AMERICAN BANKERS ASSOCIATION ®

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

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Stephen Kenneally
Vice President
Center for Regulatory Compliance
Phone: 202-663-5147
Fax: 202-828-5052
skenneally@aba.com

By electronic delivery

regs.comments@federalreserve.gov 21 December 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors
Of the Federal Reserve System
2oth Street and Constitution Avenue, NW
Washington, DC 20551

Re: **Docket Number R-1377**
Regulation E
Electronic Funds Transfer Act
74 *Federal Register* 60986, November 20, 2009

Dear Ms. Johnson:

The American Bankers Association (ABA)[1] is pleased to provide comments on the Federal Reserve Board's (Board) proposed changes to Regulation E to implement certain provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act or Act) that amend the Electronic Funds Transfer Act (EFTA) pertaining to prepaid products, particularly prepaid gift cards.

Passage of the Credit CARD Act has fundamentally changed the economics of the credit card market, and implementation of the Act's provisions covering prepaid card products will change the business model for gift cards going forward. Although improvements to disclosures will afford transparency in this market segment, it is important that the Board understand other impacts that some of the proposed changes to the terms and conditions of prepaid products, combined with a restriction on allowable fees, contained in this proposed rule will have on this market.

The prepaid card industry is diverse and contains many participants, including financial institutions that issue cards, card networks, service providers, and retailers. The proposed rule, as drafted, will affect all of

[1] The American Bankers Association brings together banks of all sizes and charters into one Association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95% of the industry's $13.3 trillion in assets and employ over 2 million men and women.

these entities and require costly changes not only to policies and procedures, but to the physical production of cards and disclosure materials. Changing production schedules is not a simple task that can be done quickly at little expense. Similarly, accurately forecasting the effects of proposed changes cannot be performed adequately without time to consider all of the proposed changes. ABA recognizes that the Board is under an obligation to publish a final rule by February 22, 2010 with which card issuers must comply by August 22, 2010. These statutory deadlines can be met by finalizing an implementing rule that affords consumers the intended protections covering the gift cards Congress had in mind without unduly restraining the development of prepaid cards for a wide variety of other uses. Doing so does not preclude the Board from future rule-making to address lessons learned from later experience, unanticipated contingencies or novel circumstances. It would be ill-advised policy to impose overly prescriptive initial standards for speculative situations that can unduly constrain development of useful innovations when the Board is able to update the rule as experience warrants.

We ask that in the final rule the Board proceed cautiously to balance the need for consumer choice and access to prepaid card products with the business factors that make such cards economically feasible. If the proposed rule changes regarding certain terms and conditions are too severe and the fee restrictions too limiting, there will be a decrease in prepaid gift card products available in the marketplace. Limiting product choice and reducing access do not benefit consumers. Accordingly, ABA is prepared to work with the Board to explore feasible means for most effectively implementing the Act and the consumer protections it provides.

ABA Comments

ABA has several recommendations for making the final rule more effective in meeting its consumer protection goals without creating undue barriers to businesses wishing to sell and maintain prepaid card products. We intend our recommendations as an effort to reduce undue compliance costs and enhance the clarity of the rule for the benefit of consumers and prepaid card providers alike.

Maintain Statutory Exclusions

As we will reiterate in other parts of these comments, the statute is as important for what it does not cover as what it does. Congress had particular concerns in mind in passing the legislation, and keeping the implementing regulation focused on the gift card genre is important so that unintended impacts on other types of prepaid cards are avoided. Developing use of prepaid cards for payroll applications or as vehicles for attracting underserved populations to the conveniences and value of banking with insured depository institutions were not the target of Congressional ire.

In particular, cards not marketed to the general public and those that are reloadable, but not marketed or labeled as gift cards or gift certificates are important statutory exclusions from coverage that the Board's proposed implementation rule must respect. ABA largely agrees with the Board's demarcation of these boundaries in the proposal, but makes some recommendations for refinement. In addition, the Board's exercise of its statutory authority to define those cards excluded from coverage as loyalty, award or promotional gift cards is soundly exercised, but it can be improved at the margin to enhance clarity.

Avoid Gift Card Definition Creep

Paragraph 20(b)(2) of the implementing regulation is intended to clarify how certain cards are excluded from coverage if they are “not marketed or labeled” as gift cards. Although the statutory language is in the passive form, the Board certainly has rule-making authority under the EFTA to clarify that the excluded cards are those “not marketed or labeled” **by the issuer** as a gift card or gift certificate. By hewing to this reading of the statute, the Board will assure that issuer banks that intend to distinguish products labeled as gift cards from those that are intended for general reloadable use (usually, but not exclusively by the purchaser) will have that intent respected and not frustrated by the inattentive retailer.

Issuers and their networked sponsors invest substantial sums to brand their cards and have them identified as providing certain features and applications. They work to position their cards as vehicles intended for particular uses. In other words, they control the labeling and the primary marketing of their cards as being gift cards or not. It would be a miscarriage to have these efforts and expenditures rendered a nullity because some store clerk mis-stocked the issuer’s cards in a display or aggregated distinctly labeled cards in a single display. These errors are neither “marketing” nor the conduct of the issuer that Congress sought to address. Issuers have no effective control over these retailer mistakes. Merchants selling bank issued, network-branded prepaid cards have no reason to care how cards are displayed since their benefit in selling them ends with their purchase and activation—not with the consumer’s future use or intent to gift.

However, the language in the implementing proposal is not sufficiently precise. It suggests that cards created for general use by a card issuer, and therefore not subject to the pricing and disclosure requirements of this rule, could have that exclusion negated as it moves through the supply chain to the market. The card issuer’s intent to produce a certain type of card, general use, that must meet certain compliance requirements could be co-opted by a retailer intentionally or through ignorance marketing a correctly labeled card erroneously as a gift card.

Consider another example that would unfairly redefine a general use card as a gift card and expand its compliance requirements. Paragraph 20(b)(3)(ii) states that a card produced as a general use card would instead be considered a gift card if there were marketing or labeling “Representing or suggesting that a certificate or 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, certificate, or accompanying material.”

If a clerk suggests to a customer that buying a general use card as a present is a good idea for a recent high school graduate heading off to college because the card will be reloadable by the student or parents, does the purchaser’s following that suggestion make the card a gift card under Paragraph 20(b)(3)(ii)? If a general use card is purchased, then given away with a note saying “Happy Birthday” on the package written by the original purchaser, does that make it subject to gift card rules? The Board should clearly answer, "No!" to these questions and make the implementing rule clear as well.

There is too much ambiguity in the language describing the categories of marketing and labeling of general-use cards that would transition them into gift cards. This definition creep will harm card issuers who produce and market general use cards in good faith, but are then subject to penalty if retailers take actions that change the cards' categorization and compliance obligations. Remember that in the gift card context the cardholder is not the purchaser, but rather a gift recipient who has no knowledge how a card was displayed at purchase or what advertising surrounded it. What the ultimate gift cardholder knows about the card's features is what accompanies it when received. The labeling of the card is the surest signal of the card's intended features—absent the special circumstances evident in the delivery of loyalty, award or promotional cards.

For these reasons, we suggest the Board make these definitions clear and simple by removing the ambiguity associated with marketing and labeling, stating that cards labeled **by the issuer** as "gift cards" be subject to gift card rules and cards labeled or marketed **by the issuer** as "reloadable" and that are not labeled as "gift" cards be within the statutory exclusion. This will remove the looming shadow of doubt cast upon card issuers by parties over whom they have little or no practical control. This simplification will also provide an easier signal for consumers to distinguish the cards they are purchasing.

Distinguish Temporary Non-Reloadable, Non-Gift Cards That Transition to Reloadable Cards

A very large number of cards that could be covered by this proposed rule are general purpose cards that are initially not reloadable, but are intended as a first step towards a consumer acquiring a reloadable card. These temporary non-reloadable cards can be purchased at a retailer by a consumer. After the purchase, funds can be accessed on the card acquired at the retailer, but it is not reloadable. The cardholder is required to provide additional personal information including name, address and Social Security Number before a second card is issued that is reloadable.

These temporary cards are covered by the proposed rule even though they are not marketed as gift cards and are not reloadable. In reality, they are the gateway to a reloadable card and are marketed as a reloadable card. These cards are not marketed as gift cards and are not intended for use as gift cards and are not reloadable. They should not be covered by this proposed rule, since there is no Congressional intent to reach this type of temporary card.

For these reasons, we suggest the Board exclude from coverage under the proposed rule all non-reloadable general-use cards that are not marketed as gift cards and that serve as a gateway to acquiring a reloadable general-use card.

Clarify Other Exclusions

We also recommend that the Board make the following additional changes or clarifications to the implementing proposal in any final rule or interpretive commentary about exclusions. First, the term “reloadable” as used in the proposed Official Staff Interpretation is limited in a manner unwarranted by a fair reading of the Act to those cards reloadable by the cardholder. Many non-gift prepaid cards such as payroll cards, HSA cards, employer-sponsored benefit cards (e.g. transit cards), so-called university or teen cards, insurance cards or disaster relief cards are reloadable by persons other than the cardholder. These cards are not the gift cards Congress intended to capture and should be part of the statutory exclusions as “reloadable and not marketed or labeled as gift cards.” Therefore the proposed Interpretation should be revised accordingly.

Second, the exclusion of cards “not marketed to the general public” should be applicable to cards that are access options to lender funded loan proceeds where the cardholder must pass underwriting criteria and qualify for the underlying loan, thus attaining borrower status. These cards are not “purchased,” but are instead indicia of accountholder or borrower status and are governed by the loan agreement. Although the cards are part of the loan relationship and advertised as such, the marketing is about loan convenience for the lender’s customers, not card availability for the walk-in general public desiring to “purchase” a card.

Similarly “tax refund cards” or refund anticipation loan cards referenced in the proposal are not sold to the general public, but are instead a means of receiving accelerated tax refunds when selected by qualifying clients of a particular tax preparer. Although the ability to obtain such accelerated funds is advertised, the condition for obtaining the card is more stringent than walking in the door and purchasing a card. The person must become a client, provide his tax related information to the preparer, and then qualify for the refund. Furthermore, the protections afforded gift cards are not applicable to tax refund clients who unfailingly choose this option because they want to use their refunds earlier than they would receive them from the government. Inactivity is not a characteristic of their use.

Abide by the Statutory Language on Periodic Fees

Under the proposed rule, statutory requirements are implemented regarding the types of fees that can be charged and when they may be assessed. The rule would prohibit dormancy, inactivity, or service fees from being charged except when there has been at least twelve months of inactivity on the account, only one fee could be charged per month, and the fee information must be clearly disclosed to the consumer. In constructing its regulatory definition, the Board exceeds its powers, ignores the statutory language, and extends the term “service fee” to reach one-time or irregular non-transactional fees. This is important, because now fees such as monthly maintenance fees, transaction fees, balance inquiry fees, reload fees and card replacement fees are in the same category. For example, under the proposed rule if an account is inactive for one year then a dormancy or maintenance fee could be charged; but no fee could be charged for replacing a lost card in the same month.

In essence, the proposed rule expands the interpretation of "service fee" essentially to read out the word "periodic" in the statute. This is unwarranted. Congress would not have used "periodic" if it did not intend to capture a certain periodicity in the assessment of fees, charges or penalties. This is a statutory boundary—not a means of circumvention as the Board suggests. Although the Board has the regulatory authority to interpret the law to eliminate ambiguity in the meaning of periodic, effectively eliminating it from the regulatory definition is not within its powers.

ABA believes that service fees based on consumer actions other than actual "use" of the cards to conduct expenditures, including but not limited to balance inquiry fees, reload fees or card replacement fees, are not within the statutory ambit of "periodic fees, charges or penalties." These irregular or periodic fees or charges should therefore be excluded from the once per month limitation of the implementing rule. By drawing this line, the Board can still address concerns about circumventing fee restrictions that are truly predicated on the transactional "use" of the card to make purchases or redeem its value.

For these reasons, we strongly urge the Board to revise the provision that groups consumer initiated non-transactional fees within the definition of service fees and periodic fees. Separating these fees will allow a more equitable distribution of fees among consumers who use those services. Consumers that are provided full disclosure as required under the proposal will not have any difficulty predicting the expenses associated with the gift card because they control the actions they take and any fees associated with those actions.

Implement an Expiration Date Requirement Based on Funds Availability

In accordance with the Act, the implementing proposal covering prepaid gift or non-reloadable general use cards will require that they have their underlying funds available to the cardholder for a minimum of five years from the date of issuance or the date that funds were last loaded on the card when that is permitted. This proposal is a welcome interpretation of the statute expiration date requirements. This would not be practical for cards that would be compliant when produced and delivered to a retailer, but then aged in the retailer's inventory, therefore shortening the expiration date time period, and for reloadable cards. The expiration date for reloadable gift cards would be extended each time it was reloaded, but the expiration date on the card would remain static. Clearly this creates an unworkable conflict.

The Board has posed two alternate methods for meeting the five-year expiration date restrictions. We support the Board's efforts to find a practical solution to implementing the five-year expiration date requirement. Proposed Alternative A places much of the burden on retailers to prevent cards with premature expiration dates from being purchased. Unfortunately, this alternative would rely on having adequate technology and trained clerks at all retail outlets. The reliance on these uncertain factors makes Alternative A a less attractive solution.

Alternative B allows a card issuer to meet the five year requirement by establishing "reasonable" policies and procedures intended to prevent cards with shorter life spans from being sold. For these reasons, we suggest the Board consider Alternative B with certain clarifications to the examples provided to illustrate compliance with this provision. In both of the first two provisions, the expiration date on the cards must be on the display rack of the retail store with at least five and one half years before the card expires.

We have concerns with these examples. First, the expiration date time frame in the statute is five years, and this "reasonable" example adds an additional six months to the life of the card, beyond the statute. Second, both of these examples assume that a card issuer has control over card stock that is delivered to retailers. A retailer could place card inventory in its own warehouse for a time period after purchasing it from the issuer and prior to putting it on the sale rack. It is possible that this delay that is out of the control of the card issuer would put the card issuer out of compliance with this portion of the rule.

For these reasons, we suggest the Board amend the examples provided in Alternative B to illustrate that compliance with this section can be achieved as long as card stock is delivered to the retailer while the card expiration date is at least five years in the future. A card issuer should not be made to "over comply" with the statute by creating a card with a six or seven year expiration date or be subject to a compliance violation due to the whims of the retailer being lazy when stocking the shelves.

Enable Flexible Delivery of New Disclosure Requirements

Under the proposal, gift cards are subject to additional disclosure requirements in several categories including on the outer packaging, on the card itself, and by the teller or telephone operator if they are facilitating the sale. The proposal requires that the disclosure of all fees be provided on or with the card or gift certificate. It also requires that a toll-free telephone number be provided for customer service purposes.

The proposal lists what general types of information must be provided, but much more clarity is needed to assist card issuers to meet the new standard for "clear and conspicuous" disclosure. For example, new disclosures regarding fees and expiration dates will now be required to be placed on the card itself. Prepaid gift cards are approximately 3 3/8 inches by 2 1/8 inches in size. This is a very small area available for disclosure if the print is to be readable by the consumer. This area is further limited by the magnetic stripe on the back of the card and the embossing of the card number that can make reading the print in those areas difficult.

Disclosure available to the customer prior to purchase on the outside of the card packaging allows for more space and offers a greater opportunity to provide detailed disclosure information. Changing the disclosure on the outer packaging and on the cards themselves can be completed by the card issuers assuming the changes are reasonable and adequate notice is provided regarding the required information and its format. Similarly, the level of disclosure that can be delivered orally must also be known precisely to allow time for card issuers to develop the proper scripts and training materials for customer service representatives selling cards directly to customers.

If the disclosure requirements in the final rule are not complete and precise, then card issuers will need to take the time to make their own interpretations of what will meet the standards. This is a critical issue, because there is not much time before the rule goes into effect on August 22, 2010. These disclosure changes are not just being made on websites and statement stuffers, these changes will require changes in the manufacturing and distribution of the plastic cards themselves. This takes time, and card issuers will not gamble on placing cards on the racks that they are not sure meet the disclosure requirements.

For these reasons, we strongly urge the Board to provide model language for its new disclosure requirements for prepaid gift card outer packaging available prior to purchase, on the card itself, and by the teller or telephone operator making a sale. It will be especially helpful for the model language provided for the card itself to be presented in the actual size of a gift card footprint so that card issuers will know exactly what size font will meet the “clear and conspicuous” standard set by the Board and how that language will fit on the little more than seven square inches available on the card.

Allow Card Replacement Discretion

Cards may be replaced for a number of reasons including if they are lost or stolen or if they have expired. Replacing cards is an expensive process for card issuers and for card holders alike. This is especially true when there is a small fund balance attached to the card.

For example, if a consumer loses a card and asks for it to be replaced, but there is only a $1.00 balance, does it make sense for the card issuer to spend more than the available fund balance on the card to send a replacement. If it is a circumstance where the card has a balance of $15 and the customer could be charged a $10 replacement fee, then the new card would only carry a $5 balance. These situations occur, and it does not make sense to require card replacement when it would cause economic harm to either party.

For these reasons, we suggest the Board set a *de minimis* card balance threshold of $20 that would grant the card issuer discretion when a card replacement request is received. If the balance is less than that level, the card issuer will have the option of replacing the card, or sending a check to the card holder and closing the account.

Preempt State Abandoned Property Laws To Protect Consumers

Section 402 of the Credit CARD Act amends the EFTA to include fee or expiration dates of gift certificates, store gift cards, or general-use prepaid cards within re-designated Section 920 of the title. This has the effect of precluding the application of State laws relating to such features where they are inconsistent with the provisions of the EFTA as amended. ABA believes this provision effectively preempts state abandoned property or escheat laws, because any such laws with less than five year dormancy triggers would be inconsistent with the five year expiration date requirement of the Act.

The fifty states and territories enforce state laws with regard to abandoned property within their jurisdictions. Various states have different laws governing what property is subject to abandonment claims and the time frame for when funds must revert to the state. Some states claim that accounts dormant for as little as three years are subject to escheatment to the state. This poses a very large problem for gift card issuers when there is a mandate that the underlying funds for cards covered by this regulation is five years.

Section 205.12 of the proposed implementing rule describes how the regulation relates to other laws. This section specifically states,

"The Board shall determine, upon its own motion, or upon the request of a State, financial institution, or other interested party, whether the act and this part preempt State law relation to electronic funds transfers, or to dormancy, inactivity, or service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards."

The overview of the proposed rule provided clarification of Section 205.12 by stating that it would not consider preemption of a State law conflicting with Federal law if that State law provided greater protection. We can support this preemption policy in this limited case since it effectively addresses the foreseeable sources of conflict.

Any requirement to remit funds associated with a covered prepaid card to the state before the funds expiration period is contrary to the very consumer rights that Congress sought to establish in the Act. For this reason and based on the express language of the amended Act, ABA suggests that the Board use its authority to preempt any State laws applicable to the prepaid cards or certificates covered by this regulation so that the escheatment trigger date be no earlier than the expiration date of the underlying funds on the card. This will preserve the bargain the consumer enters into with the card issuer when the card is purchased.

Facilitate Transition of Card Inventory

To help assure a smooth transition from current card products compliant with existing regulations to new card products that will comply with future rules, the final rule should address two card categories. The first category can be defined as card products produced and sold under the governing regulations prior to August 22, 2010. The second category is defined in the proposal as cards produced under the regulations currently in effect but not sold before August 22, 2010, when the new rules will reign.

Under the proposal, the Board did not provide clear guidance on cards that were compliant and sold under the "pre August 22, 2010" requirements, prior to August 22, 2010. These cards will have been issued in compliance with the rules in effect at the time. There could be millions of these cards in circulation that were sold with disclosure materials and pricing structures that may not meet the requirements under the new regulation.

It is not practical to project new rules on existing products. In some cases, it may not be possible retroactively to adjust the fee schedules or implement the card expiration date mandates. We believe that most card issuers will be moving forward quickly to "manage down" their inventory of existing card stock to replace it with products that will meet the standard that will be in effect from August 22, 2010, forward.

For these reasons, we suggest the Board draft a final rule that specifically states that these prepaid card products that were sold and activated, or will have been sold and activated, prior to August 22, 2010, and in compliance with governing regulations at that time, will not be subject retroactively to any new rules that become effective on August 22, 2010. Cards sold under valid rules should continue to be governed by those rules.

Under the proposal, the Board asked for comment on alternative approaches regarding cards that were issued and compliant under the "pre August 22, 2010" requirements, but not yet sold. This alternative would allow cards produced under the existing standards, but not in conjunction with the regulations that will be effective on August 22, 2010, to remain for sale as long as they met the required substantive restrictions with regard to dormancy, inactivity, and service fees, as well as the new expiration date mandate, even if the disclosure did not meet the new standard.

However, the proposed alternative discussed by the Board has several conditions. It would require that the issuers of cards that were produced and packaged under the current regulatory regime be able to make the retroactive system changes to alter the pricing schedules of cards already produced. It would also require that a scheme be developed to provide revised disclosure to purchasers of these products informing them of the new terms and conditions that apply to the card. Finally, it would also limit the exception to selling these cards that remained in inventory to retail outlets and not to any channel where the card issuers sold cards directly to the public.

We appreciate the opportunity to comment on an alternative meant to assist card issuers to "manage down" their inventory, but we do not believe that the proposal suggested by the Board is practical for most issuers. On a positive note, it would allow card issuers to avoid expenses related to inventory that would have to be destroyed because it was non-compliant. However, even if it were technologically possible, retrofitting existing card products would be expensive due to the riders placed on the alternative by the Board regarding pricing, disclosure, and limiting it only to cards in retailer inventories. The expense associated with complying with this alternative that would only apply to one sector of a card inventory may be too high to be worth the effort.

We support the approach of the Board to mitigate the cost associated with an obsolete card inventory, but we believe that this alternative is too restrictive for the benefits to outweigh its costs for most card issuers. This alternative would become more practical for card issuers if it were broadened to cover all cards sold through all channels, including retailers and directly by the card issuer, as long as the new pricing schedules were compliant and no proactive disclosure of these changes were required. Card buyers would be the recipients of a product that provided a greater service than they believed. Adding any obligation to increase the disclosure requirements on the card issuers that will be subject to increased disclosure expenses related to the new products they create in compliance to the new rule will likely offset the cost of "managing down" their inventory.

For these reasons, we suggest the Board allow card issuers to choose to continue to sell cards from their existing inventory through all retailer and bank channels if they can make the retroactive changes to the pricing schedule and terms and conditions of the new rule to make them compliant with no additional disclosure requirement. Card issuers will be able to make a business decision whether to start with a fresh inventory or calculate that it makes sense to manage down their existing card stock given the additional compliance requirements.

Conclusion

ABA appreciates the opportunity to respond to this important proposal. We appreciate the Board's effort in implementing a difficult provision of a difficult statute under a tight timeframe. We urge the Board to be sensitive to ensuring consumer and card issuer choice when drafting the final regulations. Unnecessarily complicated and expensive regulatory requirements ultimately raise the cost of products or reduce the number of products available in the marketplace, helping neither the consumer nor the card issuer.

Sincerely,

Stephen K. Kenneally
Vice President
American Bankers Association