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Federal Reserve Publishes Rules Implementing Provisions of the CARD Act Relating to Gift Cards, Gift Certificates and Prepaid Cards

The Federal Reserve Board has published final rules implementing the provisions of the Credit Card Act of 2009 relating to gift cards, gift certificates and "general use prepaid cards." The rule applies to all covered products sold or issued to a consumer on or after **August 22, 2010**.

Summary of New Rules

The new rules impose fee restrictions and new disclosure requirements on prepaid cards, including gift cards and "general use prepaid cards," defined to mean cards that are issued to consumers for household or personal use in a specified amount and are redeemable at multiple, unaffiliated merchants. The definition of "general use prepaid card" specifically *excludes* any card that is (1) reloadable and (2) "not marketed or labeled as a gift card". For purposes of the exclusion, temporary cards are considered "reloadable" as long as they are issued solely in connection with a reloadable card.

In addition to being reloadable, a card must also be "not marketed or labeled as a gift card" in order to qualify for exclusion from the new rules. The official commentary to the rules defines the term "marketed or labeled as a gift card" to mean "directly or indirectly offering, advertising or otherwise suggesting the potential use of a card . . . as a gift for another person." Importantly, a card will not be entitled to the exemption if any person in the chain of distribution, including the issuer, program manager or retail seller, "markets or labels" it as a gift card, even if such marketing is only occasional. The definition of "marketed or labeled" as a gift card is broad and could include acts such as representations that the card is "like a gift card" or the inadvertent stocking of cards in a display topped by a sign that reads "gift cards."

The commentary further provides examples of activities that are considered "marketing or labeling" a prepaid card as a gift card, including (1) using the word "gift" or "present" on a card or on packaging or promotional materials, (2) suggesting that the card could be given to another person as a "token of appreciation" or a "stocking stuffer," (3) displaying a congratulatory message on the card or accompanying material, or (4) incorporating "celebratory or gift-giving motifs" such as ribbons, candles, etc., on the card, accompanying material or promotional material. Further, the commentary specifically provides that marketing a card as "a substitute for a checking, savings or deposit account" or as a "budgetary tool" does not constitute "marketing or labeling" as a gift card.

The commentary extends a safe harbor where all of the entities in the distribution chain, including issuers, program managers and retailers, maintain policies and procedures "reasonably designed to avoid" the marketing of the card as a gift card. However, any determination of whether a card is being marketed as a gift card within the meaning of the statute will depend on facts and circumstances, including "whether a reasonable consumer would be led to believe that the card is a gift card". If a company is to avoid the requirements of the new rules in connection with its sale of cards, it will be important that all display, advertising and packaging materials be thoroughly reviewed to ensure that no indicia of marketing as a gift card are present and to establish written policies to ensure that such marketing does not occur.

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Further, operations manuals should be revised to make clear that these cards should not be referred to as "gift cards" in communications with customers.

Fee, Expiration Date and Disclosure Requirements

The rules impose the following requirements with respect to covered products:

1. No charging of dormancy or service fees by "any person" unless: (1) there has been no activity on the account for the preceding 12 months; (2) only one such fee is imposed in any calendar month; and (3) the amount and frequency, and the fact that a fee may be imposed for inactivity, are clearly and conspicuously disclosed on the card itself.
2. No sale of cards with expiration dates unless: (1) customers have an opportunity to purchase a card with at least five years of validity; (2) the underlying funds do not expire for at least the later of five years after issuance or last reload or the card expiration date; (3) certain disclosures regarding expiration and replacement cards are provided on the card itself; and (4) cardholders may receive a replacement card, or the remaining value on the card, free of charge.
3. Disclosures of the types and amounts of fees other than dormancy or service fees and the circumstances under which these fees may be imposed must be provided on or with the card.
4. A toll-free telephone number and, if one is maintained, a Web site that consumers may use to access fee disclosures must be disclosed on the card itself.



If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

B. Knox Dobbins	404.853.8053	knox.dobbins@sutherland.com
Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com
Cynthia M. Krus	202.383.0218	cynthia.krus@sutherland.com
Hannah Campbell	404.853.8011	hannah.campbell@sutherland.com