IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAYPAL, INC.,

Plaintiff,

v.

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

CONSUMER FINANCIAL PROTECTION BUREAU and KATHY KRANINGER, in her official capacity as Director of the Consumer Financial Protection Bureau,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In its latest brief, PayPal at last acknowledges that the digital-wallet accounts covered by the Prepaid Rule enable consumers to store funds for use in conducting everyday transactions—just like every other prepaid account subject to the Rule. PayPal also now concedes that it was entirely appropriate to apply the vast majority of the Prepaid Rule to digital-wallet asset accounts, and makes clear that its challenge is limited to two specific provisions: the short-form disclosure requirements and the 30-day waiting period for linking credit to a prepaid account in certain limited circumstances.

The Bureau acted well within its authority in adopting those provisions. The Bureau promulgated the short-form disclosure requirements to give consumers key information about prepaid account terms upfront—in a uniform format that makes the information easier to find, understand, and use—so that consumers can make better-informed decisions about what products best suit their needs. This fits comfortably within the Bureau's authority to prescribe rules governing disclosures under the Electronic Fund Transfer Act (EFTA) and the Dodd-Frank Act. PayPal's contention that Congress in fact meant for the Bureau to prescribe requirements relating only to the content of disclosures—while leaving the form of disclosures to individual companies' discretion—rests on no more than wishful thinking. Congress entrusted the Bureau to provide for effective disclosures, and that is what the Bureau did here.

While PayPal also claims that it was arbitrary and capricious to apply the short-form disclosure requirements to digital-wallet accounts, it barely acknowledges the (multiple) explanations the Bureau gave for requiring a standardized disclosure across the board, let alone shows that those explanations exceed the bounds of reasonableness. PayPal's challenge is at bottom a policy disagreement, not a viable Administrative Procedure Act (APA) claim. Its

challenge to the Bureau's consideration of the Rule's benefits and costs likewise fails because the Bureau fully considered the Rule's benefits and costs, including for digital-wallet accounts. And PayPal's First Amendment challenge cannot overcome the well-established precedent making clear that the government may properly require companies to disclose factual, uncontroversial information about products they offer in the commercial marketplace, which is precisely what this Rule does.

PayPal's challenge to the waiting-period provision fares no better. Congress vested the Bureau with broad authority to adopt "additional requirements" to effectuate the purposes of the Truth in Lending Act (TILA), and it is undisputed that those purposes include promoting informed use of credit by assuring "meaningful" disclosure of credit terms. The waiting period is an "additional requirement" that does just that: It makes disclosures about linked credit more meaningful by ensuring that—in the limited circumstances covered by the Rule—consumers can consider the terms of credit at a separate point in time from when they are learning about a new prepaid account. PayPal neither acknowledges this reasoning nor explains why the expert agency's understanding of what makes disclosures meaningful is unworthy of deference.

PayPal's claim that it is arbitrary to require consumers to wait to link credit cards to their digital wallets ignores what the provision actually does. After conducting a separate rulemaking on the topic, the Bureau narrowed the waiting-period provision so that it applies to consumers seeking to link a credit card to a digital-wallet account only rarely, most notably when linking the accounts would cause certain account terms to change. The Bureau determined that a modest wait was warranted in these circumstances to enable consumers to focus more effectively on these (potentially complex) consequences. PayPal does not acknowledge this reasoning (or, indeed, even the provision's limited scope), much less explain why it is arbitrary and capricious.

ARGUMENT

I. Both EFTA and the Dodd-Frank Act authorize the short-form disclosure requirements.

The Rule's short-form disclosure requirements fall comfortably within the Bureau's authority under both EFTA and the Dodd-Frank Act. Under the well-established *Chevron* framework, PayPal's statutory-authority challenge can succeed only if PayPal can show either (at step one) that Congress "unambiguously expressed [its] intent" to bar regulations governing disclosures' form or (at step two) that the Bureau's conclusion that the statute permits such regulations is not "reasonable." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). It cannot make either showing. Both EFTA and section 1032 of the Dodd-Frank Act grant the Bureau broad authority to prescribe rules governing disclosures, and nothing in either statute suggests that Congress intended to preclude the Bureau from adopting rules that make disclosures more effective by standardizing their form. The Bureau's conclusion that the statutes authorize such rules is reasonable and entitled to deference.

A. EFTA authorizes rules standardizing the form of disclosures.

EFTA grants the Bureau broad authority to prescribe rules "to carry out the [Act's] purposes" and further specifies that providers must make disclosures "in accordance with regulations of the Bureau." 15 U.S.C. §§ 1693b(a)(1), 1693c(a). In light of these provisions, PayPal cannot seriously dispute that EFTA authorizes the Bureau to adopt rules governing disclosures under the Act.[1] Contrary to PayPal's contentions, nothing in the statute suggests—let

[1] PayPal suggests that the Bureau's authority to adopt rules governing disclosures under the Act is actually limited to two discrete topics for which EFTA *separately* refers to Bureau regulations. Dkt. 23 ("PayPal Br.") at 3. That argument borders on frivolous. In PayPal's view, even though Congress granted the Bureau broad authority to "prescribe rules to carry out the [Act's] purposes," 15 U.S.C. § 1693b(a)(1), provided that disclosures must be made "in accordance with regulations of the Bureau," *id.* § 1693c(a), and otherwise made clear that it viewed rules as "essential to the Act's effectiveness," S. Rep. No. 95-1273, at 26 (1978),

alone "unambiguously" (PayPal Br. at 3)—that Congress intended for those rules to relate only to disclosures' content, and not form, even if a standardized format would make the disclosures more effective. PayPal seeks indications of such an intent in EFTA's model clause provision, express form requirements in another statute's disclosure provisions, and prior EFTA regulations, but none of that supports PayPal's reading of the statute, much less establishes Congress's unambiguous intent on the subject.[2] The Bureau reasonably concluded that EFTA permits rules prescribing uniform disclosures, and that conclusion is entitled to deference.

1. Start with the model clause provision. That provision requires the Bureau to issue "optional" model clauses that offer providers a safe harbor from liability. 15 U.S.C. § 1693b(b). If a provider uses a model clause appropriately, it will not face liability for failing to disclose information "in proper form." *Id.* § 1693m(d)(2). The requirement for "optional" model clauses in no way suggests that Congress intended to bar the Bureau from adopting mandatory requirements governing disclosures' form. Rather, as the Bureau's opening brief explains, that provision merely ensures that financial institutions will always have a surefire way to comply, even if the Bureau's regulations leave the precise form of disclosures unspecified (for example, by requiring information to be displayed "clearly and conspicuously," without specifying what

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Congress actually meant to authorize disclosure rules only on two narrow topics—security-based exceptions to the requirement to disclose the type of transfers consumers may make, and the form of disclosures about error resolution. *See* 15 U.S.C. § 1693c(a)(3), (7). Even putting the sheer implausibility of that view aside, a specific grant of authority on a particular topic does not "strip the [agency] of [its] broad grant of [rulemaking] authority." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) ("Congress generally knows how to use the word 'only' when drafting laws.").

[2] PayPal argues at length (at 4-6) that the authority to adopt rules governing disclosures' form cannot be inferred from the mere "absence of an express statutory prohibition" on such rules. That attacks a straw man. The authority for the short-form disclosure requirements derives not from such an "absence," but from the statute's broad grant of authority to adopt rules governing disclosures and from the absence of *any* indication—express or implied—that Congress intended for that authority to exclude rules that standardize the form of disclosures.

counts as sufficiently clear and conspicuous). Dkt. 20-1 ("Bur. Br.") at 24-26. In giving companies that protection, Congress did not strip the Bureau of discretion to adopt specific requirements governing disclosures' form if that would make the disclosures more effective.

In contending otherwise, PayPal reads the instruction requiring the Bureau to adopt "optional" models to imply that the Bureau may not adopt form requirements that would effectively make the models mandatory.[3] But the D.C. Circuit has routinely rejected just that sort of logic. For example, in *CSX Transportation, Inc. v. Surface Transportation Board*—which the Bureau discussed in its opening brief (at 25) and to which PayPal offers no meaningful response—the D.C. Circuit rejected an argument that "the fact that the [agency] *must*" do something implied "that it *must not*" do something else. 754 F.3d 1056, 1064 (D.C. Cir. 2014) (emphases in original) (holding that, by requiring agency to use simplified method for reviewing railroad rates in certain cases, Congress did not preclude agency from using that method in other cases). Likewise, here, the fact that the Bureau "must" provide optional models that providers can use to avoid liability does not imply that the Bureau "must not" adopt rules that effectively make the models mandatory.

Other examples abound.[4] Indeed, the D.C. Circuit has "consistently recognized that a congressional mandate in one section and silence in another often suggests not a prohibition but

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[3] PayPal also repeatedly cites, without explanation, the provision's instruction that the Bureau "take account of [certain] variations … and, as appropriate, … issue alternative model clauses for disclosure of these differing account terms," 15 U.S.C. § 1693b(b). PayPal Br. at 3, 7, 9. Here, the Bureau reasonably determined that no "alternative" model clause was "appropriate" for digital-wallet accounts: Even if those (or other) accounts did not charge for or offer certain services, they could simply note—on the same uniform disclosure as everyone else—that the service costs "$0" or is "N/A."

[4] *E.g.*, *Adirondack Med. Ctr.*, 740 F.3d at 697 (statute's express authorization to adjust one type of Medicare reimbursement rate did not preclude the agency from making the same type of adjustment for another rate); *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009)

simply a decision … to leave the [other] question to agency discretion." *Catawba Cnty.*, 571 F.3d at 36 (quotations omitted). Thus, the fact that "Congress spoke in one place but remained silent in another" will "rarely if ever" reveal Congress's unambiguous intent. *Id.* EFTA is hardly that "rare[]" case. By mandating optional models while remaining silent about mandatory form requirements, Congress did not unambiguously indicate that mandatory form requirements were off-limits. Rather, whether to adopt such requirements is left "to agency discretion." *Id.*

For related reasons, PayPal errs in contending (at 8) that the "specific" provision for optional model clauses trumps the Bureau's "general" authority to promulgate rules governing disclosures, and that mandatory form requirements render the model-clause provision a "nullity." The specific-trumps-the-general canon is "impotent … unless the compared statutes are irreconcilably conflicting." *Adirondack Med. Ctr.*, 740 F.3d at 698 (quotations omitted). The provisions here are not. And far from being a "nullity," the model-clause provision guarantees providers a straightforward way to comply, even when rules do not detail the form that disclosures must take.

2. PayPal fares no better in contending (at 10) that Congress must not have intended to allow requirements governing the form of disclosures under EFTA because another statute requires disclosures to be in a particular form and expressly grants the Bureau authority to specify the form's details. This argument suffers from the same flaw as the first: In mandating form requirements in one context, Congress does not foreclose such requirements in other contexts. Rather, EFTA's silence on form requirements is better understood to reflect

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(rejecting argument that an "express mandate" for EPA to apply a particular presumption in certain contexts "proves that Congress intended to preclude its use" in others); *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990) (express direction for agency to simultaneously consider competing applications in a particular context did not preclude agency from simultaneously considering such applications in another context).

Congress's intent to leave whether to impose such requirements "up to the agency." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990).

3. PayPal likewise widely misses the mark in contending (at 10-11) that the fact that the agency did not previously adopt form requirements as detailed as the Prepaid Rule's shows that it lacks authority to do so. While the fact that an agency did not previously exercise a particular power can confirm statutory indications that Congress did not intend to confer that power, an agency's past inaction alone can hardly establish Congress's intent. *Cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 131-32 (1983) (finding agency's "failure ... to exercise [a] power" relevant where statute's "plain meaning" showed power did not exist); *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (finding agency's previous failure to assert authority "telling" where "the text, history, structure, and context of the statute" showed authority did not exist). Here, nothing in the statute suggests that Congress intended to exclude rules regarding disclosures' form from the Bureau's otherwise broad authority to regulate disclosures under the Act.

4. For all these reasons, nothing in EFTA forecloses rules governing disclosures' form, let alone unambiguously. Thus, under *Chevron* step two, the Court must "defer to the agency's interpretation" that the statute permits such rules "so long as [that interpretation] is reasonable." *Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004); *see also City of Arlington v. FCC*, 569 U.S. 290, 296-97, 300 (2013) (applying deference to agency's interpretation of "scope of [its] statutory authority"). The interpretation here is. Bur. Br. at 27-28.

Indeed, PayPal makes little effort to argue that, if the Bureau's interpretation of its authority survives *Chevron* step one, it is unreasonable under step two. PayPal points to "First Amendment concerns" (at 12), but as explained below (*infra* section V) and in the Bureau's opening brief (at 26, 57-60), PayPal's First Amendment challenge does not present the kind of

"serious constitutional difficult[y]" that can displace *Chevron*. *See Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). PayPal also asserts (at 11-12) that the Rule's requirements are too "prescriptive" to represent a "reasonable exercise" of the Bureau's power.[5] But PayPal offers nothing beyond its own say-so to support that contention. The Bureau interpreted the statute to authorize rules requiring a clear and consistent disclosure format that makes it easier for consumers to quickly understand and compare accounts' terms. That was an entirely "reasonable policy choice," *see infra* section III and Bur. Br. at 41-49, that is entitled to deference. *See Chevron*, 467 U.S. at 844-45.

B. Section 1032 of the Dodd-Frank Act authorizes rules standardizing the form of disclosures.

As the Bureau's opening brief explains (at 28-30), section 1032 of the Dodd-Frank Act—which authorizes "rules to ensure that the features of any consumer financial product or service … are fully, accurately, and effectively disclosed"—also separately authorizes the Rule's short-form disclosure requirements. 12 U.S.C. § 5532(a). In response, PayPal primarily contends (at 13-14) that section 1032 cannot be used to "nullify the … limits" that Congress imposed in EFTA—but, as explained above, EFTA does not in fact impose the "limits" PayPal claims. And

[5] The two cases that PayPal cites (at 12) for support only underscore the reasonableness of the Bureau's exercise of authority here. In one, the Supreme Court invalidated as "unreasonable" an agency interpretation that rendered environmental permitting programs "unadministrable" and, by the agency's own admission, "unrecognizable to the Congress that designed them." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 312, 324 (2014). In the other case, the D.C. Circuit held that a rule requiring drug advertisements to disclose certain wholesale drug prices went "beyond any reasonable exercise" of the agency's authority there—which was limited to issuing rules "necessary to carry out the administration" of Medicare and Medicaid. *Merck & Co. v. HHS*, 962 F.3d 531, 536-37 (D.C. Cir. 2020). But that was because there was no "actual and discernible nexus" between the disclosure requirement and the "administration" of the programs—only an attenuated and speculative "hoped-for trickle-down effect" on program spending. *Id.* at 537-38. Here, PayPal cannot credibly dispute that the short-form disclosure requirements have a clear-cut "nexus" to the authority to "carry out [EFTA's] purposes," 15 U.S.C. § 1693b(a)(1), and promulgate disclosure rules, *id.* § 1693c(a).

PayPal's more sweeping suggestion (at 14) that section 1032 does not authorize disclosure rules for any financial product "covered by" another statute's disclosure regime finds no support in any canon of construction and cannot be reconciled with the provision's plain authorization of disclosure rules for "*any* consumer financial product or service," 12 U.S.C. § 5532(a) (emphasis added). Bur. Br. at 30.

II. Both TILA and the Dodd-Frank Act authorize the 30-day waiting period.

The Rule's 30-day waiting period for linking certain limited types of credit to a prepaid account fits comfortably within the Bureau's rulemaking authority under both TILA and the Dodd-Frank Act.

A. TILA authorizes the waiting period.

The Supreme Court has recognized that, in TILA, Congress "delegated expansive authority to [the responsible agency] to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980); *accord Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 372 (1973) (noting that Congress delegated "broad rulemaking authority" in TILA to ensure "flexibility" in responding to changing credit practices).[6] In particular, in its present form, TILA vests the Bureau with broad authority to "prescribe regulations to carry out the purposes of" the Act, including by adopting such "additional requirements" that the Bureau judges to be "necessary or proper to effectuate the purposes of [TILA]." 15 U.S.C. § 1604(a). There is no dispute that those purposes include

[6] PayPal's objection (at 17) that *Mourning* has been "repudiated" is a red herring: The Bureau does not rely on any "repudiated" aspect of that case, and nothing casts doubt on the *Mourning* Court's conclusion that the rulemaking authority Congress delegated in TILA is "broad"—a point that in any event is apparent from the statute's text. Later cases have merely clarified that *Mourning* does not permit agencies to promulgate "an unauthorized regulation" or otherwise "contravene Congress's will"—points that the Bureau in no way disputes. *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020) (quotations omitted).

promoting the informed and voluntary use of credit. *See id.* § 1601(a).

The Rule's waiting-period provision is an "additional requirement[]" that effectuates this purpose. By requiring 30 days to pass before certain limited types of credit can be linked to a prepaid account, the provision gives consumers the chance to learn about and consider, at separate points in time, the terms of a prepaid account, the terms of credit, and the (potentially complex) consequences of linking the two—thereby enabling consumers to make more informed and deliberate decisions.

The Bureau's determinations that the waiting period (1) "effectuates the purposes" of TILA and (2) is an appropriate "additional requirement" authorized by § 1604(a) are reasonable and entitled to deference. PayPal fails to show otherwise.

1. The waiting period effectuates TILA's purposes by promoting informed use of credit.

PayPal does not meaningfully dispute that the waiting period promotes the informed use of credit in just the way the Bureau explained. Although PayPal asserts (at 18) that the waiting period does not serve this goal when a digital wallet user seeks to link a *preexisting* credit card for which she has already received disclosures, this argument wholly ignores the markedly limited circumstances in which the waiting period applies. *See* Bur. Br. at 18-19. When a consumer seeks to link a credit card to a covered digital-wallet account, the waiting period generally applies only if linkage will cause certain terms or conditions of the prepaid account, the credit, or both to change. In those circumstances, the Bureau explained, consumers will be better able to make informed and deliberate decisions if they consider the changes that linking credit will bring at a point in time distinct from when they are considering and choosing a prepaid account. 83 Fed. Reg. 6364, 6397 (Feb. 13, 2018) (Admin. Record Vol. 1 ("AR1") 776). PayPal does not dispute (or even acknowledge) this reasoning.

Besides, under Supreme Court precedent, even if there were some specific circumstances in which the waiting period would not promote informed use of credit, that would "not impair" the provision's validity—for a rule may include a "reasonable margin, to insure effective enforcement." *Mourning*, 411 U.S. at 373-74 (upholding rule designed to deter companies from concealing credit charges even though it required compliance "by some creditors who do not charge for credit and thus need not be deterred"). The Bureau pointed this out in its opening brief (at 39), and PayPal says nothing to refute it.

2. The waiting period is an "additional requirement" authorized by Congress.

As the Bureau's opening brief explains (at 31-40), the Bureau also reasonably determined that the waiting period is an "additional requirement" authorized under § 1604(a). Where, as here, Congress empowers an agency to promulgate "additional" or "other" requirements, the agency may adopt requirements that the statute itself "makes no reference to" and that "Congress may not have originally intended" itself. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 219-20 (D.C. Cir. 2015).[7] Make no mistake: There are still real limits on this authority—and there is no dispute on that point.[8] In particular, as the cases that PayPal emphasizes (at 16-

[7] PayPal attempts to distinguish this case (at 21) on the ground that the rule there was "tethered to" a particular "substantive restriction" that the statute itself imposed. But that is only because the *rulemaking authority* there was tethered to a particular substantive provision: The statute specified limited conditions under which doctors could refer patients and lease medical equipment to the same hospital and further authorized the relevant agency to adopt "other requirements" for such arrangements. *Council for Urological Interests*, 790 F.3d at 216, 219. In TILA, Congress more broadly granted the Bureau authority to adopt "additional requirements" that further the Act's purposes, without limiting those requirements to any particular statutory mandate. *See* 15 U.S.C. § 1604(a).

[8] PayPal thus attacks a straw man in contending (at 16 n.3, 18) that even broad grants of rulemaking authority do not permit an agency "to issue *any* regulations," *Nat'l Mining Ass'n v. Dep't of Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997), and that authority cannot be "presume[d] … based solely on the fact that there is not an express withholding of such power." *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995). These uncontroversial

18) show, a rule may not exceed the bounds of the authority Congress granted or conflict with Congress's intent as reflected elsewhere in the statute.[9] The waiting period, however, suffers from neither of those flaws.

a. The waiting period falls comfortably within the bounds of the authority Congress delegated to the Bureau to adopt "additional requirements" to further TILA's purposes. Section 1604(a) authorizes "such additional requirements … as in the judgment of the Bureau are necessary or proper to effectuate [TILA's] purposes." 15 U.S.C. § 1604(a). Those purposes undeniably include promoting "informed use of credit"—and, as explained above, PayPal does not meaningfully dispute that the waiting period does just that. *See supra* at 10-11.

In contending that the waiting period nonetheless exceeds the Bureau's authority, PayPal claims (at 18) that § 1604(a) authorizes only additional "disclosure" requirements, not requirements that PayPal would term "substantive."[10] But there is no textual basis for PayPal's

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propositions are wholly irrelevant here. The Bureau does not contend that § 1604(a) authorizes it to adopt any regulation it wishes, nor does it base the waiting period on the mere absence of any "express withholding" of authority. Rather, the waiting period is permissible because it falls within the broad authority that Congress affirmatively granted the Bureau in § 1604(a).

[9] *See Michigan v. EPA*, 576 U.S. 743, 748, 751-52 (2015) (concluding that rule that "does significantly more harm than good" could not be considered "appropriate" under provision authorizing rules when "appropriate and necessary"); *NY Stock Exch.*, 962 F.3d at 553, 555 (holding that SEC exceeded "limits on its regulatory authority" by imposing requirements that would not further Act's purposes, notwithstanding provision barring burdens "not necessary or appropriate in furtherance of the purposes of the Act"); *Nat'l Mining Ass'n*, 105 F.3d at 694 (invalidating rule that "conflict[ed] with the plain meaning" of substantive statutory provision).

[10] PayPal also concedes (at 18) that the statute authorizes "addition[s]" to substantive requirements imposed by the statute. That concession defeats PayPal's challenge because the waiting-period provision, in addition to being an "additional requirement[]" that promotes informed use of credit, is also an "addition" to or "adjustment" of the specific substantive requirement set forth in 15 U.S.C. § 1642. That section bars providers from issuing a credit card "except in response to a request or application therefor," thereby ensuring that consumers get a credit card only if they affirmatively choose it. As the Bureau's opening brief explains (at 38 n.7), the waiting-period provision adjusts this requirement by providing that certain credit cards cannot be issued except in response to a request or application made at least 30 days after the

apparent view (at 18) that "disclosure" rules must relate only to "the nature or type of information made available to consumers," and not (for some reason) the timing of when information is considered. Congress intended to promote informed use of credit by "assur[ing] a meaningful disclosure of credit terms," 15 U.S.C. § 1601(a), and that is precisely what the waiting period does: It assures meaningful disclosure of credit terms by ensuring that consumers can consider those terms (or, for preexisting credit, information about what account terms will change upon linkage) at a point in time distinct from when they are obtaining and registering a prepaid account—so that they can more carefully focus on that information and make a more deliberate and informed choice. Affecting the timing of disclosures in this way helps ensure "meaningful" disclosure just as much as rules governing the "nature or type" of information disclosed. PayPal offers no statutory basis for its cramped understanding of what helps make disclosure "meaningful." And even if PayPal's narrow interpretation might be reasonable, PayPal certainly cannot show what it must to overcome the deference owed under *Chevron*: that its view is "the only possible interpretation" or that the Bureau's broader understanding exceeds the bounds of "reasonableness." *See Regions Hosp. v. Shalala*, 522 U.S. 449, 460 (1998).

There is likewise no merit to PayPal's contention (at 19-20) that interpreting § 1604(a) to authorize the waiting period would leave the Bureau with "sweeping" authority to make "decisions of major economic or political significance." Requiring 30 days to pass before credit

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linked prepaid account is registered, thereby ensuring that consumers get a credit card only if they make an informed and deliberate choice to get it. PayPal objects (at 19 n.6) that the waiting period does not actually relate to the issuance of credit cards because it also requires a wait to link existing credit cards that have already been issued, but this fundamentally misunderstands what a "credit card" is. A credit card is the device (such as a physical card or account number) used to access credit to make transactions and is distinct from the credit itself. *See* 15 U.S.C. § 1602(*l*). So, when preexisting covered credit is linked to a prepaid account, the consumer *is* issued a new credit card—the prepaid card becomes another device (*i.e.*, credit card) for accessing the credit. *See* 12 C.F.R. § 1026.61(a).

can be linked to a prepaid account in certain limited circumstances hardly amounts to a rule of "major" significance. And while PayPal frets (at 18-19) that upholding this rule would necessarily open the door to the Bureau adopting major rules "substantively regulat[ing] credit" in the future, that concern ignores the limiting principle that TILA itself supplies: Section 1604(a) authorizes only those "additional requirements" that promote the Act's purposes, facilitate compliance, or prevent evasion. 15 U.S.C. § 1604(a). The waiting-period provision satisfies that standard because it directly advances TILA's purposes by assuring "meaningful" disclosure. Upholding that provision in no way implies that outright bans on credit products or other "substantive regulations" that PayPal fears would satisfy that standard as well.

b. The waiting period also does not conflict with any limit Congress established in TILA. PayPal seeks such a limit in TILA's "structure," which PayPal claims (at 19) shows that when Congress wanted to adopt "substantive" credit requirements unrelated to disclosure, it said so explicitly. But, for one, this argument ignores that, whether or not the waiting period could also be considered "substantive," it undeniably makes *disclosures* more meaningful by ensuring that consumers are better able to consider them. Beyond that, the Bureau already explained—with citations to multiple binding cases—that Congress's express imposition of certain requirements does not imply that it intended to preclude the agency from adopting others if doing so would promote the informed use of credit. Bur. Br. at 35-36. Indeed, that would read the provision authorizing "additional requirements" right out of the statute.

B. Section 1032 of the Dodd-Frank Act authorizes the waiting period.

The waiting-period provision is also separately authorized under section 1032 of the Dodd-Frank Act, which empowers the Bureau to adopt "rules to ensure that the features of any consumer financial product or service" are "effectively disclosed," 12 U.S.C. § 5532(a). As the

Bureau's opening brief explained (at 40), the waiting period makes disclosures about both the potentially linked credit and the prepaid account more effective by giving consumers space to focus on each independently. PayPal does not dispute that the waiting period makes disclosures more effective in this way, and instead just repeats its objection that the waiting period is not a "traditional" disclosure requirement. PayPal Br. at 23. But, as with its challenge under TILA, PayPal does not and cannot point to anything in section 1032 that supports its view that Congress unambiguously intended for the Bureau to make disclosures "effective[]" only by specifying what information must be disclosed, not when. And PayPal does not even acknowledge the Bureau's determination that disclosures would be more effective if considered at separate points in time, let alone explain why that determination is unworthy of deference.

Nor is there any merit to PayPal's contention (at 23) that the waiting period can be permissible under section 1032 only if it is also permissible under TILA. Putting aside that the provision *is* permissible under TILA, this argument fails because nothing in the statute supports PayPal's atextual view that, in authorizing rules to ensure effective disclosure of the terms of "any" consumer financial product or service, Congress did not intend to authorize rules governing credit. *Accord supra* at 9.

III. The Rule is not arbitrary and capricious for declining to exempt digital-wallet accounts.

PayPal does not dispute that it is entirely reasonable to apply the vast majority of the Prepaid Rule to digital-wallet accounts. It does not even mention the "long form" disclosures that the Rule requires for prepaid accounts. *See* 12 C.F.R. § 1005.18(b)(4). Nor does it take issue with the special flexibilities that the Rule offers prepaid providers—such as an alternative to sending periodic statements, *id.* § 1005.18(c)(1); and the ability to provide certain disclosures electronically without obtaining E-Sign consent, *id.* § 1005.18(b)(6)(i)(B). And it expressly

concedes (at 27) that it is reasonable to subject digital-wallet accounts to Regulation E's pre-existing protections that have long applied to other accounts.

Although PayPal now claims that the Prepaid Rule was not needed to accomplish that, that ignores the long regulatory history in which the Federal Reserve Board repeatedly considered extending Regulation E to prepaid products, but then never did, raising doubt about whether existing Regulation E applied to those products. 81 Fed. Reg. 83934, 83946-47 & nn.128-143 (Nov. 22, 2016) (AR1 252-53). PayPal's claim of already-clear coverage, moreover, represents a recent about-face. It was not until after the Bureau proposed to extend Regulation E to prepaid accounts in 2014 that PayPal ever took the unqualified position that Regulation E applied to it. Admin. Record Vol. 2 at 5862. Before then, PayPal itself had consistently noted the very ambiguity that it now denies. *See, e.g.*, eBay Inc., *Form 10-K* (2014), *available at* https://go.usa.gov/xG9aN (PayPal securities filing noting that "there have been no definitive interpretations" on whether PayPal's services are subject to Regulation E); eBay Inc., *Form 10-K* (2009), *available at* https://go.usa.gov/xG9aU (same).

Having acknowledged the reasonableness of applying the great majority of the Prepaid Rule to digital-wallet accounts (and no doubt content to take advantage of the flexibilities that the Rule grants prepaid providers), PayPal focuses its challenge on two provisions of the Rule alone: the short-form disclosure requirements and the 30-day waiting period for linking certain limited forms of credit to a prepaid account. Those challenges fail. PayPal may not like the Bureau's policy judgment that digital-wallet accounts deserved no special exemption from those provisions, but it cannot show what it needs to prevail—that that judgment was "so implausible that it could not be ascribed to a difference in view." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. The Rule reasonably requires the same upfront disclosures for all prepaid accounts, including digital-wallet accounts.

After spending its opening brief arguing that digital wallets are fundamentally unlike prepaid accounts because they allow consumers to link credentials for other accounts, PayPal now acknowledges (*e.g.*, at 24) that the digital wallets covered by the Rule share a fundamental similarity with other prepaid accounts—consumers can use them to load and reload funds for use in a variety of transactions. The Bureau made the reasonable policy judgment that standardized disclosures were warranted for these fundamentally similar products. PayPal does not (and could not) show that this judgment was so unreasonable as to fail the "highly deferential" arbitrary-and-capricious standard of review. *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

1. PayPal principally objects (at 26-27, 30-31) that the capacity to store funds for use in transactions does not justify treating digital-wallet accounts like other prepaid accounts because checking and other accounts also share that feature—so digital-wallet accounts should only have to follow the "baseline Regulation E requirements" that apply to those other accounts. This contention overlooks the larger regulatory context. The Prepaid Rule requires disclosures about prepaid accounts upfront—*before* a consumer opens the account—while the preexisting Regulation E provisions that apply to checking and other accounts require disclosures only later, "at the time the consumer contracts" for the service "or before the first electronic fund transfer is made." *Compare* 12 C.F.R. § 1005.18(b)(1), *with id.* § 1005.7(a); *see also* 81 Fed. Reg. at 84017, 84019 (AR1 323, 325) (explaining importance of providing disclosures before a prepaid account is opened). This does not mean that checking account consumers are left without key information before opening their accounts—because a separate regulation (Regulation DD) under a separate statute (the Truth in Savings Act) requires pre-account-opening disclosures for those accounts. 12 C.F.R. § 1030.4(a)(1). Those requirements, however, apply only to accounts

held by a consumer at a "depository institution"—and so for the most part do not apply to digital-wallet accounts (or other prepaid accounts). *Id.* § 1030.2(a); *see also* 12 U.S.C. §§ 4305(a), 4313(1); 81 Fed. Reg. at 83940 (AR1 246).

So, if PayPal had its way, digital-wallet accounts alone—unlike other prepaid accounts (which are subject to the Prepaid Rule) and unlike checking and other deposit accounts (which are subject to Regulation DD)—would be uniquely exempt from any requirement to disclose account terms upfront. Digital-wallet accounts would also uniquely be spared of any obligation to disclose all fees, as opposed to just fees relating to electronic fund transfers. *Compare* 12 C.F.R. § 1005.18(b)(4)(ii), (f)(1) (requiring "[a]ll fees" to be disclosed for prepaid accounts), *and id.* § 1030.4(b)(4) (requiring disclosure of "any fee" on accounts covered by Regulation DD), *with id.* § 1005.7(b)(5) (preexisting Regulation E provision requiring disclosure of only certain fees); *see also* 81 Fed. Reg. at 84114 (AR1 420). PayPal cannot seriously contend that it was arbitrary and capricious to deny digital-wallet accounts this special treatment.

2. PayPal next rehashes its argument (at 26) that the Bureau failed to "identify any risks posed by digital wallets" before declining to give those accounts a special exemption from the short-form disclosure requirements. There are at least three problems with this argument.

First, this argument ignores the D.C. Circuit's teaching that "agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.).[11] Here, the Bureau

[11] The D.C. Circuit's statement in *New York Stock Exchange*, 962 F.3d at 556, that regulations "must be designed to address identified problems"—which PayPal repeatedly cites (at 2, 28)—does not cast doubt on agencies' ability to promulgate prophylactic rules. In that case, the court invalidated (on statutory, not arbitrary-and-capriciousness, grounds) a rule that the agency did not adopt to "rectify any perceived issues"—current or potential—at all. *Id.* at 545, 555-56 (invalidating rule that tested out different regulatory requirements merely to see "whether there is a problem worthy of regulation").

decided to require the same short-form disclosures for digital-wallet accounts in part to ensure that consumers would not be caught off-guard by unexpected fees if digital-wallet accounts began charging more fees in the future. 81 Fed. Reg. at 84025 (AR1 331). Although PayPal complains (at 27) that the Bureau lacked "evidence" of this risk, that future fees were at least a *risk* cannot credibly be disputed—after all, nothing prevents providers from charging more fees on digital-wallet accounts. And when it comes to "predictive judgments" like this, "[t]he 'arbitrary and capricious' standard is particularly deferential." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). Indeed, the Bureau's prediction has already proved prescient: PayPal itself has already introduced a digital-wallet account that charges for two of the four services listed on the top line of the short-form disclosure. Bur. Br. at 48 n.8.

Second, the Bureau also separately determined that the short-form disclosures were appropriate for digital-wallet accounts regardless of whether those accounts ever began charging many fees. The Bureau made the reasonable policy judgment that digital wallet consumers should have the same opportunity to learn about the account's fees (or lack thereof) upfront as did consumers acquiring other types of prepaid accounts. 81 Fed. Reg. at 84015 (AR1 321). Even where an account does not charge many fees, knowing that is itself useful in choosing an account. *Id.* at 84025 (AR1 331). The Bureau also reasonably decided to craft a single standardized disclosure that would work for all prepaid accounts, no matter their fee structures and no matter where they are sold, rather than creating individualized disclosure regimes for discrete types of products. That approach avoided creating a regulatory patchwork that could be confusing and burdensome—and that would require constant revision as practices changed for

each discrete product. *Id.* at 84015, 84041 (AR1 321, 347). Using a standardized format, moreover, makes the disclosures easier to understand and navigate.[12] *Id.* at 84014 (AR1 320).

Third, even if the Bureau had not identified the risk of unexpected fees on digital-wallet accounts in the future or explained the benefits of standardization (it did both), that would not make the rule arbitrary and capricious. Nothing in the APA "require[s] agencies to tailor their regulations as narrowly as possible to the specific concerns that generated them." *Associated Dog Clubs of N.Y. State, Inc. v. Vilsack*, 75 F. Supp. 3d 83, 92 (D.D.C. 2014).[13] PayPal does not dispute that the short-form disclosure requirements reasonably address concerns about the less-than-transparent way that at least *some* prepaid accounts were marketed previously. Nothing required the Bureau to narrowly tailor the Rule to those "specific concerns."

3. PayPal next repeats its objection (at 31) that the Bureau ignored what PayPal considers "substantial" differences between digital-wallet accounts and general-purpose reloadable (GPR) cards sold in retail stores. The Bureau already responded to this point (at 43-45, 47-49), but will say it again: It *did* consider the differences and concluded that they were not

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[12] The Bureau's determination that it would serve these goals to require consistent disclosures makes the short-form disclosures wholly unlike the health warnings for premium cigars that the district court invalidated in *Cigar Association of America v. FDA*, 436 F. Supp. 3d 70 (D.D.C. 2020). In *Cigar Association*, the court held that the agency had not adequately explained why health warnings for premium cigars were warranted in light of claims that users of that particular product already appreciated the health risks. *Id.* at 84-85. There, however, the agency never suggested that requiring consistent warnings for all tobacco products would itself serve some purpose, and in fact expressly submitted that differences among products "might warrant a different approach with respect to each category of product"—a fact that the court deemed "critical" to its decision. *Id.* at 85.

[13] *Associated Dog Clubs* held that a regulation could properly apply to small and large online dog sellers even if the agency only had evidence of "mistreatment by large online sellers." *Id.* PayPal attempts to distinguish this case (at 30 n.9) on the ground that the agency also cited evidence of problems with online sellers generally—but that fact had no bearing on the court's *independent* conclusion that small sellers could be covered "*regardless of whether* the agency had only received reports of mistreatment by large online sellers." *Associated Dog Clubs*, 75 F. Supp. 3d at 92 (emphasis added).

significant enough to warrant creating a special disclosure regime for digital-wallet accounts. 81 Fed. Reg. at 83967-68, 84015 (AR1 273-74, 321). That the Bureau judged the differences to be less "substantial" than PayPal does not make its decision arbitrary.

Relatedly, PayPal errs in contending (at 33) that the Bureau offered no "reasoned explanation" for why a "disclosure designed" for GPR cards acquired in stores made sense for digital-wallet accounts. There is no dispute that the Bureau designed the short-form disclosure to be effective when consumers obtain GPR cards in stores—a particularly challenging scenario that the Bureau focused on in designing the short form. But the Bureau also took care to design the disclosure to be effective in other contexts as well. The Rule provides, for example, special formatting guidelines and flexibilities for electronic disclosures. Bur. Br. at 14-15. And the short form has an entire section designed to capture the fees charged by digital-wallet accounts and other products with different fee structures. *Id.* at 47-48. The Bureau, moreover, *did* explain why a consistent disclosure regime was appropriate not just for in-store GPR cards, but also for digital-wallet accounts (and the many other types of prepaid accounts covered by the Rule)—it gives consumers the same opportunity to learn about account terms, ensures standardization that makes disclosures easier to understand and use, and avoids a potentially confusing regulatory patchwork. 81 Fed. Reg. at 84014-15 (AR1 320-21). PayPal does not acknowledge this reasoning, let along explain why it falls short of the "satisfactory explanation" that the APA demands. *State Farm*, 463 U.S. at 43.

4. Finally, PayPal doubles down on its contention (at 33-35) that requiring the short-form disclosure for digital wallets is unreasonable because it is "confusing" to provide a disclosure listing features that a digital-wallet account does not offer or offers for free. But when that is the

case, the short form will straightforwardly indicate that the fee is "N/A" or "$0"—terms whose meaning PayPal concedes (at 34) digital wallet consumers are fully able to understand.[14]

PayPal nonetheless confidently asserts (at 34) that a digital wallet customer who sees "Monthly Fee: $0" on a disclosure "might reasonably worry" that she could be charged such a fee in the future. But why? Consumers understand that disclosures must be accurate, so it is unclear why PayPal believes its customers would take "$0" to mean they actually risk being charged. Digital wallet consumers are unlike PayPal's hiker alarmed by a sign in the Alleghenies reading "Grizzly Killings: 0." *Cf.* PayPal Br. at 34. Such a sign (misleadingly) implies that, thousands of miles from any grizzly habitat, grizzly killings are nonetheless a risk. Disclosing a $0 fee, by contrast, only (correctly) implies that other products charge that fee, not that the consumer might suddenly have to pay that fee for *this* product.[15] PayPal would surely agree that its hiker would be unfazed by a (more analogous) sign reading "Grizzlies in area: 0."

PayPal attempts to bolster its theory that disclosing "$0" and "N/A" features is confusing by pointing to consumer complaints it has received. PayPal Br. at 35 n.11. But besides being outside the record,[16] the consumer complaints in no way suggest that the *short-form disclosure*—

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[14] The short-form disclosure requirements are therefore a far cry from the rule that the D.C. Circuit invalidated in *Merck & Co., Inc. v. HHS*, which required drug companies to disclose a wholesale price that consumers did not pay and were "unlikely to understand." 962 F.3d 531, 538, 540 (D.C. Cir. 2020). The rule in *Merck* was invalid, moreover, because the agency adopted the rule not to inform consumers (which it lacked statutory authority to do), but to improve Medicare "administration" by reducing costs—and the court found it implausible that the disclosure would serve that purpose. *See id.* at 537-38.

[15] PayPal's comparison to a menu stating "0 flies in soup" is similarly inapt. Diners do not ever expect any dish in any restaurant to have flies, but consumers are well aware that financial products often charge fees. There is therefore no reason to think that the disclosure of a "$0" monthly fee would be any more alarming than a menu stating that a dish has "no gluten."

[16] PayPal errs in suggesting (at 35 n.11) that the Bureau should have given PayPal the opportunity to submit this "evidence" of consumer confusion by reopening the Rule for public comment before ratifying it following *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *see also*

which states that almost all features are "$0"—is what caused consumers to mistakenly think that "there's a fee for any way you use your money." PayPal Br. at 35 n.11. Any such confusion is more likely caused by PayPal's *long-form* disclosure, on which PayPal has chosen to list only the services for which it charges, while omitting altogether the commonly-used services (such as transferring funds to or from a linked bank account) that it offers for free.[17] The Rule leaves it fully within PayPal's power to eliminate this confusion by simply listing on the long-form disclosure any services it offers for "$0." *See* 12 C.F.R. § 1005.18(b)(4)(ii).

PayPal also objects (at 34) that digital wallet users could misinterpret the required disclosure of a "cash reload" fee to refer to electronic reloads, not just reloads with literal cash. But the Rule leaves it fully within PayPal's power to eliminate that potential confusion as well, for example, by labeling any such fee "reload with cash" rather than "cash reload" or by expressly stating right outside the short form that electronic reloads are free. *See* 12 C.F.R. § 1005.18(b)(2)(iv); *id.* pt. 1005, Supp. I, ¶ 18(b)(7)(iii)-1.

B. The Rule reasonably applies the waiting-period provision to digital-wallet accounts.

PayPal likewise cannot show that the 30-day waiting period for linking certain types of credit to prepaid accounts is arbitrary and capricious as applied to digital-wallet accounts. PayPal contends (at 31) that the Bureau "failed to give adequate consideration" to digital-wallet accounts' "differences" in declining to exempt those accounts from the waiting period, but this ignores that the Bureau conducted an entire rulemaking on that very issue. Bur. Br. at 17-18.

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85 Fed. Reg. 41330 (July 10, 2020) (ratification). As "all the district courts in this District that have confronted the issue" have held, an agency need not "undergo the entire APA notice-and-comment processes anew" before ratifying a rule. *Moose Jooce v. FDA*, No. 18-1615, 2020 WL 680143, at *5 (D.D.C. Feb. 11, 2020), *appeals pending*, Nos. 20-5048-5050.

[17] *See, e.g.*, PayPal Cash Plus Long Form Disclosure, *available at* https://www.paypalobjects.com/marketing/ua/pdf/US/en/PayPal_Cash_Plus_Long_Form_Disclosure.pdf?locale.x=en_US (last visited Sept. 25, 2020).

Nor is there any merit to PayPal's contention (at 32-33) that the overdraft-related rationale for the waiting period "has nothing to do with" digital-wallet accounts. The Bureau also applied the waiting period to digital-wallet accounts (in very limited circumstances) for a different reason—to better enable consumers to learn about and consider the changed terms that linking would bring. Bur. Br. at 18, 50-51. And in complaining (at 35) that the Bureau "points to no evidence" that immediately linking credit cards to a digital wallet poses any problem, PayPal disregards the fact that the waiting period applies only rarely, and only in circumstances where the modest wait self-evidently enables better-informed decisionmaking. 83 Fed. Reg. at 6414 (AR1 793). PayPal does not even acknowledge the Bureau's actual reasons for applying the waiting period to digital-wallet accounts in the limited covered circumstances, much less explain why those reasons are "so unreasonable as to violate the APA's deferential arbitrary and capricious standard." *Blumenthal v. FERC*, 613 F.3d 1142, 1147 (D.C. Cir. 2010).

IV. The Bureau met its obligation to consider the Rule's benefits and costs.

The Bureau fully met its obligation under section 1022(b)(2)(A) of the Dodd-Frank Act to "consider … the potential benefits and costs [of the Rule] to consumers and covered persons." 12 U.S.C. § 5512(b)(2)(A). In a preamble section specifically devoted to the consideration of benefits and costs that section 1022 requires, the Bureau discussed the benefits and costs of the Rule to consumers and covered persons alike. It explained that the short-form disclosures would make information about accounts' terms easier to find, understand, and use, thereby helping consumers choose the best products for them, encouraging competition that could result in ever better options, and benefitting companies that charge lower fees. 81 Fed. Reg. at 84276, 84278-79, 84287 (AR1 582, 584-85, 593). The Bureau also discussed the costs of the requirements—in particular, the (relatively modest) costs involved in developing the disclosures, keeping them up-

to-date, and delivering them to consumers. *Id.* at 84280-86 (AR1 586-92). And the Bureau followed section 1022's instruction to specifically consider the Rule's impact on consumers' "access" to financial products—and concluded that any such impact would be minimal, particularly because the Rule would impose only a modest burden on providers. *Id.* at 84271 (AR1 577). This discussion of benefits and costs is just as relevant to digital-wallet accounts as to the other accounts covered by the Rule—and some non-specific hand-waving aside, PayPal does not suggest otherwise.

Contrary to PayPal's contention (at 36-37), nothing in the statute required the Bureau to include in the dedicated section 1022 discussion a separate exposition of the Rule's benefits and costs for digital-wallet accounts specifically. Rather, where (as here) an explanation "appl[ies] fully" to a subject of regulation, the agency is "not required to apply [its] reasoning separately for each specific" regulated subject. *Huntco Pawn Holdings, LLC v. Dep't of Def.*, 240 F. Supp. 3d 206, 222 (D.D.C. 2016); *accord Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 407 (D.D.C. 2017) ("[T]here is no legal support for the proposition that every product or industry affected by a rulemaking is entitled to a separate cost-benefit analysis.").[18]

PayPal also errs in contending (at 39-40) that the preamble's general benefit-cost discussion does not adequately account for "distinctions" between digital-wallet accounts and other prepaid accounts. Where the "distinctions" PayPal mentions could have made a difference, the Bureau *did* consider them. The Bureau, for example, acknowledged that digital-wallet accounts (at the time) generally charged fewer fees—but explained that consumers would still

[18] PayPal—while ignoring *Huntco* altogether—attempts to minimize *Nicopure* by pointing out (at 39) that the agency there separately considered costs for different products. But that fact does not detract from the court's unequivocal statement that "there is no" legal requirement to discuss separately the benefits and costs of each separate product. *Nicopure*, 266 F. Supp. 3d at 407.

benefit from knowing what fees *were* charged and what features were free, and from a uniform disclosure that makes information easier to understand and use across the board. 81 Fed. Reg. at 84271 (AR1 577). The Bureau also separately addressed the benefits and costs for accounts acquired in stores versus online (a distinction hardly unique to digital wallets): It not only noted that online disclosures would (like in-store ones) provide consumers with useful information, but also separately considered the different costs providers would incur in those two different contexts. *Id.* at 84282-86 (AR1 588-92). And the Bureau acknowledged that some companies provided disclosures upfront even before the Rule (another distinction not unique to digital wallets)—and concluded that consumers would nonetheless benefit from getting the consistent and comprehensive information that the Rule guarantees. *Id.* at 84017, 84019 (AR1 323, 325).

PayPal objects (at 40-41) that the Bureau inappropriately disregarded comments that the Rule would impose "unique costs" on digital wallets by "confus[ing]" consumers and "chilling … innovation." But, for one, an agency need not respond to "purely speculative" comments that "do not disclose the factual … basis on which they rest." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977). PayPal offered no "factual basis" for its comment that the short-form disclosures would confuse digital wallet customers, and the Bureau was not obligated to respond to PayPal's "pure[] speculat[ion]." In any event, the Bureau did respond, explaining that there was no reason to think that digital wallet consumers would be confused by the disclosures when other consumers were not. 81 Fed. Reg. at 84283 (AR1 589). The Bureau had no obligation to "conduct its own stud[y]" to assess PayPal's speculative (and far-fetched) claim of potential confusion. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

For similar reasons, companies' "conclusory comments" that the Rule would somehow stifle innovation required no specific response. *See Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 63

(D.C. Cir. 2011). PayPal contends (at 41) that the comments were not "conclusory" because they "concrete[ly]" urged the Bureau not to regulate digital-wallet accounts at all. But the Bureau responded to *that* "concrete" suggestion, and concluded (for the various reasons already discussed) that no exemption for digital-wallet accounts was warranted. 81 Fed. Reg. at 83962, 83967-68 (AR1 268, 273-74). PayPal points to no comment that provided any "elaboration" on the concerns about innovation, and the Bureau had no obligation to grapple with comments that did no "more than simply state" that innovation would be chilled, without "explain[ing] why." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993).

PayPal's belated challenge[19] (at 40) to the discussion of the benefits and costs of the waiting-period provision likewise lacks merit. In the separate rulemaking addressing the provision's application to digital-wallet accounts, the Bureau fully considered the provision's benefits and costs for digital-wallet accounts specifically. 83 Fed. Reg. at 6413-14 (AR1 792-93). Although that discussion first considered the benefits and costs of the narrowed Rule in comparison to the broader reach of the original Rule, it *also* compared the revised Rule to an alternative that would have, in practical effect, exempted most digital wallets from the provision altogether. *See id.* at 6414 (AR1 793). In rejecting that alternative, the Bureau concluded that the costs of applying the waiting period to digital-wallet accounts in the limited covered circumstances were justified by the benefits of promoting better-informed consumer choice. *Id.* PayPal does not acknowledge this discussion, let alone explain why it is insufficient.

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

As the Bureau's opening brief explains (at 57-60), the Rule's short-form disclosure

[19] *Compare* Dkt. 19-1 at 42 n.8 (acknowledging that the Bureau "addressed the costs and benefits of extending [the waiting period] to digital wallets" when it amended the Rule).

provisions—which require companies to disclose the terms of prepaid accounts they offer in the commercial marketplace—easily pass First Amendment muster under the well-established test set forth in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

a. Try as it might (at 42-43), PayPal cannot show that the Rule must pass a more exacting level of scrutiny. *Zauderer* applies to requirements to disclose "purely factual and uncontroversial information about the terms under which … services will be available," *Zauderer*, 471 U.S. at 651, and PayPal does not (and could not) dispute that the Rule requires disclosure only of information that is "purely factual" and "uncontroversial." And contrary to PayPal's curious suggestion (at 42), the Rule plainly requires disclosure of "the terms under which … services will be available" even when it requires providers to list features that are "$0" or "N/A" for a particular product. Precedent, moreover, makes clear that *Zauderer* applies even though (to keep the short form simple) the Rule prohibits additional information within the short-form box itself—while permitting it immediately outside the short form or anywhere else a provider wishes. *See Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403, 413-14 (D.C. Cir. 2012) (holding that *Zauderer* applies to rules that "limit[] the manner" of companies' speech, including a rule that prohibited companies from posting other prices as prominently as a mandated price disclosure).

Nor do PayPal's speculative claims (at 42) that the disclosures actually "confuse[] consumers" about PayPal's services change the analysis. Without an "evidentiary record against which to assess" such claims of confusion, the Court "cannot assume that [people] will be misled." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455, 457 (2008) (holding that Court "cannot strike down" a law on First Amendment grounds based on "the mere

possibility of … confusion"). PayPal has offered no such evidence here.[20]

b. PayPal's claim that the short-form disclosure requirements fail *Zauderer*'s test are likewise unavailing. Under *Zauderer*, a requirement to disclose "purely factual and uncontroversial information" complies with the First Amendment so long as it is "reasonably related" to the government's interest and is not so "unjustified or unduly burdensome" as to "chill[] protected commercial speech." *Zauderer*, 471 U.S. at 651. The short-form disclosure requirements satisfy this test because, as the Bureau's opening brief explains (at 57-60), they are reasonably related to the government's interest in enabling consumers to make better-informed financial decisions, and they do not unduly burden protected commercial speech.

To the extent PayPal suggests (at 44) that the Rule is unduly burdensome because it requires any other information to be provided outside the short-form disclosure box itself, precedent forecloses its challenge. In *Spirit Airlines*, the D.C. Circuit held that it did not "significantly burden" speech to preclude airlines from posting the costs they preferred to highlight as "prominently" as a mandated disclosure of the total, final price of a flight. *Spirit Airlines*, 687 F.3d at 414. PayPal's claim of burden likewise fails here because (far from relegating other speech to the "fine print" (PayPal Br. at 44)) nothing in the Prepaid Rule prevents companies from prominently displaying other information outside of the short form.

And PayPal gets both the facts and the law wrong in contending (at 44) that the short-form disclosures violate the First Amendment because they do not "remedy a harm that is potentially real not purely hypothetical," *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138

[20] The consumer complaints alleged in PayPal's complaint—which in any event do not suggest that *the short-form disclosures* caused consumers' confusion, *see supra* at 22-23—are not evidence. *Garay v. Liriano*, 943 F. Supp. 2d 1, 20 (D.D.C. 2013) ("Allegations in a complaint are decidedly not evidence.").

S. Ct. 2361, 2377 (2018) (quotations omitted). On the facts, the Bureau *did* show that the short-form disclosures remedy a "real" problem. Before the Rule, consumers had difficulty understanding or even locating information about accounts' terms, and some companies did not disclose key information upfront at all—leading many consumers to incur unexpected fees. 81 Fed. Reg. at 84017, 84075, 84078 (AR1 323, 381, 384). Even where companies did provide some information upfront, variations in how account terms were displayed made it challenging for consumers to quickly find and evaluate the information. *Id.* at 84078 (AR1 384). The short-form disclosure requirements are designed to remedy these very real problems.

In any event, PayPal also has the law wrong: A disclosure requirement need not remedy a "harm" to comply with the First Amendment. As the en banc D.C. Circuit recently made clear, disclosures need not be designed to "remedy[] deception" (or some other harm); the government may also properly mandate disclosures to "assur[e] that consumers receive particular information," at least where the government has an "adequate" "reason for informing consumers" that goes beyond satisfying "idle curiosity." *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 22-23, 26 (D.C. Cir. 2014) (en banc). In *American Meat*, the court upheld a requirement to disclose the country of origin for meat products because it "enabl[ed] consumers to make informed choices based on the characteristics of the products they wished to purchase." *Id.* at 24. The Prepaid Rule's short-form disclosure requirements advance just that type of interest. The interest in enabling consumers to make more informed decisions about what products to select—one advanced by countless requirements to disclose the costs and other traits of a whole host of products—is undeniably adequate to satisfy the First Amendment.

CONCLUSION

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

Dated: September 25, 2020

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