

CARD Act: Loyalty, Award and Promotional Card, Code and Other Device Exemption

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Effective August 22, 2010, loyalty, award and promotional “cards, codes and other devices” must comply with strict disclosure requirements set forth in new federal law, or otherwise (at least in most instances) be subject to the new federal law restricting fees on these instruments and prohibiting expiration in less than five years.

On March 23, 2010, the Federal Reserve Board (Board) issued a much-anticipated “Final Rule” implementing Title IV of the federal Credit Card Accountability, Responsibility and Disclosure Act of 2009, which was signed into law by President Obama on May 22, 2009 (collectively the CARD Act). The CARD Act amends the federal Electronic Funds Transfer Act (EFTA), and the Final Rule amends the EFTA’s implementing regulation, Regulation E. It takes effect in less than four months—**August 22, 2010**.

The CARD Act restricts most fees and expiration dates on prepaid cards. The new law includes six exemptions¹ from these requirements. **This Advisory, the first of several Advisories on the CARD Act, focuses on one of the exemptions—for “loyalty, award, or promotional” cards, codes and other devices** (referred to collectively as “Loyalty/Promo Cards”). Qualifying Loyalty/Promo Cards are not subject to the fee or expiration date restrictions if they include the required disclosures. Many companies which offer or issue Loyalty/Promo Cards may be surprised by the disclosure requirements, detailed below. All **persons** involved in issuing or distributing Loyalty/Promo Cards should review and potentially revise disclosures that appear on or with Loyalty/Promo Cards.

Loyalty/Promo Cards issued through a loyalty, award or promotional program where the **period of eligibility** for the program begins after August 21, 2010 must comply with the disclosure requirements to be exempt. State laws that are **consistent** with the CARD Act are **not preempted** by the CARD Act, which



¹ The six exemptions 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 exemptions should be interpreted narrowly to ensure consumers receive full protection contemplated by the CARD Act.

means the CARD Act provides a minimum floor. State laws that provide greater protection for consumers are not inconsistent with the CARD Act.

The CARD Act Generally

The CARD Act restricts fees for dormancy, inactivity and services on gift certificates, store gift cards and general-use prepaid cards (collectively Cards).² It permits **one** fee per month and only after there has been **no activity** during the preceding 12 months. It also prohibits Cards from expiring in less than 5 years from the date the covered Card was issued or the date funds were last loaded, whichever is later. 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 or 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. It is important to note there is no requirement for a plastic card to be used—Cards include “cards, codes and other devices.”

Loyalty, Award and Promotional Card Exemption

A Loyalty/Promo Card is exempt from the CARD Act if it: 1) 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; 2) is redeemable at one or more merchants for goods or services, or usable at ATMs; and 3) meets the disclosure requirements.

The required disclosures include: A) a statement **on the front** of the Loyalty/Promo Card that it is issued for loyalty, award or promotional purposes (e.g., “Reward” or “Promotional”); B) disclosure **on the front** of the Loyalty/Promo Card of the expiration date for underlying funds (where the card and funds expiration date are the same, a single disclosure if the dates are the same); C) disclosure **on or with** the Loyalty/Promo 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 Loyalty/Promo 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 and website is not required if no fees will be imposed and neither the Loyalty/Promo Card nor the underlying funds expire.

² 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 definitions of Cards:

“**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.

Reg E definitions of fees:

“**Dormancy fee**” and “**inactivity fee**” mean a fee for non-use of or inactivity on a Card.

“**Service fee**” means a periodic fee for holding or use of a Card; a “**periodic fee**” includes any fee that may be imposed on a Card from time to time for holding or using the Card.

³ Such employee programs need to comply with state and federal labor and tax laws as well.

Disclosures must be “clear and conspicuous” (i.e., the location and type size are readily noticeable and not obscured by a logo or indentation from embossed type), and generally must be in writing in a form the consumer may keep. Disclosures may contain commonly accepted or readily understandable abbreviations or symbols (e.g., “mo.” for month or “/” to indicate “per”). There is no specific type size or prominence requirement for the text of the specified disclosures. A disclosure made in an accompanying terms and conditions document, on packaging surrounding a Card, or on a sticker or other label affixed to the Card **does not** constitute a disclosure on the Card.

Examples of Loyalty, Award and Promotional Programs

- I. Merchant Loyalty/Retention.** Consumer retention programs that provide Loyalty/Promo Cards or coupons redeemable for or towards goods/services or other monetary value as a reward for purchases made or for visits to the merchant.
- II. Rebate.** Programs that provide Loyalty/Promo Cards redeemable for or towards goods/services or other monetary value in connection with the consumer’s purchase of a product/service and the consumer’s completion of the rebate submission process.
- III. Sweepstake/Contest.** Programs that distribute Loyalty/Promo Cards redeemable for or towards goods/services or other monetary value as part of promotion for a chance to win a prize.
- IV. Discount.** Promotions that provide coupons or discounts redeemable for or towards goods/services or other monetary value.
- V. Referral Program.** Programs that provide Loyalty/Promo Cards redeemable for or towards goods/services or other monetary value in exchange for referring other potential consumers to a merchant.
- VI. Incentive Programs.** Programs through which an employer provides Loyalty/Promo Cards redeemable for or towards goods/services or other monetary value to employees, e.g., to recognize job performance, such as increased sales, or to encourage employee wellness and safety.
- VII. Charitable/Community Relations Program.** Program through which a company provides Loyalty/Promo Cards redeemable for or towards goods/services or other monetary value to a charity or community group for fundraising purposes, e.g., a donation or prize.

Other Exemptions that May Apply in the Context of a Loyalty, Award or Promotional Program

Exemption for Cards, Codes or Other Devices 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

This exclusion is generally limited to cards, codes, or other devices that do not state a specific monetary value but instead are redeemable for (1) an admission to an event or venue (e.g., a ticket to a sporting event or a pass to enter an amusement park), (2) a specific good/service or “experience,” e.g., a spa treatment, hotel stay, airline flight, etc., or (3) a certain percentage off the purchase of a good/service (e.g., 10% off). These cards, codes and other devices are not covered by the CARD Act because they are not issued “in a specified amount.” However, if a card, code or other device is issued in a specific or pre-determined amount that can be applied toward the purchase of a specific good/service (e.g., \$50 off spa

treatment but does not attribute a specific value to the treatment, e.g., “a \$50 value”), it is subject to the CARD Act unless it qualifies for another exemption, e.g., the exemptions noted in footnote 1.

Exemption for Paper Form Certificate

Another attractive option for loyalty, award or promotional programs may be paper Cards. If the **sole** means of issuing the Loyalty/Promo Card is in paper form, it is exempt from the CARD Act even if it may be redeemed electronically, e.g., a paper certificate or point-of-sale receipt that includes a bar code or other code that is solely made available to the customer in paper form. However, a card, code or device is not issued solely in paper form simply because it may be reproduced or printed on paper (e.g., a bar code or other code, card/certificate number or coupon) where it is electronically provided to a customer and redeemable for goods/services, as the card, code or other device was initially based in an electronic form. Thus, this exemption does not apply if the customer can print the paper certificate from the merchant’s website or an email.

What to Watch Out For

Companies’ loyalty, award and promotional programs may pose the most transitional challenges given the vast array of products used to confer benefits under these programs. Program review should seek to identify: (1) **all** of the benefits available/offered as part of the program that will or **may** be deemed a card, code or other device (e.g., gift cards, merchant cards, stickers, discount coupons, codes, barcodes, etc.), (2) how these benefits are conveyed (e.g., via the Internet, the company’s website, telephone, email, e-Fax, or fax, printed at the point-of-sale, mailed directly, etc.), (3) what the benefits may include (e.g., \$10 off of a \$50 purchase, \$5 gift card celebrating the customers’ birthday, friends and family discounts in a specified or predenominated amount, etc.), and (4) other transitional challenges (e.g., products available on third-parties’ websites, seasonal promotions, marketing, internal policies/procedures, employee training, etc.).

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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