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March 23, 2015

VIA ELECTRONIC SUBMISSION

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

**Re: Comments Regarding the Consumer Financial Protection Bureau Prepaid Account Proposed Rule, CFPB-2014-0031, RIN 3170-AA22**

Dear Ms. Jackson:

The Electronic Transactions Association (“ETA”) respectfully submits this comment letter in response to the Consumer Financial Protection Bureau’s (“Bureau’s”) notice of proposed rulemaking (“NPRM”) for Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z).<sup>1</sup>

ETA is an international trade association representing more than 500 companies that offer electronic transaction processing products and services. ETA’s membership spans the breadth and scope of the payments industry and includes bank and nonbank providers of prepaid accounts, service providers that process prepaid account transactions, and other technology companies that are developing new mobile and digital payment options. Our members support the proposed rule’s goal of establishing effective consumer protections for prepaid products and services, as well as promoting consumer choice, transparency, and fairness in the marketplace.

Prepaid products provide cost-effective, convenient, and innovative payment options for millions of consumers, particularly for the approximately 68 million lower-income and unbanked consumers who may not have access to other financial services. The popularity of prepaid products—particularly general purpose reloadable (“GPR”) cards—reflects the fact that these products provide consumers with a flexible and safe method for obtaining cash from an ATM, paying bills, and making online or everyday purchases. GPR cards, for example, are available in thousands of retail stores, bank branches, and other convenient locations across the country, including many neighborhoods that are not serviced by traditional bank branches or ATMs.

Accordingly, our comments below seek to assist the Bureau in developing final rules for the prepaid industry that protect consumers; provide the industry with clear and practical guidance; promote innovation and consumer access to new products and services; and preserve the benefits consumers expect when they purchase and use prepaid products and services. The final rule should further the Bureau’s statutory mission of ensuring that “consumers may access

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<sup>1</sup> 79 Fed. Reg. 77102 (proposed Dec. 23, 2014) [hereinafter NPRM], available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-27286.pdf>.



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markets for financial products, and . . . that these markets are fair, transparent, and competitive.”<sup>2</sup> The Bureau should use this rulemaking to affirm its commitment to expanding the access that all consumers—and especially unbanked and underbanked consumers—have to cost-effective and convenient financial products and services.

Respectfully submitted,

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

Scott Talbott  
Senior Vice President of Government Affairs  
Electronic Transactions Association

Comments Enclosed

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<sup>2</sup> 12 U.S.C. § 5511 (2012).



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## **COMMENTS OF THE ELECTRONIC TRANSACTIONS ASSOCIATION**

**CFPB-2014-0031, RIN 3170-AA22**

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## COMMENTS OF THE ELECTRONIC TRANSACTIONS ASSOCIATION

### I. **The NPRM’s Definition of the Term “Prepaid Account” Has the Potential to Limit the Development of New Products and Services.**

ETA is concerned that the NPRM’s expansive, one-size-fits-all definition of the term “prepaid account” has the potential to chill innovation and stall the development of products and services. We therefore recommend that the final rule focus on conventional GPR cards as was originally proposed by the Bureau in the advanced notice of proposed rulemaking (“ANPR”).<sup>3</sup> At a minimum, the final definition of “prepaid account” should exclude digital wallets, virtual currencies, and person-to-person services, which are distinct from prepaid products.

The NPRM’s definition of “prepaid account” covers a wide-ranging group of products, including traditional plastic prepaid cards, GPR cards, payroll cards, government benefits cards (used, for example, to distribute child support and pension payments), mobile and other electronic prepaid accounts, tax refund cards, campus prepaid cards for students, peer-to-peer payment products, and new products that store virtual currencies.<sup>4</sup> The definition establishes sweeping regulations for a variety of products and services that differ substantially in form and function. In contrast to the generality of the proposed definition of “prepaid account,” the NPRM sets out highly prescriptive and exacting requirements, most of which are based on a snapshot of today’s market, and which therefore are not applicable to many of the new and developing products captured by the broad definition of “prepaid account.” Moreover, the proposed requirements are based on the Bureau’s study of prepaid products, which is inherently limited because it fails to account for how this market will grow and evolve in unanticipated ways.<sup>5</sup>

Instead, the Bureau should take an incremental approach to defining prepaid accounts so that the definition tracks and responds to a dynamic market.<sup>6</sup> Otherwise, the Bureau’s rule will potentially stifle the development of new products or limit the expansion of new technologies that have been (or will be) introduced in the market, such as digital wallets, virtual currencies, and peer-to-peer payment systems.

#### **A. Reloadable and non-reloadable products.**

We suggest that non-reloadable prepaid products not be grouped with “prepaid accounts.” The definition of prepaid accounts covers both reloadable and non-reloadable products, despite

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<sup>3</sup> 77 Fed. Reg. 30923 (May 24, 2012).

<sup>4</sup> NPRM at 77133 (recognizing that the proposed rule may “apply to virtual currency and related products”).

<sup>5</sup> See CFPB, *Study of Prepaid Account Agreements* 5–6 (Nov. 2014) (explaining that the Bureau staff reviewed prepaid product agreements available online, using previous Bureau and Financial Crimes Enforcement Network’s (“FinCEN”) studies and proposed rulemakings). Moreover, the Bureau’s study focused primarily on GPR cards. *Id.* at 8 tbl.1. This study is the basis of the Bureau’s review of “current industry practices” and “understanding of the potential costs and benefits of extending various Regulation E provisions to prepaid accounts.” NPRM at 77123.

<sup>6</sup> For example, FinCEN’s prepaid access rule excludes certain non-reloadable products under \$1,000 in value.

important differences in the functions that these products offer to consumers.<sup>7</sup> Many consumers, especially those who are unbanked, use reloadable prepaid products to replace cash in transactions. Often, reloadable prepaid products are the most effective means of making purchases and paying bills for consumers who have no bank accounts.<sup>8</sup> Reloadable products provide a critical financial service to unbanked and underbanked consumers, and accordingly, we agree that they warrant a higher level of consumer protection.

Conversely, non-reloadable prepaid products are single-use convenience products that typically serve as *one-time* cash replacements (such as when a retailer provides a refund to consumers). These products do not need the same level of consumer protections as their reloadable counterparts. Moreover, requiring the same level of protection for non-reloadable products reduces their utility because it adds time and expense to a product sold for its low cost and ease of use.

In addition, the Bureau’s “prepaid account” definition, as proposed, would include products previously excluded as “low-risk” by FinCEN’s Prepaid Access Rule. FinCEN’s rule excludes prepaid access to “funds not to exceed \$1,000 maximum value and from which not more than \$1,000 maximum value can be initially or subsequently loaded, used or withdrawn on any day through a device or vehicle.”<sup>9</sup> This FinCEN rule covers the majority of non-reloadable prepaid products available in retail stores. Moreover, many non-reloadable, under-\$1,000 prepaid products already comply with the Gift Card Rule under the CARD Act<sup>10</sup> and therefore likely have only *de minimis* fees—or no fees at all—associated with their use. And, many prepaid products are also regulated under various state money transmitter laws and regulations.<sup>11</sup>

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<sup>7</sup> *Id.* at 77313 (stating, in proposed comment 6 to Section 1005.2, that “prepaid accounts need not be reloadable by the consumer or a third party”).

<sup>8</sup> See Comments of the American Bankers Association, RIN 3170-AA22, 2 (Jul. 25, 2012) (“[GPR cards] allow people to convert their cash into a safer form that allows them to shop online where checks and cash are generally not an option.”); Comments of National Consumer Law Center, RIN 3170-AA22, 1 (Jul. 25, 2012) (“Prepaid cards are an [sic] important new financial product that holds the promise of expanding access to modern electronic transactions to millions of consumers.”); Comments of the Florida Department of Financial Services, RIN 3170-AA22, 2 (May 28, 2012) (stating that a “reason people buy [prepaid cards] is the universal acceptance of many of the cards”); Comments of the SW Center for Economic Integrity, RIN 3170-AA22, 1 (Jul. 10, 2012) (stating that “[prepaid] cards can be a very effective substitute for a checking account for people who either can’t access the banking system or won’t deal with banks due to previous bad experiences with opaque, unfair fees charged on small-balance checking accounts”).

<sup>9</sup> 76 Fed. Reg. 45403, 45408–09 (Jul. 29, 2011). The exclusion applies to prepaid access that cannot (1) be used internationally, (2) allow transfers of value from person to person within the arrangement, or (3) be reloaded from a non-depository source. *Id.*

<sup>10</sup> See 15 U.S.C. § 16931-1 (2012); 12 C.F.R. § 1005.20(a)(3)(i)–(ii) (2014).

<sup>11</sup> See, e.g., Conn. Gen. Stat. Ann. §§ 36a-595 to -610 (2015); D.C. Code Ann. §§ 26-1001 to -1026 (2015); La. Rev. Stat. Ann. §§ 6:1031-1054 (2014); Md. Code Ann., Fin. Inst. §§ 12-401 to -431 (West 2014) (Maryland Money Transmission Act); Minn. Stat. §§ 53B.01-.26 (2015) (Minnesota Money Transmitters Act); N.C. Gen. Stat. §§ 53-208.1-.30 (2014) (Money Transmitters Act); Or. Rev. Stat. Ann. §§ 717.200-905 (West 2014) (Oregon Money Transmitters Act); Tex. Fin. Code Ann. §§ 151.001–.801 (Vernon 2013) (Money Services Act); Vt. Stat. Ann. tit. 8, §§ 2500–2555 (2014) (Money Services); Va. Code Ann. §§ 6.2-1900 to -1921 (2015) (Money Order Sellers and

Applying a single rule across these diverse products will lead to consumer confusion and uncertainty amongst industry participants regarding how best to comply with overlapping regulatory regimes—issues that far outweigh any possible additional protections.

## **B. Mobile products/digital wallets.**

We suggest that mobile products and digital wallets not be grouped with “prepaid accounts.” The mobile payments market is developing and, as the Bureau acknowledges, there are significant variations in how these products work.<sup>12</sup> Rather than trying to predict the future of these products, the Bureau should take an incremental approach in the rulemaking so that it has flexibility in the future to tailor protections to fit consumers’ uses of mobile payments. It is unclear, for example, how many of the proposed rules, such as disclosures, would apply to products that use barcodes, QR displays, and other mobile and digital products and applications. Moreover, consumer behavior and expectations differ when purchasing products or services online compared to in a retail store.<sup>13</sup>

Digital wallets and other mobile products were not studied in the Bureau’s ANPR or review of the prepaid market. A rule originally intended for GPR cards and based on rules written for checking accounts and credit cards will not effectively protect consumers using digital wallets and other mobile products while still enabling development and expansion of consumer choice. The Bureau “seeks to make clear that it does not intend to extend the proposed definition of prepaid account to a product that can never store funds.”<sup>14</sup> However, for mobile wallets that store both funds and separate credit account credentials, the NPRM does not explain how mobile wallets that are treated as prepaid products would function under the proposed rules for credit account linked products.<sup>15</sup>

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Money Transmitters); W Va. Code Ann. §§ 32A-2-1 to -28 (West 2015) (Checks and Money Order Sales, Money Transmission Services, Transportation and Currency Exchange).

<sup>12</sup> NPRM at 77110.

<sup>13</sup> See FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* 1 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (“The online universe presents a rewarding and fast-paced experience for consumers, but also raises interesting—and occasionally complex—questions about the applicability of laws that were developed long before ‘dot com,’ ‘smartphone,’ and ‘social media’ became household terms.”).

<sup>14</sup> NPRM at 77129.

<sup>15</sup> See *id.* at 77111. The NPRM explains that “[a] linked line of credit is a separate line of credit that a financial institution ‘links’ to a deposit account or prepaid product to draw funds automatically where transaction made using funds from the account or product would otherwise take the balance on the account or product negative.” *Id.* at 77111 n.67. The NPRM, however, does not explore how credit “linking” relates with storing credentials. If mobile wallets are not excluded from the proposed rule, ETA requests that the Bureau clarify that a mobile wallet that stores credit card or credit account credentials is not “linked” to a credit account and should not be treated like credit cards under Regulation Z.

### **C. Virtual currencies.**

We recommend virtual currency products and services not be grouped with “prepaid accounts.” The NPRM states only that the “proposed rule may have potential application to virtual currency and related products and services” and notes that its analysis of virtual currencies is ongoing.<sup>16</sup> Virtual currency products and services were not addressed in the Bureau’s ANPR or subject to analysis in the Bureau’s prepaid study. These products and services are fundamentally different from GPR cards and similar prepaid products.<sup>17</sup> Moreover, virtual currencies are in the earliest stage of development and lack widespread consumer adoption. The Bureau should wait until it (and the numerous other state and federal agencies focusing on virtual currencies) has more fully analyzed virtual currencies before it makes these products and services subject to regulations designed for products used in traditional prepaid access.

### **D. Person-to-person transfers.**

We suggest that person-to-person (“P2P”) products and services not be grouped with “prepaid accounts.” These products are often used for consumer-to-consumer transactions and are different from GPR cards where most transactions directly include a business or financial institution.<sup>18</sup> In addition, P2P products and services operate on a different technical basis, exchange different types of information, and involve different methods by which consumers obtain and activate P2P services compared to GPR cards.<sup>19</sup>

For these reasons, P2P products do not present the same risks to consumers; therefore, it makes little sense to impose sweeping regulations designed for the GPR market on these developing products and services. The NPRM nonetheless subjects prepaid products offering P2P services to the proposed rule, when similar products without a P2P feature would be exempt. The proposed rule would cover P2P transfers “even if [the account] is neither redeemable upon presentation at multiple, unaffiliated merchants for goods or services, nor usable at ATMs.”<sup>20</sup> Thus, the rule imposes a heightened standard on P2P by discarding the “general commerce” limiting factor that excludes other prepaid accounts from the rule. Rather than seek to combine P2P products with GPR cards and other prepaid accounts through an omnibus rule, the Bureau should provide specific, focused protections for well-established prepaid products and allow other areas to develop before imposing regulations.

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<sup>16</sup> *Id.* at 77121, 77133.

<sup>17</sup> *See, e.g.,* FinCEN, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, FIN-2013-G001, 6 (Mar. 18, 2013) (defining virtual currency as “a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency”).

<sup>18</sup> NPRM at 77130.

<sup>19</sup> *See* Oz Shy, *Person-to-Person Electronic Funds Transfers: Recent Developments and Policy Issues*, Fed. Reserve Bank of Boston, No. 10-1, 5-6 & tbl.1 (Mar. 2, 2010).

<sup>20</sup> NPRM at 77130.

## **II. ETA Supports Disclosure Requirements but Recommends that Certain Requirements be Narrowed.**

Although ETA supports strong disclosure requirements for prepaid accounts, we are concerned that the proposed short form disclosure requirement, as drafted, will create complex and unwieldy disclosures that are unlikely to help consumers and may impede their understanding of prepaid products. The proposed disclosures are inflexible and risk obscuring critical information. For example, the NPRM requires that the short form disclosure include over a dozen specific and distinct disclosures, regardless of the type or uses of the specific account. These disclosures would need to be listed “even when a particular disclosure is not applicable to a specific prepaid account product,” likely resulting in consumer confusion.<sup>21</sup> As another example, the NPRM requires that the long form disclosure state the total number of fees other than those disclosed on the short form,<sup>22</sup> which could lead consumers to think that a product with a higher number of available functions (with attendant fees) is more expensive. Such a requirement, which the Bureau notes is a “focal point”<sup>23</sup> for consumers, could easily mislead consumers as to the actual cost of a prepaid product.

The Bureau should narrow and simplify the proposed short form disclosures so that important information is provided in a practical form that consumers will notice, understand, and use to guide their purchasing decisions. In addition, the NPRM’s proposed short form disclosures should account for the various types of prepaid products. Finally, the Bureau should revise the “highest fee” disclosure requirement, eliminate the incidence-based fee disclosure requirements and expand the pre-acquisition disclosure exemptions for prepaid products offered in retail stores.

### **A. The Final Rule Should Narrow the Scope of the Short Form Disclosure.**

To be most effective in conveying critical information that will benefit consumers, the short form disclosure should be streamlined to reduce confusing, non-applicable, or excessive information. The NPRM acknowledges that consumers can become overwhelmed when provided with too much information.<sup>24</sup> Further, Bureau testing shows that consumers understand that short form disclosures only include a subset of potential fee information.<sup>25</sup> We encourage the Bureau to reconsider the information required in the short form disclosures to ensure that consumers can readily access and understand the disclosures.

For example, if overdraft services are not offered, the short form disclosure should not require a statement that overdraft fees may apply, as this will create consumer confusion.<sup>26</sup>

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<sup>21</sup> *Id.* at 77157.

<sup>22</sup> *See id.* at 77263.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 77150.

<sup>25</sup> *Id.* at 77157.

<sup>26</sup> *See id.* at 77311 (A-10(f) – Model Form for Short Form Disclosures for Prepaid Accounts With Multiple Service Plans).

Information regarding overdraft services should be provided separately to consumers who sign up for such a service. Similarly, other fees that are not applicable to a product should not be included in the disclosure since the small packaging size and limited display space for retail products greatly constrains the information that issuers are able to convey. Most physical packaging for prepaid cards measures 4 x 5.25 inches and the NPRM's proposed short form disclosures would take up a significant portion of the space on the packaging materials. In addition to information and disclosures, some current packaging incorporates physical security features to protect consumers. The disclosure requirements currently proposed would reduce or eliminate these security features. Prepaid issuers should have flexibility to use the limited packaging space available to provide consumers with information and security features relevant to the specific product.

Prepaid disclosures should be purposeful in meeting two goals. First, the disclosures must be adequate, clear, and allow consumers to compare similar products. Secondly, the disclosures must engage the consumer—they must give consumers an easily discerned reason to read the disclosures and be drafted so that consumers can appreciate immediately why they are important. Yet we are concerned that the Bureau's proposal will foster less consumer involvement in their financial activities—exactly the reverse of ETA's and the Bureau's objective.

Accordingly, ETA recommends a focused and flexible short form disclosure. The fact that consumers will often receive long form disclosures before acquiring a prepaid account means that the short form disclosures can be narrowed to focus on the most important information. The short form disclosures should provide information that is most relevant to consumers in determining if a specific prepaid product is right for them, and that allows for quick and easy comparisons with other similar prepaid products.

## **B. The Final Rule Needs Tailored Disclosure Requirements Appropriate for Diverse Prepaid Products.**

To further consumer understanding and engagement, ETA recommends that the Bureau remove or reduce disclosure requirements for products that do not need the same type or level of disclosures. As discussed above, the NPRM's definition of "prepaid account" would cover a wide array of products and services, many of which offer different functions, utilize different mechanisms, and facilitate different consumer uses. A single disclosure requirement cannot effectively cover the number of products encompassed by the proposed rule without overwhelming consumers; this is one of the reasons why ETA suggests that the Bureau restructure its definition of "prepaid account."

Although ETA applauds the Bureau's focus on transparency in the prepaid market, the proposed fee disclosures may not capture how some novel prepaid product fee structures operate. For example, the Bureau appears to have anticipated two types of multiple service plans: monthly fees and pay-as-you-go plans. The NPRM does not appear to accommodate a reloadable prepaid card offered by a retailer for use with a wide variety of merchants, where the card is available to all consumers, but offers lower fees for that retailer's customers. In this

situation, the fees are not lower based on “how and where the card is used”<sup>27</sup> as described in the NPRM, but on other factors.

Multi-tier disclosures are an important aspect of the proposed disclosure regime and the NPRM should be modified to accommodate loyalty programs and other innovative fee structures. The waiver of several fees for customers who are part of a loyalty program is a critical disclosure that the short form and long form disclosures should accommodate in order to attract consumers, and equally important, not to mislead consumers. The disclosure requirements should allow companies to explain their products accurately to consumers so that consumers fully understand and benefit from the products.

The Bureau has not sufficiently studied the differences between the impact of physical, mobile, and online disclosures. The NPRM’s cost-benefit analysis does not appear to have studied this issue or calculated the potential impact of the proposed rules in the digital market. Cumbersome and over-inclusive disclosures can function as a barrier to consumer entry into the prepaid product market, an effect that is most strongly evident in online purchases. The Bureau should examine its proposed disclosure requirements to ensure that a consumer’s ability to obtain and understand—and use appropriately—prepaid products is not limited based on the consumer’s chosen method of access.

The NPRM states that disclosures are meant to facilitate consumer comparison shopping.<sup>28</sup> We support this purpose. However, the proposal would require the same fees to be disclosed across all prepaid products, regardless of whether a specific product even offers the feature that would engender the fee.<sup>29</sup> For example, a digital wallet that provides no ATM withdrawal capability would, under the proposal, be required to disclose an ATM Withdrawal fee as \$0 or N/A, or something similar. Requiring disclosures of fees that do not or cannot apply to a specific financial product will cause consumer confusion and limit the effectiveness of the disclosures in allowing for comparison shopping. Moreover, it is unlikely that consumers would attempt to compare products as different as a traditional GPR card and a digital wallet or P2P service—thus, there is no need for the comparison function of the proposed disclosures in this context. Rather, the Bureau should exclude products for which disclosures are not relevant, or provide for greater flexibility within the disclosure requirement to ensure that consumers have access to clear and accurate information.

### **C. The Final Rule Should Revise the “Highest Fee” Disclosure Requirement.**

ETA supports disclosures that allow consumers quickly and accurately to assess a prepaid product. For a tiered fee structure, the NPRM would require that prepaid products disclose the highest possible fee, and inform consumers through a caveat that the actual fees may be lower.<sup>30</sup>

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<sup>27</sup> See *id.* at 77307 (A-10(a) – Model Form for Short Form Disclosures for Government Benefit Accounts).

<sup>28</sup> See *id.* at 77147–48.

<sup>29</sup> *Id.* at 77149 (stating that the short form disclosure “would set forth fees that must be disclosed for all prepaid account products, even if such fees are \$0 or if they relate to features not offered for a particular prepaid account product.”).

<sup>30</sup> *Id.* at 77157–58, 77167–68, 77261, 77264.

ETA is concerned that this disclosure method would confuse consumers because the highest possible fee is often not the fee that most consumers would pay. For example, the standard fee for some prepaid product services or features may be higher if the consumer elects to expedite the services. Companies would be forced to reduce or limit tiered functionalities or risk confusing consumers as to the actual fee for a specific feature.

Rather than disclosing the highest possible fee, ETA recommends that the Bureau consider requiring the disclosure of the standard fee, with a notation that the fee could be higher. Another option would be for the Bureau to require a fee range that encompasses the different possible fees within a category. These types of fee disclosures would likely provide more accurate information to the consumer. Consumers use fee information not only to compare prepaid products, but also to evaluate whether a prepaid product is a good fit for their financial needs. Thus, the fees disclosed should, as much as possible, indicate to consumers what they are most likely to pay.

#### **D. The Final Rule Should Eliminate the Incidence-based Fee Disclosures.**

ETA supports many of the fee disclosures but believes that the incidence-based fee disclosure requirements are excessive, do not foster product development, and do not encourage consumer engagement. If a particular incidence-based fee is disclosed on one package, but is not disclosed on other packages of similar products, the consumer might reasonably, but perhaps erroneously, assume that the incidence-based fee disclosed on the first product is not charged on the other products. In actuality, however, the same or even higher fee might be charged on the other products. Incidence-based fees will vary based on consumer usage behaviors and patterns. As the Bureau notes, the incidence fees disclosed on the *same* prepaid product may differ between the online and retail versions.<sup>31</sup> This directly contravenes the Bureau’s assertion that “standardizing pre-acquisition disclosures across all possible acquisition channels will make it easier for consumers to compare different types of prepaid account products.”<sup>32</sup> The NPRM also notes that products disclosing outdated incidence fees may still be sold, alongside products with the updated fee disclosures.<sup>33</sup> Given that consumer usage of prepaid accounts has changed rapidly and will continue to evolve, tying incidence fees to consumer use will result in disclosures that change too often to be of any use to consumers.

Further, the NPRM would require a 12-month study of the usage patterns of each prepaid product that a company offers.<sup>34</sup> This requirement would be ongoing, requiring the review of every prepaid product offered, across all consumers, every year.<sup>35</sup> This substantial, ongoing

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<sup>31</sup> *Id.* at 77149 & n.249.

<sup>32</sup> *Id.* at 77149.

<sup>33</sup> *Id.* at 77161.

<sup>34</sup> *Id.* at 77160–62.

<sup>35</sup> *Id.* (“[I]f a financial institution offers more than one prepaid account product, it would have to consider a consumers’ fee incidence for each product separately and not consolidate the fee incidence across all of its prepaid account products.”).

regulatory burden would forestall the development of new prepaid products and fee structures that respond to emerging consumer needs and could eliminate many or all of the prepaid products that do not earn enough revenue to justify the regulatory cost this proposal would require. Companies would potentially avoid making changes to products or testing innovations because of a fear that any changes will impact incidence-based fees and require changes to packaging and marketing materials.

The benefit of this proposal, which the Bureau explains would reduce evasion of the disclosure requirements,<sup>36</sup> constitutes an unnecessary preemptive measure that is far outweighed by its cost to consumers. The incidence-based fee requirement should be removed or modified to allow companies to create clear and informative disclosures for consumers. As the Bureau suggests,<sup>37</sup> a minimum threshold for incidence-based fee disclosure revisions should be set to stabilize prepaid account disclosures and ensure consistency.

#### **E. The Final Rule Needs a Broader Retail Store Exception for Pre-Acquisition Disclosures.**

The NPRM proposes that, in retail stores, financial institutions may provide the proposed long form disclosure *after* acquisition if the product is inside a package, the short form disclosures are provided externally on the package, and the financial institution’s contact information is contained in the short form disclosure.<sup>38</sup> The NPRM, however, excludes retail stores that are deemed to be “agents” of a financial institution because they offer “one financial institution’s prepaid account products exclusively” (the “exclusive retailer” limitation). The NPRM does not provide guidance on what it means for a retail establishment to be an “agent” or to offer “one financial institution’s prepaid account products exclusively.” However, many state money transmitter licensing laws require bank issuers to appoint their retail sellers as the bank’s “agents.” Therefore, it is possible no retail store would qualify for the retail store exception as “agent” is currently constructed under the NPRM. Further, the NPRM does not state whether the limitation requires a written exclusivity restriction, or applies to all situations where, in practice, a retailer sells only one prepaid product. For example, many retailers may only have room for one product (such as small gas stations). Many small, single-store retailers may only have one option of product available to them. Some retailers may be newly opened and only have one product in store. Some retailers may attempt to stock multiple products but only receive a single

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<sup>36</sup> *Id.* at 77160–61.

<sup>37</sup> *Id.* (requesting comment on a “*de minimis* threshold below which the changes to the incidence ranking would not require form revisions”).

<sup>38</sup> *See id.* at 77155 (clarifying that “a retail store that offers one financial institution’s prepaid account products exclusively would be considered an *agent* of the financial institution, and, thus, both the short form and the long form disclosure must be provided pre-acquisition . . .”).

one. ETA recommends that the Bureau revise or eliminate the exclusivity limitation to the retail store exception to the pre-acquisition disclosure requirement.<sup>39</sup>

The retail store exception recognizes the difficulty in fitting the proposed short form disclosures onto current prepaid product packaging. “J-Hooks” are the most common way to display current prepaid cards, and are commonly 4 x 5.25 inches in size. The NPRM’s proposed short form disclosures would take up a significant portion of the packaging materials. The Bureau acknowledges this burden but underestimates the actual impact on product marketing.<sup>40</sup> Including long form disclosures would present an additional burden. The long form disclosures would be burdensome to retailers regardless of whether that retailer has a single product or multiple products in its store. Given the need for the retail exception and the lack of clarity regarding its limitations, the Bureau should eliminate the “exclusive retailer” limitation. Alternatively, the Bureau should restrict the “exclusive retailer” limitation to only those retailers that are providing a GPR card program in connection with some other financial service and provide the card in a face-to-face setting where providing long form disclosures pre-acquisition would not be overly burdensome (*e.g.*, payday, check cashing, tax preparation, *etc.*).

### **III. The Bureau Should Reconsider the Ramifications of Requiring Prepaid Issuers to Post Agreements Online and with the Bureau.**

We request that the Bureau remove the proposed rule’s requirement that prepaid account agreements be posted online. The myriad types of prepaid products means that posting agreements online would present an overwhelming amount of information that would not be useful to consumers seeking to compare these products.<sup>41</sup> Some products have numerous sub-types, which carry different agreements. ETA estimates that some prepaid issuers would be required to post thousands of agreements under the proposed rule. There is a wide variation in prepaid products and services.<sup>42</sup> As the Bureau acknowledges in the NPRM, consumers can become overwhelmed when provided too much information.<sup>43</sup> Moreover, consumers will be confronted with agreements associated with prepaid products that look similar but have different

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<sup>39</sup> See generally *id.* at 77153–55.

<sup>40</sup> See *id.*

<sup>41</sup> The NPRM makes clear that online posting of prepaid account agreements is meant to facilitate consumer comparisons of different products. See *id.* at 77191 (“[T]he Bureau’s posting of those credit card agreements on its website may, among other things, enable consumers to more effectively compare credit cards . . . . The Bureau is proposing § 1005.19 for the same reasons with respect to prepaid accounts.”).

<sup>42</sup> The NPRM notes that the proposal to require public posting of agreements is akin to the CARD Act’s requirements for open-ended credit cards, see *id.* at 77198–99, but this comparison is flawed. Prepaid products often do not have credit features and are not easily comparable based on factors such as interest rates and credit limits. Because of these differences, making these agreements publically available will have a larger impact on companies offering prepaid products than it does on credit card companies.

<sup>43</sup> *Id.* at 77150.

fee amounts or structures. This confusion poses the danger that consumers will develop mistaken beliefs about how a specific prepaid product functions or the extent and amount of fees.

Posting account agreements is also duplicative of the proposed disclosures because consumers already can compare products through the long form and short form disclosures. Since, as the NPRM recognizes, substantially similar agreements may be offered with different fees, consumers viewing a prepaid product agreement on an issuer's website or the Bureau's web page will not always be able to make accurate comparisons regarding the products available to them.<sup>44</sup> Online posting of prepaid account agreements will not facilitate consumers' analysis of the "costs, benefits, and risks" associated with accounts<sup>45</sup> because of the wide variety and degree of variation in prepaid products.

The prepaid market is dynamic and competitive, which benefits consumers. The requirement to post agreements online will inhibit innovation and the incentive for companies to develop and deploy novel and evolving prepaid products, which in turn will reduce consumer choice. The public posting of account agreements would also reduce the value of novel product types. Competitors would quickly and easily be able to replicate each other's products, reducing competition. This would slow the development of the prepaid market, which is focused on providing new and distinct products. The Bureau's requirement to post agreements online would thus effectively create a standard form agreement, in contrast to the highly adaptable products that are currently available. The Bureau should not dictate the form of agreements, which may chill innovation and product development.<sup>46</sup>

The rationale that agreements should be posted to help the Bureau monitor the market<sup>47</sup> seems to be a heavy-handed approach for little to no benefit and risks a high degree of consumer confusion. The Bureau has more effective monitoring tools at its disposal, such as its consumer complaint database and its supervisory authority. These tools obviate the need to maintain a database of all prepaid product agreements. Moreover, the Bureau has recently proposed suspending its credit card agreement posting system.<sup>48</sup> In its proposal, the Bureau states that it "is not aware of any significant costs to consumers that might arise from the temporary suspension of the quarterly submission requirement and the absence of these agreements on the [Bureau]'s Web site [sic]."<sup>49</sup> The suspension of the program suggests that the significant operational burdens for both the Bureau and industry outweigh any consumer benefits that might derive from posting the agreements.

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<sup>44</sup> See *id.* at 77199 (noting that posted agreements would need to provide all fee variations or a range of possible fees).

<sup>45</sup> *Id.* at 77191.

<sup>46</sup> See *id.* at 77198–99 (setting out the form and content of agreements submitted to the Bureau). Dictating the form of agreements submitted to the Bureau would necessarily dictate the form all prepaid product agreements take.

<sup>47</sup> *Id.*

<sup>48</sup> See Submission of Credit Card Agreements under the Truth in Lending Act (Regulation Z), 80 Fed. Reg. 10417 (Feb. 26, 2015).

<sup>49</sup> *Id.* at 10420.

#### **IV. The Final Rule Should Protect Consumer Choice and Access to Credit.**

##### **A. The Final Rule Has the Potential to Limit Consumer Choice by Making Overdraft Inconvenient and Cost Prohibitive.**

The final rule would subject prepaid products that offer overdraft features to the requirements of Regulation Z. This approach is at odds with the existing regulatory structure for similar overdraft features on products offered by banks on ATM cards and debit cards accessing a customer's deposit account, which allow for an optional, opt-in approach regulated under Regulation E.

We are concerned that the proposed rules on overdraft protections and similar credit features will limit consumer access to these services. Such programs and features are often beneficial to consumers who cannot easily (or at all) access credit and have short-term liquidity needs. Taken together, the various restrictions on overdraft and credit, including compulsory use, ability to pay, offsets, time restrictions, and rate cap may discourage prepaid issuers from offering these services to consumers.

In this regard, we note that the Bureau's cost-benefit analysis for the proposed rule does not include any data or studies addressing the potential impact of the proposed rules on consumer access to credit and overdraft services. We encourage the Bureau to analyze and address more fully the potential effect of increased regulatory burdens on the capability of companies to offer affordable and accessible products and services that meet the short-term liquidity needs of consumers. Any unanticipated consequences from the final rule could harm consumers by reducing their field of choice in the market and denying them access to financial services.

Consumer comments on the NPRM indicate that many consumers value the option to have overdraft protection.<sup>50</sup> The Bureau's Fall 2014 Semi-Annual Report indicates that only one percent of the consumers' prepaid card complaints related to overdraft features.<sup>51</sup> The proposed rules therefore appear at odds with the lack of consumer complaints concerning overdraft services for prepaid products and the clear expression of need by many consumers for this feature. Consumers choose to opt-in to overdraft plans when they need or desire stability. Many of these consumers use prepaid products to avoid the higher costs associated with traditional bank accounts or because they cannot access traditional banking services. ETA encourages the Bureau to consider an opt-in approach to overdraft services consistent with existing rules and guidance on similar bank products.

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<sup>50</sup> See, e.g., Comments of Scott Kissinger, RIN 3170-AA22 (Mar. 10, 2015) ("I think the customer has a right to the overdraft protection if they desire. I [sic] really should be up to us."); Comments of Monica Matheny, RIN 3170-AA22 (Mar. 10, 2015) ("I choose to have the right to have the overdraft protection. It helps me and my family when things are sometimes short."); Comments of Mary Hicks, RIN 3170-AA22 (Mar. 9, 2015) ("I chose to have Overdraft Protection on my prepaid card. I believe I should have the right to choose to use services like Overdraft Protection.").

<sup>51</sup> CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 43 fig.12 (Fall 2014).

## **B. The Final Rule Should Revise Its Treatment of Provisional Credit and Error Resolution to Eliminate Additional Costs Stemming from Fraud.**

ETA supports processes and procedures that protect consumers from theft and fraud. However, consumer protections that may inadvertently facilitate fraud on companies providing prepaid products and services reduce the overall effectiveness of these products and increase the cost of protecting good faith consumers.

Prepaid products are, by their nature, highly anonymous. Many types of prepaid products are available for purchase with cash, with no required identification or other information about the individual consumer. The NPRM proposes to apply “limited liability provisions and error resolution provisions, including provisional credit, to all prepaid products.”<sup>52</sup> Provisional credit requires a company to restore a consumer’s funds temporarily as the company investigates the consumer’s claim; if a true error or fraud has occurred, the funds are permanently restored. However, given the difficulties in investigating error claims and the short time in which to do so,<sup>53</sup> unscrupulous account holders would be able to withdraw funds from the prepaid account and then falsely claim that an error has occurred, thereby obtaining provisional credit. In this situation, the anonymous user could drain the provisionally-credited funds and discard the prepaid product.

ETA supports the Bureau’s proposal not to apply the limited liability and error resolution requirements of Regulation E to unregistered, unverified prepaid accounts.<sup>54</sup> However, under the proposed rule, a consumer may provide identification and verification information after an alleged error has occurred.<sup>55</sup> To help companies combat fraud and offer effective consumer protections, ETA suggests that provisional credit for prepaid products should not be required for prepaid accounts that are not registered or verified at the time the error is reported. Further, ETA requests that the Bureau extend the time allowed for investigating error and fraudulent charge claims on all prepaid products.

## **C. The Final Rule Needs Safe Harbors or Other Practical Limitations for Forced-Pay Transactions and Other Transactions Beyond the Control of Prepaid Issuers.**

The Bureau’s proposed rules for overdraft would be triggered whenever a merchant initiates a “forced-pay transaction,” such as when a network is offline and uses a stand-in balance or when a merchant does not seek authorization for the full amount of a transaction. These types of inadvertent overdrafts are common and accepted practices in many situations, such as, for

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<sup>52</sup> NPRM at 77181.

<sup>53</sup> *Id.* at 77274 (“If unable to complete their investigation within the required timeframe (generally 10 business days), covered financial institutions would be compelled to extend provisional credit . . .”).

<sup>54</sup> *Id.* at 77181. The NPRM proposes to exempt “unverified prepaid accounts” from the limited liability and error resolution requirements. *Id.*

<sup>55</sup> *Id.* at 77185; *see also id.* at 77243 (“If a consumer asserts an error on an unregistered account, the financial institution must collect identifying information and verify the consumer’s identity, and then investigate the error.”).

example, when a restaurant submits one amount for authorization, but then uses a higher amount (to include the customer's gratuity) for settlement. Or when a gas station submits a charge for authorization, and then submits the entire purchase price for settlement. Under the current payment card network rules, card issuers, including issuers of branded prepaid cards, *must* approve the settlement. These types of transactions may trigger the Bureau's proposed overdraft and credit rules even though the prepaid issuer has no control over the transactions and may have no intent to provide overdraft or similar services and may ultimately take a loss on the transactions if chargeback rights are not available.

The proposed rule includes within its definition of "finance charge" the per-transaction fee charged under "pay-as-you-go" models, even if that transaction fee is charged on a transaction that happens to take the account negative during a forced-pay situation.<sup>56</sup> The NPRM states that "any service, transaction, activity, or carrying charges imposed on the credit account, and any such charges imposed on a prepaid account if that charge is related to an extension of credit, carrying a credit balance, or credit availability, generally would be a finance charge."<sup>57</sup> The NPRM further notes that:

Such charges would include periodic participation fees for the credit plan, as well as transaction charges imposed in connection with a credit extension. For example, assume 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 would be 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.*<sup>58</sup>

Thus, in a forced-pay transaction, when a merchant forces a transaction negative, a pay-as-you-go fee and other standard fees could become a "finance charge." The issuer, however, does not charge the fee because the account went negative, but rather the fee is a customary charge applied to every transaction. The proposed definition of "finance charge" would apply to this type of merchant-initiated transaction and result in a product falling under Regulation Z's credit-oriented protections when the issuer has no intention of offering credit features. It is also unclear whether the issuer would find itself in violation of the proposed rule's disclosure requirements for failing to disclose potential credit charges, or the requirement that the issuer post accurate agreements on the Bureau website.

If finalized, this definition of "finance charge" coupled with forced-pay transactions would result in every "pay-as-you-go" program having to make fundamental changes to ensure that a normal transaction fee is not charged if the merchant forces the transaction negative. Such

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<sup>56</sup> Pay-as-you-go" per-transaction fees represent one example. There are other credit-like situations where whether a fee is a "finance charge" depends on back-end processing, not on any decision the consumer makes.

<sup>57</sup> *Id.* at 77214.

<sup>58</sup> *Id.* (emphasis added).

a situation would be unfair since the prepaid issuer would forgo its traditional revenue and could lose the cost of the transaction if the issuer does not have chargeback rights. The current definition of “finance charge” also creates a competitive disadvantage for “pay-as-you-go” models vs. monthly fee models since monthly fees charged during a month where the balance was or is negative would *not* be considered a “finance charge.”<sup>59</sup> ETA suggests that the Bureau issue a safe harbor, exemption, or other guidance clarifying that a prepaid issuer does not inadvertently trigger the credit rules because of events that occur outside of the issuer’s control.

## **V. The Final Rule Should Provide the Industry with Additional Time to Implement the Proposed Sweeping Changes.**

ETA and its members are concerned that the NPRM does not provide prepaid account issuers, packaging manufacturers, and service providers sufficient time to prepare for and implement the sweeping changes proposed in the rule. Addressing the many practical and logistical challenges presented by the proposed rule will require more than the 9 months that the NPRM currently contemplates. The following are just a few of the practical and logistical challenges presented by the NPRM that will require substantial time and effort to implement:

- It is unclear whether the disclosures can be incorporated into current product packaging or how such disclosures should be disclosed online or in the mobile space. In the mobile space, for example, it will likely take prepaid issuers and their service providers months to develop disclosure formats that satisfy the Bureau’s requirements and the practical limitations associated with mobile displays.
- The new disclosure requirements will require prepaid issuers to revise internal workflows, approve new compliant products and packaging, work with manufacturers to build inventory, and advertise and market the new products. At the same time, issuers and their service providers will need to update computer systems and software to ensure that the required disclosures are available online, incorporated into telephone scripts, *etc.*
- The new regulations will require issuers to work with counsel to revise agreements to account for the new regulations.
- The proposed rules on error resolution and fraud protection may require some prepaid issuers to hire and train additional staff, which will require significant time and effort.
- Issuers that decide to offer overdraft and similar credit features will need to review their products and services for compliance with the Bureau’s detailed regulations relating to compulsory use, credit issuance, ability to repay, and fee limitations.

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<sup>59</sup> *See id.* (“[T]he term finance charge does not include transaction fees imposed on the prepaid account where the consumer is only withdrawing funds from the prepaid account, fees for opening or holding the prepaid account, and other fees, such as cash reload fees and balance inquiry fees, that are not imposed on the prepaid account because the consumer engaged in a transaction that is funded in whole or in part by credit . . .”).

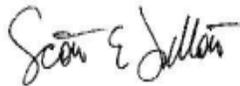
- The prepaid industry will need time to work with banks, lenders, and other related industries to coordinate in developing compliant products and services.
- For physical products, the limited nature of the manufacturing capabilities required to produce prepaid cards will create a bottleneck as companies all try to update their products at the same time.

Given these challenges, ETA respectfully suggests that a more reasonable approach would be to provide an 18-month implementation timeline. This expanded timeline will provide the prepaid industry with sufficient time to comply with the rule without sacrificing quality or consumer access to products and services.

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ETA appreciates the opportunity to comment on the Bureau's proposed rulemaking for prepaid accounts. Prepaid accounts provide secure, cost-effective, and flexible payment options for consumers, businesses, and federal, state, and local governments. We look forward to working with the Bureau to develop practical rules that promote consumer protection without limiting the ability of consumers to access these valuable products or increasing the cost of credit, especially for lower-income and unbanked consumers.

Respectfully submitted,



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