

**[ORAL ARGUMENT NOT YET SCHEDULED]**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 24-5146**

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PAYPAL, INC.,  
*Plaintiff-Appellee,*  
*v.*

CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Columbia  
Case No. 1:19-cv-3700

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**BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW  
CENTER, CONSUMER REPORTS, AND CONSUMER  
FEDERATION OF AMERICA**

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Dated: November 1, 2024

**CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES,  
FILING OF SEPARATE BRIEF, AND  
CORPORATE DISCLOSURE**

**A. Parties and Amici.** All parties appearing before the district court and in this court are listed in the Brief of Appellant Consumer Financial Protection Bureau. Amici are not aware of any intervenors. Amici understand that one additional amicus curiae, Prof. Dan Awrey, is expected.

**B. Rulings Under Review.** The ruling at issue in this court is the ruling of District Court Judge Richard J. Leon in *PayPal, Inc. v. Consumer Financial Protection Bureau*, No. 19-3700 (D.D.C. Mar. 29, 2024), ECF Nos. 48, 49.

**C. Related Cases.** This case was previously before this court and the district court as *PayPal, Inc. v. Consumer Financial Protection Bureau*, No. 19-3700, 512 F. Supp. 3d 1 (D.D.C. Dec. 30, 2020), *rev'd and remanded*, *PayPal, Inc. v. Consumer Financial Protection Bureau*, No. 21-5057, 58 F.4th 1273 (D.C. Cir. 2023).

**D. Separate Brief.** Amici are aware of one additional amicus curiae, Cornell Law Prof. Dan Awrey, intending to file a brief supporting appellant. Separate briefs are necessary because this brief is

from the perspective of consumer advocacy organizations working on behalf of low-income, vulnerable and other consumers, and the other brief will be from the perspective of an academic studying financial markets.

**E. Corporate Disclosure Statement.** *Amici* are nonprofit corporations. They have no parent corporations, nor does any corporation own 10% or more of their stock.

Respectfully submitted,

*/s/ Andrew Pizor*

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## **STATUTES AND REGULATIONS**

All applicable statutes, etc., are contained in the Brief of Appellant Consumer Financial Protection Bureau.

**CERTIFICATE OF COUNSEL REGARDING**  
**AUTHORITY TO FILE**

All parties have consented to the filing of this brief.

Respectfully submitted,

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## GLOSSARY

<b>ATM</b>	automatic teller machine
<b>CFPB</b>	Consumer Financial Protection Bureau
<b>EFTA</b>	Electronic Fund Transfer Act
<b>FDIC</b>	Federal Deposit Insurance Corporation
<b>GPR cards</b>	general purpose reloadable cards
<b>NCLC</b>	National Consumer Law Center
<b>P2P</b>	person-to-person
<b>POS</b>	point-of-sale
<b>SEC</b>	Securities and Exchange Commission

## **IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici* are Consumer Federation of America, Consumer Reports, and the National Consumer Law Center. Each is a non-profit organization that has long worked to protect consumers in their banking and payments activities and to ensure transparency, affordability and fairness in prepaid accounts, mobile payment systems and other forms of accounts.

The National Consumer Law Center® works for economic justice for low-income and other disadvantaged people in the U.S. through policy analysis and advocacy, publications, litigation, and training.

Consumer Reports is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace.

Consumer Federation of America is an association of non-profit consumer organizations founded in 1968 to advance consumer interests through research, education, and advocacy.

No party's counsel authored this brief in any part, and no party, party's counsel, or other person contributed money that was intended to fund it.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

PayPal challenges a rule that requires it to provide a “Short Form” disclosure before a consumer acquires a PayPal account that can hold funds. The Short Form is a short and simple “nutrition label” disclosing the key fees charged, where to find information about all fees, and, for certain accounts, a statement that the account is not insured by the Federal Deposit Insurance Corporation (FDIC) or requires further action to obtain insurance. PayPal argues that it was arbitrary and capricious for the Consumer Financial Protection Bureau (CFPB) to require the Short Form for its accounts capable of holding funds within PayPal’s digital wallets because those accounts rarely hold any funds and are fundamentally different from other prepaid accounts. The district court agreed.

This brief highlights three reasons why it was *not* arbitrary or capricious for the CFPB to require the Short Form for PayPal asset accounts and why the CFPB, after considering the costs, benefits and alternatives, had well-grounded reasons for believing that the Short Form would benefit consumers, including PayPal users, at little cost to PayPal and other providers.

First, PayPal holds substantial balances, and its asset accounts are similar to other prepaid accounts. PayPal holds funds in custodial accounts at partner banks and also holds nearly \$42 billion in uninsured funds payable and amounts due to customers. One survey found that Americans keep an average of \$485 in PayPal accounts. PayPal's filings with the Securities and Exchange Commission (SEC) state that it would significantly harm PayPal's business if customers reduced their balances. Funds in PayPal accounts can be used to purchase goods and services, make person-to-person payments, pay bills, and fund PayPal savings accounts. PayPal encourages consumers to obtain a debit card to access the funds at automated teller machines (ATMs), to deposit cash, and to set up direct deposit of wages. Those functions would not make sense if the accounts rarely held funds. PayPal accounts fulfill the same functions as other prepaid accounts.

Second, the CFPB appropriately designed a flexible rule that would protect consumers into the future, not the past. From the beginning of the rulemaking in 2014, the CFPB anticipated that consumer payments were moving into the digital world and that business models change. The district court's narrow focus on physical



cards used in physical stores would have made the rule outdated the moment it was released. Instead, the rule applies to accounts that function similarly whether a consumer interacts with the account digitally or physically. Consumers need the same basic fee disclosures and information about the safety of their funds whether the funds are accessed through a plastic card, a mobile app, or an account within a digital wallet. The problems with confusing and hidden fees that the CFPB found in the prepaid card market are not unique to prepaid accounts acquired at physical stores. The CFPB's approach is consistent with the purposes and longstanding interpretations of the Electronic Fund Transfer Act (EFTA), which protects a variety of "accounts" that hold funds accessed through any access device, not just physical cards.

Third, the Short Form will benefit PayPal consumers with little cost to PayPal. PayPal charges fees that would be disclosed in the Short Form, such as ATM fees, reload fees, and (if they generate significant revenue) transfer and other fees. Consumers would benefit from seeing that other fees are \$0, from learning that a function listed as "n/a" is not available, and from a link to the full fee schedule.

As with the nutrition label on food, a standardized form has benefits even if it is not individually tailored to each product. A nutrition label works for a bag of lollipops and a can of Spam, even if protein and salt content is not relevant to lollipops. Consumers are reassured, not confused, by seeing a label full of zeros for diet soda. The CFPB struck a balance by giving the Short Form both “static” required fee disclosures and customizable content with the most significant fees charged by each company. The CFPB considered baseline Regulation E without the Short Form, but that would not give consumers a clear, simple, uniform, pre-acquisition disclosure they could use for comparison shopping and would not include all fees.

Critically, the Short Form would also inform potential PayPal customers that funds in PayPal accounts are *not* FDIC-insured except under limited circumstances. A recent bankruptcy involving digital payment apps highlights the vulnerability of nonbank payment services like PayPal’s.

The CFPB appropriately considered the costs of the Short Form applicable to digital accounts like PayPal’s. PayPal offers no unique costs that should have been considered. Other digital wallet providers

with asset accounts, such as Apple, provide the Short Form and there is no reason why PayPal cannot.

The CFPB did a remarkable job designing a form to protect consumers in an evolving market. The district court’s ruling would gut the Prepaid Rule and open it up to widespread evasions by allowing an account tied to a digital wallet to escape clear disclosures no matter how much money it holds, how many fees it charges, or how unprotected the funds are.

## **ARGUMENT**

### **I. Overview of the CFPB’s Prepaid Rule**

The Prepaid Rule<sup>1</sup> clarifies that “prepaid accounts” are “accounts” protected under the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693a(2), and Regulation E, 12 C.F.R. § 1005.2(b)(3).

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<sup>1</sup> See Bureau of Consumer Fin. Prot., Final Rule, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 83934 (Nov. 22, 2016) [hereinafter Final Rule, Prepaid Rule, or Rule]. The Rule was amended in Bureau of Consumer Fin. Prot., Final Rule, Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 83 Fed. Reg. 6364 (Feb. 13, 2018) [hereinafter 2018 Amendments].

The Prepaid Rule improves on the minimal Regulation E disclosure requirements, consistent with the CFPB's mandate to ensure that financial products are fair, transparent, and competitive, 12 U.S.C. § 5511(a), that consumers are provided with timely and understandable information to make decisions, *id.* § 5511(b)(1), and that the terms of electronic transfers are readily understandable, 15 U.S.C. § 1693c(a). Before an account is acquired, key fees and information must be disclosed in a standard "Short Form," and all fees must be listed in a standard "Long Form." 12 C.F.R. § 1005.18(b)(2), (3), (4). PayPal objects to the Short Form, though it is not clear whether it always provides the Long Form either.

The CFPB was "strongly influenced" by its focus group research to develop "an easily digestible 'short form' disclosure highlighting key fees and features of a prepaid account program in a standardized format apt for comparison shopping ...." Final Rule, 81 Fed. Reg. at 83954. The Short Form contains seven "static" fees that all companies must disclose (or list \$0 or n/a). 12 C.F.R. § 1005.18(b)(2)(i) to (vii); 12

C.F.R. pt. 1005, Supp. I, ¶ 18(b)(2)-1.<sup>2</sup> The four fees most important to focus group participants must be displayed more prominently. Final Rule, 81 Fed. Reg. at 83954. The form identifies the number of additional fees, where to find the complete fee list (Long Form), and the two fees that generate the highest consumer revenue, unless they are under five percent of revenue. 12 C.F.R. § 1005.18(b)(2)(viii), (ix), (xiii).

The Short Form also requires a statement about the presence or lack of deposit insurance. 12 C.F.R. § 1005.18(b)(2)(xi). Testing showed that participants understood the FDIC statement and understood that insurance was a positive feature. Final Rule, 81 Fed. Reg. at 83955.

The CFPB promulgated model Short Forms, which may be used “at the option” of the provider, for various scenarios. *Id.* at 83959 (quoting 12 U.S.C. § 5532(b)(1)).

The model form says “Not FDIC insured” for institutions like PayPal that hold funds in uninsured accounts:

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<sup>2</sup> The static fees are periodic fees, per-purchase fees, ATM withdrawal fees, cash reload fees, ATM balance inquiry fees, customer service fees, and inactivity fees. 12 C.F.R. § 1005.18(b)(2)(i) to (vii).

Monthly fee	Per purchase	ATM withdrawal	Cash reload
<b>\$5.99*</b>	<b>\$0</b>	<b>\$0</b> in-network <b>\$1.99</b> out-of-network	<b>\$3.99*</b>
ATM balance inquiry (in-network or out-of-network)			\$0 or \$0.50
Customer service (automated or live agent)			\$0 or \$0.50* per call
Inactivity (after 12 months with no transactions)			\$1.00 per month
<b>We charge 4 other types of fees. Here are some of them:</b>			
[Additional fee type]			\$1.00*
[Additional fee type]			\$3.00
* This fee can be lower depending on how and where this card is used.			
<b>No overdraft/credit feature.</b>			
Not FDIC insured. Register your card for other protections.			
For general information about prepaid accounts, visit <a href="http://cfpb.gov/prepaid">cfpb.gov/prepaid</a> .			
Find details and conditions for all fees and services inside the package, or call 800-234-5678 or visit <a href="http://xyz.com/prepaid">xyz.com/prepaid</a> .			

12 C.F.R. pt. 1005, app. A, Model Form A-10(D). If funds are potentially insurable, but require further action by the consumer, the form may disclose: “Register your card for FDIC insurance eligibility and other protections.” See 12 C.F.R. § 1005.18(b)(2)(xi)(A).

**II. Consumers Hold Substantial Balances in PayPal Accounts, and PayPal Encourages Them To Use the Accounts Like Other Prepaid Accounts.**

PayPal accounts (through both its PayPal and Venmo brands) meet the definition of “prepaid account,” because they are capable of being loaded with funds; have a primary function of conducting transactions with multiple, unaffiliated merchants for goods or services,

at ATMs, or for person-to-person (P2P) transfers; and are not a checking account. 12 C.F.R. § 1005.2(b)(3)(i)(D). The Rule exempts digital wallets that cannot hold funds, 12 C.F.R. pt. 1005, Supp. I, ¶ 2(b)(3)(i)-6, but PayPal asset accounts can and do hold funds.

The district court found that it was arbitrary and capricious to include PayPal’s asset accounts because the Rule was designed for a supposedly very different product: general purpose reloadable (GPR) cards typically purchased as physical plastic cards. *PayPal, Inc. v. Consumer Financial Protection Bureau*, No. 1:19-cv-3700 (D.D.C. Mar. 29, 2024), ECF No. 48 at 4 (D.D.C. Mar. 29, 2024). The court found that the purpose of a digital wallet was to store credentials, not funds, *id.* at 2, and that the capacity to hold and use funds “is so rarely employed by digital wallet users that it is almost theoretical.” *Id.* at 19. That is simply not accurate.

In PayPal’s own words: “We hold a substantial amount of funds belonging to our customers, including balances in customer accounts ....”<sup>3</sup> At the end of 2023, PayPal held nearly \$42 billion in uninsured

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<sup>3</sup> PayPal Holdings, Inc., Form 10-K for the fiscal year ended Dec. 31, 2023, at 60, <https://www.sec.gov/ix?doc=/Archives/edgar/data/1633917/000163391724000024/pypl-20231231.htm> [hereinafter PayPal 10-K].

funds payable and amounts due to customers.<sup>4</sup> That figure does not include likely many billions more held by PayPal as an agent in custodial accounts at partner banks that are accessed through a PayPal account.<sup>5</sup>

Holding balances is critically important to PayPal: “[A]ny public loss of confidence in us or our ability to effectively manage customer balances, could lead customers to discontinue or reduce their use of our products or reduce customer balances held with us, which could significantly harm our business.”<sup>6</sup>

PayPal claims much of its balances are held by merchants, but many merchants are individuals. PayPal is part of a coalition that has

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<sup>4</sup> PayPal 10-K at 60 (\$41,935,000,000 in “funds payable and amounts due to customers”); *see also* PayPal User Agreement (updated Oct. 28, 2024), <https://www.paypal.com/us/legalhub/useragreement-full> (last visited Oct. 31, 2024) (except when funds are placed in a custodial bank account, “any balance in your Balance Account and any funds sent to you which have not yet been transferred to a linked bank account or linked debit card if you do not have a Balance Account, represent unsecured claims against PayPal that are not eligible for FDIC pass-through insurance”).

<sup>5</sup> PayPal 10-K at 70.

<sup>6</sup> *Id.* at 29.



emphasized that millions of “casual sellers”<sup>7</sup> on eBay, Etsy, and other sites where PayPal is accepted use sales funds “for critical needs such as food, medicine, and bills and are not running a business.”<sup>8</sup>

Moreover, many consumers, probably millions, hold balances in PayPal accounts,<sup>9</sup> and those balances can be significant. One recent survey found that Americans keep an average of \$485 in their PayPal account.<sup>10</sup> PayPal has not said how many consumers hold balances or how high those balances get. But clearly many balances are far higher than the \$6 average accepted by the court. ECF No. 28 at 19. It is not clear how PayPal calculated that \$6 figure.<sup>11</sup> Over time, PayPal has shifted how consumer funds are held in different related accounts in

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<sup>7</sup> Kelley R. Taylor, *Etsy, eBay, PayPal Want IRS 1099-K Relief for Online Sellers*, Kiplinger Personal Finance (Mar. 16, 2023), <https://www.kiplinger.com/taxes/etsy-ebay-want-irs-1099-k-relief>.

<sup>8</sup> 1099K Fairness, Mission statement, <https://1099kfairness.org/>.

<sup>9</sup> With 391 million active consumer accounts globally, PayPal 10-K at 5, even if only small portion of those had substantial balances, that would still be a lot of consumers.

<sup>10</sup> Logica, What’s in our Wallets?, <https://logicaresearch.com/americans-keep-more-money-in-paypal-than-cash-in-wallet/>.

<sup>11</sup> The \$6 figure appears to come from a one-sentence assertion by PayPal stating that, at the time of its 2015 comment letter, the average asset account balance for U.S. consumers was \$6. Administrative Record, Volume 2, at 5868 (J.A. \_\_\_\_). It is not clear if PayPal was counting all types of balances consumers can hold. *See infra* n. 12.

ways consumers likely do not notice and the court need not figure out.<sup>12</sup>

But clearly, many PayPal accounts hold significant funds, and PayPal has developed features to add to or draw on those funds just like any other prepaid account.

PayPal pushes consumers to get a physical debit card so they can “spend your PayPal balance in store anywhere Mastercard is accepted” with an image of the card showing a \$151.68 PayPal balance.<sup>13</sup> A debit card would not make sense for fleeting \$6 balances.

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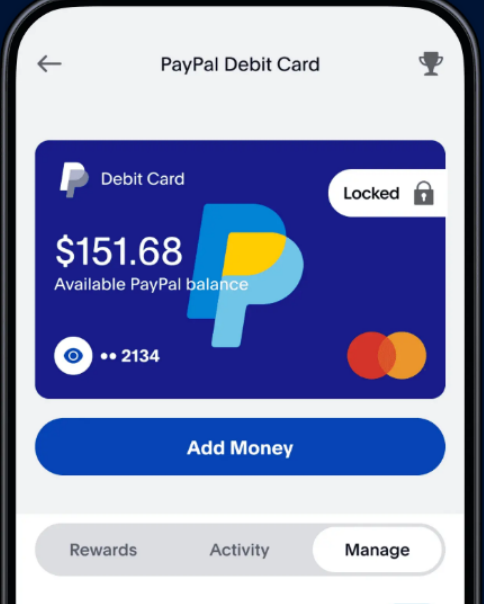
<sup>12</sup> In terms of service effective March 29, 2019, PayPal described how consumers could hold funds in a PayPal Cash account or a PayPal Cash Plus account, but not both, either of which was accessed using the PayPal login credentials. PayPal Cash and PayPal Cash Plus Terms and Conditions, <https://www.paypalobjects.com/digitalassets/c/website/ua/pdf/US/en/ppcashagreement.pdf> (last visited Oct. 22, 2024). The terms effective October 28, 2024 state that consumers may not hold funds permanently in their personal PayPal accounts and those funds must be transferred out or held in a PayPal Balance account. PayPal User Agreement, *supra* note 4. It is not clear whether or how PayPal enforces that rule. Balance accounts must be accessed through the personal account or by using a PayPal debit card. See PayPal Balance Terms and Conditions, <https://www.paypal.com/us/legalhub/pp-balance-tnc/> (updated Aug. 13, 2024, last visited Oct. 21, 2024). In addition, both agreements state that funds are transferred to custodial accounts at partner banks in certain circumstances.

<sup>13</sup> PayPal, PayPal Debit Card, <https://www.paypal.com/us/digital-wallet/manage-money/paypal-debit-card> (last visited October 22, 2024).

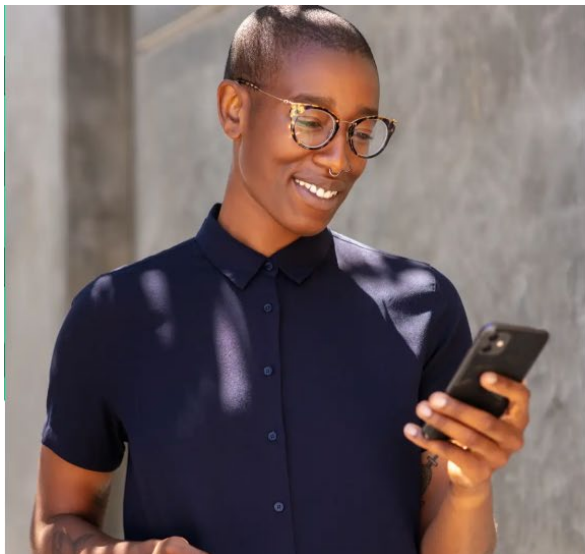
**Security from PayPal and Mastercard®**

Benefit from PayPal Purchase Protection on eligible items. With Mastercard's Zero Liability, built-in chip technology, and temporary card locking capabilities, we'll help keep you safe.

[About Purchase Protection](#)



The Venmo website urges: “Use what’s in your Venmo account” and “Earn cashback.”<sup>14</sup>



## Use what’s in your Venmo account

The Venmo Debit Card lets you spend the money in your Venmo account anywhere Mastercard® is accepted. Track your activity—and your cashback—right in the app.

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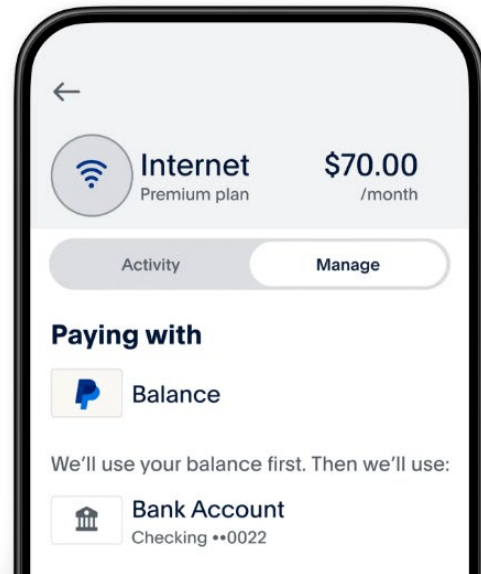
<sup>14</sup> Venmo, Shop special offers, <https://venmo.com/debitcard/signup> (last visited Oct. 22, 2024).

PayPal encourages consumers to pay bills with their balances,<sup>15</sup>

## Pay confidently, we've got you covered

If there isn't enough in your PayPal Balance<sup>1</sup> to cover the payment, we'll use your linked bank or card. That's peace of mind.

[Link Your Accounts](#)



to set up direct deposit of paychecks to PayPal and Venmo accounts,<sup>16</sup>

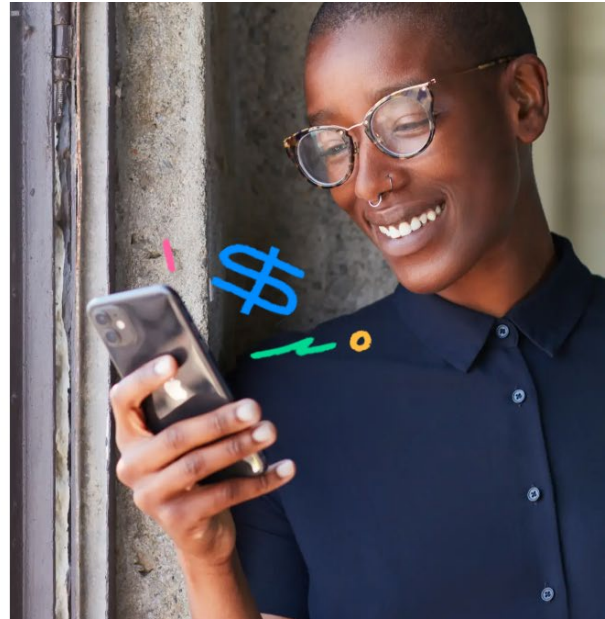
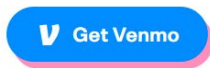
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<sup>15</sup> PayPal, Pay Bills Online, <https://www.paypal.com/us/digital-wallet/manage-money/pay-bills> (last visited July 31, 2024); *see also* Paymentus, Enhanced Digital Wallet Payments and More with PayPal, <https://www.paymentus.com/paypal/> (“Customers can easily choose their preferred digital payment method when they make bill payments.... Venmo — 70 million users\* have the option to pay their bills the same way they pay their friends — quickly and conveniently.”).

<sup>16</sup> Venmo, Get paid early. Two days early., <https://venmo.com/send-receive/direct-deposit/> (last visited Oct. 22, 2024); *see also* PayPal, Direct Deposit, <https://www.paypal.com/us/digital-wallet/manage-money/direct-deposit> (last visited Oct. 22, 2024).

# Get paid early. Two days early.

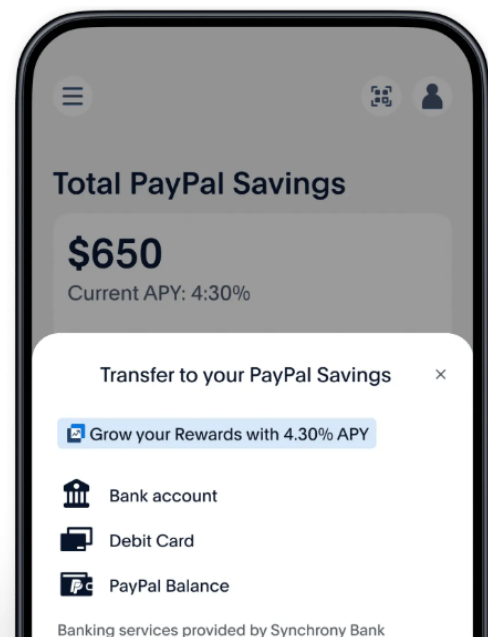
With Direct Deposit on Venmo, paychecks can show up in your account up to two days early! Jackpot!



and to transfer funds from their PayPal balance to a PayPal savings account.<sup>17</sup>

## Put your PayPal Savings to work

Transfer money from your linked bank account, debit card or PayPal balance and earn interest on your PayPal Savings. Plus, you can set up auto-save to make life easier.



<sup>17</sup> PayPal, Earn interest with PayPal savings, <https://www.paypal.com/us/digital-wallet/manage-money/start-saving> (last visited Oct. 22, 2024).

Thus, PayPal balances can be used to purchase goods or services at unaffiliated merchants and to make P2P transfers, two of the three “primary functions” in the “prepaid account” definition. 12 C.F.R. § 1005.2(b)(3)(i)(D). After obtaining a debit card, which technically requires a PayPal “Balance” account linked to the main PayPal account, consumers can also withdraw cash at ATMs, the third primary function, load cash at stores, deposit checks, and receive funds by direct deposit.<sup>18</sup>

The district court accepted PayPal’s contention that the CFPB’s rulemaking targeted “a different product altogether—namely, general-purpose reloadable (“GPR”) cards ....” ECF No. 48 at 3. But even if that were true, PayPal accounts are effectively GPR cards. PayPal accounts are used at unaffiliated merchants, making them “general purpose.”<sup>19</sup> They are reloadable. And they are accessed through physical cards, virtual cards, and other access devices.

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<sup>18</sup> PayPal Debit Card, *supra* note 13. The distinction between the standard PayPal account and the linked Balance accounts is a technical feature that consumers would likely not notice. *See supra* note 12.

<sup>19</sup> General purpose cards are distinguished from limited use cards, like store gift cards. *Compare* Reg. E, 12 C.F.R. § 1005.20(a)(1), (2) *with* 12 C.F.R. § 1005.20(a)(3).

Consumer's use of PayPal accounts to hold and use balances is far more than "theoretical." Consumers considering putting money into PayPal accounts need fee information and need to know if their accounts are FDIC insured. It was a reasonable choice for the CFPB to require the Short Form disclosure.

### **III. The CFPB Reasonably Designed the Prepaid Rule for the Future, Not the Past.**

The district court would limit the prepaid account definition to its understanding of GPR cards: physical cards bought in stores. ECF No. 48 at 4. But the CFPB made a well-reasoned decision to design a rule for the future, keeping consumers' accounts that store funds protected, even as technology, markets, consumer behavior, and business models evolve.

While physical cards were common when the CFPB conducted its initial research, the CFPB never limited its rulemaking effort on physical cards. The Proposed Rule explained that "[c]onsumers may acquire prepaid products in a variety of ways" including "online," and that "prepaid products may not be tied to a physical card or device, and instead may be accessible and usable online or at a physical location

through a mobile device such as a smartphone.” Bureau of Consumer Fin. Prot., Proposed Rule, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102, 77104 (Dec. 23, 2014). The rulemaking was informed by the CFPB’s 2014 request for information on mobile financial products, which noted “a significant increase in the use of virtual prepaid products (prepaid products accessed via computer or on a mobile device without a physical card) by underserved consumers.” Final Rule, 81 Fed. Reg. at 83953 (citing Consumer Fin. Prot. Bureau, Mobile Financial Services—A Summary of Comments from the Public on Opportunities, Challenges, and Risks for the Underserved (Nov. 2015)<sup>20</sup> [hereinafter CFPB, Mobile Financial Svcs. Comments]). The CFPB drew on a 2015 survey of digital wallets by the Federal Reserve Board, which found that “15 percent of mobile payment users reported that they used an account at a non-financial institution such as PayPal to fund their payments.” *Id.* at 83,943 (citing Board of Governors of the Fed. Reserve Sys., Consumers and Mobile Financial Services 2015, at

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<sup>20</sup> Available at [https://files.consumerfinance.gov/f/201511\\_cfpb\\_mobile-financial-services.pdf](https://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf).



17 (Mar. 2015)). The rule was also informed by the CFPB’s study of prepaid account agreements, which included agreements for products, like PayPal’s, used for P2P transfers. *Id.* at 83,956.

The problems with hidden fees are not unique to accounts acquired at physical stores. The CFPB received comments in 2014 on mobile financial services noting a lack of clear fee disclosures, a lack of uniform terminology, and the need for a simple, up-front box display of fees. CFPB, Mobile Financial Svcs. Comments at 29. As one blog recently explained, as payments move online, “it’s crucial to understand the hidden fees that payment providers can – and often do – charge. While some of the costs of payments are easily identifiable, others are not clear upfront. They may be obscured within complex fee structures or buried in small print.”<sup>21</sup>

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<sup>21</sup> Airwallex, *What you need to know about hidden payment fees* (Mar. 26, 2024), <https://www.airwallex.com/blog/what-you-need-to-know-about-hidden-payment-fees>; see also Sharon Epperson, *Here’s how to avoid unexpected fees with payment apps*, CNBC (Feb. 23, 2024), <https://www.cnbc.com/2024/02/23/heres-how-to-avoid-unexpected-fees-with-payment-apps.html> (“Payment apps sometimes charge fees for the convenience of instantly transferring money or linking credit cards to the app if they use Cash App, PayPal, or Venmo.”).

Consumers need the same basic fee disclosures and information about the safety of their funds whether they access their accounts through a plastic card or a mobile app, and whether or not the asset account is attached to a digital wallet. The CFPB anticipated that prepaid cards were becoming digital and that foresight was reasoned, not arbitrary and capricious.

The Federal Reserve Bank of Kansas City observed last year:

[N]onbank digital transaction accounts are increasingly like GPR prepaid cards in their features and functionalities. In addition to online payment services, major online payment service providers such as PayPal and Cash App now offer consumers the ability to receive direct deposits and deposit cash and even paper checks into their accounts. They have also penetrated point-of-sale (POS) payments; PayPal and Cash App account holders can obtain debit cards linked to their accounts to make POS payments or even pay directly using mobile apps at many retailers.<sup>22</sup>

The CFPB's approach is consistent with the purpose and longstanding interpretations of the EFTA, which is designed to be a flexible statute that protects consumers using products of a similar

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<sup>22</sup> Federal Reserve Bank of Kansas City, How Much Do Nonbank Transaction Accounts Improve Access to Digital Payments for Unbanked Households? (Nov. 29, 2023), <https://www.kansascityfed.org/research/payments-system-research-briefings/how-much-do-nonbank-transaction-accounts-improve-access-to-digital-payments-for-unbanked-households/> [hereinafter Kansas City Fed, Nonbank Accounts].

nature even if they evolve and take different forms.<sup>23</sup> The Prepaid Rule clarifies the definition of “asset account.” 15 U.S.C. § 1693a(2). Most EFTA provisions, including the disclosure requirements, *id.* § 1693c, apply to electronic fund transfers involving a “consumer’s account” regardless of what kind of card or other device is used to access that account.

Some EFTA provisions relate to a “card or other means of access,” *see, e.g., id.* § 1693g(a), defined in Regulation E as an “access device,” 12 C.F.R. § 1005.2(a)(1). But an access device can be a “code” and need not be a physical card. *Id.* Relatedly, for over forty years, courts interpreting the Truth in Lending Act have found that the “core element of a ‘credit card’ is the account number, not the piece of plastic.”<sup>24</sup>

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<sup>23</sup> *See* 15 U.S.C. § 1693(b) (“The primary objective of this subchapter, however, is the provision of individual consumer rights.”); *Curtis v. Propel Property Tax Fund, LLC*, 915 F.3d 234, 239 (4th Cir. 2019) (EFTA is a remedial consumer protection statute that courts read liberally to achieve its goals of protecting consumers) (citing cases).

<sup>24</sup> *U.S. v. Bice-Bey*, 701 F.2d 1086, 1092 (4th Cir. 1983); *accord Townsend v. Swiss Colony, Inc.*, 2008 WL 3009916 (N.D. Ill. Aug. 5, 2008); *Munoz v. Seventh Ave., Inc.*, 2004 WL 1593906 (N.D. Ill. July 15, 2004).

Even if hidden fees on newly emerging digital accounts were not a big problem in the early 2010s, it is not arbitrary and capricious to require all prepaid accounts to have clear fee disclosures. The Kansas City Fed found that, “like GPR prepaid cards, the cost to use these digital transaction accounts varies by account provider and how households use these accounts.”<sup>25</sup> PayPal itself charges fees that should be disclosed through the Short Form. Its competitors may as well. It was reasoned for the CFPB to require fee disclosures for all providers, even if some, at the time of the rulemaking, charged few fees.

Regulations can last decades and cover a wide array of companies and business models. But the district court displayed breathtaking confidence in proclaiming “the absence of consumer fees in the digital wallet context,” which was “unlikely to transform over time.” ECF No. 48 at 6. That certainty is unwarranted given that changes in business models can be hard to predict, especially in light of innovations and market factors yet unknown.

The rule was informed by the CFPB’s market research, monitoring, and deep experience regulating consumer markets. *See*

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<sup>25</sup> Kansas City Fed, Nonbank Accounts.

Final Rule, 81 Fed. Reg. at 83954. The court rejected the possibility of new fees in the future as “speculation.” ECF No. 48 at 15–16. But it is reasoned consumer protection to design a disclosure regime that is not stuck in the past and can adapt to changes in pricing and revenue models.

A regime designed for the unknown future is consistent with the CFPB’s mandate to ensure that terms of products are “fully, accurately, and effectively disclosed.” 12 U.S.C. § 5532(a). The CFPB also has a mandate to “prevent” unfair, deceptive or abusive practices, not just prohibit those that already exist. 12 U.S.C. § 5531(a). Mandating up-front disclosures in a clear and simple manner, with both uniform content and tailored content reflecting new revenue models, along with information on how to view all fees, is a logical way to prevent new, hidden fees and to ensure that terms are full, accurately and *effectively* disclosed.

It can take years to write a regulation. The current rulemaking formally commenced twelve years ago,<sup>26</sup> and is still not in effect as to

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<sup>26</sup> See Bureau of Consumer Fin. Prot., Advance Notice of Proposed Rulemaking, Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30923 (July 23, 2012).

PayPal. PayPal would limit the Prepaid Rule to a market of physical cards that is already disappearing.

#### **IV. The Short Form Will Benefit PayPal Consumers at Little Cost to PayPal.**

##### **A. The Short Form Is Relevant to PayPal's Fees, and Consumers Benefit from a Standard "Nutrition Label" Approach.**

PayPal portrays the Short Form as not having information that is relevant for its accounts. To the contrary, the Short Form would benefit PayPal customers.

First, the Short Form must inform consumers about seven specific, "static" fees. The district court found that "none of the seven fees ... is applicable to digital wallet products." ECF No. 48 at 14. To the contrary, PayPal charges two of the seven static fees if a debit card is requested, and all static fees are relevant to and could be charged on an asset account linked to a digital wallet.

For PayPal's standard account, the Short Form would list \$0 for four of the static fees, reassuring consumers that PayPal does not charge monthly, per-purchase, customer service or inactivity fees. The Short Form would show "n/a" under ATM withdrawal, ATM balance

inquiry and cash reload, helping consumers understand that the standard account does not have those functions.

If the consumer requests a debit card, for which a “Balance” account is required,<sup>27</sup> PayPal would have to provide a new Short Form disclosing the two static fees that PayPal charges: \$2.50 for ATM withdrawals and up to \$3.95 for cash reloads.<sup>28</sup>

Second, the Short Form must list two other fees if fee revenue exceeds *de minimis* levels. On the standard account, PayPal might have to disclose the 1.75% fee, up to \$25, for an instant transfer to a bank account or card, or the 2.9% plus \$0.30 fee for sending money to a friend or family by card.<sup>29</sup> On the Balance account, PayPal provides a Short Form that discloses the instant transfer fee, the 1% to 5% fee to deposit a check, or the 2.5% foreign transaction fee and the \$2.49 or 1.8% fee for buying or selling cryptocurrency.<sup>30</sup> Those disclosures help consumers to

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<sup>27</sup> See PayPal Debit Card, *supra* note 13.

<sup>28</sup> See PayPal, PayPal Balance Short Form Disclosure (Last updated on August 14, 2024), [https://www.paypal.com/us/legalhub/pp-short-form?locale.x=en\\_US](https://www.paypal.com/us/legalhub/pp-short-form?locale.x=en_US) (last visited Oct. 29, 2024) [hereinafter, PayPal Balance Short Form].

<sup>29</sup> See PayPal, PayPal Consumer Fees, [https://www.paypal.com/us/webapps/mpp/paypal-fees?locale.x=en\\_US](https://www.paypal.com/us/webapps/mpp/paypal-fees?locale.x=en_US) (last visited Oct. 22, 2024).

<sup>30</sup> PayPal Balance Short Form, *supra* note 28.

learn about significant fees they may be charged and to prevent companies from hiding the costs of their products.

Third, the Short Form would tell consumers the number of additional fees PayPal charges and where to obtain the Long Form with all fees listed in a standard format. PayPal charges a number of fees, but the full list is found in a confusing manner on an obscure part of PayPal's website.<sup>31</sup> PayPal does not appear to provide a Long Form for its basic account; it does provide the form for the Balance Account obtained if consumers sign up for the debit card or direct deposit.<sup>32</sup> Providing the Short Form would benefit consumers by alerting them to the number of additional fees and where to find the complete fee list. For example, PayPal's Balance account charges a 1% to 5% fee to deposit a check and the 2.5% foreign transaction fee.<sup>33</sup>

The district court implausibly found that consumers would face "confusion and alarm" at seeing fees they will almost never pay. ECF No. 48 at 14. But the majority of commenters, both industry and

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<sup>31</sup> See PayPal Consumer Fees, *supra* note 29.

<sup>32</sup> See PayPal, PayPal Balance Long Form Disclosure, [https://www.paypal.com/us/legalhub/pp-balance-tnc?locale.x=en\\_US#long\\_form\\_disclosure](https://www.paypal.com/us/legalhub/pp-balance-tnc?locale.x=en_US#long_form_disclosure) (last visited Oct. 22, 2024).

<sup>33</sup> See *id.*



consumer groups, “strongly supported standardized disclosures.” Final Rule, 81 Fed. Reg. at 84010. Testing found that consumers understood the form, even when complex products were compared to simpler ones. *Id.* at 83955. Moreover, with time, consumers become familiar with standard forms and know to look for and compare them.

Consumers benefit from a standard nutrition label even if protein, fat, and salt content are relevant to a can of Spam but not to a bag of lollipops. They get useful, reassuring information by seeing the “0” for calories on a bottle of diet soda or for salt on a no-sodium product. The Short Form is even more adaptable than the nutrition label because it blends standard content with customizable fee information on the most relevant additional fees. It was a reasoned decision for the CFPB to conclude that consumers would benefit from clear information about fees they may be charged in a standard, familiar form used for a variety of different business models.

**B. The CFPB Correctly Concluded that the Short Form Improved Consumer Protection over Baseline Regulation E Disclosures.**

The district court said that, instead of merely clarifying that baseline Regulation E applies to digital wallets that hold funds, the

CFPB adopted enhanced disclosure requirements “without ever acknowledging that a more obvious and less drastic solution” to any regulatory gap existed. ECF No. 48 at 17. But the CFPB did consider baseline Regulation E disclosures and explained why addition of the pre-acquisition Short Form would benefit consumers.

Regulation E only requires fees to be disclosed before the first electronic transfer,<sup>34</sup> “too late for many consumers to make informed acquisition decisions.” Final Rule, 81 Fed. Reg. at 84010. The CFPB noted that many institutions provided only limited fee information pre-acquisition, and consumers would not see all fees until afterwards. *Id.* The CFPB felt it was “important to provide specific formatting information that would ensure substantial consistency to facilitate consumers’ comparison and selection process across a range of acquisition channels,” whereas baseline Regulation E has only a general rule about clear and understandable disclosures. *Id.*; see 12 C.F.R. § 1005.4(a)(1). In addition, baseline Regulation E only requires disclosure of fees for electronic fund transfers, not other fees such as monthly fees, balance inquiry fees, customer service or inactivity fees

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<sup>34</sup> 12 C.F.R. § 1005.7(a).

that some companies may charge – or the cash reload fee that PayPal charges. *Id.* § 1005.7(b); 12 C.F.R. pt. 1005, Supp. I, ¶ 7(b)(5)-1.

The Prepaid Rule improves on the standard Regulation E disclosures. The CFPB’s decision to require a standardized but customizable, simple disclosure form for all accounts that can store funds, fitting a variety of business models, was a reasoned one that was not arbitrary or capricious.

**C. The Short Form Will Warn Consumers when Funds in PayPal Accounts are Not Protected by FDIC Insurance.**

The balances in standard PayPal accounts are held on PayPal’s books and are not FDIC-insured.<sup>35</sup> Consumers can obtain FDIC insurance for PayPal accounts under certain circumstances, such as by requesting a debit card or enrolling in Direct Deposit.<sup>36</sup> As discussed above, the Short Form would require PayPal to disclose the lack of

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<sup>35</sup> See *supra* note 4; Press Release, Consumer Fin. Prot. Bureau, CFPB Finds that Billions of Dollars Stored on Popular Payment Apps May Lack Federal Insurance (June 1, 2023); Consumer Fin. Prot. Bureau, Issue Spotlight: Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps (June 1, 2023), <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/>.

<sup>36</sup> PayPal User Agreement, *supra* note 4.

FDIC insurance or whether action is needed in order to obtain insurance.

That disclosure is extremely important for consumers who are trying to decide which accounts to use and how much money to put in them. When funds are held by nonbank companies and lack the protection of FDIC insurance, consumers stand to lose critical funds should the company fail. Indeed, a recent fintech bankruptcy has imperiled millions of dollars of funds held in fintech payment apps.<sup>37</sup> Consumers often mistakenly believe their balances are protected, and for that reason the FDIC recently warned in an article on banking apps that “FDIC deposit insurance does not protect against the insolvency or bankruptcy of a nonbank company.”<sup>38</sup>

The district court did not address the importance of the required disclosure when an account lacks deposit insurance. But the CFPB

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<sup>37</sup> When Synapse Financial Technologies filed for bankruptcy, consumers lost access to money in accounts offered by digital apps that used Synapse, and some may never recover those funds. See Claire Ballentine, *Moelis-Backed App Has \$113 Million Trapped in Fintech Collapse*, Bloomberg Law (July 17, 2024).

<sup>38</sup> Federal Deposit Ins. Corp., *Banking with Third-Party Apps* (June 2024), <https://www.fdic.gov/resources/consumers/consumer-news/2024-06.html>.

showed foresight in including that disclosure on the Short Form in an increasingly complex era where nonbanks are entering the banking market and the lines are blurry between which accounts are eligible for deposit insurance and which are not.<sup>39</sup> Funds in PayPal accounts are simply not as safe as those held in traditional bank accounts, and the Short Form disclosure helps consumers make informed choices.

**D. The Short Form Imposes No Unique Costs on Asset Accounts Within Digital Wallets, and the CFPB Considered the Relevant Costs.**

The district court found that the CFPB did not conduct a cost-benefit analysis specific to digital wallets. ECF No. 48 at 21. But, in fact, the CFPB did consider costs applicable to digital wallets, which are minimal.

The CFPB was not regulating digital wallets; it was regulating asset accounts. The agency analyzed the costs and benefits of requiring the Short Form for asset accounts like PayPal's offered in online and mobile settings. Final Rule, 81 Fed. Reg. at 84280–83. The costs that the CFPB considered, such as design and legal work, calculation of fee

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<sup>39</sup> *See id.*

revenue, and updating websites, *id.*, are equally relevant whether or not an asset account is offered alone or in conjunction with a digital wallet.

PayPal offers no different costs that should have been considered, and there likely are none. The Short Form is a simple disclosure requirement that is easy to comply with. PayPal’s Short Form would likely look much like Apple’s,<sup>40</sup> another company that offers an asset account within its digital wallet:

Monthly fee	Per purchase	ATM withdrawal	Cash reload
<b>\$0</b>	<b>\$0</b>	<b>N/A</b>	<b>N/A</b>
ATM balance inquiry			N/A
Customer service			\$0
Inactivity			\$0
<b>We charge 1 other type of fee. It is:</b>			
Instant transfer to a debit card			1.5%, subject to a \$0.25 minimum and \$15 maximum
<b>No overdraft/credit feature.</b>			
Register your card for FDIC insurance eligibility and other protections. For general information about prepaid accounts, visit <a href="https://cfpb.gov/prepaid/">cfpb.gov/prepaid/</a> . Find details and conditions for all fees and services in the Apple Cash Terms and Conditions.			

<sup>40</sup> Apple, Terms and Conditions, <https://applecash.green dot.com/termsconditions/> (last visited Oct. 22, 2024).

It does not appear that the Short Form poses large problems for Apple, and the form is certainly adaptable to a digital format.

The CFPB focused squarely on the costs imposed on digital wallets when it conducted a subsequent rulemaking to amend part of the Prepaid Rule that did have a unique impact on digital wallets: the Regulation Z requirements for prepaid accounts with overdraft or other credit features. Digital wallets often contain pre-existing credit cards, which are wholly different from credit offered within asset accounts through overdraft features. The CFPB listened to the digital wallet industry and exempted credit card accounts within digital wallets that were already subject to Regulation Z.<sup>41</sup>

PayPal's main complaint is essentially that the Short Form imposes costs on PayPal because consumers may decline to open PayPal accounts if they see all the fees. But the CFPB considered that if "a consumer chooses not to purchase a prepaid product electronically because the disclosures make the consumer more informed, then there will be a cost to the financial institution but also a benefit to the

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<sup>41</sup> 2018 Amendments, *supra* note 1.

consumer.” Final Rule, 81 Fed. Reg. at 84283. The CFPB fulfilled its mandate and struck the right balance by requiring the Short Form.

## V. Conclusion

The Short Form provides key information in a clear, simple, and uniform format that is relevant and useful to consumers considering a PayPal account or another prepaid account, even those linked to a digital wallet. Consumers will be better protected and evasions will be minimized if all prepaid accounts that hold consumer funds, even those linked to a digital wallet, disclose key fees, where to find all fees, and whether funds carry deposit insurance. For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

/s/ Andrew Pizor

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*Attorney for Amici Curiae*

Dated: November 1, 2024



**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
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1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6173 words, which is less than half of the maximum length for a principal brief permitted by Fed. R. App. P. 32(7)(B).

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Respectfully submitted,

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Dated: November 1, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 1, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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