

New Federal Gift Card Statutes and Regulations

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A new federal gift card law which may affect your business goes into effect this summer.

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "Credit CARD Act") was signed into law on May 22, 2009. Among other things, the Credit CARD Act amends the Electronic Fund Transfer Act to establish a federal law on general-use prepaid cards, gift certificates and store gift cards. On March 23, 2010, the Board of Governors of the Federal Reserve System (the "Board") issued its final rule regulating general-use prepaid cards, gift certificates, and store gift cards. These final regulations are effective on August 22, 2010.

Products Covered:

The final regulations apply to gift certificates, store gift cards, and general-use prepaid cards, as those terms are generally defined in the Credit CARD Act. However, the Board adopted certain adjustments to the statutory definitions to provide clarity, to avoid arbitrary and unintended distinctions among types of certificates and cards, and to provide consistency across definitions.¹ The final rule applies whether or not a physical gift

certificate, store gift card, or general-use prepaid card is issued because it applies to any "cards, codes, or other devices" that otherwise meet the definitions of gift card, gift certificate or general-use prepaid card and does not fall under one of the exclusions explained below. As such, any gift certificate, store gift card, or general-use prepaid card delivered electronically (such as an e-certificate) is covered.

Under the final rule, gift certificates and store gift cards are covered regardless of whether they can be used to buy goods or services at a single merchant or at an affiliated group of merchants. General-use prepaid cards include network branded gift cards (such as Visa), which are redeemable at any merchant that accepts the card brand. The final regulations cover gift certificates, store gift cards and general-use prepaid cards whether the amount is pre-denominated by the issuer or the amount is designated by the consumer.

Notable Exclusions:

The Board generally limited application of the final rule to gift certificates, store gift cards, and general-use prepaid cards sold to consumers primarily for

¹ The rule defines gift certificate as a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that may not be increased or reloaded in exchange for payment; and (ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

Store gift card means a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

General-use prepaid card means a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines.

personal, family, or household purposes. In comments provided by the Board, it was stated that the determination of whether a card, code, or other device is issued primarily for personal, family, or household purposes will depend on “the facts and circumstances.” As a way of further explanation, even if the card is primarily funded by a business for rewards or incentives, it may fall within the rule if the card, code, or other device will be provided to a consumer primarily for personal, family, or household purposes. The exception for loyalty, award and promotional gift cards, however, may take them out of the rule, as described below. What was clarified is that cards, codes, or other devices where the end use is for business purposes, such as reimbursing or paying for an employee for travel or other business expenses, are excluded.

Consistent with the Credit CARD Act, the final regulations exclude from the definitions of gift certificates, store gift cards and general-use prepaid cards any cards, codes or other devices that are (i) reloadable and not marketed or labeled as a gift card or gift certificate, (ii) not marketed to the general public,² (iii) issued in paper form only, (iv) redeemable for admission to an event or for the purchase of goods or services in conjunction with the admission,³ (v) redeemable for a specific good or service, or “experience,” such as a spa treatment, hotel stay, or airline flight, or (vi) entitles

the consumer to a certain percentage off the purchase of a good or service.⁴

The “paper only” exclusion for gift certificates, store gift cards, and general-use prepaid cards applies where the sole means of issuing the card, code, or other device is by paper. An example includes a paper gift certificate distributed by restaurants that is redeemable for a specific dollar amount. The final regulations set out that the exclusion does not apply simply because a card, code, or other device is reproduced or otherwise printed on paper. For example, the exclusion would not apply where a retailer e-mails a certificate redeemable for goods or services to a consumer, which the consumer could print out on a home printer.

Treatment of Loyalty, Award, or Promotional Gift Cards:

In order for loyalty, award, or promotional gift cards⁵ to avoid being subject to the substantive restrictions under the final rule on imposing certain fees or expiration dates, the cards must have the following disclaimers:

- (1) a statement on the front of the card, code, or device that it is issued for loyalty, award or promotional purposes and the expiration date of the underlying funds;
- (2) disclosure of any fees that may be imposed in connection with the card

² However, if a retail chain markets its gift cards only to members of its frequent buyers’ program, but any member of the general public may become a member of the program, the cards would be covered by the regulations, unless another exclusion applies.

³ While the exclusion would apply to cards, codes, or other devices that are redeemable for admission to an event or venue, and for goods or services purchased in conjunction with that admission, the exclusion does not cover cards, codes, or other devices issued in a specified monetary value that could be applied toward such admission.

⁴ There is also an exclusion for cards, codes, or other devices usable solely for telephone services.

⁵ The final rule defines loyalty, award, or promotional gift card as a card, code, or other device that: (i) is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program; (ii) is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines; and (iii) satisfies disclosure requirements.

and the conditions under which the fees may be imposed (this disclosure may be on or with the card, code or device); and

- (3) disclosure of a toll-free telephone number and Web-site (if one is maintained), where fee information may be obtained, if fees are imposed (this disclosure may be on either the front or back of the card, code, or device).

Restrictions on Dormancy, Inactivity or Service Fees:

The final regulations prohibit the imposition of dormancy, inactivity, or service fees unless the following requirements are met:

- (1) there has been at least one year of inactivity on the certificate or card;
- (2) no more than one such fee is charged per month; and
- (3) the consumer is given clear and conspicuous disclosures about the fees prior to purchase.

Pursuant to the Credit CARD Act, the disclosure requirements are met if a card or certificate clearly and conspicuously states (i) that a dormancy fee, inactivity charge or fee, or service fee may be charged, (ii) the amount of the fee or charge, (iii) how often the fee or charge will be assessed, and (iv) that the fee or charge may be assessed for inactivity. In addition, the charge or fee must be disclosed to purchasers of the certificate or card prior to purchase, regardless of whether the purchase is in person, over the Internet, or by telephone.

A “dormancy or inactivity fee” is a fee, charge, or penalty for non-use or inactivity. “Service fee” is defined to include monthly maintenance fees,

balance inquiry fees, and transaction-based fees, such as reload fees and point-of-sale fees. Service fees that are 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 certificate or card replacement fee (“one-time fees”), are not subject to the restrictions above. However, one-time fees and any other type of fee (i.e., any fee which is not a dormancy, inactivity, or service fee under the rule) must be disclosed on or with the certificate or card prior to purchase. Additionally, if any fees are assessed, then issuers must disclose a toll-free telephone number and Web-site (if maintained) for consumers to obtain fee information.

Restrictions on Expiration Dates:

The final regulations prohibit the sale or issuance of a gift certificate, store gift card, or general-use prepaid card that has an expiration date of less than five years after the date a certificate or card is issued or the date funds are last loaded. The imposition of any fees for replacement of an expired card or certificate if the underlying funds remain valid is prohibited, unless such certificate or card has been lost or stolen.

Relation to State Law:

The federal law does not preempt any state laws that address dormancy, inactivity, or service fees or expiration dates for gift certificates, store gift cards, or general-use prepaid cards if the state laws provide greater consumer protection than the Credit CARD Act. Numerous states have laws that address these types of fees and expiration dates and laws that require cash redemption once the value of a gift card reaches a specified level. Thus, when setting terms for gift certificates, store gift cards, or general-use prepaid cards, state laws should also be reviewed for compliance.

Notable Clarifications in Final Rule:

The following are some of the issues the Board clarified after receiving comments on its proposed rule:

- The Board did not grandfather gift certificates, store gift cards, or general-use prepaid cards that are produced, but not sold as of the effective date of the regulations.
- The disclosure rules applicable to loyalty, award, or promotional cards do not apply if the **eligibility period for such program began** before August 22, 2010. For example, a manufacturer may provide a \$20 rebate card to a consumer for a qualifying purchase between January 1, 2010 and December 31, 2010 without having the card subject to the regulations even though it is provided after August 22, 2010.
- The Board added a definition for “activity” for purposes of the requirement that in order to charge fees, there must be at least one year of inactivity on the certificate or card. Activity means any action that results in the increase or decrease of the funds underlying the certificate or card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction.
- The final rule does not require issuers to automatically issue a replacement card to consumers prior to the card expiration date of a reloadable card if the underlying funds will not expire until after the card expiration date.

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