



Before the  
Governors of the Federal Reserve System  
Washington, D.C. 20551

**COMMENTS OF THE  
NATIONAL RETAIL FEDERATION**

Docket No. R-1377

December 21, 2009

**Elizabeth T. Oesterle**

*Vice President*

*Government Relations Counsel*

The National Retail Federation  
325 7<sup>th</sup> Street, N.W.  
Suite 1100  
Washington, D.C. 20004  
(202) 783-7971

On behalf of the National Retail Federation ("NRF"), we would like to file the following comments on the proposed rule implementing *The Credit Card Accountability Responsibility and Disclosure Act of 2009* (the "CARD Act"), which created new Sections 915 of the Electronic Funds Transfer Act ("EFTA"). By Way of background, the National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

### **2009 NRF Holiday Research Shows the Continued Popularity of Gift Cards**

According to recent NRF research, gift cards remain the most requested holiday item for 2009 (for the third year in a row). According to NRF's 2009 Holiday Consumer Intentions and Actions Survey, conducted by BIGresearch, holiday shoppers plan to spend slightly less on gift cards in 2009, with the average person spending \$139.91, compared to \$147.33 last year. Total spending on gift cards is expected to reach \$23.63 billion.

With almost every major retailer offering gift cards this holiday season, shoppers will have plenty of cards to choose from. According to the survey, department store gift cards will be the most popular, with 38.4 percent of gift-givers planning to give at least one card from a department store. Gift cards to restaurants (33.4%), bookstores (24.4%), electronics stores (18.8%), and discount stores (16.3%) were also among shoppers' favorites.

In addition, nearly one-fourth (22.1%) of gift-givers will give gift card bearing a network brand (i.e. Visa, MasterCard, or American Express). While these cards offer convenience because they can be redeemed at a variety of different places, they are the most likely to expire or include maintenance, activation or dormancy fees. In its gift card tips, NRF has consistently encouraged shoppers to understand the difference between store-issued and bank-issued gift cards and use that information before making shopping decisions.

For the purpose of this rulemaking, NRF will only comment on provisions with specific applicability to retail gift cards and certificates, not open-loop or network branded cards, except to the extent that those cards are sold in retail stores.

## **The Proposed Rule**

In its proposal to amend Regulation E, which implements the EFTA, it is clear that the Board has taken the time to fully understand the gift card market. We were encouraged that background provided in the supplementary information contains a very informed differentiation between closed-loop (or merchant-issued) gift cards and open-loop cards (such as those that carry a card network branded logo).

We were further pleased with the research the Board did into creating the proper definition of “loyalty, reward or promotional” gift cards. As the popularity of gift cards has grown exponentially, retailers and others have seen the benefit of using this same format for loyalty, rewards and promotional programs. It is important that these cards are clearly distinguished from store gift cards or certificates. We are further pleased to note that the Board also took into consideration that “gift cards” are often used to issue merchandise credit and included this format in the category of cards “not marketed to the general public” and thus exempt from many of the requirements of the new rule.

## **Restrictions on Expiration Dates and Dormancy, Inactivity or Service Fees**

It is important to point out that many, if not most, national retailers no longer impose expiration dates or charge dormancy, inactivity or other service fees on their proprietary closed-loop gift cards. As the Board is aware, over 40 states have enacted consumer protection laws in this area, and retailers, unlike national banks, have always been subject to these state statutes. As a result, many retailers have moved away from both fees and expiration dates for both compliance purposes (it is easier to comply with multiple state laws) and for customer service reasons. As a result, many of the restrictions on gift cards and certificates contained in the CARD Act and in the proposed rule are simply not applicable to these retail companies.

However, small, mid-sized and regional retailers may still impose fees and expiration dates according to the laws of the state or states that they are operating in. For example, Pennsylvania, New York and Nevada place no restrictions on expiration dates. California permits dormancy fees but prohibits expiration dates. Pennsylvania, Wyoming, Wisconsin and South Dakota also place no restrictions on fees. Many of those retailers may want to continue to include expiration dates on their cards (at a minimum of five years as required by the CARD Act), or even impose dormancy or other fees after a one-year period.

These retailers understand the view of the Board that a customer must be made aware of these terms *before* purchase of the card and that the Board has proposed to require certain disclosures (expiration dates, toll free numbers and/or website information, as well as dormancy, and information about inactivity or service fees) on the card itself. While these types of disclosures are already commonly made on cards, it may pose compliance problems – especially if minimum font sizes are required.

As the Board is aware, gift cards are only so large – and, in fact, they are shrinking in size and will be changing formats in the future. Several large retailers (including quick-serve restaurants) are currently marketing their cards as key chain “fobs,” much the same size as key ring loyalty cards from supermarkets and chain drug stores. As a result, we support the proposal that readily understood symbols or abbreviations may be used to make the required disclosures to save space and request that minimum font sizes not be mandated the Board at this time (even though at least one state has opted to require minimum fonts for expiration date disclosures).

The Board should also be aware that new payment innovations may eventually make disclosure on the device itself very difficult. We have already seen experimentation in the credit card and open-loop space with small RFID enabled “touch and go” devices. There have also been significant strides made in the world of mobile payments, where applications on your cell phone may one day replace common payment devices at point of sale, including retail gift cards. In these cases, the best that a retailer may be able to do is provide required disclosures in accompanying materials or on a mobile site before an application is downloaded. We hope that the Board remains flexible about the manner and format in which disclosures are delivered and willing to re-examine “other devices” as new technologies emerge and develop to meet consumer demand.

On the subject of expiration dates, the Board has asked for input on two alternate approaches to insure that customers purchase cards that have expiration dates that are at least five years from the date of purchase. As the Board is likely aware, retailers do not “date” their cards for expiration as is done on the open-loop, network branded cards. Instead, if a retailer is going to impose an expiration date on a card it generally says something like: “this card expires five years from the date of purchase.” As a result, the alternatives presented by the Board will not generally have application in the sale of closed-loop cards.

Many retailers do, however, sell open-loop network branded cards in their stores. Grocery, convenience and drug stores often sell open-loop cards along with their own closed-loop cards or other retailers’ gift cards. We believe that the second alternative proposed by the Board to require policies or procedures to ensure that a customer has a *reasonable opportunity* to purchase a gift certificate that does not expire for five years is the appropriate standard to adopt. A flat out prohibition on selling cards that expire less than five years from the date of

purchase may not be realistic. While retailers will necessarily put reasonable controls in place to prevent the sale of non-compliant cards, there are no absolutely failsafe ways to achieve this across the market. As the Board has noted, some retailers and open-loop card issuers may currently employ inventory controls or point-of-sale procedures to prevent sales of cards that do not meet minimum timeframes, but this is unlikely to be the majority of retailers at this juncture.

### **Loyalty, Award or Promotional Cards**

We are pleased with the Board's understanding of how broadly "gift cards" are used for loyalty, award and promotional programs. We do, however, believe that we caught a very important drafting error in the proposed rule. Under the proposed rule promotional gift cards are subject to the disclosure requirements set forth in paragraphs (d)(2), (e)(2) and (f). We believe, for consistency's sake, that loyalty, award or promotional gift cards need to be additionally and specifically exempted from the disclosure requirements in paragraph (e)(2)(i). This subparagraph deals directly with the minimum expiration date requirements set forth in the statute, from which promotional cards are already exempt. We believe that this can be easily clarified, and merely wanted to bring this to the attention of the Board.

In addition, in the official staff interpretation of Paragraph 20(a)(4) the Board gives specific examples of loyalty, award or promotional programs that would qualify for the exemption. We believe that the first example given should be amended to state:

- i. Loyalty, coupon, discount, or consumer retention programs operated or administered by a merchant that provide to consumers cards redeemable for goods or services or other monetary value as a reward for certain purchases at or visits to the participating merchant.

While these concepts were probably considered by the staff in formulating the current wording of the example, we believe that the terms "coupon" and/ or "discount" should be explicitly added because retailers are commonly using the promotional "gift card" format as a means of delivering these benefits to consumers. One example is when a retailer mails a promotional discount to a customer in the form of a \$25 "gift card" with accompanying materials that state: "use this \$25 gift card towards your purchase of \$100 or more." Others are simply printing what would otherwise be clip coupons on paper stock with a similar size, shape and feel to a retail gift card. These are often glued on to advertisements that appear in weekend circulars or magazines and may state "present this card for 25% off of your purchase of \$100 or more." Explicitly including these types of promotional cards in the staff interpretation will help further clarify the rule and likely help to prevent any future confusion or controversy.

## **Cards Not Marketed to the General Public**

We commend the staff for including store credits issued in the “gift card” format in this category. These types of cards are generally issued by retailers when customers return merchandise without the original receipt, when returning a gift or in other circumstances where only store credit is available. The benefit of this format is that consumers are less likely to lose or misplace these cards as they might be if simple paper (register tape) store credit is issued. As they are not actually gift cards it was proper to exempt them in this category.

We are still somewhat concerned with portions of the staff discussion explaining the circumstances in which gift cards that are not marketed to the general public may still be covered by the requirements of the Act. The staff discussion about comment 20(b)(4)–2 provides examples illustrating the exclusion:

“For instance, a merchant may sell its gift cards at a discount to a business, either directly or indirectly through a third party. The business that purchases the cards may give them to employees or loyal consumers as Incentives or rewards. In determining whether the gift card is marketed to the general public, the merchant-issuer must consider whether the card is of a type that is advertised or made available to consumers generally or can be easily obtained elsewhere. If the card may also be purchased through retail channels, the exclusion in § 205.20(b)(4) does not apply, even if the consumer obtained the card as an incentive or reward.”

While we understand that the Board is trying to avert consumer confusion over different terms on cards that may otherwise look identical, the difficulty with the example given is that gift cards are often sold in bulk and at a discount, and are, in essence, intended for promotional purposes. These cards look and feel just like cards sold in stores.

One example of this is when a luxury retailer sells gift cards at a discount to a resort operator. They are, in turn, provided as a benefit to some resort VIP guests. This is done to help promote the retailer’s local store to the hotel guests. In these and similar cases, we would like to propose that a simple clarification on the card itself could resolve the problem. Simply put, if the context in which the card is obtained does not in and of itself imply to the recipient that the card is not marketed to the general public, simple words to that effect (“not marketed to the general public”) placed on the card or in the accompanying materials should suffice as appropriate notice to the consumer. In the alternative, the card could also display the term “promotional gift card” in order to take advantage of the exclusion for promotional cards.

## **Paper v. Plastic Gift Certificates**

Although we understand that paper gift certificates are explicitly excluded from obligations set forth in the CARD Act; we do have some concerns with the explanation of the paper exclusion articulated by the Board. In its supplementary materials the Board states:

“The proposal does not, however, preclude a paper certificate bearing a bar code or account number that is given to the consumer at the time of purchase from qualifying for the exclusion. For example, a retailer may generate a bar code on a paper certificate at the time of purchase that enables the retailer to scan the certificate and maintain a record of the certificate electronically, rather than enter the information in a ledger. Because the bar code is not issued to the consumer in any form other than on the paper given to the consumer, this certificate would qualify for the exclusion for cards, codes, or other devices issued in paper form.”

The Board had asked for input as to whether this aspect of the proposal creates an “undue risk of circumvention.” We believe that it does and it will also contribute to customer confusion about when the CARD Act protections apply. This confusion will be particularly accentuated by the fact that while *some* paper gift certificates will be exempted from coverage, others, such as those also issued by retailers who have gift cards programs, will not.

As the Board itself points out, “Other than the material on which the magnetic stripe is printed or produced ...there is no meaningful distinction between a plastic card with a magnetic stripe and a paper certificate or card with a magnetic stripe encoded.” A similar situation occurs when barcodes are used, since many retail gift cards and paper gift certificates use bar codes as the primary means of tracking transactions associated with that instrument. We believe that the proposed rule creates a distinction without a difference – other than the type of paper stock that the card is printed on.

We would respectfully suggest to the staff that only hand-written or pre-printed gift certificates (that must be completed by hand by a store clerk) be eligible for the exemption. These certificates may or may not contain tracking or serial numbers (either pre-printed or generated by validation on a store register) for account-keeping purposes. However, once an electronic tracking device such as a bar code or magnetic stripe is added a grey area rapidly emerges. This “hand written or pre-printed” requirement would ensure that small, less-sophisticated businesses be afforded the intended exemption and others will not be able to unfairly skirt the new law.

## **Marketing of gift cards**

As we have noted, NRF has many member companies that market both closed-loop gift cards (their own or those of other retailers) as well as open-loop gift cards and other prepaid cards (such as calling cards and personal use prepaid cards). Oftentimes these types of cards are marketed on the same racks, whether at point-of-sale, in the checkout lanes, or on larger displays called “gift card malls.” The Board has suggested that these types of displays may confuse consumers, particularly if prominent gift card signage is used to direct customers to the displays.

Proposed comment 20(b)(2)–4 provides that, “the exclusion for a card, code, or other device that is reloadable and not marketed or labeled as a gift card or gift certificate [only] applies if the individual card, code, or other device is not marketed or labeled as a gift card or gift certificate and if entities subject to the rule maintain policies and procedures reasonably designed to avoid such marketing.”

According to the staff commentary single promotional displays that may have prominent gift card signage at the top would not qualify as a, “procedure reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates.” Thus, the general-purpose reloadable card products on that rack would lose the benefit of the exclusions under the new rule. The Board has asked for input on this proposal and has asked for examples of measures that may be utilized to ensure that a reasonable consumer would not be confused.

We believe that “gift card malls” and other similar displays offer great consumer convenience and benefits. While we understand that the Board’s goal is to eliminate customer confusion, we believe that mandating the removal of commonly understood signage, or moving other prepaid cards to separate and distinct displays would be both burdensome and costly to the retailer and, frankly, underestimates the ability of reasonable consumers to make distinctions between popular products offered for sale.

We believe that as long as there is enough information available on the card or packaging itself to indicate that card is not, in fact, gift a gift card (prepaid calling cards seemingly automatically qualify) the retailer should be deemed in compliance. It will be up to the individual issuers of open-loop cards to mark them appropriately – such as stating prominently on the packaging “this is not a gift card” or “this product is a personal-use prepaid card.” Another alternative would be to retain the “gift card” signage on a rack, but place smaller signage in close proximity to the excluded categories of prepaid cards that would indicate the availability of “calling cards,” “wireless cards,” “personal-use cards,” and other types of prepaid cards eligible for the exclusions. Retailers employ this type of signage today, and it is generally very clear that different categories of prepaid cards are available for sale, even though the top of the rack may most prominently read “gift cards.” As a result, we believe that consumers will not be



confused about the different products being offered, and consequently, about the applicability of the new rules.

### **Additional Comments**

As the CARD Act mandates, a consumer may only be charged one inactivity fee per month after a period of twelve months of inactivity on the certificate or card. A question has arisen as to whether a retailer could be in technical non-compliance under certain circumstances. At issue is the timing of the monthly assessments. For instance, a retailer who operates on a 30-day cycle may, in one scenario, assess a dormancy fee on January 1, another on January 31 and then assess no fee for the month of February, with the next fee coming due on March 2. Depending on the date of the last transaction on a card (in this case, January 1 of the prior year), the retailer may not be in control of technical violations in this area. To be in compliance, it may require that a retailer re-program their systems to deduct on a certain calendar day each month. This, however, would require the retailer to disregard the actual date of the last transaction in calculating the dormancy period and focus on another marker, such as the 15<sup>th</sup> of every month. Any guidance that the Board may be able to give on technical compliance would help those retailers who charge monthly fees.

Several retailers have also raised serious concerns about controlling old card stock during the implementation period for the new law. Many retailers are concerned that they may not have failsafe controls to ensure that the correct cards are on every store rack in every location in every state across the country as of August 22, 2010. As the Board is aware many retailers operate thousands of locations with multiple places within those stores to purchase cards. This is even more significant a problem if you consider that many retail gift cards are also sold through third parties and the cards themselves are out of the direct control of the retailer. To add yet an additional layer of confusion, new Section 915 does not preempt stronger state consumer protection laws in this area. Therefore retailers may have to re-print many different cards to be in compliance with the applicable laws (either state or federal) in each area where they operate stores.

Similar to the Board's "Alternative B" proposal to ensure that consumers have a reasonable opportunity to purchase a card with at least five years remaining until the expiration date, we would like to suggest that the Board adopt a "reasonable procedures" standard for dealing with old card stock during a period of time (we propose 18-24 months) after August 22, 2010. While the retail companies will comply with all the operational requirements of the new law beginning on August 22, 2010, and customers will be afforded all of the benefits thereof, retailers should not be penalized for inadvertently selling cards that may not physically reflect these new policies. Guidance from the Board, along with a

realistic “safe harbor” timeframe is also extremely important due to the potential for private rights of action against card issuers under the new law.

## **Conclusion**

We are very pleased with the progress that the Board has made in the proposed rule to implement new Section 915 of the EFTA. We hope that the suggestions made in these comments will further help the Board further refine its final rule. Gift Cards have become a hugely popular item among consumers. Retailers have expanded the market to allow consumers wonderful conveniences, such as redeeming or purchasing gift cards online, providing reloadable cards that can be used to buy your daily cup of coffee or breakfast sandwich, and they are even being marketed to buy downloads of music, movies, and e-books online.

We hope that the Board will take into account the comments submitted by NRF with valuable input from retailers who have tremendous experience dealing with gift cards from both the business operations standpoint and the consumer’s point of view. Retail gift cards would not be so overwhelmingly popular if consumers did not view them as both desirable and easy to use (including the terms and conditions that may accompany them). Overall, the gift card market is one that works, and works well.

Respectfully Submitted,

Elizabeth T. Oesterle  
Vice President, Government Relations Counsel  
The National Retail Federation