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## CARD Act: Top 10 Things You Need to Do

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*Beginning August 22, 2010, the federal CARD Act will (at least in most instances) restrict fees, prohibit expiration in less than five years and impose strict disclosure requirements on prepaid “cards, codes and other devices.”*

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On August 22, 2010, the federal CARD Act becomes effective<sup>1</sup>. The Act affects virtually all prepaid products regardless of their manner of access (e.g., plastic cards, digital codes, bar codes, account numbers, email offers), as well as almost all rewards, promotions, incentives, rebates and similar offerings and programs (collectively referred to herein as Cards). Many companies, including retailers, distributors, incentive companies, promotional companies, marketers, manufacturers, telecom companies, virtual worlds, sports and entertainment companies, and others are just learning about the scope and impact of this new law.

The CARD Act applies to a prepaid Card product sold to a consumer on or after August 22, 2010, or provided to a consumer as a replacement for such product. It applies to loyalty, award and promotional Cards issued through a loyalty, award or promotional program where the period of eligibility for the program begins after August 21, 2010.

Federal law provides that a consumer **cannot waive** his or her rights under the CARD Act or agree to contrary provisions. State laws that are consistent with the CARD Act are **not preempted by the CARD Act provisions**<sup>2</sup>, which means the CARD Act provides a minimum floor. State laws that provide greater protection for consumers are not inconsistent with the CARD Act. Accordingly, for any covered program, care must be taken to comply with the CARD Act provisions, and to determine whether state law also mandates additional disclosures or actions, or otherwise prohibits charges or expiration dates.

We offer a brief summary of the scope and impact of the Act and a list of 10 action steps companies should consider taking immediately, especially as there are less than 12 weeks until the new law becomes effective and full compliance is required.



<sup>1</sup> Title IV of the federal Credit Card Accountability, Responsibility and Disclosure Act of 2009 was signed into law by President Obama on May 22, 2009. The CARD Act amends the federal Electronic Funds Transfer Act (EFTA) and the Final Rule, issued by the Federal Reserve Board (Board) on March 23, 2010, amends the EFTA's implementing regulation (Reg E).

<sup>2</sup> There may be other bases for preemption for certain bank issued Cards under other federal laws, e.g., the National Bank Act.

## Scope and Impact of CARD Act

Under the CARD Act, no “person” may impose a dormancy, inactivity or service fee with respect to a gift certificate, store gift Card or general-use prepaid Card, or sell or issue a Card with an expiration date unless certain required disclosures are made. Covered Cards include those: 1) issued on a prepaid basis primarily for personal, family or household purposes to a consumer in a specified amount that may/may not be reloaded in exchange for payment; and 2) redeemable at one or more affiliated/unaffiliated merchants for goods/services in exchange for payment, or usable at ATMs. A Card that does not comply with the CARD Act or qualify for an exemption can expose the person(s) to civil liability and penalties.

The CARD Act restricts fees for dormancy, inactivity and services on gift certificates, store gift Cards and general-use prepaid Cards.<sup>3</sup> However, certain types of “one-time fees” are allowed (e.g., an initial issuance fee, a cash-out fee, supplemental Card fee, lost or stolen Card replacement fee), assuming all disclosure requirements have been met. In contrast, any maintenance fee, service fee, periodic fee, dormancy fee, transaction fee, reload fee, balance inquiry fee, foreign transaction fee or other type of fee related to use of the Card is prohibited under the CARD Act<sup>4</sup>, except where the Card has been inactive for a year. Even where a fee may be imposed, the CARD Act permits only one fee in any given calendar month and such fee may be imposed only after there has been **no activity during the preceding 12 months**. Moreover, if activity resumes, the twelve month time period starts anew.<sup>5</sup>

The CARD Act also prohibits Cards from expiring in less than 5 years from the date the covered Card was issued or, for reloadable Cards, the date funds were last loaded, whichever is later.

Cards that qualify for one or more of the exemptions are not subject to the CARD Act restrictions and prohibitions (although they will still be subject to applicable state laws). The six exemptions apply to “cards, codes or other devices” that are (1) useable solely for telephone services; (2) reloadable and not marketed or labeled as a gift; (3) part of loyalty, award or promotional programs (but only if required disclosures are made); (4) not marketed to the general public; (5) issued in paper form only<sup>6</sup>; or (6) redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events or venues, at the event or venue or at specific

<sup>3</sup> The CARD Act requires the Board to determine the extent to which the individual definitions and provisions of the EFTA and Reg E should apply to a Card. Reg E defines the covered Cards as follows:

“Gift certificate” means a card, code, or other device that is: 1) issued on a prepaid basis primarily for personal, family or household purposes to a consumer in a specified amount that may not be increased/reloaded in exchange for payment; and 2) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods/services.

“Store gift card” means a card, code, or other device that is: 1) 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/reloaded, in exchange for payment; and 2) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods/services.

“General-use prepaid card” means a card, code, or other device that is: 1) 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/ reloaded, in exchange for payment; and 2) Redeemable upon presentation at multiple, unaffiliated merchants for goods/services, or usable at ATMs.

<sup>4</sup> This list of restricted fees is not inclusive.

<sup>5</sup> For example, if a company has a \$2 monthly maintenance fee, and a covered Card issued on January 15, 2011 is purchased, but never used, then the first month in which the \$2 maintenance fee may be imposed is after January 16, 2012 (and no other type of restricted fees may be imposed). However, if on February 1, 2012, the customer conducts a transaction (or takes another action which qualifies as an “activity”), then the maintenance fee must be immediately discontinued until the Card has no activity for another 12 month period. In addition, aggregation of fees is prohibited; using the same example, it would violate the law to impose a \$24 maintenance fee on January 16, 2012.

<sup>6</sup> If the sole means of issuing a “card, code or other device” is in paper form, it is exempt from the CARD Act even if the paper certificate has a bar code that enables the retailer to scan the certificate upon presentation. However, the exemption does not apply if the offer is electronically provided to a customer (e.g., a reward offer emailed to a customer or available on a merchant’s website), even if it may be reproduced/printed on paper (e.g., a bar code or other code, number or coupon).

locations affiliated with and in geographic proximity to the event or venue<sup>7</sup>. The Board indicated these statutory exemptions should be interpreted narrowly to ensure consumers receive the full protection contemplated by the CARD Act.

### Top Ten Things You Need to Do

This list is not intended to be comprehensive (nor is it legal advice---you should seek the advice of counsel on certain aspects of compliance). However, it is hoped that the list will prove helpful in prioritizing and focusing the action steps your company may need to take immediately:

- I. Educate Yourself About the CARD Act.** Obtain a basic understanding of the core aspects of the Act; especially the fact that it is not limited to plastic Cards, but instead applies to all prepaid “cards, codes or other devices.” Moreover, most loyalty, promotional, rebate, reward and other similar offers are subject to the Act (which means a minimum expiration date of 5 years, and broad restrictions on fees) **unless** the offer contains all of the disclosures mandated by the Act. Retailers, manufacturers of consumer goods, distributors of Cards, marketing agencies for such entities, banks and non-bank financial institutions as well as others are likely to find one or more of their products or offers are subject to the Act in some way. Many telecom companies, virtual worlds, transportation and other businesses as well as government agencies will find one or more of their products or offerings subject to certain provisions of the Act.
- II. Organize a Compliance Team.** Identify and bring together a core group of company representatives to evaluate the impact of the CARD Act, and map out action steps to be taken. In most cases, various departments will need to be involved, as the impact cuts across operations, retail, commercial, marketing, auditing, compliance and legal. This group should include employees from any department that offers goods/services to consumers or businesses where the ultimate recipient will be a consumer, or that are responsible for any advertisements, promotions, rebates, sweepstakes or similar offers. Legal and compliance personnel should also be involved, as well as audit personnel if they are responsible for monitoring compliance. Employees who handle relationships with outside vendors that may be impacted should also be involved. A Gantt chart/timeline with specific action steps to be taken should be prepared and used to help ensure that nothing gets missed.
- III. Identify Your Covered Products, Services and Offers.** Hold a meeting to identify all products, services, and offers and promotions current and planned, whether offered via a website, email, mobile phone, in person, on paper, radio, television, point-of-sale (POS), ATM, paper or otherwise to evaluate whether they will or may be subject to the Act; it is recommended this be done at a company level, although it should include within its scope offers extended by a local or regional store or branch. Remind everyone there is no need for a plastic Card – email/website/cell phone offers fall within the scope of the Act. Think carefully about any gift/incentive Card program in which you participate or send to customers. It is likely you will have some promotional offerings impacted by the Act, including a few that may not have come to mind at the start of the meeting.
- IV. Identify Modifications Needed in Your Disclosures.** Carefully consider whether your Cards will require any specific language to qualify for an exemption, or whether the current disclosures will

<sup>7</sup> Cards, codes or other devices that do not state a specific monetary value but instead are redeemable for a specific good/service or “experience,” e.g., a spa treatment, hotel stay, airline flight, etc., or a certain percentage off the purchase of a good/service (e.g., 10% off), are also not covered by the CARD Act because they are not issued “in a specified amount.” However, if the Card is issued in a predenominated amount that can be applied toward the purchase of a good/service, or states a specific monetary value (e.g., \$50 off spa treatment, or “a \$50 value”), it will not be exempt from the CARD Act.

need to be reworded or practices prohibited altogether. In many instances, current Card stock, advertisements, promotions and other offers will need to be pulled from the marketplace by August 22, 2010; it is estimated that up to eight football fields of plastic Cards will need to be removed from stores and destroyed. In addition, new compliant Card stock will need to be ordered, new displays or reconfigured displays may need to be installed, signage replaced, POS ads revised, other advertisements pulled and new ads produced. Complying with the CARD Act may well impact the economics of various programs and promotions. Consider whether it makes sense for the company to go ahead with the program or promotion. Moreover, the CARD Act imposes specific initial disclosure requirements (prior to purchase), disclosure requirements that must be on or with the Card, as well disclosures that will need to be reflected in your terms or conditions or on your website. Evaluate whether your current practices meet all CARD Act requirements (e.g., pre-purchase disclosure, on Card disclosures (as applicable), on or with Card disclosures, advertising requirements/limitations, display requirements, replacement Card rights, disclosures and compliance in accordance with the fee provisions and expiration dates). To the extent they do not, you will need to revise and implement new compliant Cards and practices by August 22, 2010.

- V. Evaluate Your Existing Policies Regarding Expiring Cards and Charging Fees.** Carefully evaluate whether you ever impose expiration dates of less than 5 years on the funds or the Card device itself, or any fees on your Cards. Certain fees are not obvious (e.g., if your products can be used across the border, consider whether a foreign transaction fee is triggered—if so, it will likely be deemed to be a restricted service fee). Even if your Cards have no fees and no expiration dates, determine if the plastic Card has an expiration date (which limits the time the plastic Card itself is usable, and is not intended to impact the use of the underlying funds). If so, additional disclosures will be triggered regarding the customer's right to replace such a Card at no cost. Also, keep in mind the CARD Act is a federal floor, and that state laws may impose additional requirements.
- VI. Review Your Loyalty, Award and Promotional Card Program.** Carefully review your loyalty, award and promotional Card program, such as Cards, coupons, rebates, rewards, sweepstakes, or similar offers that distribute Cards, codes, barcodes, account numbers, fobs redeemable for or towards goods/services or other monetary value to consumers. In most cases, you will need to add disclosures to qualify for the loyalty, award and promotional Card exemption. The required disclosures include: (A) a statement on the front of the Card that it is issued for loyalty, award or promotional purposes (e.g., "Reward" or "Promotional"); (B) disclosure on the front of the Card of the expiration date for the underlying funds (where the Card and funds expiration date are the same, a single disclosure will suffice); (C) disclosure on or with the Card of the amount of any fees that may be imposed and the conditions under which they may be imposed; and (D) inclusion on the front or back of the Card of a toll-free telephone number and, if one is maintained, a website that a consumer may use to obtain fee information or a replacement Card. Disclosure of a toll-free number/website is not required if no fees will be imposed and neither the Card nor the underlying funds expire.
- VII. Review Your General Purpose Reloadable Card Program.** If you offer or sell general purpose reloadable (GPR) Cards, and you or others, such as the issuer, intend to rely on the exemption for reloadable Card that are not advertised/labeled as a gift, you will need to take actions designed to ensure that no one in the chain of distribution advertises it (intentionally or not) as a "gift". Prepare, adopt and implement new policies and procedures, as well as monitoring and oversight mechanisms, designed to ensure that no prohibited marketing of Cards as "gifts" occurs (e.g., displaying the word "gift," "present" or a congratulatory message, incorporating gift-giving or celebratory imagery/motifs on the Card or accompanying packaging or promotional displays, or setting up a

single display that contains a variety of prepaid Cards with a “gift cards” sign appearing on top of the display)<sup>8</sup>. Something as simple as a bow or candle, or similar insignia, or a suggestion that it might be appropriate as a gift for a new graduate or student may disqualify the product from the exemption. New contracts or amendments thereto may be needed with others in the chain of distribution (e.g., distributors, advertisers, etc) that prohibit them from utilizing any reference to the Card as a gift, and require them to segregate GPR products from other types of Cards. Analyze whether any POS, radio, intercom advertisement or even paper advertisement will need to be revised. Institute a mechanism to oversee and spot check your compliance and marketing efforts on an ongoing basis.

- VIII. Review Your Initial Disclosures, Terms and Conditions, and Policies and Procedures.** Where you are required to provide written terms and conditions (e.g., the Card includes an expiration date or fees will be imposed), confirm that they will be provided to customers. If compliance will be done via a receipt (which is allowed only in very limited circumstances), make sure the receipt contains the requisite information. If the terms and conditions will be provided electronically (e.g., on your website), make sure that the customer can print out the terms and conditions.
- IX. Conduct Appropriate Training.** Train employees (as well as vendors and third-party service providers, as applicable) on the scope and impact of the CARD Act, its restrictions and prohibitions, and the actions needed to ensure compliance with the new law. Prepare and distribute new scripts to employees and vendors who interface with customers regarding disclosures that are required before the Card is purchased. Educate employees on any new policies and procedures (e.g., requiring the loyalty Card disclosures on any loyalty, reward or promotional Card product, whether it is made in-store, on a website, on a display, on signage or any other form of advertisement). It is important to institute appropriate internal controls to help ensure compliance with the company’s policies and procedures related to the CARD Act.
- X. Identify Actions Steps Needed for Compliance Beginning August 22.** All non-compliant Card stock (e.g., in-store, website, third-party stores/websites) and advertisements (e.g., in-store, website, television, radio) must be pulled from the marketplace and, in most cases, appropriately destroyed. In general, compliance with on the Card disclosures cannot be done via a sticker on the Card. Where needed, order new compliant Card stock—it may be difficult to obtain new Card stock by August 22 given the limited number of vendors and the short time frame for compliance.

As the law is new, the Board and others may provide additional information or guidance on compliance over the next few months. Also, reach out to your compliance personnel, internal legal or others to try to obtain clear guidance on what needs to be done.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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<sup>8</sup> The regulations do allow for a single display to contain both GPR Cards that may not be marketed as a gift Card, as well as a gift Card, but the signage and display regarding the prepaid GPR Cards and the traditional gift Cards must meet specific requirements, and a description of what is and is not allowed is beyond the scope of this Advisory.

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