March 23, 2015

Via Electronic Delivery

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

Re: **Docket No. CFPB–2014–0031 and RIN 3170–AA22; Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)**

Dear Ms. Jackson:

The Clearing House Association L.L.C.[1] respectfully submits this comment letter to the Consumer Financial Protection Bureau (the "Bureau") in response to the Bureau's notice and request for comment regarding its proposal to amend Regulation E, which implements the Electronic Fund Transfer Act (the "EFTA"), and Regulation Z, which implements the Truth in Lending Act (the "TILA"), as well as the official commentary to each regulation (the "Proposal").[2] The Clearing House previously submitted comments to the Bureau's advance notice of proposed rulemaking (the "ANPR"), issued in May 2012, in which the Bureau indicated its intention to extend Regulation E protections to general purpose reloadable prepaid cards ("GPR Cards") and requested public input.

I. Introduction

The Clearing House applauds the Bureau's efforts to functionally regulate prepaid accounts, particularly given that many prepaid products are offered by non-depository companies ("nonbanks") that have not previously been subject to federal consumer protection requirements. The Clearing House believes that consumers who obtain financial products and services should receive the same protections under consumer financial laws, regardless of whether the products and services they obtain are provided by a depository institution or a

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[1] Established in 1853, The Clearing House is the nation's oldest payments company and banking association. The Clearing House is owned by 21 of the largest commercial banks in America, which employ 1.4 million people domestically and hold more than half of all U.S. deposits. The Payments Company within The Clearing House clears and settles approximately $2 trillion daily, representing nearly half of the U.S. volume of ACH, wire and check image transactions. The Clearing House Association is a nonpartisan advocacy organization within The Clearing House that represents, through regulatory comment letters, amicus briefs and white papers, the interests of its owner banks on a variety of systemically important bank policy issues.

[2] Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102 (Dec. 23, 2014).

nonbank. Consistent regulatory treatment is particularly important in the payments industry, which has seen the rapid emergence of a variety of nonbank companies that offer products that allow consumers to transfer funds and are capable of storing funds before the consumer designates a destination for the transfer. We commend the Bureau for proposing to regulate such prepaid accounts under the Proposal, which will help to "level the playing field" between banks and nonbanks in order to ensure consistent protections for consumers.

We also appreciate the Bureau's efforts to strike a proper balance between the benefits of extending federal consumer protections to prepaid accounts and the costs and burdens of additional compliance obligations for financial institutions, including the risk that substantial new compliance obligations may reduce consumer access to prepaid accounts. In the ANPR regarding GPR Cards, the Bureau stated that when it extended Regulation E to cover GPR cards, it would "be mindful of avoiding any unnecessary burden on industry."[3] With this principle in mind, The Clearing House encourages the Bureau to further revise the Proposal, as reflected in this comment letter, to improve the balance between appropriate consumer protections for prepaid accounts across all channels through which such accounts are offered with the costs and burdens of compliance.

II. Executive Summary

A. Summary of the Proposal

The Bureau proposes amending Regulation E to establish a new definition of "prepaid account" as a sub-category of "account." "Entities that provide prepaid accounts, whether depository institutions or nonbanks (together "financial institutions") would generally be required to provide two disclosures to a consumer before the consumer agrees to acquire a prepaid account under the Proposal: a "short form" disclosure that includes certain key fees, such as incidence-based fees, that apply to the prepaid account, and a "long form" disclosure that identifies all account fees and the conditions under which fees could be imposed. In addition, the Proposal would narrow the definition of overdraft services under Regulation E, such that prepaid accounts would not be subject to the existing Regulation E rules for overdraft services on traditional accounts. Rather, the Proposal would define prepaid accounts that access certain overdraft services or credit features as "credit cards" subject to the requirements under Regulation Z for open-end (not home-secured) consumer credit plans and credit cards.

The Proposal would also extend limitation of liability and error resolution provisions to prepaid accounts, including with respect to provisional credit. In addition, as an alternative to the requirement to provide written periodic statements, financial institutions would be permitted to make account information available through other channels, similar to existing rules for payroll cards (the "Payroll Card Rule").[4] The effective date for the Proposal's requirements would be nine months after publication of the final rule in the Federal Register, with financial institutions and their third party distribution agents given twelve months to

[3] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30923, 30925 (May 24, 2012).

[4] 12 C.F.R. § 1005.18; Electronic Fund Transfers, 71 Fed. Reg. 51437 (Aug. 30, 2006).

remove prepaid accounts with packaging not in compliance with the final rule from retail stores and other distribution channels.

B. Summary of The Clearing House's Comments

As further explained below, The Clearing House:

- Applauds the Bureau for proposing to regulate prepaid accounts offered by nonbank companies, and further encourages the Bureau to use its authority to supervise compliance by nonbanks by defining "larger participants" of a market for prepaid accounts and by monitoring other nonbanks for compliance issues and designating such entities for direct supervision.

- Urges the Bureau to more narrowly tailor the application of Regulation Z to prepaid accounts that provide consumers with credit features, and clarify that standard prepaid account fees not specific to credit features or extensions of credit do not trigger application of Regulation Z even if associated with or assessed during the occurrence of an overdraft and that such inadvertent overdrafts are not subject to Regulation Z;

- Encourages the Bureau to exclude non-reloadable prepaid accounts from the definition of "prepaid account" because non-reloadable prepaid accounts do not function as deposit account substitutes in the same manner as debit cards, payroll cards, or GPR Cards;

- Opposes the Proposal's requirements that financial institutions disclose up to three "incidence-based" fees and conduct the associated reviews that would be required to determine the appropriate fees for disclosure;

- Recommends that the Bureau extend the Proposal's exception that allows a financial institution to provide only the short form disclosure prior to acquisition in a retail store to acquisition in all retail stores, regardless of whether the retailer offers a financial institution's prepaid accounts exclusively;

- Supports the proposed extension of Regulation E's alternatives to periodic statements under the Payroll Card Rule to prepaid accounts but encourages the Bureau to reduce the period of time for which a financial institution must provide a written transaction history from eighteen months to sixty days, consistent with the current Payroll Card Rule;

- Opposes the requirement that provisional credit be extended to prepaid account users during error investigations; and

- Urges the Bureau to extend the effective date of the Proposal's requirements from nine months after publication of the final rule in the Federal Register to eighteen months after publication.

In addition to the points highlighted above, we set forth other suggestions and comments regarding the Proposal in further detail below.

III. Discussion

A. Level Playing Field

One purpose underlying the creation of the Bureau was to "level the playing field" between banks and nonbank providers of consumer financial products and services in order to ensure fair competition and consistent protections for consumers.[5] The Clearing House commends the Bureau for taking steps to ensure that consumers that use prepaid accounts receive consistent protections, regardless of whether the prepaid account is offered by a bank or a nonbank company. In recent years, a variety of nonbank companies have emerged that offer consumers "alternative" methods of storing and transferring funds. While banks are subject to numerous statutes, regulations, and regulatory guidance designed to ensure adequate consumer protections, there has been a lack of clarity regarding whether Regulation E and other federal consumer protection requirements apply to payment products offered by nonbanks. The Clearing House applauds the Bureau for proposing to extend Regulation E to prepaid accounts offered by nonbanks, such as P2P payment services and digital or mobile wallets that allow a consumer to transfer funds, where funds can be stored before the consumer designates a destination for the funds.

We also commend the Bureau for proposing to require prepaid account providers to disclose to consumers if a prepaid account is not eligible for "pass-through" deposit insurance. While consumers are generally informed that their deposits at insured depository institutions are insured by the Federal Deposit Insurance Corporation ("FDIC"),[6] there is currently no requirement to disclose the lack of FDIC pass-through insurance associated with the funds underlying a prepaid account (whether offered by a depository institution or nonbank). While "pass-through" deposit insurance coverage is available in many instances to customer funds underlying GPR Cards and certain other prepaid accounts, it may not be available if a prepaid account is not structured to qualify for such coverage.[7] When that is the case, we believe it is essential that consumers are informed of the risk that they could lose their money if the prepaid account provider were to fail and strongly support this aspect of the Proposal.

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[5] "As mandated by Congress, [the Bureau] will particularly seek to level the playing field so that bank and non-bank providers of consumer financial products and services can compete freely and fairly – which always redounds to the benefit of consumers." Richard Cordray, Prepared Remarks to the National Association of Attorneys General (NAAG) Spring Meeting (March 8, 2011), *available at* http://www.consumerfinance.gov/newsroom/partnering-the-consumer-financial-protection-bureau-and-state-attorneys-general/; *see also* Richard Cordray, "A Level Playing Field for Consumer Financial Products and Services" (Mar. 8, 2011), *available at* http://www.consumerfinance.gov/blog/a-level-playing-field-for-consumer-financial-products-and-services/.

[6] 12 C.F.R. §§ 328.2 and 328.3.

[7] *See* New General Counsel's Opinion No. 8 (November 8, 2008), *available at* www.fdic.gov/news/news/financial/2008/fil08129.html.

In addition, The Clearing House recommends that the Bureau take further steps to level the playing field between bank and non-bank providers of prepaid accounts through direct supervision of and enforcement against both significant nonbanks in the prepaid account market and nonbanks suspected of violating consumer protections in connection with prepaid accounts. Section 1024 of the Dodd-Frank Act provides the Bureau with the authority to supervise nonbanks participating in any of three enumerated markets of consumer financial products or services, as well as "larger participant[s] of a market for other consumer financial products or services," as the Bureau defines by regulation.[8] The Clearing House strongly encourages the Bureau to exercise its authority under Section 1024 to level the playing field between depository institutions and nonbank providers of prepaid accounts both in substantive obligations as well as in supervision and enforcement regarding compliance with those obligations.[9] Without direct Bureau supervision and oversight, significant nonbanks providing prepaid account products and services will be advantaged by the lower regulatory costs associated with an uneven playing field. Further, unsupervised nonbanks will have less incentive to establish comprehensive regulatory compliance programs, which means the consumers who obtain prepaid accounts from those entities may not receive the protections they are entitled to under the law.

In addition to direct supervision of larger participants in the prepaid account market, The Clearing House encourages the Bureau to broadly exercise its authority to identify specific nonbanks providing prepaid account products and services for supervision based on a risk determination.[10] In particular, we believe that the Bureau should monitor complaints and other information regarding nonbank prepaid account providers, carefully consider whether nonbank prepaid account providers that are not larger market participants pose risks to consumers, and, where appropriate, identify and designate risky providers for direct Bureau supervision.

B. Overdraft Services and Credit Features

The Proposal would make a number of changes to Regulation E and Regulation Z relating to overdraft services and credit features associated with prepaid accounts. The Proposal would narrow Regulation E's definition of overdraft services and limit the provision of courtesy overdraft services to prepaid account users. Regulation Z permits financial institutions to provide overdraft services to debit card users without causing the debit card to become a credit card subject to Regulation Z.[11] The Proposal would define prepaid accounts that access certain overdraft services or credit features as "credit cards" subject to the requirements under

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[8] The Bureau is authorized to require reports and conduct examinations of nonbanks that are subject to its supervisory authority. Dodd-Frank Act § 1024(b)(1).

[9] The Pew Charitable Trusts encouraged the Bureau to regulate larger participants in the prepaid account market as well. The Pew Charitable Trusts, *Loaded with Uncertainty: Are Prepaid Cards a Smart Alternative to Checking Accounts?*, at 25 (Sept. 2012), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PrepaidCheckingreportpdf.pdf.

[10] 12 C.F.R. Part 1091.

[11] This is achieved through an exception to the definition of finance charge under Regulation Z. *See* 12 C.F.R. § 1026.4(c)(3).

Regulation Z for open-end (not home-secured) consumer credit plans and credit cards. In particular, when a financial institution charges a prepaid account user a fee for a transaction associated with the provision of credit, including as a result of incidental overdraft services, the prepaid account would become subject to Regulation Z. The Proposal would apply Regulation Z requirements to two categories of credit features offered in connection with a prepaid account: (i) credit plans accessed directly by prepaid account cards, such as overdraft services or linked lines of credit, where the credit is subject to a finance charge, and (ii) separate credit plans that are not accessed directly by prepaid cards, but are instead structured as "push" accounts that may be accessed by an account number and from which funds must be deposited into a prepaid account, regardless of whether such credit is subject to a finance charge. The Proposal also would prohibit financial institutions from automatically applying funds in a consumer's prepaid account against an extension of credit, including an overdraft, without written consent from the prepaid accountholder, and even then the financial institution could apply the funds to extensions of credit only once a month.

1. *The Clearing House does not believe that courtesy overdraft services should be considered "credit" subject to Regulation Z in any context.*

Overdraft protection programs and overdraft services have been subject to extensive study and consumer testing over the past ten years, including by regulatory authorities,[12] consumer protection advocates,[13] and financial services industry trade groups.[14] Much of this analysis was available to and considered by the Board of Governors of the Federal Reserve System (the "Board"), together with its own consumer testing, in connection with its promulgation in 2009 of new rules governing overdraft services under Regulation E.[15] The Board's new overdraft rules in 2009 adopted a bifurcated approach to overdraft services offered in connection with accounts accessed by debit card. Under the 2009 rule amendments to Regulation E, consumers are required to "opt-in" to receive overdraft services for ATM and one-time debit card transactions but are not required to "opt-in" to receive overdraft services for recurring debit card transactions, ACH transactions, or check transactions to their accounts.[16] The Board arrived at this bifurcated approach after extensive study, including evaluation of

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[12] *See, e.g., Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts,* GAO Report 08-281 (January 2008); Federal Deposit Insurance Corporation, *FDIC Study of Bank Overdraft Programs* (November 2008); Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration, *Joint Guidance on Overdraft Protection Programs* (Feb. 2005); Office of Thrift Supervision, *Proposed Supplemental Guidance on Overdraft Protection Programs*, 75 Fed. Reg. 22681 (Apr. 29, 2010); Board of Governors of the Federal Reserve System, *Electronic Funds Transfers Proposed Rule*, 74 Fed. Reg. 5212 (Jan. 29, 2009).

[13] *See, e.g.,* Rebecca Borné & Peter Smith, *High-Cost Overdraft Practices,* Ctr. for Responsible Lending (July 2013); Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options,* Ctr. for Responsible Lending (April 2008); Consumers Union, *Consumer Reports Poll* (November 16, 2010).

[14] *See, e.g., ABA Survey: More Consumers Avoid Overdraft Fees*, Press Release, American Bankers Association (Sept. 9, 2009).

[15] Electronic Fund Transfers, 74 Fed. Reg. 59033 (Nov. 17, 2009).

[16] 12 C.F.R. §1005.17(b).

consumer surveys and testing, from which the Board concluded that consumers prefer and are best served by an opt-in approach to overdraft services for ATM and one-time debit card transactions affecting an account that does not extend to recurring debit, ACH, or check transactions.[17] The overdraft approach adopted by the Board requires financial institutions to provide consumers with detailed information regarding overdraft services for ATM and one-time debit card transactions and requires financial institutions to obtain affirmative consent before charging a fee to a consumer for overdraft services related to ATM or one-time debit card transactions. The Board found that the opt-in approach to fee-based overdraft services for ATM and one-time debit card transactions is appropriate because consumers may not expect or desire to have their financial institutions authorize over-limit ATM and one-time debit card transactions, although some consumers may prefer coverage of occasional overdrafts to having a transaction declined.[18] In contrast, the Board concluded that many consumers desire and benefit from fee-based overdraft services for recurring debit, ACH, and check overdrafts without first opting-in to such services because these transaction types tend to be associated with more important payments (such as mortgage or rent payments) and dishonor of these transaction types tends to result in consumer fees assessed by the intended payee that may exceed overdraft fees.[19]

The Clearing House supports the balanced approach to fee-based overdraft services adopted by the Board in the 2009 amendments to Regulation E, and agrees with the Board that the approach to overdraft services currently reflected in Regulation E affords consumers a "meaningful choice" in the overdraft services available to them.[20] Consumers exercise this choice judiciously—only 16.1% of accounts surveyed by the Bureau in 2011 had elected to opt-in for overdraft services for ATM and one-time debit card transactions.[21] While the majority of consumers may elect not to opt-in to overdraft services for ATM and one-time debit card transactions, a significant percent do affirmatively elect to receive fee-based overdraft services, and those that elect overdraft services use those services to cover short-term financial shortfalls. Regulation E's opt-in construction allows consumers to control the financial products they utilize and customize those products to meet the consumer's individual financial needs.

The Clearing House believes the current approach to overdraft services under Regulation E and the exemption of fees for such services from Regulation Z's definition of "finance charge" strikes an appropriate balance between protecting consumers from unwanted and unexpected overdraft charges while allowing consumers who desire to cover short-term financial shortfalls with easy access to overdraft services. We strongly support this approach for all categories of accounts under Regulation E, including prepaid accounts. Hence, we encourage the Bureau to refine and narrow its application of Regulation Z to prepaid accounts to allow prepaid accounts to be eligible for Regulation Z's existing exemption from the definition of

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[17] 74 Fed. Reg. 59033, 59038-59039.

[18] *Id*. at 59039.

[19] *Id*. at 59043.

[20] *See id*. at 59044.

[21] Consumer Financial Protection Bureau, *CFPB Study of Overdraft Programs*, at 60 (June 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

"finance charge" for "charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing." [22]

In addition, we disagree with the Bureau's proposed approach of prohibiting financial institutions from automatically applying funds deposited by a consumer into a prepaid account toward a negative balance on an overdrawn prepaid account without written consent from the accountholder.[23] When a traditional checking account user overdraws her account, funds deposited to the account will automatically be applied to the negative balance. When a prepaid account user overdraws his account, the consumer likely intends funds subsequently deposited into the prepaid account to satisfy the overdraft.[24] The Proposal would prevent a consumer from achieving that expected outcome and could mislead prepaid account users into thinking they have more funds available than they actually do. Under the Proposal, an overdraft of a prepaid account effectively creates a credit card balance (in the amount of the overdraft). When the consumer subsequently adds funds to the prepaid account, expecting to pay off the overdraft, the prepaid account balance would reflect a credit in the amount of the deposit and the deposit would have no effect on the credit balance. Under these circumstances, the consumer is likely to be misled by believing that funds deposited to the prepaid account were applied against the overdraft first and that only the excess amount deposited will be reflected as a positive balance in the prepaid account. This situation could lead consumers to think they have more net funds available than they actually do, undermining the ability of consumers to use prepaid accounts as a budgeting tool.[25]

In its 2014 study of checking account overdrafts, the Bureau found that twenty-nine percent of consumers who overdraw their checking accounts bring their account balances positive within one calendar day of the overdraft and more than half of overdrawn checking accounts are returned to positive within three days.[26] Many prepaid account users have held or currently hold checking accounts[27] and have likely become accustomed to depositing funds into

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[22] 12 C.F.R. § 1026.4(c)(3). To achieve this change, The Clearing House encourages the Bureau to delete the following sentence from proposed 12 C.F.R. § 1026.4(c): "This exception does not apply to credit accessed by a prepaid card." The extension of the existing exemption to Regulation Z's definition of finance charge would provide financial institutions and consumers with clarity and consistency. Restricting the services available to a prepaid account user would be unduly confusing and burdensome for consumers who use prepaid accounts as transaction account substitutes with the expectation that the prepaid account will offer the same overdraft services provided by traditional accounts and allow them to quickly correct an overdrawn prepaid account by depositing funds to the account.

[23] *See* Proposed § 1026.12(d).

[24] *See* Consumer Financial Protection Bureau, *Data Point: Checking Account Overdrafts*, at 22 (July 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf [hereinafter *CFPB Data Point: Checking Account Overdrafts*].

[25] According to the Bureau, using GPR Cards as a budgeting tool is "popular" among consumers. 79 Fed. Reg. 77102, 77106.

[26] *CFPB Data Point: Checking Account Overdrafts*, at 22.

[27] The Pew Charitable Trusts, *Why Americans Use Prepaid Cards: A Survey of Cardholders' Motivations and Views,* at 1 (Feb. 2014), *available at*

an overdrawn account and having those funds automatically applied to the negative balance. By preventing financial institutions from automatically applying deposited funds to a negative prepaid account balance, the Proposal would thwart prepaid account users' efforts to quickly correct a negative balance.[28]

2. *The Bureau should clarify when a prepaid account fee triggers Regulation Z by revising the definition of "finance charge" to clarify that regular prepaid account fees not specifically associated with an extension of credit or overdraft service do not constitute finance charges*.

In addition to our view that courtesy overdraft services on any category of Regulation E "account" should not be considered "credit" subject to Regulation Z, we are concerned by the proposed treatment of inadvertent overdrafts and fees not specifically related to an extension of credit. In particular, there are a number of scenarios in which a prepaid account that does not support (and for which the issuer does not intend to afford) credit features may, nevertheless, become overdrawn through no fault of the financial institution. Under such circumstances, as the Proposal currently is drafted, it appears that a financial institution that charges its standard prepaid account transaction or account fees may unintentionally be deemed to have provided credit subject to the Proposal's enhanced Regulation Z disclosure and compliance requirements. The Clearing House urges the Bureau to more clearly differentiate between fees assessed for extensions of credit, which trigger applicability of the Proposal's Regulation Z requirements, and other prepaid account fees that are not specific to credit extensions, which should not trigger applicability of the Proposal's Regulation Z requirements even if assessed while the prepaid account is inadvertently overdrawn or in connection with a transaction that inadvertently overdraws the prepaid account.

Financial institutions regularly assess fees on prepaid accounts for general usage, such as ATM withdrawal fees, but the Proposal does not address whether these regular fees would trigger Regulation Z if the fee is assessed in connection with a transaction that results in an inadvertent overdraft of the prepaid account. For example, a consumer with a prepaid account balance of $50.00 could dispute a $20.00 debit previously posted to his account. If the issuer were required to provide provisional credit to the consumer during the investigation of the dispute, the issuer would deposit an additional $20.00 into the prepaid account during its investigation of the asserted error. The customer could then make an ATM withdrawal of $60.00, making use of $10.00 of the $20.00 of provisionally credited funds. If, under the terms of the consumer's prepaid account, ATM withdrawals are subject to a $2.00 transaction fee, the customer would have $8.00 remaining in his account after the ATM transaction. If the financial institution subsequently concludes that no error occurred in connection with the disputed

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http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/PrepaidCardsSurveyReportpdf.pdf [hereinafter *Why Americans Use Prepaid Cards*].

[28] The bifurcation of prepaid account balances will impose burdens on financial institutions beyond the costs of implementing the systems and procedures necessary to comply with the Proposal. Financial institutions could also face higher FDIC assessments because the amount of an FDIC assessment is based, in part, on the amount of deposits held by the financial institution. By prohibiting financial institutions from automatically applying funds deposited into a prepaid account toward a negative balance, the Proposal would require financial institutions to report a higher level of assessable deposits.

$20.00 debit, the $20.00 provisionally credited to the consumer's prepaid account could be deducted from the account balance, leaving the account overdrawn by $12.00. Under the Proposal, the financial institution could be deemed to have extended credit to the consumer, subject to the enhanced Regulation Z disclosure and compliance requirements included in the Proposal because the financial institution assessed a standard $2.00 ATM withdrawal fee on a transaction that inadvertently overdrew the account. Further, if the financial institution assessed a regular, monthly maintenance fee while the account was overdrawn, this fee also could be construed as a finance charge under the Proposal simply because it happened to be assessed when the prepaid account was inadvertently overdrawn. Under the example above, however, neither the ATM withdrawal fee nor the monthly maintenance fee was assessed for the financial institution's extension of credit, and the financial institution should not be subject to Regulation Z disclosure or compliance requirements for the inadvertent extension of credit and associated non-credit-based fees.

The Clearing House recommends that the Bureau revise the definition of "finance charge" to establish a bright line rule for when a prepaid account fee constitutes a finance charge that triggers application of Regulation Z. Financial institutions and consumers require a clear distinction for when a prepaid account is subject to Regulation E and when a prepaid account is subject to Regulation Z. The Clearing House recommends revising the proposed definition of finance charge found at proposed 12 C.F.R. § 1026.4(b)(2)(ii) to read as follows:

> *"A charge or fee imposed for extending credit, carrying a credit balance, or credit availability where that charge or fee is imposed on a prepaid account in connection with credit accessed by a prepaid card or accessed by an account number where extensions of credit are permitted to be deposited directly only into particular prepaid accounts specified by the creditor, excluding any charge or fee that could have been imposed in connection with the prepaid account or any activity or transaction affecting the prepaid account whether or not credit has been extended or is available (such as monthly maintenance fees or transaction fees that apply without regard to extensions of credit or credit availability)."*

To provide further clarification, The Clearing House recommends that the Bureau provide the following comment to proposed 12 C.F.R. § 1026.4(b)(2)(ii) further explaining when a prepaid account fee would not constitute a finance charge under Regulation Z:

> *"Ordinary prepaid account fees not specifically associated with credit extensions or credit availability do not constitute finance charges. Prepaid account fees applicable regardless of whether the financial institution extends or makes credit available to the consumer do not constitute 'finance charges' even if those fees are assessed when an account is overdrawn or for a transaction that overdraws the account. For example, a prepaid account user with $100.00 in his account may complete a $30.00 purchase from an international retailer whose electronic payment processing system is offline at the time of the transaction. The retailer may manually capture the consumer's prepaid account information and allow the consumer to complete the sale without receiving prior authorization from the prepaid account issuer. The consumer could then make an $80.00 ATM withdrawal, before the $30.00 purchase posts to the consumer's*

prepaid account. Because the financial institution holding the consumer's prepaid account is not aware of the retail purchase, the financial institution will authorize the ATM withdrawal. When the retailer submits the $30.00 transaction for settlement on a force post basis, the consumer's account will be overdrawn in the amount of $10.00. If the financial institution assesses a standard $2.00 international currency conversion fee on the retail purchase, the fee would not constitute a finance charge (even though it was assessed while the prepaid account was overdrawn) because the international currency conversion fee would have been assessed on the international retail purchase transaction absent any extension or availability of credit and was not assessed due to the extension or availability of credit." Proposed comment 12 C.F.R. § 1026.4(b)(2)-1.v.

3. *Credit accounts structured as "push" accounts from which extensions of credit may only be deposited into prepaid accounts are appropriately classified as credit features of prepaid accounts.*

The Clearing House supports the Proposal's differentiation between prepaid accounts offering credit features through different methods. Separate credit plans that are structured as "push" accounts that may be accessed by an account number where extensions of credit are permitted to be deposited directly only into particular prepaid accounts specified by the creditor, regardless of whether such credit is subject to a finance charge, are correctly classified as credit under the Proposal and compliance with Regulation Z is appropriate. Credit plans structured as push accounts are effectively a line of credit provided to the prepaid account user[29] through an account number. The push account has been established for the purpose of extending credit to the consumer in connection with the consumer's prepaid account. As such, we agree with the Bureau's characterization of such arrangements under the Proposal.

[29] 79 Fed. Reg. 77102, 77208.

C. Definition of Prepaid Account

1. *The definition of prepaid account should exclude non-reloadable prepaid accounts*.

The Proposal would amend Regulation E to establish a new definition of "prepaid account" as a sub-category of "account." 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.[30]

The Clearing House encourages the Bureau to narrow the scope of the definition of prepaid account to exclude non-reloadable prepaid accounts, even if those non-reloadable prepaid accounts are not marketed and labeled as gift cards or gift certificates. As the Bureau noted in the preamble included with the Proposal, "consumers may not generally use non-reloadable products as transaction account substitutes given that the funds will eventually be spent down in their entirety."[31] The Clearing House agrees that consumers do not use non-reloadable prepaid accounts as transaction account substitutes and, therefore, we encourage the Bureau to exclude non-reloadable prepaid accounts from the definition of "prepaid account." In particular, because they frequently do not provide the same functionality as debit cards, payroll cards, and GPR Cards – such as cash access, bill payment features, or funds transfer services – non-reloadable prepaid accounts are poor substitutes for the other types of consumer asset accounts that generally are subject to Regulation E. Consequently, consumers face lower risks associated with non-reloadable prepaid accounts and should not reasonably expect to receive the same benefits for such accounts as they receive for consumer deposit accounts. The inclusion of non-reloadable prepaid accounts would provide limited benefit to consumers while significantly increasing the regulatory burden placed on financial institutions that offer non-reloadable prepaid accounts. The costs of the increased regulatory burden would be borne by consumers in the form of higher fees and reduced availability of non-reloadable prepaid accounts.

If the Bureau remains concerned that consumers may be confused if non-reloadable prepaid accounts are excluded from the definition of "prepaid accounts," then The Clearing House urges the Bureau to consider establishing a separate, distinguishing and clarifying disclosure requirement for non-reloadable prepaid accounts similar to the requirement applicable to loyalty, award, and promotional gift cards under Section 1005.20 of Regulation E (the "Gift Card Rule").[32] Under the Gift Card Rule, a person that issues a loyalty, award, or

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[30] The Clearing House encourages the Bureau to clarify that loyalty programs associated with credit cards that provide cash back to consumers would not fall within the definition of prepaid account.

[31] 79 Fed. Reg. 77102, 77129.

[32] 12 C.F.R. § 1005.20.

promotional gift card must, among other things, include a disclosure on the front of the card indicating that it is a loyalty, award, or promotional card.[33] The purpose for including this front-of-card disclosure on loyalty, award, and promotional gift cards, according to the Federal Reserve Board, is to identify to consumers that the card is a type that is not eligible for the protections applicable to other types of general-use prepaid cards under the Gift Card Rule.[34] A similar disclosure provided in connection with non-reloadable prepaid accounts excluded from the definition of "prepaid accounts" under the Proposal would signal to consumers that the non-reloadable prepaid account is not entitled to the same protections as reloadable prepaid accounts in the same way that the loyalty, award, or promotional disclosure signals to consumers that such cards are excluded from the Gift Card Rule's general protections. The Bureau could further require that non-reloadable prepaid accounts be accompanied by an additional clear and conspicuous pre-acquisition disclosure indicating that the prepaid account may not provide the same protections as reloadable prepaid accounts. [35]

In support of its decision to subject non-reloadable prepaid accounts to the full scope of Regulation E protections, the Bureau expressed concern that, if non-reloadable prepaid accounts were excluded from such coverage, financial institutions might endeavor to evade affording consumers Regulation E protections by issuing multiple non-reloadable prepaid accounts to a consumer instead of issuing one reloadable prepaid account. The Clearing House does not believe the risk of such schemes is well-founded.

Financial institutions benefit most by establishing formal, long-term, multi-product relationships with consumers. Formal customer relationships afford financial institutions the opportunity to educate consumers about available financial products and services that might be appropriate and beneficial for the consumer and about which the consumer might otherwise be unaware. For example, a consumer may not know she is eligible to establish a savings account with a financial institution until she is made aware of this option by the institution. Both financial institutions and consumers benefit when consumers establish multiple product or service relationships with financial institutions; thus, financial institutions have an inherent incentive to formalize customer relationships wherever appropriate. Where formalized customer relationships are not appropriate, including where a financial institution has provided a non-reloadable prepaid card to a customer, financial institutions should not be required to comply with consumer protection requirements that are inconsistent with the nature of the product or service provided.

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[33] 12 C.F.R. § 1005.20(a)(4).

[34] *See* Electronic Fund Transfers, 75 Fed. Reg. 16580, 16589 (Apr. 1, 2010).

[35] The Clearing House further notes that excluding non-reloadable prepaid accounts from the definition of "prepaid accounts" under the Proposal would not serve to exempt such prepaid accounts from the requirements of the Gift Card Rule, which would continue to apply to such accounts absent a separate exemption under that rule.

2. *<u>The definition of "prepaid account" should provide a bright line rule clarifying when a product constitutes an "account" as currently defined under Regulation E and when a product would constitute a "prepaid account</u>."*

The Clearing House understands that the Bureau intended the definition of "prepaid account" to create a subcategory of "account"[36] under Regulation E and for the Proposal to extend certain modified requirements to this subcategory.[37] However, as currently drafted, the Bureau's proposed definition of "prepaid account" does not provide a clear demarcation between accounts that would be subject to the requirements of the Proposal and those that would not, thus, leaving financial institutions open to second-guessing about the classification and treatment of their products. Specifically, while the Proposal would define "prepaid account" as including only products that are "not otherwise an account" under Regulation E, it may not always be clear whether such is the case.

The Clearing House believes that many prepaid products could be deemed to fall within the definition of "account" because they are "other consumer asset accounts" and that certain non-prepaid consumer products that are not "demand deposit (checking)" or "savings" accounts could be construed as being "prepaid accounts" because they are (i) "capable of being loaded with funds"; (ii) are "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) are not marketed and labeled as gift cards or gift certificates. Thus, a financial institution could determine that a consumer asset account is a "prepaid account" and devote significant resources to developing and maintaining practices, policies, and procedures to satisfy the Proposal, such as providing a short and long form disclosure prior to acquisition and providing consumers with transaction histories in lieu of written periodic statements, yet have a regulator conclude that the financial institution's product should be characterized as an "account" that is not a "prepaid account." Under such circumstances, the financial institution would have failed to comply with Regulation E by following the modified requirements applicable to "prepaid accounts" rather than the requirements applicable to "accounts." Given the differing compliance requirements applicable to "accounts" and "prepaid accounts" under the Proposal, The Clearing House encourages the Bureau to revise the definitions of "prepaid account" and "account" to clarify when a product is "not otherwise an account" under Regulation E in order to allow financial institutions to more confidently classify their products as either "accounts" or "prepaid accounts."

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[36] Regulation E defines "account" as "a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes." 12 C.F.R. § 1005.2(b)(1).

[37] Proposed § 1005.2(b)(3)(i) would define "prepaid account" to mean a card, code, or other device, *that is not otherwise an account under § 1005.2(b)(1)*, that is established primarily for personal, family, or household purposes, and that satisfies the three additional criteria in proposed § 1005.2(b)(3)(i)(A) - (C), While certain modified requirements in proposed § 1005.18 would apply to prepaid accounts, the Bureau explains that "there are other provisions in Regulation E subparts A and B that would apply to prepaid accounts by virtue of their being deemed accounts in the Regulation." 79 Fed. Reg. 77102, 77146.

The Clearing House recommends that the Bureau revise the definitions of "prepaid account" to establish a bright line distinction between standard "accounts" and "prepaid accounts." The Clearing House proposes that the Bureau modify the definition of "prepaid accounts" so that a product will be deemed to constitute a "prepaid account" only if (i) the product was expressly marketed and labeled by the financial institution as a prepaid account or (ii) if the funds associated with the prepaid account are held by the financial institution in an omnibus account, together with the funds of other consumer holders of prepaid accounts.[38] Specifically, The Clearing House recommends that the Bureau add the following paragraph 2(b)(3)(i)(D) to the Proposal's definition of "prepaid account":

> *"(D) is either (i) both marketed and labeled as a prepaid account, or (ii) where the associated funds are reflected on the books and records of a financial institution as part of an omnibus account." Proposed 12 C.F.R. § 1005.2(b)(3)(i)(D).*

We believe that the revision proposed above (together with the requirement that the product is "not otherwise an account" under Regulation E) would provide financial institutions with the additional certainty and control necessary to permit them to confidently determine whether a particular product is subject to the standard Regulation E requirements applicable to "accounts" or the modified requirements applicable to prepaid accounts.

With proposed 12 C.F.R. § 1005.2(b)(3)(i)(D), The Clearing House is not seeking to exclude additional products from the scope of Regulation E. Indeed, The Clearing House supports the Bureau's inclusion of new account types, such as products that allow consumers to transfer funds and are capable of storing funds before the consumer designates a destination for the funds,[39] under Regulation E, and encourages the Bureau to subject such products to Regulation E as either "accounts" or "prepaid accounts." We believe, however, that financial institutions require greater clarity regarding product classification in order to fully comply with Regulation E as expanded to encompass prepaid accounts. Consequently, The Clearing House asks that the Bureau establish a bright line rule differentiating between "prepaid accounts" and "accounts" to reduce industry risks of unintentional noncompliance as well as to alleviate unnecessary enforcement costs for the Bureau.

3. *The definition of prepaid account should include prepaid accounts funded with virtual currencies*.

The Clearing House urges the Bureau to modify the Proposal to expressly apply to prepaid accounts funded with virtual currencies. The Bureau notes that the Proposal "may have potential application to virtual currency and related products and services … however, the Bureau's analysis of mobile financial products and services, as well as virtual currencies and related products and services, including the applicability of existing regulations and this

[38] The Bureau notes that "[i]n contrast to a traditional checking or savings account, prepaid products including GPR cards are unique in that the underlying funds are typically held in a pooled account at a depository institution or credit union." 79 Fed. Reg. 77102, 77108.

[39] *See id.* at 77129.

proposed regulation to such products and services, is ongoing."[40] The Clearing House believes virtual currencies constitute "funds" as defined under the EFTA, and as such, prepaid accounts funded or capable of being loaded with virtual currencies should be included in the definition of "prepaid account" to the same extent as if the prepaid account was funded or capable of being loaded with fiat currency.

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; yet, virtual currency systems and transactions frequently do not afford consumer or prudential protections commensurate with those available to users of closely regulated, traditional payments systems and products. As the Bureau noted in its August 2014 Consumer Advisory, virtual currencies pose specific risks to consumers.[41] Virtual currencies are "targets for highly sophisticated hackers"[42] and "[m]any criminals have seized upon the press and enthusiasm relating to virtual currency to create new versions of old scams."[43] As reflected in the virtual currency white paper prepared by The Clearing House and the Independent Community Bankers of America, and as reflected in the comment letter from The Clearing House and the Independent Community Bankers of America in response to the proposal by the New York Department of Financial Services (the "NYDFS") to regulate certain virtual currency businesses,[44] The Clearing House believes increased regulation of virtual currency businesses and activities is necessary to provide virtual currency users with consumer and prudential protections commensurate with those available to users of comparable, closely regulated, traditional payments systems and products.

The Clearing House encourages the Bureau 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 businesses[45]:

> *"'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*

[40] *Id*. at 77121.

[41] Consumer Financial Protection Bureau, *Consumer Advisory: Risks to Consumers Posed by Virtual Currencies*, at 1 (Aug. 2014), *available at* http://files.consumerfinance.gov/f/201408_cfpb_consumer-advisory_virtual-currencies.pdf.

[42] *Id*.

[43] *Id.* at 3.

[44] *See generally* The Clearing House and Independent Community Bankers of America, Virtual Currency: Risks and Regulation (June 2014), available at https://www.theclearinghouse.org/publications/2014/tch-releases-white-paper-on-virtual-currencies; Letter from The Clearing House and Independent Community Bankers of America to the New York Department of Financial Services regarding Regulation of the Conduct of Virtual Currency Businesses (Oct. 20, 2014), available at https://www.theclearinghouse.org/issues/technology-and-intellectual-property/20141020-tch-comments-on-bitlicense-regulations.

[45] *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/revised_vc_regulation.pdf.

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 that the Bureau 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.[46]

The Clearing House believes the risks to consumers posed by prepaid accounts funded in virtual currencies exceed the risks associated with prepaid accounts funded with fiat currency[47] and, further, that the benefits of acknowledging virtual currencies as "funds" for purposes of the EFTA outweigh the burden that some virtual currency systems may incur by complying with the Proposal. The Bureau has stated, "[t]he [P]roposal would create comprehensive consumer protections for prepaid financial products."[48] Because prepaid accounts funded or capable of being funded with virtual currencies present the same if not greater risks to consumers as fiat currency prepaid accounts, with additional risks inherent to virtual currencies, 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 are subject to the Proposal.

4. *The definition of prepaid account correctly excludes health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement arrangements, and should also exclude other prepaid accounts used to provide employees with "fringe benefits" as defined by the IRS*.

The Bureau has proposed excluding health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement arrangements from the definition of prepaid account.[49] The Clearing House supports the exclusion of these account types from the Proposal and encourages the Bureau to also exclude other prepaid accounts established to

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[46] 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).

[47] *See, e.g.*, Consumer Advisory: Risks to Consumers Posed by Virtual Currencies.

[48] 79 Fed. Reg. 77102, 77102.

[49] Proposed comment 1005.2(b)(3)(iv)-1 would apply IRS definitions of "health savings account," "flexible spending account," "medical savings account," and "health reimbursement arrangement" for purposes of the Proposal.

provide government benefits with defined restrictions on usage[50] or "fringe benefits" as defined by the Internal Revenue Service ("IRS"),[51] such as transportation (commuting) benefits, dependent care assistance, or educational assistance, to an employee or other individual who has performed a service to the provider of the benefit. As the Bureau notes, health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement arrangements "typically come with limits on the amount of funds that can be loaded on to them, the methods for loading, and numerous restrictions on where, when, and how those funds can be spent."[52] Furthermore, health savings accounts, flexible spending accounts, medical savings accounts, and health reimbursement arrangements typically do not provide consumers with an option to withdraw cash or send money to any merchant or other individual of the consumer's choosing.[53] Given these "numerous restrictions," consumers cannot use health savings accounts, flexible spending accounts, medical savings accounts, or health reimbursement arrangements as substitutes for traditional transaction accounts. Similarly, prepaid accounts established to provide an individual with a fringe benefit usually come with restrictions on the amount of funds that can be loaded and are exclusively funded by the provider of the fringe benefit. For example, an employer may establish a prepaid account to provide an employee with funds to pay for transportation for commuting, such as transit passes, qualified parking, or qualified bicycle commuting reimbursement. Much like health savings accounts, the IRS limits the amount of transportation (commuting) benefits that are tax-exempt (effectively limiting the amount the employer will deposit into the prepaid account), only the employer can fund the prepaid account, and the funds may only be used to pay for commuting costs.[54] Given the limited amount of funds and functionality of the transportation (commuting) benefit, the prepaid account cannot be used as a substitute for a traditional demand deposit account.

Prepaid accounts provide employers with a convenient method for providing employees with important benefits and can help consumers utilize these benefits more easily. Fringe benefits, like health savings accounts, flexible spending accounts, medical savings accounts, and

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[50] For example, the Arizona Empowerment Scholarship Account program, which provides funds for parents of special needs children to spend on educational purchases, distributes payments via prepaid cards. See http://www.arizonaschoolchoice.com/EDU_ESA.html.

[51] The IRS defines "fringe benefit" as "a form of pay for the performance of services." Other fringe benefits identified by the IRS include accident and health benefits, achievement awards, adoption assistance, athletic facilities, de minimis (minimal) benefits, employee discounts, employee stock options, employer-provided cell phones, group-term life insurance coverage, lodging on business premises, meals, moving expense reimbursements, no-additional-cost services, tuition reduction, and working condition benefits. Internal Revenue Serv., Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, at 2 (Dec. 10, 2014), *available at* www.irs.gov/pub/irs-pdf/p15b.pdf [hereinafter *Employer's Tax Guide to Fringe Benefits*]. The Clearing House recognizes that not all fringe benefits may be disbursed using a prepaid account; however, employers may choose to provide some fringe benefits through prepaid accounts. For this reason, The Clearing House encourages the Bureau to exclude all prepaid accounts used solely to disburse fringe benefits from the Proposal.

[52] 79 Fed. Reg. 77102, 77132.

[53] *Id*.

[54] *See Employer's Tax Guide to Fringe Benefits*, at 6.

health reimbursement arrangements, are subject to extensive IRS regulations that ensure consumer's benefits are protected and, consequently, decrease the risks associated with such prepaid accounts. Furthermore, the limited funding and functionality of such accounts prevents consumers from utilizing these accounts as substitutes for traditional transaction accounts. Including health savings accounts, flexible spending accounts, medical savings accounts, health reimbursement arrangements, and other fringe benefit prepaid accounts in the definition of prepaid account would significantly increase the burden financial institutions face when providing these types of accounts because they would be required to comply with both IRS regulations and the Proposal. This increased regulatory burden on financial institutions in their roles as custodians and debit card issuers would provide little if any benefit to consumers due to protections inherent to these IRS-regulated products.

D. Required Disclosures

1. *The Bureau should remove the incidence-based fee disclosure requirement from the short form disclosure*.

Under the Proposal, financial institutions would be required to provide two disclosures to a consumer before the consumer agrees to acquire a prepaid account: a "short form" disclosure that includes certain key fees that apply to the prepaid account, and a "long form" disclosure that identifies all account fees and the conditions under which fees could be imposed. Financial institutions would be required to disclose three categories of fees on the short form disclosure: (i) "top-line" fees; (ii) "static" fees; and (iii) "incidence-based" fees. The top-line fees required to be disclosed are (i) periodic fees, (ii) per-purchase fees, (iii) ATM withdrawal fees, and (iv) cash reload fees. The static fees required to be disclosed are (i) ATM balance inquiry fees, (ii) customer service fees, and (iii) inactivity fees. To determine which incidence-based fees need to be disclosed on the short form, financial institutions would be required to conduct a review, at least annually, to determine up to three fees incurred most frequently by consumers in the prior twelve-month period.

The Clearing House opposes the Proposal's requirement that financial institutions disclose up to three incidence-based fees and conduct the associated analysis and reviews required to determine the appropriate fees for disclosure, including the obligation to determine whether the financial institution "reasonably anticipates" that a prepaid account's incidence-based fee disclosure will need to be revised after a change in the prepaid account's fee schedule. It would be highly burdensome and unnecessary for financial institutions to (i) annually conduct a review and analysis to determine the three fees that were incurred most frequently in the prior twelve-month period by consumers using each particular type of prepaid account the financial institution issues, (ii) anticipate whether its existing fee disclosure would be affected by a change in the prepaid account's fee schedule, and (iii) update existing disclosures to reflect the results of its annual review and analysis. We believe the costs to financial institutions of complying with this requirement substantially outweigh the potential consumer benefits associated with disclosure of incidence-based fees, particularly considering the other fees required to be included in the short form disclosure. The requirement to annually update and disclose incidence-based fees would be particularly burdensome for financial institutions that distribute prepaid accounts through third party arrangements given the

potential need to replace card stock and related materials frequently.[55] The Clearing House urges the Bureau to further revise this requirement to lessen the cost and burden of compliance.

The Clearing House believes the top-line and static fees required to be disclosed in the short form, without separate disclosure of incidence-based fees, are sufficient to provide consumers with enough information to make an informed decision when evaluating the costs of a prepaid account and when comparing prepaid accounts because the top-line and static fees include the fees incurred most frequently by the vast majority of consumers. In its 2012 study of consumers' use of GPR Cards, the Federal Reserve Bank of Philadelphia (the "FRBP") found that consumers use GPR Cards primarily to purchases goods and for cash withdrawals,[56] particularly nondurable goods.[57] Through consumer testing, the Bureau identified the fees consumers consider most important when acquiring a prepaid account, and the Bureau relied on its consumer testing to establish the top-line fees required in the short form disclosure.[58] The Clearing House supports the Bureau's evidence-based approach to establishing disclosure requirements and agrees that top-line and static fees accurately capture the fees most consumers experience when using prepaid accounts. Many prepaid account consumers acquire a prepaid account, load it with funds, and use the account to make smaller purchases and withdraw cash.[59] A consumer may check her account balance, contact customer service of the financial institution that issued the prepaid account, and/or re-load the account with additional funds when the funds have been spent down. The fees incurred by the customer under this typical usage scenario are all included in the top-line and static fees. Many consumers will never incur fees other than top-line and static fees, and for those consumers that do incur other fee types, a full description of the fees and circumstances under which they may be incurred will be available to the consumer through the long form disclosure. Thus, including incidence-based fees in the short form disclosure will present most consumers with information about fees they are unlikely to incur when using the prepaid account.

Moreover, including incidence-based fees in the short form disclosure may confuse consumers and diminish the utility of the disclosure. The Bureau anticipates that the top-line and static portions of the short form will aid consumer comprehension and comparison shopping prior to acquiring a prepaid account. Consumers are best aided in evaluating and comparing different prepaid products, by being presented with a clear, comparable disclosure of

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[55] The Clearing House acknowledges that the Proposal would not require a financial institution to immediately replace existing inventory when updates are required to incidence-based fee disclosures, but the current Proposal would, nevertheless, potentially require annual updates to disclosures that necessitate wasteful and costly replacement of inventory.

[56] *See* Stephanie Wilshusen et al., Fed. Reserve Bank of Phila., *Consumers' Use of Prepaid Cards: A Transaction-Based Analysis*, at 21-22 (Aug. 2012), *available at* http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2012/D-2012-August-Prepaid.pdf [hereinafter *FRBP Study*].

[57] *Id*. at 23.

[58] 79 Fed. Reg. 77102, 77122.

[59] *See generally FRBP Study.*

the fees the typical consumer user of the prepaid account is likely to incur. Incidence-based fees will vary across prepaid account products[60] and will include fee categories consumers are unlikely to incur. Thus, presenting incidence-based fees in the short form disclosure will provide consumers with information about fees they are unlikely to incur, that they cannot compare across prepaid account products, and that may distract them from focusing on the top-line and static fees that reflect the costs a consumer can reasonably expect to incur most frequently in connection with holding and using a prepaid account. The Clearing House believes disclosure of incidence-based fees provides little, if any, benefit to consumers and certainly not sufficient consumer benefit to justify the high cost and burden that analyzing and disclosing incidence-based fees would place on financial institutions.

To the extent the Bureau believes fees in addition to top-line and static fees must be disclosed in the short form disclosure, The Clearing House encourages the Bureau to replace incidence-based fees with additional categories of static fees or, alternatively, to establish a safe harbor that allows a financial institution to disclose all fees on the short form disclosure (thereby avoiding the costs and burdens of conducting an annual incidence-based fee analysis and disclosure updates). If the Bureau adopts an all-fees disclosure safe harbor for the short form disclosure requirement, The Clearing House further encourages the Bureau to implement a de minimis threshold at twenty five percent (25%), with fees occurring on fewer than the threshold percentage of accounts being exempt from disclosure on the short form.

If the Bureau insists that disclosure of incidence-based fees is necessary, then establishing a safe harbor for financial institutions that disclose all fees (above the de minimis threshold) on the short form disclosure would allow financial institutions to avoid the burden of continually analyzing fees and revising its short form disclosure while providing additional fee disclosures to consumers. We appreciate that the Bureau considered the high costs that could be associated with requiring financial institutions to provide a long form disclosure prior to acquisition. However, we believe it may be more costly for many financial institutions to analyze and continually revise a short form disclosure that includes incidence-based fees than to disclose all fees under a safe harbor allowance. Therefore, The Clearing House encourages the Bureau to consider establishing a safe harbor provision allowing financial institutions to disclose all fees associated with a prepaid account prior to acquisition rather than calculate incidence-based fees and alter packaging material accordingly. The safe harbor would allow financial institutions to reduce costs while still providing consumers with additional fee information.

2. *The Bureau should extend the Proposal's exception that allows a financial institution to provide only the short form disclosure prior to acquisition in a retail store to acquisitions in all retail stores regardless of whether the retailer offers a financial institution's prepaid accounts exclusively*.

The Proposal would require financial institutions to provide a written version of the short form disclosure before a consumer acquires a prepaid account in person in a retail store.

[60] The Pew Charitable Trusts found that GPR Cards "include a wide variety of 'core' fees." The Pew Charitable Trusts, *Consumers Continue to Load Up on Prepaid Cards*, at 32 (Feb. 2014), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/PrepaidCardsStillLoadedReportpdf.pdf.

However, financial institutions would be permitted to provide the long form disclosure after acquisition provided that three conditions are met: (i) the prepaid account access device is inside the packaging material; (ii) the short form disclosure is provided on or is visible through an outward-facing, external surface of a prepaid account access device's packaging material; and (iii) a telephone number and URL are included on the packaging to allow consumers to access the long form disclosure while in the retail store. The Clearing House supports the Bureau's proposed exception to the long form pre-acquisition disclosure requirements for prepaid accounts when a consumer acquires the prepaid account in a retail store or orally by telephone, subject to the additional comments reflected below.

As the Proposal is currently drafted, if a retail store offers one financial institution's prepaid account products exclusively, then the financial institution must provide the long form disclosure in writing prior to acquisition to consumers acquiring a prepaid account in that store. However, the financial institution would not be required to provide the long form prior to acquisition if the prepaid account were acquired in a retail store that offers prepaid accounts issued by other financial institutions. The Clearing House encourages the Bureau to extend the Proposal's exception that allows a financial institution to provide only the short form disclosure prior to acquisition in a retail store to acquisitions in all retail stores regardless of any exclusive distribution relationships. Space constraints on and around prepaid card displays and packaging typically do not vary (or vary little) between exclusive and non-exclusive retail distribution arrangements. Further, consumers will have easy access to long form disclosures made available through the telephone and Internet regardless of the nature of the distribution relationship between the financial institution and retailer, and having some retailers provide long form disclosures in physical form in advance of acquisition while other retailers do not is likely to lead to consumer confusion with little benefit.

If the Bureau's final rule does not extend the exception that allows financial institutions to provide only the short form disclosure prior to acquisition to all retail distribution arrangements, then The Clearing House recommends that the Bureau clarify when a financial institution would be deemed to be in an "exclusive" relationship with a retail store, and thus, no longer eligible for the Proposal's exception.[61] In particular, we recommend that the Bureau clarify that only an express exclusivity arrangement, documented in an agreement between a financial institution and a retailer, will constitute an "exclusive" relationship for purposes of the Proposal. Passive exclusivity that exists without an express exclusivity agreement between a financial institution and a retailer should not subject the financial institution to loss of an otherwise applicable exception to the long form pre-acquisition disclosure requirements because (i) the financial institution would face a significant burden in determining and frequently re-confirming whether it is the exclusive financial institution provider of prepaid products sold through a particular retail store, and (ii) a retailer could unilaterally alter a financial institution's status as the exclusive financial institution provider of prepaid accounts distributed by that retailer through the retailer's arrangements with third parties.

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[61] Proposed comment 1005.18(b)(1)(ii)-1 would explain that "a retail store that offers one financial institution's prepaid account products exclusively would be considered an agent of the financial institution, and, thus, both the short form and the long form disclosure must be provided pre-acquisition[.]"

The Clearing House also encourages the Bureau to permit financial institutions and retailers to collaborate to leverage technology to satisfy pre-acquisition disclosure requirements, such as by allowing financial institutions to satisfy pre-acquisition disclosure requirements by making the disclosures available through electronic kiosks at retailer locations.[62]

3. *The Bureau should adopt the Regulation DD approach that excludes certain incidental fees from disclosure requirements*.

The Clearing House encourages the Bureau to exclude incidental fees, such as fees associated with state escheat laws, garnishment, attorneys' fees, and photocopying, which are exempt from disclosure under Regulation DD, from the Proposal's disclosure requirements.

4. *The Bureau should preempt state laws that make compliance with the Proposal impracticable.*

The Proposal would establish minimum font requirements for each section of the short form disclosure. Top-line fees would be required to be in a minimum eleven-point font, static fees in a minimum eight-point font, and incidence-based fees in a minimum seven-point font. A financial institution may choose to use a larger font size, but it must retain the relative sizes of the different sections to maintain the visual hierarchy of information included in the form.[63] The

[62] The Clearing House applauds the Bureau's efforts to allow financial institutions to meet their compliance obligations using technology. Technology can decrease compliance costs for financial institutions and increase the availability of prepaid accounts and related information for consumers. For example, the Proposal would allow financial institutions to provide prepaid accountholders with error resolution notices electronically. As discussed below, the lifespan of a typical prepaid account is relatively short compared to other types of traditional transaction accounts. A financial institution may be required to provide a prepaid accountholder with an error resolution notice after the consumer has stopped using the prepaid account—a particularly likely occurrence when a prepaid account is used to provide short-term benefits such as unemployment benefits. Mailing error resolution notices is costly for financial institutions and provides little benefit to a consumer who may no longer be using the prepaid account. Indeed, paper notices may serve to confuse a consumer who is no longer using the prepaid account to which the notices relate, and who is not expecting to receive notifications from the financial institution that provided the discarded prepaid account. Allowing financial institutions to provide error resolution notices electronically ensures that active prepaid account users have access to important information about their accounts in a readily-accessible format while also decreasing unnecessary confusion for inactive prepaid account users and decreasing costs for financial institutions.

[63] We note that Proposed § 1005.18(b)(4)(ii)(B)(2) is unclear regarding the maximum font size that is permissible for the disclosure of fees under Proposed § 1005.18 (b)(2)(i)(B)(2) (per purchase fees), (3) (ATM withdrawal fees), and (5) (ATM balance inquiry fees), as well as the explanation regarding inactivity fees required by Proposed § 1005.18(b)(2)(i)(B)(7). Specifically, Proposed § 1005.18(b)(4)(ii)(B)(2) states that this information "must appear in a minimum six-point font or the corresponding pixel size and appear in no larger a font than what is used for the information required to be disclosed by paragraphs (b)(2)(i)(B)(9) through (12) of this section." However, the information disclosed under Proposed § 1005.18(b)(2)(i)(B)(9) through (12) may appear in different sizes. Proposed § 1005.18(b)(2)(i)(B)(9) must appear in a minimum eight-point font, while proposed § 1005.18(b)(2)(i)(B)(10) – (12) must appear in a minimum seven-point font.

Clearing House notes some states have established minimum font sizes for payroll card account disclosures that are larger than the minimums proposed by the Bureau. For example, in Maryland, fees associated with a payroll card must be disclosed in a minimum twelve-point font.[64] To comply with both Maryland law and the Proposal, financial institutions would be required to provide incidence-based fees in twelve-point font and increase the font size of the top-line and static fees accordingly, resulting in a thirteen-point font for static fees and sixteen-point font for top-line fees. Under the Proposal, all top-line fees must appear at the top of the short form disclosure. Test designs indicate that even when using eight-and-a-half by eleven inch paper, a financial institution would not be able to disclose four fees in sixteen-point font at the top of a short form disclosure (as provided in A-10(f)—Model Form for Short Form Disclosures for Prepaid Accounts with Multiple Service Plans). As such, a financial institution could not practically satisfy both the Proposal's requirements and Maryland law. The Clearing House encourages the Bureau to resolve this conflict by preempting state laws where compliance with both the Proposal and such state laws would be impracticable.

E. Alternative to Periodic Statements and Other Disclosures

The Clearing House supports the proposed extension of Regulation E's alternative to periodic statements currently applicable to payroll card accounts to all prepaid accounts. The Clearing House applauds the Bureau's efforts to weigh the costs to industry and benefits to consumers in this matter. The Clearing House agrees with the Bureau that the costs associated with periodic paper disclosures would be unwieldy and would ultimately be passed on to the consumer.

However, we encourage the Bureau to reduce the period of time covered by a standard written transaction history provided at a consumer's request. The Proposal would require financial institutions to provide a written transaction history covering all transactions during the eighteen months prior to the consumer's request. Providing eighteen months of written transaction history to all consumers requesting written transaction histories would be unnecessarily costly and wasteful because it would require financial institutions to develop the operational capacity to (i) store and readily generate reports of significant amounts of historical data and (ii) provide additional customer service support to meet these larger, default requests. Under the existing Payroll Card Rule, financial institutions are required to provide a written transaction history covering only sixty days prior to the consumer's request. The Clearing House believes consumers with prepaid accounts generally do not require or desire written transaction histories that include transactions older than sixty days. Consequently, to avoid unnecessary cost, expense, waste and consumer confusion, The Clearing House recommends that the Bureau revise the Proposal to provide that the default written transaction history provided in response to a consumer request will cover the prior sixty days of transactions unless the consumer specifically requests a longer period of coverage, in which event the consumer will be entitled to request up to eighteen months of written transaction history.

[64] Md. Code Ann. Lab. & Empl. § 3-502.

F. Limitation on Liability and Error Resolution

The Proposal would extend the limitation of liability and error resolution provisions that apply to payroll cards to prepaid accounts, including with respect to provisional credit. The sixty-day period for reporting an unauthorized transfer under the Proposal would begin on the earlier of: (i) the date the consumer electronically accesses the consumer's account, provided that the electronic history made available to the consumer reflects the unauthorized transfer; or (ii) the date the financial institution sends a written history of the consumer's account transactions requested by the consumer in which the unauthorized transfer is first reflected. A financial institution would be permitted to comply with this requirement by limiting the consumer's liability for an unauthorized transfer as provided in Regulation E for any transfer reported by the consumer within 120 days after the transfer was credited or debited to the consumer's account. The limitation of liability and error resolution provisions would not apply to "unregistered" prepaid accounts if a financial institution discloses to the consumer that the financial institution is not required to investigate or resolve errors regarding the consumer's account until the account is registered. We support the adoption of a sixty-day reporting period as well as the exclusion of unregistered prepaid accounts from the Proposal's liability and error resolution provisions.

However, we oppose the requirement that financial institutions extend provisional credit to prepaid accounts if they are unable to investigate an error within ten business days because of the likelihood that the financial institution will suffer loss of the provisionally credited funds.[65] The relationship between a financial institution that issues a prepaid account and the prepaid accountholder frequently is more limited than the relationship established in connection with a traditional checking or deposit account and lacks the continuity that is inherent to a payroll card relationship (where regular deposits of the consumer's pay are made to the account by the consumer's employer). The typical lifespan of a GPR Card is less than six months, or five to fifteen percent of the life span of a typical checking account.[66] The tentative nature of the relationship that frequently exists between a typical prepaid accountholder and the financial institution providing the prepaid account could encourage fraud and abuse of provisionally credited funds. This limited relationship may embolden a prepaid account user to falsely allege an error, receive a provisional credit, and then exhaust the provisionally credited funds during the financial institution's investigation period. The institution may have little or no ability to recoup the ill-gotten provisionally credited funds where the institution has a limited relationship with the defrauding prepaid account user.

In addition, financial institutions may offer prepaid accounts to certain customers who apply but fail to qualify for a traditional checking account, including because those customers do

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[65] The Clearing House appreciates the Bureau's Study of Prepaid Account Agreements and its efforts to better understand how financial institutions would be affected by the extension of limitation of liability and error resolution provisions to prepaid accounts. However, the Bureau's study did not include an analysis of the actual outcomes when financial institutions extend provisional credit to prepaid accountholders. The Clearing House encourages the Bureau to conduct such a study to assess the incidence of fraud and abuse of provisionally credited funds in connection with prepaid accounts.

[66] *FRBP Study*, at 18.

not satisfy an institution's customer identification procedures or other screening standards necessary to open a traditional deposit account. Offering a prepaid account to consumers who are ineligible for traditional deposit accounts carries with it an increased risk of fraud for the financial institution, including with respect to any funds the financial institution provisionally credits during the investigation of an asserted error affecting the prepaid account. The risk that a provisional credit requirement for prepaid accounts will be abused, and that a financial institution may not be able to recover the funds that are fraudulently obtained as a result of such abuse, may discourage some institutions from offering prepaid accounts as fallback or second-look products, relegating unbanked populations seeking but failing to qualify for traditional banking relationships to the often riskier and more expensive alternative financial services marketplace.

Finally, financial institutions offer prepaid accounts as a convenience for consumers. Prepaid accounts allow consumers to establish an account quickly, easily, and anonymously[67] if they so choose. The primary motivation for most consumers who chose to use GPR Cards is the desire to "gain control" of their finances.[68] Prepaid accounts offer a convenient and important tool for consumers trying to establish financial well-being—particularly for those consumers who may be ineligible for traditional checking accounts. Prepaid accounts present a convenient way for these consumers to manage their finances; however, this is a population that presents an increased risk to financial institutions for losses. As such, financial institutions provide these consumers with a convenience by offering prepaid accounts, but must pass some of the costs of increased product risks back to the consumer. Providing provisional credit for prepaid accounts is an inherently risky proposition for financial institutions that will necessarily increase financial institutions' costs of offering prepaid accounts and may decrease the availability of such products in the market.

For the reasons stated above, we believe that financial institutions should be permitted to investigate and resolve a timely-reported error involving a prepaid account without having to provide the consumer with a provisional credit while the reported error is under investigation. However, if the Bureau concludes otherwise, we urge the Bureau to carefully balance the benefits of provisional credit during the course of an error investigation against the risk that a provisional credit requirement for prepaid accounts will be abused, as well as the possibility that such abuse will result in reduced consumer access to prepaid accounts. The Clearing House believes, at a minimum, that the proper balance between these factors requires an investigation period of twenty business days[69] for asserted errors involving prepaid accounts before a

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[67] In its 2014 study *Why Americans Use Prepaid Cards*, The Pew Charitable Trusts found that fifty-six percent of consumers who acquired a prepaid account to make purchases cited anonymity as a reason for the acquisition. *Why Americans Use Prepaid Cards,* at 14. Although the Proposal would not require financial institutions to provide provisional credit to unregistered accounts, the increased costs a financial institution will face to provide provisional credit, could reduce the availability for prepaid accounts to all consumers, including those who intentionally choose to use unregistered prepaid accounts.

[68] *Id*. at 1.

[69] Extending the investigation period to twenty days would bring the Proposal into alignment with Regulation E's twenty-business day time period to investigate a reported error if the notice of error involves an electronic fund transfer to or from the account within thirty days after the first deposit to the account was made. *See* 12 C.F.R. § 1005.11(c)(3)(i).

provisional credit requirement is triggered and supports a reasonable limit to the amount of funds that must be provisionally credited to a prepaid account.

In addition, if the Bureau requires financial institutions to afford provisional credit to prepaid accounts during reported error investigations, we urge the Bureau to exempt non-reloadable prepaid accounts from this requirement. Extending provisional credit to non-reloadable prepaid account holders poses an even greater risk to financial institutions because non-reloadable prepaid account holders typically have an even more limited relationship with the financial institution than users of GPR Cards and other reloadable prepaid accounts. Arguably, non-reloadable prepaid account holders would have more incentive to fraudulently report an error, spend provisionally credited funds, and then abandon the account because of the limited relationship with the financial institution. Consequently, financial institutions would bear an even greater risk when offering non-reloadable prepaid accounts, which would increase costs and potentially limit the availability of non-reloadable prepaid accounts to consumers.

G. Internet Posting of Prepaid Account Agreements

Under the Proposal, prepaid account issuers[70] would be required to submit their prepaid account agreements,[71] including agreements for tailored payroll card account programs and other programs not truly offered to the general public, to the Bureau on a quarterly basis for posting on the Bureau's publicly-available website.[72] Prepaid account issuers also would be required to post these agreements publicly on their websites. The Clearing House objects to the inclusion of negotiated payroll card account agreements and customized agreements for other products that are not truly offered to the general public in this requirement. Account agreements for these types of products frequently result from individualized negotiations between the issuer and a third party, such as an employer, resulting in account agreements tailored to fit the needs of individual programs (such as the needs of the employer and its

[70] The Proposal would define "prepaid account issuer" or "issuer" as "the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a prepaid account agreement." Proposed 1005.19(a)(4).

[71] The following would be excluded from the definition of "agreement": (i) ancillary disclosures required by state or Federal law, such as affiliate marketing notices, privacy policies, or disclosures under the E-Sign Act; (ii) solicitation or marketing materials; (iii) periodic statements; and (iv) documents that may be sent to the consumer along with the prepaid account or prepaid account agreement such as a cover letter, a validation sticker on the card, or other information about card security. Proposed 1005.19(b)(6)(i).

[72] On February 26, 2015, the Bureau proposed temporarily suspending credit card issuers' obligation to submit credit card agreements to the Bureau for a year. Submission of Credit Card Agreements Under the Truth in Lending Act (Regulation Z), 80 Fed. Reg. 10417 (Feb. 26, 2015). In this proposal, the Bureau acknowledged that the current process for submitting credit card agreements is "unnecessarily cumbersome for issuers" and may complicate issuers' internal tracking of previously submitted agreements. The Bureau has proposed suspending the submission requirements while it develops "a more streamlined and automated electronic system." We believe prepaid account issuers would face the same burdens as credit card issuers when submitting prepaid account agreements and request that the Bureau delay implementing the Proposal's submission requirements for prepaid account agreements until the Bureau has developed and implemented a less burdensome system for submitting prepaid account agreements similar to that contemplated in the Credit Card Agreement Proposal.

employees in a payroll card program). Public posting of confidential, negotiated provisions from these agreements would compromise the ability of issuers and third parties to negotiate tailored account agreements, ultimately undermining the competitiveness of the marketplace for these products and harming consumers.

Furthermore, posting agreements negotiated for individual programs would provide consumers with little if any benefit. Consumers do not comparison shop for prepaid accounts provided through and on terms negotiated by a third party in the same manner as a consumer might comparison shop for an off-the-rack prepaid account product, like a GPR Card. For example, when making the decision to acquire a payroll card account, a consumer is not evaluating the fees associated with different payroll card account options; the consumer typically is presented with a single payroll card account as an alternative to receiving wages or other compensation by direct deposit, paper check, or other means. Moreover, public posting of prepaid account product agreements that are not available to the general public could confuse consumers using the Bureau's proposed website or an issuer's website to shop for or compare available prepaid account products. When reviewing prepaid account agreements on a publicly available website, a consumer may be overwhelmed by hundreds or thousands of agreements that are tailored for specific programs not available to the consumer. The consumer would be inundated with irrelevant information about prepaid account products tailored to specific populations of which the consumer is not a part. Public posting of these types of customized prepaid account agreements would simply burden consumers attempting to compare available products and terms with sifting through agreements and assessing which products and terms are truly available to them. Many consumers "allot limited time" to comparison shopping prior to acquiring a prepaid account in a retail setting.[73] Adding superfluous, inapplicable information in the form of agreements for unavailable products will take time a consumer could be using to conduct a meaningful review and comparison of prepaid accounts truly available to them. Thus, The Clearing House urges the Bureau to exclude from public disclosure requirements the account agreements for prepaid accounts, including payroll card accounts, that are not truly offered to the general public; rather, issuers should be required only to make such account agreements available through the issuers' websites to those consumers who are subject to them.

The Clearing House does not object to the requirement that prepaid account agreements for products offered by a financial institution to the general public be posted to an issuer's publicly available website, but we believe submitting quarterly updates to the Bureau would be overly burdensome on prepaid account issuers with little benefit for consumers. Consumers looking to review or compare prepaid account agreements are likely to use the issuer's website to locate the applicable prepaid account agreement. Thus, making prepaid account agreements available through the issuer's website should satisfy consumer disclosure concerns. Additionally, requiring financial institutions to continually monitor prepaid account agreements for updates and to ensure that any updated agreements are submitted to the Bureau quarterly creates an unnecessary burden.

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[73] 79 Fed. Reg. 77102, 77107.

H. Effective Date

The effective date for the Proposal's requirements would be nine months after publication of the final rule in the Federal Register, with financial institutions and their third party distribution agents given twelve months to remove prepaid accounts with packaging not in compliance with the final rule from retail stores and other distribution channels. The Clearing House urges the Bureau to extend the effective date of its final rule to eighteen months after publication in the Federal Register. Nine months is insufficient time for financial institutions and other payments industry participants to make the substantial systems and technology changes that will be necessary to support the Proposal's many requirements, including the requirements that deviate from current systems and practices used to support debit card accounts and payroll card accounts.

Current payment systems provide flexibility to accommodate different types of transactions involving a prepaid account. For example, current systems, practices, and payment network rules allow merchants to obtain pre-authorization for transactions for which the merchant does not have a purchase amount at the time of the authorization, such as a gasoline purchase made "at the pump." When a prepaid account card user swipes a prepaid account card at an automated gasoline pump, the financial institution that issued the prepaid account card pre-authorizes the purchase of gasoline up to a set amount without knowing the total amount to be charged to the account. Because the final purchase amount is unknown at the time of the pre-authorization, pre-authorizations present increased potential for inadvertent overdrafts. To avoid inadvertent overdrafts, many of which would be characterized as Regulation Z extensions of credit under the Proposal, financial institutions, payment card networks, merchant processors, issuer processors, and merchants will all need to make extensive systems and process changes to prevent pre-authorizations that could result in inadvertent overdrafts on prepaid accounts for which the issuing financial institutions do not intend to provide credit features. Alternatively, financial institutions may choose to add transaction audit steps for every merchant-initiated transaction on a prepaid account card so that the financial institution can ensure that accurate, complete and timely authorization requests are received by the financial institution for every prepaid account transaction.

Most financial institutions, processors, and payment networks make changes of this magnitude only two times per year (and with a minimum lead time of six months after the change is architected) to allow all parties to payment transactions sufficient time to identify, plan, code, test, and install end-to-end systems changes without negatively affecting the ability of consumers to use their cards for transactions. Nine months is insufficient time for financial institutions to evaluate the final requirements for prepaid accounts, develop appropriate system and process changes to comply with the requirements, coordinate with payment networks, processors and merchants to develop end-to-end systems and process changes for prepaid account transactions, and implement the requisite changes across the payments system.

Additionally, as drafted, the Proposal would require financial institutions to provide prepaid account users with access to eighteen months of account history, a significantly longer time frame than currently offered by most financial institutions. Many financial institutions may not have an account history reaching far back enough back to satisfy the eighteen month requirement if the Proposal is effective nine months after finalization. Further, retaining and accessing account histories require different functionalities. Although a financial institution may

retain the account records, they may be archived and not readily accessible through the financial institution's established account statement systems. The Proposal would require technical redesigns and system changes (as well as employee training regarding the new systems and capabilities) to maintain and provide transaction histories for eighteen months in the manner that the Proposal would require. These efforts will be complex, time consuming, and costly. Nine months will be insufficient time for many financial institutions to accomplish the Proposal's requirements without unreasonable effort and cost.[74]

The Clearing House appreciates the Bureau's consideration that disposing of old packaging and developing and producing new packaging for prepaid accounts will be a costly and time consuming undertaking and has proposed allowing financial institutions twelve months to remove prepaid accounts with packaging not in compliance with the final rule from retail stores and other distribution channels. The Bureau acknowledges that prepaid account packaging may not be exhausted within twelve months, but has determined that after twelve months inventories will be "sufficiently exhausted" to justify enforcement.[75] The Clearing House disagrees with this determination and believes financial institutions should not be expected to destroy existing packaging that was manufactured within ninety days of publication of the final rule in the Federal Register, so long as the packaging was manufactured in a quantity that is consistent with the financial institution's ordinary course of business. Furthermore, financial institutions cannot reasonably rely on third party distributors to dispose of inventory. Financial institutions may not have real oversight or enforcement mechanisms to ensure third party distributors are no longer offering prepaid accounts offered through noncompliant packaging.

Given the practical limitations of instituting the systems, technological capabilities, and training necessary to support compliance with the Proposal, The Clearing House encourages the Bureau to extend the effective date for compliance from nine months to eighteen months after the final rule is published in the Federal Register, and to grant a safe harbor under the Proposal for any prepaid account packaging that was manufactured in the ordinary course of business within ninety days of the date the final rule is published in the Federal Register.

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Thank you for your consideration and review of these comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact me using the contact information provided below.

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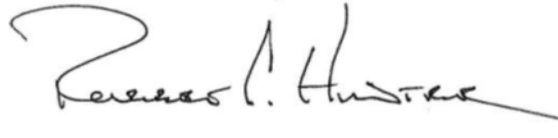
[74] We also urge the Bureau to consider the significant amount of time that will be necessary for financial institutions to develop and implement a compliance program to comply with the proposed pre-acquisition disclosure requirements, particularly with respect to government benefit, payroll, and campus prepaid products. Among other things, financial institutions will be required to revise current procedures, train third parties, enhance their monitoring of third-party practices, replace pre-printed stock, redesign packaging, reprogram websites and mobile applications (for electronic delivery), develop new call center processes and scripts and provide related training (for telephone delivery), and revise inventory processes (to accommodate the reduced inventory that institutions may hold in anticipation of more frequent disclosure changes that would be required by the Proposal).

[75] 79 Fed. Reg. 77102, 77190.

Yours very truly,



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