

April 3, 2017

By electronic delivery to: www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1275 First Street, N.E.,
Washington, DC 20002

Re: Request for Comment on Prepaid Accounts Under The Electronic Fund Transfer Act (Regulation E) and The Truth in Lending Act (Regulation Z) Delay of Effective Date and Clarification of Certain Provisions [82 FR 13782 \(March 15, 2017\)](#)

Dear Ms. Jackson:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (Bureau) request for public comment on its proposed delay of the October 1, 2017 effective date of the Rule Governing Prepaid Accounts (Rule) under the Electronic Fund Transfer Act (implemented by Regulation E) and the Truth in Lending Act (implemented by Regulation Z) by six months to April 1, 2018. The purpose of the delay is to ensure that all industry participants will be able to comply with the Rule by the effective date and to allow the Bureau to evaluate concerns raised regarding certain substantive aspects of the Rule. The Bureau is not seeking comment on policy decisions reflected in the Rule.

ABA generally supports the proposal to extend the effective date and further recommends clarification to remove inconsistencies in the Rule and clarify the distinction between a prepaid account and a checking account to ensure that banks do not inadvertently violate the regulation and risk significant potential liability and supervisory actions. Similar changes should be made to the definition of "payroll account."

Most of ABA's members who continue to offer prepaid cards indicate that they will be able to meet the deadline. However, as the Bureau recognizes, some industry participants, especially those offering prepaid cards in retail stores, may have difficulty complying with certain provisions. Other provisions of the Rule may expose those issuers to considerable fraud risks unless the Rule is amended.

We commend the Bureau for proposing to extend the deadline and for its willingness to consider making adjustments as appropriate to ensure unnecessary disruption to consumers' access to, and use of, prepaid accounts. Accordingly we support the six-month delay, assuming the impediments

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

to compliance and the fraud risks are addressed. If they are not, prepaid card issuers will need at least an additional six months to comply.

In addition, we recommend that the Bureau clarify that card issuers may comply prior to the effective date. The concern is that prepaid card issuers, for example, those issuing payroll and government benefit cards, risk violating the current rule if they make disclosure and other changes prior to the effective date of the Rule. Early compliance benefits card holders and should not be discouraged.

Our primary concern with the Rule remains the inconsistency and lack of clarity of the regulation's distinction between checking accounts and prepaid accounts. Absent a usable distinction, banks face unfair and significant compliance risk and liability for inadvertent violations if an examiner or plaintiffs' lawyer asserts that the bank's checking account should be treated as a prepaid account and subject to the related disclosures and restrictions of the Rule. While the Bureau recognized and attempted to address concerns raised in our March 23, 2015 [comment letter](#) to the proposed Rule,² we are unable to discern any functional distinction between the two products as defined. We strongly recommend that the Bureau classify prepaid accounts as "accounts marketed or labeled as a prepaid card or prepaid account," an approach adopted elsewhere in Regulation E.

The relevant text of the prepaid account definition³ is as follows:

"Prepaid Account" means...An account:

- (1) That is issued on a prepaid basis in a specific amount or not issued on a prepaid basis but capable of being loaded with funds thereafter;
- (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 transfers; **and**
- (3) That is **not a checking account**, share draft account, or negotiable order of withdrawal account. (Emphasis added.)

While the Rule expressly excludes "checking accounts" from the definition of prepaid card accounts, it does not define "checking accounts" other than to explain that they are demand deposit accounts, so the specific exclusion is not helpful. One must then examine the other two prongs of this part of the definition of prepaid card accounts. A checking account meets the first prong above because, though the terminology is uncommon for checking accounts, a checking account can be "loaded," i.e., funded, "not on a prepaid basis but [is] capable" of receiving deposits once the account is opened.

Thus, the critical question is whether, under the third prong above, the "primary function" of a checking account is "to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs or to conduct person-to-person transfers." Comment 8 to § 1005.2(b)(3)(i) makes clear that brokerage accounts and savings accounts are not prepaid cards and describes their "primary function." However, it offers no guidance on what the primary function of a checking account is. Certainly, it could

² Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83,934, 83,974 (Nov. 22, 2016), "The Bureau acknowledges, however, that its proposed approach did not sufficiently resolve the potential ambiguity referenced by comments. The Bureau believes that its express reference in final § 1005.2(b)(3)(i)(D)(3) to the account not being a checking, share draft, or NOW account together with the primary function test in final § 1005.2(b)(3)(i)(D)(2), more directly address these concerns."

³ 12 C.F.R. § 1005.2(b)(3)(i)(D)

be argued that its primary purpose is “to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs.” While the primary function arguably might be to receive payments such as payroll and other deposits, that argument would apply equally to prepaid accounts.

The Bureau in the Supplementary Information states that there are “notable differences between how prepaid accounts and checking accounts function,”⁴ but unsuccessfully attempts to distinguish them. It explains, “Checking accounts generally allow consumers to write checks and present them to payees without first receiving authorization from their financial institution. Checking accounts also allow incoming debit ACH transactions without preauthorization.”⁵

However, like checking accounts, prepaid accounts may also allow incoming debit transactions without preauthorization⁶ e.g., a single ACH bill payment, a fact recognized in the Rule’s model “long form” which includes “bill payment” in the list of prepaid account features. “Bill payment” is not limited to recurring payments (i.e., preauthorized electronic fund transfers).

In addition, a check feature does not appear to be the distinguishing factor. The Bureau’s “Prepaid Rule: Small entity compliance guide” (Guide), released February 1, 2017, states that “checking accounts...are not prepaid accounts even if they do not offer check-writing capabilities (e.g., a ‘checkless’ checking account).”⁷ Adding to the confusion, the Guide further explains that “the ability to issue preauthorized checks does not by itself qualify the account as a checking, share draft, or NOW account.”⁸ Thus, an account may be a checking account even if there is no check feature and may be a prepaid account even though it offers certain checks.

It is not clear, for example, whether “checkless checking accounts,” such as those based on the “[Model Safe Accounts](#),”⁹ and which the Bureau encourages banks to offer, are checking accounts or prepaid accounts under the Rule, as these accounts lack a check feature. The Supplementary Information creates further ambiguity about the status of such accounts. The Bureau explains that the reason for restricting overdrafts on prepaid accounts is that “financial institutions deliberately market prepaid accounts to consumers as products that are *safer and easier* to use than comparable products with credit features, in particular, *checking accounts with overdraft*,”¹⁰ (Emphasis added.), a description fitting the FDIC’s “Safe Account.” In addition, the Bureau notes that prepaid accounts tend to be used by those “with limited education, and [those who] are often unemployed or recipients of public benefits,”¹¹ people the FDIC’s Safe Account is intended to attract.

⁴ 81 Fed. Reg. 84158.

⁵ *Id.* at 84159.

⁶ Under § 1005.2(k) of Regulation E, a “preauthorized electronic fund transfer means an electronic fund transfer authorized in advance to recur at substantially regular intervals.”

⁷ CONSUMER FIN. PROTECTION BUREAU, PREPAID RULE: SMALL ENTITY COMPLIANCE GUIDE (2017), at 16.

⁸ *Id.*

⁹ Under the Model Safe Account Template, core features include “online and mobile banking/bill pay, check cashing and ‘auxiliary service and fees,’” lines of credit, and small-dollar loans (less than \$2500). “Safe Accounts are checkless, card-based electronic accounts that allow withdrawals only through automated teller machines, point-of-sale terminals, automated clearinghouse preauthorizations, and other automated means.” FED. DEPOSIT INS. CORP., MODEL SAFE ACCOUNTS PILOT FINAL REPORT, (Apr. 2012) *available at* <https://www.fdic.gov/consumers/template/template.pdf>.

¹⁰ 81 Fed. Reg. 84159

¹¹ *Id.*

In effect, under the Rule, prepaid accounts and checking accounts have no functional differences, as evidenced by the Supplementary Information and Guide.¹² The only distinction is how they are marketed and labeled.

Prior to the Rule, the distinction between checking and prepaid accounts was not an issue because there was an understanding (though not explicit) that “prepaid cards” were exempt from Regulation E. Thus, they were narrowly defined. As discussed at length in our comment letter to the proposed Rule, the Federal Reserve Board provided a much clearer distinction than the Rule. The *broadest* application of prepaid accounts was to cards usable for payments *only* through the payment card networks. Such accounts could not be used for typical online bill pay or ACH, for example. Visa and MasterCard use the same definition, as does Regulation II, which exempts prepaid accounts from that regulation’s interchange fee limits.

The Bureau declined to adopt this definition and instead changed the definition of prepaid account *dramatically*, replacing an objective test with a subjective, inconsistent one. As discussed, it is not clear whether checkless checking accounts, such as the FDIC’s Safe Account, are prepaid accounts or checking accounts. Moreover, as check use or check availability as a feature diminishes, it becomes easier to argue that traditional “checking” accounts are prepaid accounts.

The consequences of the vague and inconsistent definitions are significant and should not be dismissed as theoretical legal debates easily surmounted. Banks face significant potential liability and compliance risk from bank examiners and plaintiffs’ attorneys arising from alleged noncompliance with the Rule. Neither plaintiffs’ lawyers nor examiners are bound by informal staff opinions or Supplementary Information. They can argue that checking accounts fall within the plain language of the Rule as accounts whose “primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs.”

Nor can banks rely on assurances that examiners will abstain from an expansive view of the meaning of prepaid accounts. Agency and examination staff change and newer staff, unfamiliar with the Rule’s intent and history, can be expected to apply the regulatory language.¹³

Not only do banks unfairly face civil liability and supervisory criticism from vague definitions and an inconsistent regulation, consumers will lose choices. To reduce the potential liability for inadvertent violations, banks will seek to retain as key features obsolete or unnecessary features -- e.g., checks. Thus, consumers interested in a “checkless” checking account from a bank will be limited to “prepaid cards,” which are most visibly offered in retail stores rather than bank branches.

For these reasons, we strongly recommend that the Bureau refine the definition of prepaid accounts by deleting “That is not a checking account, share draft account, or negotiable order of withdrawal account” in § 1005.2(b)(3)(i)(D)(3) and replacing it with “That is marketed or labeled a

¹² It has been suggested that banks could look to other regulations for guidance on the definition of checking account. However, the definitions of “account” that include checking accounts in other regulations, such as Regulation CC (Expedited Funds Availability Act) and Regulation DD (Truth in Savings Act) also include prepaid accounts.

¹³ For example, in their May 18, 2016 Interagency Guidance Regarding Deposit Reconciliation Practices, bank regulatory agencies presented a novel and surprising interpretation of Regulation CC (The Expedited Funds Availability Act) that had never been raised in the almost 30 years since adoption of that regulation. They assert that the failure to correct *de minimus* deposit discrepancies caused by customer error may violate Regulation CC.

prepaid account or prepaid card.” As discussed above, under the Rule, there are no functional differences between checking accounts and prepaid accounts. The only practical differences between these products, as defined, are what they are called and how they are marketed. To be effective and consistent, the Rule should so recognize. Indeed, Regulation E, under the definition of prepaid card and elsewhere, distinguishes products on the basis of how they are labeled and marketed.¹⁴ The Bureau should do the same for prepaid cards.

A similar exclusion is necessary for “payroll card accounts.” Under §1005.2(b)(3)(i)(A), a payroll card is:

[A]n account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer’s wages, salary, or other employee compensation are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.

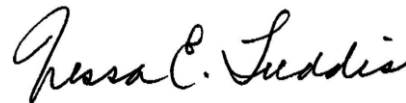
This definition arguably captures arrangements between employers and banks whereby employees are offered a checking account through the employer as a convenience to the employees. Such accounts may be generally available to the public or may include special features, such as fee waivers. The compliance risk will discourage such arrangements. Accordingly, “marketed or labeled as a payroll account” should be added to the definition of payroll account.

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ABA appreciates the Board’s proposal to extend the effective date to ensure that the industry has sufficient time to comply with the Rule and to allow appropriate modifications to ensure consumers continue to have access to prepaid accounts and to avoid the risk of fraud. Our primary concern is the vagueness of key definitions that make compliance uncertain and leave banks at unfair risk of significant liability and supervisory actions. We strongly recommend that the Bureau use this opportunity to address the inconsistency of the Rule.

We would be pleased to discuss this matter further with the Bureau.

Sincerely



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¹⁴ § 1005.2(b)(3)(i)(C) of Regulation E includes in the definition of “prepaid account” an “account that is marketed or labeled as ‘prepaid’....” § 1005.20(b) of Regulation E excludes from the term “store gift card,” “general-use prepaid card” and “gift certificate” any card or device that is “reloadable and not marketed or labeled as a gift card or gift certificate.”