

## financial services lawflash

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## CFPB Proposes Sweeping New Regulations for Prepaid Products

*CFPB proposes to regulate a wide variety of prepaid access devices (card-based, electronic, or virtual) as equivalent to credit cards.*

The Consumer Financial Protection Bureau (CFPB) recently proposed extensive new regulations (the Proposed Rule)<sup>1</sup> for prepaid products, including stored value cards, mobile payment wallets, payroll cards, certain government benefit cards, and other payment products. The Proposed Rule will be open for public comment for 90 days after its publication in the *Federal Register*, which is expected to occur shortly.

Over the last several years, credit cards, gift cards, stored value cards, and other prepaid access devices have been subjected to increased regulatory interest from a number of the financial regulatory agencies (including the Financial Crimes Enforcement Network, the Federal Reserve, and the Office of the Comptroller of the Currency) as well as the focus of legislative interest (leading to, among other things, the passage of the Credit CARD Act of 2009). This increased regulatory interest is, in part, a reflection of the growing popularity of prepaid access, gift cards, and stored value cards, particularly among the roughly 28% of U.S. households that are unbanked or underbanked. The Proposed Rule incorporates comments received and outreach performed by the CFPB in response to its 2012 Advance Notice of Proposed Rulemaking (ANPR) that sought comment, data, and information from the public about general purpose reloadable prepaid cards.<sup>2</sup> The CFPB received more than 200 comments to the ANPR and conducted industry and consumer outreach sessions to gather information to incorporate into the Proposed Rule.

At almost 900 pages, the Proposed Rule establishes comprehensive regulation of prepaid access and stored value by essentially extending the consumer protections that apply to credit cards to every “prepaid account.” Specifically, the Proposed Rule extends the requirements of Regulation E (which implements the Electronic Funds Transfer Act)<sup>3</sup> and Regulation Z (which implements the Truth in Lending Act)<sup>4</sup> to “prepaid accounts.”

The Proposed Rule defines “prepaid account” as the following:

a “card, code, or other device . . . which is established primarily for personal, family, or household purposes and which: (A) is either issued on a prepaid basis to a consumer in a specified amount or not issued on a prepaid basis but capable of being loaded with funds thereafter; [and] (B) is redeemable upon presentation at multiple, unaffiliated merchants for goods or services, useable at automated teller machines, or usable for person-to-person transfers.”

The definition of prepaid account is intended to capture mobile wallets, Internet-based payment systems, other similar Web-based or mobile payment mechanisms, and virtual currencies. However, the definition of prepaid

1. Until publication in the *Federal Register*, the Proposed Rule is available at [http://files.consumerfinance.gov/f/201411\\_cfpb\\_regulations\\_prepaid-nprm.pdf](http://files.consumerfinance.gov/f/201411_cfpb_regulations_prepaid-nprm.pdf).

2. 77 Fed. Reg. 30923 (May 24, 2012).

3. 12 C.F.R. Part 1005 *et seq.*

4. 12 C.F.R. Part 1026 *et seq.*

account specifically excludes “gift certificates;” “store gift cards;” “loyalty, award, or promotional gift cards;” and general-use prepaid cards that are marketed and labeled as a gift card or gift certificate. The CFPB intends for the definition of prepaid account to allow for flexibility to capture emerging technology-based payment systems.

Under the Proposed Rule, financial institutions issuing prepaid accounts would have to provide periodic statements or make account information easily available online. Furthermore, the error resolution and customer liability limits of Regulation E would apply to prepaid accounts, giving the consumer the ability to contest erroneous or fraudulent charges and have limited liability for errors, fraud, or a lost or stolen prepaid account if the error, fraud, or loss is promptly reported within the time period established by Regulation E.

The Proposed Rule also establishes certain disclosures that will be required to be made available to consumers prior to establishing or purchasing a prepaid account. The disclosures are intended to clarify to consumers the various fees and costs associated with the “prepaid account” and to allow consumers to comparison shop among prepaid account products. The Proposed Rule contains model forms of disclosures (a short form and a long form). Issuers of prepaid accounts would also be required to post the account agreements on their websites and submit the agreements to the CFPB for posting on a public website maintained by the CFPB. The CFPB has drafted sample disclosures, which are available for comment along with the Proposed Rule itself.

Additionally, the Proposed Rule would extend the protections afforded to credit card products under Regulation Z (many of which were enacted by the Credit CARD Act of 2009) to any overdraft line of credit or other line of credit associated with a prepaid account. These protections would include (1) a requirement that the issuer of prepaid accounts ensure that the consumer has the ability to repay the debt before offering the line of credit (similar to the ability to pay assessment required for credit card issuers); (2) providing the consumer with the same monthly billing statement that is provided to a credit card consumer; (3) giving consumers at least 21 days to repay the debt before they are charged a late fee, and all late fees must be reasonable and proportional; and (4) a limit on the total fees that may be charged during the first year to no more than 25% of the credit limit. The Proposed Rule would also impose additional obligations on issuers of prepaid accounts, beyond that required of credit card issuers. Issuers of prepaid accounts would have to wait 30 days after a consumer registers a prepaid account before formally offering credit to the consumer. The issuer would also be prohibited from using funds loaded into a prepaid account to pay the outstanding credit balance, unless the consumer affirmatively opts in to such repayment.

## **Potential Impact of the Proposed Rule**

The scope of the Proposed Rule is broader than had been expected and captures mobile wallets and other forms of virtual currency unconnected to credit cards that have not previously been subject to Regulation Z and, in the case of virtual currency, not subject to any substantive federal regulation. The expansion of Regulation Z credit card protections to prepaid cards was not unexpected, particularly because consumers often do not distinguish between gift cards, stored value cards, credit cards, and prepaid accounts and expect the same protections from each product. The Proposed Rule, if enacted as drafted, will almost certainly increase compliance costs for issuers of prepaid accounts (even mobile wallets), mainly because of the requirements for printed account statements or online account balance access and the two required disclosures (short form and long form). Whether these additional consumer disclosure requirements end up being incorporated in the final rule remains to be seen and will depend, in part, on industry and consumer input and comment on the Proposed Rule. At the same time, the Proposed Rule, when finalized, may give clearer guidance to issuers of prepaid accounts regarding regulatory expectations. This guidance may also be useful in light of the CFPB’s enforcement authority to penalize unfair, deceptive, or abusive acts or practices.

Given the scope of the Proposed Rule, we expect that it will receive substantial input and comment from the financial services industry, consumer groups, and other interested constituencies. It remains to be seen how soon the CFPB can assemble a final rule, which will almost assuredly establish final comprehensive federal regulation of prepaid and stored value cards.

# Morgan Lewis

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