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April 7, 2010

## Final Gift Card Rule Implementing Credit Card Accountability Responsibility and Disclosure Act of 2009

On April 1, 2010, the Federal Reserve Board (“Board”) published in the Federal Register amendments to Regulation E (“Rule”) to implement the gift card provisions of the “Credit Card Accountability Responsibility and Disclosure Act of 2009” (the “CARD Act” or “Act”). The gift card Rule becomes effective on August 22, 2010.

The Rule adds a new Section 205.20, which establishes requirements for both general use prepaid cards and store gift cards, as well as for gift certificates, when the cards or certificates are issued on a prepaid basis for personal, family or household purposes, unless a specific exclusion is available. While the Rule does not generally apply to business prepaid cards, such cards may be covered if resold by a recipient for personal family or household purposes. In addition, the Rule applies to any device that accesses prepaid funds, including an account number, bar code, mobile phone or contactless chip, even if there is no card issued in connection with the device.

### EXCLUSIONS

Consistent with the CARD Act, the gift card Rule excludes certain products from the definitions of general-use prepaid card, store gift card, or gift certificate. And, an excluded product is not subject to the substantive restrictions regarding when a dormancy, inactivity or service fee may be imposed or the use of expiration dates. In addition, except as noted below for loyalty, awards and promotional cards, excluded products are not subject to the disclosure requirements of the Rule. Specifically, Section 205.20(b) excludes a card or certificate that is:

- (1) Useable solely for telephone services;
- (2) Reloadable and not marketed or labeled as a gift card or gift certificate;
- (3) A loyalty, award or promotional card;
- (4) Not marketed to the general public;
- (5) Issued in paper form only; or
- (6) Redeemable solely for admission to an event or venue at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such an event or venue, at the event or venue or at a specific location affiliated with and in geographic proximity to the event or venue.

### EXCLUSION FOR RELOADABLE CARDS THAT ARE NOT MARKETED AS A GIFT CARD OR CERTIFICATE

The most important exclusion under the Rule is the exclusion for a reloadable card that is not marketed as a gift card. In describing this exclusion, Commentary Section 205.20(b)(2)-2 provides that the term “marketed or labeled as a gift card or certificate” means “directly or indirectly offering, advertising or otherwise suggesting the potential use of a card, code or

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other device, as a gift for another person.” In recognition of anti-money laundering compliance efforts, the Rule clarifies that this exclusion applies even if the reloadable card begins as a temporary non-reloadable card. For example, a temporary non-reloadable card issued by a retailer on behalf of a bank in connection with a reloadable card program where the card does not actually become reloadable until the consumer contacts the issuer and provides the necessary identification information for a reloadable card, is excluded from the Rule.

Nevertheless, the Rule and the Commentary create operational, as well as partner relationship issues, for cards in connection with this exclusion. For example, the Commentary indicates that an issuer’s intent not to market a card as a gift card is not sufficient to meet the requirements of the exclusion. Instead, an issuer must establish reasonable policies and procedures, including contractual agreements, to limit its third-party partner from marketing the card as a gift card. Specifically, Commentary Section 205.20(b)(2)-4 explains that such policies and procedures may include contractual provisions prohibiting a reloadable card, code or other device from being marketed or labeled as a gift card or gift certificate, merchandising guidelines or plans regarding how the product must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the card, code or other device is not being marketed as a gift card.

Furthermore, Commentary Section 205.20(b)(2)-2 provides that a card or certificate, including a general-purpose reloadable card, is considered to be “marketed or labeled as a gift card or certificate,” and therefore subject to the restrictions of the Rule, even if it is only occasionally marketed as a gift card or certificate. That is, if an issuer primarily advertises the card or certificate as an alternative to a bank account, but on occasion promotes the card in a television advertisement, for example, as a gift for the holiday season, the card will be viewed as being marketed as a gift card and, thus, covered by the Rule.

## EXCLUSION FOR LOYALTY, AWARD OR PROMOTIONAL GIFT CARDS

While Section 205.20(b)(3) excludes loyalty, award or promotional cards from the definitions of general-use prepaid card, store gift card, or gift certificate, such loyalty, award or promotional cards must set forth the following disclosures under Section 205.20(a)(4)(iii), as applicable:

- (1) A statement indicating that the card, code or other device is issued for loyalty, award, or promotional purposes (such as the term “Rewards” or “Promotional”), which must be included on the front of the card, code or other device;
- (2) The expiration date for the underlying funds, which must be included on the front of the card, code or other device;
- (3) The amount of any fees that may be imposed in connection with the card, code or other device and the conditions under which the fees may be imposed, which must be provided on or with the card, code or other device; and
- (4) A toll-free telephone number and, if one is maintained by the issuer, a Web site that a consumer may use to obtain fee information, which must be included on the card, code or other device.

## EXCLUSION FOR CARDS NOT MARKETED TO THE GENERAL PUBLIC

Commentary Section 205.20(b)(4)-1 identifies a number of factors that an issuer is required to consider when determining whether the exclusion for a card not marketed to the general public applies to a particular card, code or other device.

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These factors include the means or channel through which the card, code or device may be obtained by a consumer, the subset of consumers that are eligible to obtain the card, code or other device, and whether the availability of the card, code or device is advertised or otherwise promoted in the market. In this regard, the Rule clarifies that a card that is only available to consumers for a store refund or store credit, for example, is not marketed to the general public. On the other hand, a card only available to deposit account customers of the issuer, for instance, is considered marketed to the general public because the general public can obtain a deposit account from the issuer.

## RESTRICTION ON DORMANCY, INACTIVITY OR SERVICE FEES

If an exclusion is not available, Section 205.20(d) implements the CARD Act restriction on dormancy, inactivity or service fees. Specifically, the Rule prohibits the imposition of a dormancy, inactivity or service fee in connection with a gift card or gift certificate unless:

- (1) A fee is imposed only if there has been no activity for at least one year from the issuance, last reload, or any use, of the card or certificate;
- (2) Clear and conspicuous disclosures were provided on the card or certificate at the time the card or certificate was purchased; and
- (3) Not more than one dormancy, inactivity or service fee of any type is imposed in any given calendar month.

Commentary Section 205.20(d)-1 provides examples illustrating the application of this fee prohibition. For instance, the illustrations clarify that after at least a year, one dormancy, inactivity or service fee may be imposed each month if the card or certificate remains inactive. However, the Commentary also provides that if the card or certificate becomes active again following a year of inactivity, an additional fee cannot be imposed until after another full year of inactivity.

Section 205.20(a)(7) defines “activity” for purposes of the prohibition to mean “[a]ny action that results in an increase or decrease of the funds underlying a certificate or card.” Commentary Section 205.20(a)(7)-1 clarifies, however, that the imposition of a fee, an adjustment due to an error, the reversal of a prior transaction, the replacement of an expired, lost or stolen certificate or card, or a balance inquiry does not constitute “activity” for purposes of this section. Nevertheless, a purchase or other use of a gift card (including an ATM transaction) or the reloading of funds onto a card constitutes activity. The Rule also clarifies that if a consumer attempts a transaction, but that transaction fails for technical or other reasons, that attempted use does not constitute activity.

In addition, Section 205.2(a)(6) defines “service fee” to include any periodic fee for holding or using a gift card or certificate. Thus, the term periodic fee would include any fee that may be imposed from time to time for holding or using the card or certificate, such as a monthly maintenance fee, a reload fee, a transaction fee, an ATM fee, a foreign currency transaction fee or a balance inquiry fee, whether or not the fee is waived for a certain period of time or is only imposed after a certain period of time. The term service fee, however, does not include a one-time fee, such as an initial-issuance fee, a supplemental card fee, a lost or stolen card replacement fee or a cash-out fee.

## RESTRICTIONS ON EXPIRATION DATES

Again, if an exclusion is not available, Section 205.20(e) of the Rule implements the CARD Act prohibition against the sale of gift cards or gift certificates with an expiration date. Specifically, Section 205.20(e) provides that no person may sell or issue a general-use prepaid card, a store gift card, or a gift certificate with an expiration date, unless:

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- (1) The person has established policies and procedures to provide consumers with a reasonable opportunity to purchase a gift card or gift certificate with at least five years remaining until the expiration date of the card or certificate;
- (2) The expiration date for the underlying funds is at least the later of: (i) five years after the date on which funds were last loaded to a general-use prepaid card or store gift card, or the date the gift certificate was initially issued; or (ii) the expiration date of the card or certificate, if any;
- (3) Certain disclosures are provided on the gift card or certificate, as applicable;
- (4) No fee or charge is imposed on the cardholder for replacing the card or certificate, or for providing the card or certificate holder with the remaining balance in some other manner prior to the expiration of the funds underlying the card or certificate, unless such card or certificate has been lost or stolen.

## REASONABLE OPPORTUNITY

With respect to the Rule's prohibition against the issuance of a card or certificate with an expiration date unless there are policies and procedures in place to provide a consumer with a reasonable opportunity to purchase a card or certificate with at least five years remaining until expiration, Commentary Section 205.20(e)-1 clarifies when such a reasonable opportunity exists. Specifically, this Commentary section provides that a consumer is deemed to have such a reasonable opportunity if: (i) there are policies and procedures established to prevent the sale of a card or certificate unless the expiration date on the card or certificate is at least five years after the date the card or certificate is sold or initially issued to a consumer; or (ii) the card or certificate is available for a consumer to purchase five years and six months before the expiration date on the card or certificate. Notwithstanding policies and procedures in place to provide a consumer the opportunity to purchase a card or certificate with at least five years remaining, the expiration date of the underlying funds must be at least five years after issuance or reload.

## REPLACEMENT OF CARDS OR CERTIFICATES

Commentary Section 205.20(e)-2 clarifies that the expiration date prohibitions and limitations contained in Section 205.20(e)(1) apply to the purchase of a card or certificate and not to the replacement of a card or certificate. However, the Commentary also clarifies that if an expiration date for a replacement card or certificate is later than five years after the date on which funds were last loaded on a gift card, or the date the certificate is issued, then pursuant to Section 205.20(e)(2) the expiration date for the underlying funds at the time the replacement card or certificate is issued must be no earlier than the expiration date on the replacement card or certificate.

## DISCLOSURES ON GIFT CARDS OR CERTIFICATES

Sections 205.20(c) and (d) set forth the disclosure requirements for covered gift cards and gift certificates. Specifically, a dormancy, inactivity or service fee cannot be imposed unless the following information is clearly and conspicuously disclosed on the card or certificate itself:

- (1) The amount of any dormancy, inactivity or service fee;
- (2) How often such a fee may be imposed; and
- (3) That such a fee may be assessed for inactivity;

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In addition, a gift card or gift certificate cannot be sold with an expiration date, unless the following information, as applicable, is also clearly and conspicuously disclosed on the card or certificate itself:

- (1) The expiration date for the funds underlying the card or certificate, or if the funds do not expire, a statement to that effect;
- (2) The toll free number the consumer can use to obtain a fee replacement card until the funds expire or are fully used;
- (3) The Web site to be used for this purpose, if one is maintained by the issuer; and
- (4) A statement in equal prominence and close proximity to the expiration date that the card may expire before the underlying funds and that the consumer can contact the issuer for a free replacement card or certificate (except for a non-reloadable card or certificate with a seven-year manufacture date that satisfies the “safe harbor” described below).

In addition, information regarding other fees that may be imposed must be included with the card or certificate explaining the type of fee that can be imposed, the amount of any such other fee and the conditions under which the fee may be imposed.

The Commentary clarifies that disclosures need not be located on the front of the card or certificate to be considered clear and conspicuous, unless the Rule requires that the particular disclosure appear on the front of the card or certificate. And, disclosures would be considered clear and conspicuous if printed in a manner that contrasts with, and is otherwise not obstructed by the background on which they are printed and not obstructed by a logo.

The Commentary also clarifies that if an issuer chooses to provide disclosures electronically, the provision of such disclosures would not be subject to the affirmative consent provisions of the Electronic Signatures in Global and National Commerce Act. While there is no requirement that an issuer confirm that the consumer has read the electronic disclosures, such disclosures should not be provided through a by-passable hyperlink or another manner by which the purchaser can bypass the disclosure.

### “SAFE HARBOR” DISCLOSURE PROVISION FOR CARD WITH SEVEN-YEAR EXPIRATION DATE

Recognizing the limited amount of space available for disclosures near the expiration date on a gift card, and that some disclosures could be difficult to provide clearly and conspicuously if they must be placed in close proximity to the expiration date on the card, Section 205.20(e)(3)(iii) provides that a non-reloadable card that bears an expiration date that is at least seven years from the date of manufacture of the card need not comply with certain formatting and content disclosures related to when the funds expire. Nevertheless, even if the expiration date of a gift card is at least seven years after the manufacture date and the card is non-reloadable, Commentary Section 205.20(e)-8 provides that funds may not expire before the expiration date on the card, regardless of whether the expiration date is more than five years from the date of purchase. The Commentary also provides that the date of manufacture is the date on which the expiration date is printed on the card.

### RELATION TO OTHER LAWS

Section 205.12 implements the CARD Act provision amending the preemption provisions of the EFTA to include dormancy, inactivity or service fees and expirations dates on cards or certificates. This section preempts inconsistent

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state laws, but indicates that more protective state laws are not inconsistent. Accordingly, the amendment could be interpreted as establishing the protections set forth in the Rule as a federal floor. Section 205.12 should only apply to prepaid cards or certificates that are covered by Section 205.20.

### ADDITIONAL EFTA PROTECTIONS

The CARD Act directs the Board to determine the extent to which other provisions of the EFTA or Regulation E should apply to gift cards or gift certificates. However, the Board determined not to apply other Regulation E requirements, such as periodic statement disclosures or error resolution procedures, to gift cards or gift certificates at this time.

The CARD Act also provides the Board with the authority to limit the amount of dormancy, inactivity or service fees that can be assessed in connection with prepaid devices. The Board also determined not to exercise its authority under the CARD Act to limit the amount of such fees at this time. Instead, the Board indicated that it will continue to monitor gift card developments and will take action as appropriate in the future. In the meantime, the Board's broad definition of service fee, and the limitations on the imposition of such fees in connection with gift certificates, may effectively eliminate the imposition of such fees in connection with gift cards.

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