



# American Payroll Association

Government Relations • Washington, DC

March 23, 2015

**Submitted electronically via [www.regulations.gov](http://www.regulations.gov)**

Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

Re: Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); RIN 3170-AA22

Dear Ms. Jackson,

The American Payroll Association (APA) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) regarding prepaid accounts issued by the Consumer Financial Protection Bureau (CFPB or Bureau) on November 13, 2014 and published in the Federal Register on December 23, 2014<sup>1</sup>. Portions of the Proposed Rule, specifically the disclosure requirements, will greatly impact how our members implement payroll card programs. In particular, the APA is concerned that the proposed disclosure requirements will:

- Fail to provide employees with crucial program information,
- Discourage employees from using payroll cards, and
- Place burdensome requirements on payroll card issuers that may impact the quality of their programs.

We urge the Bureau to seriously consider the unique characteristics of payroll cards when issuing its final rule.

### ***The American Payroll Association***

The APA is a nonprofit professional association representing more than 20,000 payroll professionals and their companies in the United States. The APA's primary mission is to educate its members and the payroll industry regarding best practices associated with paying America's workers while complying with applicable federal, state, and local laws. In addition, the APA's Government Relations Task Force works with the legislative and executive branches of

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<sup>1</sup> 79 F.R. 77102, 12-23-14.

government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

In 2004, the APA's Government Relations Task Force formed a Payroll Card Subcommittee in response to an increased interest in the use of payroll cards by our members. This subcommittee monitors the development and use of payroll cards within the employer community and helps educate policymakers and regulators about the benefits and uses of the cards. Since 2004, the committee has supported numerous legislative and regulatory initiatives that provide employers with clear guidance on their responsibilities under the law, ensure that employees have full and free access to their wages on payday, and require that employees be provided with information on how to use a payroll card to their best advantage.

### ***The Benefits of Payroll Cards***

Payroll cards allow employees without bank accounts and those with limited access to traditional financial services to enjoy the convenience and security that their coworkers experience with direct deposit. Without payroll cards, these workers often rely on expensive check cashing services to access their wages, and then incur additional expense when purchasing money orders to pay their bills. Payroll cards provide unbanked and under-banked workers with a secure account to keep their wages and offer them a convenient means of making purchases and paying their bills.

The ability to pay all employees electronically benefits employers as well.<sup>2</sup> Payroll cards allow employers to deliver wages in a timely manner to all employees including those who do not participate in direct deposit. This is true even when employees are away from the workplace and during periods of severe weather and natural disasters when mail delivery can be impeded. Payroll cards also allow employers to enjoy administrative efficiencies and, in many instances, cost savings.

### ***The Payroll Card Enrollment Process***

While payroll card programs are administered through a financial institution or program manager, it is usually the employer that provides employees with information about their wage payment options, including the terms and conditions of the payroll card account, and enrolls interested employees in the payroll card program. As such, after the Bureau issued the NPRM last December, the APA surveyed members and requested information about their payroll card enrollment processes. The responses the APA received confirmed our understanding that addressing the method of wage payment during the onboarding process is a recognized best practice that has been in place long before payroll cards were available. One member noted that: *"Payroll card enrollment is done at the same time as direct deposit enrollment; it would not be sensible or manageable to separate these two enrollment processes."*

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<sup>2</sup>Regulation E has long recognized the ability of employers to pay their employees using only electronic means subject to state law requirements. The Compulsory Use Provision has been interpreted to allow employers to require direct deposit so long as the employee is allowed to choose the financial institution that will receive the deposit. Because payroll cards involve the electronic transfer of wages to a financial institution designated by the employer, employees must be provided at least one other payment option. State law determines other permissible payment methods and the conditions under which they may be offered. CFPB Bulletin 2013-10 (September 12, 2013).

APA members explained that addressing payroll cards (and other methods of wage payment) during the onboarding process is necessary to ensure that employees can be paid in a timely manner. They emphasized that this is particularly important in states that allow employers to eliminate paper paychecks. Members explained that the onboarding process provides a unique opportunity to sit down with employees and to review their wage payment options with them. One member stated: *“We find during the onboarding process that employees are very engaged and willing to take the time to ask questions.”* The payroll manager for a construction company noted that its employees do not have a permanent work location but are sent to jobsites that can be a hundred miles away. She noted that the new hire orientation is one of the few opportunities the company has to sit down with employees and share information.

Employers offer their employees a variety of different ways to select a preferred payment method. These include written authorization forms and self-service portals. State law often requires that an employee’s acceptance be provided in a particular format (e.g., written or electronic). In approximately half of the states, employers may give their employees the choice between direct deposit and a payroll card without offering a paper paycheck option. The statutes in some of these states provide that an employee is deemed to accept a payroll card if, after explaining the wage payment options, the employee fails to provide the employer with the information necessary to implement direct deposit. Where permitted, many of our members follow this approach.

### ***The Proposed Disclosure Regime***

The Proposed Rule would require issuers to provide employees with two separate disclosures before they acquire a payroll card account. The first disclosure is a short form that would include only the fees that the Bureau believes to be the most important for consumers to know before they acquire the account. The second disclosure is a long form that would include all fees associated with the payroll card account and the conditions under which those fees could be imposed.

The APA agrees that employees should be provided with the terms and conditions of the payroll card account, *and information about all wage payment options*, before they decide how to receive their wages. In fact, this is already required by the wage and hour laws in many states. We have several concerns regarding how the proposed disclosure regime would apply in the wage payment context.

#### **1. Meaning of “Preacquisition” Disclosure**

The Proposed Rule would require that the long and short form disclosures be provided before an employee acquires a payroll card account. The Proposed Rule does not clearly define “acquisition” in the payroll card context and, therefore, it is not clear when the required disclosures would need to be provided. The two examples provided in the Proposed Official Commentary provide limited guidance. The first example demonstrates that providing the disclosures when the employee first learns of the payroll card option satisfies the preacquisition disclosure requirement when the employee later agrees to receive wages to the account. The second example makes clear that providing the disclosures to the employee together with the payroll card at the end of the first pay period (i.e., after the employee has performed the work

being compensated) would not satisfy the preacquisition requirement. There are several points between these two examples when acquisition could occur.

The APA requests that the Bureau clarify that “acquisition” occurs when an employee accepts the payroll card as the method of receiving his or her wages. This is consistent with existing state wage and hour law disclosure requirements which, like the Proposed Rule, were designed to ensure that employees are able to make an informed payment decision. Indeed, the state law provisions typically require that employees be provided with information about all of their payment options, including the terms and conditions of the payroll card account, before accepting a payroll card. As mentioned above, state law also often prescribes the manner in which an employee may accept a payroll card account.

Defining “acquisition” to be the point at which the employee accepts the payroll card account also addresses the CFPB’s concerns about informed choice and is consistent with prior guidance offered by the CFPB. Specifically, the CFPB has made clear that Regulation E does not prohibit employers from providing non-activated payroll cards to employees, together with information regarding the terms and conditions of the account, so long as employees retain the option of receiving their wages by another means.<sup>3</sup> Employers often provide new hires with card packets containing a non-activated card and any required disclosures during the onboarding process. This process helps ensure that employees are able to access their wages in a timely manner, avoids delays that may occur when payroll cards are mailed, and is convenient for both the employer and the employee. Moreover, some of our members provide all of their employees with inactive cards to retain in the event of a future emergency. The employee is not required to ever use the card. These examples illustrate that defining “acquisition” to mean receipt of the card would not be in the cardholders’ best interest and would be a significant departure from prior guidance.

## **2. Short-Form Payroll Card Notice**

The APA is very concerned that the payroll card notice on the proposed short-form disclosure will be viewed by employees as a warning that payroll cards are not a safe method of receiving wages and, therefore, discourage their use. The notice states: “You do not have to accept this payroll card. Ask your employer about other ways to get your wages.”

For many employees, payroll cards may not only be the safest and most convenient way to receive their wages but they may be the only way to access wages without cost. To the extent that the Bureau feels that some type of notice is necessary, we urge the use of a more neutral statement that focuses on employee choice and does not cast doubt on any particular payment method. We recommend the following alternative: “You have options on how you can receive your wages. Ask your employer about those options.”

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<sup>3</sup> Letter from CFPB Director Richard Cordray to Senators Blumenthal, Manchin III, and Schumer (September 12, 2013); *See also*, 71 Fed. Reg. 51437, 51422 (August 30, 2006).

### **3. Content of the Short-Form Disclosure**

The APA supports the idea of providing employees with a clear and simple disclosure that highlights key information about the payroll card option. We are concerned, however, that the proposed short form fails to provide employees with crucial information about how to avoid fees. To ensure that employees understand how to use their payroll cards to their best advantage and in accordance with state law, the APA feels strongly that any summary disclosure must include this information.

Full access to wages is a fundamental concern under the state wage and hour laws. Despite this, methods of accessing wages without cost are not depicted on the proposed short-form disclosure. In fact, the only method of cash access listed on the short-form is ATM withdrawals. Employees can never access their full wages to the penny, as required by state law, through ATM withdrawals because ATMs only disburse funds in \$10 or \$20 increments. Moreover, although many issuers provide a set number of free ATM withdrawals each pay period, a fee would need to be listed on the short form unless the issuer never charges a fee for ATM withdrawals. We are concerned that this approach may lead employees to believe that there is always a fee to access their wages at ATMs and that there is no way for them to withdraw funds without cost. In fact, the opposite is true: there is always a method by which employees may access their wages for free. Without knowledge of the free methods of cash access available to them, employees will incur more fees.

We recommend that the short-form disclosure be revised to include information about free cash access. The issuer could also be required to identify the methods available to employees to access their net wages each pay period without cost. This information would be of tremendous benefit to employees, address the CFPB's concern that employees be provided with relevant information regarding the terms and conditions of the payroll card account, and ensure compliance with state law requirements that employees be provided full and free access to their wages. If the CFPB is concerned that there is not enough room on the short form to include this information, we recommend that the information be included in place of the proposed incidence-based fees. The calculation of incidence-based fees would be complex and difficult for issuers to implement for a payroll card program, while offering little benefit to employees.<sup>4</sup>

### **4. Content of The Long-Form Disclosure**

Like the short-form disclosure, the long-form disclosure fails to provide employees with all of the information that they need to make an informed wage payment decision and to use their payroll card to their best advantage. Although the Proposed Rule would allow issuers to list services on the long form that do not carry fees, the fee could only be listed as "0" if there is never a charge for the service (*see* ATM example above). Additional information would be

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<sup>4</sup> It is unclear from the NPRM whether the requirement to calculate incidence-based fees would apply to all of an issuer's payroll card programs in aggregate, or separately for each employer. Neither option makes much sense. It would be extremely burdensome for issuers to conduct a separate analysis for hundreds if not thousands of payroll card programs. At the same time, an aggregate analysis would provide little benefit to employees who may receive fee disclosures that list charges that are not applicable to their particular payroll card program due to state law requirements, industry differences, or unique terms negotiated by their employer.

addressed in explanatory text which the Bureau itself acknowledges is not noticed or read by many consumers.

## **5. Segregation of Information**

The APA agrees that employees should be provided with a complete fee schedule similar to the long-form disclosure. However, we also believe that crucial information about how to access wages for free should be emphasized, not hidden. Indeed, the wage and hour laws in a number of states require that employees be provided with a full fee schedule together with information on how to access one's net wages without cost. The Proposed Rule would prohibit employers from providing this information on the long- and short-form disclosures. This is because the Proposed Rule would require that the long- and short-form disclosures be "segregated" from all other information and that they contain only information directly related to the federal disclosure requirements. This would mean that issuers and employers would be required to provide a third disclosure form to employees that addresses state law requirements, increasing confusion and the risk that one or more of the forms will be lost. Consistent with the CFPB's own research, APA members expressed concern that if too many disclosure forms were provided, employees would be less likely to read any of the information.

The APA urges the CFPB to eliminate the segregation requirement in the payroll card context. Indeed, we question the value of requiring a separate long-form disclosure when state law already requires a complete itemized list of fees. We request that the Bureau consider a more flexible approach that allows issuers and employers to incorporate state law requirements into its proposed disclosure regime while not overwhelming employees with several different disclosure forms.

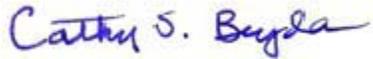
### ***Additional Concerns***

Finally, the APA is concerned that the imposition of unnecessary compliance obligations on issuers may result in an increased cost to employers or their employees, or may result in a reduction of features or functionality on payroll cards. For this reason, we request that the CFPB seriously consider whether other aspects of the Proposed Rule are appropriate in the payroll card context. For example, as suggested above, we are concerned that the calculation of incidence-based fees for inclusion on the short-form disclosure will impose a significant cost on issuers without providing a meaningful benefit to employees.

Similarly, the public posting of prepaid agreements on the CFPB's and issuer's websites makes little sense in the payroll card context. Most issuers work with hundreds if not thousands of different employers. As the Bureau itself notes, the terms and conditions of payroll card agreements often are negotiated with each employer. The public posting and quarterly review of each of these agreements would impose a significant burden on issuers while affording little or no benefit to cardholders. This is because the only payroll card account of any relevance to an employee is the one offered by his or her employer. An employee cannot comparison shop for another payroll card. Moreover, access to all of the issuer's agreements, and thousands more from other issuers, is likely to confuse an employee and result in information overload. To ensure that employees have access to their own cardholder agreements, the APA supports requiring issuers to make the agreements available on their own websites once an employee has logged onto the website.

Thank you for the opportunity to comment on this important issue. We would welcome the opportunity to discuss the above issues with you further. In this regard, please feel free to contact Bill Dunn (202-232-6889) or Cathy Beyda (650-320-1824).

Sincerely,



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