

Gift Cards and Cards that are Not Gift Cards: Navigating Compliance with the Gift Card Provisions of the CARD Act

*Practical Guidance Concerning the CARD Act and
the Federal Reserve Board's Final Gift Card Rules*

Webinar – April 28, 2010



A Broader PerspectiveSM



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Payments Practice Team

Payments Practice Team

- **PAYMENTS: Prepaid Cards, Debit Cards, Credit Cards, Remittances, Bill Payments, Mobile Payments, Virtual Payments, Micro Loans, checks, ACH and more.**
- Product launches, including design, fees, terms and conditions, and product terminations, including dispute resolution, termination and wind-down procedures
- Processing and vendor agreements, co-branded marketing agreements, bank issuance agreements
- State licensing requirements and exemptions
- State abandoned property and consumer protection laws and compliance procedures
- Federal Bank Secrecy Act and AML compliance policies, procedures and controls
- Third party distribution networks, including sales agency agreements, due diligence procedures, supervision and training

Agenda

- I. Background – CARD Act Basics
- II. Gift Cards With Fees & Expiration Dates
- III. Loyalty, Award and Promotional Cards
- IV. Special Issues for Retailers
- V. Exclusions
- VI. Transition period
- VII. Preemption
- VIII. What's Still To Come?
- IX. Qs & As

Ground Rules

- Focus on gift card provisions of the CARD Act – not credit, Anti-Money Laundering (AML), other banking laws, or the myriad state consumer protection, licensing or abandoned property laws
- “Gift cards” can include open and closed loop cards, certificates, devices, online barcodes, cell phones
- Open Loop vs. Closed Loop
- Submitted Questions
- Panel Procedures
- Availability of slides/webinar www.bryancave.com
- Not Legal Advice!

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (the “CARD Act”)

- Originally focused on Credit Cards
- Senator Charles Schumer – Gift Card Amendment *[It could've been worse!]*
- Signed into law May 22, 2009; Effective August 22, 2010
- Title IV amends the Electronic Funds Transfer Act – relating to “general-use” or open loop gift cards, gift certificates and store gift cards
- Represents the first major federal regulation of prepaid cards
- Mandates additional rulemaking:
 - ▶ The Federal Reserve Board to prescribe regulations to carry out Title IV of the CARD Act
 - * Proposed Rules issued on November 16, 2009; Final Rules were due on February 22, 2010, but not issued until **March 23, 2010**
 - ▶ FinCEN to prescribe regulations regarding the treatment of stored value as a monetary instrument with respect to the Bank Secrecy Act
 - * Final Rules were due mid-February 2010
 - * Still awaiting FinCEN’s PROPOSED rules

If you're a gift card issuer with fees...

STEP 1: DETERMINING WHAT FEES TO CHARGE

If you charge fees, you will need to decide whether to change the types or amounts of fees.

- The Rules only set limits on dormancy, inactivity and **other periodic “service fees.”**
- Periodic fees for holding or using the card.
- The Rules do not affect your ability to charge an up front activation fee, card purchase fee, or “cash-out” fee. **There is no cap on such fees, although disclosure requirements apply.**

If you're a gift card issuer with fees...

STEP 1: DETERMINING WHAT FEES TO CHARGE

- You are not allowed to charge any dormancy or inactivity fees **until after 12 months of inactivity.**
- Inactivity occurs when there is *no increase or decrease* in the amount of funds on the card - other than due to the imposition of a fee or an error or transaction reversal.

If you're a gift card issuer with fees...

- You also are not allowed to charge other **periodic service fees** until after 12 months of inactivity, including –
 - (i) balance inquiry fees,
 - (ii) transaction fees,
 - (iii) ATM fees,
 - (iv) reload fees, or
 - (v) foreign currency transaction fees.
- After 12 months of inactivity, you CAN charge any dormancy, inactivity, or **periodic service fees**, ***BUT YOU CANNOT CHARGE MORE THAN ONE SUCH FEE PER MONTH.***

If you're a gift card issuer with fees...

- So you'll need to choose which fees to charge.
- NOTE: If any one of those **other periodic service fees** is for “activity,” the 12-month waiting period for inactivity starts again and you cannot charge another dormancy fee, inactivity fee, or other service fee for another year.

If you're a gift card issuer with fees...

- Restrictions on **other periodic service fees** do NOT apply to fees that are likely to be imposed only once, such as –
 - (i) as initial issuance fees,
 - (ii) cash-out fees,
 - (iii) a supplemental card fee, or
 - (iv) a lost or stolen replacement card fee.
- NOTE: Replacement card fees are prohibited for cards that expire (are not lost or stolen) if the underlying funds remain valid.

If you're a gift card issuer with fees...

STEP 2: DETERMINING WHERE AND HOW TO DISCLOSE THE FEES

The following fees must be **ON THE CARD** (not just on the packaging and not on a sticker).

- The amount of any dormancy, inactivity, service or **other periodic service fees** that may be charged (as described above);
- How often the fees may be assessed; and
- If applicable, that the fee may be assessed for inactivity.
 - No specific font requirement, but the disclosures must be “clear and conspicuous” and “readily understandable.”
 - No specific requirement on whether these disclosures go on the front or back of the cards.

If you're a gift card issuer with fees...

ALSO ON THE CARD:

- If the card is subject to any fees, then the following must also be set forth on the card itself (either front or back) AND on the card's packaging:
 - a toll-free phone number, and
 - if applicable, a web site where consumers can obtain fee information.

Practice Pointer: *The requirement for disclosing all “**other periodic fees**” ON the card is another reason some issuers are dropping such fees.*

If you're a gift card issuer with fees...

ALSO ON THE CARD:

- Information relating to expiration dates.

- Recommended:
 - Name of Card Issuer
 - Copyright notice
 - Reference to terms & conditions (if applicable)
 - Liability for lost/stolen cards
 - Payment network logos and required disclosures

If you're a gift card issuer with fees...

ON THE PACKAGING AND/OR VISIBLE PRIOR TO PURCHASE:

- The amount and frequency of any dormancy, inactivity, service fee (which must be “on the Card”) AND **other periodic service fees** and how they are assessed.
- **All other fees** that may be charged, including the type of fee, the amount of the fee (or how it will be determined) and the conditions under which the fee will be imposed.
- IMPORTANT: The fees disclosed on the outside of the packaging and on the Card, which must be viewable pre-purchase, **CANNOT be amended once the card is purchased.**

If your gift card has an expiration date...

STEP 3: DETERMINING WHAT EXPIRATION DATE TO USE

The new Rules require that a gift card cannot expire until:

- at least 5 years *after the last load or purchase OR*
- *the date shown on the plastic cards*

whichever is **later**.

- This means that the date shown on the plastic need not be the same date as the expiration date, if the gift card can be reloaded.
- There is both a plastic expiration date and the underlying funds expiration date.

Practice Pointer: *These new rules clearly discourage reloadable gift cards given that reloads reset expiration dates for the funds.*

If your gift card has an expiration date...

- If you issue cards with an expiration date, you must have “**policies and procedures**” in place to ensure that customers have the opportunity to purchase gift cards with at least 5 years validity.
- The Official Staff Interpretation notes two ways to meet this requirement:
 - Under your **policies and procedures**, make the cards available for purchase (e.g., place on store shelves) with at least 5 years and 6 months remaining validity time; OR
 - Have **policies and procedures** in place that prevent the sale of cards with less than 5 years (for example, your authorization system will not activate a card at the time of purchase if the expiration date is less).

If your gift card has an expiration date...

STEP 4: DECIDING WHAT VALIDITY DATES TO USE WHEN MANUFACTURING YOUR GIFT CARDS

- If you manufacture your gift cards with 7 or more years of validity, then *certain* disclosure obligations do not apply.
- BUT If you manufacture your gift cards with more than 5½ years but less than 7, you must include specific disclosures relating to the expiration of the funds in close proximity to your expiration date.

Practice Pointer: *You cannot manufacture gift cards that expire in less than 5½ years without running afoul of the CARD Act provisions – unless your cards come under an exclusion.*

STEP 5: DECIDING HOW TO DISCLOSE THE EXPIRATION DATE

FOUR OPTIONS FOR FRONT-OF-THE-CARD DISCLOSURES:

1. The **Underlying Funds Expiration Date** ALONE – *Only if: (i) card manufactured with 7+ years and (ii) the funds DO expire ON that date or on a later date.*
2. The **Underlying Funds Expiration Date** PLUS a note that “Funds Never Expire” – *Only if: (i) card manufactured with 7+ years and (ii) the funds NEVER expire.*
3. The **Underlying Funds Expiration Date** PLUS a note in close proximity and equal prominence to the expiration date saying something like: “Card expires but funds never expire. Contact issuer for a replacement card.” - *Only if: (i) card manufactured with LESS than 7 years validity and (ii) the funds NEVER expire.*
4. The **Underlying Funds Expiration Date** PLUS a note in close proximity and equal prominence to the expiration date saying something like: “Card expires but funds may expire at a later date. Contact issuer for a replacement card.” - *Only if: (i) card manufactured with LESS than 7 years validity and (ii) the funds expire on a later date.*

If your gift card has an expiration date...

ON THE BACK OF THE CARD:

If you have an expiration date, you must also provide on the BACK of the card:

- a toll-free phone number, and
- if you have a website, then the website address where consumers can obtain a replacement card after their card expires, if underlying funds are available.

Practice Pointer: *The Rules don't specify that these disclosures be placed on the BACK of the Card, only that they be stated "ON" the Card.*

VISIBLE PRIOR TO PURCHASE (usually on the packaging):

- The expiration date for the underlying funds, or a statement that there is no expiration date; AND
- A toll-free phone number and, if applicable, a web site where consumers can obtain a replacement card after their card expires, if underlying funds available; AND
- **IF THE CARD WAS MANUFACTURED WITH LESS THAN 7 YEARS VALIDITY**, something like: “The card expires, but the funds do not expire,” OR “The card expires but the funds expire later than the card” and “You may contact the issuer for a replacement card.”
 - **IMPORTANT: These terms disclosed on the outside of the packaging and on the Card CANNOT be amended once the card is purchased.**
 - Note: if these disclosures on the Card are visible and are clearly and conspicuously disclosed prior to purchase, you may not need to include them on the packaging. It is recommended however that the fees be included both on the Card *and* on the packaging

Practice Pointer: *Although technically speaking, issuers with cards manufactured longer than 7 years don't HAVE to include on the packaging the disclosure about how the cards expire, but the funds don't, and the availability of a free replacement card - we would recommend including such a disclosure on the packaging, especially if it is not on the Card itself.*

If You Issue or Distribute “Loyalty, Award or Promotional” Gift Cards (“Reward Cards”)

STEP 1: DETERMINING WHETHER THE EXCLUSION APPLIES

A “loyalty, award, or promotional gift card” is 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. Sets forth the specific disclosures as required.

Practice Pointer: *If your Reward Card program does not have either expiration dates or fees, you don't need to worry about this exclusion. It only matters if you DO want to have fees and/or expiration dates.*

If You Issue or Distribute “Loyalty, Award or Promotional” Gift Cards (“Reward Cards”)

To qualify for the exclusion, the Reward Cards must be issued
“*in connection with a loyalty, award or promotional program.*”

Practice Pointers:

- Reference to the term “program” in Reward Card related contracts.
- Parameters of the “program” should be described in contracts.
- Reference to the term “program” in marketing materials, in the terms and conditions, and in card packaging.

If You Issue or Distribute “Loyalty, Award or Promotional” Gift Cards (“Reward Cards”)

- To benefit from the exclusion, include on the front of the card:
 - A statement indicating that the card is issued for loyalty, award or promotional purposes, AND
 - The expiration date (if applicable).

Practice Pointer: *We believe it would be sufficient indicate in LARGE letters on the front of the card, something like “AWARD CARD” or “PROMOTIONAL CARD”.*

If You Issue or Distribute “Loyalty, Award or Promotional” Gift Cards (“Reward Cards”)

- To benefit from the exclusion, include **on the card** (*either the front or back*):
 - A toll-free phone number, and
 - If you have a website, then the website address where consumers can obtain a replacement card after their card expires, if underlying funds are available.

Practice Pointer: *Keep in mind – these disclosures apply ONLY IF your Reward Card has fees or expiration dates.*

If You Issue or Distribute “Loyalty, Award or Promotional” Gift Cards (“Reward Cards”)

- To benefit from the exclusion, include on or with the card:
 - The amount of any fees which may be imposed; and
 - The conditions under which they may be imposed.

Practice Pointer: *This is one time that fees are NOT required to be ON the Card. However, if such fees are applicable, they still must be disclosed clearly and conspicuously.*

If You Issue or Distribute Closed Loop Gift Cards (*without any fees or expiration dates*)

- **No new disclosures are required – you can continue to use existing cards**

Practice Pointer: *In particular, the rules do NOT require you to have a toll-free telephone number or web site on the back of the card.*

- **However, if you have Reward Cards that have an expiration date OR service fees, such cards must comply with the Reward Card requirements.**

“If you sell gift cards together with any other non-gift prepaid cards in your retail locations...”

- **Displays of gift and non-gift cards for sale are now subject to scrutiny.**
- **Commentary suggests the following displays are approved, without losing the non-gift exemption:**
 - Separate displays;
 - A single display, but with non-gift products displayed on a different side, with signage as prominent as gift card signage; and
 - A single, combined display at the check-out counter that simply displays the cards without *any* signage.

#1 – Cards or Devices Usable for Telephone Services

- The exclusion covers cards usable solely for telephone services, such as:
 - prepaid cards for long-distance telephone services
 - prepaid cards for wireless telephone service
 - prepaid products that may be used for other services analogous in function to a telephone, such as prepaid cards for voice over Internet protocol (VoIP) access time
- The Board declined to extend this exclusion to other non-phone services accessible through a mobile phone such as cards usable to purchase text message services, internet access or other mobile phone applications.

#2 – Reloadable and Not Marketed or Labeled as a Gift Card

- Intended to cover
 - General purpose reloadable cards
 - Corporate expense and payroll cards
 - College and teen expense cards
- “Reloadable” important factor
 - Card is “reloadable” ONLY if its terms and conditions allow for funds to be added after initial issuance or purchase
 - Can be reloadable by either the cardholder or another party
- “Not marketed or labeled as a gift card” strictly enforced
 - Depends on card and package design, suggested usage
 - Placement on gift card in-store displays, marketing on gift card websites, can disqualify cards
- BUT non-reloadable temporary cards issued solely in connection with a reloadable card is also excluded

Practice Pointer: *“Reloadable” requirement will likely force some non-gift card issuers (for example, disaster relief cards) to make their cards reloadable.*

#3 – Not Marketed to the General Public

- What is “marketed to the general public”? Any cards that are offered, advertised or otherwise promoted to the “general public”
- Marketed includes “through any advertising medium, including television, radio, newspaper, the Internet, or signage”
- Can be a thin line:
 - An employer who “promotes” on its website that new employees will receive payroll cards can lose the exclusion
 - But an employer who “posts a policy” stating that new employees will receive payroll cards does not.
- “General Public” includes “subsets” of the general public. Cards offered to members of a frequent flyer club or users of a tax preparation service are still considered offered to the “general public” if any member of the general public can join the club or use the service.

Practice Pointer: *This is a very narrow exclusion. If possible, try to fit into another exclusion rather than relying solely on this.*

#4 – Issued in Paper Form Only

- Applies if the sole means of issuing the card, code, or other device is in paper form.
- Does not apply to copies of pin numbers or bar codes issued initially by email or electronically on a website, and then printed out by the consumer.
- BUT does apply to paper receipts encoded with a bar code or PIN number that is handed to the consumer by the merchant.

#5 – Redeemable Solely for Admission to Events or Venues

- Applies to cards that do not state a specific monetary value but instead are redeemable for an admission to an event or venue, such as a ticket to a sporting event or a pass to enter an amusement park.
- Also covers cards that entitle the consumer to obtain goods or services, in conjunction with admission to an event or venue.
- Does not apply to dollar-denominated gift cards that can be used toward the purchase admission to a venue or for the purchase of goods or services at the venue.

#6 – Cards, Codes, or Other Devices Redeemable for Specific Goods or Services or “Experiences”

- Not a formal exclusion: Based on the definition of gift cards: “issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount...”
- Excludes cards redeemable upon presentation for a specific good or service, or “experience,” such as a spa treatment, hotel stay, or airline flight.
- Also excludes cards redeemable for a certain percentage off the purchase of a good or service, such as 20% off any purchase in a store, because not “issued in a specified amount.”
- However, if the card is issued in a specified amount that can be applied toward the purchase of goods or services, such as a card redeemable for a spa treatment up to \$50, the card IS subject to this section.

#7 – Cards Redeemable to Load an Account Which Can Then Be Used to Buy Goods or Services

- Not a formal exclusion.
- Some virtual music download or gaming cards are redeemed when the cardholder loads the value into the cardholder's virtual account.
- Once the value is removed from the card and credited to the account, the 5 year minimum expiration term no longer applies to the underlying funds. (See comment 20(e)-13.)
- Per the comment, if the cardholder only partially redeems the value of a card, the five-year minimum expiration term requirement continues to apply to the funds remaining on the card.

Practice Pointer: Is this intended solely for “virtual” accounts? The official commentary doesn't say so, but the introductory comments suggest otherwise.

No Transition Rules Generally

- The Board declined to provide transition rules gift cards already in the market.
- However, gift cards sold or distributed prior to August 22, 2010 are not subject to the CARD Act or the Final Rules.

Practice Pointer: This means that all card programs, disclosures and terms and conditions must be reviewed and, if necessary, revised prior to August 22, 2010, and that all non-compliant existing cardstock must be pulled from shelves and replaced with compliant plastic as of August 22, 2010. Also, necessary “**policies and procedures**” need to be in place by August 22, 2010.

Transition Rules for Reward Cards

- The Rules do not apply to any Reward Card where the period of eligibility for the program began prior to August 22, 2010, regardless of whether the consumer became eligible to receive the card prior to such date.

Practice Pointer: This means that a 1 year promotional program commencing August 1, 2010 can continue until July 31, 2011 with older, preexisting cardstock.

Be careful not to overstretch or abuse this accommodation!

Preemption

- No preemption of state laws providing greater protections
 - Therefore, still must consider state consumer protection laws that impose more stringent requirements/prohibitions.
 - Future determinations regarding preemption will be addressed by the Federal Reserve Board upon inquiry.
- Abandoned Property Compliance
 - Rules refrained from clarifying that any state's abandoned property law requiring the escheatment of funds after less than 5 years is inconsistent with the federal law.
 - Thus for now, issuers must honor gift cards for 5 years, even if the underlying funds have been turned over to a state with a shorter escheatment period.
 - The Federal Reserve Board will likely issue a rule relating to the preemption of state abandoned property laws in the future.

Be Afraid. Be Very Afraid...

- Prepaid Card Consumer Protection Act (the “Menendez Bill”)
- Three new “cross-border” bills (Kirkpatrick, Giffords, and Cornyn)
- The Consumer Financial Protection Act (or Bureau of Consumer Financial Protection)
- Loss of Federal Preemption
- Increasing new state laws

Resources

- Network Branded Prepaid Card Association – www.nbpca.org
- Retail Gift Card Association – www.thergca.org
- American Bankers Association – www.aba.com
- American Payroll Association – www.americanpayroll.org
- National Money Transmitters Association – www.nmta.us
- Paybefore - www.paybefore.com

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