

August 14, 2017

*Via Email and Paper Mail Delivery*

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

**Re: Amendments to Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); Docket No. CFPB-2017-0015**

Dear Ms. Jackson:

I write on behalf of American Express Travel Related Services Company, Inc. (“American Express”) to comment on the proposal (the “Proposal”) to amend Regulation E (“Reg E”), which implements the Electronic Fund Transfer Act, and Regulation Z (“Reg Z”), which implements the Truth in Lending Act, and the official interpretations to those regulations. This Proposal relates to the final rule (the “Rule”), published in the Federal Register on November 22, 2016, as amended on April 25, 2017, regarding prepaid accounts under Reg E and Reg Z. The Proposal requests comment on potential modifications to several aspects of the Rule, including error resolution and limitations on liability for prepaid accounts where the financial institution has not completed its consumer identification and verification process (an “Unverified Account”), application of the rule’s credit related provisions to prepaid accounts, certain other clarifications and minor adjustments and issues relating to the effective date of the Rule.

We reiterate our appreciation for the opportunity to comment and continue our constructive engagement in the Bureau’s rulemaking process. We share the Bureau’s goal of ultimately implementing well-tailored and effective regulation of Prepaid Accounts.

American Express supports: (1) the proposal to revise the error resolution and limited liability provisions of the Rule to provide that financial institutions are not required to resolve errors or limit consumers’ liability on Unverified Accounts, (2) the proposal to amend the definition of “business partner” in the Rule and related commentary to exclude business arrangements between prepaid account issuers and issuers of traditional credit cards from coverage under the Rule’s tailored provisions applicable to hybrid prepaid-credit cards if certain conditions are satisfied, but we also provide a recommendation for how to further tailor the exception, and (3) a further delayed effective date of the Rule in light of the specific proposed revisions.

**1. Unverified Accounts**

American Express supports the proposal to revise the error resolution and limited liability provisions of the Rule to provide that financial institutions are not required to resolve errors or limit consumers’ liability on Unverified Accounts. American Express also supports, with a recommendation for further revision, that for accounts where the consumer’s identity is later verified, financial institutions would be required to limit liability and resolve errors with regard to disputed transactions that occurred prior to verification.

**a. Background**

The Rule differs from previous proposals in that it extends Reg E’s limited liability and error resolution requirements to all prepaid accounts, regardless of whether the financial institution has completed its consumer

identification and verification process (“KYC”) with respect to the account.<sup>1</sup> American Express, through its prior comment letter and other direct discussions with the Bureau, raised concerns with regards to how the treatment of Unverified Accounts, or a “Temporary Card”, will negatively impact particular consumers and prepaid programs. Specifically, if required to apply Reg E to Unverified Accounts, prepaid account issuers will be extremely challenged to offer transactional functionality (e.g., POS and online purchases), prior to both registration and KYC.<sup>2</sup> Additionally, in the event that a customer chooses not to, or does not successfully, register a prepaid account but has a dispute or error, an issuer will likely need to resolve the refunds of customer funds via a paper check. Accordingly, we respectfully submit that this provision of the Rule be amended so that Reg E’s limited liability and error resolution requirements apply only to verified accounts.<sup>3</sup>

## **b. Implementation Challenge and Impact**

Many prepaid account issuers, including American Express, already extend Reg E protections to verified prepaid accounts, either as a matter of contract with the consumer or as required by law in the case of products that accept federal payments. As detailed to the Bureau by a number of industry participants in the comment process, however, prepaid issuers face significant and persistent challenges managing fraud-related financial losses on prepaid accounts.<sup>4</sup> These challenges result primarily from the way a prepaid customer is onboarded (e.g., no credit check) and the temporary, “unsticky” nature of the prepaid account customer relationship.<sup>5</sup> These fraud-related risks are magnified for Unverified Accounts. Fraud losses on an Unverified Account, which is a product virtually identical to an anonymous gift card in terms of functionality and customer relationship, are extremely difficult to mitigate. The anonymous nature of an Unverified Account can mean an issuer is limited in its ability to: (i) investigate claims on the account and (ii) prevent an individual from repeatedly making fraudulent claims.

American Express currently extends Reg E limited liability and error resolution rights to its prepaid customers once that customer is approved for a full, or verified, prepaid account. As we’ve discussed directly with the Bureau, we have a separate claim process that applies to an Unverified Account. American Express currently permits a customer to load and then immediately spend a specified maximum amount of money on a general purpose reloadable (GPR) prepaid account.<sup>6</sup> Neither registration nor KYC is required for that Unverified Account customer to immediately access his/her money. Since the launch of our “Temporary Card” product, we felt very strongly that this approach was best for the consumer – immediate, liquid access to money loaded on a GPR card. That Temporary Card customer can spend at point-of-sale or online (e.g., pay a utility bill online) the amount initially loaded on the Temporary Card without taking any additional steps or being forced into a registration flow.

Extending Reg E’s limited liability and error resolution requirements to an Unverified Account customer who has spend capability – which the Rule would do – presents an unmanageable fraud exposure for issuers. There are three important negative consequences for the consumer of this implementation challenge.

- (1) *Limited Functionality.* Financial institutions would likely need to limit the functionality of their prepaid accounts prior to completion of the registration and KYC to reduce fraud exposure, or

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<sup>1</sup> Section 1005.18(e) of the Rule provides relief from the provisional crediting requirements for Unverified Accounts.

<sup>2</sup> Registration and KYC are typically distinct procedures in the onboarding process. Registration is typically a low threshold action that may not include each substantive identification checks, whereas the KYC step would typically involve more robust risk and compliance measures. Issuers take varying approaches to onboarding and how or when a customer gains prepaid account functionality during onboarding.

<sup>3</sup> This recommendation assumes adequate disclosure to the consumer by the prepaid account issuer of the risks of not fully registering an account. See Section § 1005.18(e)(3)(ii)(A) of the Rule.

<sup>4</sup> Fraud-related losses include the actual dollar loss from what turns out to be a fraudulent claim, as well as the costs to investigate such claims as required by Regulation E.

<sup>5</sup> Managing fraud losses on a prepaid account portfolio is substantively distinct from a traditional bank account where a credit check and other risk mitigants can be employed to protect the financial institution against fraud-related financial losses.

<sup>6</sup> Issuers’ onboarding experiences and requirements to access features and money on the account vary.

consider other policy changes that would decrease the availability or utility of prepaid accounts to consumers. For American Express, these modifications could include changes to the Temporary Card product construct to eliminate transactional capability (*i.e.*, the way a customer accesses his/her loaded funds) until that customer goes through a certain level of registration and KYC. Immediate access to funds loaded on a Temporary Card will likely not be a sustainable product construct because of the potential for fraudulent activity and associated losses.<sup>7</sup> The timing of the full account approval can be quick, but only after a customer provides American Express with personal information (*e.g.*, name, address, SSN and email address) and we conduct our standard customer diligence.

This change could have a negative impact on a large percentage of prepaid consumers. As we have disclosed to the Bureau, the percentage of customers who do not successfully register, or choose not to register or go through KYC is significant. Customers, for many different reasons, use a Temporary Card product like a gift card – purchase the product in retail, load funds, immediately access those funds for POS or online spend, do not reload funds and they remain anonymous in the customer relationship. A change in product construct could force these customers down a full registration path and prevent the Temporary Card from having any immediate utility. While we feel strongly that this experience is not the best for our customer, we would very reluctantly consider the need to implement this type of product construct change in response to the Rule.

- (2) *Refund Via Paper Check.* For an individual who fails verification or chooses not to register, in the event of a claim or dispute, we would likely need to return that customer's money via paper check, which means the customer is delayed from accessing their own money. The only effective way reduce some of the fraud risk would be stop allowing customers to spend down their remaining funds – which American Express currently does today for an unverified account – and instead issue refund via paper check to these customers. A refund check typically takes up to 10 business days to reach the consumer during which time the customer does would not have access to his/her funds. As noted by the Bureau, additional complications are presented by customers without a fixed address. Further, issuing a refund via paper check potentially causes an unbanked consumer to incur check cashing fees to access their own money.
- (3) *Pull and Replace of Inventory.* The Rule allows financial institutions to continue selling prepaid accounts in non-compliant packaging manufactured in the normal course of business prior to the rule's effective date. This provision provided relief from "pull and replace" – a very costly and resource intensive exercise – of non-compliant inventory. However, financial institutions would need to seriously consider whether a pull and replace is necessary where immediate use of the product is advertised on their retail packaging or described in the terms and condition to ensure that the packaging accurately reflects the functionality of the account. American Express' retail packaging, for example, outlines the current product construct on the exterior of the package (*e.g.*, a description of how to load funds and access those funds with the Temporary Card) as well as in the "Temporary Card Terms & Conditions" contained in the package. We do not have language in the terms and conditions that would advise a customer that a refund could be given via paper check. Given the nature of the changes American Express would likely need to make for an Unverified Account (*i.e.*, how and when a consumer accesses his/her money), the Rule's allowance regarding non-compliant packaging would not effectively eliminate the legal risks associated with what would be inaccurate and misleading disclosures. We would likely need to execute a pull and replace of inventory in advance of distributing product with the new construct.

We note that a further delay of effective date alone of the Rule *does not* solve for these substantive issues. First, a delay would not change or reduce the potential negative customer impact of the change in Temporary Card

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<sup>7</sup> American Express has walked through with the Bureau the ways in which fraud is perpetuated carry out and also the challenges for investigating certain claims. We are happy to discuss further in a direct conversation with the Bureau if additional information or data would be helpful

construct outlined above. A delayed effective date simply provides more time to assess and then make any product changes, but it would not eliminate the substantive implementation challenge of extending Reg E limited liability and error resolution requirements to Unverified Accounts. In addition, while a delay would naturally reduce the amount of inventory to pull and replace (as additional product will have flowed through retail), we expect that we'd still need to pull and replace inventory for the extended timeline.

### **c. Recommendation**

American Express supports the proposal to revise § 1005.18(e)(3) of the Rule and related commentary to provide that, for prepaid accounts that are not payroll card accounts or government benefit accounts, a financial institution is not required to comply with the liability limits and error resolution requirements in §§ 1005.6 and 1005.11 for any prepaid account for which it has not successfully completed its consumer identification and verification process.

For accounts where the consumer's identity is later verified, the Proposal provides that financial institutions would be required to resolve errors and limit liability with regard to disputed transactions that occurred prior to verification. We do recommend that the Bureau consider a time limit on this "look back" period. Specifically, a period of thirty (30) days would capture the vast majority of customers who ever register their product. Therefore, the time limit would have minimal consumer impact, but would greatly reduce the scope of challenges associated with investigating pre-verification claims.<sup>8</sup> A longer period increases the potential for fraud-related losses because a financial institution's investigation of an error that occurred before the institution knows the identity of the customer is extremely difficult and that difficulty only increases as more time passes between the date of the disputed transaction or alleged error and registration. An uncapped time period also increases the likelihood that a prepaid card was passed around to multiple individual users.

Finally, American Express also supports the proposed related changes to model language that require, for programs where there is no verification process, financial institutions explain in their initial disclosures their error resolution process and limitations on consumers' liability for unauthorized transfers, or explain that there is none, and comply with the process (if any) that they disclose.

## **2. Exception to hybrid prepaid-credit card provisions**

### **a. Background**

Under the Rule, the Bureau amended Reg E and Reg Z to establish a set of requirements in connection with "hybrid prepaid-credit cards" that can access overdraft credit features offered by the (i) prepaid account issuer, (ii) its affiliate (iii) or its business partner. The provisions were intended to address the Bureau's concerns about overdraft credit features that are associated with prepaid accounts in part because of the way that such services have evolved on traditional checking accounts. The Bureau thus concluded that it was appropriate to apply traditional credit card rules to overdraft credit features (referred to as "covered separate credit features") accessible by hybrid prepaid-credit cards, as well as a short list of tailored provisions established by the Rule to reduce the risk that consumers would experience problems in accessing and managing their prepaid accounts that are linked to such credit features.

The Bureau notes in the Proposal that certain implementation challenges with respect to hybrid prepaid-credit cards were raised by, and uniquely impact "digital wallet" providers. We note, however, so that the Bureau can appropriately size the impact of this issue, that this same challenge can impact any prepaid account. The extent of the impact is determined by strategic product, marketing and business decisions rather than an inherent difference between what the industry refers to as a "digital wallet" versus a prepaid account generally. Any

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<sup>8</sup> American Express would be happy to share specific registration data directly with the Bureau so that we can substantiate this statement. This data is proprietary and confidential, however, so we have not included it in this letter.

prepaid account – not only those marketed as “digital wallets” – can be capable of both (i) storing payment credentials for other accounts and (ii) being loaded with funds.

b. *Support for Exception Applicable to “Business Partner”*

American Express supports – with the recommendation on scope detailed below – the proposal to create a limited exception from the definition of “business partner” that would exclude certain arrangements between companies that offer credit card accounts and companies that offer prepaid accounts from the provisions in the Rule applicable to covered separate credit features accessible by hybrid prepaid-credit cards. We agree with the Bureau’s rationale that where the credit card products would already be subject to traditional credit card rules under Reg Z and certain other safeguards are present, it is not necessary, from a consumer protection perspective, to apply the Rule’s tailored provisions to such business arrangements. Such products should be treated as “non-covered separate credit features.”

c. *Recommendation to Extend Application of the Exception*

First: We appreciate that in the Proposal the Bureau solicits comments on the proposed scope of this exception. For the reasons described above, we respectfully submit that to avoid potential confusion regarding implementation, the language of the exception, including the commentary, should be drafted to clearly apply to all types of prepaid accounts, rather than limiting its purported applicability and underlying rationale to “digital wallets”.

Second: The proposed exception and conditions thereto relate only to the definition of “business partner”. The proposed exception does not extend to a separate credit feature of an “affiliate” or the prepaid account issuer itself. We respectfully submit that the exception should be applied in a consistent manner for affiliates and the prepaid account issuer, *so long as the same conditions, safeguards and protections are met*. This approach avoids an unfair and differential impact to certain prepaid account issuers, and should not introduce new risks to the consumer nor undermine the important policy goals of the Bureau.

While the implementation challenge outlined by the Bureau is currently most relevant today to certain “digital wallet” providers and their “business partners”, the structural product features that give rise to that implementation challenge could apply to any prepaid account, regardless of how the financial institution decides to market the offering. We should expect that as prepaid accounts evolve and innovate, issuers will seek to offer additional funding sources that consumers can link, including credit cards and other future credit product innovations. Not all of those credit-based innovations will be provided by business partners, but rather could be provided by affiliates of or the prepaid account issuers themselves.

For example, certain American Express prepaid products today offer the same functionality of loading money via a credit card. This functionality, which we feel provides an important funding option for a certain subset of our customers, is no different from what a “digital wallet” provider would provide, but we have not at this time chosen to market our product in the same way. Because a permissible load source is an American Express credit or charge card, we would be covered by hybrid prepaid-credit card provisions. If we enable a non-American Express credit card as a funding source, however, we could be excepted from the hybrid prepaid-credit rules, notwithstanding that the only difference in these funding sources is that one is issued by an affiliate (in this case, an American Express bank). Again, this linkage of a funding source to an American Express prepaid account – from the consumer’s perspective – is similar to what the Bureau has examined with respect to “digital wallets”.

The fact that the credit card is issued by an affiliate, or even the prepaid account issuer itself (as we should expect financial institutions to considering as this space matures and innovates) should not prevent the issuer from availing itself of the exception *so long as, with respect to the credit card account, all the consumer protection conditions to the exception are met*. We agree with the Bureau that the provisions applicable to hybrid prepaid-credit provide important protections for situations potentially presenting risk to consumers. Expanding what is considered a “non-covered separate credit feature”, as described above, should not undermine the important policy

goals (including those related to overdraft) of the tailored provisions for hybrid prepaid-credit cards. Further, the same potential for consumer confusion exists (*e.g.*, by providing seemingly inapplicable and unnecessarily complex long form disclosures and delaying link authorization) as outlined in the Proposal, and the same implementation challenges exist for all prepaid accounts (including those with affiliate- or self-issued credit cards).

American Express does not have any comments or recommendations on whether any alternative or additional conditions should be added in order to qualify for the proposed exception in § 1026.61(a)(5)(iii)(D). The proposed conditions provide appropriate safeguards to protect against the prepaid account and the credit card account being connected in a way that would pose the types of risks to consumers that we agree should be covered by the general rules for covered separate credit features accessible by hybrid prepaid-credit cards.

### 3. Extension of Effective Date

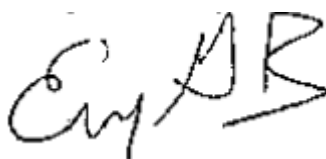
The Proposal also solicits input on whether a further delay beyond the current April 1, 2018 effective date is necessary in light of the specific proposed amendments. American Express supports a further delay, and recommends an extension date of one (1) year. This additional time would ensure that industry participants can comply with the Rule while reducing disruption to consumers. In particular, this timing would avoid disruption and diversion of critical resources – throughout the entire prepaid product value chain – during the lead up to the 4<sup>th</sup> quarter holiday period, which is when consumers have some of the highest demand for prepaid products.

To meet the April effective date, we would have needed to have certainty with respect to the substantive requirements of the Rule (*e.g.*, the application of certain requirements to Unverified Accounts) by approximately August 1. This date takes into account lead time necessary to make and implement strategic product decisions, develop or revise assets (*e.g.*, card packages, marketing claims and terms and conditions), card production and retail distribution. Accordingly, a further delay of the effective date is necessary and appropriate in light of the Proposal and will ensure continued availability of prepaid products with minimal disruption to consumers.

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American Express appreciates the opportunity to comment on the Rule, and commend the Bureau for its continued constructive approach to the rulemaking process for prepaid accounts. We hope that our input is helpful. We thank the Bureau for its consideration of our comments. If you have any questions about this letter, or would like American Express to provide any other information, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily AB", written in a cursive, stylized font.

Emily Goodman Binick  
Vice President & Senior Counsel  
American Express Company