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December 21, 2009

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

Submitted via email

Re: Electronic Fund Transfers, Docket No. R-1377

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA) appreciates the opportunity to comment on a proposed rule by the Board of Governors of the Federal Reserve System ("the Federal Reserve") amending Regulation E, which implements the Electronic Fund Transfers Act ("the EFTA"). This proposed rule amendment would restrict the fees and expiration dates that may apply to gift certificates, store gift cards and general-use prepaid cards.

Background

On May 22, 2009, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the Credit CARD Act) was signed into law. Section 401 of the Credit CARD Act amends the EFTA and imposes restrictions on how a gift card issuer -- either a financial institution or a retailer -- imposes dormancy, inactivity, or service fees with respect to gift certificates, store gift cards, and general-use prepaid cards. In addition, the Credit CARD Act generally prohibits the sale or issuance of such products if they are subject to an expiration date earlier than five years from the date of issuance or five years from the date on which funds were last loaded to the card.

Community banks traditionally offer gift cards that typically carry a card network brand logo (such as Visa, MasterCard, American Express or Discover) and can be used at a wide variety of merchants that accept or honor cards displaying that brand. According to ICBA's 2009 Community Bank Payments Survey, 63 percent of community banks offer prepaid gift cards to consumers.

ICBA Comments

While the proposed rule will improve the consumer experience through greater disclosures, restrictions on fees and expiration dates, it must do so in a manner that is clear to the consumer and enables banks to offset the expenses related to gift cards. ICBA urges the Federal Reserve to clarify preemption of state laws with respect to escheat provisions and expand the exclusion for “reloadable” cards to include non-gift prepaid cards. Disclosures of the card should be limited to the most critical terms, other terms should be disclosed via stickers or packaging and should be “clear and conspicuous.” This will allow sufficient clarity for the consumer while giving flexibility in implementing card disclosures to issuers. Consumer-activated fees should be distinguished from periodic service fees and should be excluded from the “one fee per month” provision. Cards with plastic expiration dates of less than five years should be offered for sale, provided that the issuer/seller has policies and procedures in place that will ensure consumers have a reasonable opportunity to access the card funds for at least five years. Finally, the requirement to automatically replace expired reloadable cards should be eliminated.

ICBA’s detailed comments on specific aspects of the proposed rule follow.

Governing Law and Regulation

The Credit CARD Act requires the Board to determine the extent to which the individual definitions and provisions of the EFTA and Regulation E should apply to gift certificates, store gift cards and general-use prepaid cards. ICBA commends the Federal Reserve for its balanced and uniform application of the EFTA and Regulation E to the referenced instruments regardless of issuer. We further applaud the Federal Reserve’s decision not to add periodic statement requirements.

The Credit CARD Act amends EFTA so as not to preempt any state laws that address dormancy, inactivity, service fees, or expiration dates for gift certificates, store gift cards, or general-use prepaid cards if such state laws provide greater consumer protection than the new gift card provisions. More than 40 states have laws applicable to gift cards. Most commonly, state gift card laws restrict the circumstances under which dormancy, inactivity, or service fees may be charged and/or restrict the circumstances under which the card or funds underlying the card may expire. Other state laws simply require the disclosure of fees or expiration dates. Many states have applied abandoned property or escheat laws to funds remaining on gift cards, and some states require that consumers have the option of receiving cash back when the underlying balance falls below a certain amount.

ICBA urges the Federal Reserve to clarify preemption of state laws with respect to escheat provisions. Additionally, ICBA requests the Federal Reserve to clarify that state escheat law restrictions are 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.

Exclusions

The proposed rule excludes several types of cards, codes or other devices that are: 1) reloadable and not marketed or labeled as a gift card or gift certificate; 2) loyalty, award or promotional gift cards; and 3) not marketed to the general public. Entities would qualify for this exclusion as long as they maintain “policies and procedures reasonably designed to avoid marketing of a prepaid card not otherwise subject to the rule, such as a general purpose reloadable card, as a gift card or gift certificate are established and maintained.”

ICBA urges the Federal Reserve to expand the exclusion for “reloadable” cards to include non-gift prepaid cards such as payroll cards, health savings account cards, flexible spending account cards, university cards, teen cards, insurance cards, disaster relief cards and corporate expense cards, which may be 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.

Disclosures

Under the proposal, required disclosures on the certificates and cards include the expiration terms for cards and certificates and any underlying funds. The proposal also mandates a toll-free telephone number and, if one is maintained, a Website, for consumers to obtain a replacement instrument if funds are available after the instrument’s expiration.

ICBA strongly urges the Federal Reserve to limit disclosures on the card to the most critical terms such as applicable fees, expiration dates and issuer contact information. Other terms should be disclosed via stickers or packaging. Having excessive disclosures on the card will impede consumer understanding of the terms and conditions for these cards. In lieu of the Federal Reserve prescribing font and other prominence requirements for on-the-card disclosures, ICBA recommends using the “clear and conspicuous” standard to provide issuers some flexibility in complying with card disclosure requirements given the limited space on the physical card.

Fee Prohibitions

The proposed rule prohibits dormancy, inactivity and service fees on gift certificates, store gift cards, and general-use prepaid cards unless there has been no activity within a one-year period; only one fee per calendar month is assessed; and applicable fees are “clearly and conspicuously” stated on the certificate or card and the purchaser receives disclosures before purchase. The proposed rule does not impose any dollar caps on fees, nor is there a maximum balance over which fees may not be debited.

ICBA appreciates the Federal Reserve's clarifying that the "one fee per month" rule applies solely to dormancy, inactivity or service fees and that a service fee does not include a one-time fee, such as an initial issuance fee or cash-out fee. ICBA, however, strongly urges the Federal Reserve to distinguish consumer-activated fees from periodic service fees. Under the proposed rule a balance inquiry or reload fee could not be charged in the same month as a maintenance or dormancy fee. Issuers often incur separate charges from their networks, processors and/or service providers for such "optional," non-automatic, uses by cardholders.

We urge the Federal Reserve to 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.

ICBA strongly applauds 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 that there are clear and prominent disclosures on the terms of such fees. ICBA strongly opposes the requirement under the proposed rule that replacement cards should be provided to the customer free of charge. Community banks incur many expenses when reissuing a card and a reasonable fee will offset expenses.

Expiration Dates

The Credit CARD Act requires gift certificates have expiration dates at least five years after issuance and cards have expiration dates of at least five years after the funds are last loaded on the card. Expiration terms must be clearly and conspicuously disclosed. The Federal Reserve acknowledges that there are often two "expirations" involved in a single gift card: 1) the expiration date of the plastic card or certificate itself (the "plastic" expiration), and 2) the expiration date of the underlying funds (the "funds" expiration).

The Board suggests two alternatives for addressing gift card expiration date issues. The first, Alternative A, requires that all plastic expiration dates be at least five years after the date the card is sold or issued. The second, Alternative B, appears to allow cards with plastic expiration dates of less than five years to be offered for sale, provided that the issuer/seller has policies and procedures in place that ensure consumers have a reasonable opportunity to purchase gift cards with at least five years remaining before the plastic expiration date.

ICBA recommends adoption of Alternative B as it provides card issuers and sellers greater flexibility with respect to their card inventory. 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 Federal Reserve.

ICBA strongly urges the Federal Reserve to shorten minimum plastic expiration dates. 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.

Additionally, ICBA strongly opposes the requirement to automatically replace expired reloadable cards. As the focus of the proposed rule is on gift cards, it is unlikely that the card purchaser will have the recipient's address at the time of purchase, making it impossible for an issuer to comply with this requirement. Moreover, it would be extremely costly and burdensome for issuers/sellers to obtain and maintain this information and consumers may be hesitant to provide this information.

Again, ICBA appreciates the opportunity to comment on this proposed rule. If you have any questions or would like additional information, please contact the undersigned by telephone at (202) 659-8111 or by e-mail at cary.whaley@icba.org.

Sincerely,

/s/

Cary Whaley

Vice President, Payments & Technology Policy