



# Federal CARD Act Applies to Loyalty and Promotional Offers: What You Need to KNOW

November 4, 2010

*Not Intended as Legal Advice*

Deborah Thoren-Peden  
[thoren@pillsburylaw.com](mailto:thoren@pillsburylaw.com)  
213.488.7320

# CARD ACT BACKGROUND

---

- Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD Act”) signed into law May 22, 2009
- Imposed restrictions on fees and expiration dates on most prepaid products (cards, codes and other devices)
- Federal Reserve Board (FRB) issued proposed amendments to Regulation E (Reg E) on November 20, 2009
- FRB issued Final Rule (amendments to Reg E) on March 23, 2010
- Effective August 22, 2010; Transition time for certain products Jan, 31/11 (but not loyalty)
- No retroactivity

# WHAT IS COVERED?

---

- Gift Certificates
- Store Gift Cards
- General-Use Prepaid Cards

## WHAT IS COVERED, Cont'd

---

- Cards, codes and other devices that are
  - issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that can/cannot be increased or reloaded in exchange for payment; and
  - redeemable upon presentation at a single merchant or multiple affiliated/unaffiliated group of merchants for goods and services.

## WHAT IS COVERED, Cont'd, Examples

---

- Mall Cards
- Other Closed Loop Cards
- Non-Reloadable Open Loop or Network Branded Prepaid Cards
- Reloadable Open Loop or Network Branded Prepaid Cards if marketed as gift
- Virtual Currency
- Telecom and Broadband Cards

# METHODS OF ACCESSING FUNDS

---

- Cards
- Codes
- Bar code
- Chip device
- Mobile phone
- Sticker with contactless chips
- Fobs
- Other

---

*Not Intended as Legal Advice*

pillsbury

# WHAT ARE THE GENERAL RESTRICTIONS?

---

- Prohibits dormancy fees, inactivity fees and service fees unless a card, code or other device has been inactive for 12 calendar months
- Permits only one fee per month
- Minimum expiration date of 5 years from date of last load
- Clear and conspicuous disclosures are required
- Does NOT preempt state law if state laws provide greater consumer protection (federal floor)

# WHO MUST COMPLY WITH THE CARD ACT?

---

- “Persons”
  - Issuer
  - Distributor
  - Program Manager
  - Retailer/Merchant
  - Site Owner
  - Most anyone in supply chain

# WHAT FEES ARE RESTRICTED?

---

- Service, dormancy and inactivity fees are PROHIBITED UNLESS:
  - No activity for 12 calendar months
  - Only 1 fee/charge per calendar month (e.g., maintenance or activity based)
  - Disclosure requirements are met
- The scope of these fees will be interpreted broadly (e.g., monthly maintenance, balance inquiry, per transaction, usage, ATM, POS, reload, foreign currency transaction fees)

## WHAT FEES ARE RESTRICTED, Cont'd

---

- Any “activity” restarts the 12 month period
  - Any increase/decrease of available balance, except via permitted fee, return of a previously purchased item, or error adjustment
- Balance inquiry alone does not = activity
- Fee accumulation is prohibited (e.g., retroactive fee of \$2 per month after 24 months of inactivity = \$48 in month 25)

# WHAT EXPIRATION DATES ARE PERMITTED?

---

- NO PERSON may sell/issue cards that expire in less than 5 years from DATE OF PURCHASE
- 4 Requirements:
  - (1) Policies and Procedures that give consumer REASONABLE OPPORTUNITY to buy card w/exp. date at least 5 years:
    - Procedures must either PREVENT sale/initial issuance of cards w/less than 5 years, OR
    - Cards made available with at least 5 ½ years remaining on cards (e.g., on display)

## WHAT EXPIRATION DATES ARE PERMITTED, Cont'd

---

- (2) Expiration of funds – may not occur until the later of 5 years AFTER date of last load or expiration date on card (if any)
  - If card is reloadable, trigger from date of last load
  - Distinguishes between plastic card and fund date
  - Required regardless of whether there is an expiration date on card
- (3) Required disclosures
- (4) No replacement fee for expired card
  - Issuer can send replacement OR choose to send check for balance (but no fee allowed)

# OVERVIEW OF DISCLOSURE REQUIREMENTS

---

- Prior to purchase disclosures
  - One-time fees and dormancy, inactivity and service fees
  - Expiration dates
- On the card disclosures
  - Dormancy, inactivity and service fees
  - Expiration dates
  - Toll-free number and, if one is available, website
- With the card disclosures
  - One-time fees
  - Cards sold via telephone, a website, etc.

# PRE-PURCHASE DISCLOSURE REQUIREMENTS

---

- Required even if sold in person, on Internet, via phone, etc.
- Any person who issues/sells covered cards must **CLEARLY AND CONSPICUOUSLY DISCLOSE**, as applicable, **BEFORE PURCHASE**:
  - (1) Amount of any allowed service/inactivity or dormancy fee
  - (2) How often charged
  - (3) That fee may be assessed for inactivity
  - (4) Expiration date for underlying funds, or if applicable, no expiration
  - (5) Toll-free # and, if maintained, website to obtain replacement card and fee info

## PRE-PURCHASE DISCLOSURE REQUIREMENTS, Cont'd

---

- (6) UNLESS non-reloadable card has expiration date at least SEVEN years from date of manufacture (date card is printed), statement that card expires, but underlying funds do not, or do so later than card AND statement that consumer may contact issuer for replacement card
- (7) If ANY additional fees:
  - Type
  - Amount (or explain how fee will be determined)
  - Conditions for imposition (e.g., initial issuance; cash out)

# ON-CARD DISCLOSURE REQUIREMENTS FOR FEES

---

- To the extent fees are permitted and charged, these disclosures **MUST** be ON THE CARD, as applicable:
  - (1) Amount of any service, inactivity, dormancy fee that may be charged
  - (2) How often the fee may be charged
  - (3) Statement that the fee may be assessed for inactivity
  - (4) Toll free # and, if maintained, website consumer can use to get info on fees

# ON-CARD DISCLOSURE REQUIREMENTS FOR EXPIRATION DATES

---

- No expiration disclosure required if neither card nor funds expire
- If expiration dates:
  - (1) The expiration date of underlying funds or, if applicable, statement that funds never expire; if reloadable, then statement to the effect funds expire 5 years from date funds last loaded
  - (2) Toll- Free # and, if maintained, website consumer can use to obtain free replacement card if card expires and funds remain available
    - e.g., “Funds expire after Card. Call for replacement card” or “Funds do not expire. Call for new card after [01/01/2016]”

## ON-CARD DISCLOSURE REQUIREMENTS FOR EXPIRATION DATES, Cont'd

---

- (3) EXCEPT where non-reloadable card has expiration date at least SEVEN years from date of manufacture (date card is printed), a statement that card expires but underlying funds: (a) do not expire; or (b) do so after card expires and consumer can contact issuer to get replacement card
  - This disclosure must be ON Card, Equal Prominence, and Close Proximity to Expiration Date
  - Ok if same size, located immediately next to or directly above or below expiration date w/o any intervening text or graphical display

# ADDITIONAL RULES FOR DISCLOSURES

---

- Stickers affixed to Cards are NOT sufficient to make required disclosures
- Disclosure made on top or under indentations, embossing or graphics are not likely to be sufficient
- QUESTION TO ASK: ARE DISCLOSURES CLEAR AND CONSPICUOUS TO CONSUMER?

# CARD ACT EXCLUSIONS

---

- If ANY exclusion applies, card, code or other device is EXCLUDED from the CARD Act
- Cards, codes and other devices that are:
  - (1) used solely for telephone services
  - (2) reloadable and not marketed or labeled as a gift card
  - (3) a loyalty, award, or promotional card
  - (4) not marketed to the general public
  - (5) issued in paper form only
  - (6) redeemable solely for admission at events or venues (e.g., sporting venues) or to obtain goods and services in conjunction with admission to such events or venues

*Statutory exclusions are to be narrowly construed*

## EXCLUSION FOR CARDS THAT ARE RELOADABLE AND NOT MARKETED / LABELED AS A GIFT

---

- (2) Reloadable and not marketed or labeled as a gift card:
  - Reloadable if terms and conditions permit reload
  - OK if another can use the account/Card
  - No exclusion if anyone other than consumer-purchaser (e.g., issuer, retailer, program manager, payment network, etc.) directly or indirectly offers, advertises/otherwise markets or suggests the potential use of the card, code or other device as a gift for another
  - Exclusion can be lost even if Card is primarily marketed for a non-gift purpose

## EXCLUSION FOR CARDS THAT ARE RELOADABLE AND NOT MARKETED / LABELED AS A GIFT, Cont'd

---

- Examples of how exclusion can be lost:
  - marketing or referencing it as a potential “gift” or “present”
  - any suggestion it can be given to another, such as a “token of appreciation”, congratulatory message, a stocking stuffer
  - any gift giving or celebratory imagery or motif, such as a ribbon, bow, box, candle
  - marketing a Card as a gift can be in any means, e.g., on card, accompanying docs, promotional message, ads, etc.

## EXCLUSION FOR CARDS THAT ARE RELOADABLE AND NOT MARKETED / LABELED AS A GIFT, Cont'd

---

- To qualify for exclusion, covered entities must have policies and procedures reasonably designed to avoid such marketing
  - Contractual provisions prohibiting marketing/labeling as gift
  - Merchandising guidelines/plans on how to display
  - Controls to regularly monitor or verify not marketed as gift
  - Inadvertent incorrect replacement by retail clerk/consumer not violation if such policies/procedures
- Multi-sided display w/separate panels and signs of equal prominence

# EXCLUSION FOR A LOYALTY, AWARD OR PROMOTIONAL CARD

---

- (3) a loyalty, award, or promotional card
  - Such Cards, codes, devices are exempt under this exception ONLY IF:
    - Issued in connection with a loyalty, promotional, rebate or promotional purpose
    - Redeemable upon presentation for goods/services;
    - Meets disclosure requirements

# EXCLUSION FOR A LOYALTY, AWARD OR PROMOTIONAL CARD, Examples

---

- **MERCHANT LOYALTY/RETENTION** – consumer retention program that provide cards or coupons redeemable for or toward goods/services or other monetary value as a reward for purchase or visit
- **REBATE** – given to consumer in connection with purchase or completion of rebate submission that is redeemable toward goods/services/other monetary value, e.g., gift cards mailed to consumer
- **PROMOTIONAL** – sales promotion operated by merchant or manufacturer that provides coupons or discounts for or toward goods/services or other monetary value

## EXCLUSION FOR A LOYALTY, AWARD OR PROMOTIONAL CARD, Examples, Cont'd

---

- SWEEPSTAKES OR CONTESTS – that distribute cards redeemable for or towards goods/services or other monetary value to consumers as an invitation to enter into the promotion for chance to win prize
- REFERRAL PROGRAMS – that provide cards redeemable for or towards goods/services or other monetary value to consumer in exchange for referring other potential consumers to a merchant
- INCENTIVE PROGRAMS – thru which employer provides cards redeemable for or towards goods/services/other monetary value to employees to recognize job performance, such as increased sales or to encourage safety (note – state and federal labor laws)

## EXCLUSION FOR A LOYALTY, AWARD OR PROMOTIONAL CARD, Examples, Cont'd

---

- CHARITABLE OR COMMUNITY RELATIONS PROGRAMS – thru which a business provides cards redeemable for goods/services/monetary value to a charity or community group for fundraising, e.g., as a donation or prize

*CARD Act applies to loyalty, award and promotional cards issued pursuant to loyalty, award or promotional program that begins on or after August 22, 2010*

# EXCLUSION FOR A LOYALTY, AWARD OR PROMOTIONAL CARD, Required Disclosures

---

- REQUIRED DISCLOSURES:

- On FRONT of Card, a statement that it is issued for loyalty, reward or promotional purpose (e.g., “Reward” or “Promotional”)
- On FRONT of Card, the expiration date for underlying funds- when card and funds expiration are the same, a single disclosure re expiration is ok
- If fees are imposed, then on FRONT or BACK of Card, a toll free # and, if maintained, website consumer can use to get fee information
- On or With Card, any fees and the conditions under which they may be imposed

# EXCLUSION FOR CARDS NOT PUBLICLY MARKETED

---

- (iv) not marketed to the general public
  - To qualify, card CANNOT be directly or indirectly offered, advertised or otherwise promoted to general public
  - The means or channel thru which card can be obtained must be evaluated
    - is the card advertised or promoted in the marketplace
    - is only a subset of consumer eligible to obtain the card
  - If card can also be bought via retail channels, no exclusion, even if consumer received from a business as a reward or incentive

## EXCLUSION FOR CARDS NOT PUBLICLY MARKETED, Examples

---

- **INSURANCE PROCEEDS** – where insurance company settles a policyholder’s claim, such a Card qualifies for exclusion if it is simply a way to get insurance proceeds AND Card availability NOT ADVERTISED to general public
- **STORE CREDIT** – where merchandise retailer gives store credit for exchange, such a card qualifies for exclusion, but Card MUST clearly indicate it contains funds for STORE CREDIT and ABILITY TO RECEIVE REFUNDS by prepaid card is NOT ADVERTISED TO general public

# VIRTUAL CURRENCY

---

- No formal exclusion from the CARD Act for virtual currency, media/music downloads, other applications, etc.
- If card has been redeemed in full and funds loaded into virtual account that can be used to buy goods/services, CARD Act no longer applies
  - However, if not redeemed in full (i.e., no redemption or only partial redemption into another virtual account) then covered by the CARD Act unless qualifies for an exclusion
  - Consumer need not actually purchase the goods/service for the virtual account to be excluded

# CLEAR AND CONSPICUOUS STANDARD

---

- Disclosures must be readily understandable, and generally in writing in a form the consumer may keep
- In case of written/electronic disclosure, the location and type size are readily noticeable
- Written and electronic disclosure must be in retainable form
- Disclosures on top of indentations or logos not likely to qualify if they obstruct readability

## CLEAR AND CONSPICUOUS STANDARD, Cont'd

---

- Common abbreviations ok (e.g., mo. for month)
- Oral disclosure – where allowed, must be at volume and speed sufficient for consumer to hear and comprehend
  - Applicable disclosures must be on a written copy of code/confirmation which must be provided to consumer promptly

# LIABILITY UNDER REG E

---

- Private right of action by individuals
- Governmental agencies may also enforce (FTC, AG)
- Reg E penalties for willfulness or negligence
- Litigation likely
- EFTA – No preemption of contrary state laws unless state law is inconsistent with CARD Act or Reg E; not deemed inconsistent if more protective
  - State laws prohibiting fees/expiration dates still apply
  - State laws that exempt “loyalty” often limited to closed loop where **NO VALID CONSIDERATION GIVEN**

# “GOING FORWARD” ACTION STEPS

---

- Analyze your programs/offers
  - In-store
  - Website
  - Email programs
  - Third-parties (e.g., stores, websites, email)
- Review ads – both current and planned

## “GOING FORWARD” ACTION STEPS, Cont’d

---

- Review website and other Internet marketing
- Enter into new contracts to impose appropriate requirements/restrictions
- Prepare new scripts
- Retailers may need to pull ads/ change POS messages, etc.
- Prepare new policies and procedures and distribute
- Training

## “GOING FORWARD” ACTION STEPS, Cont’d

---

- Any other needed actions
- For covered products, consider if changes undermine economics
- Anticipate significant transitional challenges
- If relying on exclusion, be VERY CAREFUL not to accidentally lose it

## “GOING FORWARD” ACTION STEPS, Cont’d

---

- July 27, President Obama signed Eco-Gift CARD Act (H.R. 5502)
- Effective date of CARD Act is January 31, 2011 for gift certificates, store gift cards and general-use prepaid cards produced prior to April 1, 2010 if:
  - Issuer treats certificates/cards as having no expiration date
  - At consumer’s request, issuer replaces certificate/card at no cost
  - Issuer provides consumers with certain required disclosures
- Disclosure requirements met by providing notice to consumers that—
  - certificate/card underlying funds have no expiration date
  - consumers have a right to a free replacement certificate/card
  - any dormancy/inactivity/service fee will not be charged if the fees do not comply with the CARD Act

# DODD FRANK ACT

---

Signed into law on July 21, 2010, 2,300+ page bill with numerous impacts for financial services providers. Some of the provisions most likely to impact them are discussed herein:

- Consumer Protection effectively joins safety and soundness as a basic principle of regulation
- Bureau of Consumer Financial Protection
- Preemption
- Interchange

# BUREAU OF CONSUMER FINANCIAL PROTECTION

---

- Bureau of Consumer Financial Protection (“Bureau”) will implement and enforce consumer financial laws
- purpose to ensure consumers have access to financial products and to facilitate markets for such products that are “fair, transparent and competitive”
- although housed within the Federal Reserve System, Bureau will be autonomous with independent budget and a Director appointed by the President
- Elizabeth Warren – interim director

# Control All Consumer Financial Regulation/New Units

---

- Bureau will take charge of all consumer financial regulation currently enforced by other federal agencies
- Transfer of consumer protection functions from various prudential regulators within 1 year and enactment of six special units within The Bureau:
  - (1) research; (2) consumer complaint; (3) fair lending; (4) financial education; (5) military service member; (6) older Americans.

# BUREAU OF CONSUMER FINANCIAL PROTECTION

---

- Highly likely to impose significant new consumer favorable protections
  - Likely to have significant impact on financial services businesses
  - Bureau has primary supervising and enforcement authority over banks, credit unions, thrifts with more than \$10 billion in assets; the prudential regulators have backup enforcement authority
  - Less than \$10 billion, such authority remains with current regulators
  - Bureau has supervisory and enforcement authority over many non-bank companies that provide financial services
  - Usual enforcement powers, civil litigations, penalties up to 1,000,000 (though no punitive damages)
  - Sanctions can include rescission of contracts, refunds, damages, restitution, public notification, limits on further authorities
-

# PREEMPTION

---

- Weakening
  - National and federal banks will need to comply with more state laws, just as state licensees must do
  - Factual determination of whether the law specifically requires preemption
  - Preemption disfavored in D.C. – Treasury Whitepaper
  - National banks can still exempt interest rates allowed other banks is outdated, but does not address other bank charters' ability to do so
  - Subsidiaries, affiliates and agents of national banks not protected by presumption

# INTERCHANGE RULES

---

- Interchange fees charged for electronic debit transactions must be “reasonable and proportional” to the cost incurred for the transactions
- Fed can set interchange fee and change network operating rules established by private agreements among network participants; network fees subject to fee caps
- Debit cards are principle focus, limited exemptions

## Durbin – Other Limits:

---

### Limits imposed on:

- ability of payment card networks to impose restrictions on merchants regarding accepting credit cards for payment \$10 and under;
- discounts for paying by cash, check, debit or credit or
- use of competing card networks for debit card transactions
- modeled on provisions of The Credit Card Act related to penalties and charges
- most impact on debit

# Interchange Fee – Potential Impact

---

- Impact tens of billions of dollars
- Payment networks may adjust interchange fee for fraud prevention purposes, but Federal Reserve may construe this exception narrowly
- Covers debit cards and prepaid cards set up to have pass-through insurance

# INTERCHANGE RULES (cont'd)

---

- Federal Reserve sending out surveys to limited group
- Small issuers under \$10B assets, including assets of affiliates, are exempt, but only from reasonable proportional requirements for interchange fees; but they are not exempt from fraud rules - Fed could mandate small banks have a security system in place consistent with industry standards
  - Marketplace forces may also impact small issuers
- Ensure network fees are not used to evade interchange fee price controls
- Final rules out by late Spring 2011, effective July 23, 2011

# Interchange Rules – Speculation on Fed's Likely Acts:

---

- Fed has broad powers – likely, at a minimum to:
- Set and cap interchange transaction fees and set safe harbor ranges for such fees;
- Recognize differences in signature wallet debit cards and PIN debit fees
- Cap fees a lower end of the current market fees

# INTERCHANGE (cont'd)

---

- Any deal with economics based on interchange likely to be significantly impacted
- Exemption for government benefit programs where card may only be used to transfer or debit funds
- Exemption for general purpose reloadable prepaid cards that may not be used to debit an account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on a prepaid basis)
- Government Benefit and Prepaid lose their exemption if: 2 years after enactment the cards allow a consumer to be charged a fee for overdrawing an account, or there is a fee for the first monthly withdrawal using an ATM that is part of the issuer's ATM Network.

# FinCEN NPR – Prepaid Access

---

- Proposal to significantly expand AML/CIP/SAR/CTR/MSB Registration to providers of prepaid access, including sellers
- If finalized, many retail sellers will discontinue sales of covered products
- Covered products include almost any type of prepaid cards, electronic wallets, mobile products, etc.
- Exemptions for cards with \$1,000 limit (must be stated on card); most government benefit cards; closed-loop devices usable only in U.S. that don't allow transfer of value
- Likely significant increase in amount of data capture, CIP capture, AML training, systems, reporting