New Year, New Amendments to the Prepaid Rule

In a nod to prepaid card industry concerns, the Consumer Financial Protection Bureau (CFPB) has delayed the effective date of its Prepaid Account Rule by one year, to April 1, 2019. In addition to pushing the Prepaid Account Rule’s effective date into next year, the CFPB has also made other substantive changes in response to various industry concerns (the “2018 Prepaid Amendments”). In this article, we summarize the substantive changes the CFPB made to the Prepaid Account Rule through the 2018 Prepaid Amendments.

Unverified Prepaid Accounts Are Excepted from Regulation E’s Error Resolution and Limited Liability Requirements

As industry participants are likely know now, the Prepaid Account Rule amended Regulation E to impose a comprehensive set of consumer protection requirements upon prepaid accounts, bringing such accounts into closer alignment with regulations governing traditional deposit accounts. Chief among these consumer protections are error resolution processes that prepaid account issuers must follow when a consumer provides adequate notice of an error (i.e., within sixty days after an account statement indicates the error). Perhaps even more significantly, provision of such notice also limits a consumer’s liability to $50 in most circumstances (and $500 in certain circumstances where notice was not timely). Prepaid industry participants raised concerns about complying with these requirements, particularly with respect to prepaid accounts that remain unverified (unidentified) by the consumer.

The CFPB responded to these complaints in the 2018 Prepaid Amendments by tweaking Regulation E error resolution and limited liability requirements to only apply once a consumer has successfully completed a financial institution’s identification and verification process. If a prepaid account program does not offer such a process, the initial disclosures provided with the account must describe the applicable error resolution process and liability limitations or state that there are no such protections.

Exceptions Created and Expanded for Hybrid Prepaid-Credit Card Accounts

The Prepaid Account Rule was intended to provide clarity to industry members who raised questions about what requirements applied to prepaid accounts (typically governed by Regulation E, which governs electronic fund transfers) that offered credit features, such as the ability to borrow money through overdraft programs or cash advances (typically governed by Regulation Z, which governs consumer lending). The CFPB used the Prepaid Account Rule to establish special requirements and protections for these types of cards, which the Bureau deemed “hybrid prepaid-credit cards.”
The 2018 Prepaid Amendments shed further light on when the hybrid prepaid-credit card requirements apply. First, they do not apply to certain business arrangements where a traditional credit card account is merely linked to a prepaid account—such as a digital wallet for storage purposes—as long as certain conditions are satisfied. Second, the 2018 Prepaid Amendments expand the types of incidental credit offerings prepaid account issuers may provide (such as structuring credit as a negative balance) without triggering the special protections or Regulation Z (such as a thirty-day waiting period before an issuer can offer overdraft features, limitations on credit-related charges, and requiring issuers to send monthly statements).

**Disclosure Requirement Changes**

One of the Prepaid Account Rule’s consumer protection mechanisms requires a financial institution or third party to provide short and long form disclosures to a consumer before the consumer acquires a prepaid account (“pre-acquisition disclosures”). However, industry expressed concerns to the Bureau about what “pre-acquisition” meant in certain circumstances. For example, if a consumer sent an application for a prepaid account by mail, was a financial institution required to first mail pre-acquisition disclosures and then later send the card for the account, or could the financial institution send both the disclosure and the card at the same time?

The CFPB uses a bulk of the 2018 Prepaid Amendments to change or clarify when, and how, a financial institution or third party can deliver these disclosures. First, a financial institution or third party may provide these disclosures at the time the consumer receives a prepaid account, as long as there is not an alternative means for the consumer to receive the account funds. Further, in an effort to cut potentially significant costs to industry, if a prepaid account is sold at a retail location, the financial institution may provide the long form disclosure electronically, after a consumer acquires the account, assuming the financial institution does not already provide the disclosure inside packaging materials or otherwise mail or deliver written account-related communications to the consumer.

Finally, in an effort to address industry concerns regarding ease and accuracy of disclosure requirements, the 2018 Prepaid Amendments makes the following three changes: (1) a financial institution no longer needs to provide oral or electronic disclosures for prepaid accounts acquired by phone or electronically if the financial institution provided written disclosures prior to acquisition; (2) financial institutions that impose multiple fee types can now consolidate the variations and disclose category names and fee amounts (in a format that is similar to what is currently used for ATM balance inquiry fees) instead of specified fee types; and (3) foreign language disclosures are no longer required for payroll card and government benefit accounts that are acquired using a real-time third-party interpretation service or in a foreign language on an ad hoc basis as an accommodation by an employer to a consumer.

**Clarification Regarding Loyalty, Award, or Promotional Gift Cards**

The Prepaid Account Rule excludes loyalty, award, and promotional gift cards (“gift cards”) from the definition of prepaid account, because the CFPB already regulates gift cards under Regulation E, and the Bureau was worried consumers would be confused if these products were covered by multiple regimes. However, industry expressed confusion over the scope of the exclusion because one section of the regulations appeared to exclude gift cards that are marketed OR labeled as such, whereas another section appeared to only exclude gift cards that are marketed AND labeled as such. The 2018 Prepaid Amendments clarify that cards that meet the definition of gift card under the Gift Card Rule are not considered prepaid accounts, even if they fail to include the required disclosures (that is, they are not labeled as gift cards) contained in the gift card provisions of Regulation E, as long as the cards are not marketed to the public. If a gift card fails to include the required disclosures (that is, it is not labeled as a gift card) and is marketed to the general public, it is no longer excluded from the definition of prepaid account, because a consumer would likely have no indication that the card was something other than a prepaid account.
Two Changes to Procedures for Submitting Prepaid Account Agreements to the CFPB

Prepaid Rule provisions requiring issuers to submit prepaid account agreements to the Bureau on a rolling basis have been met with criticism by industry commentators, primarily because changes to the accounts, no matter how minor, would trigger constant filings with the Bureau. In an effort to make such submissions less time consuming, the CFPB now permits specified types of changes to be submitted annually or when other amendments are submitted. Additionally, covered entities may now submit short and long form disclosures as separate addenda (instead of as one integrated agreement or addendum).

What it means and what to expect: The 2018 Prepaid Amendments, like the Bureau’s other recent actions under Acting Director Mick Mulvaney’s leadership, reflect the Bureau’s larger efforts to deregulate, and make things more transparent for, covered entities. The 2018 Prepaid Amendments enter into effect on April 1, 2019, which gives regulated entities a little more than a year to acquaint themselves with these changes. Regulated entities should review the reference guides that have been published by the Bureau and can expect additional materials to be released throughout the year.

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