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Via Electronic Mail

December 21, 2009

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

RE: Docket No. R-1377

Dear Ms. Johnson:

MasterCard International (“MasterCard”)¹ submits this comment letter in response to the proposed amendments to Regulation E and its Official Staff Commentary (“Proposal”) issued by the Board of Governors of the Federal Reserve System (“Board”) to implement Title IV of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“Act”). The Proposal addresses certain disclosure requirements, limits on fees and expiration dates on gift certificates, store gift cards and general-use prepaid cards. *See 74 Fed. Reg. 60986* (Nov. 20, 2009). MasterCard appreciates the opportunity to provide its comments on the Proposal.

Scope of the Proposal

The Board notes in the Supplementary Information that Title IV of the Act is not expressly limited to consumer-purpose prepaid card products, and requests comment on whether it would be appropriate to limit the scope of the final rule so that it only applies to consumer-purpose prepaid card products. Based on Congress’ decision to codify Title IV of the Act in the Electronic Fund Transfer Act (“EFTA”), the circumstances that gave rise to the introduction of the Title IV provisions and the sophistication of commercial parties, we strongly encourage the Board to limit the scope of the final rule to consumer-purpose prepaid card products.

¹ MasterCard advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. In the company’s roles as a franchisor, processor and advisor, MasterCard develops and markets secure convenient and rewarding payment solutions, seamlessly processes more than 20 billion payments each year, and provides analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world’s leading financial institutions. With more than 25 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard.

By its own description, the EFTA is a consumer protection statute. *See* EFTA § 902(b). Moreover, the long-standing congressional interpretation of the EFTA is as a consumer protection statute. The congressional report accompanying the EFTA states that the statute's principal purpose is "the creation of substantive *consumer* rights." *See* S. Rep. 95-915, 9405 (emphasis added). The Board reached a similar conclusion in its 1997 report to Congress on stored value products, where it was noted that "the primary goal of the [EFTA] is to protect consumers."² The inclusion of the Title IV provisions in the EFTA signifies Congress' intent to apply the Title IV protections to consumers. This approach is consistent with the origin of the Title IV provisions, which was a concern regarding the utility of gift cards purchased by consumers and regarding whether consumers were receiving appropriate disclosures with respect to limits on card utility, such as limits that result from expiration dates and fees.³ Finally, due to the sophistication of commercial parties, there is not a need to extend the Title IV protections to business-purpose prepaid card products. Many federal laws regarding financial services practices and disclosures, including the Truth in Lending Act and Truth in Savings Act, recognize the difference in the level of sophistication of consumer and commercial parties and apply exclusively or primarily to consumers. Because commercial parties do not require the same protections as consumers, the Proposal should apply only to consumers.

Excluded Products

The Act identifies six prepaid products that are not subject to the substantive restrictions regarding expiration dates and fees. Among the excluded products are prepaid cards that are "reloadable and not marketed or labeled as a gift card or gift certificate," and prepaid cards that are "not marketed to the general public." The Proposal would implement these statutory exclusions under proposed §§ 205.20(b)(2) and (b)(4), respectively, and the proposed Official Staff Commentary for such sections. Our comments on these aspects of the Proposal follow.

Proposed § 205.20(b)(2)

The Board requests comment under proposed § 205.20(b)(2) regarding the treatment of certain temporary cards that can be converted into, or replaced by, a reloadable card. Some programs for the issuance of reloadable cards that are not marketed or labeled as gift cards require consumers to purchase a temporary card and then to undertake an identification and card validation process before the card can be reloaded or replaced with a permanent card capable of accepting multiple loads. The issuers of these cards typically employ this two-step process to control the quality of the customer identification and card validation. In the Supplementary Information, the Board notes that these temporary cards are not literally reloadable at the time of purchase because they cannot be reloaded without further action. For this reason, the Board

² Board of Governors of the Federal Reserve System, *Report to Congress on the Application of the Electronic Fund Transfer Act to Electronic Stored-Value Products*, (March 1997) at 2.

³ *See* Press Release from Senator Charles E. Schumer, "Schumer, Mark Udall Introduce Bill to Protect Consumers from Hidden Gift Card Fees Secretly Draining Shoppers' Pockets," (March 27, 2009) (stating that the purpose of the legislation, originally introduced by Senator Schumer as S. 710, the Fair Gift Card Act, is to "protect millions of American consumers from unreasonable expiration dates and fees that routinely drain gift cards' value").

raises the question of whether these cards should fall outside the exclusion for reloadable cards that are not marketed or labeled as gift cards.

We strongly discourage the Board from treating these temporary cards as non-reloadable cards for purposes of Title IV. Congress draws distinctions in Title IV based on the intended use of cards, granting exclusions for prepaid cards that are not intended to be used as gifts. The premise of the exclusions in Title IV is that, if a card is not intended to be used as a gift and consumers understand this, then the card does not raise the same policy concerns as a gift. The intended use of the temporary cards at issue is clearly not as a gift. Such cards are marketed as reloadable, and are not marketed or labeled as a gift card. The fact that these cards cannot be reloaded until validated or replaced does not change the intended use of the card as communicated to or understood by consumers. Such cards are not “designed to be purchased by one consumer and given to another consumer as a present or expression of appreciation or recognition” and are not the type of product that Congress intended to regulate under the Act. *See 74 Fed. Reg. 60986.*

Also, the alternatives to recognizing that the exclusion in Section 205.20(b)(2) applies to temporary cards that are reloadable and not marketed or labeled as a gift card raise serious concerns. One alternative is to treat such cards as non-reloadable cards—whether pre- and post-identification/validation and including any replacement permanent card. This approach would unfairly apply restrictions to these cards after the consumer takes the identification/validation step and the card literally is capable of reloading. The other alternative is to treat these cards as non-reloadable until reloaded and as reloadable thereafter. As the Board seems to acknowledge in the Supplementary Information, this approach is unworkable because it would do little more than confuse consumers. The only approach that does not strain the policy underlying Title IV is to treat temporary cards as an integral part of a reloadable card product—which approach is consistent with the development and marketing of these cards by issuers.

Proposed § 205.20(b)(4)

Proposed § 205.20(b)(4) would implement the statutory exclusion for cards that are not marketed to the general public. The Board expressed concern in the Supplementary Information that a broad interpretation of this exclusion could create a loophole and undermine the protections provided by Title IV of the Act. The Board’s approach to this exclusion is best summarized by the following statement in the Supplementary Information: “where the card is not advertised or otherwise promoted . . . the Board believes the card is not marketed to the general public.” *See 74 Fed. Reg. 60994.* However, the Board’s approach unreasonably limits the scope of an express exclusion provided by Congress in Title IV. Had Congress intended to provide an exclusion only for cards that are not marketed, it could have done so. Rather, it chose to provide an exclusion based on how, not whether, cards are marketed.

The Board’s approach so narrowly interprets Title IV that gift cards marketed exclusively to members of a retailer’s frequent buyers program fall outside the exclusion. *See proposed comment 20(b)(4)-2.ii.* As we understand the Proposal, the rationale for this interpretation is that these programs typically allow any member of the general public to become a member of the program, and that these cards are therefore indirectly marketed to the general public.

The Board's objective of implementing the exclusion in Title IV for cards not marketed to the general public in a way that does not undermine the protections provided in the Act can be accomplished without eviscerating the exclusion. We believe that the statutory exclusion can be given its meaning and the Board's objective can be met with a comment in the Official Staff Commentary that defines "not marketed to the general public" as cards that are marketed to persons who meet a distinct and objective qualification, condition, or limitation that results from an affirmative action of such persons (*e.g.*, electing to participate in a frequent buyer program).

Teen Cards

Proposed comment 20(b)(4)-2.iii explains that the exemption for cards that are not marketed to the general public would not apply to a reloadable card advertised to teenagers to help them manage their everyday expenses, or to cards marketed to parents to enable parental monitoring of such spending. Although we recognize that the Proposal specifically provides that a product is not covered if it falls within any exclusion, we ask the Board to explicitly state that teen cards are excluded under Proposed § 205.20(b)(2) if such cards fit the description of Proposed comment 20(b)(4)-2.iii and are not marketed or labeled as a gift card. We think that such a clarification would be helpful to issuers and marketers of teen cards notwithstanding proposed comment 20(b)-2 regarding multiple exclusion eligibility.

Expiration Date Alternatives

The Act generally prohibits the sale or issuance of a gift card unless the expiration date is not earlier than five years after the date on which the card is issued or on which funds were last loaded, and certain disclosure requirements are met. The Proposal under § 205.20(e)(2) provides for two alternatives to implement this requirement. Under the first alternative, Alternative A, a person generally would be prohibited from selling or issuing a gift card unless the expiration date is at least five years after the date the card was sold or issued to a consumer and the expiration date for the underlying funds is at least the later of five years after the date the card was issued (or the date on which funds were last loaded). Under the second alternative, Alternative B, a person must have policies and procedures in place to ensure that a consumer will have a "reasonable opportunity" to purchase a card with at least five years remaining until the expiration date.

MasterCard believes that Alternative B is preferable to Alternative A because it would provide needed flexibility to issuers of different kinds of card products and protect consumers in a manner that is consistent with Title IV of the Act. With respect to the question raised by the Board in the Supplementary Information regarding whether there is a risk under Alternative B that consumers may become confused if a card is embossed with an expiration date that is less than five years after the date of issuance but there is no expiration date for the underlying funds, we believe that the requirement for policies and procedures gives card issuers an opportunity to best determine how to make consumers aware of the duration of the funds underlying a card.

One-Year Transition and Grandfathering of Existing Products

The Act directed the Board to adopt a final rule not later than February 22, 2010, which must become effective no later than August 22, 2010. The Board requests comment on whether

it should issue a final rule that provides for a transition period or that would grandfather products that are already in the marketplace as of the effective date. As the Board notes in the Supplementary Information, rigorous adherence to the mandated timeframe would require a wide range of issuers and other program participants, such as retailers, to remove and replace card stock, including cards that have already been placed into store inventory. This process will require a significant amount of coordination among manufacturers of covered products, product issuers, and retail distribution participants. These efforts must be undertaken in tandem with a number of other implementation challenges, including retail employee education initiatives, product redesigns, system changes, and changes to marketing materials and displays. Given the complexities involved, we strongly urge the Board to issue a final rule that grandfathers products that are in the marketplace as of the August 22, 2010 effective date, and provides for a one-year transition period ending on February 22, 2011 for all other products. Although we expect that the vast majority of programs are likely to come into compliance with the final rule well before then, we think this approach would give market participants adequate time to revamp their programs to ensure that consumers receive the protections mandated by the Act.

On-Card Disclosure of “Service Fees”

The Act generally provides that no person may impose a dormancy fee, an inactivity charge or fee, or a service fee, unless, among other requirements, the amount of the fee is printed on the card itself. Under the Act, the term “service fee” means “a periodic fee, charge, or penalty” for holding or using a gift card. Under proposed comment 20(a)(6)-1, such fees would include a monthly maintenance fee, any transaction fee (including foreign transaction fees), a reload fee, or a balance inquiry fee.

We are concerned that the definition of “service fee” in the proposed Official Staff Commentary may sweep too broadly in light of space limitations and the other on-card disclosure requirements, and will result in a significant compliance burden and program limitations. This concern is heightened by the Board’s proposed comment 20(c)-1, which effectively discourages printing disclosures on the back of a card on top of indentations from embossed type on the front of the card. MasterCard urges the Board to reconsider the definition of “service fee” for purposes of the on-card disclosure requirements or to allow for an alternative disclosure of such fees, such as by disclosing the dollar amount of all service fees that may apply as a range (*e.g.*, the “lowest” and “highest” fees that may apply). We think that either approach would protect consumers and be consistent with the fee disclosure requirements mandated by Title IV of the Act.

Clarification Regarding Loyalty, Award, or Promotional Gift Card Disclosures

The Act provides an exclusion for loyalty, award, or promotional gift cards. In order to be eligible for this exclusion, however, the Proposal would require, among other things, that certain disclosure requirements be met. Specifically, the Proposal would require that issuers set forth “the disclosures specified in paragraphs (d)(2), (e)(2), and (f)(2) of this section and provide[] the disclosures specified in paragraph (f)(1) of this section on or with the card, code, or other device.” *See* proposed § 205.20(a)(4)(iii). Although proposed comment 20(a)(4)-1 makes clear that all of the required disclosures for such cards may be provided on or with the card, we note that the construction of the applicable sentence in the text of the Proposal could be read

incorrectly to mean that the flexibility to provide disclosures with, rather than on, the card applies only to the (f)(1) disclosure. We request that this point be clarified in the final rule. Also, we note that the reference to (e)(2) in the above-quoted provision appears to be a typographical error, with the correct cross-reference being to (e)(3).

Use of Electronic Disclosures

The Board has clarified in proposed comment 20(c)(2)-1 that gift card disclosures provided electronically are not subject to the consumer-consent and other applicable provisions of the E-SIGN Act. The text of the Proposal is ambiguous on this point and we suggest that the second sentence of § 205.4(a)(1) be modified by inserting the words “to be in writing” so that it reads as follows: “The disclosures required to be in writing by this part may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act)(15 U.S.C. 7001 et seq.).”

Again, MasterCard appreciates the opportunity to provide its comments on the Proposal. Please do not hesitate to contact me at (914) 249-5978, or our counsel at Sidley Austin LLP in connection with this matter, Michael McEneney at (202) 736-8368, or Joel Feinberg at (202) 736-8473.

Sincerely,

Jodi Golinsky
Vice President and
Regulatory & Public Policy Counsel

cc: Michael F. McEneney, Esq.
Joel D. Feinberg, Esq.