

Legal Updates & News

Legal Updates

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

November 2009

On November 20, 2009, the Federal Reserve Board (“Board”) published proposed amendments to Regulation E (“Proposed Rule” or “Rule”) to implement the gift card provisions in the “Credit Card Accountability Responsibility and Disclosure Act of 2009” (the “CARD Act” or “Act”) currently scheduled to become effective on August 22, 2010. The deadline for filing comments is on December 21, 2009.

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Restriction on Dormancy, Inactivity or Service Fees

Proposed Section 205.20(d) implements the CARD Act restriction on dormancy, inactivity or service fees. Specifically, the Proposed Rule prohibits the imposition of a dormancy, inactivity or service fee in connection with a gift card or certificate unless:

- (1) a fee is imposed only if there has been no activity for one year;
- (2) clear and conspicuous disclosures are provided on the card or certificate at the time the card or certificate is purchased; and
- (3) no more than one fee is imposed in any given calendar month.

The Proposed Commentary provides examples illustrating the application of the prohibition. For instance, the illustrations clarify that after one year, a dormancy, inactivity or service fee may be imposed on a monthly basis if the card remains inactive. However, the Proposed Commentary provides that when a card becomes active again following a year of inactivity, a fee cannot be imposed until after another full year of inactivity.

The Proposed Commentary also clarifies the meaning of “activity” for purposes of the prohibition to mean “[a]ny action by a consumer to increase, decrease, or otherwise make use of the funds underlying a gift

certificate, store gift card, or general-use prepaid card.” Specifically, under the Proposed Commentary, the imposition of a fee, the replacement of an expired, lost or stolen certificate or card, or a balance inquiry does not constitute “activity” for purposes of this section.

In addition, Proposed Commentary Section 205.20(a)(6) defines a “service fee” to include any periodic fee for holding or using a gift card or certificate. In this regard, 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 transaction fee, a reload 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. A service fee, however, would not include a one-time fee, such as an initial-issuance fee or a cash-out fee.

Restrictions on Expiration Dates

Proposed Section 205.20(e) provides two alternatives for implementing the CARD Act provision restricting expiration dates. Under Proposed Alternative A, a gift card or certificate cannot be sold with an expiration date, unless:

- (1) the card or certificate expiration date is at least five years after the card or certificate is issued or sold;
- (2) the expiration date for the underlying funds is at least five years after the card or certificate is issued or last loaded, or after the card or certificate expiration date, whichever is later;
- (3) certain disclosures are made, including “[a] statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, that the certificate or card expires, but the underlying funds either do not expire or expire later . . . and that the consumer may contact the issuer for a replacement card;” and
- (4) no fee is imposed for replacing the card or certificate prior to the expiration of the underlying funds.

Under Proposed Alternative B, an issuer is required to have policies and procedures to ensure that a consumer has a reasonable opportunity to purchase a card or certificate that has an expiration date that is at least five years from the date of purchase, rather than, as proposed under Alternative A, imposing a flat prohibition against the sale of a card or certificate that has an expiration date of less than five years.

Disclosures on Gift Cards or Certificates

Proposed Sections 205.20(c) and (d) set forth the disclosure requirements for covered gift cards and certificates. Specifically, the following information would have to be clearly and conspicuously disclosed on the card or certificate itself:

- (1) the amount of any dormancy, inactivity or service fee, how often such a fee may be imposed and that such a fee may be assessed for inactivity;
- (2) information about the expiration date and potential fees, including a toll-free number, and if one is maintained, a Web site, that a consumer can use to obtain a replacement card or certificate and fee information.

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

The Proposed Commentary clarifies that disclosures need not be located on the front of the card or certificate to be considered clear and conspicuous. 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 or by a logo.

Additionally, the Proposed Commentary clarifies that if an issuer chooses to provide disclosures electronically, the delivery of such disclosures would not be subject to the affirmative consent provisions of the Electronic Signatures in Global and National Commerce Act. However, such disclosures could not be provided through a by-passable hyperlink.

Exclusions

Consistent with the CARD Act, the Proposed Rule excludes certain products from the definitions of gift certificate, store gift card, or general-use prepaid card. Specifically, Proposed Section 205.20(b) would exclude cards or certificates that are:

- (1) useable solely for telephone services;
- (2) reloadable and not marketed or labeled as a gift card or gift certificate;
- (3) used in connection with a loyalty, award, or promotional program;
- (4) not marketed to the general public;
- (5) issued in paper form only; or
- (6) redeemable solely for admission to events or venues at a particular location or group of affiliated locations.

Nevertheless, Section 205.20(a) makes it clear that a gift card or certificate is not actually required and, thus, that the restrictions apply, for example, to a mobile phone containing a contactless chip and to an electronic promise communicated online or through a code.

Exclusion for Reloadable Cards that are not Marketed as Gift Cards or Certificates

In connection with the exclusion for cards that are reloadable and not marketed or labeled as a gift card or certificate, the Proposed Commentary clarifies the meaning of the term “marketed or labeled as a gift card or certificate” to mean “directly or indirectly offering, advertising or otherwise suggesting the potential use of a card, code or other device, as a gift for another person.”

The Proposed Commentary also 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, 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 at any time promotes the card in a television ad, for example, as a gift for the holiday season, the card will be viewed as being marketed as a gift card and covered by the Proposed Rule.

In addition, the Proposed Commentary provides that the exclusion applies only if the issuer does not itself market the card and if the issuer maintains policies and procedures reasonably designed to prevent others from marketing its cards as gifts.

Exclusion for Loyalty, Award or Promotional Gift Cards

The Board used its authority under the Electronic Fund Transfer Act (“EFTA”) to require clear and conspicuous disclosures for loyalty, award or promotional gift cards. In particular, under Proposed Section 205.20(a)(4)(iii), in order for loyalty, award or promotional gift cards or certificates to be excluded, the following disclosures must be provided on or with the cards or certificates:

- (1) the amount of any dormancy, inactivity or service fee, how often such a fee may be imposed and that such a fee may be assessed for inactivity; and
- (2) information about the expiration date, including a toll-free number, and if a Web site is maintained, that a consumer can use the Web site to obtain a replacement card and information about fees that can be imposed.

Relation to Other Laws

Proposed 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 gift cards or certificates. Currently, this section preempts inconsistent state laws, but states that have more protective state laws are not inconsistent. Accordingly, the amendment could be interpreted as establishing the protections set forth in the Proposed Rule as a federal floor. In this regard, it is essential that the Board clarify that Proposed Section 205.12 does not apply to prepaid cards or certificates that are excluded from coverage under 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 certificates. However, the Board determined not to propose at this time applying to gift cards or certificates other Regulation E requirements, such as periodic statement disclosures or error resolution procedures.

The CARD Act also provided the Board with the authority to limit the amount of dormancy, inactivity or service fees that can be assessed. The Board determined not to exercise its authority under the CARD Act to limit the amount of such fees. Instead, the Board indicates that it will continue to monitor gift card developments and will take action as appropriate.

For further information or to discuss these issues at greater length, please contact Rick Fischer, at (202) 887-1566, Oliver Ireland, at (202) 778-1614, Obrea Poindexter, at (202) 887-8741, or Mark Gillett, at (213) 892-5289.