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Potential Major Change For U.S. Prepaid Products: Paypal VS CFPB Court Vacates Two Significant Restrictions in CFPB'S Prepaid Account Rule

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On 30 December 2020, the United States District Court for the District of Columbia entered an order invalidating two provisions of the "Prepaid Account Rule" (the Rule) promulgated by the Consumer Financial Protection Bureau (CFPB). Specifically, the order invalidated the Rule's mandatory short form disclosure requirement and the requirement for a thirty-day delay before linking prepaid products to credit, on the basis that the CFPB had exceeded its statutory authority.[1]

The Rule[2] imposes consumer protection requirements with respect to open loop, general purpose prepaid cards as well as other products that are "capable of holding funds, rather than merely acting as a pass-through vehicle," such as digital wallets.

In December 2019, PayPal, Inc., which provides digital wallet services to consumers, filed suit against the CFPB challenging (among other things) the validity of these two provisions.[3] In particular, PayPal argued that in implementing these provisions, the CFPB exceeded its statutory authority under the Electronic Fund Transfer Act (EFTA), the Dodd-Frank Act, and the Truth in Lending Act (TILA). In response, the CFPB asserted that it was entitled to impose these rules pursuant to its general rulemaking authority and because nothing in its implementing statutes expressly prohibited the CFPB from issuing such rules. After considering the parties' arguments, the Court agreed with PayPal.

With respect to the short-form disclosure requirement, the Court concluded that the CFPB exceeded its statutory authority under the EFTA and the Dodd-Frank Act by requiring providers to issue *mandatory* disclosure forms to consumers because, among other things, Congress expressly directed the CFPB to only "issue *model* clauses for *optional* use by financial institutions." Thus, because the plain language of the CFPB's statutory authority does not permit it to issue "*mandatory*" disclosure requirements and the short form disclosure requirement is "*not* a model form that providers have the option of utilizing," the Court held that it must vacate that provision of the prepaid rule.[4]

Similarly, with respect to the thirty-day credit linking restriction, the Court concluded that the CFPB acted beyond its statutory authority under TILA to "'assure a meaningful *disclosure* of credit terms' by imposing instead a substantive restriction on offering credit."[5] Because the thirty-day credit linking restriction sought to substantively regulate credit and not just the proper disclosure of credit, the Court held that it must vacate that provision of the prepaid rule.[6]

The Court's decision, which takes a very narrow and strict construction of the CFPB's scope of authority, may have additional impacts well beyond these two provisions. It will be interesting to see what other CFPB restrictions are likely to be caught in this net. While many in the prepaid payments industry may cheer this decision, it is not yet final. The CFPB has the opportunity to seek post-judgment relief from the district court and to file an appeal with the United States Court of Appeals for the D.C. Circuit.

NOTES

[1] *PayPal, Inc. v. CFPB*, No. CV 19-3700 (RJL), 2020 WL 7773392, at *1 (D.D.C. Dec. 30, 2020).

[2] The "Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)" Rule.

[3] *Id.*

[4] *Id.* at *4, 6 (emphasis in original).

[5] *Id.* (emphasis added).

[6] *Id.* at 7-9.

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