

# Gift Cards: Federal Reserve Board Issues Final Regulation E Amendments

March, 2010

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On March 23, 2010, the Federal Reserve Board ("FRB") announced its much-anticipated final version of amendments to Regulation E implementing the gift card provisions at Title IV of the federal Credit Card Accountability, Responsibility and Disclosure Act of 2009 (the "Credit CARD Act").<sup>[1]</sup> The announcement comes one month after the February 22, 2010 statutorily-mandated deadline by which the FRB was to have published its final Regulation E gift card amendments. The Credit CARD Act's gift card provisions and the FRB's related Regulation E amendments will take effect August 22, 2010. The final Regulation E amendments are posted online at <http://www.federalreserve.gov/newsevents/press/bcreg/20100323a.htm>.

Now is the time for issuers, merchants, ATM networks honoring gift cards, merchant acquirers, and ISOs that advertise gift cards and other entities in gift card supply/distribution chains to develop or update their written policies, procedures and training programs to ensure compliance with these new and comprehensive federal gift card requirements.

Some important compliance highlights include the following:

## **In general, what products are covered?**

Gift certificates, store gift cards and general-use prepaid cards (together, "Gift Cards") (whether sold at retail locations, online or telephonically) issued primarily for personal, family or household purposes to a consumer in a specified amount as those terms are more specifically defined in the Credit CARD Act and Regulation E. Gift Cards include retail ("closed-loop") gift cards that can be used to buy goods or services at a single merchant or affiliated group of merchants, and network-branded ("open-loop") gift cards redeemable at any merchant that accepts the card brand.

## **In general, what products are not covered?**

Other types of prepaid cards, such as cards that are (1) useable solely for telephone services; (2) reloadable and not marketed or labeled as a gift card or gift certificate;<sup>[2]</sup> (3) loyalty, award, or promotional gift cards;<sup>[3]</sup> (4) not marketed to the general public; (5) issued in paper form only; or (6) redeemable solely for admission to events or venues (such as a ticket to a sporting event or a pass to enter an amusement park) or to obtain goods or services in conjunction with admission to such events or venues. As long as any one of the exclusions apply, a Gift Card generally is not covered by the Credit CARD Act and Regulation E, even if other exclusions do not apply. However, the FRB takes the position that statutory exclusions should be interpreted narrowly to ensure that consumers receive the full protections contemplated in the statute.

## **In general, who is potentially covered?**

Any entities involved in the issuance, distribution or sale of Gift Cards (or the issuance or distribution of loyalty, award or promotional Gift Cards) potentially are affected by the new

statute and the related Regulation E amendments. Such entities generally include card issuers, merchants, marketers, program managers, owners of ATMs that honor Gift Cards, payment card networks, and merchant acquirers and third-party processors that advertise or sell Gift Cards.

### **What do the Credit CARD Act and the FRB's proposed amendments to Regulation E generally prohibit or require?**

- Expiration date restrictions. A Gift Card may not be sold or issued unless: (1) the expiration date of the funds underlying the Gift Card is no less than five years after the date of issuance (in the case of a gift certificate) or five years after the date of last load of funds (in the case of a store gift card or general-use prepaid card); and (2) information regarding whether funds underlying a certificate or card may expire must be clearly and conspicuously stated on the certificate or card and disclosed prior to purchase.
- Regulation E's related requirements concerning Gift Card expiration dates: A Gift Card must include a disclosure alerting consumers to the difference between the certificate or card expiration date and the funds expiration date, if any, and that the consumer may contact the issuer for a replacement card. Such disclosure must be stated with equal prominence and in close proximity to the certificate or card expiration date. However, non-reloadable Gift Cards that bear an expiration date on the Gift Card that is at least seven years from the date of manufacture need not include this disclosure.

No fees may be imposed for replacing a Gift Card if the underlying funds remain valid, to ensure that consumers are able to access the underlying funds for the full five-year period. However, in lieu of sending a replacement certificate or card, issuers may remit, without charge, the remaining balance of funds to the consumer.

- Dormancy fees, inactivity charges and service fees. Such fees are prohibited unless: (1) there has been no activity on the card account for one year from the date that the charge or fee is imposed; (2) certain disclosures are made on or with the card; (3) only one fee is charged in a given month; and (4) any other requirements that may be imposed by FRB are met. Fees subject to the proposed restrictions would include monthly maintenance or service fees, balance inquiry fees, and transaction-based fees, such as reload fees and point-of-sale fees.
- Disclosure requirements relating to fees. Gift Cards must clearly and conspicuously state (1) that a dormancy fee, inactivity charge or fee, or service fee may be charged; (2) the amount of such fee or charge; (3) how often such fee or charge may be assessed; and (4) that such fee or charge may be assessed for inactivity.

Additionally, the purchaser must be informed of any dormancy fee, inactivity charge or fee, or service fee prior to purchase regardless of whether a Gift Card is purchased in person, via the Internet or by phone.

Regulation E also requires the disclosure of all other fees, such as initial issuance fees and cash-out fees, imposed in connection with a Gift Card. These disclosures must be provided on or with the Gift Card prior to purchase and disclosure on the Gift Card of a

toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain fee information or replacement Gift Card.

**When do the Credit CARD Act and the FRB's Regulation E amendments take effect?**

The mandatory compliance date is August 22, 2010 as set forth in the Credit CARD Act. Gift Cards sold on or after August 22, 2010 must fully comply with the Credit CARD Act and Regulation E amendments, including any disclosure requirements that apply. Additionally, loyalty, award or promotional gift cards will be subject to the disclosure requirements discussed here if they are issued pursuant to a loyalty, award or promotional program that begins on or after August 22, 2010.

**How do the Credit CARD Act and its regulations relate to state gift card laws?**

The Credit CARD Act's gift card provisions preempt inconsistent state laws. A state law is not inconsistent with the Credit CARD Act or its implementing regulations if the state law provides greater protection for the consumer than the Credit CARD Act. Thus, the EFTA creates what is sometimes referred to as federal "floor preemption." More than 40 states regulate gift cards in some fashion. Many states restrict or ban service fees or expiration dates. Some states only require disclosure of fees or expiration dates. Many states apply abandoned property or escheat laws to funds remaining on cards. Some states require that consumers have the option of receiving cash back on balances below a certain amount. While all states that regulate gift cards address "closed-loop" (or proprietary) cards in some form, many states do not regulate "open-loop" (i.e., network-branded) cards issued by banks or thrifts.

**Will non-gift card products be subject to the new gift card rules?**

General use prepaid cards – e.g., prepaid cards for the unbanked, payroll cards, and government benefits cards – are specifically excluded from coverage under the Credit CARD Act if they are reloadable and not marketed or labeled as a gift card or gift certificate. However, if anyone (other than the consumer-purchaser of the card), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used promotes the use of the card as a gift card or gift certificate, general purpose reloadable debit cards and other such non-gift card products will be subject to prohibitions, restrictions and disclosure requirements contained in the Credit CARD Act and Regulation E.

Compliance obligations could therefore arise if, for example, a retailer were to display non-gift card products within an in-store "gift card mall" or otherwise promote the use of such cards as a gift card or gift certificate. Under Regulation E, however, such products nevertheless would be excluded from coverage if entities subject to the rules maintain robust policies and procedures reasonably designed to avoid such marketing.

Notably, however, the FRB's Regulation E Section-by-Section Analysis provides the following additional guidance with respect to the exclusion at 12 CFR Part 205.20(b)(2) ("Reloadable and not marketed or labeled as a gift card or gift certificate"):

*[T]he mere mention that gift cards or gift certificates are available in an advertisement or on a sign that also indicates the availability of other excluded prepaid cards does not by itself cause the excluded prepaid cards to be marketed as a gift card or a gift certificate. The key*

*consideration is whether a consumer acting reasonably under the circumstances could be led to believe that all certificates or cards referenced in the advertisement or the sign are gift cards or gift certificates. For instance, a retailer could state in an advertisement 'Gift Cards and Prepaid Cards Sold Here' to promote the availability of gift cards and general-purpose reloadable cards in the store without causing the general-purpose reloadable card to be marketed as a gift card or gift certificate, provided that a consumer acting reasonably under the circumstances would not be led to believe that all certificates or cards referenced in the advertisement are gift cards or gift certificates. Similarly, the posting of a sign in a store which communicates the general availability of gift cards does not by itself constitute the marketing of other excluded prepaid cards that may also be sold in the store as gift cards or gift certificates, provided that a consumer acting reasonably under the circumstances is not led to believe that the sign applies to all prepaid products sold in the store...Such determinations would depend on the facts and circumstances of an individual sign or advertisement.*

It is therefore critically important *“ starting now ”* for issuers and marketers of general use prepaid non-gift cards to begin formulating comprehensive compliance programs that include, for instance, procedures requiring close and frequent communications with retailers to ensure that such non-gift card products are not marketed or labeled as gift cards.

#### **How can I learn more about this topic?**

There are a variety of resources for this purpose including, for instance, the FRB's website at <http://www.federalreserve.gov/>. Industry trade association newsletters and conferences are an additional resource. You should consult your company's legal department or knowledgeable outside counsel for legal advice on these and other electronic payments issues.

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[1] Signed into law on May 22, 2009, the Credit CARD Act amends the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) which, in turn, is implemented by Regulation E, specifically at 12 CFR Part 205.20 ("Requirements for gift cards and gift certificates").

[2] Regulation E provides that the exclusion for Gift Cards that are reloadable and not marketed or labeled as a gift card or gift certificate applies also to temporary cards issued solely in connection with a general-purpose reloadable card, even if the temporary card is initially non-reloadable.

[3] The front of a loyalty, award, or promotional gift card must state (1) that the card is issued for loyalty, award, or promotional purposes and (2) any funds expiration date that may apply. Additionally, all fees, including any dormancy, inactivity, or service fees, must be disclosed on or with the loyalty, award, or promotional gift card.