IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAYPAL, INC., 2211 North First Street San Jose, CA 95131, *Plaintiff,* v. CONSUMER FINANCIAL PROTECTION BUREAU, 1700 G Street NW Washington, DC 20552, and KATHY KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau, 1700 G Street NW Washington, DC 20552, *Defendants.*	Civil Action No. 19-3700 (RJL)

MEMORANDUM IN SUPPORT OF
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INTRODUCTION

Plaintiff PayPal, Inc. brings this action challenging a Consumer Financial Protection Bureau ("CFPB" or "Bureau") rule that imposes onerous regulations on providers of "digital wallets." A digital wallet is an Internet-based financial product that allows consumers to electronically store and access various payment credentials (for example, credit card or debit card credentials) for use in online transactions. PayPal is a major provider of digital wallet products and a global leader in facilitating innovative digital and mobile payments on behalf of consumers and merchants.

Effective last year, the Bureau implemented the "Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)" Rule ("the Prepaid Rule," "the Final Rule," or "the Rule").[1] The Prepaid Rule was the result of a long-running CFPB initiative to regulate "prepaid cards," also known as "general purpose reloadable cards" ("GPR cards"). GPR cards are typically plastic cards that consumers acquire at brick-and-mortar retailers, load with cash, and use to pay for purchases.

Despite extensive record evidence that GPR cards differ from digital wallets in fundamental ways, the Bureau—with scant explanation—chose to sweep *both* products into a single regime regulating "prepaid accounts." The Rule identified no evidence of consumer harm in the context of digital wallets that demanded any regulatory fix. Instead, the Bureau seized on an immaterial overlap—the fact that both products (like a great many financial products) are

[1] References to "the Rule" correspond to several related final rules that collectively implement the regulations at issue here. *See* AR1 240-693 (Nov. 22, 2016) (Final Rule); AR1 698-704 (Apr. 25, 2017) (delaying implementation of the Final Rule by six months); AR1 743-828 (Feb. 13, 2018) (amending the Final Rule and delaying its implementation until April 1, 2019). Citations to volume 1 of the Administrative Record ("AR") are denoted "AR1," and citations to volume 2 of the AR are denoted "AR2."

capable of holding consumers' funds—to justify its action. The result of these missteps was to impose on digital wallet providers and consumers a prescriptive set of regulations fundamentally designed for GPR cards—despite repeated warnings from digital wallet providers that the Rule's requirements were ill-suited to consumers' acquisition and use of digital wallets. In particular, the Rule required a prescriptive, one-size-fits-all fee disclosure designed entirely around the fees charged by GPR cards that was likely to significantly confuse digital wallet customers about the fees (or lack of fees) applicable to their products. The Bureau also imposed, based on GPR-card-related concerns, a 30-day ban on digital wallet consumers' ability to link their accounts to certain credit cards, including cards the consumers had previously or independently acquired, thus frustrating their use of a core digital wallet feature. These actions were contrary to law under the Administrative Procedure Act ("APA") for several reasons, each of which requires the Court to set aside the Final Rule.

First, the Bureau exceeded its statutory authority in mandating that digital wallet providers use the highly prescriptive fee disclosure form designed for GPR cards. This "short form" disclosure requires providers to convey fee information in a specified order and format using specified language, prohibits clarifying annotations, and even prescribes the allowable font size, down to mandating the number of *pixels* providers must use. Dictating that providers use a specified disclosure form goes well beyond the rulemaking authorization set forth in the relevant statute, the Electronic Fund Transfer Act ("EFTA"). EFTA merely authorizes the agency to "issue model clauses for *optional* use by financial institutions," 15 U.S.C. § 1693b(b) (emphasis added); it does not allow the Bureau to *require* the use of a particular model form, especially one as highly prescriptive as the disclosure mandated by the Bureau here. The Bureau's limited authority reflects a congressional policy, embedded in EFTA's structure, to allow institutions flexibility in making any disclosures required under EFTA and its implementing regulations.

The Bureau's short form requirement contravenes EFTA's express limitation and upends that congressional policy; it therefore exceeds the Bureau's authority and warrants vacatur. 5 U.S.C. § 706(2)(C); *see also* Dkt. 1 at 31-32 (Compl. ¶¶ 79-86).

Second, the Bureau exceeded its statutory authority by imposing the 30-day ban on linking certain credit products to any newly acquired prepaid account, including digital wallets. The Bureau cited the Truth in Lending Act ("TILA") as authority to impose the temporary ban, but TILA does not empower the Bureau generally to restrict consumers' acquisition or use of credit. *See* Dkt. 1 at 32-34 (Compl. ¶¶ 87-93). Instead, TILA is a *disclosure* statute that aims to promote consumers' "informed use of credit" by requiring lenders to disclose credit terms and conditions. 15 U.S.C. § 1601(a). The Bureau's prohibition here is a *substantive* restriction on consumers' use of credit, as it restricts digital wallet consumers from linking their own independently acquired credit cards to their digital wallets; the restriction cannot be justified as a requirement that merely promotes the "informed use of credit."

Third, in subjecting digital wallets to a regulatory regime designed for GPR cards, the Bureau made a fundamental category error that was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A); Dkt. 1 at 34-36 (Compl. ¶¶ 94-102). From the start, the Bureau's rulemaking initiative was driven by policy concerns about GPR cards—their rapid growth, potential regulatory gaps, and the fees consumers incur. Indeed, the Bureau's advance notice of proposed rulemaking failed even to *mention* digital wallets. The result was a rule crafted for GPR cards—one that (1) requires disclosure of the types of fees usually charged by GPR cards (but not digital wallets); (2) mandates a "short form" disclosure designed to help consumers shop for plastic GPR cards in retail locations (not consumers acquiring digital wallets online); and (3) temporarily prohibits the linking of credit accounts that might serve an "overdraft" function (a concept ill-suited to digital wallets holding credit or debit card and bank account credentials).

Indeed, and quite remarkably, the Bureau applied this broad regulatory regime to digital wallets without even analyzing whether digital wallets presented any of the concerns that animated the rulemaking in the first place. The Bureau's failure to justify this regulatory mismatch was arbitrary and capricious, and the Court should set the Rule aside.

Fourth, the Bureau neglected its statutory obligations under the APA, EFTA, and the Dodd-Frank Act to perform a reasoned cost-benefit analysis to justify the Rule. In addition to the general duty that the APA imposes on agencies to consider the consequences of their actions, *see Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015), EFTA and the Dodd-Frank Act both expressly command the Bureau to perform a rigorous cost-benefit analysis. *See, e.g.*, 15 U.S.C. § 1693(a)(2) (EFTA); 12 U.S.C. § 5512(b)(2) (Dodd-Frank). The Bureau failed to satisfy those statutory requirements here, as the Bureau did not appropriately consider either the costs to digital wallet providers of complying with the Prepaid Rule or the Rule's stifling of innovation in the digital wallet space and the reduction of consumers' abilities to access the benefits of such products. Dkt. 1 at 37-38 (Compl. ¶¶ 103-110). Indeed, the Bureau's cost-benefit analysis of the short form disclosure mandate does not mention the term "digital wallet" at all, much less grapple with concerns that the Rule would "confuse and alarm" consumers by forcing providers to disclose largely irrelevant and inapplicable fees tailored to an entirely different product. AR2 5880; *see also* AR2 5860-5890 (PayPal Comment Letter (Mar. 23, 2015)). This mistake, too, demands vacatur of the Rule.

In addition, the Rule violates the First Amendment because it commands PayPal to make misleading and inapplicable disclosures to its customers and restricts it from offering relevant clarifying context regarding the mandated disclosures. Under the Rule, PayPal must highlight to consumers the highest possible fee amounts even if, in the vast majority of cases, PayPal customers will pay lower fees or no fees at all. Compounding concerns with that compelled speech, PayPal is not permitted to provide customers, within the short form disclosure, the information necessary to accurately describe the fees they might actually encounter. The Rule thus at once compels and restricts speech of digital wallet providers in ways that are very likely to confuse consumers about the nature of PayPal's product. The Bureau has identified no substantial interest to justify this type of presumptively unconstitutional content-based speech restriction, nor has it demonstrated that applying the short form disclosure requirement to digital wallets is reasonably related to its regulatory interests. *See* Dkt. 1 at 39-41 (Compl. ¶¶ 111-117). Accordingly, the Court should vacate the Rule or enjoin the enforcement of the Rule as applied to PayPal and declare its application to PayPal unconstitutional.

BACKGROUND

I. THE ROLE OF DIGITAL WALLETS IN THE FINANCIAL TECHNOLOGY ECOSYSTEM

For nearly two decades, PayPal has been the leading provider of an innovative financial product: the digital wallet. *See, e.g.*, AR2 5860. Like its physical counterpart, a digital wallet electronically stores a consumer's payment credentials. In registering for a digital wallet—a process that takes place entirely on the Internet—a consumer may elect to connect (or "link") a digital wallet with one or more traditional payment devices (or "funding instruments") including credit cards, debit cards, and bank accounts. AR2 5862, 5868, 5874. The payment credentials uploaded by the consumer—such as account numbers, expiration dates, and personal identifying information—are securely stored in the digital wallet just as a credit card might be stored in a physical wallet. AR2 5862. Later, when a consumer wishes to use a particular payment method to make a payment or to transfer funds, the digital wallet provider accesses the relevant credentials on the consumer's behalf and effects the transaction. AR2 5868. The counterparty never views or accesses the payment credentials; a digital wallet provider like PayPal handles the entire process, effecting the transaction without revealing the consumer's sensitive payment information to the merchant or entity on the other side of the exchange. In this way, digital wallet providers serve as trusted intermediaries between the consumer and anyone—friends, merchants, complete strangers—with whom a consumer transacts. *See* AR2 5869.

A. The Capacity To Store Funds Is An Ancillary Feature Of Digital Wallets

Although some digital wallets, including PayPal's, have the capacity to store a consumer's funds, the Bureau recognized that this is only an ancillary feature of a digital wallet. *See* AR1 249 (noting that all digital wallets store payment credentials, while only some store funds); *see also* AR2 5862 ("[D]igital wallets are used primarily not to access funds, but rather to access payment credentials."). A consumer need not hold *funds* in her digital wallet to pay for purchases or to send money to others; the digital wallet already contains the *credentials* necessary to effect the payment regardless of whether the wallet holds a balance. As explained to the CFPB during the rulemaking, "[n]early 100% of PayPal's US consumer accounts are linked to at least one payment card or bank account as a funding source," "the average PayPal account balance held by a US consumer is only $6.00," and "most [consumers] never carry a balance." AR2 5862, 5865. Furthermore, as PayPal noted, the "vast majority of consumer transactions" in the United States "are funded by stored payment credentials." AR2 5868.

Moreover, when a consumer does carry a balance in a digital wallet, it is often because the consumer has received funds from someone else, not because the consumer herself added funds to the digital wallet for later use. *See* AR2 5868. Upon receiving funds from a transaction using a digital wallet, a consumer can choose to leave the funds in the digital wallet; use the funds to pay for other transactions; or transfer the funds to a bank account linked to the wallet.

B. Most Digital Wallet Consumers Do Not Pay Any Usage Fees

Like "most digital wallets available today," AR1 278, PayPal generally does not charge fees for the typical usage of its digital wallet product. PayPal does not, for example, charge any fees to obtain a digital wallet, to maintain a digital wallet, to make purchases from merchants using credentials stored in a digital wallet, to send money to friends using a digital wallet funded by a linked bank account or balance, or to obtain customer service relating to a digital wallet. *See* AR2 5864, 5871-5872. In addition, when a consumer receives funds from someone else and stores those funds in the digital wallet, PayPal does not charge a fee to transfer those funds to a linked bank account or debit card using the default service, which usually takes one to three business days to complete. *See* AR2 5871-5872. PayPal imposes a fee only in rare circumstances—like cross-border multi-currency transactions and expedited (rather than standard) balance transfers—and only after notifying the consumer of the relevant charge and obtaining her express consent. AR2 5864.

The absence of consumer fees is no accident: PayPal's business model, like those of other digital wallet providers, is based on charging fees to merchants *receiving* payments, not consumers *making* payments. AR2 5864. By accepting payments via PayPal, small businesses can assuage consumer concerns about their ability to keep payment information secure. AR2 5869 ("Consumers … can recognize PayPal's brand and entrust us with their financial data, whereas they might not have trusted the merchant to do so."). Many large companies, too, allow customers to pay using digital wallets like PayPal, recognizing that in a time when data breaches are common, consumer confidence in transaction security is invaluable.

C. Digital Wallets Are Categorically Different From GPR Cards

GPR cards—the main target of the Prepaid Rule—are very different from digital wallet products. "[O]ne of the most common and widely available … prepaid products," GPR cards are *designed* to store funds and often serve as "substitutes for traditional checking accounts." AR1 242. As PayPal explained throughout the administrative process, digital wallets and prepaid cards "are fundamentally different products with different consumer use cases." AR2 5862.

Acquisition. A GPR card is typically a physical card that is purchased by a consumer at brick-and-mortar retail locations, such as drugstores and supermarkets. AR1 245. GPR cards are usually glued to packaging that contains details about the card. The product is typically presented on a display rack, hanging by a "J-hook." *Id*. A digital wallet, by contrast, is a purely digital, Internet-based product obtained exclusively through a website or mobile application.

Functionality. The core function of a GPR card is to store a consumer's funds so that the consumer may use the card in an electronic transaction, *see* AR1 243, much as a traditional debit card might be used, *see* AR1 1998 ("[GPR] prepaid cards look and work like bank debit cards except no bank is required."); *see also* AR1 1997-2014 (Consumer Reports, "Prepaid Cards: How They Rate 2014" (Nov. 2014)). By contrast, "digital wallets are used primarily not to access *funds*, but rather to access payment *credentials*," thereby allowing the digital wallet provider to complete transactions on the customer's behalf. AR2 5862 (emphases added).

Funding. "[T]he essence of traditional prepaid cards is indeed pre-funding." AR2 5865. To pay for transactions using a GPR card, consumers generally must load the card with funds in advance using cash or by a transfer from another account. AR1 243. In contrast, a consumer can use a digital wallet to pay for transactions without ever having an account balance; most consumers never carry a balance; and for those that do, the balance is usually the result of receiving funds from someone else rather than a consumer adding funds to their own digital wallet. *See, e.g.*, AR2 5868.

Provider's business model. There are also "vast differences" between the "business models and consumer fee structures" of digital wallet providers and prepaid card issuers. AR2 5871. In general, GPR card issuers generate revenue by charging consumers various fees for basic services. *See* AR2 552 (describing numerous fees charged by major issuers of GPR cards); *see also* AR2 547-562 ("Comments of the Staff of the Bureau of Consumer Protection" (July 23, 2012)). These fees often include charges to open an account, maintain an account, make individual purchases, load or reload funds onto the card, or obtain customer service. *Id.*; *see also* AR1 243 (describing fees for "online bill pay," "speak[ing] to a customer service agent," "receiv[ing] a written copy of their account history," and "obtain[ing] balance information at ATMs"). As PayPal noted during the rulemaking process, PayPal's core product does not charge any of these consumer-facing fees, imposing fees only in rare circumstances, and with the consumer's express knowledge and consent. *See* AR1 278; AR2 5864, 5871-5872. Instead, as noted, digital wallets' "transaction revenue is generated primarily from fees charged to merchants, not to consumers." AR2 5881.

II. STATUTORY AND REGULATORY BACKGROUND

Three statutes—the Electronic Fund Transfer Act, the Truth in Lending Act, and the Dodd-Frank Act—define the scope, and limits, of the Bureau's delegated authority.

A. The Electronic Fund Transfer Act

Enacted in 1978, EFTA, 15 U.S.C. § 1693 *et seq.*, "provide[s] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." *Id.* § 1693(b); *see* Pub. L. No. 95-630, 92 Stat. 3728 (1978). Although EFTA's "primary objective … is the provision of individual consumer rights," 15 U.S.C. § 1693(b), the statute also imposes certain duties on certain providers of financial services. As relevant here, providers must disclose "[t]he terms and conditions of electronic fund transfers … at the time the consumer contracts for an electronic fund transfer." *Id.* § 1693c(a). The disclosures must be "in readily understandable language" and must cover certain categories of information, "to the extent applicable." *Id.* Among other details, a provider is required to disclose "any charges for electronic fund transfers." *Id.* § 1693c(a)(4).

To facilitate disclosure while preserving flexibility, Congress directed the Bureau to "issue model clauses for optional use by financial institutions." 15 U.S.C. § 1693b(b). The statute provides even more specific guidance regarding the optional clauses for disclosing fees and other charges: The Bureau is obligated to "take account of variations in the services and charges under different electronic fund transfer systems" and, where appropriate, "issue alternative model clauses for disclosure of these differing account terms." *Id.* For "financial institutions," the optional clauses "facilitate compliance with the disclosure requirements." *Id.* Although Congress created a safe harbor from liability for financial institutions who "utiliz[e] an appropriate model clause issued by the Bureau," *id.* § 1693m(d)(2), Congress did not *mandate* use of these optional clauses.

Finally, EFTA permits the Bureau to "prescribe rules to carry out the [statute's] purposes," 15 U.S.C. § 1693b(a)—rules now codified in what has become known as "Regulation E."[2] 12 C.F.R. § 1005 *et seq*. The Bureau's delegated authority is subject to important limits. First, the Bureau must "take into account, and allow for, the continuing evolution of electronic banking services and the technology utilized in such services." 15 U.S.C. § 1693b(a). Second, the Bureau must "conside[r] the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers." *Id.* Third, "to the extent practicable," the Bureau must "demonstrate that the consumer protections of the proposed regulations outweigh the compliance costs imposed upon consumers and financial institutions." *Id.*

[2] At the time of EFTA's enactment, the authority to prescribe regulations was delegated to the Board of Governors of the Federal Reserve ("the Board"). Upon the passage of the Dodd-Frank Act in 2010, most rulemaking authority under EFTA transferred from the Board to the Bureau, Pub. L. No. 111–203, § 1084, 124 Stat. 1376, 2081 (2010), and Regulation E was renumbered from 12 C.F.R. § 205 *et seq.* to 12 C.F.R. § 1005 *et seq.* *See* AR1 252 n.116.

B. The Truth In Lending Act

Enacted by Congress in 1968 to promote "[t]he informed use of credit," TILA requires lenders to provide potential borrowers with "meaningful disclosure[s] of credit terms." 15 U.S.C. § 1601(a); *see* Pub. L. No. 90-321, 82 Stat. 146 (1968). Such disclosures, Congress anticipated, would facilitate credit shopping by allowing "the consumer … to compare more readily the various credit terms available to him" and would also "protect the consumer against inaccurate and unfair … practices." 15 U.S.C. § 1601(a). Substantive restrictions on credit offerings are generally beyond TILA's reach: The purpose of the statute is to "provide[] for full disclosure of credit charges, rather than [the substantive] regulation of the terms and conditions under which credit may be extended." H.R. Rep. No. 90-1040 at 7 (1967).

Congress delegated first to the Board, and then later to the Bureau, the power to "prescribe regulations to carry out the purposes" of TILA. 15 U.S.C. § 1604(a); *see also* Pub. L. No. 111-203, § 1100A, 124 Stat. 1376, 2107 (2010). These regulations "may contain … additional requirements, classifications, differentiations, or other provisions," but such regulations must be "necessary or proper" to "effectuate [TILA's] purposes," "prevent circumvention … thereof," or "facilitate compliance therewith." *Id.* § 1604(a). The regulations implementing TILA are collectively known as "Regulation Z." *See* 12 C.F.R. § 1026 *et seq.*

C. The Dodd-Frank Act

Finally, the Dodd-Frank Act of 2010 created the Bureau and provided it with the authority to "prescribe rules … as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws." 12 U.S.C. § 5512(b)(1); *see also id.* § 5532(a) (permitting CFPB to "prescribe rules to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers"). But the Bureau's rulemaking power is not unbounded.

Among other requirements, the Bureau must "consider the potential benefits and costs to consumers and covered persons" resulting from a rule, "including the potential reduction of access by consumers to consumer financial products or services." *Id.* § 5512(b)(2)(A)(i).

III. THE PREPAID RULE

Although the Prepaid Rule was intended to "create comprehensive consumer protections for prepaid accounts under Regulation E … [and] Regulation Z," AR1 240, the Bureau's rulemaking process focused almost exclusively on developing a regulatory regime specific to GPR cards. During this process, PayPal explained the numerous reasons why "[d]igital wallets do not present the same consumer risks" as GPR cards and why the Bureau's GPR-card-based regime was a poor fit for digital wallets. AR2 5865. PayPal's exhortations were not heeded, resulting in a Final Rule that arbitrarily sweeps digital wallets into a regulatory regime designed for a wholly different product.

A. The Bureau Issues An Advance Notice Of Proposed Rulemaking That Never References Digital Wallets

Nearly eight years ago, the Bureau issued an Advance Notice of Proposed Rulemaking ("ANPR") with the described purposes of "seeking comment, data, and information from the public about [GPR] prepaid cards." *See* AR1 1; *see also* AR1 1-3 (ANPR). The Bureau claimed that it was interested in this "specific type" of prepaid card because it represented "one of the fastest growing segments of the overall prepaid market," and, in light of the "risk of consumer harm," the Bureau was "seeking information to determine how best to implement consumer protection rules for this product." AR1 1-2. Moreover, the Bureau highlighted the fact that Regulation E "generally d[id] not apply to GPR cards" which, the Bureau feared, could "contribute to market distortions" and "consumer confusion" should the Bureau fail to impose a "comprehensive federal regulatory regime" on that product. AR1 2. The ANPR did not mention digital wallets. *See* Dkt. 17 at 12 (¶ 53) (CFPB admission that "ANPR does not use the term 'digital wallets'").

B. The Bureau Issues A Proposed Rule Sweeping Digital Wallets Into The Definition Of Prepaid Accounts

Despite the ANPR's focus on GPR cards, the Bureau, with little explanation, issued an expansive proposed rule that also applied to digital wallets. *See* AR1 4-238 (Proposed Rule).

The proposed rule's requirements applied to "prepaid accounts," a term the Bureau defined broadly. The Bureau explained that digital wallets—which it spent only three paragraphs describing and analyzing in a 200-page proposed rule preamble—would fall within the term's ambit, so long as consumers had a mere ability "to store funds in [them] directly." AR1 13, 32. Further, the Bureau acknowledged a preference to regulate broadly: It wanted to "cast a wide net in including products within the proposed definition of prepaid account" and to apply requirements "evenly across like products." AR1 31. Why and how the Bureau considered a digital wallet a "like product" to a GPR card received cursory discussion. Although it acknowledged that "there may be significant variations in how funds are held in digital wallets and how payments are processed by digital wallets," the Bureau failed to identify or explain any of those relevant "variations." AR1 13. In addition, the Bureau never acknowledged that, unlike the regulatory gap it had identified for GPR cards in the ANPR, "Regulation E already applie[d] to PayPal accounts," AR2 5862, or that the "[c]redit cards and debit cards stored in digital wallets" were "already governed by Regulation Z and Regulation E," respectively, AR2 5863.

The Bureau's proposal to sweep digital wallets into a regulatory regime built for GPR cards had particular relevance to the two provisions challenged here:

Short form disclosure requirement. The proposed rule mandated that extensive disclosures be provided to consumers before consumers acquire a prepaid account. These "short form" disclosures would require a prepaid account issuer to "highlight[] four types of fees"—the "periodic fee, per-purchase fees, ATM withdrawal fees, and the cash reload fee"—at the top of the short form, "even if such fees [we]re $0 or if they relate[d] to features not offered for a particular prepaid account product." AR1 51-52. The requirement, in other words, mandated fee disclosures regardless of their relevance to the product.

It was not hard to discern that the short form disclosure was designed for GPR cards. The Bureau offered several examples of how the short form might help a consumer, all of which show that the requirement was designed for plastic GPR cards sold in brick-and-mortar retail stores. The proposed rule described, for example, how the short form would facilitate comparison shopping by a consumer "tak[ing] a package containing a prepaid account access device off a J-hook in a retail store," AR1 52, because the mandated font sizes would allow the short form to "fit on most packaging material currently used in retail locations," AR1 77. Moreover, the Bureau extensively described the focus groups and consumer testing it had used to workshop the short form disclosure. AR1 24-26. Although all sixty-nine of the Bureau's study participants "self-identified as having used a prepaid card," there is no mention in the proposed rule's preamble that the participants had any experience with digital wallets. *See id.*

Thirty-day credit linking ban. The Bureau also proposed a revision to Regulation Z aimed at prepaid card issuers that "offer[ed] overdraft services or other credit features" in connection with prepaid card products. AR1 6. To that end, the Bureau's proposal required a prepaid card issuer to "obtain a consumer's consent before adding overdraft services and credit features to a prepaid account," and it barred an issuer from linking those "features until at least 30 calendar days after a consumer register[ed] the prepaid account." *Id.* This temporary ban, the Bureau speculated, would "promote the informed use of the prepaid account and the credit card account by separating the decision to purchase and register a prepaid account from the decision to accept an offer to link a credit card account to that prepaid account." AR1 90. The Bureau asserted that the "addition of a credit feature" to a prepaid card would "cause[] a significant transformation" to the account, and the 30-day linking ban would "help ensure that consumers [we]re fully aware of the implications of their decision to effect such a transformation." AR1 41.

The proposed rule did not discuss this change in the context of digital wallets at all, despite the obvious disruptive implications for a product whose core functionality is to link a consumer's various preexisting payment credentials, including credit cards. Put another way, the Bureau's credit linking ban analyzed only scenarios in which prepaid card issuers might try to foist additional credit products onto new GPR card users—not situations in which consumers hoped to connect their *existing* credit products to their digital wallets in an effort to maximize the functionality of those digital wallets.

The Bureau received significant comments highlighting deep flaws in the proposed rule. For example, commenters objected to the application of the short form disclosure regime and the credit linking ban to digital wallets. As to the short form disclosure requirement, commenters warned that for "free products," like most digital wallets, "repeatedly disclosing '$0' or 'N/A' risks consumer confusion and imposes substantial cost without a commensurate consumer benefit, or any benefit at all." AR2 10434; *see also* AR2 10434-10437 (Financial Innovation Now Comment Letter (Aug. 11, 2017)). Commenters explained that these disclosures—designed for GPR cards—were a "fundamental mismatch in the digital wallet context." AR2 10435.

With respect to the 30-day credit linking ban, commenters urged that "the concerns underlying the Bureau's decision to impose the waiting period [we]re inapplicable to most digital wallets and … such a delay would likely lead to consumer confusion and a lack of options." *See, e.g.*, AR2 10536; *see also* AR2 10535-10545 (Electronic Transaction Association Comment

Letter (Aug. 14, 2017)). This, one commenter noted, was because "unlike general purpose reloadable cards … a digital wallet is by its very nature a product designed to link credit card credentials for potential use whenever the wallet is employed." AR2 10537.

C. The Bureau Finalizes A Rule That Fails To Properly Distinguish Digital Wallets From Other Prepaid Accounts

On November 22, 2016, the Bureau finalized the Prepaid Rule, in a publication spanning more than 450 pages in the *Federal Register*. *See* AR1 240-693 (Final Rule). As relevant here, the Bureau acknowledged—and then summarily rejected—both PayPal's explanation of the differences between digital wallets and GPR cards and its request to exclude digital wallets from the pre-acquisition disclosure requirements. The Rule also finalized a credit linking provision that materially differed from the Bureau's proposed rule, and offered a cost-benefit analysis of the Bureau's rulemaking efforts that failed to adequately consider—or, indeed, to consider at all—the impact of the Final Rule on digital wallet providers and consumers.

To start, the Bureau summarily rejected PayPal's position that digital wallets were different in kind from other prepaid accounts, asserting in conclusory terms that it was "not convinced" that digital wallets were "fundamentally dissimilar to other types of prepaid accounts." AR1 274. The Bureau admitted that, unlike GPR cards and other forms of prepaid accounts, "digital wallets currently on the market" did "not charge usage fees," but attempted to justify the extension of the Prepaid Rule to digital wallets by speculating that this "may not hold true in the future." *Id.* "If" such "fees d[id] become standard" in the future—a contingency for which the Bureau identified no evidence—the Bureau asserted that consumers should "know what those fees are and when they will be imposed." AR1 278.

Short form disclosure requirement. Next, the Bureau rejected PayPal's explanation that "prepaid cards and digital wallets are too different to effectively standardize disclosures across both industries." AR2 5879. In lieu of providing reasoning to support its decision, the Bureau asserted that "consumers of digital wallets should have the same opportunity to review fees (or lack thereof) in the short form disclosure as consumers of other prepaid accounts." AR1 321. The Bureau also reiterated that, although digital wallet providers did not charge usage fees, "this may not hold true in the future," *id.*, overlooking the fact that the absence of usage fees for digital wallets is the result of the unique functionality and business model underlying this product. Finally, the Bureau was "not persuaded that there are sufficient factors distinguishing digital wallets from other types of prepaid accounts" to justify "treating digital wallets differently." *Id*. The Bureau did not explain why the numerous distinctions PayPal raised were irrelevant, nor did the Bureau elaborate on any reasoning underlying its conclusion. *See id.* What is more, the Bureau did not even attempt to survey what disclosures digital wallet providers were already providing or assess the adequacy of those disclosures.

Credit linking requirement. With respect to the proposed 30-day credit linking ban, PayPal argued that digital wallets should be exempted from the waiting period because "stored credentials do not present the same risks of consumer harm as overdraft protection for prepaid cards." AR1 553. The Bureau did not just reject this argument; it finalized a series of new and complex provisions based on a concept it never noticed for public comment. Specifically, the Bureau imposed a 30-day ban on a PayPal accountholder's ability to link a credit card—even one acquired through channels completely independent of PayPal—if the issuer of that card was a "business partner" of PayPal (a term the Rule defined broadly). AR1 471; *see* AR1 568-569. In doing so, the Bureau failed to address meaningfully PayPal's comments explaining that storing payment credentials in a digital wallet does not present the overdraft concerns motivating the credit linking ban and that transactions with linked credit and debit cards are already regulated.

Finally, although the Bureau recognized its obligation under the Dodd-Frank Act to "consider[] the potential benefits, costs, and impacts" of its Rule, the Bureau's efforts to produce the mandated cost-benefit analysis did not so much as mention the term "digital wallet." AR1 577-614. The Bureau wholly failed to explain how any of its cost-benefit analysis applied to digital wallets—a product the Bureau sought to regulate with no evidence of consumer harm.

D. The Bureau Substantively Revises The Prepaid Rule But Fails Adequately To Address The Credit Linking Restriction

After issuing the Rule, the Bureau proposed substantive amendments to it. *See* AR1 705-742. Among other things, the Bureau attempted to remedy adverse consequences for consumers that would result if credit cards issued by entities with promotional or marketing agreements with digital wallet providers could not be linked to digital wallets within 30 days of the acquisition of a prepaid account. But instead of directly addressing this problem by exempting digital wallet providers from the credit linking requirement, the Bureau doubled down on its regulatory approach. Specifically, the Bureau proposed a new five-factor test designed (the Bureau claimed) to exempt linking credit cards issued by entities that would otherwise qualify as a digital wallet issuer's "business partner." AR1 740-741; *see* 12 C.F.R. § 1026.61(a)(5)(iii)(D).

PayPal submitted comments responding to the Bureau's proposal. AR2 10515-10523 (Aug. 14, 2017). PayPal explained that the new five-factor test did not adequately address its concerns. AR2 10516. That is because the proposal, even as revised, would limit providers' and credit card issuers' ability to offer significant consumer benefits through affiliated offerings. *Id.*

Notwithstanding PayPal's objections, the Bureau finalized its proposed amendment in February 2018. *See* AR1 743-828. The Rule took effect on April 1, 2019. *See* AR1 743.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") requires this Court to "hold unlawful and set aside agency action[s]" that are "in excess of statutory jurisdiction, authority, or limitations"; that are made "without observance of procedure required by law"; or that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C), (D).

In assessing whether the Rule reflects a proper exercise of the Bureau's authority, this Court "decide[s] all relevant questions of law," 5 U.S.C. § 706, and where "it's clear enough" what the statute means—as is the case here—there is no "ambiguity for [an] agency to fill," *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Moreover, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (internal citations and alterations omitted).

This Court's review of whether the Rule is arbitrary and capricious—while "narrow[er]"—nonetheless requires a "searching and careful" analysis. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Agency action is arbitrary and capricious when, among other things, the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Similarly, an agency's failure to "cogently explain why it has exercised its discretion in a given manner" will compel vacatur. *Id.* at 48-49. These standards allow some deference to an agency, but this Court retains a critical role in "ensuring that [the] agenc[y] [has] engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

ARGUMENT

I. THE BUREAU LACKS THE STATUTORY AUTHORITY TO IMPOSE THE RULE'S SHORT FORM DISCLOSURE REQUIREMENT

Consistent with basic separation-of-powers principles, the Bureau's "power to act and how [it is] to act is authoritatively prescribed by Congress, so that when [it] act[s] improperly … what [it] do[es] is ultra vires." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). This core principle of administrative law dooms the Rule's short form disclosure requirement (12 C.F.R. § 1005.18(b)). Invoking its authority under EFTA, *see* AR1 264, the Bureau adopted a short form disclosure requirement that commands PayPal to make detailed, rigid pre-acquisition disclosures about its digital wallet product. This requirement exceeds the Bureau's authority under EFTA—a defect that requires vacatur of the Rule. 5 U.S.C. § 706(2)(C).

A. EFTA Authorizes The Bureau To Adopt Only Model, Optional Disclosures

Whether EFTA grants the Bureau the power the agency asserts is a question of statutory interpretation. That inquiry thus "[b]egin[s], 'as always, with the plain language of the statute'" in question. *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663-664 (D.C. Cir. 2009). And "where," as here, "the statute's language is plain," that "is also where the inquiry … end[s]." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

Here, EFTA's text and structure unambiguously establish that the Bureau lacks the power to mandate a prescriptive short form disclosure, including with respect to digital wallets. EFTA requires providers to disclose the "terms and conditions of electronic fund transfers," including, "to the extent applicable … any charges for electronic fund transfers." 15 U.S.C. § 1693c(a)(4). But the statute does not prescribe the *form* that such disclosures must take.

To the contrary, Congress mandated flexibility. EFTA directs the agency to "issue *model* clauses for *optional* use by financial institutions." 15 U.S.C. § 1693b(b) (emphasis added). And

Congress created a safe harbor for—but did not require—use of these model clauses, protecting those providers who voluntarily "utiliz[e] an appropriate model clause issued by the Bureau." *Id.* § 1693m. Congress emphasized the imperative of flexibility with respect to disclosure of fees and charges, obligating the Bureau to "take account of variations in the services and charges under different electronic fund transfer systems" and, where appropriate, "issue alternative model clauses for disclosure of these differing account terms." *Id.* § 1693b(b).

As that statutory text and structure reflect, the basic paradigm Congress enshrined in EFTA is one of flexibility with respect to the form of consumer disclosures. In fact, like many statutes, EFTA reflects a careful "compromise." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). On the one hand, EFTA seeks to ensure that consumers receive adequate notice of essential terms of electronic fund transfers ("EFTs") by requiring providers to make meaningful disclosures. On the other hand, cognizant of the significant diversity of electronic transfer products and the need to avoid a rigid regulatory approach, Congress refrained from prescribing the exact form such disclosures must take—and decided not to extend such authority to the Bureau. Rather, Congress instructed the Bureau to issue "model" and "optional" clauses and rewarded the voluntary use of those clauses by creating a safe harbor from liability.

EFTA's legislative history reinforces what is plain from the statute's text and structure. The original version of the Senate bill that led to EFTA authorized—but did not require—the Board to "issue model forms and clauses to facilitate compliance." 124 Cong. Rec. 3913, 3918 (Feb. 21, 1978). In response to "objections" by financial institutions, Senator Brooke proposed an amendment that would affirmatively "require the Federal Reserve Board to issue model clauses for disclosure of EFT terms and conditions." Amendment on S. 2546, 124 Cong. Rec. S8284 (daily ed. March 23, 1978). The purpose of this "compromise amendmen[t]" was to help businesses comply with disclosure requirements by giving them an "assured" means of "meeting [those] disclosure requirements." *Id.* Senate and House Banking Committee reports on subsequent bills repeatedly underscored the key point that use of the model clauses would be voluntary, not mandatory. *See* S. Rep. No. 95-915, at 4 (1978) ("To facilitate compliance with th[e] [disclosure] requirement, the Federal Reserve Board is required to promulgate model clauses for standard disclosures. While use of such clauses would be optional, a financial institution which utilized an appropriate model clause would be assured of compliance with the act's requirements."); H.R. Rep. No. 95-1315, at 22 (1978) (discussing "optional use" of clauses).

This legislative history confirms that the purpose of EFTA's model clause provision was to assist financial institutions in compliance by offering a flexible, but sure-fire, means of satisfying EFTA's disclosure obligation. Had Congress wanted to issue *mandatory* requirements regarding the form of disclosure itself or to empower the agency to do so, it easily could have said so.[3] But it did not. Instead, Congress's considered judgment was to retain flexibility with respect to the form of required disclosures.

B. The Short Form Disclosure Requirement Exceeds The Bureau's Authority

The Prepaid Rule's short form disclosure requirement is inconsistent with this statutory design. To state the obvious, a congressional delegation of authority to issue "model,"

[3] Indeed, Congress *has* provided for such mandatory disclosures in a different statute: TILA. In 1988, Congress amended *TILA*—not EFTA—to mandate that credit card providers disclose specific information (*e.g.*, annual fees and annual percentage interest rates) in a "tabular format." 15 U.S.C. § 1637(c)(1)(A). Commonly referred to as a "Schumer Box," these disclosures must be "in the form of a table" that is "substantially similar" to the model tables found in Regulation Z. *See* 12 C.F.R. § 226.6(b).

"optional" disclosures that must "take account of variations in … services and charges" is a far cry from the prescriptive, mandatory, one-size-fits-all short form disclosure the Rule requires.

Rather than allowing the flexibility Congress intended under EFTA, the short form disclosure requirement is a model of top-down, regulatory rigidity. For one thing, compliance with the disclosure requirement is decidedly mandatory, not optional, as Congress contemplated under EFTA. *See* 12 C.F.R. § 1005.18(b)(1)(i) ("[A] financial institution shall provide the disclosures required by paragraph (b) … before a consumer acquires a prepaid account.").

More fundamentally, the complexity and rigidity of the short form disclosure requirement demonstrate that the Bureau has strayed far beyond its limited authority to propose optional, model clauses. *See* AR1 240 (the Rule "adopts specific content, form, and formatting requirements" for disclosures). Under the Rule, short form disclosures in written or electronic form "shall be provided in the form of a table." 12 C.F.R. § 1005.18(b)(6)(iii). The Rule then imposes a series of prescriptive requirements with respect to the grouping of information, *id.* § 1005.18(b)(7)(i)(A), and even dictates the specific font size and bolding of certain fees, *id.* § 1005.18(b)(7)(ii)(B)(i). The Rule also enumerates the specific fees that must be disclosed (whether or not a consumer is likely to ever encounter those fees), *id.* § 1005.18(b)(2)(i)-(vii), and requires a covered financial institution to "disclose the highest amount it may impose for [a variable] fee," *id.* § 1005.18(b)(3)(i). The Rule even *prohibits* providers from including explanatory phrases within the disclosure box to describe the fees even if such phrases would clarify the nature and cost of services provided to the consumer. *See id.* § 1005.18(b)(3)(ii) ("[A] financial institution must use the same symbol and statement for all fees that could vary.").

None of this is remotely consistent with Congress's design of EFTA.[4] Although EFTA requires disclosures, it does not mandate the form of the disclosures—reflecting a deliberate choice by Congress to give financial institutions flexibility. As described above, this was a critical feature of the legislative compromise underlying EFTA. The Bureau's short form disclosure requirement overrides that compromise and stands the purpose of the model clause provision on its head: The Bureau's mandated disclosures are not "model[s]"; they are not "optional"; and they fail to "take account of variations in the services and charges under different electronic fund transfer systems." 15 U.S.C. § 1693b(b).

Confirming the Bureau's statutory overreach, the short form requirement represents a sharp departure from prior disclosure regulations under EFTA. The general initial disclosure provision of Regulation E has long required financial institutions to disclose certain types of information, including "[a]ny fees," 12 C.F.R. § 1005.7(b)(5), only "as applicable," *id.* § 1005.7(b). The short form requirement in the Prepaid Rule, in contrast, demands the disclosure of fees that the provider *does not actually charge*. Moreover, Regulation E generally preserves the flexibility Congress intended service providers to have in complying with EFTA's disclosure requirements, but the Prepaid Rule destroys that flexibility. As the official commentary to 12 C.F.R. § 1005.4(a) explains, "[N]o particular rules govern type size, number of pages, or the relative conspicuousness of various terms," *except* "as otherwise set forth in" two sections of Regulation E: § 1005.18(b)(7), the short form requirement for prepaid accounts (added by the

[4] To the extent there is any ambiguity as to whether EFTA permits the Bureau to issue the mandatory disclosures at issue here, that ambiguity should be construed against the Bureau so as not to run headlong into First Amendment concerns. *See infra* at 44-45; *see also Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (courts should "make every effort" to construe statutes in a manner that "avoid[s] needless constitutional confrontations"); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1340-1341 (D.C. Cir. 2002) ("[T]he constitutional avoidance canon of statutory interpretation trumps *Chevron* deference.").

Rule), and § 1005.31(c), which governs remittance transfers (previously codified in Regulation E). And as a comparison of the two exceptions to this general rule makes clear, the modest formatting guidelines applicable to remittance transfers are a world apart from the detailed, pixel-by-pixel prescriptions of the short form for prepaid accounts.[5] Prior to enacting the Prepaid Rule, then, the Bureau itself understood—and heeded—the limits that EFTA imposes on its rulemaking authority.

In an attempt to free itself from congressionally imposed limits, the Bureau based the Rule's short form disclosure requirement on a general rulemaking provision in EFTA. *See* AR1 264 ("[T]he final rule's pre-acquisition disclosure requirements … are adopted pursuant to the Bureau's authority under [15 U.S.C. § 1693b(a)]."). The Bureau's effort to override Congress's

[5] *Compare* § 1005.31(c)(3) (remittance transfers) ("Disclosures … provided in writing or electronically must be in a minimum eight-point font, except for disclosures provided via mobile application or text message …."), *with* § 1005.18(b)(7)(ii)(B)(1) (prepaid accounts) ("The information required in the short form disclosure by paragraphs (b)(2)(i) through (iv) of this section must appear as follows: Fee amounts in bold-faced type; single fee amounts in a minimum type size of 15 points (or 21 pixels); two-tier fee amounts for ATM withdrawal in a minimum type size of 11 points (or 16 pixels) and in no larger a type size than what is used for the single fee amounts; and fee headings in a minimum type size of eight points (or 11 pixels) and in no larger a type size than what is used for the single fee amounts. The information required by paragraphs (b)(2)(v) through (ix) of this section must appear in a minimum type size of eight points (or 11 pixels) and appear in the same or a smaller type size than what is used for the fee headings required by paragraphs (b)(2)(i) through (iv) of this section. The information required by paragraphs (b)(2)(x) through (xiii) of this section must appear in a minimum type size of seven points (or nine pixels) and appear in no larger a type size than what is used for the information required to be disclosed by paragraphs (b)(2)(v) through (ix) of this section. Additionally, the statements disclosed pursuant to paragraphs (b)(2)(viii)(A) and (b)(2)(x) of this section and the telephone number and URL disclosed pursuant to paragraph (b)(2)(xiii) of this section, where applicable, must appear in bold-faced type. The following information must appear in a minimum type size of six points (or eight pixels) and appear in no larger a type size tha[n] what is used for the information required by paragraphs (b)(2)(x) through (xiii) of this section: text used to distinguish each of the two-tier fees pursuant to paragraphs (b)(2)(iii), (v), (vi), and (ix) of this section; text used to explain that the fee required by paragraph (b)(2)(vi) of this section applies 'per call,' where applicable; and text used to explain the conditions that trigger an inactivity fee and that the fee applies monthly or for the applicable time period, pursuant to paragraph (b)(2)(vii) of this section.").

judgment about the need for flexibility exceeds the agency's authority. *Cf. CFPB v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 84 (D.D.C. 2016), *aff'd*, 854 F.3d 683 (D.C. Cir. 2017) ("Although it is understandable that new agencies like the CFPB will struggle to establish the exact parameters of their authority, they must be especially prudent before choosing to plow head long into fields not clearly ceded to them by Congress.").

EFTA's general provision that the Bureau may "prescribe rules to carry out [EFTA's] purposes," 15 U.S.C. § 1693b(a)(1), cannot be read to override the limits Congress imposed in § 1693b(b). In requiring the Bureau to issue model disclosure clauses, but delimiting that authority, Congress has spoken to the precise question of the form of disclosures through a "more limited, specific authorization." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012). That specific provision—and its limitations—controls here. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). It makes no sense to conclude that Congress—having gone through the trouble of enacting a model clause provision as a compromise to retain flexibility for financial institutions—silently granted the agency authority to override that compromise. *See Greenlaw v. United States*, 554 U.S. 237, 251 (2008) ("We resist attributing to Congress an intention to render a statute so internally inconsistent.").

Further, the Bureau's expansive interpretation of its general authority would undermine the purpose of EFTA's model clause provision. A statute must be construed "so as to give effect to every clause and word." *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 733 (D.C. Cir. 2005) (quotation marks and citation omitted). Yet under the Bureau's construction of EFTA, the issuance of optional model clauses would be pointless because the agency could compel financial institutions to use the exact same disclosures under its general authority. This anomalous result further indicates that the Bureau's interpretation of EFTA is untenable. Where, as here, "a general authorization and a more limited, specific authorization exist side-by-side," the superfluity canon forecloses an interpretation in which the "specific provision … is swallowed by the general one." *RadLAX*, 566 U.S. at 645; *accord Bloate v. United States*, 559 U.S. 196, 207 (2010) ("[G]eneral language … , although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.").

In short, EFTA's authorization to the Bureau to "issue model clauses for optional use by financial institutions," 15 U.S.C. § 1693b(b), defines but also limits the scope of the Bureau's authority to regulate the *form* of disclosures under EFTA. Because the Prepaid Rule's short form disclosure requirement exceeds these limits, it must be set aside.[6]

[6] To the extent the Bureau believed that the Dodd-Frank Act, 12 U.S.C. § 5532(a), provided independent rulemaking authority from EFTA for the disclosure requirement, AR1 316; *see also* AR1 324, the Bureau was mistaken. The Dodd-Frank Act authorizes the Bureau to "prescribe rules to ensure that the features of any consumer financial product or service … are fully, accurately, and effectively disclosed to consumers." 12 U.S.C. § 5532(a). Because EFTA specifically addresses 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," § 1693c(a), that statute—not the general delegation in the Dodd-Frank Act—controls. *See Bulova Watch Co.*, 365 U.S. at 758 ("[A] specific statute controls over a general one without regard to priority of enactment." (quotation marks omitted)). It is implausible that, through § 5532(a), Congress intended to cast aside pre-existing limits on the agency's authority under EFTA, and the Bureau failed to advance, much less explain, such a sweeping statutory argument in promulgating the Rule. Moreover, even if the Dodd-Frank Act conferred additional authority on the Bureau, the short form disclosure requirement would exceed that authorization. Like EFTA, the Dodd-Frank Act (1) permits the Bureau to mandate certain disclosures, 12 U.S.C. § 5532(a); (2) authorizes the agency to issue "model form[s] that may be used *at the option of the covered person* for provision of the required disclosures," § 5532(b)(1) (emphasis added); and (3) provides a "[s]afe harbor" for entities that choose to "us[e] a model form," § 5532(d). For substantially the same reasons described with respect to EFTA, the Dodd-Frank Act does not give the Bureau the power to transform optional model clauses into mandatory ones.

II. THE BUREAU LACKS THE STATUTORY AUTHORITY TO IMPOSE THE 30-DAY CREDIT LINKING BAN

The Prepaid Rule should also be vacated because the Rule's credit linking ban (12 C.F.R § 1026.61(c)) exceeds the Bureau's statutory authority. The Bureau identified TILA as the primary statutory basis for the credit linking prohibition. AR1 266. But TILA is a *disclosure* statute; it does not permit the Bureau *substantively* to restrict the use of credit through regulation, as the Rule's credit linking ban attempts to do here.

A. TILA Does Not Authorize The Bureau To Impose Substantive Bans On The Use Or Acquisition Of Credit

As the title of the statute itself suggests, the "Truth in Lending Act" is a disclosure statute. In enacting TILA, Congress found that "economic stabilization would be enhanced and … competition among [creditors] … strengthened by the informed use of credit." 15 U.S.C. § 1601(a). To promote the "informed use of credit," Congress concluded that consumers need "an awareness of the cost" of that credit. *Id.* Thus, as the statute makes clear, "[i]t is the purpose" of TILA to "assure a meaningful disclosure of credit terms," which, in Congress's view, would permit consumers to comparison shop between different credit products and would protect consumers from "inaccurate and unfair credit … practices." *Id.*

In Section 1604(a) of TILA, Congress delegated to the Bureau the authority to "prescribe regulations to carry out the purposes" of TILA, 15 U.S.C. § 1604(a)—namely, the "meaningful disclosure of credit terms," *id.* § 1601(a). The Bureau is also authorized to impose "additional requirements, classifications, differentiations, or other provisions" that are "necessary or proper to effectuate [TILA's] purposes." *Id.* § 1604(a). But nowhere does TILA authorize the Bureau to adopt regulations on the substance of credit terms that are divorced from TILA's core purpose of ensuring the "meaningful disclosure of credit terms."

Consistent with the statutory text, the Supreme Court has consistently understood TILA as a disclosure statute. *See, e.g.*, *Chase Bank USA*, *N.A. v. McCoy*, 562 U.S. 195, 198 (2011) ("Congress passed TILA to promote consumers' 'informed use of credit' by requiring 'meaningful disclosure of credit terms.'"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("The concept of 'meaningful disclosure' … animates TILA …."). The D.C. Circuit has followed suit, noting, for example, that the Bureau's "authority to issue regulations interpreting TILA is designed to enhance the purpose of the statute—to achieve 'meaningful disclosure' for the consumer." *Consumers Union of U.S., Inc. v. Fed. Reserve Bd.*, 938 F.2d 266, 269 (D.C. Cir. 1991); *see also Williams v. First Gov't Mortg. & Inv'rs Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999). Other circuits are in accord. *See, e.g.*, *Poulin v. Balise Auto Sales*, *Inc.*, 647 F.3d 36, 38 (2d Cir. 2011) ("TILA is a disclosure statute …."); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1120 (9th Cir. 2009) ("TILA is only a 'disclosure statute' and 'does not substantively regulate consumer credit ….'" (citation omitted)).

TILA's legislative history cements this understanding of statutory purpose. The statute was enacted in 1968. *See* Truth in Lending Act, Pub. L. No. 90-321, tit. 1, 82 Stat. 146. The accompanying committee reports focus exclusively on disclosure requirements and disclaim any intention to impose substantive regulations. The Senate Banking Committee explained that the "basic purpose" of TILA "is to provide a full disclosure of credit charges" and that the law would "not in any way regulate the credit industry," nor would it seek "to impede or retard the growth of consumer credit." S. Rep. No. 90-392 at 1-2 (1967); *see also* H.R. Rep. No. 90-1040 at 7 (1967) ("[TILA] provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended.").

Consistent with that understanding of TILA's purpose, the legislative history underlying TILA's rulemaking provision itself was tied to disclosure. The statute, explained the Senate

Committee report, authorizes the Bureau to "prescribe methods to [e]nsure the required information is disclosed clearly and conspicuously." S. Rep. No. 90-392 at 19. The House Banking Committee report went a step further, identifying the types of "substantive regulations in connection with … full disclosure" that Congress had in mind: regulations "governing the method of determining annual percentage rates, prescribing procedures for clear and conspicuous disclosure of the required information, and prescribing reasonable tolerances of accuracy." H.R. Rep. No. 90-1040 at 29. Again, nothing suggests that Congress delegated to the agency the authority to regulate the terms and conditions of credit.

B. The Credit Linking Provision Operates As A Ban On Acquiring And Using Credit, Not A Disclosure Requirement

The 30-day credit linking ban adopted by the Bureau has no anchor in TILA's purposes. The regulation is a substantive restriction on the availability of credit: It categorically bars a consumer from linking certain credit cards (including pre-existing credit cards) to a covered account until 30 days have passed from the time the consumer acquires the account. 12 C.F.R. § 1026.61(c)(1)(iii). This prohibition, or "waiting period," restricts access to credit and cannot fairly be described as a disclosure requirement. Indeed, the requirement addresses *when* a consumer may access credit, not the *information* that must be provided to the consumer. With no basis in statutory text, structure, or purpose, the Bureau's transparent effort to "jam a square peg" (substantive credit regulation) "into a round hole" (TILA's disclosure regime) is ultra vires and unlawful. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017).

In adopting the requirement, the Bureau acknowledged that TILA has "[h]istorically" been a foundation for "rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices." AR1 265. But, the Bureau claimed, the credit linking ban can be justified by its authority to issue "additional requirements" that are "necessary or proper" under 15 U.S.C. § 1604(a). *Id.* The "additional requirements" language, the Bureau asserted, was inserted by the Dodd-Frank Act to "clarif[y] the authority to exercise TILA section [1604(a)] to prescribe requirements beyond those specifically listed in the statute." *Id.*

Once again, the Bureau reads too much into too little. In adding the "additional requirements" provision, Congress did not intend to hand over to the Bureau unbounded authority to restrict (temporarily or otherwise) the acquisition or use of credit products. Structurally, the snippet of text on which the Bureau relies remains part of a statutory section titled "Disclosure Guidelines," undermining the notion that Congress intended to unmoor the Bureau's authority from TILA's longstanding disclosure objective. *See Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 772 n.2 (D.C. Cir. 2019) ("Headings, although 'not commanding,' 'supply clues' about Congressional intent."). What is more, the "additional requirements" provision remains explicitly linked to "the purposes of [TILA]," 15 U.S.C. § 1604(a), namely, disclosure—an additional textual point weighing against the claim that Congress intended to expand the Bureau's authority beyond TILA's disclosure objective.

Legislative history supports that conclusion. The "additional requirements" language appears for the first time in the version of the bill that was reported by the Senate Banking Committee to the full Senate. *See* S. 3217, § 1099, 111th Cong., 2d sess. (Apr. 29, 2010). The Committee report, however, does not indicate that the change expanded the Bureau's authority. Instead, the report states only that the provision "makes conforming amendments to the Truth in Lending Act." S. Rep. 111-176, at 182. Similarly, the Conference Report does not suggest this "conforming amendment" effected an enlargement of the Bureau's substantive authority. *See* H.R. Rep. No. 111-517 (Conf. Rep.).

To be sure, TILA contains a limited number of provisions that establish discrete substantive obligations or prohibitions related to the provision of credit. *See, e.g.*, 15 U.S.C.

§ 1639c ("Minimum standards for residential mortgage loans"); *id.* § 1650 ("Preventing unfair and deceptive private educational lending practices"). Reinforcing the problems with the Bureau's credit linking ban, these provisions demonstrate that where Congress intended to impose or authorize substantive restrictions on the use of credit, it did so expressly. Here, the credit linking prohibition is untethered to any of TILA's substantive provisions. In addition to characterizing the prohibition as promoting disclosure, an argument that fails for the reasons discussed above, the Bureau suggested that the prohibition was "necessary and proper," AR1 573, to further 15 U.S.C. § 1642, which "requires that no credit card shall be issued except in response to a request or application therefor," AR1 574. The credit linking provision, however, is unrelated to this substantive prohibition on unsolicited credit cards. Instead of barring financial institutions from *issuing* unsolicited credit cards, the credit linking provision prevents them from "*offer[ing]* … covered separate credit feature[s]" in the first place and from *linking* preexisting credit cards to digital wallets. AR1 574.

Application of the credit linking ban to digital wallets demonstrates just how far the ban exceeds the Bureau's authority under TILA. The Rule prevents customers from linking their digital wallets to certain credit cards even where the customer previously acquired the credit card and is able to independently use that card (that is, outside the digital wallet). In that circumstance, the credit linking ban cannot be justified as promoting the "informed use of credit" by consumers, nor does it address the concern that motivated the Bureau to develop this provision in the first place—that prepaid card issuers would rush new accountholders into adding credit as an overdraft feature. *See* AR1 41.

Because the credit linking prohibition exceeds the scope of the Bureau's delegated authority under TILA, the Prepaid Rule is ultra vires and should be vacated.[7]

III. THE RULE IS ARBITRARY AND CAPRICIOUS AS APPLIED TO DIGITAL WALLETS

Apart from the lack of statutory authority, the Rule is arbitrary and capricious, which independently warrants vacatur. 5 U.S.C. § 706(2)(A). The APA demands reasoned decision-making, obligating an agency to "articulate a satisfactory explanation" for its actions, *State Farm*, 463 U.S. at 43, and to "cogently explain why it has exercised its discretion in a given manner," *id.* at 48. The Bureau failed those requirements in at least two ways: by capriciously eliding key differences between digital wallets and GPR cards with a one-size-fits-all approach and by imposing significant regulations based on unfounded speculation about digital wallets.

A. The Bureau Had No Rational Justification For Subjecting Digital Wallets To A Regulatory Regime Designed For GPR Cards

A fundamental category error lies at the heart of the Prepaid Rule's application to digital wallets. In determining the scope of the Rule, the Bureau defined regulated "prepaid accounts" broadly to include GPR cards *and* digital wallets—products with different functionalities, consumer uses, and business models. By failing meaningfully to account for the differences between those products and subjecting them to the same onerous regulatory regime without

[7] In addition to TILA, the Bureau appeared to believe that 12 U.S.C. § 5532(a) was a legal basis for the credit linking requirement. AR1 574. This makes little sense. Section 5532(a), as discussed *supra* at 27 n.6, is a generic version of EFTA that authorizes the Bureau to "prescribe rules to ensure that the features of any consumer financial product … are fully, accurately, and effectively disclosed to consumers." *See also id.* § 5532(b)(1) (referring to "[a]ny final rule prescribed by the Bureau under this section requiring *disclosures*" (emphasis added)); *id.* § 5532(d) (referring to "the *disclosure requirements* of this section" (emphasis added)); S. Rep. No. 111-176 (2010) ("Under this section, the Bureau is granted rulemaking authority to ensure that information relevant to the purchase of [consumer] products or services is disclosed ….”). The credit linking provision does not implicate or even relate to disclosure requirements. It thus cannot be upheld as an exercise of the Bureau's authority under § 5532(a).

justification, the Bureau violated the APA. The Bureau's failure to grapple with "these differences" "was not reasoned decisionmaking." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 824 (D.C. Cir. 1983).

As PayPal and other commenters made clear to the Bureau, GPR cards and digital wallets are different products: The former serves as a payment method whereas the latter functions principally as a repository for payment methods. Although there are "some high-level similarities between prepaid cards and digital wallets"—for example, both allow consumers to "store funds and to make payments at a large number of merchants"—the products are "fundamentally different with different consumer use cases." AR2 5862.

As noted, GPR cards are generally "purchased at retail locations" and then "loaded" by the consumer "with funds through a variety of means." AR1 242; *see also supra* at 7-9. This allows a GPR card to stand in for a "traditional checking account[]." AR1 242. Issuers typically generate revenue by charging consumers fees. In comparison, digital wallets are "used primarily not to access funds, but rather to access payment credentials such as consumers' credit, debit, and prepaid cards … and bank accounts." AR2 5862. Simply put, digital wallets are designed primarily to store payment methods and thus to facilitate commercial exchanges, not to store funds. Although digital wallets may permit users to maintain a positive balance, "[u]nlike a prepaid card, consumers are not required to pre-load funds, and most never do pre-load a balance," AR2 5868. In the "rare cases" that users do store a balance, they do so in small amounts—for PayPal customers, the record reflected the average balance was only $6.00—and "only briefly." *Id.* Digital wallet providers, moreover, do not charge consumer-facing fees for the product's core functionality. These are not small distinctions. At least without evidence to the contrary, it does not make sense to think that GPR cards should be regulated the same way as digital wallets.

Over PayPal's repeated objections and in the face of this record evidence, the Bureau nonetheless established a regulatory regime that arbitrarily treats dissimilar products as if they were the same: "[P]repaid accounts" is defined to include "a range of products including GPR cards … and digital wallets." AR1 274. Rather than carefully assessing the different characteristics of GPR cards and digital wallets and rigorously analyzing the need for and type of regulation appropriate for each, the Bureau opted for Procrustean regulation, seizing on any similarities between the two products to justify a uniform approach. Asserting that it was "not convinced by the argument that digital wallets … [we]re fundamentally dissimilar to other types of prepaid accounts," the Bureau claimed that, "to the extent that [digital wallets] are used to access funds the consumer has deposited into the account in advance," "the Bureau believes digital wallets operate very much like a prepaid account." *Id.* That assertion is doubly flawed.

First, the Bureau's claim that it was "not convinced" that GPR cards and digital wallets are dissimilar is pure "ipse dixit." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1155 (D.C. Cir. 2011). The APA demands that an "agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). To satisfy this requirement, "conclusory statements will not do; an 'agency's statement must be one of reasoning.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).

The Bureau's justifications for its approach are a model of conclusory reasoning. The Bureau cited no study supporting its conclusion, pointed to no expert research suggesting that consumers use GPR cards and digital wallets similarly, and referenced no focus group encouraging it to regulate the two products similarly; indeed, it cited nothing at all other than its own "belie[f]." AR1 274. In addition, the Bureau's assertion is contrary to the evidence that was before it. Apart from extensive comments provided by digital wallet providers like PayPal, *see, e.g.*, AR2 729-742; AR2 5861-5890, and Google, *see, e.g.*, AR2 5267-5271—which described the differences between digital wallets and GPR cards—the record contained probative evidence from the Bureau itself on this point. A 2015 report published by the CFPB explained that "a 'digital wallet'" was a vehicle by which "[b]ank accounts, credit cards, debit cards, and prepaid cards can be accessed." AR1 1602. In other words, the Bureau acknowledged that digital wallets were a mechanism by which a consumer *accesses* a GPR card, not a GPR card itself. That "unexplained inconsistenc[y]" renders the Rule arbitrary and capricious. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (collecting authority).

Second, to the extent that the Bureau elected to regulate GPR cards and digital wallets as the same simply because digital wallets could theoretically hold a balance, the Bureau unreasonably seized on an ancillary feature of digital wallets to impose sweeping regulations designed for GPR cards. GPR cards and digital wallets are designed to serve different purposes: GPR cards serve as the equivalent of checking accounts for some (and are thus designed to hold funds) while digital wallets are designed principally to permit digital wallet providers to access payment credentials. The Bureau not only failed to grapple with that crucial distinction, it did not identify any evidence, statistics, reports, or competing analysis of its own. That failure of reasoning is fatal under the APA. *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 340 (D.C. Cir. 2019) ("[F]ail[ure] to provide an adequate explanation" "d[oes] not meet the APA's requirements for reasoned decisionmaking.").

The Bureau's category error—treating digital wallets as if they were merely electronic versions of GPR cards—is especially glaring when it comes to the short form disclosure requirement. The Bureau's principal justification for that requirement was its belief that the form would facilitate comparison shopping between GPR products in a brick-and-mortar retail setting. The Bureau explained that the disclosures are intended to "facilitate consumer understanding" of the prepaid account's key terms by "set[ting] forth the prepaid account's most important fees." AR1 240. This "consumer understanding," in turn, would permit "comparison shopping among prepaid account programs." *Id.* In other words, the Bureau designed the disclosure regime to assist a consumer rummaging through a rack of GPR cards at a pharmacy and attempting to comparison shop based on information visible on the package. It makes no sense to take a disclosure regime designed to facilitate in-person comparison shopping and apply it to an electronic product like PayPal's, for which consumers do not comparison shop in a store and which already discloses key terms and conditions to users.

Moreover, the content of the short form disclosure is wholly disconnected from the fee structure of digital wallets. As the Bureau noted in the Rule's preamble, the short form disclosure includes a "prepaid account's *most important* fees," including the four fees highlighted "above the line": monthly maintenance, per purchase, ATM withdrawal, and cash reload. AR1 240 (emphasis added). But record evidence before the CFPB indicated that these fees were foreign to digital wallet products like PayPal's. During the rulemaking process, the Bureau was aware that PayPal did not charge consumers a monthly fee, did not charge consumers a per purchase fee, and did not support ATM withdrawals or cash reloads. *See* AR2 5880. In forcing digital wallet providers into its GPR-card-focused short form disclosure regime, the Bureau required providers to highlight inapplicable fees in a manner highly misleading to consumers.

This fundamental mismatch between the Rule and digital wallet products is further demonstrated by the credit linking ban. The ban was born of policy concerns that GPR card providers might funnel a new customer into a linked credit product as an expensive form of overdraft protection. AR1 6. But a digital wallet customer approaches the acquisition of a digital wallet from precisely the opposite perspective. The customer generally *already has* a credit product (usually a credit card) and acquires the digital wallet in order to link the credit product's credentials to a digital platform. Linking a credit product to the digital wallet is, for many users, the whole point of acquiring a digital wallet. The Bureau's singular focus on GPR cards caused it to miss this basic reality.

B. The Bureau Lacked A Well-Founded, Non-Speculative Basis For Subjecting Digital Wallets To Heightened Regulation

The Rule is also arbitrary and capricious as applied to digital wallets because the Bureau identified *no* evidence of consumer harm with respect to digital wallets that warranted enhanced regulation above and beyond the general requirements of Regulation E, much less the costly, prescriptive regulation imposed by the Rule. The APA presupposes that the agency has identified a "problem" in need of a remedy, *State Farm*, 463 U.S. at 43; it follows that a regulation cannot be a "solution in search of a problem," *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 546 (S.D.N.Y. 2019). In fact, a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971). Moreover, an agency may not rely "on speculation" to supply a problem in need of solving. *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013).

Those principles compel vacatur. The Rule is based on the Bureau's stated desire to "lessen consumer risk," AR1 577, yet it failed to identify *any* real-world evidence of consumer risk or harm with respect to digital wallets. In describing the supposed "problem" the Rule is intended to fix, the Bureau focused on GPR cards, citing studies that largely had nothing to do with digital wallets. *See* AR1 242-248. The Bureau also pointed to characteristics of GPR cards that made comparison shopping in brick-and-mortar retail locations challenging, which, the Bureau claimed, "mean[s] that consumers often purchase a card before they have an opportunity to review the full terms and conditions." *Id.* Those challenges, of course, are inapplicable to digital wallets—which are accessed online with a less time-constrained opportunity to review terms and conditions and far fewer space limitations for written disclosures.

When it came to digital wallets, the Bureau offered only a few perfunctory paragraphs describing the Bureau's (limited) understanding of the product. AR1 249. Significantly, the Bureau did not identify *any* evidence of consumer confusion or harm to consumers from digital wallet products. Instead, the Bureau asserted (citing no record evidence) that it "understands that some, but not all, digital and mobile wallets allow a consumer to store funds[.]" *Id.* But it failed to explain why that fact, if true, demonstrated a problem in need of a regulatory solution.

Under the APA, "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.). Here, it was arbitrary and capricious for the Bureau to rely on evidence relating to GPR cards to support the regulation of digital wallets without any evidence of actual consumer risk as to digital wallets. *See Cigar Ass'n of Am. v. FDA.*, 2020 WL 532392, at *10-13 (D.D.C. Feb. 3, 2020) (FDA acted arbitrarily and capriciously in relying on studies of health risks of cigars generally to support warning labels for premium cigars specifically).

The Bureau's tortured attempt to justify the application of the short form disclosure requirement to digital wallets underscores the Rule's unlawfulness. Rather than identifying evidence of risks that digital wallets posed to consumers, the Bureau resorted to speculation. The Bureau acknowledged, for example, that "digital wallets currently on the market may not charge usage fees" to consumers, but it asserted that "may not hold true in the future." AR1 274; AR1 321 (same). The Bureau offered no evidence to support its prediction that digital wallet providers would alter their offerings in the future to make them more like GPR cards. Nor did it grapple with comments, *see* sources cited *supra* at 35-36, that showed the opposite was true.

Without at least some supporting evidence or reasoned analysis, the Bureau's unadorned speculation ("may not hold true in the future") simply will not do under the APA. "[M]ere speculation" does not constitute "adequate grounds upon which to sustain [an agency's] conclusion." *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988); *see also Otay Mesa Prop., L.P. v. Dep't of the Interior*, 344 F. Supp. 3d 355, 370 (D.D.C. 2018). Because "agency actions based upon speculation are arbitrary and capricious," *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994), the Rule should be vacated.

IV. THE BUREAU FAILED TO PERFORM THE STATUTORILY MANDATED COST-BENEFIT ANALYSIS REGARDING APPLICATION OF THE PREPAID RULE TO DIGITAL WALLETS

The Bureau also failed to assess meaningfully the costs and benefits of applying the Rule to digital wallets. The Bureau is statutorily obligated to weigh the costs and benefits of the rules it promulgates, and its failure to comply with this duty—imposed by the APA, required by EFTA, and sharpened by specific provisions in the Dodd-Frank Act—renders the Prepaid Rule arbitrary and capricious. Here, although the Bureau assessed the costs and benefits of applying the Rule to traditional prepaid products like GPR cards, it failed to weigh the extensive burdens against the limited, speculative benefits of imposing the Rule's mandates on fundamentally dissimilar products like digital wallets. Accordingly, the Rule should be set aside.

A. The Bureau Is Obligated To Consider The Costs And Benefits Of Regulation

Generally, the APA requires an agency to consider the costs and benefits of the regulations it proposes. "[R]easoned decisionmaking" demands "consideration of [all] the relevant factors" underlying agency action, *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d. 219, 230 (D.D.C. 2016) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015)), and an agency "may not 'entirely fai[l] to consider an important aspect of the problem,'" *Michigan*, 135 S. Ct. at 2707. It follows that an agency typically must "pay[] attention to the advantages *and* the disadvantages" of its decisions. *Michigan*, 135 S. Ct. at 2707.

As relevant here, the Bureau is subject to two additional statutory requirements to engage in cost-benefit analysis. Under EFTA, the Bureau must "conside[r] the costs and benefits [of its rulemaking] to financial institutions, consumers, and other users of electronic fund transfers." 15 U.S.C. § 1693b(a)(2). And under the Dodd-Frank Act, it must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule." 12 U.S.C. § 5512(b)(2). Thus, particularly for the Bureau, "cost-benefit analysis is a central part of the administrative process." *Metlife, Inc.*, 177 F. Supp. 3d. at 240.

An agency violates its cost-benefit analysis obligations when it "opportunistically frame[s] the costs and benefits of [a] rule; … neglect[s] to support its predictive judgments; contradict[s] itself; and fail[s] to respond to substantial problems raised by commenters." *Bus. Roundtable*, 647 F.3d at 1148-1149. Uncertainty "does not excuse the [agency] from its statutory obligation … to apprise itself—and hence the public and Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

B. The Bureau's Cost-Benefit Analysis All But Ignores Digital Wallets

The omission of a meaningful cost-benefit analysis is basic and glaring: In promulgating the initial Prepaid Rule, the Bureau failed to perform the statutorily required cost-benefit analysis with respect to digital wallets *at all*. Despite discussing GPR cards in detail, the Bureau's 37-page cost-benefit analysis in its preamble to the initial Rule does not mention the term "digital wallet," AR1 577-614, let alone provide a reasoned quantitative or qualitative assessment of the benefits and costs of regulation on the digital wallet product. That unexplained failure to assess the costs and benefits of the Rule to digital wallets is a per se default of the Bureau's cost-benefit analysis obligations under the Dodd-Frank Act, EFTA, and the APA.[8]

And the Bureau's statutory violation here is anything but harmless. Record evidence and comments before the agency explained the concrete costs to digital wallet providers and consumers from the Bureau's ill-advised regulatory regime. For example, Google warned the CFPB that its "heavy regulation" of digital wallets would "risk inadvertently stunting the continuing development" of the products, which, Google asserted, "could have a deleterious impact on the broad range of consumers that would otherwise benefit[] from such innovation." AR2 5268. And PayPal cautioned the Bureau that the Rule would "stifle innovation in the digital and mobile payments space" which would "impair[] the ability of companies … to develop new, valuable products to engage consumers" in an "increasingly digital society." AR2 5862; *see also* AR2 10435 (Financial Innovation Now comment noting that the Prepaid Rule should be "narrowly crafted to avoid stifling continued innovation" in the "market for electronic payment products"). Indeed, even the CFPB's own 2015 analysis of "mobile financial services" highlighted that the "landscape [wa]s continuing to evolve" and that it should tread carefully regarding "choos[ing] technological winners and losers." AR1 1578.

In the face of that evidence, the Bureau was silent. It did not consider quantitatively or qualitatively the benefits (if any) to users of digital wallets from the Rule's short form disclosure requirement, not did it endeavor to quantify the Rule's costs to digital wallet providers and their customers. PayPal, for example, commented that costs to both users and providers of digital

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[8] In later amending the Rule, the Bureau belatedly addressed the costs and benefits of extending the credit linking ban to digital wallets. *See* AR1 790-794. But even assuming that after-the-fact analysis remedied the Bureau's prior failure, that discussion only underscores the lack of *any* cost-benefit analysis in connection with applying other aspects of the Rule—most significantly, the short form disclosure requirement—to digital wallets.

wallets would be significant: "[T]he proposed disclosures would confuse and alarm" potential customers by outlining fees that a "consumer would not [actually] incur," thereby causing "a major increase in potential customers abandoning the signup process, or calling the customer support line in confused frustration." AR2 5880.

To be sure, the Bureau noted concerns that the Rule's disclosure requirement would adversely affect electronic providers, AR1 589, but its response only highlights the lack of rigor with which the Bureau approached the application of the Rule to digital wallets. The Bureau asserted that it "disagree[d]" with those concerns, citing "rounds of consumer testing." *Id.* But the Bureau acknowledged that its consumer testing "did not specifically test the disclosure regime in an electronic setting," *id.*, and offered no reason why such nonelectronic testing would shed any light on the complications with online pre-acquisition disclosures for digital wallets. The Bureau in that way "duck[ed] [a] serious evaluation of the costs" of the Rule as applied to digital wallet providers. *Bus. Roundtable*, 647 F.3d at 1152.

In short, in applying the Rule to digital wallets, the CFPB attempted to solve an imaginary problem at an unreasonable cost. By ignoring the relevant factors that distinguish digital wallets from GPR cards; entirely failing to consider comparable market research on digital wallets; and wholly ignoring the costs to digital wallet providers and consumers from the short form disclosure requirement, the Bureau failed to engage in the cost-benefit analysis required by the APA, EFTA, and the Dodd-Frank Act. "[W]hen an agency ignores a mandatory factor it defies a 'statutory limitation on its authority.' Such an act is necessarily arbitrary and capricious." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 656 F.3d 580, 587 (7th Cir. 2011). The Rule should, accordingly, be set aside.

V. THE PREPAID RULE VIOLATES THE FIRST AMENDMENT

Finally, the short form requirement violates PayPal's First Amendment rights by compelling PayPal to disclose information that is largely inapplicable to its products and likely to confuse its customers, while simultaneously prohibiting PayPal from presenting clarifications to dispel that confusion. The Court should therefore hold the Rule unconstitutional as applied to PayPal and enjoin the Bureau's enforcement of the Rule against the company.

Regulations that "target speech based on its communicative content" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Examples of "content-based" restrictions include regulations that "'compel[] individuals to speak a particular message'" or to deliver a "government-drafted script." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Burdens of this type on commercial speech are "no exception" to the general rule, and demand "heightened scrutiny." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Where commercial speech regulations require the disclosure of only "factual and noncontroversial information," the government still must prove that its regulation is "reasonably related" to its "interest in preventing deception of consumers" and not "unjustified or unduly burdensome." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-651 (1985). Here, the Bureau has failed to meet either of these standards.

The short form disclosure is precisely the type of "government-drafted script" that the Supreme Court has analyzed using strict scrutiny. *NIFLA*, 138 S. Ct. at 2371. Indeed, as PayPal has explained, *see supra* at 23-25, the mandated disclosure lays out (1) exactly what fees must be disclosed; (2) in what order those fees must be disclosed; (3) the font that must be used to make those disclosures; and (4) even the font size, down to the number of pixels. It is difficult to imagine compelled speech more "script[ed]" than the short form disclosure. What is more, the

Bureau has acknowledged that many of those fees do not—and may never—apply to digital wallet products like PayPal's. The Bureau's "mere speculation or conjecture" about the future runs directly afoul of the Supreme Court's requirement that a "governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). Here, the Bureau did not point to any evidence that digital wallet consumers were actually harmed by the product's existing disclosures, nor explain how the short form disclosure might alleviate those unnamed harms in the future.

Even if the "commercial speech" standard applies, the Rule is deficient. The requirement that PayPal describe fees that are largely inapplicable to its customers is not "reasonably related" to the Bureau's professed goal of providing consumers with information relevant to choosing between prepaid products. Similarly, prohibiting PayPal from making clarifying disclosures regarding fees that might confuse consumers in no way "directly advances" the government's interest in ensuring that consumers can comparison shop among like product offerings, nor is it "drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Indeed, just the opposite is true, as the Rule bars PayPal from providing on the short form any context about the fees consumers might *actually* encounter rather than the fees that the Bureau has deemed important for a wholly different product (GPR cards) acquired in a wholly different context (brick-and-mortar stores).

In sum, the Rule forces PayPal to make statements likely to confuse and mislead customers and then prohibits it from clearing up the resulting confusion. This content-based restriction on PayPal's speech rights violates the First Amendment and should be enjoined.

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.

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Respectfully submitted,

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