

What To Know About CFPB's New Prepaid Card Rule

Law360, New York (November 1, 2016, 3:55 PM EDT) -- The Consumer Financial Protection Bureau issued its final rule to amend provisions of Regulation E and Regulation Z to further regulate prepaid card products, or “prepaid accounts.” As discussed below, the rule generally takes effect on Oct. 1, 2017 (the effective date).

The final rule generally tracks the proposed rule issued by the CFPB in November 2014, but the CFPB made several important revisions, including clarifications relating to the scope of the final rule, whether a prepaid card issuer needs to verify a cardholder’s identity at the time the cardholder asserts an error, and whether an incidental overdraft would be considered a credit extension under the final rule.

Scope of the Final Rule

The final rule extends Regulation E protections to prepaid accounts far broader than conventional network-branded, general-purpose reloadable prepaid cards. The final rule revises the definition of “account” under Regulation E to include “prepaid accounts,” and the final rule restructures the definition of prepaid account from the proposed rule to enumerate four categories of prepaid accounts:

1. Payroll card accounts currently subject to Regulation E;
2. Government benefit accounts currently subject to Regulation E;
3. Accounts “marketed or labeled as ‘prepaid’” that are redeemable upon presentation at multiple unaffiliated merchants for goods or services or that are usable at ATMs; and
4. Accounts that are (1) issued on a prepaid basis or capable of being loaded with funds; (2) whose “primary function” is to conduct transactions with multiple unaffiliated merchants for goods or services or at ATMs, or to conduct person-to-person (P2P) transfers; and (3) that are not otherwise accounts under Regulation E (i.e., accounts other than checking, share draft or NOW accounts).



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With respect to this fourth “functional” category of prepaid accounts, the CFPB’s official interpretations (the commentary) provide that an “account’s primary function must be to provide consumers with general transaction capability.” Accounts that provide such capability only incidentally are excluded from the “functional” category of prepaid accounts. As a result, the final rule covers a broad array of “prepaid accounts” including reloadable and nonreloadable prepaid accounts, payroll card accounts and many university cards, among others. There are, however, a number of exclusions to the term “prepaid account,” including, health savings accounts, flexible spending accounts, and similar accounts and accounts governed by Regulation E’s gift card provisions (such as gift certificates, store gift cards, loyalty cards or promotional gift cards).

Certain mobile and other electronic prepaid accounts may be considered a prepaid account. In particular, digital wallets capable of storing funds (and not simply storing payment credentials) that can be used, for example, for purchases at multiple unaffiliated merchants or to conduct P2P transfers are considered “prepaid accounts,” even if only a portion of the wallet can store funds, and even if the consumer does not use the funds-storing functionality of the wallet. This would require digital wallet providers to comply with the requirements under the final rule (such as the preacquisition disclosures requirements).

Disclosures

The final rule establishes “know before you owe” preacquisition disclosure requirements, including short-form and long-form disclosures that unless a particular exception exists, consumers must receive before a consumer acquires a prepaid card account (i.e., purchases, opens or chooses to be paid via a prepaid account).

Short-Form Disclosure: The short-form disclosure must include certain static fees, including for example, periodic fees, per-purchase (or “point-of-sale”) fees, ATM withdrawal fees and cash reload fees, certain incidence-based fees and certain other information (including, a statement regarding account registration, Federal Deposit Insurance Corporation insurance and a link to the CFPB’s website). Issuers must also disclose up to two “additional fees” that generate the highest revenue from consumers for the prepaid account program to be reassessed on a biannual basis; however, issuers are not required to disclose additional fee types that generate less than 5 percent of revenue for the prepaid account program.

Long-Form Disclosure: The long-form requires disclosure of the same information required under the short-form disclosure, except that the long-form disclosure must include all fees that may be imposed by the issuer in connection with a prepaid account. And, for each fee type, the amount of the fee and the conditions (if any) under which the fee may be imposed, waived or reduced. To the extent known, the issuer must disclose any third-party fees that may be imposed, or if third-party fees are unknown, the issuer must disclose this fact without specifying the fee amounts. There is an exception to the timing of delivery for long-form disclosure for accounts sold in retail locations (and not only retail stores) and that meet certain requirements. Under the final rule, a bank branch offering its own prepaid accounts would not be considered a retail location, but a bank that sells another issuer’s prepaid accounts in its branch should be considered a “retail location” under the final rule.

Disclosures in a Foreign Language: The final rule requires that issuers deliver preacquisition disclosures in a foreign language if the issuer, (1) principally uses a foreign language on the packaging material; (2) principally uses a foreign language to advertise, solicit, or market a prepaid account and provides a

means in the advertisement, solicitation or marketing material that the consumer can use to acquire the prepaid account by telephone or electronically; or (3) provides a means for the consumer to acquire a prepaid account by telephone or electronically in a foreign language. Issuers are not required to provide preacquisition disclosures in a foreign language if the issuer uses a foreign language in person.

Electronic Disclosures: The final rule requires electronic delivery of preacquisition disclosures for prepaid accounts acquired electronically, including digital wallets capable of storing funds (rather than simply storing payment credentials). The final rule sets forth the requirements for delivery of electronic disclosures, including, for example, a requirement that the preacquisition disclosures be provided in a manner reasonably expected to be accessible in light of how the consumer acquires the prepaid account and be viewable across all screen sizes. Importantly, preacquisition disclosures for accounts acquired electronically, need not meet the requirements of the E-SIGN Act.

Billing Statements

In a significant expansion of the current 60-day account history requirement under the payroll card rule, the final rule requires issuers to either provide periodic statements or, alternatively, make available, at no cost to the consumer, the consumer's account balance by telephone, a 12-month electronic account history and, upon request, a 24-month written account history.

The account histories must disclose certain fee information, including the amount of any fees assessed and a summary total of all fees assessed by the issuer, and written account histories for prepaid accounts for which the issuer has not yet completed its consumer identification and verification processes are not required.

Posting and Submitting Prepaid Account Agreements

Similar to the Credit Card Accountability Responsibility and Disclosure Act (CARD Act), issuers must submit their account agreements to the CFPB on a rolling basis, post account agreements to their websites as frequently as the issuer is required to submit the agreement to the CFPB, and comply with consumers' request to provide a copy of the open account agreement. The final rule sets forth the type of information and procedures for issuers to submit and withdraw account agreements on a rolling basis.

There are two exceptions to the submission requirement — one for product testing (accounts offered as part of a product test to a limited group of consumers and for a limited time) and one for issuers with a de minimis (less than 3,000) number of accounts). Account agreements not offered to the general public, which according to the commentary, excludes account agreements that are only offered by virtue of a consumer's relationship with a third party (such as agreements for payroll card accounts, or accounts used to distribute student financial aid or property and casualty insurance payouts) are not required to be posted.

Compulsory Use

Prohibition on Compulsory Use: The final rule follows the approach in Regulation E and Regulation Z that prohibits financial institutions from requiring that debits or balances on accounts be paid from another account held with the financial institution. Thus, as a general matter, prepaid card issuers cannot require that overdrafts or other credit extensions made from hybrid prepaid-credit accounts (as discussed further below) be paid from the prepaid account. One exception to this general rule is that

prepaid card issuers can offset such balances from the prepaid account if the cardholder agrees in writing and the issuer does not make such deductions more than once per month.

Payroll and Government Benefit Accounts: The proposed rule required issuers of payroll cards and government benefit cards to state at the top of the short-form disclosures that cardholders are not required to receive their wages or benefits on the card. Industry commenters justifiably contended that this statement would be perceived as implicitly encouraging consumers not to use the card. The final rule retains the negative disclosure in the proposal, but also adds a second, more neutral disclosure alternative: “You have several options to receive your wages [payments]: [list of options available to the consumer]; or this payroll [benefits] card. Tell your employer [benefits office] which option you choose.”

Dispute Resolution and Consumer Liability

Dispute Resolution: With some modifications of the provisions of the proposed rule, the final rule extends the requirements for dispute resolution under Regulation E to prepaid accounts. Issuers of prepaid cards subject to the rule are generally required to investigate and resolve disputes within 10 business days of receiving notice from a consumer regarding an alleged error. If a prepaid card issuer is unable to complete an investigation within that time frame, the issuer can have up to 45 days to complete the investigation, so long as the issuer provides the consumer with a provisional credit for the disputed amount while the issuer completes its investigation.

Importantly, in response to industry comments, the CFPB included in the final rule a critical exception to this general provisional credit obligation. Specifically, the final rule stipulates certain circumstances where, if the issuer “has not completed its consumer identification and verification process with respect to that prepaid account,” then the issuer is not required to provisionally credit the account.

Consumer Liability: The consumer liability rules under the final rule generally parallel the existing limitations and thresholds under Regulation E for debit cards. Specifically, the final rule retains three tiers of liability for unauthorized transfers, depending on when the consumer learned of the loss or theft of a prepaid card, when the financial institution received notice of such loss or theft, and when the financial institution transmitted or made available to the consumer the periodic statement showing the unauthorized transaction. Prepaid card issuers also must comply with the error resolution procedures of Regulation Z in certain situations, such as when an unauthorized transaction accessed an overdraft credit feature of a prepaid account.

Prepaid Accounts with Overdraft and Credit Features

The CFPB sets forth sweeping and broad consumer protections, including requirements pertaining to the structuring of a prepaid account, in connection with any so-called “credit feature” available in connection with a prepaid card. Specifically, with some exceptions, the Regulation Z credit card protections will apply if the prepaid product allows consumers to pay for goods or services that would exceed the balance in the prepaid account.

By departing from the treatment of overdraft services associated with ATM cards and debit cards, the CFPB appears to have made a policy choice to effectively limit overdraft services and credit features associated with prepaid cards. Under the final rule, the following are examples of prepaid cards that would be considered “hybrid prepaid-credit cards” and therefore covered by the credit card provisions of Regulation Z:

1. Prepaid cards that provide access to credit because such prepaid cards are linked to a separate credit account or feature; and
2. Prepaid cards that provide access to credit by establishing a negative balance on the account.

Exemption for Incidental Overdraft, Including Force-Pay Transactions: Based on concerns from the prepaid industry, the CFPB in the final rule has attempted to address incidental overdraft transactions where a purchase is made that would exceed the balance on a cardholder's prepaid account in limited circumstances, such as in so-called "force-pay" transactions. The final rule generally provides that such incidental overdraft services are not "hybrid prepaid-credit cards" when: (1) the prepaid card accesses incidental credit in the form of a negative balance on the asset account; (2) the amount of the transaction will not cause the prepaid account balance to become negative by more than \$10 at the time of the authorization or a delayed load cushion where credit is extended while a load of funds from an asset account is pending; and (3) the prepaid account issuer does not generally charge credit-related fees for the credit.

Credit Card Requirements for Prepaid Accounts with Overdraft Services or Credit Features: The credit provisions under the final rule, which in some respects exceed existing Regulation Z protections applicable to credit card accounts, include:

- Performing an ability-to-repay analysis;
- Providing monthly periodic statements;
- Requiring at least 21 days to repay amounts associated with a credit feature prior to assessing any late fees, together with a requirement that such fees be "reasonable and proportional" to the account violation;
- Limiting total fees in the first year to no more than 25 percent of the initial credit limit;
- Restricting increases on interest rates applicable to use of a credit feature, unless the cardholder has missed two consecutive payments; and
- Requiring 45-day advance notice of any interest rate increases so that the consumer may cancel the credit feature.

In addition, the final rule:

- Requires prepaid card issuers to wait 30 days from the time that the consumer registers the prepaid account before offering credit features to the consumer;
- Limits the ability of an issuer to use prepaid funds to repay amounts due on the credit feature; and
- Prohibits issuers from requiring payment within 21 days from the time the periodic statement is mailed.

Implementation Date

The effective date of the final rule, Oct. 1, 2017, is subject to certain exceptions:

- Issuers that do not have sufficient data to provide 12 or 24 months of electronic or written account histories or readily accessible data to calculate the summary total fees by the effective date, may, in lieu of complying with the final rule on Oct. 1, 2017, make available or provide account histories using data for the time period it has, or display the summary total using the data it has until the issuer accumulates the data necessary to fully comply with the requirements under the final rule;
- Issuers may use existing access devices and packaging materials that do not meet the disclosure requirements as of Oct. 1, 2017; however, issuers must provide notice of certain changes and updated initial disclosures to consumers who acquire prepaid accounts after Oct. 1, 2017, via noncompliant packaging materials; and
- Issuers must submit prepaid account agreements to the CFPB no later than Oct. 31, 2018, for all prepaid account agreements the issuers offer as of Oct. 1, 2018. However, the requirement to submit credit card agreements to the CFPB for hybrid prepaid-credit cards does not have a delayed effective date. Therefore, issuers must submit credit card agreements to the CFPB for hybrid prepaid-credit cards by Oct. 1, 2017.

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