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Gift Certificate/Card Issuers Dealt Another Hand Under Gift Card Amendment and Interim Final Rule

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On July 27, 2010, President Obama signed into law H.R. 5502, amending Section 403 of the CARD Act and extending the effective date of the gift card provisions in the CARD Act to January 31, 2011 for certain gift certificates, store gift cards and general-use prepaid cards produced prior to April 1, 2010. In turn, on August 11, 2010, the Federal Reserve Board announced its interim final rule implementing this new law and delaying certain supplemental requirements set forth in its final rule issued on March 23, 2010.

H.R. 5502 amends Section 403 of Title IV of the Card Accountability Responsibility and Disclosure Act of 2009 and inserts a provision extending the effective date of the gift card provisions therein (the “CARD Act”) to **January 31, 2011** for gift certificates, store gift cards and general-use prepaid cards (referred to herein as “Cards”) produced prior to April 1, 2010 – if the issuer qualifies for the Section 403(b) exception (referred to herein as the “Gift Card Amendment”). The Federal Reserve Board’s August 11, 2010 “Interim Final Rule” addresses the status of certain additional requirements adopted by the Board in its March 23, 2010 “Final Rule,” a rule that implements the CARD Act and Gift Card Amendment. The CARD Act, Final Rule and Interim Final Rule are effective **August 22, 2010**.

The CARD Act is among the many financial reforms enacted in the past year. It affects virtually all prepaid products regardless of their manner of access (e.g., plastic cards, digital codes, account numbers, email offers), as well as almost all rewards, promotions and similar offerings and programs.¹ Many companies, including retailers, distributors, incentive companies, promotional companies, marketers, manufacturers,

¹ The new law includes six exclusions from these requirements. The six exclusions are cards, codes or other devices: 1) useable solely for telephone services; 2) reloadable and not marketed or labeled as a gift card or gift certificate; 3) that are part of loyalty, award or promotional programs; 4) not marketed to the general public; 5) issued in paper form only; 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 locations affiliated with and in geographic proximity to the event or venue. The Board indicated that the statutory exclusions should be interpreted narrowly to ensure consumers receive full protection contemplated by the CARD Act.

telecom companies, virtual worlds, sports and entertainment companies and others are just realizing the scope and impact of this new law. It will have a significant impact on these companies because of the widespread application of the CARD Act to a broad range of products and services, and the limited scope of exclusions, to effectuate its consumer protection aspects.

In general, the CARD Act covers all prepaid “cards, codes and other devices” that are: (1) issued to a consumer on a prepaid basis primarily for personal, family or household purposes in a specified amount that may/may not be reloaded in exchange for payment; and (2) redeemable at one or more affiliated or unaffiliated merchants for goods/services in exchange for payment, or usable at ATMs. It restricts fees for dormancy, inactivity and services on Cards; it permits one fee per month and only after there has been no activity during the preceding 12 months. It also prohibits the Card from expiring in less than 5 years from the date the Card was issued or the date funds were last loaded, whichever is later. There is no requirement for a plastic card to be used – covered products include “cards, codes and other devices.”

Amended Section 403 extends the effective date for the CARD Act disclosures required by Sections 915(b)(3)² and (c)(2)(B)³, provided the issuer of the Card:

- (A) complies with Section 915(b)(1) and (2) of the CARD Act;⁴
- (B) considers any such Card for which funds expire to have no expiration date with respect to the underlying funds;
- (C) at a consumer’s request, replaces a Card that has funds remaining at no cost to the consumer; and
- (D) complies with the disclosure requirements of Section 403(b)(2).

The Section 403(b)(2) disclosure requirements are met by providing notice to consumers via in-store signage, messages during customer service calls, on websites and in general advertising, that (1) any such Card for which funds expire shall be deemed to have no expiration date with respect to the underlying funds; (2) consumers holding a Card have a right to a free replacement Card that includes the packaging and materials typically associated with such a Card; and (3) any dormancy fee, inactivity fee or service fee for such Cards that might otherwise be charged will not be charged if the fee(s) do not comply with Section 915 of the CARD Act. Providing these required notices is to continue **until January 31, 2013**, except as otherwise modified by the Interim Final Rule, discussed below.

The Board's Interim Final Rule, in order to carry out the intended purpose of the Gift Card Amendment, delays the effective date of certain supplemental requirements set forth in its Final Rule as follows:

- I. Form of Disclosures.** The Gift Card Amendment requires that certain alternative disclosures be made to the consumer in order for an issuer to qualify for the Section 403(b) exception and take advantage of the delayed effective date. These disclosure requirements will be implemented through Interim Final Rule Section 205.20(h)(2). Interim Final Rule Section 205.20(c)(2) and (3) have been revised to provide that the Section 205.20(h)(2) disclosures and Section 205.20(c)(3) prior-to-purchase disclosures need not be made in a retainable form; these disclosures may be made orally.

² The Card clearly and conspicuously states (1) that a dormancy fee, inactivity charge or fee, or service fee may be charged; (2) the amount of such fee; (3) how often such fee/ may be assessed; and (4) that such fee may be assessed for inactivity; and the issuer/vendor of the Card informs the purchaser of the fee before the Card is purchased.

³ The terms of expiration are “clearly and conspicuously stated.”

⁴ It is generally unlawful for any person to impose a dormancy fee, inactivity charge or fee or service fee with respect to a Card. Except that such a fee may be charged if (1) there has been no activity on the Card in the 12-month period ending on the date on which the fee is imposed; (2) the required disclosures have been met; (3) not more than one fee is charged in any given month; and (4) any additional requirements that the Board may establish through rulemaking have been met.

- II. Compliance Dates.** Interim Final Rule Section 205.20(g)(1) confirms the delayed effective date for certain a Card sold to a consumer, or provided to a consumer as a replacement for such Card, as provided for in Section 205.20(h). In contrast, it confirms that the Gift Card Amendment does not delay the effective date of the disclosures required by Section 205.20(a)(4)(iii) and, thus, the effective date for loyalty, award and promotional cards, codes and other devices **remains unchanged**.
- III. Temporary Exemption for Disclosures.** Interim Final Rule Section 205.20(h)(1) delays the effective dates of Sections 205.20(c)(3), (d)(2), (e)(1), (e)(3)(i)-(iii), (f)⁵ to January 1, 2011 provided that issuers of such Cards comply with the additional disclosure requirements of Sections 205.20(h)(1)(i)-(iv).
- IV. Additional Disclosures.** Interim Final Rule Section 205.20(h)(2) largely tracks the language of the Gift Card Amendment with regard to the additional disclosures required to be made to consumers to take advantage of the delayed effective date. These additional disclosures may be made through a third party, e.g., a merchant installs in-store signage and disclosures on the issuer's behalf.
- V. Expiration of Disclosure Requirements.** Interim Final Rule Section 205.20(h)(3)(i) confirms that the Section 205.20(h)(2) disclosures are to be maintained until January 31, 2013, including disclosures on websites and those given via telephone. However, with respect to in-store signage and general advertising, to avoid consumer confusion relating to fully compliant Cards issued on or after January 31, 2011, the Section 205.20(h)(2) disclosures are **not** required to be provided after January 30, 2011.

Although the Interim Final Rule is effective August 22, 2010, the Board is seeking public comment on it. Comments on the Interim Final Rule must be submitted within 30 days after publication of the Interim Final Rule in the Federal Register, which is expected shortly.

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

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⁵ Section 205.20(c)(3) requires that the disclosures required by Sections 205.20(d)(2), (e)(3), and (f)(1) be disclosed to the consumer prior to purchase.

Section 205.20(d)(2) prohibits the imposition of any dormancy, inactivity, or service fee unless, among other things, certain specified clear and conspicuous disclosures about the fees are made on the Card.

Section 205.20(e)(3)(i) requires that the expiration date for the Card's underlying funds—or the fact that the underlying funds do not expire—be disclosed on the Card. These disclosure requirements are subject to the delayed effective date under the Gift Card Amendment for Cards produced prior to April 1, 2010.

Section 205.20(e)(1) prohibits the issuance or sale of Cards, unless policies and procedures have been established to ensure that a consumer will have a reasonable opportunity to purchase a Card with at least 5 years remaining until the Card expires.

Section 205.20(e)(3)(ii) requires the disclosure on the Card of a toll-free telephone number, and, if one is maintained, a website that a consumer may use to obtain a replacement Card after expiration if the underlying funds may be available.

Section 205.20(e)(3)(iii) requires certain disclosures on the Card about expiration and replacement Cards, except where a non-reloadable Card bears an expiration date that is at least 7 years from the date of manufacture.

Section 205.20(f) requires additional fee disclosures on or with the Card and disclosure on the Card of a toll-free telephone number, and, if one is maintained, a website that a consumer may use to obtain fee information.

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