



Network Branded Prepaid Card Association

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August 4, 2017

Filed electronically at FederalRegisterComments@cfpb.gov

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

Re: Comment Letter in Response to Amendments to Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z) [Docket No. CFPB–2017–0015]

Dear Ms. Jackson:

This letter is submitted on behalf of the Network Branded Prepaid Card Association (the "NBPCA")¹ in response to the Notice of Proposed Rulemaking with Request for Public Comment regarding Amendments to Rules Concerning Prepaid Accounts under the Electronic Funds Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), which was published by the Consumer Financial Protection Bureau ("CFPB") in the *Federal Register* on June 29, 2017, starting at page 29630 (the "Proposal").² The Proposal would make several substantive changes to the CFPB's final rule for prepaid accounts published in the *Federal Register* on Nov. 22, 2016 (the "Rule").³ The Proposal follows an earlier rulemaking from the CFPB in which it extended the effective date for part of the Rule from Oct. 1, 2017 to April 1, 2018.⁴

The NBPCA appreciates and supports the CFPB's decision to amend certain provisions of the Rule, which will benefit consumers and industry alike by easing the challenges and costs of complying with the Rule. The NBPCA believes, however, that some of the changes contained in the Proposal will present additional technical and logistical challenges that will require a longer

¹ The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this new and rapidly growing payments category. The NBPCA's members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card manufacturers, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.

² 82 Fed. Reg. 29630 et seq. (June 29, 2017).

³ 81 Fed. Reg. 83934 et seq. (Nov. 22, 2016).

⁴ 82 Fed. Reg. 18975 et seq. (Apr. 25, 2017).



implementation period beyond April 1, 2018, in order for providers to comply. These challenges are in addition to the already significant compliance challenges presented by the Rule. For this reason and as discussed in more detail below, the NBPCA is requesting that the CFPB extend the implementation period of the Rule until April 1, 2019.

In addition, the NBPCA is concerned that certain aspects of the Proposal, while constituting a positive step forward from the original requirements of the Rule, do not go far enough to address the significant compliance challenges faced by industry. The NBPCA believes that it is critically important to address these substantive issues in order to avoid negative outcomes for consumers.

I. The Amendments included in the Proposal Require an Extended Implementation Period until April 1, 2019

The Proposal contains a number of substantive changes to the Rule that the NBPCA believes will be positive for both industry and consumers. The Proposal includes, among other things, important modifications to the Rule's error resolution and limitation on liability requirements for unverified and unregistered accounts, changes to the short-form disclosure and the requirements for submission of account agreements designed to add flexibility for providers, and changes to the retail exception for providing the long-form electronically. However, the NBPCA is concerned that the various changes included in the Proposal will require more time for compliance than is provided for by the current April 1, 2018 effective date. Moreover, the NBPCA notes that even an additional 6-month extension of the effective date to October 1, 2018 would be difficult for providers to comply with because it would mean trying to replace product and implement the Rule during the holiday season. During this period, issuing banks, program managers, marketers, and technology service providers, put a freeze on the development and implementation of any changes to their prepaid programs. The NBPCA thus urges the CFPB to extend the effective date by an additional 12 months, to April 1, 2019.

The changes included in the Proposal will require, among other things, modifications to the short-form disclosure, the inclusion of new and additional account opening disclosures, and additional platform development by providers. Such changes impact every participant in the prepaid value chain and do not merely require time to assess and implement, but also require time for review and approval by interested parties. To the extent the amendments included in the Proposal require issuers to change provisions in their cardholder agreements or packaging materials, then, in order to comply with the Rule, issuers will need to review and approve various program documents for compliance. Such a review may include further modified cardholder agreements, card packaging, card carriers, FAQs, website materials, and marketing materials. In the case of program managers, the changes in the Proposal would not only require additional



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waiting time for approval from issuing bank partners, but would require further negotiation and work with retailers on timing the release of new product packaging and materials. Relatedly, the Proposal will impact the production of compliant card packaging and materials, which will be delayed until the amended final version of the Rule is released, rather than go through the expense of producing card packaging now that may have to change in the course of a mere few months.

Furthermore, the NBPCA notes that while the CFPB has already extended the effective date of the Rule once, to April 1, 2018, the proposed substantive changes to the Rule made by the Proposal were not issued until mid-June of this year, and any ultimate final version of the Rule is unlikely to be issued until this fall. This highlights a particular problem providers have in complying with the requirements of the Rule when the substance of the Rule continues to change and is still unsettled. Each time the CFPB releases a new proposed change to the Rule, industry is required to stop its work, review the proposed change or changes, suggest comments and further revisions to the CFPB, make appropriate changes, and then seek the necessary approvals from program participants in order to comply with the revised Rule. The same is true here. While the NBPCA and its members appreciate the fact that the CFPB is listening to feedback regarding the compliance challenges and is amending the Rule accordingly, the fact remains that the proposed amendments create additional work for providers that necessitates a longer implementation period. Moreover, the NBPCA stresses that since providers are unlikely to receive the Rule in its final form until this fall, under the current effective date, they will only have a few months to make necessary final changes to their processes, cardholder agreements, and marketing and packaging materials, as well as conduct any further platform development necessitated by the Rule, all while ensuring that these revised materials and processes are reviewed and approved by the issuing banks.⁵

Finally, the NBPCA notes that the CFPB released its final rule on Arbitration Agreements on July 10, 2017 (the "Arbitration Rule"). In addition to the other implementation challenges and issues noted above, providers will need more time in order to implement any other necessary changes to their programs required in light of the Arbitration Rule.

⁵ It is also worth noting that providers in particular industries are finding compliance with certain aspects of the Rule particularly challenging and may need additional time to implement the necessary changes. For example, the Rule requires that electronic short and long form disclosures must be provided in a responsive form. The NBPCA understands that many government agencies and employers that currently host online prepaid card disclosures do not have website platforms that can respond to screen size. Providers of government benefit and payroll card programs must update their platforms to enable responsive technology and modify content to a responsive design. Undertaking such platform development is a large initiative and challenging to achieve, even by April 1, 2018, and we therefore again respectfully request that the CFPB extend the effective date of the Rule to April 1, 2019.



For these reasons, the NBPCA asks the CFPB to extend the effective date of the Rule to April 1, 2019.

II. Additional Changes within the Proposal with which the NBPCA has Serious Concerns

Error Resolution and Limitation on Liability

The NBPCA strongly supports the CFPB's proposal to amend the Rule to provide that Regulation E error resolution and limited liability requirements do not extend to prepaid accounts that have not successfully completed the financial institution's consumer identification and verification process.⁶ As the NBPCA has expressed in both its conversations with and comment letters to the CFPB, the Rule's extension of Regulation E's limited liability provisions to unverified, anonymous products would lead to a significant increase in fraud losses stemming from the difficulties experienced by financial institutions in investigating claims of unauthorized use or error in the case of anonymous accounts. In addition, the NBPCA believes providing relief from this requirement would make it less likely that providers may choose to significantly restrict the features and usability of unregistered prepaid accounts.

NBPCA members have expressed concern, however, over potential increases in fraudulent activity stemming from the Proposal's requirement that issuers, upon verification of a consumer's identity, must continue to limit that consumer's liability for any errors and unauthorized transactions occurring prior to the consumer's verification and satisfying the timing requirements of the Rule.⁷ The NBPCA understands that the CFPB's reasoning behind this proposal is to protect consumers in the case of an error or unauthorized transaction occurring in the period of time between when the Prepaid Account is acquired and when the consumer registers the Prepaid Account. As an alternative to the requirement included in the Proposal, the NBPCA suggests that the CFPB require providers to offer Regulation E error resolution and limited liability for transactions conducted up to 30 days prior to the date a cardholder registers their card and completes the financial institution's consumer identification and verification

⁶ 82 Fed. Reg. 29630.

⁷ 82 Fed. Reg. 29630. First-party fraud in connection with a prepaid account continues to be a concern for providers. For example, the card fraud investigations team of one member company with operations in the payroll card industry identified \$1,208,649 in first-party fraud committed by cardholders during the period of January–June 2017. It should be noted that this amount does not represent the full cost of the first-party fraud for this time period as the card fraud investigations team only handles claims greater than \$500. Importantly, this fraud occurred in the payroll card industry, under circumstances where the cardholder had been verified initially. The member noted that it would expect this number to significantly increase in a scenario in which it was not able to reasonably verify whether the cardholder raising the dispute was authorized to transact on the card before it was registered.



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process. Such an approach would address the concerns expressed by the CFPB by ensuring consumers receive Regulation E limited liability protection for transactions occurring within 30 days of registering a card, while also helping to mitigate the risk of increased fraud for providers by shortening the time period between a disputed transaction and the date the consumer completes the registration process.⁸ As an example, limiting the application of Regulation E limited liability protection to transactions occurring within 30 days prior to registration would ensure that a disputed transaction with respect to an unregistered account occurs recently enough to registration that the information needed by the financial institution to investigate the dispute is readily available.

The NBPCA stresses that consumers would still be able to dispute unauthorized transactions or errors occurring outside of the 30-day period, but financial institutions would have more time to investigate these claims without being tied-up by the specific limited liability requirements contained in Regulation E. The NBPCA understands that the CFPB, in adopting this approach, would need to modify certain disclosures in the Rule. The NBPCA suggests that the CFPB could simply modify the model language in the Rule to require providers to explain in their initial disclosures that the error resolution process and limitations on consumers' liability for unauthorized transfers does not apply to transfers occurring more than 30 days prior to registration.

The Extension of the LAP Card Exception and Non-Reloadable Prepaid Products

The NBPCA remains concerned about the continued application of the Rule to various non-reloadable prepaid products.⁹ The NBPCA notes that the Proposal extends the exclusion provided in the Rule for loyalty, award, or promotional ("LAP") gift cards to products that are not marketed to the general public, even if such products do not include the disclosures required for LAP cards under the CARD Act.¹⁰ While the NBPCA appreciates the Proposal's clarification that the existing LAP Card exemption extends to LAP cards that are also not marketed to the

⁸ A shortened time period between a disputed transaction on an unregistered account and registration is important to reducing the risk of fraud as a longer period of time increases the risk that a card may have been passed around between multiple individuals and that disputed transactions may in fact be fraudulent. NBPCA members believe that an extended period beyond 30 days would increase the risk that a card had in fact been passed around by multiple individuals while simultaneously making it harder for a financial institution to investigate a disputed transaction since, as noted above, much of the information necessary for the financial institution to conduct its investigation will have become stale or unavailable after more than 30 days.

⁹ The CFPB addresses certain of these products in its Proposal, making changes to both the unsolicited issuance provisions of Regulation E as well as the timing requirements for the Rule's own pre-acquisition account disclosures in order to ease the costs of compliance. While the NBPCA is appreciative of the changes included in the Proposal as applied to these products, the NBPCA urges the CFPB to, as discussed more fully herein, exclude non-reloadable products that are not marketed to the general public.

¹⁰ 82 Fed. Reg. 29633.



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general public, the NBPCA expects few, if any, products would benefit from the expanded exemption as we understand that virtually all LAP cards already bear the required disclosures in order to qualify for the LAP exemption under the CARD Act.

Instead the NBPCA strongly encourages the Bureau to exempt any cards that are not marketed to the general public, such as disbursement cards for providing refunds for utility payments, in order to provide meaningful relief. The NBPCA points out that while these products do not technically qualify as LAP cards under the CARD Act, they offer similar features and function in much the same manner. For these reasons, the NBPCA urges the CFPB to similarly exclude these products from the Rule to ensure that these disbursements can continue to be made by prepaid card.

Credit Features Offered in Connection with a Prepaid Account

The NBPCA is disappointed that the Rule as amended continues to exhibit markedly different treatment for overdraft and credit features offered in connection with prepaid accounts, from how the same types of features are treated when they are offered in conjunction with a debit card connected to a traditional checking account. The NBPCA continues to believe that there is no compelling reason for treating similar bank products differently,¹¹ and for providing disfavored treatment to the one product that is designed to provide access to financial services for low and moderate income consumers who might not otherwise have access to a traditional bank account. On its face, it appears that the Rule attempts to treat consumers who, by their own volition, have affirmatively selected to use a prepaid card to access their money, much differently than consumers who have decided to open a traditional bank account with an associated debit card. Accordingly, it seems that prepaid card users do not have the same flexibility to choose the bank features that meet their specific needs like their debit card counterparts. This is particularly troubling considering that the limitations on such features included in the Rule hinge on the access device selected by the consumer when they open their bank account. Even with the CFPB's proposed amendments, the Rule in its current form will make it impracticable for prepaid card providers to continue offering prepaid card features that take advantage of the full range of the card's potential as demanded by consumers. We urge the CFPB to re-evaluate its requirements for offering credit features in connection with prepaid accounts before finalizing its proposed amendments.

The NBPCA also has concerns with respect to the changes the CFPB did include in its Proposal. Specifically, the Proposal amends the definition of "Business Partner" for purposes of

¹¹ The NBPCA believes this is particularly true in light of the CFPB's statement in the Proposal that its concern with respect to overdraft credit features that are associated with prepaid accounts stems from "the way that such services have evolved on traditional checking accounts." (82 Fed. Reg. 29646).



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the Rule to create a limited exception for certain business arrangements between prepaid account issuers and credit card issuers that offer traditional credit card products.¹² To qualify for the exception, providers must, among other things, not allow the prepaid card to access credit from the credit card account in the course of a transaction with the prepaid card unless the consumer has submitted a written request to authorize linking the two accounts that is separately signed or initialized.¹³

The NBPCA understands that this exception is designed to address certain complications in applying the credit provisions of the Rule to credit card accounts linked to digital wallets that can store funds, but also applies to prepaid accounts more broadly.¹⁴ The NBPCA has significant concerns with the structure of this exception that it believes are important to share with the CFPB. First, the exception amends the definition of "Business Partner" under the Rule and applies only to traditional credit cards linked to a prepaid account offered by a party other than the prepaid account issuer. The NBPCA believes the exception should be extended to traditional credit cards issued by the prepaid account issuer. Similar to credit cards offered by a third party that are linked to a digital wallet or prepaid account, credit cards offered by an account issuer itself are already subject to Regulation Z's open-end credit card rules and, given the other requirements of the CFPB's proposed exception, could be offered to consumers under circumstances that pose very little risk. It is unclear what additional concern would be addressed by further limiting the exception to situations in which the traditional credit card linked to the prepaid account is offered by a third party, rather than allowing the exception to also apply to traditional credit card products offered by the prepaid account issuer itself.

Second, the NBPCA also wishes to express its concerns with conditioning the linking of a prepaid card and credit card account on the receipt of a written request, separately signed or initialized by the accountholder. The NBPCA believes that section 101(a) of the E-Sign Act would apply to enable a signature or agreement obtained electronically to have the same effect if it were obtained in writing, and we respectfully request that the CFPB confirm this point in the Rule.

Finally, the NBPCA notes that the Rule does not state whether the requirement to obtain a written authorization is to apply prospectively or retroactively. Applying such a requirement retroactively would likely prove to be an extremely expensive and burdensome requirement for providers and consumers who have previously agreed to the linkage. The NBPCA urges the CFPB to clarify that the signed consent requirement in the Proposal would only apply prospectively.

¹² 82 Fed. Reg. 29635.

¹³ 82 Fed. Reg. 29640.

¹⁴ 82 Fed. Reg. 29649.



Exclusions in the Rule for Healthcare and Employee Benefit Products Limited to Explicit Examples

The NBPCA wishes to highlight one additional issue not addressed by the CFPB in the Proposal, but which the NBPCA has expressed its concerns on previously.

Specifically, the NBPCA continues to be concerned with the apparent limitation of the applicability of the exemptions for healthcare and employee benefit products contained in the Rule to the explicit examples given by the CFPB. Specifically, the Rule provides that a "prepaid account" does not include an account "loaded only with funds from a health savings account, flexible spending arrangement, medical savings account, health reimbursement arrangement, dependent care assistance program, or transit or parking reimbursement arrangement."¹⁵ While the NBPCA agrees that it would be inappropriate to subject these employee benefit products to coverage under the Rule, the NBPCA is also concerned that by limiting the exclusion to the enumerated products, the CFPB may cause other similar products to be deemed "prepaid accounts," subject to all of the requirements of the Rule. For example, consider 529 college and ABLE Act savings plans. Like an HSA, a 529 plan and an ABLE plan are tax-advantaged savings plans designed to encourage consumer savings that can be spent on certain "qualified expenses".¹⁶ While these savings plans operate similarly to an HSA, under the current Rule, it appears that an account loaded only with funds from one of these listed programs would still qualify as a "prepaid account."¹⁷ Such a result would be harmful to both industry and consumers because the increased compliance costs would make it difficult for providers to continue offering these products.

III. Other Amendments contained in the Proposal

Long Form Retail Exception

The Proposal would amend the Rule to allow financial institutions offering prepaid accounts that qualify for the retail location exception to satisfy the requirement that they provide the long form disclosure after acquisition by allowing the long form disclosure to be delivered electronically without receiving E-Sign consent if the long-form is not provided inside the

¹⁵ 81 Fed. Reg. 84326 (Nov. 22, 2016) (Rule Section 1005.2(b)(3)(ii)(a)).

¹⁶ In the case of 529 Plans, qualified expenses include qualified tuition expenses. Whereas in the case of ABLE plans, qualified expenses relate to qualified disability expenses.

¹⁷ It is worth noting that, in the case of ABLE Act savings plans, while the federal law allowing for these tax-advantaged plans was passed in 2014, because the plans are state enabled, we are only just now seeing them adopted by the states. These plans are a good example of a product that did not exist at the time the CFPB was preparing its Rule, but nevertheless would greatly benefit from inclusion in the exceptions from the Rule provided by the CFPB.



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prepaid account packaging material and if the financial institution is not otherwise mailing or delivering to the consumer written account-related communications within 30 days of receiving the consumer's account information.¹⁸

The NBPCA supports this change in the Proposal as it does not believe it makes sense to require providers to give the long-form disclosure to a consumer in writing when the consumer has already been provided access to the same disclosure via the internet, particularly when a great majority of American consumers have access to the internet through either a mobile device, a computer, or via free access at their local library. The NBPCA also believes this amendment to the Rule will help to decrease the costs to providers in complying with the Rule.

Short-Form Changes

The Proposal would modify the short-form disclosure requirements for those financial institutions disclosing additional fee types. In particular, the Proposal would modify the Rule to allow financial institutions disclosing additional fee types with three or more fee variations to consolidate those variations into two categories and allow those two categories to be disclosed on the short form.¹⁹ The NBPCA believes this change will add needed flexibility to the disclosure requirements of the Rule, but notes that, as discussed above, issuers and program managers may need additional time to review and revise their disclosures to take advantage of the provided relief.

Agreement Submission Changes

The Proposal includes additional changes to the rules governing submission of prepaid account agreements, including allowing issuers to delay submitting a change in the names of other relevant parties to a prepaid account agreement (such as employers for a payroll card agreement) until such time as the issuer is submitting other agreement changes to the Bureau; and permitting short form and long form disclosures to be provided to the Bureau as separate addenda to the agreement, rather than integrated into the agreement or as a single addendum.²⁰

The NBPCA believes each of these changes will ease the costs to providers in complying with the Rule's submission requirements and the NBPCA therefore supports these proposed amendments.

Foreign Language Requirement

¹⁸ 82 Fed. Reg. 29637 – 29638.

¹⁹ 82 Fed. Reg. 29630.

²⁰ 82 Fed. Reg. 29633.



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The Proposal maintains the Rule's requirement for financial institutions to provide the short-form and long-form disclosures in a foreign language whenever the financial institution provides a means for a consumer to acquire a prepaid account by telephone or electronically principally in a foreign language. However, the Proposal includes an exception in the case of payroll card accounts and government benefit accounts where the foreign language is offered by telephone only via a real-time language interpretation service provided by a third party.²¹ While the NBPCA generally supports this proposed amendment to the Rule, the NBPCA is concerned that by limiting its application to services provided by third parties, the CFPB will discourage providers from soliciting translation help from its own employees who happen to speak multiple languages, out of a fear that the provider may be deemed to be in violation of the Rule. The NBPCA also requests that the CFPB consider clarifying that a third party's (e.g., employer or retail partner) phone or electronic acquisition activities that are unrelated to financial services offered by a provider are not imputed onto the financial institution under the Rule.

In addition, the NBPCA notes that the foreign language requirements, as written in the Rule, appear to require that any use of translation services on a call used to acquire a prepaid account would trigger pre-acquisition disclosures in the language of the caller's choice. The NBPCA wishes to point out that the broad application of this requirement is of particular concern to government agencies and employers who do not use call and translations services primarily to offer financial products. Many agencies offer call services in a wide range of languages to meet their service mandates, and when those calls cover payment options, it appears the agencies would be forced under the Rule to offer short and long form disclosures to the caller in the foreign language she selects. Operationally, offering disclosures in the full range of available languages would be virtually impossible and would effectively require government agencies to anticipate what languages would be utilized in order to provide properly translated disclosures in accordance with the Rule's timing requirements.

Safe-Harbor for Early Compliance

The CFPB notes in the Proposal that it is not aware of any conflicts between the Rule and current Federal regulations governing prepaid accounts. In light of this, the CFPB expressly does not include the addition of a safe harbor for early compliance with the Rule as part of the Proposal. While it appears, based on the CFPB's comments in the Proposal, that the CFPB would not pursue an enforcement action against an issuer that makes a disclosure or other change to conform with the requirements of the Rule prior to the effective date, the NBPCA is nevertheless concerned that an issuer making such a change could face potential liability stemming from a private right of action. In particular, should an issuer decide to comply with the requirements of

²¹ 82 Fed. Reg. 29640.



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the Rule early, a private party could bring a complaint against the issuer alleging that it was operating out of compliance with Regulation E, and therefore subject the issuer to a potential risk of loss. For this reason, the NBPCA urges the CFPB to include a safe harbor for early compliance in the final version of the Rule.

IV. Conclusion

The NBPCA appreciates the opportunity to provide its comments to the CFPB on its Proposal. The NBPCA appreciates the many substantive changes the CFPB intends to make to the Rule, and the NBPCA believes the majority of these changes are beneficial to both consumers and industry. However, the NBPCA believes that the many substantive changes to the Rule included in the Proposal, while generally positive, will require additional time beyond the April 1, 2018 effective date in order for the prepaid industry to comply. For this reason, the NBPCA strongly urges the CFPB to extend the effective date of the Rule until April 1, 2019. In addition, the NBPCA asks the CFPB to reexamine some of the substantive issues with the Rule raised in this letter and to make additional amendments or changes to the Rule accordingly.

We appreciate your consideration of these important concerns and remain available to answer any questions you have regarding the issues discussed herein.

Sincerely,

Brian Tate
President and CEO
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