**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| PAYPAL, INC.,<br><br>*Plaintiff*,<br><br>v.<br><br>CONSUMER FINANCIAL PROTECTION BUREAU,<br><br>and<br><br>KATHY KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau,<br><br>*Defendants*. | ) | Civil Action No. 19-3700 (RJL)<br><br>**ORAL ARGUMENT REQUESTED** |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The story of this rulemaking is one of unexplained plot twists and an untenable ending. From the start, the Consumer Financial Protection Bureau focused its regulatory efforts on general purpose reloadable, or GPR, cards—typically known as "prepaid cards." Its Advance Notice of Proposed Rulemaking described little else, and not once mentioned digital wallets. *See* AR1 1-3. GPR cards are typically plastic cards that are sold in retail stores; they hang on J-hooks or behind the sales counter until a consumer takes one to the register and loads it with funds, usually cash. The benefit of a GPR card (as the Bureau noted, AR1 242) is that it allows consumers to hold funds and spend them in electronic transactions; the risks (as the Bureau also noted, AR1 243, 249-250) are unexpected fees and costly, unwanted "overdraft" features. Rather than subjecting these products to Regulation E's preexisting baseline protections for checking and savings accounts, the Bureau determined in the Prepaid Rule that such products warrant heightened—and more exacting—regulation under the Electronic Fund Transfer Act ("EFTA") and the Truth in Lending Act ("TILA"), including highly prescriptive fee disclosure regulation and a 30-day ban on linking certain credit features to the card.

But whatever the merit of the Bureau's justifications for heightened regulation of GPR cards, those justifications did not warrant the exact same heightened regulation of digital wallets. Digital wallets such as PayPal's core product are not acquired in retail stores; they are not principally vehicles for consumers to load cash for later use; they do not come with costly or unexpected fees; and far from having an "overdraft" feature, their fundamental purpose is to link with credit and other accounts to facilitate payments using those linked accounts. *See* Dkt. 19-1 at 12-16 ("PayPal Br." at 5-9). And yet, when its 235-page proposed rule was issued, the Bureau inserted a three-page plot twist that applied—wholesale—the more burdensome regulatory regime designed for GPR cards to the very different product of digital wallets. This was paradigmatic regulatory overreach. Digital wallets share none of the GPR-card risks cited by the Bureau, and the Bureau identified no consumer risks specific to digital wallets, much less any evidence of such risks. The Bureau ultimately finalized its proposal more than three years later, including an amendment that attempted (unsuccessfully) to unravel some of the damage caused by imposing the linking ban and other elements of its GPR-card regime on digital wallets.

The Bureau's regulatory approach to digital wallets cannot be reconciled with the Administrative Procedure Act's ("APA") requirement of reasoned decisionmaking or with the cost-benefit analysis requirements in the Dodd-Frank Act, as PayPal explained in its opening motion. As the D.C. Circuit recently explained, "[r]ules are not adopted in search of regulatory problems to solve," and "unless an agency's authorizing statute says otherwise, an agency regulation *must* be designed to address *identified* problems." *New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020) (emphases added). In this respect, the Bureau's opposition fares no better than the scant explanation offered by the Rule itself. Faced with an administrative record devoid of any identified risks posed by digital wallets, the Bureau largely *assumes* that GPR cards and digital wallets are alike and insists that digital wallets should not be "carve[d] out" from the Prepaid Rule, for uniformity's sake. Dkt. 20-1 at 15 ("CFPB Br." 3). In neither its rulemaking nor its opposition here does the Bureau justify that approach.

The Bureau also suggests (at 54) that including digital wallets in the Rule eliminated regulatory uncertainty about whether digital wallets were covered by Regulation E in the first place—a complete red herring. The baseline requirements of Regulation E have existed for decades and already applied broadly to any consumer "asset account" held by a financial institution, including digital wallets. If there was uncertainty on this point, a limited rulemaking to clarify that point may have been justified. But the Prepaid Rule uniquely imposes heightened requirements under Regulation E to address the risks posed by GPR cards, not the baseline requirements that apply to virtually every other EFTA-covered account (for example, checking accounts). The result of the Bureau's handiwork is a regulatory regime fundamentally unsuited to digital wallets—one that imposes prescriptive disclosures of fees that do not exist and likely never will for digital wallets and that, in certain instances, imposes a 30-day ban on the very thing that consumers use digital wallets for, that is, linking their accounts to a credit product.

If that were not enough, the Bureau lacked statutory authority under EFTA, TILA, and the Dodd-Frank Act to adopt the short-form requirement and the 30-day credit linking ban in the first place. Because it finds no provision expressly prohibiting these mandates in statutory text, the Bureau claims essentially unbounded regulatory authority, ignoring the many elements of the text, structure, and purpose of EFTA and TILA that demonstrate Congress never intended to allow the Bureau to do what it has done here.

For these reasons and others stated below, the Court should set aside the Prepaid Rule.

## ARGUMENT

### I. THE SHORT FORM DISCLOSURE REQUIREMENT IS CONTRARY TO LAW

As explained in PayPal's opening brief (at 20-27), EFTA's text, structure, and purpose unambiguously demonstrate that Congress struck a careful balance under the statute: Congress provided for regulated parties to disclose the essential terms of electronic fund transfers, *see* 15 U.S.C. § 1693c, but to preserve flexibility for providers and consumers, Congress refrained from prescribing (or authorizing the agency to prescribe) the precise form disclosures must take. Instead, Congress required the Bureau to "issue model clauses for optional use" that must "take account of variations in the services and charges under different [EFT] systems." *Id.* § 1693b(c). Thus, with respect to model clauses alone, Congress authorized the agency to provide for the form of disclosure—and only on the express condition that the model forms be "optional."

The short form disclosure requirement upends this statutory balance. It imposes a highly prescriptive, one-size-fits-all mandate that requires disclosures in a tabular format; enumerates the specific fees that must be referenced (even if the fee is entirely inapplicable); mandates the prominent disclosure of the highest possible fee (even if the fee is not typical); and goes so far as to regulate the font size, pixel size, and bolding of particular items. *See* PayPal Br. 23. The Rule renders Congress's provision for "optional" model clauses a nullity: There is no room for any "model clause" because the Bureau has already prescribed the disclosure form down to the pixel, and there is no place for "optional" disclosures because the Bureau has made the disclosure form *mandatory*. That approach exceeds the Bureau's statutory authority, requiring vacatur of the short form disclosure mandate.

Resisting this—and apparently any—statutory limit on its authority to mandate disclosures under EFTA, the Bureau defends the mandate on three principal grounds: (1) that EFTA does not expressly restrict the Bureau's power to mandate disclosure forms; (2) that the Bureau's interpretation of EFTA is entitled to deference; and (3) that Section 1032 of the Dodd-Frank Act independently authorizes the mandated disclosure form. Each argument fails.

### A. The Absence Of An Express Statutory Prohibition Is Not A Carte Blanche Delegation To Prescribe Mandatory Forms

**1.** The Bureau's defense of its statutory authority under EFTA rests on a false premise. Ignoring traditional tools of statutory interpretation and instead asking the Court to construe EFTA's general rulemaking provision "in a vacuum," *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989), the Bureau's position boils down to this: Because EFTA does not expressly forbid prescriptive, mandatory disclosure form requirements, any such requirements are fair game. *E.g.*, CFPB Br. 22 ("Nothing in the Act forecloses the Bureau from prescribing rules regarding a disclosure's form."); *id.* ("Nothing in EFTA even suggests … that Congress intended to foreclose regulations that standardize the form that disclosures must take."). The Bureau thus claims the authority to prescribe disclosure forms as it wishes—simply because no provision of EFTA explicitly says it cannot.

That claim defies basic principles of statutory interpretation and agency authority. The D.C. Circuit has time and again "reject[ed] … as entirely untenable" the view, advanced by the Bureau here, that "regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency." *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1174 (D.C. Cir. 2003). "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994), *amended*, 38 F.3d 1224 (D.C. Cir. 1994). Courts thus "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995).

This principle holds even where, as here, an agency possesses general rulemaking authority. "[G]eneral rulemaking authority," the D.C. Circuit has cautioned, "does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006); *see Merck & Co. v. HHS*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020) ("An agency's general rulemaking authority plus statutory silence does not … equal congressional authorization."). "A court does not simply assume that a rule is permissible because it was purportedly adopted pursuant to an agency's rulemaking authority." *N.Y. Stock Exch.*, 962 F.3d at 546.

The pertinent question is "whether the [Bureau] has stayed within the bounds of its statutory authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013). And discerning the limits of agency authority, like statutory interpretation generally, is a "'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). Accordingly, in deciding whether EFTA authorizes the short form disclosure mandate, the Court "must employ all the tools of statutory interpretation, including 'text, structure, purpose, and legislative history.'" *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (citation omitted).

For these reasons, the Bureau's refrain that EFTA does not contain an express prohibition on the short form disclosure mandate, *e.g.*, CFPB Br. 22, is unavailing. The proper inquiry is whether, using all the tools of statutory construction, EFTA authorizes the Bureau to require the highly prescriptive disclosure form it mandated here. It does not.

**2.** Against this backdrop, the Bureau's reliance on general rulemaking authority—namely, 15 U.S.C. §§ 1693b(a)(1) and 1693c(a)—is misplaced. Section 1693b(a)(1) permits the Bureau to "prescribe rules to carry out [EFTA's] purposes," and § 1693c(a) cross-references this authority in requiring providers to disclose the "terms and conditions" of electronic fund transfers, including "any charges" for transfers "to the extent applicable."[1] But this general authority is not a *carte blanche* to regulate without regard for limits reflected in EFTA's text, structure, and purpose. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*,

[1] The Bureau's reliance on § 1693c is also misplaced because the clauses under subsection (a) make clear that Congress intended the Bureau's authority to be limited to those clauses in which Congress assigned a role to the agency. *See* 15 U.S.C. § 1693c(a)(3) (allowing confidentiality limitations "as determined by the Bureau"); *id.* § 1693c(a)(7) (summary of error resolution provisions "in a form prescribed by regulations of the Bureau"). The phrase "in accordance with regulations of the Bureau" in subsection (a) is merely a reference to the instances in which Congress expressly assigned a responsibility to the agency. Neither justify the Rule here.

559 U.S. 280, 290 (2010) ("[c]ourts have a 'duty to construe statutes, not isolated provisions'"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[t]he meaning … of certain words or phrases may only become evident when placed in context").

Construed properly, EFTA clearly demonstrates that the short form mandate exceeds the limits of the Bureau's authority. EFTA contains many textual indications that Congress intended disclosure requirements to be flexible and adaptable to the circumstances of different electronic fund transfer services. *See* PayPal Br. 9-10, 20-21. This is most clearly demonstrated by EFTA's model clause provision, 15 U.S.C. § 1693b(b), where Congress expressly considered the use of disclosure forms and provided that they are to be "optional" and "shall take account of variations in the services and charges under different electronic fund transfer systems." And unlike the one-size-fits-all disclosure form prescribed here, section 1693b(b) requires the Bureau to "issue *alternative* model clauses for disclosure of these differing account terms." *Id.* (emphasis added). Moreover, Congress went still further to provide a safe harbor for providers that use one of the Bureau's optional model clauses, immunizing the provider from "any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause issued by the Bureau." *Id.* § 1693m(d)(2). Congress's clear purpose in these provisions was to promote providers' use of model forms where appropriate, but also to allow providers flexibility by making the forms "optional." *Id.* § 1693b(b).

These provisions are entirely at odds with the CFPB's claimed boundless authority to require disclosure forms under EFTA. *First*, EFTA's model clause provision makes clear that Congress considered the appropriate means of regulatory intervention regarding disclosure forms and enacted a scheme based on optional model clauses to achieve its objectives. The Bureau's dissatisfaction with this approach is no basis to overhaul EFTA's design.

*Second*, the specific authority reflected in EFTA's model clause provision trumps any implicit general authority claimed by the Bureau. "'[I]t is a commonplace of statutory construction that the specific governs the general,'" and this "canon has full application … to statutes … in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Here, EFTA's model clause provision is a limited, specific authorization that speaks to the question of the form of disclosures, and the Bureau may not evade the limits of this specific authorization (namely, that the models are to be optional and tailored) by resort to general rulemaking authority. *See American Petroleum*, 52 F.3d at 1119 (where "specific statutory directive defines [the agency's] relevant functions ... in a particular area," an agency "cannot rely" on general rulemaking authority to evade a limitation); *National Min. Ass'n v. U.S. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997).

*Third*, and perhaps most significant, the Bureau's mandated short form disclosure renders the twin provisions in § 1693b(b) and § 1693m(d)(2) a practical nullity. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Al Bahlul v. United States*, 2020 WL 4459284, at *6 (D.C. Cir. Aug. 4, 2020) (citation omitted). Once the Bureau has mandated the precise form of disclosure, there is no longer any room for "optional" model clauses (much less for any tailored "alternative" clauses), nor is there any role for a safe harbor for providers' use of optional model forms. In effect, the Bureau's approach sweeps aside the congressional scheme reflected in these provisions and replaces it with a rigid and mandatory scheme that cannot be found in EFTA.

**3.** The Bureau seeks to minimize (at 25) the import of these provisions by characterizing them as merely a "'floor'" that allows the agency apparently unlimited power to prescribe the form of disclosure. Although Congress may set regulatory floors rather than ceilings, section 1693b(b) bears none of those hallmarks. *Compare Yurok Tribe v. Dep't of Interior*, 785 F.3d 1405, 1412 (D.C. Cir. 2015) (statute using phrase "not … less than" "sets a floor, not a ceiling, on the amount of money that a Tribe can receive in a self-determination contract"). EFTA authorizes (and mandates) the issuance of model disclosures, but requires that those models be optional and tailored to specific EFT providers. It would be inconsistent with that congressional scheme to suppose that Congress silently delegated to the agency the authority to *require* regulated parties to use those same model disclosures. *See* PayPal Br. 26. In fact, the Bureau does not even attempt to explain what role the model clause provision would play in the statutory regime were the Bureau free to define the form of disclosure across the board.

The Bureau also seeks to dismiss (at 25-26) PayPal's interpretation as merely an argument based on the *expressio unius* canon. Not so. The relevant question here is what authority Congress granted the Bureau with respect to disclosure forms. EFTA speaks directly to that issue and demonstrates that Congress considered the issue and directed the Bureau to produce *optional* forms tailored to the "variations in the services and charges under different electronic fund transfer systems." 15 U.S.C. § 1693b(b). In delimiting the Bureau's authority, Congress necessarily indicated what that authority did *not* encompass. *Compare CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056, 1063 (D.C. Cir. 2014) (statutory requirement that STB must provide simplified procedures in one category of cases did not preclude use of simplified procedures in other unmentioned cases). By contrast, it is the Bureau's wooden statutory interpretation—which recognizes only explicit prohibitions on its authority and otherwise would disregard those provisions of EFTA that speak directly to the issue—that is deeply flawed and would stand the congressional judgments reflected in EFTA on their head. "Like any key term in an important piece of legislation," the model clause provisions reflect a "compromise between groups with marked but divergent interests." *Ragsdale v. Wolverine*

*World Wide, Inc.*, 535 U.S. 81, 93 (2002). That is a "balance" that the Bureau may not "alter" at will. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

The Bureau's sweeping interpretation of its EFTA authority runs up against two other principles of statutory interpretation. *First*, courts "look to other legislative acts" to assess statutory meaning, and EFTA lacks the provisions that Congress has elsewhere used to authorize prescriptive disclosure regimes. *Merck*, 385 F. Supp. 3d at 89. TILA is a notable example. Congress directed the Bureau in TILA to "require that the disclosure of [certain types of] information shall, to the extent the Bureau determines to be practicable and appropriate, be in the form of a table." 15 U.S.C. § 1632(c)(2)(A). Moreover, TILA *expressly* delegated to the Bureau "discretion in prescribing [the] order and wording of [the] table." *Id.* § 1632(c)(2)(B). In TILA, Congress thus specifically addressed formatting requirements and, indeed, the very "tabular format," *id.* § 1637(c)(1)(A), that the Bureau seeks to mandate here under EFTA—in the absence of any comparable congressional authorization. Had Congress wanted to authorize such formatting requirements, "it could have simply borrowed from the statute next door." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). The Bureau does not even address TILA's significance, *see* PayPal Br. 22 n.3, let alone offer a reason to disregard "Congress's choice to depart from the model of a closely related statute," *SAS Inst.*, 138 S. Ct. at 1355.

*Second*, the disclosure form mandated here is a conspicuous departure from any prior rulemaking under EFTA in the more than four decades since the statute was enacted. *See* PayPal Br. 22-23 & n. 3. The Bureau (at 27-28) does not contest the accuracy of PayPal's description of this history; instead, it brushes off the history as irrelevant. But "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Bankamerica Corp. v. United*

*States*, 462 U.S. 122, 131 (1983). Until this Rule, no agency claimed authority under EFTA to mandate the precise form of disclosure. And it is "telling" that the Bureau has failed to identify any comparable prescriptions under EFTA. *Loving*, 742 F.3d at 1021. The short form requirement "is far afield" from other rules issued under EFTA, *Merck*, 385 F. Supp. 3d at 97, and "[i]n light of the text, history, structure, and context of the statute, it becomes apparent that the [Bureau] never before adopted its current interpretation [of its authority] for a reason: It is incorrect," *Loving*, 742 F.3d at 1021.

### B. The Bureau's Appeal To Agency Deference Cannot Save Its Boundless Interpretation Of Its Regulatory Authority Under EFTA

With no anchor in EFTA's statutory text or structure for the expansive authority it claims, the Bureau falls back on *Chevron* deference. CFPB Br. 27-28. But the predicate for *Chevron* deference is genuine ambiguity. Here, it is "clear enough" what Congress intended under EFTA, "leaving no ambiguity for the agency to fill." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Because a faithful application of the traditional tools of statutory construction demonstrates that Congress did not delegate to the Bureau the authority to mandate a highly prescriptive, one-size-fits-all disclosure form under EFTA, there is no room for deference.

In any event, the Bureau's conclusion that it has the authority to promulgate the short form disclosure mandate fails at *Chevron*'s second step for three reasons.

*First*, even assuming that EFTA confers some relevant regulatory authority, the short form requirement is impossible to reconcile with any reasonable understanding of the statute. The Bureau's wildly prescriptive requirements—specifying layout, font size, and pixel size in byzantine detail (*see* PayPal Br. 25 n. 5) as well as mandating the disclosure of irrelevant fee categories, confusing terminology, and the highest possible fee regardless of its frequency or likelihood, all while forbidding clarifications—reflect the kind of "blunderbuss" effort that "falls beyond any reasonable exercise of the [Bureau's] statutorily assigned power." *Merck*, 962 F.3d at 536. An agency interpretation "that is 'inconsisten[t] with the design and structure of the statute as a whole' … does not merit deference." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citation omitted). The Bureau does not and cannot dispute that Congress intended financial institutions to have flexibility in determining the form of disclosure under EFTA. *See* PayPal Br. 20-24, 26. The short form mandate eliminates the very flexibility that Congress provided for, and thus is an unreasonable interpretation of the statute.

*Second*, the significant First Amendment concerns raised by the Bureau's nearly limitless asserted authority to regulate how providers communicate with consumers defeats resort to *Chevron* step two. As explained in Part V, below, the short form disclosure mandate violates the First Amendment and, at the least, raises serious constitutional questions. That forecloses *Chevron* deference. *See Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).

*Third*, the "analysis of disputed agency action under *Chevron* step two and arbitrary and capricious review is often 'the same.'" *N.Y. Stock Exch.*, 962 F.3d at 558. The short form mandate thus fails *Chevron* step two for the same reasons that it is arbitrary and capricious, as discussed below. *See infra* pp. 33-35; PayPal Br. 33-40.

### C. The Bureau's Dodd-Frank Authority Cannot Be Invoked As An End Run Around EFTA's Limits

The Bureau also makes the bold claim that its authority under the Dodd-Frank Act, 12 U.S.C. § 5532(a), permits the agency to adopt the short form mandate even if EFTA withheld such authority. CFPB Br. 28-30. That claim is wrong.

As PayPal has explained (at 27 n. 6), Dodd-Frank's general authority cannot be invoked to justify the short form mandate because EFTA specifically defines (and limits) the Bureau's authority to "prescribe rules," 15 U.S.C. § 1693b(a), regarding the disclosure of "[t]he terms and conditions of electronic fund transfers," *id.* § 1693c(a). That specific statute "controls over a general one," *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), such as the general authority discussed in § 5532(a). Otherwise the "general" statute would "nullif[y]" the targeted provisions of the "specific statute." *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). The Bureau's expansive claim of § 5532(a) authority would effectively nullify the disclosure-related limits Congress imposed on the Bureau's authority under EFTA—a result Congress could not possibly have intended. And while the Bureau claims (at 30) that the "specific-controls-the-general canon" applies only where two statutes conflict, it fails to recognize that there *is* such a conflict here, because EFTA does not authorize the mandatory short form requirement.

Even more remarkable are the sweeping implications of the Bureau's view of § 5532(a). Under the Bureau's reading, section 5532(a) would allow the agency to circumvent not only EFTA's prohibition on prescriptive, mandatory disclosures but *any* of the limited disclosure authorities in EFTA and other consumer protection statutes. For example, EFTA states that "any regulation prescribed … by the Bureau … shall not apply to any electronic benefit transfer system established under State or local law." 15 U.S.C. § 1693b(d)(2)(B). According to the Bureau, it could nonetheless apply disclosure regulations to State and local electronic benefit transfer systems pursuant to its general authority under § 5532(a) of the Dodd-Frank Act. That cannot be what Congress intended, and if Congress had indeed wanted to cast away any provisions delimiting the Bureau's disclosure authority in other statutes, it would have done so clearly. After all, Congress "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Here, it is "inconceivable that Congress … intended to eliminate, by mere implication, the controls that Congress had carefully imposed" on the Bureau through other, more targeted statutes. *American Fed'n of Gov't Employees AFL-CIO, Local 2953 v. Fed. Labor Relations Auth.*, 730 F.2d 1534, 1546-1547 (D.C. Cir. 1984) (internal quotation marks and citation omitted).[2]

Instead, § 5532(a) is properly understood as a limited gap-filling provision that comes into play where a "consumer financial product or service" is not covered by an existing disclosure regime. This does not "take disclosures for a whole host of financial products off the table." CFPB Br. 30. The Bureau has authority to impose reasonable disclosure requirements with respect to the financial products listed in the Bureau's brief—provided that those requirements are consistent with other statutory disclosure regimes.

[2] The Bureau's reading of § 5532(a) would apparently override many other statutory limitations on its authority. *See, e.g.*, 15 U.S.C. § 1603 (TILA) (listing numerous types of "[e]xempted transactions" to which TILA's disclosure requirements "do[] not apply"); *id.* § 1631(b) ("If a transaction involves more than one creditor or lessor, only one creditor or lessor shall be required to make the disclosures."); *id.* § 1633 ("The Bureau shall by regulation exempt from the requirements of this part any class of credit transactions within any State [if certain conditions are met]."); 12 U.S.C. § 4302(c) (Truth in Savings Act) ("The disclosure requirements contained in this section shall not apply to any sign (including a rate board) disclosing a rate or rates of interest which is displayed on the premises of the depository institution if [certain conditions are met]."); *id.* § 4311(a) ("No regulation prescribed by the Bureau … shall apply directly with respect to any depository institution described in clause (iv) of section 461(b)(1)(A) of this title."); *id.* § 1831t(b)(2)(B) (Federal Deposit Insurance Act); *id.* § 2803(g), (i) (Home Mortgage Disclosure Act); *id.* § 1702(a), (b) (Interstate Land Sales Full Disclosure Act).

## II. THE 30-DAY CREDIT LINKING BAN IS CONTRARY TO LAW

The 30-day credit linking ban also exceeds the Bureau's statutory authority and must be vacated. *See* PayPal Br. 28-33. While TILA authorizes the Bureau to "prescribe regulations to carry out the purposes" of the Act, 15 U.S.C. § 1604(a)—namely, "assur[ing] a meaningful disclosure of credit terms" to promote the "informed use of credit," *id.* § 1601(a)—the linking ban is not a disclosure requirement and is untethered to the purpose of meaningful consumer disclosure. The ban is instead a paradigmatic substantive restriction on the access and use of credit that is nowhere authorized by TILA. In practical effect, the linking ban prohibits a consumer from linking certain credit cards—including the consumer's own previously acquired credit cards—to an account subject to the Rule (including a digital wallet) until 30 days after the consumer acquires the account. The linking ban regulates when and how a consumer may use credit, not the information that must be provided to a consumer in deciding to obtain credit. If a substantive ban on access to credit can be passed off as a "disclosure" requirement, TILA truly imposes no limit on the Bureau's authority to substantively regulate credit. That is not the scheme Congress enacted in TILA, and the restriction must be vacated.

In response, the Bureau presses three main arguments: (1) that TILA's reference to "additional requirements" allows the agency to adopt substantive credit restrictions; (2) that the Bureau's interpretation is entitled to *Chevron* deference; and (3) that § 1032 of Dodd-Frank authorizes the regulation. None of these arguments has merit.

### A. TILA Does Not Delegate General Authority To Impose Substantive Restrictions On Credit

The 30-day credit linking ban is "agency action in search of a statutory home." *Merck*, 385 F. Supp. 3d at 97. As PayPal has shown, and the Bureau does not seriously contest, TILA—the "*Truth* in Lending Act"—is at its core a disclosure statute that authorizes disclosure-related regulations. Although certain discrete provisions of TILA impose substantive obligations, the 30-day credit linking ban is unrelated to any of them. Even the Bureau concedes (at 33) that the ban "do[es] not interpret or otherwise implement some specific statutory provision." That concession alone should end the matter, for "an agency cannot purport to act with the force of law without delegated authority from Congress," and TILA's general authority to regulate credit disclosures is wholly insufficient to support the linking ban. *N.Y. Stock Exch.*, 962 F.3d at 554.

In an effort to escape application of this straightforward rule, the Bureau points to a provision of TILA authorizing it to adopt "additional requirements … as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). According to the Bureau (at 31, 34), this provision gives the agency "unusually broad authority" to go beyond "the specific requirements that Congress itself prescribed," and to adopt any rule "that the Bureau might determine would … serve the goals that Congress set forth." The Bureau's claim to such expansive authority does not withstand scrutiny.[3]

*First*, a "mere reference to 'necessary' or 'appropriate' in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute." *N.Y. Stock Exch.*, 962 F.3d at 554 (citing *Michigan v. EPA*, 135 S. Ct. 2699 (2015)). Thus, in *New York Stock Exchange*, the D.C. Circuit rejected the government's position that a "statutory

[3] In discussing TILA, the Bureau repeats the error it makes as to EFTA by conflating the absence of an express restriction with a delegation of authority. *E.g.*, CFPB Br. 33 ("TILA does … not foreclose a waiting period"). The absence of a congressional red light is not the same thing as a green light, because courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *American Petroleum*, 52 F.3d at 1120. Nor does the absence of an express restriction create ambiguity. "[T]he failure of Congress to use 'Thou Shalt Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

reference to 'regulations as may be necessary or appropriate' gave it authority to act, as it saw fit, without any other statutory authority to adopt the" program at issue. *Id.* at 554.

The Bureau in effect advances the same position rejected in *New York Stock Exchange*, claiming authority to adopt "any" requirements "that [it] determine[s] would likewise serve the goals that Congress set forth." CFPB Br. 34. And it seeks to resurrect the since-repudiated standard in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), which could be read to allow any regulation "reasonably related to the purposes of the enabling legislation," *id.* at 369 (internal quotation marks and citation omitted). *See* CFPB Br. 32-33 (citing *Mourning*). But in *Michigan v. EPA*, "which post-dates *Mourning*," the Supreme Court clarified that "a 'necessary or appropriate' provision … does not necessarily empower the agency to pursue rulemaking *that is not otherwise authorized*." *N.Y. Stock Exch.*, 962 F.3d at 556 (emphasis added). Even in *Mourning*, the "disclosure requirement" at issue was "enforced through the statute's pre-existing remedial scheme and in a manner consistent with it," *Ragsdale*, 535 U.S. at 92—a connection to statutory text much stronger than any the Bureau has identified here. As in *New York Stock Exchange*, this Court should reject the Bureau's attempt to use a "necessary and proper" clause to assert expansive regulatory authority beyond what Congress has delegated.

*Second*, TILA's reference to "additional requirements" does not change the analysis. "Additional" refers to something "[t]hat is in addition to something else; added, extra, supplementary." Oxford English Dictionary, *Additional, adj. and n.* (2010).[4] And "requirement" means "a condition which must be complied with." Oxford English Dictionary, *Requirement, n.* (2010).[5] Thus, § 1604(a) authorizes the Bureau to adopt added conditions necessary to further

[4] Available at https://tinyurl.com/y3fevyc4 (last visited Aug. 20, 2020).

[5] Available at https://tinyurl.com/y4buzyyf (last visited Aug. 20, 2020).

"purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). The provision does not free the Bureau from the obligation to identify specific "statutory authority" for the linking ban because "the power to issue regulations is not the power to issue *any* regulations." *National Min. Ass'n*, 105 F.3d at 694.

The Bureau does not argue that the 30-day linking ban is necessary to prevent evasion or circumvention of TILA, or to promote compliance with the law. Rather, attempting to draw an attenuated link to TILA's "purposes," the Bureau contends (at 39) that the 30-day linking ban is structured to "promote informed and voluntary use of credit" by mandating that consumers wait 30 days to link a covered account to certain credit products. This sweeping justification makes no sense when applied to digital wallets (which consumers typically acquire precisely *because* they want to link the digital wallet to an already-acquired credit card that was already subject to TILA disclosure requirements at acquisition), *see infra* pp. 35-36, admits of no limiting principle, and is inconsistent with TILA's basic design.

The informed use of credit is of course a principal congressional objective in TILA—but "[t]he means chosen by Congress to effectuate legislation matters." *Merck*, 385 F. Supp. 3d at 94. Under TILA, Congress elected to promote informed use of credit not through substantive restrictions but through accurate *disclosure*—namely, by "assur[ing] a meaningful disclosure of credit terms" to further "an awareness of the cost [of credit] by consumers." 15 U.S.C. § 1601(a). Thus, as PayPal has explained, TILA is at bottom a disclosure statute, to which Congress has expressly added a limited number of substantive requirements. The 30-day credit linking ban is not an "additional" disclosure requirement because it has no effect on the nature or type of information made available to consumers. Nor is the 30-day credit linking ban an "addition" to any of TILA's substantive requirements—as the agency all but concedes. *See* CFPB Br. 33.

The Bureau's argument in fact amounts to a sweeping arrogation of authority to substantively regulate access to and use of credit—all in the name of promoting "disclosure." "[T]he breadth of [an agency's] asserted authority" must be "measured … by the implications of the authority claimed." *Merck*, 962 F.3d at 541. If the Bureau were correct that TILA authorizes any substantive restriction the agency claims is related to the "voluntary or informed" use of credit, the Bureau would have virtually boundless authority to regulate the terms and conditions of credit transactions. The Bureau would presumably be permitted to ban outright certain credit products on the theory that they are too complicated for consumers to understand; to prohibit the linking of prepaid accounts to credit products altogether; or to impose "waiting" periods of months or longer before consumers may access certain products. Nothing in TILA suggests that Congress delegated the Bureau such vast authority to substantively regulate credit products and frustrate consumer choice.[6] Congress surely "did not intend to grow such a large elephant in such a small mousehole," *Loving*, 742 F.3d at 1021, silently delegating to the Bureau broad regulatory power over a significant part of the American economy.

*Third*, other tools of statutory interpretation underscore why the Bureau's interpretation of "additional requirements" cannot be correct. To begin with, the Bureau's reading is inconsistent with the structure of TILA itself. When Congress intended for TILA to impose substantive obligations or prohibitions regarding credit, Congress said so explicitly. *See* PayPal Br. 31-32 (listing substantive provisions). Under the Bureau's reading, however, "all of

[6] In a footnote, the Bureau suggests that the linking ban is an "adjustment" to 15 U.S.C. § 1642, which provides, "No credit card shall be issued except in response to a request or application therefor." As PayPal has explained (at 32), however, the ban does not prevent the issuance of credit cards; it bars regulated parties from "offer[ing] … covered separate credit feature[s]" in the first place and from linking preexisting cards to digital wallets, AR1 574. The ban is thus unrelated to § 1642 and cannot reasonably be viewed as an "adjustment" of that provision.

Congress's [substantive provisions] would have been unnecessary" because the Bureau, "by virtue of its heretofore undiscovered carte blanche grant of authority from" the "additional requirements" provision "would already have had free rein to impose" these substantive obligations. *Loving*, 742 F.3d at 1020. This Court should not "lightly presume congressional intent to implicitly delegate decisions of major economic or political significance" to the Bureau, including the authority to substantively regulate credit products. *Id.* at 1021.

Legislative history, too, refutes the Bureau's position. The Bureau suggests (at 36) that the legislative history on "additional requirements" is "silen[t]." Not so. The Senate Committee Report accompanying the bill that added the phrase to TILA noted that the provision "ma[de] conforming amendments to the Truth in Lending Act." S. Rep. No. 111-176, at 182 (2010); *see also* PayPal Br. 38 (describing legislative history). The Bureau's attempt to transform a "conforming amendment[]" into a sweeping grant of authority should be rejected.[7]

With all of these indicators of statutory meaning stacked against the Bureau's interpretation, *Council for Urological Interests v. Burwell*, 790 F.3d 212 (D.C. Cir. 2015), cannot redeem the Bureau's claimed "additional requirements" authority. *See* CFPB Br. 34. That case involved a statute—the Stark Law—that imposes all manner of substantive restrictions on physicians and hospitals aimed at preventing fraud in the Medicare program. *See Council for Urological Interests*, 790 F.3d at 215-216. The law also contains exemptions to a statutory

[7] The Bureau's dismisses (at 36) the relevance of the fact that this "additional requirements" provision falls under a heading labelled "Disclosure Guidelines" by pointing out that, in enacting TILA in 1968, Congress specified a heading of "Regulations" and that the "Disclosure Guidelines" was added during codification. But this misses the point: The question is whether "additional requirements" language that Congress added when enacting Dodd-Frank in 2010 should be understood in light TILA's core purposes to promote disclosure. When Congress acted in 2010, it was plainly aware that it was inserting the language under a "Disclosure Guidelines" heading in § 1604 as it had been codified, yet Congress made no change to that long-established heading.

prohibition on self-interested physician referrals, including one that allows certain equipment leases involving physicians and hospitals otherwise prohibited by the Stark Law when a lease satisfied five enumerated requirements, 42 U.S.C. § 1395nn(e)(1)(B)(i)-(v), as well as "other requirements as [HHS] may impose by regulation as needed to protect against program or patient abuse," *id.* § 1395nn(e)(1)(B)(vi). The D.C. Circuit held that this "other requirements" provision gave HHS the authority to "add a requirement that ban[ned]" certain types of leases from the exclusion. *Council for Urological Interests*, 790 F.3d at 219.

The case distinguishes itself. TILA, unlike the Stark Law, is not principally concerned with substantive regulation. What is more, the 30-day credit linking ban, unlike the agency rule in *Council for Urological Interests*, is not tethered to any substantive restriction that Congress did impose under TILA. And deferring to an agency's reliance on express statutory authority in the Stark Law to impose additional restrictions on an exemption for leases is far afield from the Bureau's attempt to transform a conforming amendment to TILA into a broad grant of substantive regulatory authority over credit products.

In sum, "[t]here is nothing in [TILA] that authorizes" the 30-day credit linking ban. *N.Y. Stock Exch.*, 962 F.3d at 556. With no statutory anchor, "the [Bureau's] position … amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Railway Labor*, 29 F.3d at 670. This Court should "categorically reject that suggestion." *Id.*

### B. The Bureau's Broad Claim Of TILA Authority Is Not Entitled To Deference

The Bureau's appeal to *Chevron* deference does not change the result. "Even under *Chevron*, [courts] owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' [courts] find [themselves] unable to discern Congress's meaning." *SAS Inst.*, 138 S. Ct. at 1358. Because application of the traditional tools of statutory construction foreclose the Bureau's position, that should be the end of the matter.

But even if TILA were ambiguous, the Bureau's sweeping interpretation strays far beyond "'the bounds of reasonable interpretation.'" *Utility Air*, 573 U.S. at 321. As explained above, the Bureau's position that Congress has silently delegated to it the power to impose any substantive credit regulation that can be somehow tied to the goal of promoting "informed and voluntary" use of credit would arrogate to the agency vast authority over credit products. Accepting the Bureau's interpretation could "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Id.* at 324. If a 30-day waiting period can pass muster under the guise of promoting the "informed and voluntary" use of credit, almost any substantive restriction could be justified along similar lines. *Chevron* step two is "a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities" and "usurp undelegated policymaking discretion." *N.Y. Stock Exch.*, 962 F.3d at 557 (citation omitted). Because the Bureau's construction of TILA would leave the Bureau with significant, unconstrained authority over credit products without clear congressional authorization, its interpretation fails *Chevron*'s second step.

Finally, the 30-day credit linking ban cannot survive *Chevron* step two for the same reasons that the ban is arbitrary and capricious, as explained below. *See infra* pp. 35-36.

### C. The Bureau's Reliance On Dodd-Frank Authority Is Misplaced

The Bureau's perfunctory argument that § 5532(a) of Dodd-Frank independently authorizes the linking ban warrants little additional discussion. According to the Bureau, the ban—which it concedes (at 36) is "arguably 'substantive'"—may be upheld as a regulation that ensures "effective[] disclos[ure]" of the "features of [a] consumer financial product or service," 12 U.S.C. § 5532(a). For the reasons discussed above, however, the credit linking ban bears no relation to a traditional disclosure requirement. *See also* PayPal Br. 33 n. 7. And authority to adopt disclosure requirements does not "translate[] into a power to control" all aspects of consumer financial transactions. *Colorado River*, 466 F.3d at 139.

Moreover, like EFTA, TILA specifically addresses disclosure requirements regarding credit products; if the 30-day ban is not a permissible regulation under TILA, it cannot be justified under Dodd-Frank's general authority. An agency "cannot rely on its general authority to make rules … when a specific statutory directive defines the relevant functions of [the agency] in a particular area." *American Petroleum*, 52 F.3d at 1119. As with the Bureau's arguments relating to EFTA/Dodd-Frank above, the Bureau's general authority under Dodd-Frank cannot be used to make an end run around limitations under TILA. *See supra* pp. 3-14.

## III. THE PREPAID RULE'S HEIGHTENED REGULATORY REQUIREMENTS ARE ARBITRARY AND CAPRICIOUS AS APPLIED TO DIGITAL WALLETS

The Prepaid Rule is independently unlawful because the Bureau's decision to subject digital wallets to a more burdensome EFTA disclosure regime—and one designed for GPR cards—was arbitrary and capricious. *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) ("Agency action may be consistent with the agency's authorizing statute and yet arbitrary and capricious under the APA."); 5 U.S.C. § 706(2)(A). While the Bureau insists that arbitrary and capricious review is "'narrow'" and "'very deferential,'" CFPB Br. 40, such review is "not toothless," *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 54 (D.D.C. 2017), and the Court's task is not merely to "rubber-stamp agency decision-making," *American Paper Inst. v. Train*, 543 F.2d 328, 338 (D.C. Cir. 1976). Instead, the Bureau must demonstrate that it considered all of the relevant factors, "especially in highly technical cases" like this one, *American Paper*, 543 F.2d at 338, and reasonably explain "'why it chose to do what it did,'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).

Here, the Bureau wholly failed to justify lumping in digital wallets with GPR cards and subjecting them to regulation under the Prepaid Rule that goes far beyond the baseline provisions of Regulation E, which apply to traditional bank accounts. *See* PayPal Br. 33-40. From the start, the Bureau's rulemaking had one overriding objective: to address with heightened regulation the particular risks posed to consumers by GPR cards. *See infra* pp. 26-33; *see also* AR1 1-3, 243, 249-250. Along the way, however, the Bureau decided to sweep in digital wallets, and yet failed to marshal *any* evidence that digital wallets presented the same risks to consumers or to explain how the Rule's GPR-card-focused remedies were appropriate for digital wallets. The Bureau did not, for example, point to any relevant characteristics the two products shared beyond the capacity to hold funds—an unremarkable feature of any "asset account" covered by EFTA and subject to Regulation E's baseline requirements. Nor did the Bureau reference any digital-wallet-specific risks that would justify extension of a regime designed for GPR cards to a completely different product. In other words, the Bureau committed a fundamental category error that rendered both the short form disclosure requirement and the credit linking ban arbitrary and capricious as applied to digital wallets. The APA does not permit this type of "unreasoned decisionmaking." *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 487 (D.C. Cir. 2020).

### A. The Prepaid Rule Departs From Regulation E's General Disclosure Requirements

For more than forty years, EFTA and Regulation E have established protections for consumers who electronically transfer funds to and from accounts held with financial institutions. From its inception, Regulation E has applied to any "electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account." 12 C.F.R. § 1005.3(a). And Regulation E extends to financial products with the capacity to hold funds, including checking accounts, savings accounts, and payroll card accounts. *Id.* § 1005.3(b)(1), (3). Indeed, Regulation E covers *any* "consumer asset account" that is "held directly or indirectly by a financial institution" and that is "established primarily for personal, family, or household purposes." *Id.* § 1005.2(b)(1); *see also* 15 U.S.C. § 1693a(2) (EFTA definition).

Regulation E's baseline provisions apply to any covered asset account. Many of these provisions include general disclosure requirements that track the substantive disclosure requirements of EFTA. For example, under a section of Regulation E titled "Initial Disclosures," financial institutions must disclose, "as applicable," "[a]ny fees imposed by the financial institution for electronic fund transfers or for the right to make transfers." 12 C.F.R. § 1005.7(b)(5); *see also* 15 U.S.C. § 1693c(a)(4) (providers must disclose "to the extent applicable" "any charges for electronic fund transfers or for the right to make such transfers"). Likewise, institutions must provide "[a] summary of the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure for placing a stop-payment order." 12 C.F.R. § 1005.7(b)(7); *see also* 15 U.S.C. § 1693c(a)(5). Regulation E mirrors EFTA in requiring that these disclosures be "clear and readily understandable," but otherwise does not prescribe the layout, formatting, or verbiage. 12 C.F.R. § 1005.4(a)(1); 15 U.S.C. § 1693c(a) ("disclosures shall be in readily understandable language"). Instead, an appendix to Regulation E offers a series of optional model disclosures for institutions to use. 12 C.F.R. § 1005, App. A.

These basic disclosure requirements apply to *every* covered account under Regulation E, and until the Rule, the Bureau had departed from them only once.[8] The heightened requirements

[8] In 2012, the Bureau prescribed heightened disclosure requirements for remittance transfers. *See* 12 C.F.R. § 1005.31. These transfers had previously been subject to a patchwork of state regulation, because, prior to the Dodd-Frank Act amendments, EFTA excluded wire transfers, and even after those changes, other categories of transfers "believed to compose the majority of the remittance transfer market" "generally f[e]ll outside the scope of existing Regulation E." Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6195 (Feb. 7, 2012). To remedy this issue, the Bureau promulgated "general[]" requirements that set forth, for example, how certain information about remittance transfers is to be displayed for consumers, including what

of the Prepaid Rule's short form disclosure—with its mandate prescribing exactly what regulated parties must say, which fees (or lack thereof) must be disclosed, and even the visual format that must be used, *see* PayPal Br. 23-25 & n.5—represent a drastic departure from Regulation E's baseline requirements and looks nothing like any requirement promulgated in a half-century of agency rulemaking under EFTA.

### B. The Bureau Failed To Identify Any Risks Posed By Digital Wallets That Warrant Imposition Of A More Burdensome Regulatory Scheme

Putting aside whether the Bureau had the statutory authority to promulgate this unprecedented expansion of Regulation E's disclosure regime (it did not), the agency was still required by the APA to justify its actions—to explain why some products (*e.g.*, GPR cards, digital wallets) warranted more extensive and burdensome regulation and why the baseline requirements that apply to other covered accounts (*e.g.*, checking accounts) were insufficient. *See Amerijet*, 753 F.3d at 1350 ("agency must articulate an explanation for its action").

Here, the Bureau utterly failed to provide such a justification for digital wallets. It did not identify *any* risks posed by digital wallets that warranted application of an enhanced regulatory scheme designed to address risks posed by GPR cards. Instead, the Bureau's regulatory syllogism was this: (a) due to the circumstances in which they are acquired and used, GPR cards pose special risks warranting heightened regulation; (b) digital wallets, like GPR cards, can hold consumers' funds and allow consumers to make payments; (c) *ergo* digital wallets should be subject to heightened regulation too. That rationale cannot possibly satisfy the demand of reasoned decision-making under the APA—not least because it fails to meaningfully

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information is to be grouped together for the consumer's convenience. *See id.* § 1005.31(c); *see also* PayPal Br. 24-25 & n.5. Even these somewhat more exacting requirements are far more flexible than the Prepaid Rule, containing substantially fewer directives with respect to both content and format.

distinguish digital wallets from *any other product* covered by Regulation E (all of which can hold consumer funds). None of the Bureau's arguments to the contrary are availing.

*First*, the Bureau's concern (at 1, 42, 45) about whether the baseline protections of Regulation E applied to digital wallets is an irrelevant detour. PayPal has long maintained that digital wallets are "asset accounts" within Regulation E's ambit, even before the Prepaid Rule expanded it. As PayPal acknowledged in its complaint, "its activities are 'subject to federal … consumer protection law and regulations' including … Regulation E." Dkt. 1 at 18 (Compl. ¶ 43). PayPal also told the Bureau as much during the rulemaking process. *See* AR2 5862 ("Regulation E already applies to PayPal accounts"). To the extent the Bureau believed the issue was unsettled, it could have undertaken—with PayPal's support, *see id.*—a modest rulemaking to clarify matters. But a professed concern about Regulation E's applicability cannot logically justify the imposition of *additional*, heightened regulations on digital wallets—requirements that go far beyond those imposed by Regulation E on traditional bank products.

*Second*, the Bureau has never identified record evidence demonstrating that digital wallets pose the same risks to consumers that motivated the Bureau's regulation of GPR cards. That is not surprising. From the outset of the rulemaking, the Bureau focused on risks in how GPR cards are marketed, acquired, and used by consumers. *See, e.g.*, AR1 9. For example, the Bureau expressed concern about how GPR cards are displayed for purchase at retail stores: The cards are often displayed on physical "J-hooks" that offer providers "limited space in which to explain their product and disclose key features" or are sometimes "displayed behind a register, requiring a consumer to ask to see each product packaging individually." AR1 9-10. As a result, "only limited fee information on the outside of packaging for GPR cards" may be available, preventing consumers from "access[ing] comprehensive information about the card's fees and terms." AR1 316; *see also* AR1 245 (explaining that "various factors continue to negatively affect consumers' ability to make meaningful comparisons" between GPR cards); *id.* (describing consumers' inability to "review the full terms and conditions" of GPR cards before purchasing them and consumers' difficulties "disentangl[ing] themselves from their [GPR cards]"). Likewise, the Bureau described at length its concerns that some GPR cards offered linked "overdraft" credit which consumers could use, for a fee, once they had spent the funds loaded on to their GPR cards. *See* AR1 5-7, 13-15.

These concerns are irrelevant to digital wallets—which are not purchased in retail stores and whose very purpose is to link other credit and deposit accounts to facilitate consumer payments, *see* AR2 5862, 5865—and the Bureau pointed to no comparable risks that could justify applying the same enhanced regulatory scheme to both products. This gap is fatal: "Rules are not adopted in search of regulatory problems to solve," and "unless an agency's authorizing statute says otherwise, an agency regulation *must* be designed to address *identified* problems." *N.Y. Stock Exch.*, 962 F.3d at 556 (emphases added).

The Bureau effectively concedes that it failed to identify any risks specific to digital wallets, but asserts (at 45-46) that "even if the only 'problems' in the market involved other types of prepaid accounts," that poses no barrier to "extending the Rule's protections to digital wallets with asset accounts as well." Not so. Generic or theoretical industry risks do not, without more, justify applying the same regulatory regime to every part of the industry.

The recent decision in *Cigar Association of America. v. FDA*, 436 F. Supp. 3d 70 (D.D.C. 2020), illustrates the point. There, the FDA sought to apply a "health-warnings labeling regime" to *all* cigar products, despite evidence that *premium* cigars might "not pose the same public health concerns as mass-market cigars." *Id.* at 72-73. Makers of premium cigars pointed out, for example, that their customers had "far lower disease and mortality rates" than consumers of other cigar products, rendering warning labels "proposed for mass-market cigars … not warranted for premium cigars." *Id.* at 73. The court agreed, explaining that "[r]ather than analyzing the behavior of premium cigar consumers" or assessing "consumer understanding of the risks associated with premium cigar products," the FDA improperly relied on general "scientific studies" that contained "almost no discussion of the necessity for [the proposed] warnings for premium cigars." *Id.* at 86. And the court faulted the FDA for failing to explain why "concerns generally attendant to cigar or other tobacco consumption obtain with respect to premium cigars," criticizing the agency for failing to "cite any study indicating a lack of information about the health consequences of premium cigar use on the part of … premium cigar users" before extending the warning regime to those products. *Id.*

That reasoning controls here. The Bureau's identification of risks posed by GPR cards does not give it *carte blanche* to regulate any financial product that shares some feature with GPR cards. To apply the same additional regulatory requirements to digital wallets, the Bureau was required to provide a justification for doing so. But the Bureau points to no evidence suggesting that it analyzed the behavior of digital wallet users; evaluated consumers' understanding of fees (or lack thereof) charged by digital wallets; or reviewed any academic or scientific study so much as mentioning digital wallets. The Court is to "accord deference" to the Bureau's determination that "a problem exists within its regulatory domain," but that deference is "not a blank check," *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988), and here, the Bureau's failure to even attempt to understand how digital wallets are marketed, acquired, or used or to grapple with digital wallets as distinct products is not the product of reasoned decisionmaking.[9] At bottom, the Rule was premised on a series of risks that the agency

[9] The Bureau's contrary citations to authority (at 45-46) are not compelling. The Bureau's citation to *Cigar Association of America v. FDA*, 315 F. Supp. 3d 143 (D.D.C. 2018) is no longer good law. The D.C. Circuit reversed the district court holding on which the Bureau relies, concluding the agency there was *not*, in fact, permitted to "extrapolate[] from its experience with

identified pertaining to GPR cards. *See, e.g.*, AR1 245 ("[s]tructure of [t]ypical GPR [c]ard [p]rograms" could "expose consumers … to greater risks, such as potential losses resulting from … insolvency or malfeasance"). Because the Bureau can point to no evidence in the administrative record demonstrating that digital wallets posed those same risks, it has failed to justify applying the same enhanced requirements to both products.[10]

*Third*, having failed to identify any digital-wallet-specific risks, the Bureau attempts (at 41-42) to justify treating (and regulating) digital wallets like GPR cards because they both permit a consumer to "load funds," "use those funds to make purchases," and "reload more funds later." That is also no basis to apply the Rule's burdensome mandates to digital wallets.

For one, those features do not meaningfully distinguish digital wallets from other "asset account[s]" that are subject to baseline Regulation E protections. 12 C.F.R. § 1005.2(b)(1). A checking account, for instance, permits consumers to "load funds" into their accounts (via an in-branch deposit, direct deposit, etc.), "use those funds to make purchases" (*e.g.*, via debit cards),

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other … products," *id.* at 161, and that it was required to independently meet its legal obligations with respect to each class of products, *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56 (D.C. Cir. 2020). The Bureau's other cases are also distinguishable. In *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257 (D.C. Cir. 2014), the court permitted the government to infer that disparities in the employment of disabled individuals existed among government contractors because they existed among the general workforce, but plaintiffs never attempted to demonstrate that this inference was unreasonable. And in *Associated Dog Clubs of N.Y. State, Inc. v. Vilsack*, 75 F. Supp. 3d 83, 92 (D.D.C. 2014), a case where the court upheld a regulation applying to small and large online pet sellers even though the "agency had only received" specific reports of "mistreatment by large online sellers," the court also had before it information suggesting "concerns about unregulated Internet breeders generally." Here, the Bureau had no information before it suggesting concerns with digital wallet providers—generic or specific.

[10] The Bureau excuses (at 44) its lack of evidence or data by claiming that regulating digital wallets with GPR cards was just a "policy judgment" that does not "requir[e] evidence." This makes little sense—the issues of how digital wallets are marketed, acquired, or used and whether those products create genuine risks for consumers that justify heightened regulation—are undoubtedly empirical questions of fact that do require evidence to assess. It would be a startling proposition if an agency could invoke a "policy judgment" rationale to subject a whole class of products to regulation absent any evidence of a problem to remedy.

and "reload more funds later" (via additional deposits). And yet electronic fund transfers for checking accounts are subject only to baseline Regulation E requirements. In fact, these features appear to be shared by *every product* subject to baseline regulation under Regulation E. Thus, the ability to store funds, standing alone, cannot justify the application of heightened regulatory requirements such as the short form requirement and the 30-day ban on credit linking.

Similarly, the Bureau vaguely contends (at 43-44) that GPR cards and digital wallets are "sufficiently similar … to warrant consistent regulatory treatment." But as PayPal explained during the rulemaking, digital wallets and traditional GPR cards are "fundamentally different" products with wholly "different consumer use cases." AR2 5862; *see also* PayPal Br. 33-34 (explaining that the two products have "different functionalities, consumer uses, and business models"). The Bureau admits as much, acknowledging (at 43) that there are key "differences" between the two products, namely that digital wallets "tend[] to charge fewer fees" and that consumers are "less likely to use them as a substitute for a checking account." But despite the Bureau's acknowledgment that consumers might not use the balance-holding function of a digital wallet "at all," CFPB Br. 43, it nevertheless seized on that feature to rationalize applying the same regulatory scheme to two otherwise dissimilar products. This was error, and because the Bureau "failed to give adequate consideration" to the "obvious and substantial differences" between the two regulated products, its decision to lump them together does not constitute "reasoned decisionmaking." *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 824 (D.C. Cir. 1983).

Similarly, the Bureau fails to meaningfully answer PayPal's argument (at 14, 36-37) that the Rule was designed with GPR cards (and not digital wallets) squarely in mind. For example, the administrative record is replete with references to how the in-store acquisition process motivated the format and content of the short form disclosure. *See, e.g.*, AR1 945 (describing the testing of various disclosures "on the backs of prepaid card package prototypes"); AR1 946 (describing "shopping" simulations in which consumers were asked to compare prepaid cards "hanging on a vertical surface"); AR 391 (noting that the short form disclosure's "size requirements will ensure that consumers can read and understand the disclosures … while also accommodating the existing packaging constraints for prepaid accounts sold at retail locations"). And as the contractor the Bureau hired to assist it with designing the short form disclosure explained, this was no accident: The Bureau's rulemaking effort was keyed to "decid[ing] how information about the cost and features of [prepaid card] products … c[ould] most effectively be disclosed to consumers, *particularly in retail stores*." AR1 862 (emphasis added).

The Bureau's focus on GPR card users is also evident in the design of the 30-day credit linking ban. As the Bureau repeatedly highlighted, many consumers opt for prepaid accounts like GPR cards because they are "safer and easier" to use than "checking accounts with overdraft." AR1 465. GPR cards, the Bureau posited, permit "consumers to control their spending": If there are not sufficient funds on the GPR card to cover the full amount of a transaction, it simply will not be processed, and the consumer incurs no debt. *Id.* Adding an "overdraft" feature to a prepaid account alters this calculus, and the Bureau promulgated the 30-day ban to "prevent consumers from being pressured to make a decision on *overdraft credit* when acquiring the prepaid account." AR1 467 (emphasis added); AR1 295 (linking overdraft protection to a GPR card "cause[d] a significant transformation" to the product and the 30-day ban "ensure[d] that consumers [we]re fully aware of the implications" of their actions). In other words, it was the Bureau's concern with customers being rushed into linking overdraft credit to a product (GPR cards) they likely obtained to *avoid* any overdraft feature that was the premise of the 30-day ban. That rationale has nothing to do with digital wallets, which consumers obtain for the express purpose of linking their payment credentials, including credit cards obtained months or years before the acquisition of the wallet, to make purchases.

In its response (at 47-48), the Bureau points to no similar effort to understand how or why digital wallet consumers acquired their accounts, whether they comparison shopped before selecting an account, whether they shared GPR card users' concerns about overdraft, or whether any of the fees mandated in the short form disclosure were relevant to consumers' decision to obtain a digital wallet. Instead, the Bureau simply asserts (at 47)—without any evidence—that one-size-fits-all regulation is appropriate: Despite being designed in a retail context, the short form requirement is just as "useful" if a prepaid product is acquired "online, over the phone, [or] through some other channel." But the APA requires "reasoned explanation," *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), for why an agency has chosen to act in a specific way. Here, the Bureau offers no reasoned explanation for why a disclosure designed to aid consumers in selecting a GPR card in a retail context has applicability to a wholly different product obtain in a wholly different way, and it offers no reason why a cooling-off period designed to protect GPR card users from haphazardly connecting overdraft credit to their accounts has any applicability to digital wallet users who do not share the same concerns about the use of credit.

### C. The Bureau's Fundamental Category Error Infects The Short Form Disclosure Requirement And The Credit Linking Ban

Due to the profound errors outlined above, the Bureau applied an ill-fitting regulatory regime designed for GPR cards to digital wallets without adequate justification. The short form disclosure mandate and credit-linking ban underscore the irrationality of the agency's approach.

**1.** As PayPal has explained (at 37), the Rule forces digital wallet providers to present their customers with a prescriptive disclosure outlining fees that, although germane to how GPR cards work, do not reflect the features of digital wallets and that digital wallet consumers (rightly) do not expect to encounter. As PayPal informed the Bureau during its rulemaking, this leaves digital wallet users "confus[ed] and alarm[ed]" about the fees they should expect to pay when using their products. AR2 5880. The Bureau's failure to grapple with this issue is fatal under the APA. As the D.C. Circuit recently held, "informing consumers about a price that … customers will almost never pay, and that they are unlikely to understand, unlashes [a mandated] disclosure from its claimed administrative mooring." *Merck*, 962 F.3d at 539–540.

The Bureau answers (at 49) that claims of customer confusion prompted by the short form disclosure "strain[] credulity." But the idea that government-compelled disclosures relating to incidental aspects of a product that have very little, if anything, to do with how consumers acquire or use a product will confuse consumers is common sense. And the Bureau's inability to grasp this problem underscores its unjustified dismissal of PayPal's concerns. For example, a "cash reload" fee may mean one thing to a GPR card user—likely the cost of "reloading" cash on the card, as she initially did at purchase—but can imply something very different and confusing to a digital wallet user, who does not usually deal in literal "cash" but *does* use the wallet to access funds from linked accounts and occasionally to receive peer-to-peer payments from friends and family members. Likewise, the Bureau's assurance (at 49) that "nearly all participants understood that 'N/A' meant a feature was not offered and that '$0' meant a feature was free" misunderstands the problem. It is not that digital wallets users are unable to discern what "$0" or "N/A" means; it is the very presence of inapplicable fee disclosures that is confusing and misleading. Just as a hiker in the Alleghenies is likely to be disoriented by a sign that reads "Grizzly Killings: 0" and wonder precisely what she is getting into, so too a potential digital wallet customer who sees "Monthly Fee: $0" might reasonably worry that such fees are typical or that PayPal plans to charge them in the future. If her concern is great enough, she might even abandon the sign-up process entirely. The Bureau's failure to grasp and, more importantly, address these predictable consequences of its ill-fitting regime warrants vacatur as to digital wallets.[11]

**2.** The Rule's 30-day linking ban also flunks APA review, because, as PayPal explained in its opening brief (at 37-38), the ills the ban seeks to address have nothing to do with how digital wallet users acquire and link their digital wallet and credit products.

The Bureau's asserted rationale (at 50-51) for this provision—consumers should not be herded from one financial product (a prepaid account) to another (a linked overdraft credit feature) without being offered time to understand how those two products interact—does not apply to digital wallets. Most fundamentally, the mechanics are completely reversed: Digital wallet users generally obtain a credit product first and then obtain a digital wallet to store and deploy that credit product's credentials. AR2 5864-5865. The Bureau points to no evidence whatsoever that digital wallet consumers are harmed by the ability to seamlessly link their preexisting credit products to their digital wallets (products that were subject to TILA protections when acquired), nor does it direct the Court to any record citations for its assertion that, without the 30-day ban, digital wallet users would be unable to understand the consequences of linking

[11] PayPal has, in fact, received an avalanche of complaints from consumers expressing uncertainty and alarm based on the mandated disclosures. *See, e.g.*, Dkt. 1 at 6-7 (Compl. ¶ 9) ("Seems like there's a fee for any way you use your money … I don't understand this new rule."); *id.* ("It sounds like there will be more fees than there was. It was unclear if I can still transfer to my bank without a charge."); *id.* ("Why do I have to have all these terms and conditions for a small amount of money in my [P]ay[Pa]l account?"); *id.* ("I'm not sure if you are going to charge me to hold the money & then the next time I pay with [P]ay[P]al, use it. Would that be free?"). These "[s]ubsequent events have borne out" PayPal's prediction that the Rule would confuse consumers. *Wold Commc'ns, Inc. v. FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984) (Ginsburg, J.). What is more, PayPal would have submitted evidence of just this type had the Bureau properly invited comment on its after-the-fact decision to ratify the Rule following *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

their two products. Indeed, the ability to link a credit feature to a digital wallet is part of the fundamental use case of a digital wallet. AR2 5864. If the Bureau is going to impose a burdensome cooling-off period before consumers can use their financial products as they are intended to be used, it is required to identify risks that warrant the cooling-off in the first place. It failed to do so here.[12]

## IV. THE BUREAU'S COST-BENEFIT ANALYSIS IS DEFICIENT

In creating the Bureau under the Dodd-Frank Act, Congress imposed a significant constraint on the agency's rulemaking authority—namely, that the Bureau "shall consider … the potential benefits and costs to consumers" of any proposed regulation with attention to the "potential reduction of access by consumers to consumer financial products … resulting from" the regulation. 12 U.S.C. § 5512(b)(2).[13]

In the rulemaking below and in its brief before this Court (at 51-56), the Bureau brushes aside this limitation on its authority. As the Bureau sees it, it does not matter that its cost-benefit analysis regarding the 2016 Rule failed to mention digital wallets, much less quantitatively or qualitatively calculate the benefits and costs of regulating them. *See* AR1 577-614. Nor does it matter, the Bureau says, that it did not grapple with comments from PayPal and others explaining why the Bureau's "regulate first, ask questions later" approach would dampen innovation in the

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[12] The Bureau's retort (at 50) that consumers confused or frustrated by the 30-day waiting period need only choose a different type of digital wallet product to circumvent the linking ban carries little weight. Even putting aside the Bureau's curious suggestion that consumers should obtain an unregulated product to avoid a burdensome requirement connected to a regulated product, the Bureau response serves to artificially slice digital wallet products into categories based on limited sets of characteristics. This chills industry innovation in the space, *see infra* p. 41, and punishes digital wallet providers for offering consumers products with multiple features.

[13] As the Bureau recognizes (at 52-53 n. 10), its organic statute "requires it to consider the costs and benefits for the rules it promulgates." This is true even if EFTA does not include an additional cost-benefit analysis mandate that applies to the Bureau's rulemaking activities here.

electronic payments sphere. The Bureau's threadbare discussion of the costs and benefits of regulating digital wallets demands vacatur of the Rule. *See Business Roundtable v. SEC*, 647 F.3d 1144, 1148-1149 (D.C. Cir. 2011).

### A. The Bureau All But Ignored The Costs And Benefits Of Subjecting Digital Wallets To Heightened Regulation

The most glaring deficiency with respect to the Bureau's cost-benefit analysis regarding digital wallets is its absence. As PayPal has argued (at 41-42), and the Bureau concedes (at 53), the Bureau's 37-page cost-benefit analysis in the preamble to the 2016 Rule does not mention "digital wallets." That oversight is conspicuous given that payroll card and government benefit accounts—both ancillary products that, like digital wallets, differ from the paradigm of GPR cards that motivated the rulemaking—received robust attention in the cost-benefit analysis section, with multiple pages devoted to each. *See, e.g.*, AR1 578-579, 589-590.

In its defense, the Bureau maintains (at 52-53) that it did "address the benefits and costs" of regulating digital wallets, pointing to two paragraphs in a nearly 700-page *Federal Register* preamble and final rule that were "incorporated … by reference" in the cost-benefit analysis. Whatever the propriety of satisfying § 5512(b)(2) by incorporating the preamble without specific attention to § 5512(b)(2) factors, the Bureau's incorporation argument gets it nowhere, as its two citations do not come close to satisfying its cost-benefit analysis obligations.[14]

[14] The Bureau attempts (at 52) to shield its errors from review—relying on cases that, unlike here, did not involve a statutory obligation to consider costs and benefits—by claiming this Court may not "substitute [its] judgment for that of the agency." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003). That is true, but irrelevant. A reviewing court is also not required to "tolerate rules based on arbitrary and capricious cost-benefit analyses," *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007), or cost-benefit analyses that "g[i]ve no explanation for [a] failure" to account for critical information, *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007).

The first citation (AR1 272-273) refers to a paragraph summarizing arguments that PayPal and others made regarding the differences between digital wallets and GPR cards. It contains no analysis by the Bureau. And the Bureau's second citation (AR1 277-278) encompasses a single relevant paragraph that asserts the Bureau "is not persuaded by … objections to [its] proposal to cover digital wallets that can hold funds under the definition of prepaid account." AR1 278. Even credited at face value, this paragraph hardly counts as cost-benefit analysis: It contains no reasoned assessment of the benefits and costs of subjecting digital wallets to regulation under the short form disclosure mandate or the credit linking ban; it cites no evidence, anecdotal or empirical, in support of the claims made; and it fails to attempt to quantify the costs and benefits of regulation or to explain why quantification is not possible. It is textbook *ipse dixit*. If such conclusory analysis were sufficient, the Bureau's cost-benefit obligations would be a dead-letter.

What is more, even if the paragraph could forgivingly be considered cost-benefit analysis, the rationality of the analysis collapses on inspection. The Bureau first claims that because "digital wallets … can hold funds," "consumers who transact using digital wallets deserve the same protections as consumers who use other prepaid accounts." AR1 278. But, as explained elsewhere, the Bureau ignored record evidence that consumers do not acquire digital wallets to "hold funds" and they do not meaningfully use digital wallets in that manner. *See* PayPal Br. 14-15; *supra* pp. 27-33. Nor did the Bureau even investigate or establish existing regulations or practices with respect to digital wallets to assess whether new "protections" were needed. The Bureau next claims that a "digital wallet could fall victim to erroneous or fraudulent transactions," AR1 278, concerns Regulation E guards against. But, again, the Bureau cites no evidence that this is a real-world problem with respect to digital wallets. More importantly, while this concern might justify clarifying that Regulation E's baseline obligations apply to digital wallets (as PayPal has long agreed), it provides no justification for subjecting digital wallets to the burdensome short form disclosure mandate and 30-day credit linking ban. *See supra* pp. 26-33. Finally, the Bureau asserts that although "most digital wallets … do not typically charge many fees … it is impossible to rule out that existing or new digital wallet providers will charge such fees in the future." AR1 278. This is sheer speculation unconnected to any record evidence, and this flimsy rationale is self-evidently not a serious evaluation of the costs and benefits of subjecting digital wallets to a complex, burdensome regulatory regime.

Perhaps recognizing that these two paragraphs will not carry the day, the Bureau argues (at 53) that it had no obligation to "separately discuss the benefits and costs of applying [the Rule] to each specific type of product that the [R]ule covers." Instead, the Bureau argues (at 54), a "general discussion" of the Rule's overall "benefits and costs" should "appl[y] equally" to all of its regulated products. This is doubly wrong.

To begin, the Bureau cites (at 53) only one case in support of its claim that it can ignore whole classes of products in assessing the costs and benefits of regulatory action. But in that case the organic statute (the Tobacco Control Act) contained no "requirement that costs be taken into account," *Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 401 (D.D.C. 2017), and the court emphasized the agency had in fact "separately address[ed] the costs to each of the regulated product categories," *id.* at 407. Here, not only is the Bureau subject to a robust statutory cost-benefit analysis requirement, but § 5512(b)(2) obligates the agency to consider, among other things, "the potential reduction of access by consumers to consumer financial products"—an inquiry that necessarily demands attention to different "products."

In addition, the Bureau's premise that a general discussion of costs and benefits of regulating prepaid accounts can substitute for a product-specific analysis makes sense only if products are meaningfully similar. The administrative record here demonstrated that GPR cards and digital wallets are not similar in relevant ways, as they differ in acquisition, functionality, funding, and business model. *See* PayPal Br. 14-16. The Bureau simply failed to confront those distinctions and contrary record evidence in its rush to force digital wallets into a regime designed for GPR cards. *See supra* pp. 26-33.

Lastly, the Bureau contends (at 53) that this objection does not apply to the 30-day credit linking ban because the agency purportedly did "address the benefits and costs of that provision for covered digital wallets specifically in the 2018 amendments to the Rule." That is incorrect. The Bureau's 2018 cost-benefit analysis "evaluate[d] the benefits, costs, and impacts of this final rule [that is, the amendment to the 2016 Rule] relative to the baseline established by the [2016] Rule." AR1 790. In other words, the Bureau compared the costs and benefits of moving from a world governed by the 2016 Rule (including the initial version of the credit linking ban) to a world governed by the amended rule (including the amended linking ban). Nowhere in that analysis did the Bureau assess the *relevant* question of whether the benefits outweighed the costs of subjecting digital wallets to the credit linking ban in the first place.

### B. The Bureau Unreasonably Disregarded The Unique Costs That The Rule Imposes On Digital Wallets

Because the Bureau did not undertake the required cost-benefit analysis, it failed to grapple with the specific harms that the Rule would inflict on digital wallets. This was error.

Out of the gate, the Bureau misunderstands (at 55-56) PayPal's position during the comment period (AR2 5880-5881) that the short form disclosure would "confuse and alarm" customers. The issue is not that PayPal's customers would be unable to interpret the factual information contained in the disclosure if they encountered it in a digital context rather than a brick-and-mortar retail store. Instead, the problem is that customers will be confronted by a series of unexpected disclosures that—even if presenting purely factual information about fees that PayPal did not charge—by their very presence "rais[e] unnecessary questions" about what fees consumers should expect to encounter. AR2 5880. The Bureau disparages this commonsense point (at 56), suggesting that there is no reason that customers should have "trouble understanding that '$0' meant a service was free." But context matters, as discussed above. *See supra* pp. 33-35. A diner confronted with a menu disclaimer that there are "0 flies in her soup" might comprehend the factual content of the disclaimer yet still opt for the salad.

The Bureau also breezily disregards (at 55) comments from others in the electronic payments community by asserting that the fears they expressed about the chilling effect the Rule will have on innovation were too "nonspecific" and "'conclusory'" to warrant a response. Not so. Google, for example, explained that the "development and adoption of [digital wallet] technology [wa]s still in its infancy," and called on the Bureau to "tread lightly in regulating digital wallets" because their "technology change[d] almost daily." AR2 5267-5268. This was a concrete alternative—hold off on regulating a nascent and evolving industry to avoid dampening innovation and investment—and the Bureau was required to respond. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). And Financial Innovation Now, a group of leading technology companies including PayPal, made a similar point, explaining that the digital wallet marketplace was marked by "continued innovation" that required the Bureau "to give further consideration to … the treatment of digital wallets." AR2 10434-10435. This failure to "consider and respond to the material comments and concerns that [we]re voiced" demands vacatur of the Rule. *Make The Rd. N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020).

In short, in imposing uniquely prescriptive and burdensome regulation on a nascent and fast-evolving digital financial product, the Bureau was statutorily required to offer at least *some* quantitative or qualitative assessment of the "costs" of regulation for digital wallets as well as the "benefits." 15 U.S.C. § 5512(b)(2). The Bureau's failure to do so, and its failure to respond reasonably to comments explaining why the Rule would threaten "access by consumers" to innovative financial products, renders the Rule arbitrary and capricious and contrary to law. *Id.*

## V. THE PREPAID RULE VIOLATES THE FIRST AMENDMENT

Finally, the short form disclosure mandate violates PayPal's First Amendment rights, forcing PayPal to communicate a scripted, misleading series of statements that will confuse customers (and potential customers) while simultaneously prohibiting it from effectively offering customers contextual information necessary to dispel that confusion. *See* PayPal Br. 51-52.

The Bureau's defense of the disclosure mandate is unpersuasive. As an initial matter, the Bureau is incorrect (at 57-58) that the disclosure mandate need only meet the more forgiving standard for compelled commercial speech outlined in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), rather than a heightened level of scrutiny. *Zauderer* applies only where the government mandates disclosure of "purely factual and uncontroversial information about the terms under which … services will be available." *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). That is not the case here. As PayPal has explained (at 4, 5, 15, 43, 44, 47), the disclosure mandate is factually divorced from the conditions under which consumers encounter and use digital wallets and thus confuses consumers about the "terms under which … services will be available." *See supra* pp. 33-35.

As applied to PayPal, the mandate bears little resemblance to typical compelled commercial disclosures. It prescribes (1) the fees to disclose—even if those fees are nonexistent and not germane to digital wallets; (2) disclosure of the highest possible fees, without regard to whether that fee would ever be imposed; (3) the order of the fees; and (4) what font and how many pixels to use. Further, the mandate prohibits saying anything more within the short form, even if additional language would better inform consumers. In other words, the requirement compels PayPal to recite the script pre-approved by the Bureau for a different product in the manner pre-approved by the Bureau without any additional information not approved by the Bureau.[15]

This compelled disclosure is properly subject to heightened First Amendment review. Regulations that "target speech based on its communicative content," such as the Rule's disclosure mandate, are "presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This standard applies to regulations that require delivery of a "government-drafted script." *NIFLA*, 138 S. Ct. at 2371. Commercial speech regulations are typically "no exception." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

Even under intermediate scrutiny, the government "must do more than simply 'posit the existence of the disease sought to be cured'"; "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the [law] will … alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Here, the absence of real-world evidence of consumer harm from digital wallets is dispositive because, under the First Amendment, "mere speculation or conjecture" will not suffice: The Bureau must "demonstrate that the harms it recites are real." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). Even if the Bureau's speculative reasons for applying the short form mandate to digital wallets were enough under the APA, those justifications are surely insufficient under the First Amendment.

[15] The Bureau argues (at 59) that PayPal has offered no evidence to support the point that repeatedly disclosing "$0" for fees that do not exist and are not germane to digital wallets will confuse consumers. But evidence of this problem is far from theoretical. *See supra* p. 35 n. 11.

Finally, even if *Zauderer* applied, the short form requirement may not be constitutionally applied to PayPal. Under *Zauderer*, a disclosure must be "reasonably related" to a government interest and not "'unduly burdensome' in a way that 'chill[s] protected commercial speech.'" *American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26, 33 (D.C. Cir. 2014). Furthermore, a mandated disclosure must "remedy a harm that is 'potentially real not purely hypothetical,' … and extend 'no broader than reasonably necessary.'" *NIFLA*, 138 S. Ct. at 2377. As explained above, the Bureau cannot satisfy that standard.

Citing out-of-circuit precedent, the Bureau claims that disclosure requirements—as opposed to speech restrictions—do not require that the government provide "evidence or empirical data" supporting the disclosure or demonstrating that "the harms" "are real." CFPB Br. 58-59 n. 12 (citing *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 97-98 (2d Cir. 2010)). But assuming the distinction survives *NIFLA*, *see* 138 S. Ct. at 2377 ("Our precedents require disclosures to remedy a harm that is 'potentially real not purely hypothetical'"), the short form mandate is not merely about disclosure. It consists of a compelled speech requirement *and* a prohibition against saying anything that is not government-approved within the tabular disclosure—a speech restriction. The Bureau responds (at 59) that PayPal is free to provide any speech it feels is necessary to clarify the compelled disclosures *outside* the short form box, but that is cold comfort: The short form disclosure was explicitly designed to focus consumers' attention on the information presented there at the expense of any information that might be provided elsewhere. In other words, the speech compelled by the Bureau is displayed prominently while the information PayPal wishes to convey to counteract the confusing effects of the compelled speech is relegated to the "fine print."

Finally, the Bureau errs in arguing (at 58-59) that a theoretical interest in informing consumers about products, without more, satisfies heightened First Amendment review. The

Bureau forgets that a predicate for regulating speech is evidence of harm absent regulation. That principle is fatal here because the Bureau points to *no* evidence that it evaluated what disclosures digital wallet providers were already making to consumers before the Rule was promulgated, much less that those disclosures were inadequate. The Bureau appears to assume that the only way consumers can be informed about a product is through regulatory fiat. That premise, of course, is at war with the First Amendment, which embodies the principle that the key to informed consumers (and citizens) is free speech, not government restraint. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("'The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.'").

## CONCLUSION

For the foregoing reasons, the Court should vacate the Rule, declare the Rule unconstitutional as applied to PayPal, and enjoin its enforcement against PayPal.

Dated: August 21, 2020

Respectfully submitted,

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