these apps in the manner contemplated under the proposal.

Exemption for Payroll/Government Issued Cards

Under the Proposal, the disclosures would need to be provided prior to the consumers making a decision as to receiving funds on their payroll or government benefit cards. However, this requirement will be very difficult to implement and monitor in this context. Prepaid transactions in these situations may occur in a variety of ways, such as face-to-face discussions, over the phone, through the Internet, etc., and more significantly, are not dictated by the issuer but rather at the government agency and employer level.

Building processes to accommodate these variations will be very difficult. This burden is compounded in that the fees for the payroll and government programs are not standardized and vary from program to program as they are often negotiated on an individual program basis. There is the additional problem that may specifically affect the underbanked if they elect not to receive funds through these prepaid programs in that the only alternative available will be to receive a paper check. This will require very significant changes to current systems with no indication as to the extent that consumers will choose to receive paper checks. Furthermore, payroll and benefit recipients may not make any election for payment, and thus many states allow for a default to prepaid cards if the employee fails to choose a payment method within a specific time frame. Not allowing for this option creates unnecessary barriers for government agencies and employers.

Posting of Agreements

Consistent with the rules implementing the CARD Act,[22] under the Proposal, a prepaid product issuer would be required to make quarterly submissions of its account agreements to the Bureau, post prepaid account agreements to the issuer's website, and comply with a consumer's request to provide a copy of the consumer's open account agreement if the relevant agreement is not posted to the issuer's website.[23]

The Associations believe the proposed requirements to post and submit prepaid product agreements should not apply to products offered to a limited audience. Examples include government benefit cards, payroll cards, prepaid accounts used to distribute student financial aid disbursements, property and casualty insurance payout programs, and other similar programs.

[22] 12 C.F.R. § 1026.58

[23] § 1005.19(b), (c) and (d)

For these products, the proposed posting and submission requirements do not benefit consumers given that these products are not offered to the general public, but rather are available as a result of the direct relationship that the cardholders have with their respective government agency, employer, university, insurance company, or other specific provider. Consumers do not and cannot "shop" for these types of limited prepaid accounts, as a consumer would for one that was truly available to all members of the public and, therefore, posting for the purpose of comparison shopping is not applicable. The information in these agreements also would provide limited, if any, value to consumers who are not eligible for these products and the burden to financial institutions will be significant.

We also note that on February 24, 2015, the Bureau issued a proposal to suspend temporarily a similar requirement to submit credit card agreements to the Bureau, as required under the CARD Act. This proposal was issued out of recognition that there needs to be an automated and more streamlined approach for these submissions that will benefit both the Bureau and issuers. We believe the submission requirements under the Proposal should also be subject to a similar streamlined process and that compliance with these requirements should not be required until such a process is in place.

Overdraft

The Associations strongly support effective consumer protections and, specifically, the principles of customer choice, transparency, and fairness. These goals have been met by Regulation E and DD mandates that have afforded consumers strong protections and detailed disclosures for overdraft features in the context of checking accounts. As the Bureau notes in its proposal, most participants in consumer testing conducted by the agency expressed concern about overdraft programs and explained that they preferred prepaid products because they did not allow them to spend more than what was loaded onto the card.[24] We support the ability of consumers to obtain the financial products they want with the features that fit their individual lifestyles and financial needs. However, we disagree with the Bureau's proposed treatment of overdraft on prepaid products as credit and instead urge the agency to apply those protections that are currently afforded to consumers of checking accounts.

Under the regulatory regime applied to checking accounts, consumers always have the ability to exercise this choice and we believe they do quite often. Debit card overdraft services are valued and used by customers who affirmatively choose the debit card overdraft option after receipt of required notices that explain pricing and alert them to potentially less expensive options. In 2011, CBA polled eighteen member institutions, which collectively represent over forty percent of the approximately 192 million consumer checking accounts in the United States. The poll consisted of two basic questions: How many consumer checking accounts do you have and how many of those customers have affirmatively opted-in to overdraft services? The answers, respectively: 89,089,050 and 14,281,348 – *a 16 percent opt- in rate*.[25] Thus, the fact

[24] 79 FR 77101 at 77205

[25] It is important to note that the poll did not include two of the largest banks in the United States, Bank of America and Citi, as they do NOT offer their customers overdraft protection at POS or for ATM transactions and, therefore, their customers do not have the option to opt-in to begin with.

that a defined set of customers affirmatively choose and use the service demonstrates that there is a demand for the service and for credit.

Additionally, there is scant evidence that overdraft features on prepaid accounts are abusive to consumers. In fact, to our knowledge, there is only one major issuer of prepaid products that currently offers overdraft services. Also, as noted by the Bureau in the Proposal, "overdraft services on prepaid accounts have been generally structured similar to overdraft services offered by financial institutions on checking accounts, but in some ways, are more consumer-friendly."[26] Without evidence of specific harm, we see no reason for the Bureau to take such drastic measures to reduce the ability of consumers to choose overdraft services on prepaid products.

Irrespective of these facts, the Bureau takes the position in the Proposal that offering overdraft services constitutes the provision of credit, thereby requiring additional credit card-like protections and declining to extend existing exemptions under Regulation Z and Regulation E's compulsory use provisions for overdraft services on deposit accounts to prepaid products.[27] Under the Proposal, prepaid issuers offering prepaid products with overdraft features would be required to comply with existing credit card protections found in the Truth in Lending Act (TILA)[28] and Regulation Z,[29] implementing various provisions addressed in the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act).[30] The Bureau has argued that this is the appropriate treatment of overdraft under TILA's definition of open-end credit. As the Bureau states, "the Bureau believes that overdraft lines of credit, overdraft services, and similar credit (sic) features offered in connection with a prepaid account satisfy the definitions of (1) credit; (2) open-end (not home-secured) credit plan; and (3) credit cards under TILA and Regulation Z."[31] Accordingly, the applicable provisions include:

- Requiring issuers to verify each consumer's ability to pay (regardless of the size of the credit line) before offering credit features, prohibiting the issuer from opening such an account or increasing the value of a credit line if the consumer is found not to be creditworthy;
- Preventing issuers from requiring payment on credit products or charging late fees for non-payment within 21 days of mailing the consumer a billing statement;
- Limiting total prepaid account fees to 25% of the credit limit during the first year a credit account is open;

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[26] 79 FR 77101 at 77111

[27] § 1026.12(a)(2)

[28] 12 U.S.C. § 1601 *et seq*.

[29] 12 C.F.R. Part 226

[30] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24

[31] 79 FR 77101 at 77205

- Restricting issuers from increasing the interest rate on an existing credit balance unless an account holder misses two consecutive payments; and,
- Requiring issuers to provide 45 days advance notice (during which the consumer may cancel the credit account) to an account holder before increasing the interest rate prospectively on new purchases.

The Proposed Rule would also impose unique requirements that are more stringent than those currently applicable to credit cards under Regulation Z, including:

- Imposing a 30-day waiting period after a prepaid card is registered to formally offer credit to the consumer; and
- Precluding an issuer from exercising a right of set-off to draw on the funds loaded into the account to repay any outstanding credit without affirmative consumer consent.

The Bureau might have sought an outright prohibition on overdraft for prepaid products, but chose this approach presumably to give consumers the option of overdraft should they want it. Indeed, it appears the Bureau recognized that some consumers, as they expressed in comments to the ANPR, wish to retain the availability of overdraft on prepaid products. These consumers stated that the overdraft fee charged by their prepaid products was less than similar fees on other products and allowed them to bridge cash shortfalls between paychecks and to fulfill other short-term credit needs.[32] The Associations agree that consumers using prepaid products should have access to short-term liquidity options that are safe and convenient. Nevertheless, for the reasons stated below, we believe the approach outlined in the Proposal would effectively eliminate overdraft protection on most prepaid cards.

From the inception of TILA almost 50 years ago, it has been well understood that overdraft protection (as distinct from an overdraft line of credit) is not subject to TILA and Regulation Z. This was stated succinctly in the Joint Guidance on Overdraft Protection Programs, issued by the Office of the Comptroller of the Currency (OCC), the FRB, the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) in February 2005.[33] The Guidance states:

> TILA and Regulation Z require creditors to give cost disclosures for extensions of consumer credit. TILA and the regulation apply to creditors that regularly extend consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments.
>
> Under Regulation Z, fees for paying overdraft items currently are not considered finance charges if the institution has not agreed in writing to pay overdrafts. Even where the institution agrees in writing to pay overdrafts as part of the deposit account agreement, fees assessed against a transaction

[32] *Id* at 77205

[33] 70 FR 9127

> account for overdraft protection services are finance charges only to the extent the fees exceed the charges imposed for paying or returning overdrafts on a similar transaction account that does not have overdraft protection. [Footnotes omitted]

The Bureau, in its supplementary information to the Proposal, notes that TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment."[34] It further states that the charges imposed by a financial institution for paying an item that overdraws a deposit account are not "finance charges" unless "the payment of such items and the imposition of the charge were previously agreed upon in writing."

According to the Bureau, the typical overdraft program fees charged are not finance charges under Regulation Z, and thus a financial institution offering overdraft services is not a creditor under Regulation Z because it is not assessing a finance charge and is not structuring the repayment by written agreement in more than four installments. The Bureau states it is not reversing this long-standing policy. Instead, it "declines to extend this policy to include prepaid accounts."[35] We support the choice not to reverse this long-standing policy, but we do not agree that it should not be expanded to prepaid products.

First, as noted above, the TILA definition of credit involves the granting of a *right* to defer repayment of a debt or the granting of a *right* to incur debt and defer its payment. Discretionary overdraft programs involve neither alternative. A customer who overdraws their account has an immediately due and payable negative balance. In these instances, banks often contact these customers by letter (or by phone or other means) to collect the immediately due and payable balance. Banks typically do not establish overdraft repayment plans or allow other conduct suggesting that the customer may defer repayment. Instead, banks collect the outstanding negative balance, often by collecting it from an incoming deposit. These practices show that the customer enjoys no right of deferred payment.

In addition, the customer enjoys no right to incur debt and defer its payment. Banks regularly refuse to authorize transactions into overdraft. Unlike a credit card or an unsecured line of credit, which has a credit limit and binds the bank to approve eligible transactions up to the credit limit, on a deposit account with no mutually agreed-upon overdraft line of credit, customers have no right to incur debt by overdrawing their deposit account. Without such a right, the TILA definition of credit does not apply to these transactions.[36]

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[34] 15 U.S.C. Section 1602(f)

[35] 79 FR 77101 at 77206

[36] The Bureau suggests that merely advancing funds to cover an overdraft amounts to a right to incur debt and defer its payment. See page 390 of the Proposed Rule Courts that have looked at this issue in other contexts uniformly disagree. See *Riethman v. Barry*, 287 F.3d 274 (3d Cir. 2002) (law firm did not extend credit by continuing to perform services beyond retainer when it refused to set up a repayment plan); *Shaumyan v. Sidetex*, 900 F.2d 16 (2d Cir. 1990) (paying contractor as contractor completes work is not credit if contractor refused to set up repayment plan); *Rogers Mortuary v. White*, 594 P.2d 351 (N.M. 1979) (funeral home did not grant credit when refused to set up repayment plan for an outstanding debt).

If the TILA definition of credit does not apply to these transactions, the definition of finance charge cannot be revised to cover these transactions because embedded in that definition is the term, "credit." Several Members of Congress seemed to recognize this when they proposed the Overdraft Protection Act of 2009, H.R. 3904. Among other things, the Act would have amended TILA to require an affirmative opt-in for overdraft services for all deposit accounts and would have amended the definition of "finance charge" such that overdraft fees were considered finance charges under the Act.

Secondly, the approach being presented ignores decades of precedent, based on existing regulation for bank accounts followed by all the banking agencies. The interpretation is simple: overdrafts are not finance charges under TILA and Regulation Z unless the depositary institution agrees in writing to pay such items and to impose an overdraft fee for paying such items. The FRB, in particular, as the agency then responsible for drafting and interpreting regulations under TILA, has maintained that position consistently, and, at one time, was entitled to judicial deference unless its interpretation is "demonstrably irrational."[37] One likely reason the FRB maintained this longstanding interpretation of "finance charge" under the TILA is because without an agreement to pay items into overdraft, the institution does not extend credit under TILA.

The proposed approach creates an unwieldy and unnecessary process that creates significant financial, operational and customer disincentives to the inclusion of overdraft features on a prepaid account. Although, to the best of our knowledge, none of the Associations members offer overdraft features on prepaid cards, others do; and, again, it is clear from some comments from consumers to the Bureau that they value that and would prefer to retain these services. If the proposed approach is adopted, many of those who do offer overdraft would cease to do so due to the cost and burden of complying with the Regulation Z requirements referenced earlier in this section.

Third, the Bureau states in general that the proposal is designed to eliminate a regulatory gap between prepaid cards and debit cards, which it says are so similar as to raise a concern for the Bureau of consumer misunderstanding where different protections are offered between the two. We believe the application of different standards to prepaid products and debit products will only serve to further confuse customers about the standards that apply to the products they are using. Specifically, classifying overdrafts on prepaid products as a credit feature element stands to create confusion among consumers. Consumers are already unsure about the credit capabilities of prepaid cards, with many people thinking these products result in reports to the credit bureaus and thereby help establish or build credit. The Bureau should ensure that any overdrafts and credit features are clearly understood and ensure that they are consistent and uniform across products to avoid consumer confusion and to promote competition. Thus, any prepaid overdraft option should comply with Regulations E and DD and prepaid credit features with Regulation Z.

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[37] *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).

Fourth, application of this approach creates numerous problems that do not appear to be intended. One specific concern is with regard to the broad definition of "finance charge." This broad definition could subject a wide-range of transactions to the credit provisions of Regulation Z, including those that issuers cannot control, are inadvertent, and not intended to give customers more than the prepaid balance. Specifically, the Proposal would provide that "credit" includes "a transaction where the consumer has sufficient or available funds in the prepaid account to cover the amount of the transaction at the time the transaction is authorized but insufficient or unavailable funds in the prepaid account to cover the amount of the transaction at the time the transaction is paid."[38] As such, even those prepaid products without dedicated overdraft service programs could be impacted due to the inability to control force-pay transactions.

Due to force-pay transactions, there is virtually no scenario in which a prepaid product will have no chance of overdrafting. For example, a negative balance situation can occur when a network is offline, a merchant does not seek authorization for the full amount or a transaction (*e.g.* later included tips or pay at the pump transactions) or a mandated provisional credit dispute not settled in the customer's favor and results in a negative balance. Under the Proposal, even if an issuer does not charge a fee directly correlated or categorized to an overdraft, that issuer could still be considered noncompliant with Regulation Z provisions if any fee (*e.g.* monthly service and transaction fees) is assessed while the account is negative status.[39]

The Associations urge the Bureau to not extend the provisions of TILA and Regulation Z to overdraft services on prepaid products and instead apply those protections currently afforded consumers of deposit accounts. As noted, CBA members do not provide overdraft protection on prepaid products. Even a complete prohibition would have a less deleterious effect on our products than the Regulation Z approach being proposed. The before-mentioned compliance costs associated with the application of TILA and Regulation Z provisions will make overdraft features on prepaid cards overly burdensome to provide.

If the Bureau moves forward with its proposed provisions for overdraft features, it is of the utmost importance that the agency clearly defines what constitutes a charge that could trigger the application credit regulations. We would suggest the Bureau clearly define prepaid credit features under Regulation Z, explicitly stating that the product must charge a fee directly correlated to the overdraft in question and specifically exclude other charges and fees that are wholly unrelated to an overdraft but applied while a prepaid product has a negative balance.

Agent of Card Issuer

The Proposal would provide that a financial institution may become the agent of the card issuer if an agreement between the institution and the card issuer provides that the cardholder

[38] Comment 2(a)(14)-3 (Regulation Z)

[39] While the credit provisions are only triggered if an issuer imposes a fee or charge for such a force-pay transaction, if there is a negative balance on the prepaid account, there is concern that account fees (*e.g.* monthly service fees and transaction fees) could be viewed as a charge for a credit feature. As such, applying credit features to overdraft services on prepaid products will only serve to inconvenience the customer as they will no longer be able to use their cards in possible force pay situations (e.g. Pay-at-the-pump, use in restaurants for tipping, etc.).

may use a line of credit with the institution to pay obligations incurred by use of a prepaid product that is a credit card.[40] Regulation Z currently includes within the definition of "card issuer," a financial institution that has an agreement with the card issuer that provides that the cardholder may use a line of credit with the financial institution to pay obligations incurred by the use of the credit card. In such case, the financial institution is the agent of the card issuer. The Bureau proposes to expand the term "agent" to include third parties who offer credit plans that are accessed by a prepaid card, for example, where credit is pulled by a prepaid card that is considered a credit card under the Proposal. Such third parties would be considered "agents" irrespective of whether the third party and card issuer have an agreement.[41]

The Associations urge the Bureau to not deem credit card issuers to be agents of prepaid issuers in circumstances where a consumer adds a credit card as a funding source to a prepaid product. In such circumstances, the credit card issuer typically will not have an agreement with the prepaid issuer, because the credit card funding transaction is processed over credit card networks with the prepaid issuer acting as the merchant. Moreover, the issuer would not know whether the credit card is being used as a funding source for a wallet that does not hold funds (where the wallet is not a "credit card" under the Proposal) or whether the credit card is being used to fund a wallet that holds funds (where the wallet is a "credit card" under the Proposal). Consequently, if the Bureau were to adopt the rule as proposed, a credit card issuer could be subject to obligations under Regulation Z without having any knowledge of the underlying facts giving rise to the obligations. Alternatively, we urge the Bureau to limit its expansion of the term "agent" to credit card issuers that have a direct agreement with the prepaid issuer so that the third-party issuer is in a position to know whether it has obligations under Regulation Z.

Effective Date

The Bureau proposes that all prepaid accounts comply with the requirements of the Electronic Funds Transfer Act and Regulation E, as modified, within nine months of publication of the Bureau's final rule in the Federal Register.[42] This nine month effective date would apply to disclosures for newly-manufactured prepaid account materials and disclosures or other information delivered to consumers online or by telephone.

The Bureau is proposing a delayed effective date for prepaid account packaging, access devices, and other printed materials that were created prior to the nine month effective date, so that immediate removal or destruction of unsold or undistributed prepaid account packaging, access devices, or other physical materials created prior to the nine month effective date would not be mandated. However, within twelve months of publication of the Bureau's final rule in the Federal Register, all prepaid accounts would have to comply fully with the requirements of the rule including its disclosure requirements, regardless of when the physical packaging, access devices, or other physical materials on which such disclosures appear were created. [43]

[40] Comment 2(a)(7)–1.ii (Regulation Z)

[41] § 1026.2(a)(7)

[42] § 1005.18(h)(1)

[43] § 1005.18(h)(2)

The Associations believe an effective date of eighteen months, at a minimum, is needed to ensure industry has enough time to comply with these numerous changes as many current platforms cannot support many of the proposed changes. The following are some concrete examples of the specific changes financial institutions would need to undertake in order to comply with the proposal:

- Disclosures - The timing of providing disclosures will need to be adjusted in order to provide them prior to acquisition of the product, especially for government benefit, payroll, and campus products. This will require revisions to current procedures, training to third-parties, enhanced monitoring of third-party practices, replacement of preprinted stock, as well as other similar changes. For electronic delivery, there will need to be reprogramming of websites and mobile apps. For retail, packaging must be developed and replaced. For customer acquisition by telephone, call center processes will need to be changed. Specifically, scripts must be updated and additional training will need to be developed and provided to employees. Packaging will need to be redesigned and inventory processes must be changed to accommodate the reduced inventory that will be needed in anticipation of more frequent disclosure changes.

- Incidence Fees – Many financial institutions would have to perform the annual analysis by way of a manual process. Significant time will be needed to evaluate and determine the feasibility of automating this annual review and to implement and test a new, automated process.

- Maintaining 18 Months of Transaction History – Currently, many of our member banks do not have programs that provide electronic access to eighteen months of account history. Although many have the information, much of it may be archived and not readily accessible. The Proposal would require system changes and a platform redesign in order to maintain and provide transaction histories for eighteen months in the manner that the proposal would require. This platform redesign would also be necessary in order to accommodate the new data fields, which include the year-to-date and previous calendar month transactions. Overall, this will be a very time consuming, complex, and difficult process, which will require significantly more than nine months to accomplish.

- Requirements to Post and Submit Agreements – Currently, there is not a process or location for the posting of account agreements on the websites of many financial institutions or for submitting them to the Bureau on a quarterly basis. This will require significant changes. In order to implement these provisions, financial institutions would be required to create a location on their website for the posting of agreements, develop a process of maintaining inventory for the agreements, create a process to update them on a quarterly basis, and develop a periodic monitoring process to ensure accuracy of these agreements. In addition, significant time and resources will be needed to train employees on these new processes.

To the extent the Bureau would like quicker implementation of certain sections, it should consider staggering the effective dates so that system-driven changes (e.g. incident fee calculations and periodic statement changes) have a longer implementation date than static changes like the submission of agreements to the Bureau's web page.

CONCLUSION

The Associations appreciate the opportunity to provide our views on the Proposal, and we look forward to working with the Bureau to develop regulations for prepaid products that provide robust consumer protections and, at the same time, maintain the substantial benefits which so many consumers have recognized with this product and promote further enhancements and competition in the industry.

We support providing prepaid customers with the same robust Regulation E protections that users of payroll cards receive today, with minor variations to ensure that these products maintain the value afforded to consumers by the very nature and design of the product, and we firmly believe a consistent regulatory standard for prepaid products would provide consumers and the industry with clarity regarding the protections that apply to all prepaid products. Accordingly it is especially important to avoid regulation of prepaid that increases costs and decreases availability.

We thank you for your consideration. Please do not hesitate to contact either of the undersigned.

Sincerely,

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