

SUMMARY OF THE BOARD'S RULE ON GIFT CARDS¹

I. Background.

- A.** *Credit CARD Act.* The Credit CARD Act (“Act”) was signed into law on May 22, 2009. Title IV of the Act amended the Electronic Fund Transfer Act (“EFTA”) and generally imposed limits on fees and expiration dates on gift certificates, store gift cards and general-use prepaid cards, with certain exceptions.² Title IV also incorporated references to dormancy fees, service fees and expiration dates into the EFTA provision that allows state laws to provide greater consumer protection than the EFTA, effectively creating a “federal floor” with respect to the gift card provisions of the Act. Title IV becomes effective on August 22, 2010.
- B.** *Proposed Rule.* On November 20, 2009, the Board of Governors of the Federal Reserve System (“Board”) published in the *Federal Register* proposed amendments to Regulation E, 12 C.F.R. Part 205, (“Proposal”) to implement the gift card provisions of the Act.
- C.** *Final Rule.* On March 23, 2010, the Board issued a final rule (“Rule”) implementing the gift card provisions of the Act, as outlined below. As of the date of this summary, the Rule had not been published in the *Federal Register*. The Rule applies to any card that is sold or provided to a consumer on or after August 22, 2010, including cards provided in replacement of lost, stolen or expired cards. However, for loyalty, award or promotional gift cards, the disclosure requirements particular to those cards apply only to cards that are issued pursuant to a loyalty, award or promotional program that begins on or after August 22, 2010. § 205.20(g).

II. Cards Subject to the Rule.

- A.** *Consumer Purpose Limitation.* The Rule only applies to cards that are sold or issued primarily for personal, family, or household purposes, whether funded by a consumer or a business. *See* Comment 20(a)-4. The Rule does not apply to business-purpose cards, such as prepaid per diem cards, T&E cards or purchasing cards.
- B.** *Gift Certificates.* The Rule defines a “gift certificate” as a card that is: (1) issued

¹ This document is intended for informational purposes only. This document is not legal advice, nor should it be relied upon as legal advice. The recipient is encouraged to seek its own legal counsel with respect to the interpretation of the rule and its applicability to any specific fact, circumstance, or entity.

² For purposes of this summary, such products are referred to as “cards” and include cards, codes or other devices.

in a specified amount that may not be increased or reloaded in exchange for payment; and (2) redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

§ 205.20(a)(1).

- C. *Store Gift Cards.* The Rule defines a “store gift card” as a card that is: (1) issued in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (2) redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

§ 205.20(a)(2).

- D. *General-Use Prepaid Cards.* The Rule defines a “general-use prepaid card” as a card that is: (1) issued in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (2) redeemable upon presentation at multiple, unaffiliated merchants for goods or services or usable at ATMs (*e.g.*, a network-branded card). § 205.20(a)(3).

III. Excluded Cards.

- A. *In General.* Consistent with the Act, the Rule excludes a number of card products from the requirements and restrictions of the Rule.

- B. *Phone Cards.* The Rule excludes cards used “solely for telephone services,” such as prepaid cards for long-distance telephone service, prepaid cards for wireless telephone service and prepaid cards for other services that function similar to telephone services, such as prepaid cards for voice over Internet protocol (VoIP) access time. § 205.20(b)(1); Comment 20(b)(1)-1.

- C. *Cards Not Labeled or Marketed As “Gift” Cards.* The Rule excludes cards that are “reloadable and not marketed or labeled as a gift card or gift certificate.” Under the Rule, a card is “reloadable” if the terms and conditions of the cardholder agreement permit funds to be added to the card after the initial purchase or issuance. A card is not “reloadable” merely because the issuer or processor is technically able to add functionality that would otherwise enable the card to be reloaded. Comment 20(b)(2)-1. The term “reloadable” includes a temporary non-reloadable card issued solely in connection with a reloadable card. *See* § 205.20(b)(2); Comment 20(b)(2)-6.

1. *Marketing and Labeling: Activities Included.* The phrase “marketed or labeled as a gift card or gift certificate” means directly or indirectly offering, advertising or otherwise suggesting the potential use of a card as a gift for another person, including: (a) using the word “gift” or “present” on a card or accompanying material, including documentation, packaging and promotional displays; (b) representing or suggesting that a card can be given to another person, for example, as a “token of appreciation” or a

“stocking stuffer,” or displaying a congratulatory message on the card or accompanying material; or (c) incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or congratulatory message, on a card, accompanying documentation, or promotional material. Comment 20(b)(2)-3.i.

2. *Marketing and Labeling: Activities Not Included.* Under the Rule, the term “marketed or labeled as a gift card or gift certificate” does not include representing that a card can be used: (a) as a substitute for a checking, savings, or deposit account; (b) to pay for a consumer’s health-related expenses (*e.g.*, a card tied to a health savings account); (c) as a substitute for travelers checks or cash; or (d) as a budgetary tool (*e.g.*, by teenagers or to cover emergency expenses). Comment 20(b)(2)-3.ii.
3. *Applying the Exclusion.* Generally, whether the exclusion applies is dependent upon the facts and circumstances and does not depend on the type of entity that makes the promotional message. For example:
 - a. *Entities Included.* A card can be deemed to be marketed or labeled as a gift card if any entity in the payment chain (except the purchaser) promotes the use of the card as a gift. Such entities include the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used. Comment 20(b)(2)-2.
 - b. *Marketing Efforts Included.* A card can be deemed to be marketed or labeled as a gift card even if it is only occasionally marketed as a gift card. Thus, a network-branded general purpose reloadable card would be deemed to be marketed or labeled as a gift card if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as “the perfect gift” during the holiday season. Comment 20(b)(2)-2.
4. *Mandatory Policies and Procedures.* For the exclusion for a card that is reloadable and not marketed or labeled as a gift card to apply, entities subject to the Rule (*e.g.*, issuers, program managers, and retailers) must maintain policies and procedures reasonably designed to avoid such marketing. Comment 20(b)(2)-4. Procedures may include contractual provisions prohibiting a reloadable card from being marketed or labeled as a gift card, merchandising guidelines or plans regarding how the card must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the card is not being marketed as a gift card. *See* Comment 20(b)(2)-4.
 - a. *Internet Example.* An Internet site that sells both gift cards and reloadable cards intended for other purposes and that displays a banner

advertisement or a graphic on the home page that prominently states “Gift Cards,” “Gift Giving,” or similar language without mention of other available card products (or uses an Internet address that includes only a reference to gift cards) would fall outside of the exclusion for reloadable cards that are not marketed or labeled as gift cards.
Comment 20(b)(2)-5.

D. *Loyalty, Award, or Promotional Cards.* The Rule excludes “loyalty, award, or promotional gift cards.” Such cards are defined as a card that: (1) is issued in connection with a loyalty, award, or promotional program; (2) is redeemable upon presentation at one or more merchants for goods or services, or usable at ATMs; and (3) meets the following disclosure requirements: (a) a statement indicating that the card is issued for loyalty, award, or promotional purposes (*e.g.*, use of the word “Reward” or “Promotional”) must appear on the front of the card; (b) the expiration date for the underlying funds must appear on the front of the card; (c) the amount of any fees that may be imposed in connection with the card, and the conditions under which they may be imposed, must be provided *on or with* the card; and (d) a toll-free telephone number and, if one is maintained, an Internet site, that a consumer may use to obtain fee information, must be included on the card. § 205.20(b)(4)(iii); Comments 20(a)(4)-2 and 20(a)(4)-3. Examples of loyalty, award, or promotional programs include:

1. *Merchant Loyalty Programs.* Consumer retention programs operated or administered by a merchant or other person that provide to consumers cards or coupons redeemable for or towards goods or services or other monetary value as a reward for purchases made or for visits to the participating merchant. Comment 20(a)(4)-1.i.
2. *Promotion Programs.* Sales promotions operated or administered by a merchant or product manufacturer that provide coupons or discounts redeemable for or towards goods or services or other monetary value. Comment 20(a)(4)-1.ii.
3. *Rebate Programs.* Rebate programs operated or administered by a merchant or product manufacturer that provide cards redeemable for or towards goods or services or other monetary value to consumers in connection with the consumer’s purchase of a product or service and the consumer’s completion of the rebate submission process. Comment 20(a)(4)-1.iii.
4. *Sweepstakes.* Sweepstakes or contests that distribute cards redeemable for or towards goods or services or other monetary value to consumers as an invitation to enter into the promotion for a chance to win a prize. Comment 20(a)(4)-1.iv.
5. *Referral Programs.* Referral programs that provide cards redeemable for

or towards goods or services or other monetary value to consumers in exchange for referring other potential consumers to a merchant. Comment 20(a)(4)-1.v.

6. *Employer Incentive Programs.* Incentive programs through which an employer provides cards redeemable for or towards goods or services or other monetary value to employees, for example, to recognize job performance, such as increased sales, or to encourage employee wellness and safety. Comment 20(a)(4)-1.vi.
7. *Charitable Programs.* Charitable or community relations programs through which a company provides cards redeemable for or towards goods or services or other monetary value to a charity or community group for their fundraising purposes, for example, as a reward for a donation or as a prize in a charitable event. Comment 20(a)(4)-1.vii.

E. *Cards Not Publicly Marketed.* The Rule excludes cards that are not marketed to the general public. A card is deemed to be marketed to the general public under the Rule if the potential use of the card is “directly or indirectly offered, advertised, or otherwise promoted to the general public.” Comment 20(b)(4)-1.

1. *Exemption Eligibility Factors.* Factors that the Board may consider in determining whether the exclusion applies to a particular card include the means or channel through which the card may be obtained by a consumer, the subset of consumers that are eligible to obtain the card, and whether the availability of the card is advertised or otherwise promoted in the marketplace. Comment 20(a)(4)-1.
2. *Prepaid Card Examples.* The Rule includes a number of examples related to prepaid card offerings. *See, e.g.,* Comments 20(b)(4)-2.ii through -2.vii.
 - a. *General Considerations.* Generally, in determining whether a prepaid card falls within the exclusion, the merchant must consider whether the card is “of a type that is advertised or made available to consumers generally or can be obtained elsewhere.” If the card can also be purchased through retail channels, the exclusion does not apply, even if the consumer obtained the card from the business as an incentive or reward. Comment 20(b)(4)-2.i.
 - b. *Insurance Proceeds Programs Excluded.* The exclusion covers programs under which an insurance company settles a policyholder’s claim and distributes the insurance proceeds to the consumer by means of a prepaid card. Comment 20(b)(4)-2.iv.
 - c. *Card Refund Programs Excluded.* The exclusion covers programs

under which a merchant provides store credit to a consumer following a merchandise return by issuing a prepaid card that clearly indicates that the card contains funds for store credit. Comment 20(b)(4)-2.v.

- d. *Certain Tax Refund Programs Excluded.* The exclusion covers programs under which a tax preparation company elects to distribute tax refunds to its clients by issuing prepaid cards, however, the exclusion does not apply if the tax preparer promotes the ability to receive tax refund proceeds through a prepaid card “as a way to obtain ‘faster’ access to the proceeds.” Comment 20(b)(4)-2.vi.

F. *Paper Form.* The Rule excludes products “issued in paper form only.” This generally applies to certificates issued in paper form where only the paper itself may be used to purchase goods or services. The exclusion does not apply to a card that is provided electronically to a consumer, even if it may be reproduced or otherwise printed on paper by the consumer. Comment 20(b)(5)-1; *see, also*, Comments 20(b)(5)-1.i through -1.iv (providing examples).

G. *Event-Related.* The Rule generally excludes cards that are not redeemed for a specified monetary value, but rather are used for admission or entry to an event or venue. This exclusion also covers cards that are usable to purchase goods or services in addition to entry into the event or the venue, either at the event or venue or at an affiliated location or location in geographic proximity to the event or venue. Comment 20(b)(6)-1; *see, also*, Comments 20(b)(6)-1.i through -1.iii (providing examples).

H. *Multiple Exclusions.* A card is not covered by the Rule as long as any one of the exclusions applies, even if other exclusions do not apply. For example, a card marketed as a reloadable card to teenagers for occasional expenses that enables parents to monitor spending does not qualify for the exclusion under § 205.20(b)(4) (cards not marketed to the general public), however, it may be exempt from the requirements of the Rule under § 205.20(b)(2) (reloadable cards not marketed or labeled as a gift card). Comment 20(b)-2.

IV. Definitions of Fees.

A. *Definition of “Dormancy or Inactivity Fee.”* The Rule provides that the terms “dormancy fee” and “inactivity fee” mean a fee for non-use of or inactivity on a card. § 205.20(a)(5). In a clarification from the Proposal, the Rule provides that the term “activity” means any action that results in an increase or decrease of the underlying funds, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction. § 205.20(a)(7). The purchase and activation of a card, the use of the card to purchase a good or service, or the reloading of funds onto a card constitutes activity. But, the imposition of a fee, the replacement of an expired, lost, or stolen card, and a balance inquiry do not constitute activity. Also, if a consumer attempts to engage in a transaction with a

card, but the transaction cannot be completed due to technical or other reasons, such attempt does not constitute activity. Or, if the funds underlying a card are adjusted because there was an error or the consumer has returned a previously purchased good, the adjustment does not constitute activity. Comment 20(a)(7)-1.

- B.** *Definition of “Service Fee.”* The Rule provides that the term “service fee” means “a periodic fee” for holding or use of a card and includes “any fee” that may be imposed from time to time for holding or using the card. § 205.20(a)(6). A service fee includes a monthly maintenance fee, a transaction fee, an ATM fee, a reload 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. A service fee does not include a one-time fee or a fee that is unlikely to be imposed more than once while the underlying funds are still valid, such as an initial issuance fee, a cash-out fee, a supplemental card fee, or a lost or stolen card replacement fee. Comment 20(a)(6)-1.

V. Prohibition on Fees.

- A.** *General Rule.* The Rule provides that no person may impose a dormancy, inactivity, or service fee with respect to a card, unless: (1) there has been no “activity” (*see* Section IV.A, *supra*) with respect to the card in the one year period ending on the date on which the fee is imposed; (2) the following disclosures are made clearly and conspicuously on the card, as applicable: (a) the amount of any dormancy, inactivity, or service fee that may be charged; (b) how often such fee may be assessed; and (c) that such fee may be assessed for inactivity; and (3) not more than one dormancy, inactivity, or service fee may be imposed in any given calendar month. § 205.20(d); *see, also*, Comments 20(d)-1 and 20(d)-4 (providing examples applying the one-year-no-activity and one-fee-per-month rules).
- B.** *Fee Accumulation Prohibited.* The prohibition on fees applies to any accumulation of dormancy, inactivity, or service fees for previous periods into a single fee (*e.g.*, a monthly maintenance fee of \$2.00 per month may not be accumulated such that a fee of \$24 is imposed on January 1 of the following year). Comment 20(d)-5.

VI. Prohibition on Expiration Dates.

- A.** *General Rule.* Under the Rule, no person may sell or issue a card, unless the following four criteria are met:
- 1.** *“Reasonable Opportunity.”* The person has established policies and procedures to provide consumers with a reasonable opportunity to purchase the card with at least five years remaining until the card expiration date. Such opportunity exists if: (a) the policies and procedures

prevent the sale of a card unless its expiration date is at least five years after the date the card was sold or initially issued to a consumer; or (b) the card is available to consumers to purchase five years and six months before the card's expiration date. Comment 20(e)-1.

2. *Expiration Requirements Are Met.* The expiration date for the underlying funds is at least the later of: (a) five years after the date on which funds were last loaded to the card; or (b) the card's expiration date, if any.
3. *Disclosure Requirements Are Met.* The following disclosures are provided on the card, as applicable: (a) the expiration date for the underlying funds or, if the underlying funds do not expire, that fact; (b) a toll-free telephone number and, if one is maintained, an Internet site that a consumer may access to obtain a replacement card after the card expires if the underlying funds may be available; and (c) except where a non-reloadable card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the card expiration date, that the card expires, but the underlying funds either do not expire or expire later than the card, and that the consumer may contact the issuer for a replacement card.
4. *No Replacement Fees.* A cardholder may not be charged a fee for a replacement card or receiving the remaining balance in some other manner prior to the funds expiration date, unless such card has been lost or stolen. § 205.20(e).

B. *Expiration Date Disclosure Rules.*

1. *Precise Date Not Required.* The Rule provides that the disclosure requirement in Section VI.A.3.a, *supra*, may be satisfied by disclosing that: "Funds expire 5 years from the date funds last loaded to the card."; "Funds can be used 5 years from the date money was last added to the card."; or "Funds do not expire." Comment 20(e)-3.
2. *No Expiration Date.* No expiration date disclosure is required on the card if the card and underlying funds do not expire. Comment 20(e)-4, *see, also*, Comments 20(e)-7 and 20(e)-13 (describing the relationship between card expiration and funds expiration).

VII. Card Replacement Rules.

- A. *In General.*** Cards issued as a replacement may bear a card expiration date of less than five years from the date of issuance of the replacement card. Comment 20(e)-2.

- B. *Relationship to Underlying Funds.* If a replacement card expiration date is later than 5 years after the card was initially issued, the expiration date for the underlying funds at the time the replacement card is issued must be no earlier than the expiration date for the replacement. Comment 20(e)-2; *see, also*, Comment 20(e)-7 (describing the relationship between card expiration and funds expiration).
- C. *Expired Cards.* When a card expires, but the underlying funds have not expired, an issuer generally may provide either a replacement card or pay the remaining balance on the card (*e.g.*, by check), however, the issuer may not charge a fee for the service. Comment 20(e)-10.
- D. *Stolen Cards.* The Rule does not require the replacement of a card that has been lost or stolen. Comment 20(e)-11.

VIII. Pre-Sale Disclosure Requirements.

- A. *Requirements for Purchases.* Before a consumer purchases a card (whether in person, via the Internet, by telephone, or by other means), a person that issues or sells such card must disclose, clearly and conspicuously, as applicable: (1) the amount of any dormancy, inactivity, or service fee that may be charged; (2) how often such fee may be assessed; (3) that a fee may be assessed for inactivity; (4) the expiration date for the underlying funds or, if the underlying funds do not expire, that fact; (5) a toll-free telephone number and, if one is maintained, an Internet site that a consumer may use to obtain a replacement card after the card expires if the underlying funds may be available; (6) except where a non-reloadable card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the card expiration date, that the card expires, but the underlying funds either do not expire or expire later than the card, and that the consumer may contact the issuer for a replacement card; and (7) for each type of fee that may be imposed in connection with the card (other than fees already subject to disclosure), the type of fee, the amount of the fee (or an explanation of how the fee will be determined), and the conditions under which the fee may be imposed. § 205.20(c)(3).
- B. *Post-Purchase Changes Not Permitted.* In a clarification from the Proposal, the Rule provides that the fees and terms and conditions of expiration that are required to be disclosed prior to purchase may not be changed after purchase. § 205.20(c)(3).

IX. Formatting Requirements and Disclosure Standards.

- A. *Written or Electronic Form.* With limited exception, the Rule requires that disclosures be provided to the consumer in written or electronic form, in a format

that the consumer may keep (*i.e.*, in a retainable form). § 205.20(c)(2).

- B.** *Clear and Conspicuous Standard: In General.* Disclosures generally will meet the clear and conspicuous standard if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to consumers. Comment 20(c)-1.
1. *“On Card” Disclosures.* Disclosures are not required to be located on the front of the card to be considered clear and conspicuous, except where the Rule specifically requires front-of-card disclosures. Disclosures on the back of a card that are printed on top of indentations from embossed type appearing on the front of the card are not likely to be conspicuous if the indentations obstruct the readability of the disclosures. Comment 20(c)-1.
 2. *Abbreviations Permissible.* The Rule provides that certain commonly accepted or readily understandable abbreviations (*e.g.*, “mo.” for month or a “/” to indicate “per.”) would meet the clear and conspicuous standard. Comment 20(c)(1)-2.
 3. *Oral Disclosures.* Where oral disclosures are permitted, they would meet the clear and conspicuous standard if they are given at a volume and speed sufficient for a consumer to hear and comprehend them. Comment 20(c)(1)-1.