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Via Email

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Attention: Docket No. R-1377

Re: Gift Certificates, Store Gift Cards and General-Use Prepaid Cards Proposed Rules

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System (“Board”) on behalf of the Network Branded Prepaid Card Association (“NBPCA”) in response to the proposed rules issued in connection with gift certificates, store gift cards and general-use prepaid cards which were published in the *Federal Register* on Nov. 20, 2009 at 74 *Fed. Reg.* 60986-61012 (“Proposed Rules”). Specifically, the Proposed Rules seek to amend Regulation E, which implements the Electronic Fund Transfer Act (“EFTA”), and the corresponding official staff commentary.

The Proposed Rules address fees, expiration dates and disclosures relating to certain prepaid products, primarily gift cards, as well as various exemptions from those requirements. The Proposed Rules build on provisions set forth in Title IV of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD Act”) which become effective on August 22, 2010.

The NBPCA is a non-profit trade association representing a diverse group of organizations that take part in delivering network branded prepaid cards to consumers, businesses and governments. The NBPCA’s members include financial institutions, card organizations, processors, program managers, marketing and incentive companies, card distributors and law firms. The NBPCA is active on behalf of its members to enhance the environment for the success of network branded prepaid cards through education of

government officials, the media and consumers. It also works with members to establish and encourage best practices to benefit card users and industry participants.

The NBPCA appreciates the opportunity to comment on the Proposed Rules and respectfully requests that the Board consider integrating/adopting the suggestions set forth herein. This letter provides the NBPCA's comments to the Proposed Rules as well as further requests for additional clarification based upon the Proposed Rules.

Issues Raised in the Proposed Rules and by the Board's Requests for Comments

I. Definitions

1. The exclusion for "reloadable" cards is overly narrow.

The Proposed Rules exclude from the definitions of the terms gift certificate, store gift card and general use prepaid card cards that are "[r]eloadable and not marketed or labeled as a gift card or gift certificate." (§ 205.20(b)(2), 74 *Fed. Reg.* 61006.) The NBPCA is concerned about a limitation on the term "reloadable" that was not anticipated. The definition of "reloadable" in the proposed interpretations is limited to those cards with the "capability of having more funds added by a cardholder after initial purchase or issuance." (Official Staff Interpretation on Paragraph 20(b)(2), 74 *Fed. Reg.* 61008 (emphasis added).) There are many non-gift prepaid cards in popular use that are reloadable, but not by the cardholder. For example, many payroll cards are reloadable solely by the employer; health savings account cards and flexible spending account cards are reloadable, also by the employer; university cards, teen cards, insurance cards, disaster relief cards and corporate expense cards may all reloadable as well, but not by the cardholder. Such cards should not be included within the definition of "general use prepaid cards" and should not be subject to restrictions designed solely for gift card products. In addition, a possible result of this language may be to make more cards reloadable by the cardholder that otherwise are not intended to be reloadable.

Recommendation: We urge the removal of the limitation "by a cardholder" in the definition of "reloadable" as it makes the exclusion overly narrow and leads to the unintended consequence of subjecting many useful non-gift prepaid products to these Rules which are intended only to cover gift cards.

II. Fees

1. Consumer activated fees should be distinguished from periodic service fees.

We believe the Board has generally set forth fair and reasonable rules regulating fees on gift cards, which benefit consumers while still ensuring that gift cards, a very popular and useful product, are available to the public. In particular, we support the Board's decision not to impose any dollar caps on fees, nor to set a maximum balance over which fees may

not be debited, provided of course that there are clear and prominent disclosures on the terms of such fees. (§ 205.20(d), 74 *Fed. Reg.* 61006).

We also appreciate that the Board has clarified that the “one fee per month” rule applies solely to dormancy, inactivity or service fees. (§ 205.20(d)(3), 74 *Fed. Reg.* 61006). The term “service fee” is defined as “a periodic fee for holding or use of a gift certificate, store gift card, or general use prepaid card.” (§ 205.20(a)(6), 74 *Fed. Reg.* 61006). However, in the proposed interpretations, the Board notes that such “periodic fees” include “a transaction fee, a reload fee, or a balance inquiry fee.” Presumably, this would mean that a balance inquiry or reload fee could not be charged in the same month as a maintenance or dormancy fee. This is a concern because issuers typically incur separate charges from their networks, processors and/or service providers for such “optional,” non-automatic, uses by cardholders.

Recommendation: We believe that Congress’ intent in limiting “periodic” service fees to one fee per month would exclude occasional, and non-periodic fees generated by consumers’ actions – other than actual “use” of the cards – such as balance inquiry fees, reload fees, or other fees that are not automatically charged either on a periodic basis or when a card is used to make a purchase. We request that the Board clarify that fees such as balance inquiry fees and reload fees, which are consumer activated (that is, due to an action or request by the consumer) but are not periodic nor the result of card use, and which are clearly disclosed, are *not* “service fees” and are permitted to be charged in the same month as a periodic service fee, if applicable. This critical issue regarding the definition of “service fees” also has significant repercussions with respect to card disclosure requirements. (*See* part IV.1. below.)

III. Expiration Dates

1. Alternative B provides card issuers and sellers greater flexibility with respect to their card inventory.

The NBPCA appreciates the Board’s acknowledgement that there are often two “expirations” involved in a single gift card: (i) the expiration date of the plastic card or certificate itself (the “plastic” expiration), and (ii) the expiration date of the underlying funds (the “funds” expiration). Many cards have plastic expiration dates as indicated by the “valid thru” date printed on the front of the card. But passage of such a date does not always mean that a cardholder has lost his or her funds. Often, the funds do not expire, or expire at a later date.

The Board has suggested two alternatives for addressing gift card expiration date issues. The first, Alternative A, requires that all plastic expiration dates be at least 5 years after the date the card is sold or issued. (§ 205.20(e)-Alternative A, 74 *Fed. Reg.* 61006-07). Alternative A would likely pose technological challenges to sellers of gift cards, as they would need to determine at the point of sale and prior to purchase if enough time remains before the plastic expiration date. In addition, it may also inconvenience consumers

(those purchasing gift cards or merely in line behind such persons) if sellers need to manually review cards' expiration dates before the purchase transaction is completed.

The second, Alternative B, appears to allow cards with plastic expiration dates of less than 5 years to be offered for sale, provided that the issuer/seller has policies and procedures in place that will ensure consumers have a reasonable opportunity to purchase gift cards with at least 5 years remaining before the plastic expiration date. (§ 205.20(e)-Alternative B, 74 *Fed. Reg.* 61007.) Based on the proposed interpretations, Alternative B appears to be more flexible in accommodating inventory that may have aged to be offered for sale (that is, cards that have less than 5 years remaining before the plastic expiration date, at the time the card is sold or issued), so long as the cards were originally placed on display for sale at retail with at least 5 ½ years remaining before the plastic expiration date. (Official Staff Interpretation on Paragraph 20(e)-Alternative B, 74 *Fed. Reg.* 61012). Significantly, both of these alternatives require the issuer to ensure that the underlying funds expiration does not occur until a full 5 years has elapsed from the date of purchase, and to provide, upon request, replacement gift cards free of charge.

Recommendation: As between Alternatives A and B, the NBPCA urges the Board to adopt the Alternative B language on expiration dates as a permanent, not just temporary, solution. This alternative provides issuers and sellers of gift cards greater flexibility to deal with aged inventory while still generally offering cards for sale to consumers with plastic expiration dates that meet requirements set by the Board.

2. Minimum plastic expiration dates should be shortened.

The NBPCA appreciates that the Board has substantially clarified the expiration provision from the original CARD Act. We understand that the funds expiration date must be 5 years after the card was issued/loaded *or* the plastic expiration date displayed on the front of the card - whichever is later. We understand that these provisions also require a disclosure printed *on the card* that states when the underlying funds expire, or that they don't expire; as well as information about how the consumer may obtain a replacement card including a toll-free number for such purposes.

We do not believe that the minimum plastic expiration date should be 5 years (as it must be when gift cards are delivered to retailers for sale in both Alternatives A and B) *given that the funds would still be available for at least 5 years and free replacement cards are available*. It has been our experience that lengthy plastic expiration dates increase fraud levels significantly. Moreover, there is no obvious countervailing benefit to consumers for a 5-year plastic expiration date, given that the vast majority of consumers use the card within 12 months, and that in any event replacement cards are easily available free of charge.

Recommendation: In order to minimize fraud, we encourage the Board to modify the requirements of § 205.20(e)-Alternative B and permit issuers to have plastic expiration dates as short as 3 years *provided the funds remain available for at least 5 years, the*

cards are freely replaceable and this information is properly disclosed. Permitting a shorter plastic expiration date, provided the underlying funds remain available, would benefit both consumers and the industry and would reduce risks of fraud and misuse.

3. A separate activation date should not impact the start of the 5-year expiration period.

A troubling issue arises when gift cards have an “activation date” which is different from the “sale date.” For example, some gift cards sold over the internet are mailed or delivered without being activated, and the recipient is instructed to activate the card upon receipt. Even if a card is sold online and mailed to a consumer with more than the minimum 5 years until expiration of both the plastic and the funds, it is possible that the recipient won’t activate the card until after a delay of many months. Issuers would be required to track activation dates separately from sale dates, which could pose technological difficulties. Moreover, issuers would simply be unable to ensure that plastic expiration dates are greater than 5 years from the time of card activation if a cardholder has waited several years between receipt and card activation.

Recommendation: We request clarification from the Board that, when a gift card has different sale and activation dates, the timing for expiration date purposes (for both the plastic and the underlying funds) begins when the card is sold in order to make clear that subsequent activation does not re-start the clock or create a new expiration date.

4. Preemption of state laws with respect to escheat provisions should be clarified.

The Board’s discussion of the Proposed Rules notes that the EFTA, as amended by the CARD Act, does not preempt that any state laws that address fees or expiration dates for gift cards unless those state laws are inconsistent with the EFTA. State laws are not deemed to be inconsistent if they provide greater consumer protections than the gift card provisions in the CARD Act. (74 Fed. Reg. 60988).

We believe this section was inserted with state consumer protection laws in mind. However, there are another set of state laws that impact gift cards: state abandoned property laws. There is a public misconception that gift card issuers simply keep unused gift card funds. In fact, many state laws require issuers of unused gift cards to send the remaining funds to the state where the cardholder resides or where the issuer is incorporated - usually either 3 or 5 years after the card is sold or last used. It appears the result of the interplay of these abandoned property laws combined with the Proposed Rules will be that many issuers will be required to remit (or “escheat”) funds to the state while still remaining obligated to keep the cards active and provide free replacement cards for several more years.

Recommendation: We request that the Board clarify that state escheat restrictions requiring escheat of gift cards or gift certificates be superseded so that card issuers are

not required to escheat funds to the state until after both the plastic and funds expiration dates have passed and until the issuer is no longer required to offer free replacement cards.

5. Automatic replacement of expired reloadable cards should not be required.

The Board has requested comments on whether it should also or alternatively require issuers of reloadable cards to automatically issue replacements to consumers prior to the plastic expiration date if the funds expiration date is later. (74 *Fed. Reg.* 60999.) As the Board has noted, not all issuers of such cards have systems in place to collect consumers' personal information, at the point-of-sale or otherwise, and creating such systems could be prohibitively expensive. As the Board also notes, issuers will not have reliable addresses to send replacement cards if consumers do not notify them of changes in address (which is likely to occur in a five year period).

We strongly urge against a requirement for automatic replacement of expired reloadable cards. It is not usual or necessary for gift card products, and would increase the risk of fraud for those cards. To ensure compliance, either sellers of gift card products would be required to collect personal information from purchasers at the point of sale, or issuers would be forced to use temporary cards and require recipients to provide personal information before receiving a permanent, reloadable card, in order to ensure that information is collected from all cardholders. As the Rule's focus is on *gift* cards, it is quite possible that the card purchaser may not have relevant recipient information available at the time of purchase. Requiring the using of temporary cards would significantly increase costs and infuse a layer of complexity into a product that consumers choose as a gifting option largely due to their convenience. Automatically issuing replacement cards may also be viewed by consumers as interfering with their privacy, and is wasteful of both paper and plastic resources.

Reloadable card issuers are required under the Proposed Rule to disclose information on the expiration date(s) of the plastic and funds, and information on obtaining a replacement card, on the card itself. Consumers are able to request a replacement card free of charge, and many may need to provide an updated mailing address from the one given at or around the of card purchase 5 years prior.

Recommendation: The Board should not require issuers of reloadable cards covered by the CARD Act to automatically issue replacement cards prior to the plastic expiration date.

IV. Disclosures

1. Required disclosures "on" the card should be limited to key terms; other terms should be disclosed via stickers or packaging.

The Proposed Rules have significant requirements for disclosures that must be made “on” the card itself. These include:

- The amount of any dormancy, inactivity or service fees, including any balance inquiry fee, reload fee, ATM fee or other transaction fee, because the Board has also deemed these types of fees to be service fees (see Part II.1. above);
- How often such fees may be charged;
- That such fees may be charged for inactivity;
- The plastic expiration date, if any;
- The funds expiration date, or if the underlying funds don’t expire, that fact;
- A statement in equal prominence and close proximity to the plastic expiration date noting that the card expires but the underlying funds either do not expire or expire at a later date, and that the consumer may contact the issuer for a replacement card;
- A toll-free number and, if maintained, the web site from which replacement cards are available;
- A toll-free number and, if maintained, a web site for the consumer to obtain information about all card fees.

In addition to the types of required disclosures in the Proposed Rules, many state consumer protection laws also require disclosure *on the card itself* of: (i) the name of the card issuer; (ii) any limitations on refunds for lost/stolen cards; and (iii) FDIC insurance coverage (or lack thereof). In addition, for network branded cards, there are requirements for placement and size of the network logo (Visa, MasterCard, American Express or Discover) and other network indicia. Finally, most intellectual property lawyers require issuers to include copyright and trademark notices on the card as well.

Bottom Line: This is a tremendous amount of data to fit onto one small plastic card. Having too many disclosures is unwieldy and likely to impede - not encourage - consumer understanding of the terms and conditions for these cards. Please see Attachment A for examples of what a card might look like if it contained all the disclosures required by the Proposed Rules.

Recommendation: If the card has a reference that “other terms apply” and where to obtain them, most of this data (such as reload fees and how to obtain a replacement card) can be disclosed clearly and conspicuously elsewhere - either on the card packaging and/or on a sticker affixed to the card. We strongly recommend that the Board limit the disclosures required to be printed on the card itself to only the most critical terms and permit separate disclosures of all relevant terms on the packaging and/or with a sticker.

2. Disclosures “on the card” cannot be required for non-card products such as “codes,” “virtual cards” or “other devices.”

A related concern involves the extension of the Proposed Rules to cover all potential types of prepaid gift products, such as electronic or digital gift certificates or computer

chips attached to mobile payment devices. We have observed an increase, for example, in the use of contactless stickers placed on mobile phones to perform payment transactions. For these products, the above disclosures are not just unwieldy, they are impossible. We understand that the Board has sought comment regarding approaches or solutions that could avoid “potential impediments to innovation while still providing consumers clear and conspicuous disclosures” for certain products, especially those that have very limited space on which to print disclosures.

Recommendation: We suggest that the Board expressly exclude any non-plastic card code or device from the requirements for “on-card” disclosures, and instead, permit the disclosures for such products to be clearly and conspicuously included on the packaging, or, for virtual or web products, to be offered in a format that can easily be downloaded and/or printed and retained by the consumer.

3. Requirements for disclosures on loyalty, award and promotional cards should be clarified.

The NBPCA commends the Board’s approach in defining loyalty, award and promotional cards broadly to encompass all such cards that are issued in connection with a loyalty, award or promotional program, provided that the appropriate disclosures are made. Many promotional cards, such as those cards given to consumers in connection with store sales or promotions, have expiration dates and occasionally have fees.

The Board has noted that the Proposed Rule “does not impose substantive restrictions on dormancy, inactivity, or service fees, or on expiration dates, for cards ... issued pursuant to a loyalty, award, or promotional program.” However, the Board is imposing a requirement that the terms that apply to these cards are clearly and conspicuously disclosed. (Preamble, 74 *Fed. Reg.* 60994.) However, the list of required disclosures appears to be inconsistent with this intention.

We understand that the reference to disclosures required by paragraphs “(d)(2), (e)(2) and (f)” was in fact intended to read “(d)(2), (e)(3) and (f).” Even so, the explicit requirement for these disclosures seems strained in this context and we request additional clarification regarding the Board’s intentions.

For example, paragraph (d)(2) sets forth the requirement for disclosure of dormancy or service fees, which are generally *not* applicable to reward card products. Similarly, the disclosure in paragraph (e)(3)(iii) requires a “statement disclosed with equal prominence and in close proximity to the [plastic] expiration date” noting that the plastic expires, but the underlying funds do not, or that the funds expire later than the plastic expiration date, and the consumer may contact the issuer for a replacement card. While these paragraphs are qualified by the phrase “as applicable,” the exclusion for loyalty, award and promotional cards that meet specific disclosure requirements may be misunderstood to mean that the Proposed Rule’s general restrictions on fees and expiration dates referenced

in those three paragraphs actually *apply* to these cards, rather than the requirement to merely *disclose* any fees or expiration dates.

Recommendation: We believe that simply saying these disclosures only apply “if applicable” will create unnecessary confusion. We suggest that Board consider creating a separate sub-section in the Rule to specifically address the disclosure requirements applicable to loyalty, award and promotion cards. In addition, and more importantly, we request that the Board confirm that - with respect to loyalty, award and promotional cards - expiration dates, on both the plastic and the funds that are clearly and conspicuously disclosed can be imposed, without the requirement to offer free replacement cards.

4. Specific size of font and other prominence requirements for disclosures are not necessary.

The Board has already imposed a requirement for “clear and conspicuous” disclosures which we believe is appropriate and provides clarity for consumers while also providing necessary flexibility to issuers. The Board has now requested comments on whether it should specify type size or prominence requirements for disclosures. The “clear and conspicuous” standard is used in both credit card and debit card disclosure requirements. As prepaid cards are often considered the functional equivalent of credit and debit cards in many respects (particularly in size and design), it seems incongruous to mandate a different standard for gift cards under the Proposed Rules.

Recommendation: We believe that the use of the “clear and conspicuous” standard for disclosures provides sufficient clarity while at the same time allowing for flexibility in implementing card disclosures. Given that issuers must also comply with non-uniform, more restrictive state laws on disclosures, we strongly discourage the Board from imposing any specific font size or prominence requirements for disclosures under these Proposed Rules.

V. Exclusions

1. Temporary, non-reloadable cards that provide access to general purpose reloadable cards should be excluded.

The Board requested comments on the appropriate treatment of non-gift general-purpose reloadable cards that are initially sold as a non-reloadable card. (Preamble, 74 *Fed. Reg.* 60993.) The Board expressed concern that if such products were excluded, the consumers that elect not to register the card (and thus do not receive a reloadable card) are left without the statutory protections provided by the CARD Act. Alternately, the Board observed that if such products are not excluded, then the exclusion in the Proposed Rule for reloadable cards not marketed as gifts (§ 205.20(b)(2)) would be essentially be eliminated for many general-purpose reloadable cards.

A third approach the Board considered was for the restrictions in the Proposed Rules on fees and expiration dates to be applied only to the initial, non-reloadable card only, and not to the ultimate reloadable replacement card. However, the Board expressed concern that this approach may confuse or surprise consumers when they receive new terms regarding fees and expiration dates for the reloadable card that are different from those initially disclosed for the non-reloadable card.

We believe there is a fourth option: using its “Additional Rulemaking” authority granted by Congress, the Board should issue a new Rule regarding such temporary cards (which were not contemplated or addressed in the original legislation). These temporary cards are a necessary and functional part of most general purpose reloadable card programs that are relied upon by so many unbanked and underserved consumers. Furthermore, consumers have a choice, as with all reloadable cards, as to whether or not to add funds. The fact that it is a consumer’s choice to take the steps necessary to add funds should not turn these products into gift cards.

We note that there are many reasons why the Board should implement separate rules for these temporary general purpose cards:

- They are not gift cards and were never intended to be included in this gift card legislation.
- These temporary card products are not marketed or sold as anything *other than* general-use, non-gift reloadable prepaid cards.
- The card packaging clearly indicates that the consumer is purchasing a reloadable non-gift card and includes all disclosures applicable to a reloadable non-gift card. As a convenience to the customer, a temporary card is provided at the point-of-sale in order to allow the consumer immediate access to their funds while their personalized card is being printed and mailed.
- Such non-reloadable temporary cards are not only a convenience to the consumer, but they also reduce the risks of money laundering, by strictly limiting the amount of funds to be loaded on the anonymous temporary card.
- These temporary cards are extremely useful and convenient for consumers. For example, some payroll cards are also provided initially as “instant issue” cards, to give employees immediate access to their wages before a personalized card is printed and delivered.
- If the consumer does not pass the issuer’s customer due diligence review, a personalized card is not issued and, in lieu of a refund check, the consumer has the option to spend the remaining funds loaded onto the card. Fees are generally not assessed in those circumstances.

In considering this issue, it is important to understand that general purpose reloadable prepaid card providers do not want their cards to be purchased or used as a gift card. They are in the business of establishing long-term relationships with their cardholders and the typical short-term gift card usage actually creates a loss for them. They have no

incentive whatsoever to induce a consumer who is seeking a gift card to purchase a temporary general purpose reloadable card.

Provided that the temporary cards are clearly designated as temporary cards, and are issued solely in connection with a long term, reloadable, general purpose prepaid card program, such cards should *not* be subject to the CARD Act restrictions. Certainly disclosures should be made ON the card and on the packaging at the time the temporary card is sold to consumers, and once again when the temporary card is “registered” and/or at the time the personalized, reloadable card is sent to the cardholder.

Recommendation: We urge the Board to explicitly exclude, from the coverage of the Proposed Rules, any temporary non-reloadable card offered at retail solely in conjunction with a non-gift, general purpose, reloadable card product.

2. The exclusion for paper certificates does not create an undue risk of circumvention.

The Board has excluded cards, codes or other devices that are issued in paper form only from the scope of the Proposed Rules. However, such paper certificates may bear a bar code or account number which allows the retailer to record and track the certificate’s use electronically. The Board has requested comment as to whether this aspect of the Proposed Rules creates an “undue risk of circumvention.” (74 *Fed. Reg.* 60995).

We do not believe that this exemption creates an undue risk of circumvention. The reason so many retailers have moved away from paper certificates to electronic or plastic products is because of the enhanced features available on electronic devices that benefit both the retailer and the consumer. We believe it is extremely unlikely that a retailer or gift card issuer would return to paper certificates in lieu of cards for the purpose of avoiding application of the Proposed Rules. We agree that the smaller companies that still issue their certificates on paper should be excluded.

Recommendation: We urge the Board to keep the paper certificates exemption from the Proposed Rules as drafted.

VI. Marketing

1. What constitutes “marketed or labeled” as a gift card should be clarified.

One issue of note is that the proposed interpretations indicate that non-gift prepaid card products, such as general purpose reloadable cards, could be deemed “gift cards” if they are sold from a display that is labeled “Gift Cards.” (Official Staff Interpretation on Paragraph 20(b)(2), 74 *Fed. Reg.* 61008-09). The Board suggests, instead, that two separate displays should be used, one for “gift cards” and another for other “non-gift” products. (Preamble, 74 *Fed. Reg.* 60993). We believe that requiring two separate display cases is not only unnecessary, but would also create significant difficulties for

retailers that sell prepaid cards (because floor and rack space are at a premium). Rather than provide space for a second display, retailers may stop selling general purpose reloadable cards altogether, thereby significantly restricting access of these economical and beneficial products for the unbanked and underbanked.

In addition, we do not believe that the same concerns about consumers confusing general purpose reloadable cards with gift cards exist when such products are sold online as opposed to in retail stores. For example, if a purchaser visits a website with “gift cards” or gifting messages in the website name, the online seller has multiple opportunities through web technology to educate the purchaser about the products being sold. For example, a purchaser could visit a website that makes both gift and personal use products available to consumers. A purchaser interested in buying a personal use product could receive multiple messages through “pop ups” that must be actively closed and/or accepted which inform the purchaser that a general purpose reloadable card is not a gift card.

We note that products are marketed in many ways for retail sale, including the use of circulars, catalogues and other advertising. The Board’s comments on displays could be read to mean that gift and general-use reloadable prepaid card products could not be advertised in the same print or online media, the way that other products like canned vegetables or frozen food are currently advertised by retailers.

Finally, an issuer, program manager, marketer or distributor of prepaid cards may itself, or through affiliates, have business segments that are involved with both gift cards and general-use reloadable cards. A company should be able to describe its business without the risk that it will cause its general-use reloadable prepaid cards, that are not otherwise marketed as gift cards, to lose their exemption under the Proposed Rules when the company (or others in the media) describes its general business to the public, either on a website, via company brochures, through press releases, or otherwise.

Recommendation: We request that the Board clarify that the same retail display case can be used for both gift and non-gift cards, provided any of the following apply: (i) the top signage communicates, in a manner to avoid consumer confusion, that both gift and non-gift cards are available for sale on the same display (for example a display could utilize 2 different signs at the top or above each section distinct section); (ii) the sections for each product are clearly labeled or otherwise distinct from each other by use of colors, design, and/or signage; (iii) the display has a generic label such as “prepaid cards”; or (iv) the non-gift card is clearly labeled on the outside of the package as “Not a Gift Card” (or words to the same effect). For online purchases, we request that the Board clarify that general-use reloadable prepaid cards may be offered for sale on websites that also offer gift cards for sale, provided that an online purchaser of a general-use reloadable prepaid card is informed prior to purchase that card is not a gift card. We also request that the Board clarify that the same advertising material can be used for both gift and non-gift cards, and that the consequence of any bona fide error in advertising gift and non-gift cards would be for the advertiser to retract the advertisement as soon as practicable after

the error and either send a replacement gift card to any consumer who purchased a non-gift card in reliance on the faulty advertisement or refund the consumer's money.

VII. Scope of the Proposed Rules

1. Any cards that cannot be purchased or obtained by the general public should be covered by the "Not Marketed to the General Public" exemption.

The NBPCA agrees generally with the examples of cards not marketed to the general public, except for the example regarding "tax refund cards." The comments suggest companies that actively markets the "ability of a consumer to receive a prepaid card for faster access to their tax refund proceeds" then the exclusion would not apply. (74 *Fed. Reg.* 60995). We would agree that if a tax preparation company allows anyone off the street to come in and purchase a prepaid card which could be used for tax refunds, then the exemption would not apply. But if, under the example provided, the only way a consumer could receive the tax refund prepaid card is by becoming a customer of that tax preparer and getting his or her taxes completed by the tax preparation company, then clearly the card is *not* being offered to the general public. We note that consumers file only 1 tax return a year – so this is not the nature of a frequent flyer or loyalty program where one consumer can enroll in multiple programs.

Recommendation: We request that the Board clarify that a tax preparation company's (or other similar company's) advertising of consumers' ability to obtain their tax refunds (or other funds) on a prepaid card does not, in itself, vitiate the exclusion, provided that the cards are not made available to the general public.

2. The scope of the Proposed Rules should be limited so that they do not apply to cards issued for business purposes, should eliminate the example regarding reward or incentive programs, and should clarify the comment regarding "monitoring."

The Board solicits comments as to "whether it is appropriate to limit the scope of the final rule so that it does not apply to cards issued for business purposes." (74 *Fed. Reg.* 60989). The NBPCA believes that such a limitation is both fair and reasonable, given that the CARD Act provisions were intended solely to cover a consumer product, gift cards and gift certificates, and further given that the EFTA is a consumer protection statute limited solely to consumer products. We understand that once a card is sold to the public, it does become subject to the Proposed Rules, even if it was originally sold as a business product. However, we are concerned that the example given regarding the applicability of the CARD Act protections to "reward or other incentive programs" will cause undue confusion given the exclusion for such programs under paragraph 205.20(b)(3). (Preamble, 74 *Fed. Reg.* 60989; Official Staff Interpretation on Paragraph 20(a)(4), 74 *Fed. Reg.* 61009-10.) We request that the Board simply remove that example from its commentary accompanying the Rule. We are also concerned about the suggestion that issuers would have to "potentially monitor the distribution or sale of gift cards to ensure that the end use is for business purposes." As with other reward and

incentive products (samples distributed, for example), it is industry practice simply to mark the reward or incentive product as “not for resale.” The comment suggests a much higher level of oversight, which, in our view, will make reward or incentive products unfeasible.

Recommendation: The NBPCA endorses a clear limitation on the scope of the Proposed Rules so that they do not apply to business products. In addition, we suggest (i) that the reward/incentive example be removed from this section of the Proposed Rules; and (ii) that the language denoting the possible requirement for monitoring be eliminated, and instead language indicating that issuers of non-consumer products which (a) are appropriately labeled as “not for resale” or other similar language; and (b) are distributed through entities that are contractually bound not to resell such products to the public, be clearly granted a “safe harbor” from any liability if such products are sold to the public unwittingly or in violation of the contract.

VIII. Effective Date

1. The effective date for compliance should be extended for all cards existing in the marketplace.

The CARD Act requires final rules to be adopted by the Board that become effective no later than August 22, 2010. The Board has requested comments on the potential costs to issuers and other program participants to remove and replace existing card stock in store inventory to ensure that all cards sold after the effective date are in full compliance with the Proposed Rules. In addition, the Board has requested comments as to whether it should grandfather cards that are in the marketplace as of the effective date from some or all of the requirements set forth in the Proposed Rule. The Board has noted that it intends to limit such relief to only cards that are sold in physical retail channels, and not to provide relief for cards that are purchased online or by phone. Finally, the Board has requested comment as to how issuers or vendors should alert consumers to the revised terms regarding fees and expiration dates.

If the final Board rules are issued on February 22, 2010, the industry will have 6 months to produce and merchandise new stock, as well as remove old stock, and possibly manufacture and install new displays and signage. Please see Attachment B for typical production to issuance timelines, for both gift cards and promotional cards. As issuers of gift and reloadable cards rely on a limited number of third party vendors for services such as card production and merchandising, these vendor resources will be hard pressed to meet the needs of the affected members of the prepaid industry by the compliance deadline. Assuming that it is possible to accomplish this in 6 months, our information indicates that to replace all card stock in inventory at retail by August 22, 2010 would cost at least \$20-50 million *per card issuer and/or distribution channel*.

We also question the reasoning behind the suggestion that no older inventory should be distributed for online sales. Because issuers control the disclosures on their websites, and

the packaging of cards sold directly from their own inventory, if online sales of older inventory was permitted, it could allow issuers to package older inventory with very clear and conspicuous meaningful disclosures, and allow such issuers to replace more quickly the inventory at the retail point-of-sale.

In view of the fact that so many issuers/distributors have large inventories of existing card stock (one of our members, for example, has a million cards in inventory), we believe that grandfathering existing stock is a fair and reasonable approach to the transition issue.

Recommendation: We encourage the Board to grandfather all physical cards (gift cards as well as loyalty, award and promotional cards required to comply with specific disclosure requirements) already in the marketplace, including cards that are sold online or via telephone, as of the effective date for an additional period of two years, until August 22, 2012.

Older stock should be permitted to be sold so long as there is display and point-of-sale signage and/or website or Interactive Voice Response notice (for cards that must be activated or registered). New terms should be available for download on websites or mailed upon request, at no charge, through Interactive Voice Response systems. Finally, issuers should have the options of “stickerizing” older stock with permanent or difficult to remove stickers (together with a message not to remove) that advises consumers of new fee and expiration date terms, if any. Fees should be suppressed for the initial 12 months of inactivity after sale, free replacement cards should be made available, and other requirements in the Proposed Rules (other than related to disclosure of terms on the card or card packaging) should apply.

Conclusion

The NBPCA supports the growth and success of network branded prepaid cards in the marketplace. Our members not only seek to meet consumer product demand, but they also strive to achieve the highest level of consumer satisfaction.

The NBPCA supports the goals of the Board’s Proposed Rules and we respectfully urge the Board to consider all of the comments and suggestions set forth herein. If you have any questions, or would like to discuss any of the matters outlined above in further detail, please do not hesitate to contact us at (201) 746-0725.

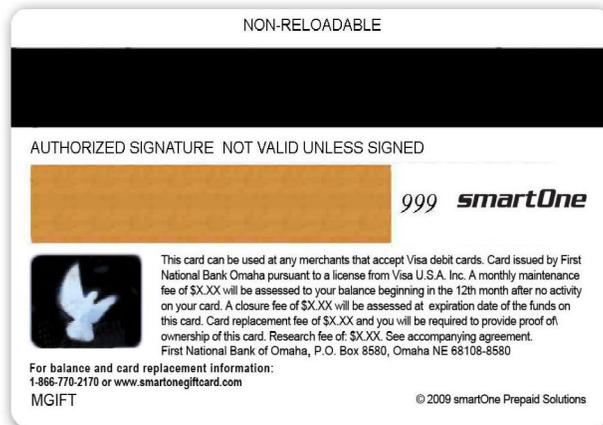
Sincerely,

The Network Branded Prepaid Card Association

Kirsten Trusko
President and Executive Director

ATTACHMENT A

**EXAMPLES OF CARDS CONTAINING ALL DISCLOSURES
REQUIRED BY THE PROPOSED RULES[⊕]**



[⊕] Note - Disclosures on the reverse of the card may be even more difficult to read because the embossing on the front of the cards may distort the fine print.

ATTACHMENT B

**AVERAGE PRODUCTION TO ISSUANCE TIMELINES
 FOR GIFT CARDS AND PROMOTIONAL CARDS**

Typical Time-Line: Prepaid Card Development from Design through Launch*

| TASK NAME | MONTH 1 | MONTH 2 | MONTH 3 | MONTH 4 | MONTH 5 | MONTH 6 | MONTH 7 | MONTH 8 | MONTH 9 | MONTH 10 | MONTH 11 |
|--|---------|---------|---------|---------|---------|---------|---------|---------|---------|----------|----------|
| Scope Document, MSA & Prepaid SOW ** | | | | | | | | | | | |
| Program Registration ** | | | | | | | | | | | |
| Design Card and Collateral ** | | | | | | | | | | | |
| Collateral Proof Prep, Assn Approvals, and Proof Sign Offs | | | | | | | | | | | |
| Marketing, Customer Service Setup, Finance, Training | | | | | | | | | | | |
| Ordering Cards and Collateral | | | | | | | | | | | |
| Testing | | | | | | | | | | | |
| Ready for Launch | | | | | | | | | | | |

* Different programs may have variations from 2-4 weeks within each functional line.