

# PayPal Prepaid Accounts Ruling May Curtail CFPB Authority

By Keith Bradley and Corey McGehee (January 27, 2021)

Just before New Year's Eve, the U.S. District Court for the District of Columbia invalidated two provisions in the Consumer Financial Protection Bureau's rules for prepaid accounts. So far as we know, this case marks the first time any court has invalidated a bureau rule, in the 10 years since the bureau's founding. It is notable on that account alone.

What is more striking is how the court dealt with one of the new authorities that the Dodd-Frank Act granted to the bureau. If the court's approach holds up on appeal, the bureau may have less expansive authority than it had seemed.

The case is *PayPal Inc. v. CFPB*, and it involves prepaid cards and accounts. The basic concept is a card that looks like a debit card, but instead of drawing on a checking account, the card represents its own store of funds, which the consumer can load with funds, pay from, and reload.

But there doesn't have to be a physical card. A digital wallet, such as those that companies like PayPal offer, can, depending on certain characteristics, fall within the prepaid regulation.

The CFPB has a range of regulatory authority over prepaid accounts under the Electronic Fund Transfer Act. The CFPB has adopted various requirements for prepaid, most of which are housed in Reg E, its general regulation under EFTA. Some features of the prepaid rule are in Reg Z, because they involve related credit features and the CFPB relied on the Truth in Lending Act, a statute that regulates consumer credit.

PayPal challenged two particular features of the CFPB's prepaid regulation. First, the regulation requires a prepaid provider to disclose, among other items, the amounts it charges for various types of fees — card reload fee, balance inquiry fee, transaction fee, etc. — and whether the account is insured by the Federal Deposit Insurance Corp. The provider must make these disclosures in a particular form, a template for which is included in the regulation.

Second, some providers offer credit card accounts accessible through the same accounts as the prepaid features. The regulation mandates that, in some circumstances, a provider cannot link credit to prepaid until 30 days after the customer opens the prepaid account.

The court invalidated both of these provisions. Regarding the restriction on linking credit and prepaid, the CFPB argued it has authority under TILA to impose additional requirements for credit transactions. The court found that the CFPB cannot prescribe this sort of limitation, because TILA in general requires disclosures about credit terms, rather than regulating the terms of the credit products themselves.

The court's decision about the prepaid disclosures is even more interesting. Under EFTA, a provider has to disclose the terms and conditions of electronic fund transfers. But, the court determined, the statute allows the CFPB to specify only a model form for disclosures, not a mandatory form.



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A provider would get a safe harbor against charges of insufficient disclosure if it used the model form, but it would not be required to do so. Therefore, the court concluded, EFTA does not empower the CFPB to mandate a specific form for disclosures.

The CFPB had regarded Section 1032 of the Dodd-Frank Act as its main authority for the prepaid disclosures rule. This provision says:

The Bureau may prescribe rules to ensure that the features of any consumer financial product or service ... are fully, accurately, and effectively disclosed to consumers.

The CFPB is allowed, in such a rule, to include a model form "that may be used at the option of the [provider]"; if it does, the model form must have a "clear format and design," use "plain language comprehensible to consumers," and "succinctly explain the information." The form must be "validated through consumer testing."

In the prepaid rule, the bureau clearly thought this was what it was doing. The rule cites Section 1032, and the bureau conducted extensive testing of its model forms to assess what format and presentation would make the relevant information clear for consumers to understand.

In light of the Section 1032 authority, the CFPB thought any gaps in its EFTA authority did not matter. As the bureau explained in its rule:

The authority granted to the Bureau in section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the 'features' of consumer financial products and services generally. Accordingly, the Bureau may prescribe disclosure requirements in rules regarding particular features even if other Federal consumer financial laws do not specifically require disclosure of such features.

This district court disagreed. The court ruled that because a specific statute controls over a general one, the disclosure provisions in EFTA limit what the Bureau can require in disclosures about electronic fund transfers, regardless of the apparently broad authority in Section 1032.

One could think of the Consumer Financial Protection Act as providing certain general authorities within its sphere, to fill any gaps and bring the whole gamut of consumer financial products and services into one cohesive regulatory regime. Provisions like Section 1032, a general-purpose authority to regulate disclosures; Section 1031, general unfair, deceptive, or abusive acts or practices authority; and Section 1055, remedies available for violations of federal consumer financial law, would be part of that program.

The bureau surely has understood the CFPB that way, as revealed in the quotation above about its reading of Section 1032, and in many other statements in various contexts.

The district court's decision here presents significant tension with that view. At a minimum, other bureau-mandated disclosure requirements may be at risk. The bureau has repeatedly relied on Section 1032 to require disclosures that other statutes did not specifically require.

Section 1032 is woven throughout the bureau's TILA-RESPA integrated disclosure rule, which governs the major disclosures get during the mortgage loan process. It is also prominent in the bureau's regulations requiring mortgage servicers to provide error

resolution channels for homeowners and reach out to troubled borrowers to discuss potential workarounds.

More broadly, the district court's reasoning about specific and general statutes might apply to other parts of the CFPB unification program.

For example, if a given statute has a one-year statute of limitations, while the CFPB allows a three-year statute of limitations, does the one-year period bind the bureau?

If a given statute provides a limited remedy including no penalties, does that constitute a specific statute that blocks the bureau from getting the higher CFPB penalties?

The Fair Debt Collection Practices Act prohibits particular enumerated types of communication by debt collectors, a category defined by the statute. Do those specific prohibitions preclude the bureau from regulating other communications, or debt collection by non-debt collectors, using its general UDAAP authority?

Presumably the bureau will appeal this decision, and it may or may not be affirmed. At this point, though, the district court's decision may be an important signal that courts read the CFPB much more narrowly than the bureau has been.

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