IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAYPAL, INC.,

Plaintiff,

v.

Case No. 1:19-CV-03700-RJL

CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA,[1] in his official capacity as Director of the Consumer Financial Protection Bureau,

Defendants.

AMENDED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Rohit Chopra is automatically substituted as a defendant in his official capacity as Director of the Consumer Financial Protection Bureau.

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INTRODUCTION

Prepaid products in various forms are among the fastest-growing methods for American consumers to make payments, and they are used for billions of transactions annually. Yet, for years, it was unclear what federal consumer protections applied to many of these products. To address that regulatory uncertainty and ensure that consumers receive consistent protections, the Consumer Financial Protection Bureau undertook to establish clear rules of the road for this rapidly expanding market. The end result was a rule entitled "Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)" (Prepaid Rule or Rule), which took effect in April 2019. 81 Fed. Reg. 83934 (Nov. 22, 2016) (Admin. Record Vol. 1 ("AR1") 240); 83 Fed. Reg. 6364 (Feb. 13, 2018) (AR1 743).

The Rule generally extends to prepaid accounts the same protections—such as limits on consumers' liability for unauthorized transfers and certain rights in the event of errors—that Regulation E has long applied to other types of accounts, including checking and savings accounts and some limited types of prepaid products. As a result of the Rule, consumers now receive clear and consistent protections when they use a wide range of prepaid products—whether a physical general-purpose reloadable (GPR) card bought in a store; a virtual GPR card or other prepaid account acquired online; a card supplied by a third party for disbursement of government benefits, wages, student loan funds, or insurance proceeds; or any other type of prepaid account.

The Prepaid Rule also covers some, but not all, digital wallets—namely, those that come with a prepaid account. Some digital wallets simply act as a pass-through that allows consumers to store and use payment credentials for other accounts (like credit cards, debit cards, and bank accounts), but cannot store funds. Those digital wallets are not covered by the Rule. Other digital

wallets, however, also contain their own asset accounts that, like other prepaid accounts, allow consumers to load funds that can then be used in everyday financial transactions, such as making purchases in stores or online and transferring money to friends and family. Digital wallets with this sort of prepaid asset account are covered by the Prepaid Rule—and the consumers who use them get the same protections that they get with other prepaid accounts.

In addition to extending Regulation E's preexisting protections to prepaid accounts, the Prepaid Rule also adopts a few requirements specially tailored to prepaid products, including a requirement that companies give consumers an upfront "short-form" disclosure. That disclosure provides a snapshot of key fees and other terms of the prepaid account in a standardized form designed to be easy for consumers to quickly review and understand.

PayPal challenges those short-form disclosure requirements, and the Prepaid Rule's application to digital wallet accounts generally, under the Administrative Procedure Act (APA). PayPal claims that the Rule is arbitrary and capricious, that the Bureau failed to properly consider the Rule's benefits and costs, and that the short-form disclosure requirements violate the First Amendment. This Court should reject those challenges.

First, the Rule easily satisfies the APA's requirement for reasoned decision-making. The Bureau explained why it declined to carve out digital wallets with asset accounts from the Rule's scope: Consumers can use those accounts in the same way as other prepaid products—to store funds for use in a wide variety of transactions—so they should receive the same protections.

The Bureau also thoroughly explained the reasons behind the short-form disclosure requirements. For instance, it explained that specific requirements for a clear and uniform disclosure, rather than more general guidelines that would allow disclosures' content and format to vary from product to product, would make disclosures easier to understand and more likely to

be read. It also explained that it was appropriate to require companies to use the same standardized short-form disclosure even when they do not charge certain fees or offer certain services: Among other things, it is useful for consumers to know when a service is free or is not offered, and maintaining the same standardized form makes the disclosures more effective. The Bureau also specifically explained why it was useful to require the same disclosures for asset accounts tied to digital wallets—including because consumers acquiring those accounts should have the same opportunity to learn about the account's fees (or lack thereof) as do consumers acquiring other types of prepaid accounts. These explanations all fall comfortably within the bounds of reasonableness. While PayPal may not agree with the Bureau's policy judgments, Congress and the APA leave those judgments to the agency.

Second, the Bureau thoroughly considered the benefits and costs of the Rule in compliance with its statutory obligations. The preamble's discussion of the Rule's benefits and costs applies equally to the digital wallet accounts covered by the Rule, and the Bureau also specifically considered how subjecting digital wallets with asset accounts to the same rules as other accounts would bring important benefits—like avoiding a patchwork regime that could leave consumers confused about their rights, giving digital wallet consumers the same protections as consumers of other similar accounts, and enabling consumers using digital wallets with asset accounts to learn about account features and fees upfront.

Finally, the Rule's disclosure requirements are entirely consistent with the First Amendment. It is well established that the First Amendment permits the government to require companies to disclose factual, non-controversial information about the products they are offering in the marketplace. PayPal's suggestion that the Rule unconstitutionally restricts companies from providing consumers with "clarifying" information distorts the Rule's actual requirements.

While companies cannot add detail to the short-form disclosure box itself (as that would risk information overload that would make the disclosure less effective), companies can provide additional information, including clarifying details about when certain fees may be lower or waived, anywhere else they wish, including immediately outside the disclosure box. Nothing in the First Amendment bars disclosure regulations with that sort of modest restriction on where commercial information may be placed.

BACKGROUND

A. Statutory Background

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to, among other things, "protect consumers from abusive financial services practices." Pub. L. No. 111-203, 124 Stat. 1376, 1376. Title X of that law, known as the Consumer Financial Protection Act, 12 U.S.C. § 5481 *et seq.*, created the Consumer Financial Protection Bureau and gave it primary authority for "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." *Id.* § 5491(a). Congress directed the Bureau to use this authority to ensure that markets for consumer financial products and services would be "fair, transparent, and competitive," including by ensuring that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions." *Id.* § 5511(a), (b)(1).

The Act gave the Bureau various tools to accomplish its mandate. For instance, it granted the Bureau new authority to ensure effective disclosures about consumer financial products and services. Specifically, section 1032 of the Act authorizes the Bureau to adopt rules "to ensure that the features of any consumer financial product or service … are fully, accurately, and

effectively disclosed to consumers" so that consumers can "understand the costs, benefits, and risks associated with the product or service." 12 U.S.C. § 5532(a).

Congress also transferred to the Bureau the authority to implement 18 preexisting consumer financial statutes, many of which provide for disclosures in addition to other consumer protections. *Id.* §§ 5581, 5481(12), (14). Those statutes include the Electronic Fund Transfer Act (EFTA), which requires financial institutions to disclose "the terms and conditions of electronic fund transfers involving a consumer's account" and generally to provide advance notice of any disadvantageous change in those terms, 15 U.S.C. § 1693c(a)-(b), in addition to providing other protections like limiting consumers' liability for unauthorized transfers, *id.* § 1693g, and allowing consumers to stop payment of preauthorized electronic transfers from their accounts, *id.* § 1693e(a). *See* 12 U.S.C. §§ 5581(b)(1), 5481(12), (14).

EFTA initially gave the Board of Governors of the Federal Reserve System (Federal Reserve Board or Board) authority to promulgate rules implementing the Act. Pub. L. No. 90-321, § 904, *as added by* Pub. L. No. 95-630, § 2001 (1978). Pursuant to that authority, the Board issued so-called "Regulation E" in 1979, which it amended several times over the years. *See* 81 Fed. Reg. 83946 (AR1 252). The Dodd-Frank Act transferred most of the authority to implement EFTA to the Bureau in 2011, and the authority to issue rules under EFTA is now primarily vested in the Bureau. Pub. L. No. 111-203, §§ 1061(b)(1), 1084(3); *see also* 15 U.S.C. § 1693b.

B. Prepaid Products

Prepaid products—financial products that allow a consumer to load funds for later use in making purchases and conducting other transactions—have been one of the fastest expanding types of payment instruments in the United States. AR1 3070. Those products take various forms. One of the most prevalent types is the general-purpose reloadable (GPR) card. Consumers

can buy GPR cards at a retail store, over the phone, or online; load (and reload) them with funds; and then use them to access the stored funds at ATMs and to make in-person and online purchases. 81 Fed. Reg. at 83936-37 (AR1 242-43). The label GPR "card" is something of a misnomer, as GPR cards need not actually involve a physical card and can instead be electronic only. *Id.* at 83936 (AR1 242). Consumers can use a smartphone application or other similar means to use such "virtual GPR cards" to conduct transactions online or in stores. *Id.* Other prepaid products include those used by third parties to distribute funds to consumers, such as cards used for payroll, student loan disbursements, insurance proceeds, and certain government benefits. *Id.*

Prepaid products also include some—but not all—digital wallets. *Id.* at 83943 (AR1 249). In its most basic form, a digital wallet is not a prepaid product. Rather, such a digital wallet allows consumers to digitally store payment credentials for different accounts (such as debit cards, credit cards, and checking accounts) that consumers can then access through a website or mobile application to make purchases online or in stores, to pay bills, and to transfer and receive money. *Id.* Some digital wallets, however, also come with a prepaid asset account that, like GPR cards and other prepaid products, allows consumers to load and store funds and then access the funds to make online and in-store purchases and engage in other transactions. *Id.*

Regulation E (the rule implementing EFTA) has covered payroll cards and certain government benefit prepaid products for many years. *Id.* at 83936 (AR1 242). But, before the Bureau's Prepaid Rule, it was less clear what rules applied to GPR cards and other prepaid products like digital wallets with asset accounts. *Id.*

C. The Prepaid Rule

Shortly after assuming its authorities under the federal consumer financial laws, the Bureau began considering how to resolve this regulatory uncertainty for the fast-growing prepaid market. The Bureau issued, and considered comments responding to, an advance notice of proposed rulemaking; met with industry, consumer groups, and advocacy organizations; undertook market research and monitoring; conducted focus groups and consumer testing of sample disclosures; and studied 325 publicly available prepaid account agreements, including agreements for digital wallets with asset accounts. 81 Fed. Reg. at 83954, 83956 (AR1 260, 262).

Based on those activities, the Bureau proposed, and in November 2016 finalized, a rule to govern prepaid accounts—titled "Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)." 81 Fed. Reg. 83934 (Nov. 22, 2016) (2016 Rule) (AR1 240). In January 2018, before the Rule took effect, the Bureau issued another final rule modifying several aspects of the original rule. 83 Fed. Reg. 6364 (Feb. 13, 2018) (2018 Rule) (AR1 743). After that rule and an earlier one delayed the effective date to give industry more time to come into compliance, the Rule took effect on April 1, 2019. *Id.;* 82 Fed. Reg. 18975 (Apr. 25, 2017) (AR1 698). This brief refers to the 2016 Rule, as amended by the 2018 Rule, as the "Prepaid Rule" or the "Rule."

As relevant here, the Rule contains amendments to Regulation E, which implements EFTA. Those amendments generally extend the regulation's preexisting protections to prepaid accounts and also create a few specific requirements just for those types of accounts—including, as most relevant in this case, tailored requirements to disclose a prepaid account's key fees and other terms before the consumer acquires the account.

1. Regulation E's Coverage of Prepaid Accounts

First and foremost, the 2016 Rule amended Regulation E's definition of "account" to specifically include "prepaid account[s]." 81 Fed. Reg. at 83965 (AR1 271). By including prepaid accounts within that definition, the Rule eliminated the previous uncertainty about whether and when Regulation E's protections applied to these types of accounts. Now, they unambiguously do. So, for example, just like with other asset accounts, consumers generally now face only limited liability for unauthorized transfers from their prepaid accounts, 12 C.F.R. §§ 1005.6, 1005.18(e); get various protections in the case of errors, *id.* §§ 1005.11, 1005.18(e); and have the right to get the financial institution to stop a preauthorized electronic fund transfer from the consumer's prepaid account, *id.* § 1005.10(c), the right to advance notice about certain changes in account terms, *id.* § 1005.8(a), and the right to receive up-to-date information about their prepaid account's transactions and balance, *id.* §§ 1005.9(b), 1005.18(c).

The Rule sets forth a comprehensive definition of the "prepaid account[s]" now covered by Regulation E. *Id.* § 1005.2(b)(3)(i). Among other things, the definition generally includes accounts that are "issued on a prepaid basis" or are "capable of being loaded with funds" after issuance "[w]hose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services, or at automated teller machines, or to conduct person-to-person transfers." *Id.* § 1005.2(b)(3)(i)(D). This definition captures a broad range of accounts that can be loaded with funds and used for transactions—including GPR cards, payroll card accounts, government benefit accounts, certain non-reloadable accounts, student loan disbursement cards, prison release cards, and some digital wallets. *See id.*

Not all digital wallets are prepaid accounts subject to the Prepaid Rule's tailored requirements. The Rule's official interpretations, adopted along with the Rule, make this

abundantly clear: To qualify as a "prepaid account," the product "must be capable of holding funds, rather than merely acting as a pass-through vehicle." 12 C.F.R. pt. 1005, Supp. I, ¶ 2(b)(3)(i)-6. So, as the official interpretations specifically explain, a digital wallet that only stores credentials for a consumer's other accounts and that cannot itself store funds is not a prepaid account. *Id.* Rather, a digital wallet is a "prepaid account" subject to the Rule if—and only if—it can itself store funds that consumers can then use to engage in transactions. *Id.*

So, for example, if a provider offers a digital wallet that only acts as a pass-through for other linked accounts and a distinct asset account that the consumer may opt to add to the wallet—as PayPal currently does[2]—only the distinct asset account is subject to the Rule. The digital wallet itself is not.[3] By contrast, if a provider offers a digital wallet product that bundles an asset account with the digital wallet's pass-through capabilities—such that a consumer automatically gets an asset account whenever she signs up for the product—that digital wallet is covered by the Rule because, in that scenario, the asset account and the pass-through feature are combined in a single, inseparable product. But it is the presence of that asset account, not the digital wallet's pass-through functionality, that brings the digital wallet within the Rule's scope.

Some commenters on the proposed rule urged the Bureau to narrow the Rule's scope to exempt digital wallets altogether. *E.g.*, Admin. Record Vol. 2 ("AR2") 5867, 5489-90. Other

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[2] *See* PayPal User Agreement, *available at* https://www.paypal.com/us/webapps/mpp/ua/useragreement-full (last visited May 26, 2023) (describing "PayPal personal account" as an account that allows a user to "send and receive money" by linking various payment methods but that cannot hold a balance, and a "separate" "Balance Account" that can hold a balance and be "used for purchases or to send personal transactions to friends and family members"); *see also* PayPal Balance Terms and Conditions, *available at* https://www.paypal.com/us/legalhub/pp-balance-tnc (last visited May 26, 2023) (explaining that Balance Account allows users to "hold a balance, and use balance to send and receive money, buy things online using mobile devices or in stores, and make payments").

[3] The provider of the digital wallet service, may, however, be subject to other requirements of Regulation E.

commenters disagreed, arguing that broad coverage was important to prevent evasion. *E.g.*, AR2 5548, 7665.

After considering these comments, the Bureau declined to narrow the Rule's scope, not least because carving out certain specific types of products would both create substantial complexity as well as potentially confuse consumers about what protections apply to similar products. 81 Fed. Reg. at 83966, 83971 (AR1 272, 277). And when a digital wallet not only acts as a pass-through for other accounts but also comes with its own asset account that can store funds, that digital wallet operates just like other prepaid accounts: A consumer can load (and reload) funds into the account and use those funds to make purchases from a wide variety of merchants and to conduct person-to-person transfers. *Id.* at 83972 (AR1 278). Given these similarities, the Bureau concluded that consumers using digital-wallet asset accounts should get the same protections as consumers who use other types of prepaid accounts. *Id.* For example, just like other accounts, an asset account tied to a digital wallet could fall victim to erroneous or fraudulent transactions—so consumers holding those accounts should benefit from Regulation E's error-resolution and limited-liability protections, too. *Id.* Likewise, the Bureau made the policy judgment that those digital wallet consumers should get the same opportunity as consumers of other prepaid products to learn about the product's fees (or lack thereof) upfront, even though most digital wallets did not charge many fees at the time. *Id.*

2. Disclosure Requirements

As relevant in this case, the Rule also adopted new disclosure requirements for prepaid accounts. The Rule generally requires that financial institutions provide consumers both a "short form" and "long form" disclosure before the consumer acquires a prepaid account. 12 C.F.R. § 1005.18(b). The two disclosures are designed to work together: The short form provides a

snapshot of key fees and information in a standardized format that lends itself to quick review and comparison-shopping, while the companion long-form disclosure provides comprehensive information about all the fees and features of the account. 81 Fed. Reg. at 84007-08 (AR1 313-14). PayPal's challenge focuses on the short-form disclosure. *See* Compl. ¶¶ 98-100, 108, 113-14, 116.

The Rule's disclosure requirements aim to ensure that consumers get the information they need to make informed decisions about what products are best for them. In crafting those requirements, the Bureau recognized that even the most complete and accurate disclosures will not serve this goal unless consumers actually read and understand them. And, of course, a standardized format can make reviewing a disclosure more straightforward. 81 Fed. Reg. at 84013 (AR1 319). So, the Bureau developed and continually refined different prototype forms, and it conducted multiple rounds of consumer testing that studied consumers' engagement with, and comprehension of, those forms. *Id.* at 83954 (AR1 260); AR1 860-997. Based on that testing, the Bureau developed a short-form disclosure that would provide accurate and useful information in a form that consumers are likely to read and understand. *See, e.g.*, 81 Fed. Reg. at 84013-14, 84276, 84278 (AR1 319-20, 582, 584).

The Rule requires companies to follow specific content and formatting requirements designed to ensure that the short-form disclosures appear in the standardized form proven effective in the Bureau's testing. More specifically, under the Rule, fees must be displayed in a table. 12 C.F.R. § 1005.18(b)(6)(iii). The top "static" section of the table sets forth the seven fees most common for prepaid accounts, with four fees—any periodic fee, per purchase fee, ATM withdrawal fees, and cash reload fees—featured more prominently by appearing on the top line in bolded, slightly larger font. *Id.* § 1005.18(b)(2), (b)(7)(i)(A), (b)(7)(ii)(B)(*1*). To maintain the

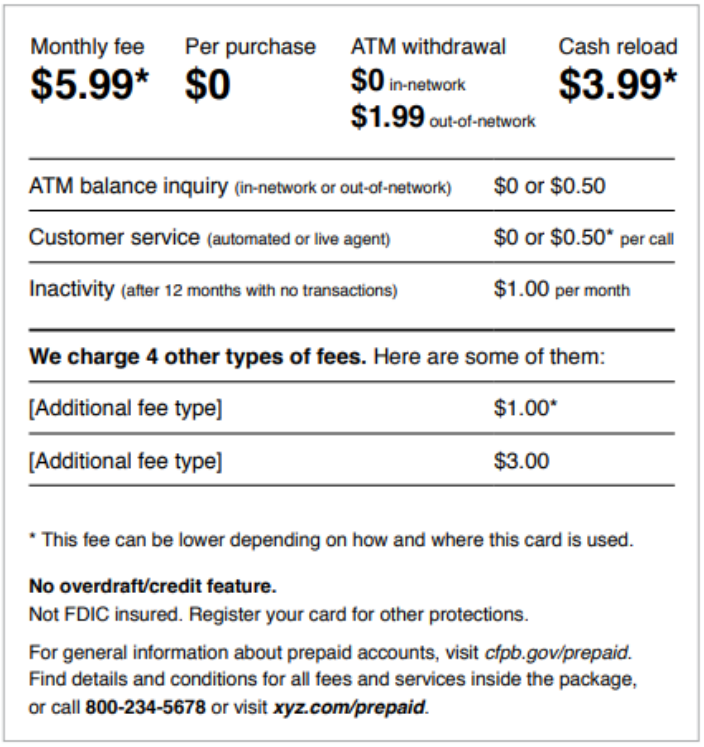
standardization that makes it easier for consumers to quickly read and understand the disclosures, these entries must appear on the short-form disclosure even if the particular account does not offer the particular service or does not charge for it. 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(2)-1; 81 Fed. Reg. at 84025 (AR1 331).

Below this, the short form has a "dynamic" section that must disclose how many other types of fees the account charges and list the two that generate the most revenue from consumers (if they exceed a de minimis threshold). 12 C.F.R. § 1005.18(b)(2)(viii)-(ix). As the Bureau explained, this part of the disclosure is particularly important for products with different fee structures, such as digital-wallet asset accounts, which at the time the Rule was adopted generally did not charge the fees reflected in the short form's "static" top portion. 81 Fed. Reg. at 84041 (AR1 347).

To keep the short form simple, the Rule provides guidelines for clear and concise phrasing designed to be easy for consumers to understand. *See, e.g.*, 12 C.F.R. § 1005.18(b)(2)(i)-(viii). The Rule also limits footnotes and caveats within the short form. This is particularly relevant where a fee could be waived or otherwise vary. In those instances, the Rule generally requires disclosure of the highest fee that could be charged, followed by an asterisk or other symbol linked to a statement that "This fee can be lower depending on how and where this card is used," or something substantially similar. *Id.* § 1005.18(b)(3)(i). The short-form disclosure itself generally cannot describe the specific conditions under which the fee may be lower or waived, but the financial institution can provide those details anywhere else it wants, including immediately outside the short-form disclosure box or elsewhere on the same webpage, mobile screen, or packaging. *See* 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(3)(i)-1; *see also* 81 Fed. Reg. at 84064 (AR1 370).

In crafting the short form's standardized format, the Bureau recognized that consumers acquire prepaid accounts in many different ways, including in stores, online, and by phone—and designed the disclosure regime to be adaptable to all these contexts. 81 Fed. Reg. at 84008 (AR1 314). For instance, the Rule prescribes minimum font sizes to avoid small print—and specifies them in terms of a "point" size for printed disclosures and "pixels" for online. *Id.* at 84085 (AR1 391); 12 C.F.R. § 1005.18(b)(7)(ii)(B). Those minimum font sizes were set to accommodate the limited space on "J-hook" packages for prepaid accounts sold in stores, but the Rule also permits providers to use larger font if space permits, like with an online disclosure. 81 Fed. Reg. at 84085 (AR1 391); 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(7)(ii)-1. It also explains how to provide disclosures when space is even more tight, like on a mobile phone screen. 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(6)(i)(B)-2.

The Rule includes several model short-form disclosures to help institutions comply. *See* 81 Fed. Reg. at 84340-44 (AR1 646-50); 12 C.F.R. pt. 1005, App. A-10(A)-(E). As an example, one such model form looks like this:



Monthly fee	Per purchase	ATM withdrawal	Cash reload
$5.99*	**$0**	**$0** in-network **$1.99** out-of-network	**$3.99***

ATM balance inquiry (in-network or out-of-network)	$0 or $0.50
Customer service (automated or live agent)	$0 or $0.50* per call
Inactivity (after 12 months with no transactions)	$1.00 per month

We charge 4 other types of fees. Here are some of them:

[Additional fee type]	$1.00*
[Additional fee type]	$3.00

* This fee can be lower depending on how and where this card is used.

No overdraft/credit feature.
Not FDIC insured. Register your card for other protections.

For general information about prepaid accounts, visit *cfpb.gov/prepaid*. Find details and conditions for all fees and services inside the package, or call **800-234-5678** or visit ***xyz.com/prepaid***.

To ensure that consumers will reap the benefits of the short form's carefully crafted and tested design, the Rule requires that disclosures be in a form "substantially similar" to the relevant model. 12 C.F.R. § 1005.18(b)(6)(iii)(A). If an institution appropriately uses a model form, it enjoys a safe harbor from liability. 15 U.S.C. § 1693m(d)(2).

D. Procedural History

Plaintiff PayPal, Inc., filed this suit in 2019 to challenge the Prepaid Rule's application to digital wallet accounts. PayPal principally focused its challenge on two provisions in the Rule, the short-form disclosure requirements and a provision that created a 30-day waiting period for linking credit to a new prepaid account in some circumstances. PayPal argued that both those requirements exceeded the Bureau's statutory authority, that the Rule is arbitrary and capricious, that the Bureau did not properly consider the Rule's benefits and costs, and that the short-form disclosure requirements violate the First Amendment. The parties filed cross-motions for

summary judgment, and this Court granted summary judgment to PayPal on December 30, 2020, on the ground that the challenged provisions exceeded the Bureau's statutory authority. ECF No. 27. In assessing the short-form disclosure requirements, the Court interpreted the relevant statutes to preclude the Bureau from adopting mandatory disclosure clauses and held that the Rule impermissibly adopted such mandatory clauses. *Id*. at 8-14. The Court accordingly vacated the short-form disclosure requirements "to the extent [they] provide[] mandatory disclosure" clauses. *Id*. at 20. The Court did not reach PayPal's arbitrary-and-capricious, benefit-cost, or First Amendment claims.

The Bureau appealed the judgment with respect to the short-form disclosure requirement, but not the 30-day waiting period provision. The court of appeals reversed. *PayPal, Inc. v. CFPB*, 58 F.4th 1273 (D.C. Cir. 2023). It concluded that even if the relevant statutes prohibited mandatory disclosure clauses (an issue it did not need to resolve), the Rule did not make any model clauses mandatory. *Id.* at 1279. A model clause, the court held, is "specific copiable language," and the Rule does not mandate that providers use any such language, but rather leaves them discretion to use "substantially similar" terms. *Id.* The court remanded to allow this Court to consider PayPal's remaining challenges to the Rule. *Id.* at 1280-81.

STANDARD OF REVIEW

Under the Administrative Procedure Act (APA), the court may set aside a rule if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A)-(C). The standard for reviewing a claim that a rule is arbitrary and capricious is "deferential" and asks "whether the agency action was reasonable and reasonably explained."

Jackson v. Mabus, 808 F.3d 933, 936 (D.C. Cir. 2015). And the Court reviews a challenge to a rule's constitutionality de novo. *C-SPAN v. FCC*, 545 F.3d 1051, 1054 (D.C. Cir. 2008).

ARGUMENT

I. The Rule is not arbitrary or capricious.

PayPal cannot meet its "heavy burden" to show that the Rule is arbitrary or capricious. *See Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000); *see also Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016).

Review under the arbitrary-and-capricious standard is "narrow" and "very deferential." *Id.*; *see also Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (describing the arbitrary-and-capricious standard as "highly deferential"). As the Supreme Court explained in *State Farm*, a court must uphold an agency's action so long as it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020) (applying *State Farm*'s "satisfactory explanation" standard). A rule is arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. In conducting arbitrary-and-capricious review, "a court is not to substitute its judgment for that of the agency." *Id.*

The Bureau's decision not to exclude digital wallets with asset accounts from the Prepaid Rule's scope easily withstands arbitrary-and-capricious review. The Bureau explained its reasons for including such digital wallets within the Rule's coverage, and that decision—both generally and for purposes of the short-form disclosure requirements specifically—falls comfortably within the bounds of reasonableness.

A. The Rule reasonably treats digital wallets with asset accounts the same as other prepaid accounts.

The Bureau carefully considered comments urging the Bureau to narrow the Rule's scope to exclude digital wallets with asset accounts (as well as comments supporting broad coverage), and it explained why it declined to do so. For one, the Bureau made the judgment that carving out specific types of products would create substantial and unwarranted regulatory complexity and risk leaving consumers confused about what protections applied to which products. *See* 81 Fed. Reg. at 83966, 83971 (AR1 272, 277). Moreover, the Bureau found no good reason to exclude digital wallets with asset accounts from the Rule's scope because such digital wallets share a key feature with other online and physical prepaid products: A consumer can load funds into the account, use those funds to make purchases in stores and online and to conduct other transactions, and reload more funds later. *Id.* at 83972 (AR1 278). Given this fundamentally similar functionality, the Bureau explained that consumers using digital-wallet asset accounts should get the same protections as consumers who use other types of prepaid accounts. *Id.* Those protections are all the more important, the Bureau explained, given that more and more consumers have begun to use digital wallets to conduct daily financial transactions. *Id.* at 83968 (AR1 274).

This reasoning easily meets *State Farm*'s requirement for a "satisfactory explanation," 463 U.S. at 43. And, indeed, PayPal has never explained why digital-wallet asset accounts

should not be subject to Regulation E as a general matter, including, for example, why those accounts should not generally receive the same error-resolution and limited-liability protections as electronic fund transfers using other types of prepaid accounts. PayPal even suggested in the prior briefing that the Bureau would have had "PayPal's support" in simply clarifying that digital-wallet asset accounts were subject to the general requirements of Regulation E. *See* PayPal's Reply in Supp. of Mot. for Summ. J. at 27 (Aug. 21, 2020) (ECF No. 23). But, before the Prepaid Rule, whether Regulation E applied to digital wallets with asset accounts was unclear. *See Zepeda v. PayPal, Inc.*, No. 10-2500, 2017 WL 1113293, at *11 (N.D. Cal. Mar. 24, 2017) (noting that "PayPal arguably is not" subject to EFTA). PayPal itself questioned whether Regulation E applied to its products. *See* eBay Inc., Form 10-K (2014), *available at* https://go.usa.gov/xG9aN (PayPal securities filing noting that "there have been no definitive interpretations" on whether PayPal's services are subject to Regulation E); eBay Inc., Form 10-K (2009), *available at* https://go.usa.gov/xG9aU (same). The Prepaid Rule eliminates that regulatory uncertainty and provides clear protections for consumers who use prepaid accounts.

In contending that the Rule's coverage of digital wallets with asset accounts is arbitrary and capricious, PayPal suggests that the Bureau improperly (1) ignored "critical differences" between digital wallets and prepaid products like GPR cards and (2) subjected digital wallets with asset accounts to the Rule absent "evidence that there is any problem to be solved." Compl. ¶ 96; *see also id.* ¶ 97. Neither contention finds support in the record or the APA.

1. First, while it is arbitrary and capricious to fail "even to consider" key differences between the subjects of a regulation, PayPal cannot credibly contend that the Bureau fell short on that front. *See Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 824 (D.C. Cir. 1983) (finding agency decision arbitrary and capricious where agency "fail[ed] even to consider

… differences"); *cf. also State Farm*, 463 U.S. at 43 (explaining that rule is arbitrary and capricious if agency "entirely failed to consider" important facts). PayPal emphasizes (Compl. ¶¶ 2-6) the differences between GPR cards and digital wallets—namely, that GPR cards store funds, while digital wallets allow consumers to access payment credentials—but that difference is beside the point: The Rule does *not* regulate digital wallets that only allow consumers to store and access credentials for other accounts. 12 C.F.R. pt. 1005, Supp. I, ¶ 2(b)(3)(i)-6. Rather, the Rule applies to a digital wallet if and only if the wallet also has its own asset account that can hold funds. *Id.* As the Bureau reasonably concluded, digital wallets with such asset accounts—which, like other prepaid accounts, consumers can use to store funds for use in a wide variety of transactions—are sufficiently similar to other prepaid accounts to warrant consistent regulatory treatment.

True, the record showed some differences between the asset accounts that come with (some) digital wallets and other prepaid accounts like GPR cards—at the time, digital wallets' asset accounts tended to charge fewer fees, and consumers were less likely to use them as a substitute for a checking account, and in some cases may not have used them at all (opting instead to use only the digital wallet's stored-payment-credentials functionality). But the Bureau considered those differences and reasonably concluded that these features did not make digital-wallet asset accounts so "fundamentally dissimilar" as to warrant different regulatory treatment. 81 Fed. Reg. at 83967-68, 84015 (AR1 273-74, 321). Rather, in the Bureau's judgment, the fact that consumers could use digital wallets' asset accounts the same way as GPR cards and other prepaid accounts—to load funds for use in conducting transactions—made them similar enough that consumers should get the same protections for both, including disclosures about account

terms and changes and limited-liability and error-resolution rights. *Id.* at 83968, 83972 (AR1 274, 278).

The Bureau pointed to the concrete—and indisputable—similarities between digital wallets' asset accounts and other prepaid accounts in explaining why it was not excluding digital wallets with asset accounts from the Rule's scope. 81 Fed. Reg. at 83972 (AR 278). That specific and straightforward explanation is a far cry from the type of "conclusory" assertion that will fail arbitrary-and-capricious review. *Cf. Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350-51 (D.C. Cir. 2014) (explanation was too conclusory where it said "nothing about 'why' [the agency] made the determination"). PayPal objects that the Bureau cited no "studies," "surveys," or "reports" supporting its decision to treat digital wallets with asset accounts the same as other prepaid accounts. Compl. ¶ 5. But "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). In any event, the Bureau's decision was a policy judgment, not a factual determination requiring evidence. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 484 (D.C. Cir. 2009) (distinguishing "policy judgments," which are entitled to "substantial deference," from "[f]indings of ascertainable fact" that must be supported by "substantial evidence"). And there is no dispute that sufficient evidence supported the (entirely uncontroversial) factual finding on which this policy judgment was based—that consumers can use digital-wallet asset accounts, like other prepaid accounts, to load and reload funds for use in various types of transactions.

PayPal may have preferred a different policy. But to prevail on its arbitrary-and-capricious challenge, PayPal must show that the Bureau's reasons for giving digital-wallet asset

accounts the same protections as other prepaid accounts was "so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43. It cannot make that showing.

2. PayPal fares no better to the extent that it contends that the Bureau impermissibly included digital wallets with asset accounts within the Rule's scope absent evidence that there was any "problem" with those products that needed solving. Compl. ¶ 96. To begin, PayPal's premise is wrong: Before the Rule, it was unclear what protections applied to digital wallets' asset accounts—for instance, whether they were subject to Regulation E's limited-liability and error-resolution protections, and what information providers were required to disclose. The Prepaid Rule solved this problem by making clear that prepaid accounts were "accounts" subject to Regulation E generally—and it extended Regulation E's protections to a broad range of prepaid products to avoid a patchwork regulatory regime that could leave consumers confused about what protections applied to which products. *See* 81 Fed. Reg. at 83966, 83971 (AR1 272, 277). Consistent with this goal, the Bureau made the judgment that consumers who conduct transactions with digital wallets' asset accounts should get the same protections as consumers who use other types of prepaid accounts. *Id.* at 83972 (AR1 278).

In any event, contrary to PayPal's contention, even if the only "problems" in the market involved other types of prepaid accounts, that would not have precluded the Bureau from extending the Rule's protections to digital wallets with asset accounts as well. "The APA does not … require agencies to tailor their regulations as narrowly as possible to the specific concerns that generated them." *Associated Dog Clubs of N.Y. State, Inc. v. Vilsack*, 75 F.Supp.3d 83, 92 (D.D.C. 2014) (upholding regulation that applied to small and large online sellers even though "agency had only received reports of mistreatment by large online sellers"). Likewise, to the extent that PayPal objects that the Bureau did not make specific findings about how each of the

Rule's protections would help consumers using digital wallets with asset accounts in particular, the Bureau "had no obligation to make such … particularized finding[s]." *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 264 (D.C. Cir. 2014) (upholding regulation that applied to government contractors where agency "explain[ed] the need" for regulation to correct problem "in the workforce population as a whole," even though it did not explain the need with respect to government contractors specifically).

B. The Rule reasonably applies the short-form disclosure requirements to digital wallets with asset accounts.

PayPal also fails in challenging the Bureau's decision not to exempt digital wallets with asset accounts from the Rule's short-form disclosure requirements specifically. The Bureau reasonably explained why it found such an exemption unwarranted. 81 Fed. Reg. at 84015 (AR1 321). For one, creating individualized disclosures for very specific categories of prepaid accounts would create just the type of patchwork regulatory regime that the Bureau aimed to avoid. *Id.* Further, the Bureau explained that consumers acquiring digital wallets with asset accounts should have the same opportunity to learn about the account's fees (or lack thereof) as did consumers acquiring other types of prepaid accounts. *Id.* While most digital-wallet asset accounts did not impose many fees at the time, knowing that a service is free is itself useful. *Id.* at 84015, 84025 (AR1 321, 331). Moreover, if providers started charging more fees on digital wallets' asset accounts in the future, consumers should know about those fees, too—without the Bureau having to revise the Rule first. *Id.* at 83972 (AR1 278). These reasons easily amount to the "satisfactory explanation" that the APA demands. *See State Farm*, 463 U.S. at 43.

PayPal, however, appears to claim that digital-wallet asset accounts are so different from other types of prepaid accounts that it is irrational to require the same disclosures for them. *See* Compl. ¶¶ 97-102. But, again, this argument can succeed only if PayPal could show that the

Bureau's explanation was "so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43. It cannot make that showing.

PayPal has questioned whether it makes sense to apply the short-form disclosures to electronic products because those disclosures were designed with "brick-and-mortar-store, retail shoppers firmly front-of-mind." Compl. ¶ 57. But, in fact, the Bureau designed the short-form disclosure to give consumers useful and readily understandable information no matter how a consumer acquired the account—whether in a store, online, over the phone, through some other channel, or even across multiple channels. *See, e.g.*, 81 Fed. Reg. at 84014 (AR1 320); *see also* 12 C.F.R. § 1005.18(b)(6)(i)(A)-(C) (providing for written, electronic, or oral disclosures, depending on how the consumer acquires the account). Variations in how information is disclosed can make the information harder to digest, no matter whether a consumer is considering accounts in a store or online—so, the Bureau standardized the disclosures across the board to make it easier for consumers to choose the best accounts for them. 81 Fed. Reg. at 84014 (AR1 320). At the same time, it tailored the Rule to accommodate differences between in-store, online, and other channels, for example by permitting special formatting for electronic disclosures. *Id.* at 84008 (AR1 314); *see also,* 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(6)(i)(B)-2.

There is likewise no merit to PayPal's claim (Compl. ¶ 101) that it is irrational to require short-form disclosures for digital wallets with asset accounts because, at the time of the rulemaking, those accounts generally did not charge the fees listed on that disclosure's top line (or did not offer those features at all). *Other* parts of the disclosure are specifically designed to capture fees for products like digital-wallet asset accounts that have different fee structures. *See* 81 Fed. Reg. at 84041 (AR1 347); 12 C.F.R. § 1005.18(b)(2)(viii)-(ix). As the Bureau explained, a standardized format, with the same layout listing the same fees across the same top line, makes

the disclosure easier for consumers to read and understand. 81 Fed. Reg. at 84025 (AR1 331). In addition, it is useful for consumers to know when a feature is free or not offered. 81 Fed. Reg. at 84025 (AR1 331). And, of course, if digital wallet providers started charging these fees in the future (which PayPal now does[4]), those top-line disclosures would become all the more important. *Id.*

PayPal criticizes as impermissible "speculation" the Bureau's observation that digital wallet providers could charge fees in the future. Compl. ¶ 101. This criticism is beside the point, because (as explained above) the Bureau determined that there were good reasons to require the same disclosures for all prepaid accounts, including those tied to digital wallets, regardless of whether those accounts ever charged the top-line fees. At any rate, it was not speculative for the Bureau to note the mere *possibility* that digital wallet providers could charge fees in the future—nothing prevents them from doing so. Besides, "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Pub. Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) (quotations omitted). And "[t]he 'arbitrary and capricious' standard is particularly deferential" when reviewing "predictive judgments" like that. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Bureau permissibly made such "a reasonable predictive judgment" on the need for regulation "based on the evidence it had." *Prometheus Radio Project*, 141 S. Ct. at 1160; *see also Prairie Band of Potawatomi Nation v. Yellen*, 63 F.4th 42, 46 (D.C. Cir. 2023) ("Because agencies generally have wide discretion to determine where to draw administrative lines, courts are especially deferential where agencies must make predictive

[4] *See* PayPal Balance Short Form Disclosure, *available at* https://www.paypal.com/us/legalhub/pp-short-form (last visited May 26, 2023); *see also* PayPal Balance Terms and Conditions, *available at* https://www.paypal.com/us/legalhub/pp-balance-tnc (last visited May 26, 2023).

judgments with limited information." (cleaned up)); *Coal. of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1017 (D.C. Cir. 2022) ("We defer to the Commission's predictive judgments about areas that are within its field of discretion and expertise as long as they are reasonable." (cleaned up)). Agencies, moreover, "can, of course, adopt prophylactic rules to prevent potential problems before they arise," for "[a]n agency need not suffer the flood before building the levee." *Stilwell v. Off. Of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.); *see also Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 560-61 (D.C. Cir. 2015) ("[I]n situations in which an agency must make a judgment in the face of a known risk of unknown degree, the 'agency has some leeway reasonably to resolve uncertainty, as a policy matter, in favor of more regulation or less.'" (quoting *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 316 (D.C. Cir. 1992))).

PayPal has also asserted that disclosing that a service costs "$0" or is "not offered" is "misleading." *E.g.*, Compl. ¶¶ 2, 7, 56; *see also* PayPal's Mem. In Supp. of Mot. for Summ. J. at 37 (May 6, 2020) (ECF No. 19-1) ("2020 Mem."). But that unsupported assertion not only strains credulity; it is also refuted by the Bureau's consumer testing, which showed that nearly all participants understood that "N/A" meant a feature was not offered and that "$0" meant a feature was free. AR1 868, 882-83, 888; *see also* AR1 881, 889, 906.

Finally, although PayPal emphasizes that its customers rarely actually use their digital wallets' asset accounts (Compl. ¶ 3), that hardly makes it arbitrary and capricious to require providers to disclose those accounts' terms. The fact that many consumers may not actually use their digital wallets' asset accounts suggests only that these consumers may not have affirmatively wanted the account that came bundled with their digital wallet; it is no reason to deny those consumers information about the accounts they are receiving—let alone to deny

information about those accounts to the consumers who *do* use them. 81 Fed. Reg. at 84015 (AR1 321).

II. The Bureau appropriately considered the benefits and costs of the Rule.

In an analysis spanning 40 pages in the Federal Register, the Bureau thoroughly considered the benefits and costs of the Prepaid Rule, in accordance with the requirement in section 1022 of the Dodd-Frank Act that the Bureau "consider … the potential benefits and costs" of its rules "to consumers and covered persons," including any potential reduction in consumers' access to consumer financial products and services and the impact on smaller depository institutions and consumers in rural areas. 12 U.S.C. § 5512(b)(2)(A). The Bureau explained that the short-form disclosures would make information about accounts' terms easier to find, understand, and use, thereby helping consumers choose the best products for them, encouraging competition that could result in ever better options, and benefitting companies that charge lower fees. 81 Fed. Reg. at 84276, 84278-79, 84287 (AR1 582, 584-85, 593). The Bureau also discussed the costs of the requirements—in particular, the (relatively modest) costs involved in developing the disclosures, keeping them up-to-date, and delivering them to consumers. *Id.* at 84280-86 (AR1 586-92). And the Bureau followed section 1022's instruction to specifically consider the Rule's impact on consumers' "access" to financial products—and concluded that any such impact would be minimal, particularly because the Rule would impose only a modest burden on providers. *Id.* at 84271 (AR1 577). This discussion easily satisfies section 1022's requirement to consider the Rule's benefits and costs.

In challenging the Rule's discussion of benefits and costs, PayPal's "burden to show error is high." *Cigar Ass'n of Am. v. U.S. FDA*, 5 F.4th 68, 76 (D.C. Cir. 2021) (quoting *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012)). As with arbitrary-and-

capriciousness review more generally, courts are not to "substitute [their] judgment for that of the agency" when the agency assesses "the costs and benefits of alternative [policies]." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (Roberts, J.). Instead, the Court's role is "to determine 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (quoting *State Farm*, 463 U.S. at 43).

PayPal cannot meet its high burden to show any problem with the Bureau's discussion of the Rule's benefits and costs. PayPal objects that the Bureau (1) did not discuss the benefits and costs for covered digital wallets specifically, and (2) ignored industry concerns about unique costs for those digital wallets as a result. *See* Compl. ¶¶ 106-108. These contentions fail.

a. PayPal's objection that the Bureau did not address the benefits and costs specifically for digital wallets is doubly unfounded. First, the Bureau did address the benefits and costs of applying the Rule to digital wallets with asset accounts specifically—including the benefits of avoiding a patchwork regulatory regime that could leave consumers confused, ensuring that consumers who get digital-wallet asset accounts enjoy the same protections as consumers of other similar types of accounts, and giving digital wallet consumers information upfront about an account's fees or lack thereof. 81 Fed. Reg. at 83966, 83971-72 (AR1 272, 277-78). Although this digital-wallet-specific discussion did not appear in the section entirely devoted to assessing the Rule's benefits and costs under section 1022 of the Dodd-Frank Act, that section expressly incorporated the discussion elsewhere in the preamble by reference. *Id.* at 84269 (AR1 575).

Beyond that, the cost-benefit discussion itself addressed digital wallet accounts (or similar online accounts) specifically where the different type of account could make some difference. The Bureau, for example, acknowledged that digital wallet accounts (at the time)

generally charged fewer fees—but explained that consumers would still benefit from knowing what fees *were* charged and what features were free, and from a uniform disclosure that makes information easier to understand and use across the board. 81 Fed. Reg. at 84271 (AR1 577). The Bureau also separately addressed the benefits and costs for accounts acquired in stores versus online (a category that includes accounts tied to digital wallets): It not only noted that online disclosures would (like in-store ones) provide consumers with useful information, but also separately considered the different costs providers would incur in those two different contexts. *Id.* at 84282-86 (AR1 588-92).

Second, and in any event, nothing in section 1022 (or any other provision) requires the Bureau to separately discuss the benefits and costs of applying a rule to each specific type of product that the rule covers. *See generally* 12 U.S.C. § 5512(b)(2)(A). Indeed, "there is no legal support for the proposition that every product or industry affected by a rulemaking is entitled to a separate cost-benefit analysis." *Nicopure Labs, LLC v. FDA,* 266 F. Supp. 3d 360, 407 (D.D.C. 2017). Rather, where (as here) an explanation "appl[ies] fully" to a subject of regulation, the agency is "not required to apply [its] reasoning separately for each specific" regulated subject. *Huntco Pawn Holdings, LLC v. U.S. Dep't of Def.*, 240 F. Supp. 3d 206, 222 (D.D.C. 2016).

The general discussion of the Rule's benefits and costs applies equally to the digital wallet accounts subject to the Rule—and that is all that the Dodd-Frank Act (or APA) requires. *Cf. Huntco Pawn Holdings* 240 F. Supp. 3d at 220-21 & n.7 (concluding that agency met its APA obligations where it did not provide specific reasons for declining to exempt pawn loans from regulation and instead gave broadly applicable reasons for declining to narrow the rule's scope generally). For instance, the Bureau explained that the short-form disclosure requirements would benefit consumers by making it easier for consumers to find, understand, and compare

information about different products' terms. 81 Fed. Reg. at 84271-72 (AR1 577-78). This, in turn, would better inform consumers about their choices, allow them to pick the best product for them, and even encourage companies competing in the market to provide ever better products. *Id.* at 84276 (AR1 582). The Bureau also anticipated that the requirements could benefit companies that charge lower fees, *id.* at 84287 (AR1 593)—indeed, as PayPal itself acknowledged, its products would compare favorably to other prepaid products, AR2 5880.

The Bureau also considered the costs of developing disclosures (which the Bureau anticipated would be minimal given that the Bureau was providing native design files as well as source code for web-based disclosures), keeping them up-to-date as account terms changed, and delivering the disclosures to consumers. 81 Fed. Reg. at 84280-86 (AR1 586-92). This included a specific discussion of the (fairly minor) costs for providers that would be delivering disclosures electronically. *Id.* at 84282-83 (AR1 588-89).

These benefits and costs are just as relevant for consumers and providers of covered digital wallets. So even if there were a "lack of specificity" regarding digital wallets in particular, that would "not 'demonstrate that the agency's decision was not based on a consideration of the relevant factors.'" *Huntco*, 240 F. Supp. 3d at 221 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C. Cir. 2003)).

b. Contrary to PayPal's contention (2020 Mem. at 42-43), the Bureau also appropriately considered industry comments that the Rule would impose unique costs in the context of covered digital wallets by "stifl[ing] innovation" and "confus[ing] and alarm[ing]" consumers. PayPal previously cited comments about innovation, but those comments raised only nonspecific concerns stating, without elaboration, that unspecified aspects of the Rule would chill unspecified forms of innovation in the digital wallet space. 2020 Mem. at 42; *see also* AR2

5267-68, 5862, 10435. It is unclear how the agency could meaningfully respond to such "conclusory comments," and it had no obligation to do so. *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 63 (D.C. Cir. 2011); *see also Brennan v. Dickson*, 45 F.4th 48, 72 (D.C. Cir. 2022) (An agency "need not respond to every fact, idea, or opinion raised in comments, nor need it address speculative or plainly baseless concerns." (citation omitted)); *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (holding that agency did not have to respond to "comments stating without elaboration" that rule would have certain adverse effects); *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35–36 & n.58 (D.C. Cir. 1977)) ("[C]omments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response."). The Bureau had no obligation to grapple with comments that did no "more than simply state" that innovation would be chilled, without "explain[ing] why." *Pub. Citizen, Inc.*, 988 F.2d at 197.

As for PayPal's contention that the Bureau failed to consider comments arguing that the short-form disclosures would "confuse and alarm" potential customers and cause them to "abandon[] the signup process" (2020 Mem. at 43), it is just wrong on the facts. The Bureau specifically addressed that concern, including in the preamble's dedicated discussion of benefits and costs pursuant to section 1022. 81 Fed. Reg. at 84283 (AR1 589). In particular, the Bureau disagreed that disclosures would confuse consumers who acquire their products online, given that consumer testing showed that other consumers had no trouble understanding the disclosures. *Id.* PayPal faults the Bureau for not specifically testing the disclosures "in an electronic setting" (2020 Mem. at 43), but, as the Bureau explained, there was no reason to think that putting the same information on a screen rather than on paper (with appropriate formatting adjustments) would make it any less understandable. 81 Fed. Reg. at 84283 (AR1 589). Neither PayPal nor

any other commenter offered any study or other evidence suggesting that the disclosures would be any less clear for consumers acquiring digital wallets with asset accounts or other online products, and the Bureau is not obligated to conduct such a study itself. *See Prometheus Radio Project*, 141 S. Ct. at 1161.

And while PayPal commented that a disclosure stating that a feature costs "$0" would somehow confuse digital wallet customers into thinking they would have to pay, it provided no evidence to support that deeply counter-intuitive assertion. AR2 5880-81. The Bureau acted reasonably in discounting this wholly speculative concern and instead concluding that consumers acquiring digital wallets with asset accounts would be no more confused than others, who the Bureau's testing showed had no trouble understanding that "$0" meant a service was free. AR1 882-83, 881, 889, 906; *see also Brennan*, 45 F.4th at 72 (holding agency need not address speculative comments); *Home Box Off., Inc.*, 567 F.2d at 35 n.58 (same).

Finally, as for PayPal's concern that the Rule's disclosures could cause consumers to "abandon[] the signup process" (2020 Mem. at 43), the Bureau explained that if consumers decide not to get an account because they are more informed, that is a consumer benefit, not a cost. 81 Fed. Reg. at 84283 (AR1 589). This reasoning applies with full force to consumers who decide not to get a particular digital wallet when a disclosure helps them realize that the product comes with an asset account they do not want or need.

III. The short-form disclosure requirements do not violate the First Amendment.

The Rule's short-form disclosure requirements do not violate the First Amendment. As the Supreme Court has explained, commercial speech receives First Amendment protection principally because of "the value to consumers of the information such speech provides"—so an entity's "constitutionally protected interest in *not* providing any particular factual information …

is minimal." *Zauderer v. Off. Of Disciplinary Couns. Of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). Laws compelling commercial speech are therefore subject to a more lenient constitutional test. In particular, under *Zauderer*, the government can require disclosure of "purely factual and uncontroversial information" so long as the requirement is "reasonably related" to a government interest and is not so "unjustified or unduly burdensome" as to "chill[] protected commercial speech." *Zauderer,* 471 U.S. at 651; *see also Am. Meat Inst. v. USDA*, 760 F.3d 18, 21-22, 27 (D.C. Cir. 2014) (en banc) ("*AMI*").

The Rule's short-form disclosure requirements readily satisfy that test. PayPal does not (and could not) dispute that the short-form disclosure requirements relate to purely factual and uncontroversial information. And a reasonably crafted mandate to disclose purely factual and uncontroversial information will "almost always" satisfy the "reasonably related" prong of the *Zauderer* test. *AMI*, 760 F.3d at 26. The disclosure requirements here are no exception. Those requirements advance the government's interest in ensuring that consumers get easily digestible information about the fees and other terms of prepaid accounts so that they can make better-informed financial decisions.[5] The "reasonably related" requirement is "self-evidently satisfied" where, as here, the government advances such an interest in assuring that consumers receive particular information about attributes of the product or service being offered by requiring companies to disclose that information. *Id.* at 26. Finally, the short-form disclosure requirements

[5] PayPal does not and could not dispute the adequacy of this interest. *Cf. AMI*, 760 F.3d at 23-24 (upholding requirement to disclose meat's country of origin where requirement advanced government's interest in, among other things, "enabling customers to make informed choices based on characteristics of the products they wished to purchase"). In any event, the government interest furthered by the Rule's short-form disclosure requirements is at least as substantial—indeed, is materially identical to—the interest in "enabling customers to make informed choices based on [product] characteristics" underlying the country-of-origin disclosures upheld in *AMI*. *Id.* at 24.

are not so burdensome as to restrict or chill protected speech: Where, as here, a rule "simply regulates the manner of disclosure," it does not impose an impermissible "burden on speech." *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012).

PayPal has offered four reasons why the short-form disclosures nonetheless offend the First Amendment. Each is wrong. First, PayPal contended that the *Zauderer* standard does not apply at all, and that the disclosure requirements must instead pass strict scrutiny. *See* Compl. ¶ 113. But the sole case it cited to support applying strict scrutiny to a disclosure mandate involved a law requiring pro-life crisis pregnancy centers to disclose that other clinics offered abortions, *Nat'l Inst. of Family & Life Advocs. v. Becerra, 13*8 S. Ct. 2361 (2018). Compl. ¶ 113 nn.104-05. There, *Zauderer* did not apply because the challenged disclosures (1) did not relate to the services that the clinics themselves provided, but to services available elsewhere, and (2) involved abortion, "anything but an 'uncontroversial' topic." *Id.* at 2372. Neither problem is present here, where the disclosures relate to the products that entities themselves provide and deal with the costs and other terms of prepaid accounts, hardly a topic of controversy. *See Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 540-42 (D.C. Cir. 2020) (post-*National Institute of Family & Life Advocates* decision applying *Zauderer* to regulation requiring disclosure of hospital prices).

Second, PayPal has contended that the Bureau did not meet its burden to show that it was addressing a "real" problem or that the regulation would be effective in "alleviat[ing]" some harm. 2020 Mem. at 45 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). Even assuming that this requirement for justifying *restrictions* on speech also applies to a *disclosure* mandate,[6] the Bureau met its burden. For one, the Bureau *did* show that the short-form

[6] Case law suggests it does not. *See Conn. Bar Ass'n v. United States*, 620 F.3d 81, 97-98 (2d Cir. 2010) ("[W]hile the First Amendment precludes the government from restricting commercial speech without showing that 'the harms it recites are real and that its restriction will

disclosures remedy a "real" problem. Before the Rule, consumers had difficulty understanding or even locating information about accounts' terms, and some companies did not disclose key information upfront at all—leading many consumers to incur unexpected fees. 81 Fed. Reg. at 84017, 84075, 84078 (AR1 323, 381, 384). Even where companies did provide some information upfront, variations in how account terms were displayed made it challenging for consumers to quickly find and evaluate the information. *Id.* at 84078 (AR1 384). The short-form disclosure requirements are designed to remedy these very real problems.

In any event, a disclosure requirement need not remedy a "harm" to comply with the First Amendment. As the en banc D.C. Circuit has made clear, disclosures need not be designed to "remedy[] deception" (or some other harm); the government may also properly mandate disclosures to "assur[e] that consumers receive particular information," at least where the government has an "adequate" "reason for informing consumers" that goes beyond satisfying "idle curiosity." *AMI*, 760 F.3d at 22-23, 26. In *AMI*, the court upheld a requirement to disclose the country of origin for meat products because it "enabl[ed] customers to make informed choices based on the characteristics of the products they wished to purchase." *Id.* at 24. The Prepaid Rule's short-form disclosure requirements advance just that type of interest. And, as the D.C. Circuit has held, the government necessarily meets its burden to demonstrate "a measure's effectiveness" where, like here, it "uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait" to inform their purchasing decisions. *Id.* at 26 (citing *Edenfield*, 507 U.S. at 770-71); *see also id.* at 23-24.

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in fact alleviate them to a material degree,' *Edenfield v. Fane*, 507 U.S. 761, 770-71[ ](1993), it does not demand evidence or empirical data to demonstrate the rationality of mandated disclosures in the commercial context." (certain quotations and citation omitted)).

Third, PayPal argues that, for the digital wallets covered by the Rule, the short-form disclosure requirements are not "reasonably related" to the interest in enabling consumers to make better-informed decisions because the fees featured most prominently on the short form are "largely inapplicable." Compl. ¶ 116. But requiring companies to disclose when a particular feature is free or not offered serves the government's interest in providing consumers easy-to-digest information, not least because knowing that a product does not charge a fee (or does not offer a feature at all) helps consumers understand the product and facilitates informed decision-making. PayPal asserted that disclosing that certain fees are "$0" or that a feature is not offered is "likely to confuse" consumers (2020 Mem. at 44), but it cites no evidence to support this assertion, which the Bureau's testing refutes, *see supra* pp. 25, 30–31.

Finally, PayPal contended that it does not serve the government's interest to "prohibit[] clarifying disclosures" about when fees may be lower or waived. Compl. ¶ 116. But the Rule does not prohibit such clarifications; it just requires that any clarification be made outside the short-form disclosure box itself. *See* 12 C.F.R. pt. 1005, Supp. I, ¶ 18(b)(3)(i)-1; *see also supra* pp. 10–12. This limited restriction on where a clarification can be placed preserves the short form's simplicity and avoids information overload, and thus is reasonably related to the interest in providing consumers with information they can quickly and easily digest.[7]

[7] Even if the Court concluded that some challenge had merit, that would not warrant the wholesale invalidation of the Rule that PayPal's complaint appears to seek. Indeed, PayPal makes no argument why, if it prevailed on its challenges to the Rule's short-form disclosure requirements, that would warrant setting the Rule aside in its entirety. It would not. When one portion of a rule is invalid, a court should "sever and affirm" the remainder so long as it "can say without any "'substantial doubt' that the agency would have adopted the severed portion on its own." *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) (internal alterations and quotations omitted). There is no doubt here, much less a "substantial" one, that the Bureau would have adopted the remainder of the Prepaid Rule—which extends a host of important protections to prepaid accounts—even if it could not have adopted the short-form disclosure provisions that PayPal specifically challenges

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to the Bureau.

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Respectfully submitted,

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or applied those provisions to digital wallets' asset accounts. In the event that the Court finds the short form disclosure requirements invalid, the Bureau requests the opportunity to provide supplemental briefing addressing the appropriate remedy.