

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

MAY 2018

EDITOR'S NOTE: DOMESTIC AND INTERNATIONAL MATTERS

Victoria Prussen Spears

**THE FAIR CREDIT REPORTING ACT: WHERE WE'VE BEEN AND
WHERE WE'RE GOING**

David A. Elliott, Miya A. Moore, and Sara Solano

CFPB UPDATES PREPAID RULES

David F. Freeman, Jr., Christopher L. Allen,
Michael A. Mancusi, Brian C. McCormally,
and Anthony Raglani

**TEXAS' PROPOSITION 2 EXPANDS HOME EQUITY LOAN MARKETS
FOR LENDERS AND CONSUMERS**

Scott D. Samlin and Avinoam D. Erdfarb

**THE IMPLICATIONS OF "FULL ALIGNMENT" FOR BREXIT PLANNING
BY FINANCIAL INSTITUTIONS**

Bob Penn, David Toube, Knox McIlwain, Katherine Dillon,
and Alessandro S. Forzani

THE FUTURE OF MREL

Alan Bainbridge, Simon Lovegrove, and Jack Prettejohn

UNDERSTANDING THE NOTICE OF REFUSAL PERIOD IN UCP600

Wang Jingen

**INTRODUCTION OF BAD BANKS IN INDIA — IS IT A PANACEA TO SOLVE
THE EXISTING NPA CRISIS?**

Rishabh Sant Tiwari



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THE BANKING LAW JOURNAL

VOLUME 135

NUMBER 5

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Editor's Note: Domestic and International Matters Victoria Prussen Spears	253
The Fair Credit Reporting Act: Where We've Been and Where We're Going David A. Elliott, Miya A. Moore, and Sara Solano	255
CFPB Updates Prepaid Rules David F. Freeman, Jr., Christopher L. Allen, Michael A. Mancusi, Brian C. McCormally, and Anthony Raglani	265
Texas' Proposition 2 Expands Home Equity Loan Markets for Lenders and Consumers Scott D. Samlin and Avinoam D. Erdfarb	272
The Implications of "Full Alignment" for Brexit Planning by Financial Institutions Bob Penn, David Toube, Knox McIlwain, Katherine Dillon, and Alessandro S. Forzani	276
The Future of MREL Alan Bainbridge, Simon Lovegrove, and Jack Prettejohn	281
Understanding the Notice of Refusal Period in UCP600 Wang Jingen	289
Introduction of Bad Banks in India—Is It a Panacea to Solve the Existing NPA Crisis? Rishabh Sant Tiwari	302

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ISBN: 978-0-7698-7878-2 (print)

ISBN: 978-0-7698-8020-4 (eBook)

ISSN: 0005-5506 (Print)

ISSN: 2381-3512 (Online)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

CFPB Updates Prepaid Rules

*David F. Freeman, Jr., Christopher L. Allen, Michael A. Mancusi,
Brian C. McCormally, and Anthony Raglani**

The authors of this article discuss recent amendments to the Consumer Financial Protection Bureau rules establishing disclosure requirements and other consumer protections for prepaid accounts.

The Consumer Financial Protection Bureau (“CFPB”) recently announced the adoption of amendments (“Amendments”) to its rules establishing disclosure requirements and other consumer protections for prepaid accounts (collectively, the “Prepaid Account Rule” or the “Rule”).¹ The Amendments clarify and revise certain provisions of the Prepaid Account Rule, which itself amends provisions of Regulation E—the implementing regulations of the Electronic Fund Transfer Act (“EFTA”)—and Regulation Z—the implementing regulations of the Truth in Lending Act (“TILA”). The Rule was finalized initially in October 2016, but its effective date was delayed by rulemaking in April 2017. Modifications to the Prepaid Account Rule were then proposed by

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¹ CFPB, Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z) (Jan. 25, 2018), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_prepaid_final-rule_2018-amendments.pdf; *See also* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 83,834 (Nov. 22, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-11-22/pdf/2016-24503.pdf>.

the CFPB in June 2017.² The Amendments were delayed further as a matter of CFPB policy during the agency's recent transition of leadership.³

As discussed in greater detail below, the Prepaid Account Rule will impose substantial compliance requirements on prepaid accounts and associated credit features; however, the Amendments extend the Rule's implementation period by a full year to April 1, 2019 and address several industry concerns identified during the rulemaking process.

SUMMARY OF THE AMENDMENTS

According to the CFPB, the Amendments are focused on addressing specific provisions of the Prepaid Account Rule with which compliance was viewed by industry participants as difficult to achieve by the applicable effective date, as well as those provisions that presented potential unintended consequences.⁴ The Amendments are, in general, consistent with those proposed by the CFPB in June 2017 and address the following areas of the Prepaid Account Rule.

Error Resolution and Limited Liability

The adopting release states that the CFPB views the Prepaid Account Rule's error resolution and limited liability rights for consumers to be beneficial—even with respect to unverified prepaid accounts; however, in order to mitigate the potential for fraud losses and to address significant concerns raised by industry commenters, the Amendments create an exception from the error resolution and limited liability requirements of Regulation E⁵ for unverified prepaid accounts other than payroll card or government benefit accounts. The exception applies where a financial institution:

- Has not successfully completed the consumer identification and verification process, but has disclosed to the consumer the risks of not

² See Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 Fed. Reg. 29,630 (June 29, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-06-29/pdf/2017-12845.pdf>.

³ See CFPB Statement on Prepaid Rule (Dec. 21, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-prepaid-rule/>.

⁴ As noted, on April 25, 2017, the CFPB published a final rule delaying the effective date of the Prepaid Account Rule as adopted initially to April 1, 2018. The Amendments further delay the effective date of the Rule to April 1, 2019. See Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); Delay of Effective Date, 82 Fed. Reg. 18,975 (Apr. 25, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-04-25/pdf/2017-08341.pdf>.

⁵ See 12 C.F.R. §§ 1005.6 & 1005.11.

registering and verifying the account in a manner consistent with that prescribed through the applicable model form;⁶

- Has completed the consumer identification and verification process and could not verify the identity of the consumer, but has made the above-described disclosure; *or*
- Does not have a consumer identification and verification process for the prepaid account program and has made the alternative consumer disclosure required under 12 C.F.R. § 1005.18(d)(1)(ii), as amended.⁷

For accounts where a consumer's identity is later verified, a financial institution is not required to limit liability and resolve errors with respect to disputed transactions that occurred prior to the successful completion of the consumer identification and verification process for that account. The exception no longer applies, however, to any disputed transactions that occur after a consumer's identity is verified successfully.

Loyalty, Award, or Promotional Gift Cards

In an effort to avoid confusion regarding the exclusion from the Prepaid Account Rule for “loyalty, award, or promotional gift cards” that are also addressed by Regulation E’s “Gift Card Rule,” the Amendments revise the Rule’s definition of “prepaid account,” as well as the related official commentary, to clarify that if a card satisfies the first two prongs of the definition of “loyalty, award, or promotional gift card” under the Gift Card Rule,⁸ but does not contain the disclosures ordinarily required under the third prong of the Gift Card Rule,⁹ the card is nevertheless excluded from the definition of “prepaid

⁶ See Appendix A-7 to Part 1005. The model notice provided under Appendix A-7(c) has been revised by the Amendments to address unverified prepaid accounts.

⁷ As amended, Section 1005.18(d)(1)(ii) requires financial institutions that do not have a consumer identification and verification process to provide notice to the consumer describing the financial institution’s error resolution process and limitations on consumers’ liability for unauthorized transfers, if any, or to state in the notice that no such protections are in place for the prepaid account program.

⁸ See 12 C.F.R. § 1005.20(a)(4).

⁹ Under Regulation E, in order to satisfy the Gift Card Rule’s definition of “loyalty, award, or promotional gift card,” the card must set forth the following disclosures: (i) a statement indicating that the card is issued for loyalty, award, or promotional purposes, which must be included on the front of the card, (ii) the expiration date for the underlying funds, which must be included on the front of the card, (iii) the amount of any fees that may be imposed in connection with the card, and the conditions under which they may be imposed, which must be provided on or with the card, and (iv) a toll-free telephone number and, if one is maintained, a website, that a consumer may use to obtain fee information, which must be included on the card,

account” for purposes of the Prepaid Account Rule if it is not marketed to the general public.¹⁰

Pre-Acquisition Disclosures

In general, the Prepaid Account Rule requires financial institutions to provide consumers who are seeking to obtain a prepaid account with certain information regarding key fees, the issuing financial institution and its prepaid account program. Such information must ordinarily be provided in both short- and long-form disclosure statements prior to the consumer’s acquisition of the prepaid account. The Amendments address several aspects of these pre-acquisition disclosure requirements, including by:¹¹

- Clarifying that in an instance of “unsolicited issuance” of prepaid funds—i.e., when a prepaid account (other than a payroll card or government benefit account) is used for disbursing funds to a consumer and the financial institution or third-party making the disbursement does not offer any alternative means for the consumer to receive such funds in lieu of accepting the prepaid account—pre-acquisition disclosures may be provided at the time the consumer receives the prepaid account (e.g., disclosures may be provided in the same packaging as the access device). Such disclosures must inform the consumer that there are no other means by which the consumer can receive the funds initially and of the consequences of disposing of the access device.
- Creating an exception from the requirement that pre-acquisition disclosures be provided (i) electronically when the consumer acquires a prepaid account through electronic means and (ii) orally when a consumer acquires a prepaid account orally by telephone. Under the exception, financial institutions are permitted to provide written pre-acquisition disclosures to the consumer prior to acquisition of the prepaid account. New official commentary to Regulation E clarifies that when a financial institution provides pre-acquisition disclosures in writing, it need not also provide such disclosures electronically or orally, even if the account acquisition process is later completed by such means.
- Expanding the retail location exception to the pre-acquisition disclosure requirements—which establishes conditions pursuant to which long-form disclosures are not required to be provided to a consumer

code, or other device. *See id.* § 1005.20(a)(4)(iii)(A)–(D).

¹⁰ *See id.* § 1005.20(b)(4).

¹¹ *See id.* § 1005.18(b).

before his or her acquisition of a prepaid account in person at a retail location¹²—by permitting, under certain circumstances, a financial institution to provide long-form disclosures to a consumer in electronic form after a consumer acquires a prepaid account, without regard to the consumer notice and consent requirements of the E-SIGN Act.¹³

- Permitting financial institutions to consolidate the disclosure of additional fee types with multiple variations into two fee variation categories, provided that the names of the two categories and amounts of the fees are disclosed in a format substantially similar to that used to disclose two-tier fees required for ATM balance inquiry fees and customer service fees.¹⁴ The adopting release for the Amendments states that the CFPB does not expect financial institutions to use this alternative form of disclosure if three or more fee variations cannot be consolidated into two categories logically and in a way that does not create consumer confusion.
- Creating an exception to the requirement that pre-acquisition disclosures be provided in foreign languages—which, at present, is required under certain circumstances when a financial institution uses a foreign language in connection with the acquisition of a prepaid account—for any payroll card and government benefit account where the use of a foreign language is offered by telephone only via a real-time language interpretation service provided by a third-party, or by the employer or government agency, on an informal or ad hoc basis as an accommodation to the prospective account holder.

The Submission of Prepaid Accounts to the CFPB

The Prepaid Account Rule requires prepaid account issuers to submit account agreements—including any amendments to such agreements and identifying information about the issuer, the prepaid account program manager, and other relevant parties—to the CFPB on a rolling basis.¹⁵ The Amendments modify these requirements in two ways. First, the Amendments permit prepaid

¹² See *id.* §§ 1005.18(b)(1)(ii)(D) & 1005.18(b)(4).

¹³ See 15 U.S.C. § 7001 *et seq.* The provision of electronic long-form disclosures is permitted under the Amendments if a financial institution does not provide such disclosures inside the prepaid account packaging material and is not otherwise mailing or delivering to the consumer written account-related communications within 30 days of obtaining the consumer's contact information.

¹⁴ See 12 C.F.R. §§ 1005.18(b)(2)(v)–(vi).

¹⁵ See *generally id.* § 1005.19(b).

account issuers to submit the short-form disclosure required by the Rule and the information required to be included in the long-form disclosure as separate addenda, as opposed to as part of an integrated agreement or single addendum. Second, the Amendments allow issuers to delay the submission of a change to the list of names or other relevant parties to a particular prepaid account agreement until the earlier of (i) the time that the issuer submits an amended agreement or other changes of identifying information of relevant parties and (ii) May 1 of each year, for any names of relevant parties that occurred between the issuer's most recent submission of relevant-party information and April 1 of that year.

Credit-Related Provisions

The Prepaid Account Rule establishes provisions to be codified under Regulation Z which address hybrid prepaid credit cards, or cards that can access overdraft features offered by the prepaid account issuer, its affiliate, or its business partner. In general, the Prepaid Account Rule seeks to apply traditional credit card rules to overdraft credit features accessible by hybrid prepaid credit cards; however, due principally to concerns raised by industry participants regarding the application of traditional credit card rules to digital wallet products—which may be linked to multiple payment options, including credit card products governed by Regulation Z—the Amendments contain a limited exception from the definition of “business partner” for purposes of the hybrid prepaid credit card requirements. Under the revised definition of the term, a credit card provider that is subject to Regulation Z's rules governing open-end credit card products that has an arrangement with a company that offers prepaid accounts, including digital wallet providers, is not a “business partner” for purposes of the relevant provisions of the Prepaid Account Rule, provided that the arrangement and the features of the underlying credit card and prepaid accounts satisfy certain conditions.¹⁶

The Amendments also exclude from the hybrid prepaid credit card requirements a prepaid account pursuant to which credit is extended through a negative balance on the asset feature of the account—similar to an overdraft

¹⁶ For example, the prepaid account issuer and the credit card issuer are not permitted to allow the prepaid card to draw, transfer, or authorize the draw or transfer of credit from the credit card account in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers, except where the prepaid account issuer or the card issuer has received from the consumer a written request that is separately signed or initialized to authorize the prepaid card to access the credit card account. In addition, the prepaid account issuer must apply the same terms, conditions and features to the prepaid account regardless of whether a consumer authorizes linkage to a credit card account.

feature on a deposit account—provided that several provisions established by the Prepaid Account Rule are satisfied.¹⁷ A prepaid account issuer may take advantage of this exception even when a “covered separate credit feature”¹⁸ offered by a “business partner” is attached to the prepaid account, provided that the above-noted conditions are satisfied. The CFPB’s adopting release states that this provision will facilitate the extension of incidental credit by prepaid account issuers and reduce operational burdens for prepaid account users.

Effective Date

As noted, the Amendments delay the previously-applicable effective date of the Prepaid Account Rule by a full year, to April 1, 2019. In connection with the longer implementation period, the adopting release for the Amendments describes the CFPB’s intention to support industry implementation, including by publishing a revised small-entity compliance guide and other forms of implementation guidance and releasing native design files for print and source code for use in web-based consumer disclosures, among other initiatives.

CONCLUSION

The Prepaid Account Rule will result in significant compliance obligations for prepaid account issuers and the prepaid product market generally; however, the Amendments address several provisions of the Rule which had been the subject of dispute across the industry. Moreover, consistent with Acting Director Mick Mulvaney’s recent comments regarding the CFPB’s internal strategic shift from “regulation by enforcement” to regulation through more transparent formal rulemaking processes upon which financial institutions can more easily rely, the CFPB has expressed a commitment to facilitate implementation of the Prepaid Account Rule through the solicitation of continued industry input and the publication of various compliance tools, each of which may assist in reducing certain burdens associated with implementation and ongoing compliance.

¹⁷ See generally 12 C.F.R. § 1026.61(a)(4).

¹⁸ Under the Prepaid Account Rule, a “covered separate credit feature” is defined, in general, to mean “a separate credit feature that can be accessed by a hybrid prepaid credit card” *Id.* § 1026.61(a)(2).