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Practice Group:
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CFPB Finalizes Expansive Prepaid Account Rule Creating New Compliance Hurdles

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On October 5, the Consumer Financial Protection Bureau (“CFPB”) issued its much-anticipated Final Rule to establish a sweeping new federal regime of consumer protection requirements for prepaid accounts under the implementing regulations of the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z). The Final Rule will become effective on October 1, 2017, and governs the following “prepaid accounts” (as described in Regulation E).

- general purpose reloadable cards;
- mobile wallets and certain other electronic prepaid accounts;
- peer-to-peer payment products;
- student financial aid disbursement cards;
- tax refund cards;
- payroll cards; and
- government benefit cards.

The Final Rule’s definition of “prepaid accounts” excludes:*

- gift cards and gift certificates;
- loyalty, award or promotional gift cards; and
- certain health, dependent care, and transit or parking card programs.

** As described in Regulation E.*

The Final Rule, which will have broad implications for prepaid market participants and millions of consumers, is nearly 1,700 pages in length and represents the culmination of a protracted four-year CFPB rulemaking process that included the issuance of a Notice of Proposed Rulemaking (“NPRM”) in November 2014. Notably, a number of essential aspects of the NPRM were retained in the Final Rule, including the requirement that two initial “Know Before You Owe” fee disclosures be generally provided to consumers before their acquisition of a prepaid account. As in the NPRM, the Final Rule extends certain error resolution and liability protections under Regulation E to prepaid accounts. Both the NPRM and the Final Rule also contain certain protections under Regulation Z and the Credit Card Accountability Responsibility and Disclosure Act (“CARD Act”) for consumers with prepaid accounts that are linked to credit products.

See below for a comprehensive analysis of the Final Rule.

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Regulation E Protections

- **Access to Prepaid Account Information.** Financial institutions will be required to make certain account information available at no cost to consumers by telephone, online, and in writing upon request, unless the financial institution provides the consumer periodic statements. The Final Rule requires that consumers must have access to 12 months of online account transaction history and 24 months of written account transaction history, instead of 18 months for both as proposed in the NPRM.
- **Error Resolution Rights.** Financial institutions will be required to investigate and resolve erroneous charges on registered accounts generally within 10 business days of receiving notice from consumers. If the financial institution is unable to complete its investigation within this time period, it may have up to 45 days to do so if a provisional credit is provided to the consumer for disputed charges while the financial institution completes its investigation. Provisional credit requirements will only apply to accounts for which the financial institution has completed its consumer identification or verification process.
- **Fraud Protection & Limitation of Liability.** Consumers will also receive protections from fraudulent charges or other unauthorized transactions on lost or stolen registered cards. In addition, the Final Rule will limit consumer liability for unauthorized charges to US\$50, if the consumer promptly notifies the bank issuer.

Credit Features and Regulation Z Protections

The Final Rule provides that prepaid cards which give consumers access to a credit because the cards are linked to a separate credit account or feature will be considered “hybrid prepaid-credit cards” subject to certain protections under Regulation Z and the CARD Act. Further, prepaid cards that give consumers access to credit by creating a negative balance on the account will also be considered hybrid prepaid-cards for purposes of such protections. Moreover, the Final Rule establishes a new section of Regulation Z that generally requires overdraft credit to be structured as a separate sub-account or an account that is distinct from the asset portion of the prepaid account.

- **Ability to Pay.** Prepaid card issuers will be required to make sure that consumers are able to pay the debt before offering credit.
- **Monthly Billing Statement.** Prepaid card issuers will be required to provide consumers periodic statements that detail fees and, if applicable, interest rate, outstanding balance, and other information about repaying the debt.
- **Reasonable Repayment Time.** Prepaid card issuers will be required to provide consumers at least 21 days to repay their debt before being charged a late fee, which must be “reasonable and proportional” to the violation of the account terms at issue.
- **Limits on Fees and Charges.** Total fees for prepaid credit products will be capped at 25 percent of the account’s credit limit for the first year the account is open. Prepaid card issuers will be prohibited from increasing the interest rate on an existing balance unless cardholders miss two consecutive payments. Additionally, prepaid card issuers will also be allowed to increase the interest rate prior to new purchases but will be required to provide consumers 45 days advance notice, during which time period consumers will be permitted to cancel the credit account.

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- **30-Day Waiting Period.** Prepaid card issuers will be required to wait at least 30 days after consumers register prepaid accounts before offering credit to consumers.
- **Distinction Between Prepaid Funds and Credit Repayment.** Prepaid card issuers will be prohibited from automatically taking credit repayment whenever a prepaid account is loaded with funds. Prepaid card issuers will be allowed to automatically take funds from a prepaid account no more than once per calendar month to repay due credit, so long as the consumer affirmatively consents. Under the Final Rule, payments cannot be required until 21 days after mailing the periodic statement.

Pre-Acquisition Disclosures (Know Before You Owe)

Like the NPRM, the Final Rule provides that financial institutions must generally give consumers both short form and long form fee disclosures up front before consumers acquire a prepaid account.

- **Short Form Disclosure.** The short form will require the clear disclosure of fees associated with prepaid account programs (e.g., monthly fees; per purchase fees; ATM withdrawal fees; and the costs to reload cash onto the account, including third-party fees). In addition, the short form will also require the disclosure of ATM balance inquiry fees; customer service fees; account inactivity fees; and certain information regarding additional types of fees that may be charged to consumers. Under the Final Rule, the criteria for determining types of fees will be based on fee categories that produce the most revenue from consumers (which will vary depending on the program), as opposed to the incidence-based (how often charged) approach proposed in the NPRM. Financial institutions will be required to assess additional types of fees every 24 months, instead of every 12 months as proposed in the NPRM, and to update disclosures as necessary.

Among the other noteworthy disclosures required in the short form is a statement concerning the availability of overdraft credit features and, if available, whether fees would apply. The short form must also include a statement related to the prepaid account's eligibility for insurance from the Federal Deposit Insurance Corporation or National Credit Union Administration. The short form must also include a statement directing consumers to the CFPB's website that contains general information about prepaid accounts, and a statement directing consumers to the long form disclosure.

Regarding payroll and government benefit cards, the short form must include a statement that consumers are not required to accept the payroll or government benefit account or, alternatively, include a statement providing consumers a list of options available for receiving their benefits or wages.

- **Long Form Disclosure.** The long form will be required to contain a comprehensive list of all of the prepaid account's fees and more detailed information about how these fees are assessed. The Final Rule provides that the long form disclosure can be provided post-acquisition if the consumer acquires the account in person at a retail location, provided certain requirements are met. The long form disclosure may also be provided post-acquisition if the consumer acquires the account by telephone so long as certain requirements are met.

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Terms Posting/Submission

The Final Rule provides that prepaid account issuers must submit their prepaid agreements to the CFPB on a rolling basis (i.e., within a reasonable time of being issued), instead of on a quarterly basis as proposed in the NPRM. The CFPB plans to post the agreements on its website. Account issuers must also post prepaid account agreements offered to the general public on their own website, although government benefit and payroll card accounts are excluded from this requirement (which is a change from the proposal contained in the NPRM).

As of October 1, 2017, issuers must post prepaid account agreements on their own websites. The effective date of the Final Rule's cardholder agreement submission requirements will be delayed until October 1, 2018.

Model Forms/Disclosures

The Final Rule contains model disclosures and forms.

Conclusion

It is clear from the comprehensive nature of the final rule that the regulatory landscape of the prepaid account industry is changing dramatically. To effectively navigate this shifting and complicated terrain in an increasingly card-based digital economy, various categories of industry participants will likely benefit substantially from high-quality regulatory counseling on compliance with the CFPB's expansive new requirements.

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