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Submitted electronically

March 23, 2015

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

Re: Proposed Rule Regarding Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z) [Docket No. CFPB-2014-0031 and RIN 3170-AA22]

Dear Ms. Jackson:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on this proposed rule by the Consumer Financial Protection Bureau (CFPB) that would amend Regulation E which implements the Electronic Fund Transfer Act (EFTA) and Regulation Z which implements the

¹ The Independent Community Bankers of America®, the nation's voice for more than 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

With 52,000 locations nationwide, community banks employ 700,000 Americans, hold \$3.6 trillion in assets, \$2.9 trillion in deposits, and \$2.4 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

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Truth in Lending Act (TILA) to create new requirements for prepaid financial products.

Background

The CFPB is proposing comprehensive consumer protections for prepaid financial products (or prepaid products). The CFPB notes such products are among the fastest growing types of payment instruments in the United States yet have not been subject to the existing federal consumer protection regulatory regimes that require consumer disclosures, error resolution, and protection from unauthorized transfers. The CFPB's proposed rule follows its May 2012 advance notice of proposed rulemaking (ANPR) on prepaid cards, which ICBA responded to with extensive comments.² This proposed rule would amend provisions in Regulation E and Regulation Z to address prepaid accounts.

Specifically, the CFPB's proposed rule would define "prepaid account" as payroll cards; certain federal, state, and local government benefits cards; student financial aid disbursement cards; tax refund cards; and certain peer-to-peer payment products.³ The term would cover both reloadable and non-reloadable prepaid accounts. The proposed rule would also cover mobile and other electronic prepaid accounts that can store funds but do not have a physical card.

The proposed rules would expressly bring prepaid products within the ambit of Regulation E as prepaid accounts and create new provisions specific to these accounts. The proposal would generally cover those prepaid accounts that are cards, codes, or other devices capable of being loaded with funds and usable at unaffiliated merchants or for person-to-person transfers, and are not gift cards (or certain other related types of cards). The proposal would modify Regulation E to establish disclosure requirements specific to prepaid accounts that would require financial institutions to provide certain disclosures to consumers prior to and after the acquisition of a prepaid account. The proposal also would include an option for an alternative to Regulation E's periodic statement requirement that would permit prepaid product providers to make available to consumers certain methods for access to account information in lieu of sending periodic statements.

The proposal would apply Regulation E's limited liability and error resolution provisions to prepaid accounts, with certain modifications, including applying these provisions after account registration. Moreover, the proposal would require prepaid account issuers to provide the CFPB with terms and conditions for prepaid accounts, which it would post on a website it maintains. Issuers also

² 77 Fed. Reg. 30,923 (May 24, 2012).

³ The term "prepaid account" would not include gift cards; gift certificates, or loyalty, award, or promotional gift cards; payroll cards used to disburse "incentive-based payments" such as employee bonuses; or health savings accounts, flexible spending accounts, or health reimbursement arrangements.

would be required to post the terms and conditions on their own websites or make them available upon request.

Most significantly, the proposal would contain amendments to Regulations Z and E to regulate prepaid accounts with overdraft services or credit features. Among other things, prepaid cards that access overdraft services or credit features for a fee would generally be credit cards subject to Regulation Z and its credit card rules. The proposal would require that consumers consent to overdraft services or credit features and give them at least 21 days to repay the debt incurred in connection with using such services or features. Regulation E would be amended to include disclosures about overdraft services or credit features that could be linked to prepaid accounts. The compulsory use provision under Regulation E also would be amended so that prepaid account issuers could not require consumers to set up preauthorized electronic fund transfers to repay credit extended through an overdraft service or credit feature.

Summary of ICBA Comments

Overall, ICBA supports consistent requirements for reloadable prepaid accounts and traditional deposit accounts when the functionality is comparable. Nevertheless, we have concerns and suggestions regarding specific aspects of this proposed rulemaking on prepaid accounts. As the CFPB recognizes, consumers often use some prepaid products to accomplish the same purposes as deposit accounts, and as such, disclosures and substantive requirements should be consistent.

In keeping with this policy goal, ICBA urges the CFPB to exclude “non-reloadable” prepaid accounts from the definition of “prepaid account,” as these accounts have different functionality and a different purpose from deposit accounts, and therefore do not need the same disclosure and substantive requirements. The CFPB could instead incorporate an explicit provision in the final rule to prohibit issuers from using repeated re-issuances or other tactics to circumvent compliance.

ICBA also strongly urges the CFPB to extend the definition of “prepaid account” to include prepaid accounts funded with virtual currencies, because these payment and currency systems do not have consumer or prudential protections commensurate with comparable payments systems and products.

In addition, ICBA opposes regulating overdraft services accessed through prepaid accounts as a credit service covered by Regulation Z, and urges the CFPB to expressly exempt fees for this service from the definition of “finance charge” under Regulation Z. ICBA also urges the CFPB not to finalize more requirements for overdraft services on prepaid accounts than are currently required for deposit accounts.

Furthermore, ICBA urges the CFPB to use the term “deposit fee” instead of “cash reload fee” on prepaid account disclosures, not to require the quarterly submission of prepaid card agreements until the CFPB has finalized its system for submitting credit card agreements, and not to require the public posting or submission of prepaid card agreements that are not offered to the general public.

Finally, ICBA encourages the CFPB to provide institutions with an implementation period of at least 18 months after publication of the final regulatory requirements.

ICBA Supports Consistent Requirements for Reloadable Prepaid Accounts and Deposit Accounts

The CFPB notes that prepaid products in various forms are among the fastest growing types of payment instruments in the United States. The CFPB cites a 2013 study by the Federal Reserve which showed that compared with noncash payments such as credit, debit, automated clearing house (ACH), and check, prepaid card payments increased the fastest rate from 2009 to 2012.⁴ The CFPB also acknowledges the lack of access to checking accounts and other types of credit products appears to be the consumer motivation for the use of prepaid products.⁵

The CFPB states there is significant variation among prepaid products, with some products being “reloadable” while others are not. Also, some prepaid cards, such as certain gift cards, are “closed-loop,” so a consumer can only use the product at a specific merchant or group of merchants.

Reloadable prepaid card programs are evolving increasingly into full-featured alternatives to traditional checking accounts and debit cards. These programs allow account holders to: deposit funds at retail locations, using direct deposit, transfers from debit cards and linked checking and savings accounts, and checks by mail or through mobile deposit capture; write checks; withdraw cash from ATMs; send, receive, or request money from other cardholders; pay bills; pay for purchases at multiple, unaffiliated merchants; and establish sub-accounts for family and friends. Additionally, these programs are marketed as financial accounts as well as checking account and debit card alternatives.

ICBA supports a consistent legal and regulatory framework for deposit and deposit-alternative accounts, such as reloadable prepaid cards described above, for banks and non-bank providers. Consumers opting for deposit and deposit-

⁴ Fed. Reserve Sys., *The 2013 Federal Reserve Payments Study, Recent and Long-Term Payment Trends in the United States; 2003-2012, Detailed Report and Updated Data Release* (2014).

⁵ The Pew Charitable Trusts, *Why American Use Prepaid Cards*, (finding that 58 percent of consumers that use prepaid products are currently without a checking account, but want to have a checking account in the future).

alternative products offered by non-banks are entitled to the same transparency and protections as they would receive from banks. As the CFPB moves forward with finalizing this proposed rule, we encourage it to require the same disclosures and protections for reloadable prepaid cards as are required for other deposit account products such as consumer checking accounts. As such, incidental fees such as fees associated with state escheat laws, garnishment, attorneys' fees, and photocopying should not be required regulatory disclosures, since these are not disclosure requirements under Regulation DD (Truth in Savings) for deposit accounts.

Proposed Definition of “Prepaid Accounts” Should Exclude “Non-Reloadable” Prepaid Accounts

The CFPB's proposed rule would amend Regulation E to establish a new definition of “prepaid account” as a sub-category of “account.” A prepaid account would be defined as a card, code, or other device, not otherwise an “account” under Regulation E, that is established primarily for personal, family, or household purposes and that: (i) 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; (ii) is redeemable upon presentation at multiple, unaffiliated merchants for goods or services, usable at automated teller machines, or usable for person-to-person transfers; and (iii) is not a “gift certificate;” “store gift card;” “loyalty, award or promotional gift card;” or “general-use prepaid card” that is both marketed and labeled as a gift card or gift certificate.⁶

The CFPB proposal would include non-reloadable prepaid cards in the definition of prepaid account and thereby subject these cards to the same new requirements as reloadable cards. The CFPB rationalizes it would be inappropriate to exclude a product from the definition based on whether or not it can be reloaded and that consumers would benefit from the disclosures and substantive protections even on non-reloadable cards. The CFPB also notes that providers could evade the requirements by instead of reloading a card, issuing non-reloadable cards repeatedly to the same consumer.

ICBA urges the CFPB to narrow the scope of the definition of prepaid accounts to exclude non-reloadable prepaid accounts from the definition, because non-reloadable prepaid accounts do not function as deposit account substitutes in the same way as debit cards, payroll cards, and general purpose reloadable cards. Non-reloadable prepaid accounts do not provide the same functionalities as debit cards, payment cards, and reloadable cards such as fund transfers, direct deposit, cash access, and recurring bill payments. The functionality of reloadable accounts is very similar to the functionality of checking accounts, thereby necessitating the need for consistent regulatory treatment. The proposed

⁶ 79 Fed. Reg. 77102, 77208 (Dec. 23, 2014).

disclosures and additional protections would be burdensome for issuers and would not provide commensurate benefit for consumers.

ICBA does not agree with the CFPB's rationale for a broader definition. The CFPB reasoned that issuers would evade the requirements by issuing several non-reloadable cards to consumers. ICBA believes that in reality, issuers would likely not engage in this practice as it would cause consumer confusion and would not be a competitive way to conduct business. Alternatively, ICBA recommends the CFPB address its concern by incorporating an explicit provision in the final rule to prohibit issuers from using repeated re-issuances or other tactics to circumvent compliance. That would be a more focused approach than the current proposed definition. For smaller institutions, such as community banks, that offer non-reloadable cards for gift or travel, the regulatory burden for compliance with the proposed expanded definition would be extensive, and could lead to higher costs for these products and prevent community banks from providing these products to consumers in the future.

The Definition of Prepaid Account Should Include Prepaid Accounts Funded with Virtual Currencies

The CFPB states that with respect to mobile financial products and services, it anticipates the proposed rule would apply to certain mobile wallets. The CFPB also notes the proposed rule may have potential application to virtual currency and related products and services. However, as a general matter, the CFPB's analysis of virtual currencies and related products and services, including the applicability of existing regulations and this proposed regulation to these products and services, is ongoing. Thus, the proposed rule does not specifically resolve these issues.

ICBA strongly urges the CFPB to modify the proposed rule to expressly apply to prepaid accounts funded with virtual currencies. ICBA believes that virtual currencies constitute "funds" as defined under the EFTA, and urges the CFPB to include prepaid accounts funded or loaded with virtual currencies in the definition of "prepaid account."

Virtual currencies frequently are promoted as alternatives to or substitutes for existing, well-established, and highly-regulated payment products and systems such as credit cards, debit cards, and ACH payments. However, virtual currency systems do not afford consumer or prudential protections commensurate with those available to users of closely regulated, traditional payments systems and products. ICBA, along with The Clearing House, has articulated this position in a virtual currency white paper and a comment letter to the proposal by the New York Department of Financial Services (the "NYDFS") to regulate certain virtual currency businesses.⁷

⁷ See *generally* ICBA and The Clearing House, Virtual Currency: Risks and Regulation (June 2014), available at

ICBA urges the CFPB to adopt the following definition of virtual currency, which is similar to the definition proposed by NYDFS as part of its proposal to regulate certain virtual currency businesses⁸:

“Virtual currency’ includes any type of digital unit that is used as a medium of exchange or a form of digitally stored value or that is incorporated into payment system technology, including digital units of exchange that (i) have a centralized repository or administrator; (ii) are decentralized and have no centralized repository or administrator; or (iii) may be created or obtained by computing or manufacturing effort.”

We believe the CFPB should exclude from the definition of “virtual currency” (i) digital units that can be used only for purchases of goods or services at a specific merchant or defined group of affiliated merchants (such as electronic gift cards or digitally stored merchant credit offered to a consumer after a return), whether denominated in fiat currency or an alternative currency, (ii) digital units that are used solely within online gaming platforms with no market or application outside of those gaming platforms, and (iii) digital units that are used exclusively as part of a customer affinity or rewards program.⁹

Lastly, ICBA strongly believes that extending coverage to prepaid accounts funded in virtual currencies is essential to the CFPB’s goal of providing “...comprehensive consumer protections for prepaid financial products.”¹⁰ We believe that “comprehensive consumer protections for prepaid financial products” can only be achieved by acknowledging that virtual currencies constitute “funds” for purposes of the EFTA and Regulation E and, therefore, that prepaid accounts funded with virtual currency should be subject to the proposed rule.

Overdraft Services for Prepaid Accounts Should Not Be Covered Under Regulation Z

ICBA is deeply concerned about proposed changes to Regulation Z to address the treatment of overdraft services offered in connection with prepaid accounts.

<http://www.icba.org/files/ICBASites/PDFs/VirtualCurrencyWhitePaperJune2014.pdf> ; Letter from ICBA and The Clearing House and the New York Department of Financial Services regarding Regulation of the Conduct of Virtual Currency Businesses (Oct. 20, 2014), available at <http://www.icba.org/files/ICBASites/PDFs/ltr102014.pdf>.

⁸ See Regulation of the Conduct of Virtual Currency Businesses, to be codified at 23 NYCRR 200.2(p) (Feb. 4, 2015), available at

http://www.dfs.ny.gov/legal/regulations/revise_vc_regulation.pdf.

⁹ We believe extending the Proposal’s requirements to such limited purpose programs denominated in digital units is unnecessary and note that these recommended carve outs are similar to the Bureau’s proposed exclusions for store gift cards; and loyalty, award, or promotional gift cards. Proposed 12 C.F.R. § 1005.2(c)(2)-(3).

¹⁰ 79 Fed. Reg. 77102.

According to the CFPB, most prepaid accounts do not currently offer overdraft services. ICBA urges the CFPB to develop a regulatory framework that provides issuers the flexibility to offer prepaid cards with overdraft services if they so desire. Application of Regulation Z to overdraft services on prepaid products is not the proper regulatory framework because the substantive and disclosure requirements are specifically tailored for credit products such as credit cards and formal lines of credit.

The CFPB is proposing changes to Regulation Z so that prepaid account issuers that offer overdraft services or other credit features in connection with such accounts and charge a fee for the service (such as interest, transaction fees, annual fees, or other participation fees) generally would be subject to Regulation Z credit card rules and disclosure requirements for open-end (not home-secured) consumer credit plans. In addition, the CFPB is proposing to revise Regulation Z so its credit card rules would apply to separate lines of credit linked to prepaid accounts. The proposal also would require an issuer to obtain a consumer's consent before adding overdraft services and credit features to a prepaid account and would prohibit the issuer from adding such features until at least 30 calendar days after a consumer registers the prepaid account. Moreover, the proposal would amend Regulation Z as it pertains to credit on prepaid accounts to provide that a consumer would receive a periodic statement not more often than once per month and then have at least 21 days to repay the debt the consumer incurred in connection with using the overdraft service or credit feature. The proposal also would prevent an issuer from requiring, as terms of the credit feature, that it could immediately take incoming payments to a prepaid account, such as cash loads or direct deposits, to repay and replenish the credit line.

In addition, the CFPB is proposing changes to Regulation E to require disclosures about overdraft services or credit features that could be linked to prepaid accounts in the short and long form disclosures. The CFPB is proposing to provide that the compulsory use provision would apply to overdraft services or other credit features linked to prepaid accounts. As proposed, prepaid account issuers would be prohibited from requiring consumers to set up preauthorized electronic fund transfers to repay credit extended through an overdraft service or credit feature. The CFPB is proposing to amend Regulation E to restrict issuers from applying to a consumer's prepaid account different terms and conditions such as charging different fees for accessing funds in a prepaid account, depending on whether the consumer elects to link the prepaid account to an overdraft service or credit feature.

Overdraft protection services have been subject to much study and scrutiny by regulatory agencies in the last ten years.¹¹ The Federal Reserve changes to

¹¹ See 69 FR 31760 (June 7, 2004); *Joint Guidance on Overdraft Protection Programs*, 70 FR 9127 (Feb. 24, 2005); 74 FR 5584 (Jan. 29, 2009); 74 FR 59033 (Nov. 17, 2009); Fed. Deposit Ins. Corp., Fin. Inst. Letter FIL-81-2010, *Overdraft Payment Programs and Consumer Protection Final Overdraft Payment Supervisory Guidance*, (Nov. 24, 2010); 77 FR 12031 (Feb. 28, 2012);

Regulation E, which became effective July 1, 2010, prohibit financial institutions from charging consumers (both existing and new account holders) a fee for paying overdrafts on ATM and non-recurring Point-of-Sale (POS) debits unless the consumer affirmatively consents, or opts in, to overdraft coverage for these transactions. The Regulation E amendments also require disclosures that clearly describe a bank's overdraft program, fees, and alternatives for covering overdrafts transactions.

As with deposit account products, the CFPB should clarify that fees for overdraft services accessed through prepaid account products are exempt from Regulation Z's definition of "finance charge." ICBA supports this approach to regulating overdraft services for all categories of accounts under Regulation E, including prepaid accounts, and we oppose any consideration of overdraft services as a "credit" product to be regulated by Regulation Z.

The CFPB has recognized that consumers use prepaid accounts in the same way as they use traditional deposit accounts, including deposit accounts that are accessible through debit cards. Therefore, these consumers may reasonably expect that overdraft protection options would be available on prepaid cards as they are available for debit cards and deposit accounts. Nevertheless, under the CFPB's proposed rule, prepaid account users would not receive the same options to access overdraft services as consumers that have deposit accounts. These consumers would instead be required to have a formal extension of credit subject to Regulation Z requirements.

ICBA opposes any Regulation Z requirements for prepaid account overdraft services for the same reasons these requirements should not apply to deposit accounts. As with deposit accounts, Regulation Z is not the appropriate regulatory scheme with which to address overdraft protection services because this service is not a normal extension of credit and the disclosures would not, therefore, be meaningful to the consumer. Indeed, the Federal Reserve originally carved out overdraft services from the definition of finance charge under Regulation Z.¹² The Federal Reserve specifically excluded charges imposed by a financial institution that overdraw the account from the definition of finance charge unless the payment of these items and the imposition of the charge were previously agreed upon in writing, because the financial institutions reserved the discretion to pay or not pay the overdraft thereby making the typical credit disclosures insignificant.

CFPB Overdraft White Paper, *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf; CFPB Overdraft Data Point, *available at* <http://www.consumerfinance.gov/reports/data-pointchecking-account-overdraft/>. See also <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3170-AA42>.

¹² 34 FR 2002 (Feb. 11, 1969).

The Federal Reserve extensively examined this issue for deposit accounts again within the last 10 years, and determined that a better approach than Regulation Z coverage was to impose disclosure requirements under Regulation DD (Truth in Savings) and disclosure and opt-in requirements for debit cards under Regulation E. In its analysis, the Federal Reserve declined to extend Regulation Z coverage to overdraft services because the compliance costs would eliminate the service, which many consumers value, and an annual percentage rate (APR) disclosure based on overdraft fees would have little, if any, benefit to consumers.

Based on this analysis, ICBA urges the CFPB to revise the proposed rule's definition of "finance charge" so that overdraft service fees on prepaid accounts receive an exemption from the definition, and not to impose additional regulatory requirements for overdraft services on prepaid accounts that are not currently required for deposit accounts. Not allowing prepaid card users to access overdraft services is ineffective consumer policy, particularly because these consumers expect the same services as they would receive on traditional deposit accounts. The same logic imposed by the Federal Reserve should be applied for prepaid cards, which as the CFPB recognizes, often serve as a substitute for a deposit account for many consumers.

While ICBA opposes the treatment of overdraft services on prepaid accounts as credit covered by Regulation Z, we support the proposal's differentiation between prepaid accounts offering credit features or separate credit plans that are structured as "push" accounts. These accounts are more consistent with a line of credit that should be covered under Regulation Z.

Prepaid Accounts Should Have Consistent Disclosures

The CFPB's proposed rule requires that institutions disclose a "cash reload fee" or "a fee for loading cash into a prepaid account using the term 'Cash reload' or a substantially similar term." The proposed requirement clarifies that this fee would "include the cost of adding cash at a point-of sale terminal, the cost of purchasing an additional card or other device on which cash is loaded and then transferred into a prepaid account, or any other method a consumer may use to load cash into a prepaid account.

ICBA supports this fee disclosure, but urges the CFPB to rename the fee to a "deposit" fee for clarity. Consumers should be able to compare the fees and services they are receiving on prepaid accounts with other prepaid accounts and also with what they would receive on a deposit account. "Deposit fee" is a more universal term that is meaningful to the consumer in distinguishing the pricing differences between deposit accounts and prepaid accounts.

Posting of Prepaid Account Agreements Should Not Be Required Until the New Credit Card System is Developed

The CFPB is proposing § 1005.19(b) which would require prepaid account issuers to electronically submit to the CFPB prepaid account agreements offered by the issuer on a quarterly basis. The CFPB would post the prepaid account agreements it receives on its website pursuant to proposed § 1005.19(b)(7).

Providing account agreements on a quarterly basis to the CFPB is burdensome to prepaid card issuers and not helpful to consumers. In the CFPB's recent proposed rulemaking on credit card agreements, it acknowledged that its process was "unnecessarily cumbersome for issuers and may make issuers' own internal tracking of previously submitted agreements difficult." The CFPB also noted the current process for CFPB staff to manually review, catalog, and upload new or revised agreements to its website, and to remove outdated agreements, can extend for several months after the quarterly submission deadline.¹³ ICBA foresees similar operational problems with the requirement for prepaid account agreements.

ICBA urges the CFPB to delay moving forward with this requirement until it has developed its streamlined submission system for credit card agreements. Once that is developed, the CFPB can revisit the feasibility of developing a similar system for larger issuers to submit prepaid account agreements. As with the requirement for credit card agreements, the CFPB should further evaluate the need for this requirement and weigh its benefit with the burden on financial institutions. Indeed, the CFPB has regulatory flexibility with this proposed requirement, which unlike the requirement for credit cards, is not mandated by statute.

Furthermore, if the CFPB moves forward with this requirement, we recommend not requiring the submission and public posting of agreements that are tailored agreements for a particular purpose or program and not offered to the general public. The public posting of these agreements would compromise the ability of issuers to negotiate customized account agreements.

Compliance with New Rules Should Not Be Required Until 18 Months After Publication

The CFPB proposes that with certain exceptions, the effective date for the requirements set forth in a final rule would be nine months after the final rule is published in the Federal Register. The exception proposed by the CFPB is that for a period of 12 months after the final rule is published in the Federal Register, financial institutions would be permitted to continue selling prepaid accounts that do not comply with the final rule's pre-acquisition disclosure requirements, if the account and its packaging material were printed prior to the proposed effective date.

¹³ 80 Fed. Reg. 10418 (Feb. 26, 2015).

ICBA encourages the CFPB to extend the effective date of the final requirements to 18 months to ensure that systems and technology changes can be made in time. This approach would be more practical for community banks and other financial institutions currently faced with numerous regulatory changes, and would guarantee better compliance with any new requirements.

Thank you for considering the comments in the letter. If you have questions or need additional information, please contact me at 202-821-4469 or Elizabeth.Eurgubian@icba.org.

Sincerely,

/s/

Elizabeth A. Eurgubian
Vice President & Senior Regulatory Counsel