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Via www.regulations.gov

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

RE: RIN 3170-AA22
Docket No. CFPB-2014-0031

Ladies and Gentlemen:

NetSpend Corporation (“NetSpend”), a TSYS company, is pleased to provide this letter in response to the Bureau of Consumer Financial Protection’s (“CFPB”) request for comments on its proposed rule (“Proposal”) to regulate prepaid card products.¹ The Proposal follows a May 2012 advance notice of proposed rulemaking (“ANPR”) in which the CFPB sought information regarding general-purpose reloadable (“GPR”) prepaid card products as part of a fact-gathering effort to determine whether and how to apply Regulation E, which implements the Electronic Fund Transfer Act (“EFTA”), to such cards.²

NetSpend is a leading provider of prepaid card products and serves a wide variety of consumers, including unbanked and underbanked consumers in the U.S. who may not have (or want) a traditional bank account and who often rely on alternative financial services. NetSpend is committed to providing consumers with innovative and affordable financial products that meet their financial needs. NetSpend is the program manager and processor for bank-issued prepaid cards marketed to consumers primarily through the Internet, direct marketing and retailers, as well as through employers. NetSpend’s prepaid card products are offered with different fee plans and options designed to provide consumers with choice while delivering the most value at the lowest price to the cardholder. As of December 2014, NetSpend had approximately 3.2 million active cardholders.

NetSpend appreciates the opportunity to provide input on ways the CFPB can develop a regulatory framework for prepaid card products to ensure that consumers understand their options and choices in the prepaid card market without threatening the

¹ See Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 *Fed. Reg.* 77,102 (Dec. 23, 2014).

² See 77 *Fed. Reg.* 30,923 (May 24, 2012).

continued existence of many prepaid card programs. Subject to certain exceptions (*e.g.*, special rules for provisional crediting), NetSpend generally believes that consumers will be best served if the CFPB treats prepaid cards in a manner similar to other types of financial products that consumers use for transactions, such as deposit accounts. Like debit cards that access a deposit account, prepaid cards enable consumers to shop on the Internet and pay for travel-related services, such as rental cars, airline tickets and hotel accommodations, which otherwise might require a credit card or other type of debit card. Consumers rely on prepaid cards to meet not only transactional needs, but also short-term liquidity needs through overdraft services. Consumer liquidity needs can arise at various times, such as when handling housing or medical emergencies, or covering an unexpected appliance or car repair. These same liquidity services can be obtained by consumers today in connection with overdrafts on deposit accounts.

One of NetSpend's greatest concerns regarding the Proposal is its treatment of overdraft services. In a dramatic departure from what was discussed in the ANPR, the Proposal would amend various provisions of both Regulation E and Regulation Z in a way that would negatively impact consumers by limiting their ability to obtain funds when they are most needed. The Proposal includes complex, onerous, costly and difficult-to-understand requirements for prepaid card products that include overdraft services. NetSpend believes that the Proposal's overly prescriptive and complex rules for overdraft services would make offering such services for consumer short-term liquidity needs impracticable, if not impossible, thereby eliminating an option consumers have today to meet their liquidity needs and an option that remains available to consumers who have traditional deposit accounts. For the reasons discussed below, we urge the CFPB to establish for prepaid cards an "opt-in" approach consistent with existing Regulation E provisions governing overdraft services.

Another significant area of concern is that the Proposal does not define clearly the precise point in time at which an account would be deemed to be "acquired" online. As discussed further below, the Proposal would likely limit issuers' ability to reach consumers that rely heavily on their smartphones to request financial products and services, thereby negatively impacting consumer choice. For the reasons discussed below, we urge the CFPB to state that, in connection with a request for a prepaid card online, disclosures may be provided with the physical card so long as the consumer has not actually (1) purchased the prepaid card, (2) loaded the prepaid card, or (3) formally applied for a prepaid account by providing all of his or her personal information for purposes of account registration. NetSpend believes that this disclosure approach is more beneficial to consumers because they would receive disclosures at a meaningful time and could more easily perform a side-by-side comparison of terms. As a result, this approach would facilitate comparison shopping, a policy goal of the CFPB's, which NetSpend fully supports.

NetSpend appreciates the opportunity to provide its perspective on overdraft services on prepaid accounts, account-related disclosures and the other issues discussed below raised by the Proposal.

Coverage of “Prepaid Accounts”

Clarification Is Needed Regarding the Definition of Account and Prepaid Account

Regulation E currently applies to a demand deposit (checking) account, savings account, 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.”³ Under the Proposal, the term “account” in Regulation E also would include a “prepaid account.” That is, under the Proposal, a prepaid account is a type of Regulation E “account,” although overdraft services would be treated differently under Regulation E depending on whether such services are offered in connection with one type of “account” (a demand deposit account)⁴ or whether the services are offered in connection with another type of “account” (a “prepaid account”). As a result, the Proposal creates ambiguity about whether accounts other than prepaid accounts might be subject to the rules applicable to prepaid accounts. To eliminate this ambiguity, NetSpend believes that it is essential for the CFPB to clarify in any final rule that the term “prepaid account” does not include an individual demand deposit, savings or other consumer asset account (irrespective of whether check writing privileges are associated with the account).⁵

Prepaid Products That Should Not Be Covered a Final Rule

NetSpend partners with a wide variety of commercial, government and not-for-profit entities to provide cost-effective disbursement solutions that are beneficial to both consumers and the partnering entities. These prepaid card programs include:

- Employee reimbursement and allowance programs (*e.g.*, programs for distributing expense reimbursements or petty cash allowances for business-related expenses);

³ 12 C.F.R. § 1005.2(b)(1).

⁴ *See* 12 C.F.R. § 1005.17(a) (stating that the term “overdraft service” means “a service under which a financial institution assesses a fee or charge *on a consumer’s account* held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account”) (emphasis added).

⁵ In this regard, we note the term “deposit” under the Federal Deposit Insurance Act appears broad enough to cover funds held by a bank in an “account” (as currently defined by Regulation E) or a “prepaid account” (as defined in the Proposal). *See* 12 U.S.C. § 1813(l)(1) (defining the term “deposit” broadly to include any “balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account”).

- Emergency disbursement programs (*e.g.*, programs in which government funds or funds from charitable organizations are distributed to disaster relief victims);
- Legal disbursement programs (*e.g.*, programs used to distribute class action or structured legal settlement amounts);
- Insurance disbursement programs (*e.g.*, programs for paying insurance proceeds or worker compensation claims); and
- Specialty merchant programs (*e.g.*, programs for paying consumers for cell phone returns, waste recycling (such as scrap metal) and pawn shop consignments).

A unifying feature of all of these prepaid card programs is that they are not marketed to the general public as an “account” substitute.⁶ Most of the programs are non-reloadable; however, some programs do offer reloads by the same source that provides the initial load. These prepaid card programs deliver significant value to both consumers and businesses and are generally “one-off” prepaid arrangements, in that there generally is no expectation of an ongoing customer relationship. Consumers benefit from these prepaid card programs because they do not need to cash or deposit a check (which can involve check cashing fees or can take time to “clear”), and because they are able to use the funds underlying the card immediately. Businesses and governmental entities benefit from these programs because of efficiencies and fraud reduction associated with delivering an electronic payment product into the hands of consumers. We urge the CFPB to clarify in any final rule that such prepaid card programs are not covered when they are non-reloadable and not marketed to the general public.⁷ NetSpend believes such an approach could mirror the approach taken in Regulation E for gift cards.⁸ An exemption for such prepaid cards is appropriate because to subject such cards to the requirements of the Proposal would significantly increase issuer costs without achieving the CFPB’s goal of facilitating comparison shopping because consumers do not shop for these types of prepaid cards.⁹

⁶ We also note that some of these products may not be deemed for “consumer” purposes, such as employee reimbursement and allowance cards.

⁷ We also would encourage the CFPB to provide clarifying commentary that in-store advertising by third parties of the availability of receiving funds by a prepaid card does not constitute “marketing” by the issuer; for example, when a mobile phone provider or an appliance retailer posts at a cash register or customer service center that store credit or a product rebate will be issued by prepaid card. *See* existing Comment 20(b)(4)–1.

⁸ *See* 12 C.F.R. § 1005.20(b)(4).

⁹ *See* 79 *Fed. Reg.* at 77,154 (stating that providing the long-form disclosures would impose “significant cost” on prepaid card issuers).

Treatment of Overdraft Programs and Services

Under the Proposal, prepaid card accounts that offer overdraft services for a fee, as NetSpend does today, would be considered “credit cards” subject to Regulation Z and all of the provisions that apply to credit cards. Thus, the “addition” of an overdraft feature to a prepaid account would trigger the application of many Regulation Z credit card requirements, including delivery of additional account-opening disclosures, periodic statements, and ability-to-pay requirements. There are substantial legal, policy and operational problems with the overdraft-related aspects of the Proposal.

Background on NetSpend’s Overdraft Services

Some banks that issue prepaid cards managed by NetSpend make available an optional overdraft service in which eligible prepaid cardholders must “opt in” before an overdraft is paid on a prepaid account. Prior to opting in, consumers receive disclosures about the terms and conditions of the overdraft service. That is, a consumer will not be charged a fee for an overdraft unless the consumer affirmatively requests that such overdrafts be paid on his or her behalf after the consumer has the opportunity to evaluate any fees that may result from that service.¹⁰ Overdraft services offered through NetSpend-managed prepaid card programs are fee-for-service programs, similar to the optional ATM and debit card overdraft services that are currently regulated under Regulation E pursuant to an opt-in approach.¹¹ NetSpend also requires consumers who opt in to an overdraft program to consent to receive disclosures electronically (consistent with E-SIGN Act requirements) so that NetSpend can provide consumers with alerts via email of overdraft transactions and inform them of the opportunity to “cure” the overdraft within the next 24 hours in order to avoid the resulting overdraft fee.

Many consumers that opt in to overdraft services choose to receive text message alerts so that they not only know their balance, but will be promptly notified about any overdraft usage and the opportunity to pay an overdraft within 24 hours and avoid the resulting overdraft fee. In addition, any overdraft of \$10 or less on GPR card accounts, and of \$5 or less for payroll card accounts, will incur no fee, a feature we refer to as an “overdraft buffer.” Moreover, overdraft fees are capped at three per month for GPR card users and five per month for payroll card users. Additionally, NetSpend uses an algorithm to waive the overdraft fee when the consumer’s balance is positive at authorization even if it settles negative or if the balance was negative at authorization, but settles positive. These policies have produced exceptional benefits for consumers. For example, in September 2014,

¹⁰ In general, under the terms of issuers’ prepaid card agreements, the issuer does not agree to pay any overdrafts that a consumer may incur. That is, even if a consumer “opts in” to an overdraft service under the issuer’s contract with the consumer, a consumer does not have a “right” to incur overdrafts. We understand that this is the same approach used in contracts of financial institutions in connection with debit cards and deposit accounts.

¹¹ See 12 C.F.R. § 1005.17.

approximately 63% of overdraft transactions on NetSpend's GPR products did not incur a fee. When consumers do incur a fee, the fee is \$15 per occurrence for GPR cards and \$25 per occurrence for payroll cards. A \$15 overdraft fee is half the average of what is charged by banks for overdrafts on deposit accounts.¹² In addition, NetSpend monitors consumers' use of overdraft services and temporarily suspends their ability to use the overdraft services if the data indicate that the consumer is incurring excessive overdraft fees.

The Proposal Will Harm Consumers

According to the Federal Deposit Insurance Corporation ("FDIC"), there are approximately 68 million unbanked or underbanked adult consumers in the U.S.¹³ The FDIC has found that unbanked and underbanked households rely more on prepaid cards for their financial needs than do banked households. For example, in 2013, the FDIC found that 27.1% of unbanked households and 19.6% of underbanked households reported using prepaid cards, compared with 8.8% of fully banked households.¹⁴ A key reason why unbanked and underbanked consumers choose to use prepaid cards, according to FDIC findings, is that these consumers do not have enough money to open a bank account.¹⁵ NetSpend believes that, for these consumers, prepaid card products often make it possible to participate in the modern "cashless" economy and to meet their financial needs, including their emergency liquidity needs. Many consumers also use NetSpend's prepaid cards because they may want to avoid or reduce the fees that may be associated with other types of financial accounts, including traditional deposit accounts, or because they simply prefer a prepaid financial product that offers product features such as those offered by NetSpend.

Today, consumers have a wide variety of options for making a purchase when a financial shortfall occurs, including use of a credit card, drawing on funds in a savings account, payday loan products, home-equity loan products, borrowing from relatives, friends or employers and overdrafts. However, not all of these options are available to all consumers. For unbanked and underbanked consumers, prepaid card overdraft services can provide much needed short-term liquidity and an important alternative to financial services that banked consumers have available to help them address their short-term funding needs. Consumers may not want credit card services under Regulation Z, but may want optional overdraft services provided under Regulation E. The Proposed Rule effectively removes the second option for consumers. Consumers who lose access to opt-in, prepaid card overdraft services may be forced to turn to less convenient and higher-cost alternatives.

¹² See Moebs Services, Inc. "Overdraft Price Stabilizes per Moebs Study" (Jan. 28, 2014), <http://www.moebs.com/Portals/0/pdf/Press%20Releases/140128%20PR%20OD%20Survey%20Final.pdf>.

¹³ Federal Deposit Insurance Corporation, 2013 FDIC National Survey of Unbanked and Underbanked Households (Oct. 2014) at 15.

¹⁴ *Id.* at 29.

¹⁵ *Id.* at 39.

The Proposal Departs from Established Regulatory Requirements for Overdraft Services

In 2009, the FRB adopted a final rule under Regulation E (now Section 1005.17 of the CFPB's Regulation E) that limits a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service. Before a fee can be assessed for an overdraft, a consumer must affirmatively consent to the payment of such overdrafts.¹⁶ The amendments to Regulation E followed extensive consumer testing under the direction of the FRB, evaluating whether consumers understood that fees could be imposed for paying transactions that result in overdrafts. As the CFPB is aware, under these provisions of Regulation E, an institution may not assess a fee for such overdrafts unless the consumer opts in, or affirmatively consents, to the institution's overdraft service for ATM and one-time debit card transactions. In addition, detailed disclosures about overdrafts and the opt-in right must be provided to the consumer, and the consumer's written affirmative consent must be obtained, before fees or charges may be assessed on the consumer's account for paying such overdrafts.

The CFPB's Proposal does not explain why a Regulation E opt-in approach for prepaid card overdraft services is neither appropriate nor sufficient to ensure that only those consumers who want to pay a fee for an overdraft service actually pay such a fee. The Proposal fails to discuss how or why the sizable portion of prepaid card users who want overdraft services are better served or protected by a new and very different rule.¹⁷ That is, the Proposal does not explain why the existing rules in Regulation E for other types of debit cards should not be applied to overdrafts for prepaid accounts. The CFPB does not state or suggest that those rules are flawed or ineffective in ensuring consumers have a choice of whether overdrafts will be paid for deposit accounts. Instead, discussion in the Supplementary Information regarding overdraft services is tied primarily to the CFPB's consumer testing conducted by ICF International, a subsequent report by ICF ("ICF Report"), and statements by the CFPB that some consumers do not want overdraft services.¹⁸

¹⁶ See 74 Fed. Reg. 59,033 (Nov. 17, 2009). The FRB's final rule under Regulation E was preceded by a Regulation DD final rule that addressed depository institutions' disclosure practices related to overdraft services. The Regulation DD rule became effective January 1, 2010. See 74 Fed. Reg. 5,584 (Jan. 29, 2009). The Regulation DD rule requires depository institutions to disclose aggregate overdraft fees on periodic statements, and not solely institutions that promote the payment of overdrafts. See 12 C.F.R. § 1030.11.

¹⁷ For example, a recent survey by the Pew Charitable Trusts found that approximately 27% of prepaid card users want an overdraft fee-for-service feature, and that 29% would pay a \$15 fee to avoid a declined transaction. See Pew Charitable Trusts, "Why Americans Use Prepaid Cards" (Feb. 2014), at 18-19.

¹⁸ See, e.g., 79 Fed. Reg. at 77,164 ("In the [CFPB's] consumer testing, many participants expressed a desire to avoid using any financial products that offer overdraft. Further, [a consumer group survey performed by the Pew Charitable Trusts] indicates that many consumers turn to prepaid cards specifically to avoid incurring any overdraft charges"); ICF Report at 10-11 ("Most participants indicated that they would not want to have an overdraft program on their prepaid accounts. In fact, a few participants said one primary reason that they used a prepaid card was to prevent themselves from overspending and incurring overdraft fees. However, a few other participants were aware that their prepaid card allowed them to overdraw by a limited amount without a fee as

However, the fact that *some* consumers may not want overdraft services for prepaid card transactions is not a sufficient reason for treating overdraft services as “credit” and proposing a rule that could, in all likelihood, result in prepaid card issuers not offering overdrafts to other consumers who *do want* overdraft services. Presumably, consumers who choose to not opt in to overdraft services for deposit accounts do not want such services. The CFPB’s proposed treatment of overdraft services does not appear to be driven by any “data” or by a need to ensure that consumers understand products available in the marketplace. Rather, the Proposal, by intent or otherwise, appears designed to ban overdraft services regardless of whether consumers want such overdraft services or not.

In this regard, we note that the CFPB’s consumer testing focused almost exclusively on prepaid card disclosures and did not substantively address consumer desire for, or access to, overdraft services.¹⁹ For those consumers who do not want overdraft services on prepaid cards, the CFPB has failed to explain why an opt-in approach does not achieve that desired result. NetSpend believes that the CFPB’s approach of treating overdraft services as a credit product completely disregards how consumers use overdraft services and their awareness and understanding of doing so. For example, in NetSpend’s experience, consumers use overdraft services in a manner indicating conscientious use of the service, including in ways that take advantage of our overdraft buffer and 24-hour repayment option. We believe that it is incumbent upon the CFPB to explain why a Regulation E disclosure and opt-in approach to overdraft services is insufficient to: (1) protect consumers who do not want overdraft services, and (2) ensure that consumers who may want overdraft services understand the terms of the service and can use the service in beneficial ways (*e.g.*, to meet their short-term financial needs). In NetSpend’s view, the CFPB has issued a Proposal that will fundamentally change a financial service offering that many consumers value and use effectively today, and that the CFPB has done so without any supporting data and with no persuasive rationale. In this regard, we note that the CFPB’s most recent Semi-Annual Report found that only four consumers submitted complaints to the CFPB relating to “overdraft, savings or rewards features,”²⁰ which suggests that less than one percent of consumer complaints regarding prepaid cards relate to overdraft services. Even assuming that all four of these complaints related to confusion about overdraft service enrollment, we

long as the funds were loaded within a few days. In general, *these participants liked having that feature on their prepaid card*” (emphasis added).

¹⁹ See 79 *Fed. Reg.* at 77,122 (stating that “[the CFPB] and ICF focused mainly on designing and testing ‘short form’ disclosures that would highlight key information about a hypothetical prepaid product in a format that would be easy to understand, yet small enough to fit on existing packaging material used to market prepaid products on J-hooks in retail stores”).

²⁰ Semi-Annual Report of the Consumer Financial Protection Bureau, for the period April 1, 2014 through September 30, 2014, at 44 (stating that, of the “approximately 400 prepaid card complaints submitted by consumers,” only one percent (*i.e.*, four complaints) “involved issues with adding money to a reloadable prepaid card, dealing with misleading advert[is]ing [*sic*] or marketing, and incurring overdraft fees or not being properly compensated on rewards”). And, even for this limited number of complaints, it is not at all clear that the consumer complaints related to unwanted enrollment in overdraft services.

believe such a statistic clearly does not justify a special approach to overdraft services for prepaid accounts that is not an opt-in approach.

In addition, we note that, with respect to the CFPB's testing of disclosures, the ICF Report states that "all participants were able to correctly indicate whether or not an overdraft program was offered" when reviewing a short form that presented one service plan.²¹ Yet, the CFPB fails to discuss in the Proposal why consumer comprehension of the disclosure and the existence of prepaid card overdraft services is insufficient to ensure that consumers are aware of possible overdraft services. The CFPB's own testing clearly reflects that "all" consumers, in fact, did understand when an overdraft service was available:

At different points in the interview, each participant was shown both a form that indicated at the bottom that the card did not offer an overdraft program, and another form that indicated that the card charged an overdraft fee of \$15 per transaction (implying that it did offer such a program). All participants noticed this text on both versions, and in all cases were able to correctly identify whether or not the card offered an overdraft program.²²

This consumer understanding seems especially relevant to adopting an opt-in approach, as is currently the case for ATM and one-time debit card transactions. Based on the evidence presented in the ICF Report, it appears that consumers can, when given appropriate disclosures, fully understand whether or not overdraft services are offered and whether or not they would like to receive such services. We believe that it is incumbent upon the CFPB to explain why a disclosure-based approach, coupled with an opt-in and continuing opt-out right, is inadequate to ensure that only consumers who want overdraft services receive such services. Moreover, the Proposal creates dramatically different rules for overdraft services offered in connection with prepaid card accounts than the rules that apply to overdraft services for other types of deposit products, despite the fact that prepaid cards and debit cards accessing a deposit account and the overdraft services offered in connection with each are substantially the same. The different treatment of substantially similar products would result in consumer confusion and a reduction in consumer choice.

NetSpend also believes that overdraft services are a long-standing practice by banks and credit unions that provides substantial benefits to consumers. The ability of banks to cover overdrafts in deposit accounts is well recognized in the relevant provisions of the various state Uniform Commercial Codes (UCC § 4-401(a)). In NetSpend's experience, most consumers take seriously the responsibility of managing their prepaid account balances and maintaining sufficient funds to cover transactions on the account. Covering overdrafts is a valuable service to consumers for those instances in which the consumers have a liquidity need or timing issue that causes an overdraft on the consumer's account. Also, there is no

²¹ ICF Report at 34.

²² *Id.* at 24. *See also id.* at 25 ("When reviewing forms for cards that did offer an overdraft program, all participants were able to correctly identify the fee that they would be charged if they overdrew their account (*i.e.*, \$15)").

evidence that consumers who have deposit accounts (in which overdrafts are “offered”) accessed by network-branded debit cards are somehow fundamentally different from consumers who use network-branded prepaid cards to pay for goods and services, particularly with respect to consumers who use overdraft services. To the contrary, we believe each product serves the same basic purpose for each consumer—to use a payment card to pay for goods and services.

Moreover, the value of overdraft services is equally important for consumers engaging in prepaid card transactions as it is for consumers who use debit cards that access funds in a deposit account. In either case, consumers may want the ability to complete transactions despite the fact that the presentment of credits and debits to their account has caused a temporary overdraft. For example, consumers may prefer that a utility payment be paid even if a \$15 overdraft fee is assessed, rather than incur a late payment fee imposed by the utility company or face having the utility service temporarily suspended, which could involve service reinstatement fees. We also urge the CFPB to consider how newer account “alert” services that are provided to consumers, including by NetSpend, can help consumers avoid overdrafts, such as by more easily monitoring account balances.

By departing from the well-reasoned regulatory treatment of overdraft services for ATM cards and debit cards, the CFPB appears to have made a choice for all prepaid card consumers to restrict consumer access to overdraft services associated with prepaid cards. At the same time, those consumers who have opted in to overdraft services for deposit accounts are unaffected by the Proposal. Moreover, because the Proposal’s accompanying requirements under Regulation Z are so onerous, we fully expect that prepaid card issuers will not find it economically feasible to continue offering overdraft services to consumers who want to receive such services. NetSpend believes this is a policy decision that will deprive many consumers, including unbanked and underbanked consumers, of access to a financial service that they want and need and could obtain with a deposit account. Because consumers may not want credit card services under Regulation Z, applying the Regulation Z requirements to overdraft services on prepaid accounts could prevent consumers’ use of overdraft services to meet underlying short-term liquidity needs, and would increase the likelihood that consumers will turn to other financial products or alternative financial services, which would be more costly and less convenient.

Treating Overdrafts as Credit Is Not Consistent with the Truth in Lending Act

The CFPB’s proposed treatment of overdraft services on prepaid accounts is not consistent with the statutory definition of “credit” in the Truth in Lending Act (“TILA”) and would overturn more than 40 years of regulatory implementation of the TILA definition of credit. TILA defines credit as “*the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer*

payment therefor.”²³ On the other hand, overdraft services on prepaid accounts and deposit accounts are discretionary; that is, the financial institution decides whether it will cover transactions that may result in an overdraft. The definition of credit in the statute has remained unchanged for more than 40 years, even though TILA has been amended numerous times since its original enactment in 1968. The Proposal would radically redefine how to determine whether the consumer has a “right” to incur debt, not by looking at the legal obligation between the parties, but by stating that the discretionary practice of a financial institution somehow creates a legal right. This approach is both unprecedented and fraught with risk.

In the Supplementary Information, the CFPB gives little, if any, rationale as to why paying an overdraft is somehow a “right granted” by a creditor. Even though the Proposal is limited to prepaid accounts, the fact that the CFPB has proposed applying Regulation Z to overdraft services, where no consumer “right” exists, raises serious questions regarding the legal status of other transactions in which a service is provided, but there is no right granted to incur a debt and defer the payment. For example, under the interpretation of “credit” that the CFPB has advanced in the Proposal, it seems likely that other informal payment arrangements in which a service is provided and payment is due later could be considered credit transactions under Regulation Z, including utility services, services rendered by doctors, lawyers, or accountants, and any situation in which a business provides a service and receives payment for the service at a later date.

NetSpend believes consumers should have choices when deciding which financial products and services they want, and that similar products should receive comparable regulatory treatment. Overdraft services offered by banks and credit unions on ATM cards and debit cards accessing a customer’s deposit account are not treated as the offering of loans or extensions of credit subject to the requirements of Regulation Z, presumably because there is no “right” to incur debt or defer payment. Yet, this is precisely the approach the CFPB proposes to take for overdrafts on prepaid accounts. Rather than effectively prohibiting prepaid card issuers from offering overdraft services by treating such transactions as “credit”, as the Proposal would, a Regulation E opt-in approach to discretionary overdraft services on prepaid cards should instead be adopted. This would ensure that prepaid card issuers have the opportunity to operate on a level playing field with other financial service providers that offer deposit services in connection with other network-branded debit products.

Redefining “Finance Charge” for Prepaid Accounts

Central to the CFPB’s proposed treatment of overdraft services for prepaid accounts is the Proposal’s redefinition of what constitutes a “finance charge” for purposes of prepaid accounts. Under the Proposal, any “service, transaction, activity, or carrying charge” would be deemed a finance charge. We believe this interpretation of what types of fees constitute a

²³ 15 U.S.C. § 1691a(d) (emphasis added).

“finance charge” is inconsistent with TILA and represents a fundamental departure from congressional goals of ensuring uniform disclosures for credit products.

TILA defines a finance charge as a charge imposed as an incident to an extension of credit and provides that the finance charge does not include charges of a type payable in a comparable cash transaction.²⁴ As currently implemented under Regulation Z, a finance charge includes “any charge imposed on a checking or other transaction account *to the extent that the charge exceeds* the charge for a similar account without a credit feature.”²⁵ However, if a charge for an account with a credit feature, such as an account with an overdraft line of credit, does not exceed the charge for an account without a credit feature, the charge is not a finance charge under Regulation Z.²⁶ NetSpend believes the current interpretations in Regulation Z are consistent with congressional intent insofar as Congress has delineated the difference between the cash price and the credit price of any goods, services, or money obtained in a transaction. Yet, under the Proposal, the CFPB would fundamentally change this interpretation of TILA. Furthermore, the CFPB would make this change for only *some* types of overdrafts—for overdrafts on prepaid accounts, but not for overdraft lines of credit linked to deposit accounts. In addition, the Proposal would create a more stringent test for determining if a fee is a finance charge for overdrafts (which do not meet the definition of credit) than for true credit transactions, such as an overdraft line of credit, in which a “right” to credit is granted.

Under existing Regulation Z, if a creditor imposes a fee in connection with a transaction involving an overdraft line of credit, that fee is not a finance charge if the creditor imposes the same fee for a transaction not involving the overdraft line of credit.²⁷ In other words, fees assessed against an account for overdraft credit services may be finance charges, but only if the fees exceed the charges imposed for paying similar transactions for an account that does not have overdraft credit services. The Proposal would create a completely different rule for which fees are finance charges for overdraft services on prepaid accounts compared with overdraft lines of credit on checking accounts.²⁸ This aspect of the Proposal conflicts with the core TILA principle of enabling consumers to compare transactions, and it establishes different tests for what fees are finance charges for fundamentally identical services—overdrafts. In fact, the Proposal contorts the treatment of fees; the exclusion of the same fee for transactions involving comparable accounts (those with, and without, overdraft fees) was established because such a fee is *not* a “cost of credit.” That is, if the same fee is imposed on credit and non-credit transactions, the fee simply is not a cost related to credit.

²⁴ See 15 U.S.C. § 1605(a).

²⁵ See 12 C.F.R. § 1026.4(b) (emphasis added).

²⁶ See 12 C.F.R. pt. 1026, Supp. I, cmt. 4(b)(2)–1.

²⁷ See 12 C.F.R. pt. 1026, Supp. I, cmt. 4(b)(2)–1.ii.

²⁸ This discussion of the CFPB’s treatment of fees as finance charges does not in any way mean that NetSpend views overdrafts as credit under TILA, for the reasons explained above.

For all of the reasons discussed above, overdrafts on prepaid cards should not be treated as “credit” under Regulation Z. If, notwithstanding this, the CFPB determines to treat such transactions as credit, NetSpend urges the CFPB to clarify in any final rule that the treatment of fees applicable to prepaid accounts is consistent with TILA and the existing rule on how fees are treated on overdraft lines of credit. NetSpend believes the CFPB could accomplish this result by clarifying that if the same fee is imposed on a prepaid account, whether the account may pay an overdraft or not pay an overdraft, that fee is not a finance charge. For example, for any transactional charge or monthly charge that is assessed in connection with two similar accounts (one that offers overdraft services and one that does not), the CFPB should clarify that such charges are not “finance charges” under Regulation Z. This would establish consistency of the treatment of fees for overdrafts for prepaid accounts with true credit transactions.

Such a clarification also is appropriate because many prepaid card transactions involve circumstances that are similar to so-called “split-tender” transactions (including transactions that may involve the NetSpend purchase cushion feature). That is, a transaction may involve debiting funds from the prepaid account and also an overdraft. For example, if a consumer with \$25.00 in his or her prepaid account engages in a \$28.00 transaction, part of the funds would be an overdraft. In these circumstances, if the issuer imposes a \$1.00 transaction fee for the underlying transaction regardless of whether the overdraft service is triggered, such charge should not be deemed a finance charge. NetSpend encourages the CFPB to include a similar clarifying example as part of any final rule that addresses these types of negative balance circumstances.

Clarification on Offering a Purchase Cushion

NetSpend notes that the proposed treatment of the finance charge could effectively prevent issuers from offering consumers a purchase cushion feature. Under NetSpend’s purchase cushion feature, as discussed above, qualifying cardholders (generally those who have made a direct deposit in a specified amount) under certain of NetSpend’s programs may incur a negative balance of up to \$10 without incurring an overdraft fee. Nevertheless, a cardholder might incur a transaction fee (*e.g.*, a per-transaction fee) that would be charged irrespective of whether a consumer utilizes the purchase cushion. Under the Proposal, this transaction fee would be deemed a finance charge, and the transaction would be deemed credit merely because a fee is assessed on the transaction, even though that same fee would apply regardless of whether the transaction resulted in a negative balance in the account. Any final rule should not treat such a fee as a finance charge (or as a fee for an overdraft) because it is the same transaction fee that would apply regardless of whether the transaction resulted in use of the purchase cushion or not. Any final rule should not jeopardize an issuer’s ability to provide consumers a purchase cushion feature because such features present no risk to consumers and are beneficial to consumers by enabling them to complete transactions where there is only a *de minimis* amount needed to cover a transaction. In order

for issuers to offer consumers this beneficial service, we request that the CFPB provide clarification regarding purchase cushion features such as NetSpend's service. Specifically, the CFPB should make clear in any final rule that transaction-based fees that apply regardless of whether an overdraft occurs, are not finance charges when a purchase cushion (or similar feature) is accessed and that issuers are not required to "waive" such fees.

Proposed Disclosure Requirements

Under the Proposal, prepaid card issuers would have to provide each consumer with both short-form and long-form disclosures, consistent in form and substance with the Model Forms included as part of the Proposal. With respect to the timing requirements, the Proposal generally would mandate that the short-form and long-form disclosures be provided "before a consumer acquires a prepaid account."²⁹ As the CFPB acknowledges, the proposed timing requirement is a departure from the disclosure standard established by Congress under the EFTA.³⁰ Under the EFTA, "terms and conditions" for an electronic fund transfer service must be "disclosed at the time the consumer contracts for" the service.³¹ According to the CFPB, the Proposal's different timing requirement for prepaid accounts "is necessary and proper...because the proposed revision will assist consumers' understanding of the terms and conditions of their prepaid accounts."³²

In addition, for prepaid cards that are sold in retail stores, the CFPB has proposed a conditions-based exception from the requirement that the issuer provide the long-form disclosure before the consumer "acquires" a prepaid account. Specifically, under the Proposal, a prepaid issuer need not provide both the short-form and long-form disclosures provided that the prepaid card is inside of packaging material; the short-form disclosure is provided in tabular form on, or is visible through, packaging material; and the long-form disclosure is accessible by telephone and via a Web site. NetSpend appreciates the CFPB's recognition of challenges associated with delivering disclosures in the retail environment. NetSpend generally supports the Proposal's modified approach for relying primarily on the short-form disclosure for prepaid cards that are sold in retail stores. In the retail setting, there are space constraints, and consumers normally buy and/or load funds onto the prepaid card while at the store. Since there is typically a bargained-for exchange in the retail setting, it is important for consumers to understand the terms, conditions and features of the prepaid card before the consumer obtains the card.

At the same time, as discussed in detail below, we believe that a different approach for delivering the short-form and long-form disclosures is necessary, and better for

²⁹ Proposed § 1005.18(b)(1)(i).

³⁰ See 79 *Fed. Reg.* at 77,148 (observing that the Proposal's timing requirement for delivering disclosures is different than the EFTA).

³¹ 15 U.S.C. § 1693c(a).

³² 79 *Fed. Reg.* at 77,148.

consumers, in an Internet-based context where consumers request and, at no cost, receive a prepaid card with no obligation (under contract or otherwise) to use, or even load funds onto, the card.

*The CFPB Should Clarify the Concept of “Acquiring” An Account, Including for Internet-based Interactions*³³

NetSpend shares the CFPB’s observation that “there are many ways a consumer could obtain a prepaid account and that the proposed disclosure regime should be adaptable to this variety.”³⁴ Indeed, prepaid cards are in fact marketed in a variety of ways, including in retail stores, on the Internet through an issuer’s or program manager’s Web site, and through Internet-based marketing arrangements with third-parties where consumers are accessing marketing messages through their desktops and mobile devices, such as smartphones. Because prepaid cards are marketed to consumers through such a variety of channels, and because these channels could expand in the future, NetSpend supports a disclosure regime that is appropriate for a consumer simply requesting a prepaid card online. We believe these consumers should be provided the prepaid account disclosures at a meaningful time (*i.e.*, with the physical card itself), enabling him or her to make an informed decision at the appropriate time.

The proposed timing requirement does not establish an appropriate test for when consumers should receive disclosures upon a mere online request for a prepaid card; for example, there are many different types of online interactions between consumers and issuers regarding prepaid cards that clearly do not involve an “acquisition” of a prepaid account. In this regard, we note that the proposed disclosure regime appears to be based on the retail distribution model where there is a bargained-for exchange and consumers have the opportunity to comparison shop for prepaid cards. NetSpend encourages the CFPB to consider the way in which consumers shop for products in today’s mobile environment where a consumer may use his or her smartphone to simply request a card. In these circumstances, we strongly encourage the CFPB to clarify in any final rule that it is permissible to deliver disclosures together with the card. Specifically, we urge the CFPB to state that, in connection with a request for a prepaid card online, disclosures may be provided with the physical card so long as the consumer has not actually (1) purchased the prepaid card, (2) loaded the prepaid card, or (3) formally applied for a prepaid account by providing all of his or her personal information for purposes of account registration.³⁵ We encourage the CFPB to adopt this approach as part of any final rule because by merely requesting a

³³ We discuss separately below acquisition issues associated with payroll card accounts.

³⁴ 79 *Fed. Reg.* at 77,148.

³⁵ A consumer merely requesting a card online typically provides enough of his or her personal information necessary for the issuer to deliver the consumer a card (specifically, his or her name and address). In contrast, a consumer formally applying for a prepaid account is typically required to provide his or her name, address, date of birth and Social Security number so that the issuer may verify the consumer's identity as part of the account registration process.

prepaid card online, the consumer has yet to make a financial commitment or apply to become a registered accountholder, nor has the consumer loaded any funds on a prepaid account that he or she must use the card to access.

Moreover, in the Internet-based environment, it is important for the CFPB to recognize that consumers do not always obtain cards directly through an issuer's or program manager's Web site. For example, in the case of online or mobile marketing, an issuer or program manager may partner with a third party to place banner advertisements on Web sites which are often accessed by consumers through their smartphones (generally, "third-party Web sites"). Banner advertisements and third-party Web sites typically have significant space limitations and often have limited functionality. For example, in many cases, the banner ad may simply be a pop-up advertisement or appear in the form of Internet advertising placed alongside other Internet content with "yes" and "no" radio buttons for the consumer to indicate whether he or she would like to receive additional information about a prepaid card product. Because of the significant space limitations and limited functionality associated with banner advertisements and third-party Web sites, it would be difficult, and in many cases impossible, to provide disclosures in a form that would be useful to consumers at the time a consumer requests a prepaid card. As a result, the proposed disclosure timing requirement would have a chilling effect on the ability of issuers and program managers to continue to utilize banner advertisements and third-party Web sites to reach consumers that rely heavily on the Internet and their smartphones to request financial products and services, thereby adversely impacting consumer choice.

NetSpend encourages the CFPB to also consider the challenges consumers face when attempting to comparison shop on the Internet. NetSpend believes that many consumers utilize smartphones, rather than desktops or laptops, to shop for prepaid cards via the Internet, which would make online comparison shopping even more difficult. A consumer shopping for a prepaid card on his or her smartphone who is seeking to perform a side-by-side comparison of terms must visit the Web sites of multiple providers or open several Web browsers and attempt to toggle back and forth between browsers to compare terms, which can be extremely challenging on a smartphone. Moreover, based on NetSpend's experience, we believe that consumers who initially request prepaid cards online actually compare such card features after they receive the physical card, and not while reviewing the products online. In NetSpend's experience, the vast majority of consumers who obtain prepaid cards via a request on a third-party Web site never register, load or use their cards. We believe that most of these consumers are obtaining cards online merely for comparison shopping purposes and, thus, providing disclosures with the card would be more beneficial to these consumers than disclosures on the third-party Web site.

Under the approach NetSpend urges the CFPB to adopt, issuers still would be required to provide disclosures before a consumer actually (1) purchases, (2) loads, or (3) formally applies for a prepaid card. These are appropriate touch points in the consumer

experience to deliver disclosures because the consumer has actually made a financial commitment or applied to become a registered accountholder, or must use the card to access his or her funds. We also believe this disclosure approach is more beneficial to consumers because they would receive disclosures at a meaningful time and could more easily perform a side-by-side comparison of terms. As a result, this approach would facilitate comparison shopping, a policy goal of the CFPB's, which NetSpend fully supports. Thus, it should be permissible under any final rule to deliver disclosures with a physical card requested by a consumer online if, at the time of the request, a prepaid account has not been "acquired" by the consumer because the consumer has not purchased, loaded or formally applied for a prepaid account.

For Initial Disclosures, NetSpend Strongly Encourages the CFPB to Mandate Only Short-Form Disclosures for Each Type of Prepaid Account

NetSpend believes an initial disclosure approach that relies solely on a short-form disclosure, regardless of the type of prepaid account, is the best way to provide consumers with appropriate information on which to base a shopping decision.³⁶ We also believe providing or making available two disclosures (both short-form and long-form disclosures) at the same time could contribute to "information overload," a concern that the CFPB itself appears to recognize.³⁷ That is, the provision of both short-form and long-form disclosures when the consumer is shopping for a prepaid card would require consumers to assess two documents (the long form and the short form), and compare those two forms with similar documents from other prepaid card issuers, a process that would likely be challenging to many, if not most, consumers.³⁸ Mandating two sets of disclosures when shopping for a prepaid card also would increase compliance costs for prepaid card issuers (*e.g.*, printing costs and ensuring both disclosures are accurate and regularly updated) with no commensurate benefit to consumers.

The CFPB Should Not Require an Incidence-Based Fee Disclosure

With respect to the short-form disclosure, the Proposal would require a prepaid card issuer to initially disclose the three incidence-based fees that were incurred by consumers most frequently during the prior 12 months. We do not believe the CFPB has adequately

³⁶ We discuss separately below some additional disclosure issues associated payroll card accounts.

³⁷ 79 *Fed. Reg.* at 77,150 ("In the [CFPB's] testing, for example, many participants reported feeling overwhelmed by the amount of information included on a prototype long form and they struggled to compare two long form disclosures, even those that listed identical fee types. The [CFPB] believes that the potential size and complexity of the long form might overwhelm and lead consumers to disregard the disclosure and also not use it to comparison shop across products or even to evaluate a single product").

³⁸ The CFPB states in the Supplementary Information that "consumers in testing also generally found it more difficult to perform side-by-side comparisons of two long form disclosures included on the inside of prototype packaging material versus comparing two short form disclosures provided on an outside surface of prototype packaging material." 79 *Fed. Reg.* at 77,154.

explained the reason for this requirement. For example, according to the ICF Report, only “approximately half” of the test subjects “understood that they could not know whether they would be charged that fee based on the information provided, but that it was possible.”³⁹ NetSpend does not believe this “data” warrants an incidence-based fee disclosure. And, we note that such a statistic stands in stark contrast to the 100 percent of test subjects that understood whether or not an overdraft service was offered based on disclosures tested by ICF.⁴⁰

The CFPB Should Not Mandate Disclosure of Third-Party Fees

Under the Proposal, the long-form disclosure would need to include all fees that could be imposed in connection with a prepaid account, including, to the extent known, any third-party fee amounts that could apply. NetSpend believes that it may not always be possible to accurately disclose third-party fees because the amount, timing and frequency of such fees are not always within the control of the issuer. Accordingly, we urge the CFPB not to mandate the disclosure of third-party fees on the long-form disclosure (if such a disclosure is retained in any final rule) beyond requiring a statement such as “third-party fees may apply.”

Flexibility is Needed under the Proposed Short-Form Disclosure Requirements

The Proposal includes highly prescriptive requirements for the short-form disclosure, including “top-line” fee disclosures, “below the line” fee disclosures and several additional disclaimer and content requirements that can vary based on the type of prepaid account being offered and its features. Under the Proposal, if the amount of a fee disclosed on the short form could vary, the issuer would be required to disclose the highest possible fee associated with the service, along with a symbol and a disclaimer explaining that a lower fee could apply.⁴¹ Instead of simply requiring disclosure of the highest possible fee, NetSpend strongly encourages the CFPB to revise the Proposal to allow issuers to disclose the range of fees that may apply if a service is used, together with a brief statement regarding the reason(s) for fee variation. We believe the approach of providing a fee range and explanation for fee variation would provide consumers with more helpful information on which to comparison shop in the context of a short-form disclosure. For example, similar to the Proposal’s asterisk-based approach for “top-line” fee disclosures, which would mandate a disclaimer statement that “fees can be lower depending on how and where this card is used,” we believe it would be more useful to consumers to understand that the amount of a monthly fee depends upon use of direct deposits, or that the amount of a cash reload fee depends upon where funds are loaded. NetSpend also believes that a range-based approach is more

³⁹ ICF Report at 30.

⁴⁰ See *supra* n.21.

⁴¹ Proposed § 1005.18(b)(2)(i)(C).

appropriate in order for prepaid card issuers to establish product differentiation and would preserve competition among issuers.

NetSpend also strongly encourages the CFPB to reconsider the proposed requirement to disclose at the bottom of the short form the total number of “other fees” that are not listed elsewhere on the form.⁴² We believe this requirement would create a disincentive to provide prepaid cardholders with a wide range of features because disclosing a high number of purely optional fees would give consumers a misimpression of the fees required to use the card, and would not be instructive to consumers with respect to service-based fees that are entirely optional, such as a custom card fee. The proposed requirement also would inhibit issuers’ ability to roll out new product features in connection with cards that are already in the distribution chain because the disclosed number of fees would be inaccurate if the issuer added optional services. We believe a better approach would be to require that: (1) only the fees that a consumer may incur to actually use the card be disclosed, and (2) optional service-based fees be disclosed before a consumer has an opportunity to engage in the service and incur the fee. This also would better ensure consumers receive information at a time when it is more likely to be useful and relevant. As a result, we encourage the CFPB to state in any final rule that this disclosure requirement does not apply to fees with respect to the account that only apply at the option of the consumer.⁴³

The CFPB Should Address Potentially Duplicative Disclosure Requirements

The Proposal would define the term “prepaid account” as an “account” for purposes of Regulation E. As a result, it appears that prepaid accounts would be subject both to many of the existing disclosure requirements of Regulation E and to those set forth in the Proposal. For example, the proposed short-form and long-form disclosure regime would be in addition to the initial disclosure requirements in existing § 1005.7(b) and would correspond to the requirements in proposed § 1005.18(b) for prepaid accounts generally. In essence, the Proposal would mandate the delivery of the long-form disclosure twice—once as a stand-alone disclosure and again as part of the terms and conditions of the prepaid account as set forth in the initial disclosures.

NetSpend believes that providing a long-form disclosure to consumers together with a short-form disclosure would not provide consumers with more detailed information at a meaningful time in the product experience. On the other hand, we believe delivering a long-form disclosure with (or as part of) initial disclosures would enable consumers to more readily study and consider the information on the proposed long form and use that

⁴² See Comment 18(b)(2)(i)(B)(10)–2 of the Proposal, which would require issuers to include in the disclosed number of fees “each variation of [a] fee that might be imposed.”

⁴³ NetSpend’s proposed approach is based on the approach in Regulation Z regarding which fees are required to be included the 25 percent limitation on fees that can be imposed during the first year a credit card account is open. See 12 C.F.R. § 1026.52(a)(1).

information to comparison shop if the consumer desires to do so. NetSpend believes this approach is consistent with the CFPB's own findings that "few participants [in consumer testing] researched prepaid accounts before acquisition, particularly in retail stores."⁴⁴

Proposed Periodic Statement Requirements

Disclosure of Fee Totals on Periodic Statements

The Proposal would require issuers to disclose on any periodic statement, or electronic account history, a summary total of the amount of all fees assessed against a prepaid account, including third-party fees, for the prior calendar month and for the calendar year to date. NetSpend believes the disclosure of fees on periodic statements can be useful to consumers in assessing how they are using their prepaid card, but encourages the CFPB to revise the Proposal. In NetSpend's experience, the amount of third-party fees charged to a consumer's prepaid account may not always be discernible to the issuer and, therefore, cannot accurately be included in the fee totals. Additionally, NetSpend requests that the CFPB allow issuers to distinguish in fee totals: (1) fees for using the prepaid account (*e.g.*, per-transaction fees); (2) optional fees; and, if mandated, (3) third-party fees (to the extent known). We believe this disclosure approach would be more helpful to consumers regarding account use. In addition, allowing issuers to distinguish between fees in this way would present a more accurate picture to consumers of fees that are incurred for use of the account.

Frequency of Written Histories at No Charge

The Proposal would require that issuers provide eighteen months of transaction history in writing to a consumer upon written or oral request at no charge, so long as a consumer does not make such a request more than once per month. NetSpend recognizes the importance of the providing consumers the ability to access their account histories at any time at no cost; however, the Proposal effectively requires that issuers provide regular online access to account history and generate a written history in response to consumer request on a monthly basis. As such, the Proposal provides no relief to issuers for providing online access to account history and does not permit issuers to recover the cost of providing a written history. Consumers can obtain free access to their transaction history online, through any computer, smartphone or tablet, and can obtain their balance information over the phone at no cost. Many programs also offer innovative features such as text alerts after every transaction to let consumers know exactly how much money they have left in their accounts. Given the varied ways a consumer has to access their transaction history at no charge, NetSpend believes that requiring issuers to mail written history to consumers each month upon request at no cost is not necessary or appropriate. NetSpend believes a more appropriate balance of consumer benefit and cost to issuers would be to permit consumers to request a written copy of their transaction history once every twelve months at no cost. For

⁴⁴ 79 *Fed. Reg.* at 77,171.

each additional written copy in a twelve-month period, an issuer could charge a reasonable fee.

Issues Relating to Payroll Card Accounts

In addition to the issues identified regarding prepaid accounts generally, NetSpend encourages the CFPB to consider certain issues raised by the Proposal that relate to payroll card accounts. That is, the CFPB has proposed to define the term “payroll card account” as a type of “prepaid account” and, as a result, would subject payroll card accounts to all of the requirements under the Proposal (including, for example, requirements for overdraft services), with special payroll card rules in certain instances (*e.g.*, special short-form disclosure requirements). NetSpend appreciates the CFPB’s recognition in the Proposal that payroll card accounts differ from other types of prepaid accounts in several ways, including in how consumers are enrolled in payroll card programs. Nevertheless, we believe that several aspects of the Proposal should be revised under any final rule to address requirements for payroll cards that arise under state law. For example, state wage and hour statutes include specific requirements (often imposed on employers) that address restrictions and requirements relating to disclosures, fees, liabilities, and other factors relating to paying wages through a payroll card account. We encourage the CFPB to take these and other issues into consideration as it develops any rules applicable to payroll card accounts.

Account “Acquisition” for Payroll Cards

As discussed above, the Proposal generally would require that consumers receive both short-form and long-form disclosures before they “acquire” a prepaid account. For payroll card accounts, NetSpend urges the CFPB to clarify that account acquisition occurs when an employee chooses to receive his or her wages through a payroll card account, or before the consumer is enrolled in a payroll card program (*i.e.*, before a consumer will be required to access wages by using a payroll card). For example, it should be permissible to deliver disclosures to employees any time before a payroll card account is actually opened and is capable of receiving wages. We believe this delineation in the payroll card context is consistent with both state law and the CFPB’s own guidance on this issue.⁴⁵

⁴⁵ See Letter from CFPB Director Richard Cordray to Senators Blumenthal, Manchin III, and Schumer, dated September 12, 2013, citing 12 C.F.R. § 1005.5(b) and observing that the current provisions of Regulation E do not prohibit employers from providing consumers with inactive payroll cards. See also 71 *Fed. Reg.* 51,437, 51,442 (Aug. 30, 2006) (FRB final rule stating that including an “unactivated payroll card” together with materials provided to employees about the terms and conditions of the payroll card account “would not violate Regulation E, provided that the terms and conditions for issuing an *unsolicited* access device as provided under [12 C.F.R. § 1005.5(b)] are satisfied and the consumer retained the option to receive compensation by means other than the payroll card account” (emphasis in original)). With regard to state law, NetSpend understands that state wage and hour laws generally require that employees receive required disclosures before the employee agrees to receive their wages through the payroll card account.

Disclosure of Incidence-Based Fees and the Registration Statement

Under the Proposal, prepaid card issuers (including issuers of payroll cards) would be required to disclose the three incidence-based fees that they reasonably anticipate will be incurred by consumers most frequently during the next 12-month period. Subsequently, at the same time each year, the issuer would need to reassess whether the incidence-based fees it disclosed in the prior 12-month period were actually the most frequently incurred fees during that 12-month period; if not, the issuer would be required to revise the incidence-based fees contained in written, oral or electronic disclosures within 90 days. For reasons already discussed above, NetSpend believes this requirement would impose burdens and costs on prepaid card issuers that are not justified by any resulting consumer benefits, given that for many consumers the incidence-based fees may not be relevant to their own use preferences. If this requirement is retained in any final rule, NetSpend urges the CFPB to provide clarification on how it applies to payroll card accounts. Specifically, NetSpend encourages the CFPB to state in any final rule that the requirement applies to incidence-based fees under an issuer's payroll card programs generally and not to a specific employer-based program. As it relates to payroll cards, NetSpend believes that the space on the short-form disclosure that the CFPB proposes to use for incidence-based fee disclosures would be better used to inform employees how they can access 100 percent of wages without incurring any fees, consistent with mandates under many state wage and labor laws.

NetSpend further notes that the registration statement (*i.e.*, "Register your card with XYZ Prepaid Company to protect your money.") is not appropriate in the payroll card context. The employee, through the employer, will have provided sufficient identifying information so that an issuer can identify the cardholder and verify the cardholder's identity. Thus, a separate statement regarding registration is not necessary or appropriate. Similar to arguments regarding the disclosure of incidence-based fees in the payroll card context, NetSpend believes that the space on the short-form disclosure could be better used, for example, to inform employees how they can access 100 percent of wages without incurring any fees.

Posting of Account Agreements

The Proposal would require prepaid card issuers (including issuers of payroll cards) to make quarterly submissions of their account agreements to the CFPB and post agreements to the issuer's Web site. NetSpend understands that other industry participants believe the burdens and costs of this proposed requirement far outweigh any potential consumer benefits, a view that NetSpend shares. NetSpend believes consumers are unlikely to comparison shop by visiting a CFPB database and that the posting requirement is of absolutely no utility to consumers in the payroll card context because consumers simply decide whether or not to be paid wages through a payroll card account, and not which issuer will provide that account. In addition, because payroll card account terms and conditions are established by agreement between issuers and employers (and may differ depending on

applicable state law), we believe the posting requirement would not be helpful to consumers in considering payroll card account options. Requiring issuers of payroll cards to submit account agreements may also confuse those consumers that might use the CFPB database to comparison shop other generally-available prepaid accounts because of the sheer volume of payroll card account agreement that will be submitted. Accordingly, the CFPB should, at most, only require prepaid card issuers to post on their Web site current versions of their basic prepaid card agreements, not their payroll card agreements.

Compulsory Use Disclosure

At part of the short-form disclosure for payroll card accounts, the CFPB proposes that the form state the following: “You do not have to accept this payroll card. Ask your employer about other ways to get your wages.” NetSpend has two concerns regarding this proposed disclosure. First, we believe it suggests that consumers should not accept the card. NetSpend believes a disclosure that is clearer, such as “You may ask your employer about other options for receiving your wages,” conveys the same information and is less likely to confuse consumers. Second, we encourage the CFPB to clarify that it is not a violation of the compulsory use provisions in the EFTA or Regulation E if the consumer is given a choice between different payment options and is enrolled by his or her employer into a payroll card program by virtue of neglecting to choose another option. That is, so long as a consumer has a right to request receipt of his or her wages by another means (*e.g.*, by direct deposit to another account), NetSpend believes an opt-out right coupled with other choices for receiving wages is sufficient and that a consumer should not be required to affirmatively opt in to receive a payroll card.⁴⁶ We assume the CFPB would not require an opt-in approach without expressly proposing this in a rulemaking process.

Finally, with respect to payments by employers that do not involve recurring payments by employers (*e.g.*, expense reimbursement, termination pay, and incentive programs), NetSpend requests that the CFPB clarify that employers will not have to provide consumers an opt-out right for these types of payments. Under Section 1005.10(e)(2), an employer is prohibited from requiring employees to establish an account at a particular financial institution as a “condition of employment.” NetSpend requests that the CFPB clarify that prepaid cards used by an employer to provide these types of payments to an employee are not subject to the restrictions of Section 1005.10(e)(2). Employers use prepaid card to make these payments as a convenient method for employees to receive such

⁴⁶ Regulation E has long recognized the ability of employers to pay their employees using electronic means only subject to state law requirements. The Compulsory Use Provision has been interpreted to allow employers to require direct deposit so long as the employee is allowed to choose the financial institution that will receive the deposit. Because payroll cards involve the electronic transfer of wages to a financial institution designated by the employer, employees must be provided at least one other payment option. State law determines other permissible payment methods and the conditions under which they may be offered. CFPB Bulletin 2013-10 (September 12, 2013).”

payments and to facilitate employer compliance with state law requirements.⁴⁷ If the CFPB were to take the view that prepaid cards used to make these payments are offered to the employee “as a condition of employment,” employers could be prohibited from using prepaid cards to make these payments, which would result in delays in providing such payments to employees and could result in employers violating their obligations under state wage and labor laws.

Segregation of Disclosures

NetSpend urges the CFPB to eliminate the requirement that the long- and short-form disclosures be “segregated” from all other information in the payroll card context. In addition to the issues raised earlier in this letter with regard to all prepaid cards, payroll card issuers and employers would be required to provide an additional disclosure form to employees that address state law requirements. We have concerns that each additional form increases the risk of confusion to consumers and makes it less likely that any of the information will actually be reviewed by them. In fact, we question the value of requiring a separate long-form disclosure when state law already requires a complete itemized list of fees in the payroll card context. We would appreciate the flexibility to be able to include both state and federal disclosures on one form.

Clarification Regarding Force-Pay Transactions

The Official Interpretations issued in connection with the Proposal suggest that the CFPB would cover as “credit” an authorized transaction on a prepaid account when the consumer has insufficient or unavailable funds in the prepaid account at the time of authorization, as well as “a paid transaction on a prepaid account where the consumer has insufficient or unavailable funds in the prepaid account at the time the transaction is paid.”⁴⁸ As a result, the Proposal could be read as covering so-called force-pay transactions, transactions involving stand-in processing arrangements or other situations where negative balances occur by operation of network rules, rather than at the option of the prepaid card issuer (generally “negative balance transactions”). By treating such transactions as “credit” transactions, the Proposal could potentially result in all prepaid cards being deemed credit because of the inability to control when negative balance transactions arise, including in circumstances in which a transaction-based fee is charged (which would be a finance charge under the Proposal).

In this regard, it is important to recognize that negative balance transactions are a product of payment system limitations and realities that require clear rules to provide certainty to merchants about payments—the so-called “payment guarantee” that is

⁴⁷ For example, state laws require employers to pay terminated employees any amounts owed within a short period of time after the employee’s termination, and prepaid cards are utilized to meet this obligation.

⁴⁸ See proposed Comment 2(a)(14)–3 (Regulation Z).

established under payment card network rules. It is our understanding that the role of the payment guarantee is to ensure that merchants have certainty about payments when providing goods or services to consumers in connection with payment card transactions. Negative balance transactions can occur when a merchant does not have an opportunity to seek authorization for the full amount of a transaction as part of the initial authorization request or the issuer must rely on “stand-in” authorization by a payment network or processor. Some common examples of these types of transactions include hotels settling incidental charges in excess of the initial room authorization, or when a tip for a meal is involved.

In the case of restaurant transactions, for example, assume that a prepaid cardholder with a \$100 prepaid card is presented with an \$85.00 bill for a meal (before any tip). The merchant could initially seek authorization for \$85.00, or could seek authorization for \$97.75 (the amount of the meal and an assumed 15% tip of \$12.75). Under payment network rules (*e.g.*, Visa and MasterCard), if the merchant receives an issuer’s authorization for either amount, the merchant is guaranteed payment for the transaction. Assume the same facts except that the consumer decides to tip 20% (\$17.00), which results in a \$2.00 overdraft. In this scenario, we understand the merchant is guaranteed payment for only the amount initially authorized; however, assuming a properly signed receipt, the merchant would receive payment for the amount of the meal plus the tip (\$102.00 in this example). Under the Proposal, it appears that in this situation the prepaid card issuer would be deemed to have issued a credit card. We believe that treating such a transaction as credit would raise untenable compliance and legal risks because such transactions could result in automatic violations of the rule as proposed. For example, if the prepaid card is deemed a credit card in this circumstance, account-opening disclosures under Regulation Z must be provided to the consumer, but it would be impossible to deliver such disclosures after the fact.

It is important to note that negative balance transactions are not controllable by prepaid card issuers because issuers do not have an opportunity to authorize every transaction, and also must contend with intervening transactions, such as Automated Clearing House (“ACH”) debits that may occur on the account. As a result, NetSpend urges the CFPB to provide clarification that force-pay and other negative balance transactions outside the control of the issuer do not result in an overdraft transaction and would not transform a prepaid card into a credit card.

Provisional Crediting for Prepaid Accounts

The CFPB requested comment on whether there might be consequences in extending the requirement for provisional credit for error resolution for prepaid accounts. Currently, under Regulation E, account-holding institutions must provisionally credit funds within 10 business days of an alleged error (20 business days for new accounts) if the institution is unable to complete its investigation within that timeframe. NetSpend appreciates the CFPB’s recognition of prepaid fraud issues and understands that the CFPB has proposed

requiring consumer registration of a prepaid card as a precondition to asserting an error as a means to address fraud. While this approach is helpful, it is not sufficient to address potential fraud. NetSpend urges the CFPB to provide greater flexibility under the provisional crediting rules by giving prepaid card issuers additional time to investigate potential fraud. For example, NetSpend recommends that the CFPB broaden the definition of a “new” account to mean those where the transactions being disputed are within 90 days of the initial deposit to the account, as opposed to the 30 days prescribed in Regulation E today. In doing so, a greater number of prepaid claims would be subject to the 20-business-day timeframe for provisionally crediting funds and the 90-day timeframe for extended investigations. NetSpend believes that redefining a “new” account for prepaid cards under Regulation E makes sense for several reasons. First, a bank or credit union opening a demand deposit account typically checks the proposed accountholder’s bank history to predict how the accountholder will handle the bank account in the future. In the case of prepaid cards, however, the customer relationship may be temporary, until the funds underlying the prepaid account are spent. This means that a prepaid card carries risk similar to a new bank account longer than the 30 days specified for a new account under Regulation E. Second, unlike traditional deposit accounts, the consumer relationship with a prepaid card issuer can be short term (until the balance on a prepaid card is spent). For these reasons, NetSpend recommends that the definition of “new account” under Regulation E for prepaid card accounts be 90 days versus 30 days. NetSpend also encourages the CFPB to clarify in any final rule that non-reloadable cards, which essentially are a cash substitute, are exempt from error resolution and provisional crediting requirements because there is no expectation of an ongoing relationship with the consumer.

Compliance Period

NetSpend believes it is essential for the CFPB to provide a sufficiently long compliance period in connection with any final rule, particularly if the CFPB proceeds with treating overdrafts as credit. For example, we estimate that NetSpend would need at least 24 months to develop and test new systems for delivering required disclosures (*e.g.*, periodic statements for prepaid cards that are also deemed a credit card) and establishing new systems (*e.g.*, to perform underwriting for complying with ability-to-pay requirements under Regulation Z). In addition, it is critical for the CFPB to provide guidance with respect to products that are currently in the hands of consumers, as well as products that are in the distribution chain. For existing prepaid accounts that offer overdraft services, NetSpend encourages the CFPB to establish at least a 6-month period during which such services could continue to be offered without being subject to the new rule, so that NetSpend can communicate the changes to consumers with sufficient notice to allow them to make alternative financial arrangements as necessary. These implementation timeline

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modifications would allow issuers to avoid the destruction of millions of cards, consistent with the spirit of the ECO-Gift Card Act.⁴⁹

* * *

We appreciate the opportunity to provide comments on issues raised by the Proposal and are available to answer questions and provide additional information if helpful. We look forward to working with the CFPB to help develop rules that effectively promote the best interests of consumers.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Harris', is written over a light yellow rectangular background.

Charles J. Harris
President

⁴⁹ Pub. L. No. 111-209 (2010).