

[Banking and Finance Law Daily Wrap Up, TOP STORY—PayPal responds to CFPB’s summary judgment arguments in Prepaid Account Rule case, \(Aug. 25, 2020\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

PayPal’s brief addressed arguments from the Bureau that it had the authority to adopt the Prepaid Account Rule’s short-form disclosure requirements and 30-day credit linking ban.

PayPal, Inc. submitted a response to the Consumer Financial Protection Bureau’s memorandum opposing summary judgment in favor of PayPal and asserting that the court should grant summary judgment in the Bureau’s favor, in a case involving PayPal’s challenge to the Prepaid Accounts Rule. PayPal addressed arguments made by the Bureau in support of the Rule. For example, that the Electronic Fund Transfer Act’s absence of a prohibition against mandatory disclosure form requirements is not, as the Bureau asserted, a *carte blanche* delegation to prescribe such forms. PayPal reiterated its argument that the Bureau lacked authority to adopt the Rule and that it applied an ill-fitting regulatory regime designed for general purpose reloadable cards to digital wallets without adequate justification. PayPal also argued that the Rule violates PayPal’s First Amendment rights because the compelled disclosure is subject to heightened First Amendment review, and a theoretical interest in informing consumers about products does not satisfy that review ([PayPal, Inc. v. CFPB](#), Case No. 1:19-cv-03700-RJL).

PayPal sued the CFPB over the Prepaid Accounts Rule, which amends Reg. E and Reg. Z to give prepaid account consumers protections similar to those for checking account and credit card consumers. PayPal motioned for summary judgment in the case in May 2020 and made several arguments related to statutory authority, the rulemaking process, and constitutionality (see [Banking and Finance Law Daily](#), May 8, 2020). PayPal argued that the Bureau lacks the statutory authority under the Electronic Fund Transfer Act (EFTA) to impose the rule’s short form disclosure requirement and lacks the statutory authority under the Truth in Lending Act (TILA) to impose the 30-day credit linking ban. PayPal also argued that the rule is arbitrary and capricious because there is no rational justification for subjecting digital wallets to heightened regulation and that the Bureau failed to perform a cost-benefit analysis regarding application of the rule to digital wallets. Finally, PayPal argued that the rule violates the First Amendment in that it compels PayPal to disclose information. In July, the Bureau filed its brief in opposition, and argued that the court should grant summary judgment in the Bureau’s favor (see [Banking and Finance Law Daily](#), July 9, 2020). The Bureau argued that it reasonably exercised its broad authority in adopting the short-form disclosure requirements and the 30-day waiting period, as both the EFTA and the Dodd-Frank Act authorized the Bureau to adopt the short-form disclosure requirements. Similarly, both the TILA and the Dodd-Frank Act authorize the waiting period for linking certain credit to a prepaid account. And the Bureau argued that the Rule’s disclosure requirements are entirely consistent with the First Amendment.

PayPal’s response to the Bureau’s motion, filed August 21, argues that the short-form disclosure and the 30-day credit linking ban are contrary to law. The EFTA’s absence of a prohibition against mandatory disclosure form requirements is not, as the Bureau asserted, a *carte blanche* delegation to prescribe such forms. EFTA’s model clause provision makes clear that Congress considered the appropriate means of regulatory intervention regarding disclosure forms and enacted a scheme based on optional model clauses to achieve its objectives. The specific authority reflected in EFTA’s model clause provision trumps any implicit general authority claimed by the Bureau. In addition, the Bureau’s mandated short-form disclosure would leave no room for "optional" model clauses, thus nullifying those statutory provisions. The EFTA lacks the provisions that Congress has elsewhere used to authorize prescriptive disclosure regimes, and the disclosure form mandated by the Bureau

is a conspicuous departure from any prior rulemaking under EFTA. Even assuming that EFTA confers some relevant regulatory authority on the Bureau, the short form requirement (e.g., mandating layout, font, and pixel size) is impossible to reconcile with any reasonable understanding of the statute. Contrary to the Bureau’s position, it lacks the authority under the Dodd-Frank Act to adopt the short form mandate. The 30-day credit ban is contrary to law because the TILA does not delegate general authority to impose substantive restrictions on credit—it is at its core a disclosure statute that authorizes disclosure-related regulations, and its provision authorizing the adoption of additional requirements does not give the Bureau the authority to adopt a rule that goes beyond the requirements Congress prescribed.

PayPal argued that the Rule’s heightened regulatory requirements are arbitrary and capricious as applied to digital wallets, because the Rule departs from Regulation E’s general disclosure requirements and the Bureau failed to identify any risks posed by digital wallets that warrant imposition of a more burdensome regulatory scheme. The Bureau pointed to no evidence suggesting that it analyzed the behavior of digital wallet users; evaluated consumers’ understanding of fees (or lack thereof) charged by digital wallets; or reviewed any academic or scientific study so much as mentioning digital wallets. The Bureau’s concern with customers being rushed into linking overdraft credit to a product has nothing to do with digital wallets, which consumers obtain for the express purpose of linking their payment credentials to make purchases. PayPal also asserted that the Bureau’s cost-benefit analysis was deficient, as it did not discuss digital wallets, and disregarded the unique costs the Rule imposes on digital wallets (such as consumer confusion). Finally, PayPal argued that the Bureau’s defense of the Rule against PayPal’s claim that it violates the First Amendment was unpersuasive. As a government-drafted script, the compelled disclosure is properly subject to heightened First Amendment review, and a theoretical interest in informing consumers about products does not satisfy that review.

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Companies: PayPal, Inc.

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