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Federal Reserve System

12 CFR Part 205
Electronic Fund Transfers; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R–1377]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation, which interprets the requirements of Regulation E. The final rule restricts a person's ability to impose dormancy, inactivity, or service fees for certain prepaid products, primarily gift cards. The final rule also, among other things, generally prohibits the sale or issuance of such products if they have an expiration date of less than five years. The amendments implement statutory requirements set forth in the Credit Card Accountability Responsibility and Disclosure Act of 2009.

DATES: The rule is effective August 22, 2010.

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SUPPLEMENTARY INFORMATION:

I. Statutory Background

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) (EFTA or Act), enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The EFTA is implemented by the Board's Regulation E (12 CFR part 205). Examples of the types of transactions covered by the EFTA and Regulation E include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation provide for the disclosure of terms and conditions of an EFT service; documentation of EFTs by means of terminal receipts and periodic statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs. Further, the Act and regulation restrict the unsolicited issuance of ATM cards and other access devices.

The official staff commentary (12 CFR part 205 (Supp. I)) interprets the requirements of Regulation E to facilitate compliance and provides protection from liability under Sections 916 and 917 of the EFTA (as redesignated by the Credit Card Act) for financial institutions and other persons subject to the Act who act in conformity with the Board's commentary interpretations. 15 U.S.C. 1693n(d)(1). The commentary is updated periodically to address significant questions that arise.

On May 22, 2009, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) was signed into law.[1] Section 401 of the Credit Card Act amends the EFTA and imposes certain restrictions on a person's ability to impose 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 of a gift certificate or the date on which funds were last loaded to a store gift card or general-use prepaid card.

The Credit Card Act directs the Board to prescribe rules implementing EFTA Section 915 within nine months after enactment. The gift card and related provisions become effective 15 months after enactment, or on August 22, 2010. *See* EFTA Section 915(d)(3); Section 403 of the Credit Card Act.

II. Background

A gift card is a type of prepaid card that is designed to be purchased by one consumer and given to another consumer as a present or expression of appreciation or recognition. When provided in the form of a plastic card, a user of a gift card is able to access and spend the value associated with the device by swiping the card at a POS terminal, much as a person would use a debit card. Among the benefits of a gift card are the ease of purchase for the gift-giver and the recipient's ability to choose the item or items ultimately purchased using the card. According to one survey, over 95 percent of Americans have received or purchased a gift card.[2]

There are two distinct types of gift cards: Closed-loop cards and open-loop cards. Closed-loop gift cards constitute the majority of the gift card market, both in terms of the number of cards issued and the dollar value of the amounts loaded onto or spent with gift cards.[3] These cards generally are accepted or honored at a single merchant or a group of affiliated merchants (such as a chain of book stores or clothing retailers) as payment for goods or services. They have limited functionality and generally can only be used to make purchases at the merchant or group of merchants.

Closed-loop gift cards are typically issued by a merchant, or by a card program sponsor or service provider working with a merchant, and not by a financial institution. These cards may be sold in a predenominated or consumer-specified amount at the merchant itself or distributed through other retail outlets, such as at grocery stores or drug stores. Generally, closed-loop gift cards cannot be reloaded with additional value after card issuance. Further, the issuer typically does not collect any information regarding the identity of the gift card purchaser or the recipient.

For merchant-issuers, gift cards have largely replaced paper-based gift certificates as a more cost-effective and efficient means of facilitating gift-giving by consumers. In addition to reducing costs associated with the issuance of paper certificates, electronic gift cards may also be less vulnerable to fraud or counterfeiting. Merchants benefit from the sale of items purchased with gift cards, as well as from additional spending by gift card recipients beyond the face amount on the card. Some merchants may also derive revenue from fees, such as from monthly maintenance or transaction-based fees. Nonetheless,

[1] Public Law 111–24, 123 Stat. 1734 (2009).

[2] *See* Comdata, 2007 Adult Gift Card Study (available at: *http://www.comdata.com/comdata/content/surveys/2007/adult_gift_card_study_2007.pdf*).

[3] There are no consensus industry figures about the overall size of the prepaid card market. *See* Rachel Schneider, "The Industry Forecast for Prepaid Cards, 2009," Center for Financial Services Innovation (March 2009) at 4 (available at: *http://www.cfsinnovation.com/research-paper-detail.php?article_id=330539*). According to the Federal Reserve's 2007 Electronic Payments Study, $36.6 billion was spent using closed-loop prepaid cards in 2006, compared to $13.3 billion spent using open-loop prepaid cards. *See* 2007 Federal Reserve Electronic Payments Study 27–42 (March 2008). Industry studies using different methodologies suggest a larger prepaid card market, but nonetheless confirm that the closed-loop cards make up a substantial portion of the market. *See, e.g.,* Tim Sloane, "Sixth Annual Closed Loop Prepaid Market Assessment," Mercator Advisory Group (October 2009) (estimating that of the $247.7 billion total amount loaded across all prepaid segments in 2008, 75 percent, or $187.24 billion, were loaded onto closed-loop cards, including closed-loop gift cards).

most merchant-issued closed-loop gift cards today do not charge any fees or carry expiration dates.[4]

Open-loop gift cards differ in several respects from closed-loop gift cards. First, open-loop gift cards typically carry a card network brand logo (such as Visa, MasterCard, American Express, or Discover). Thus, they can be used at a wide variety of merchants that accept or honor cards displaying that brand. Second, open-loop gift cards are generally issued by financial institutions. Third, due in part to higher compliance and consumer service costs, open-loop gift cards are more likely to carry fees compared to closed-loop gift cards, including card issuance and transaction-based fees. Fourth, open-loop gift cards are more likely to offer the capability of being reloaded with additional value (reloadable) than are closed-loop gift cards.

A consumer may obtain gift cards in several ways. Gift cards can be purchased at retail locations, by telephone, or on-line for the purchaser's own purposes or received from another consumer as a gift. In addition, gift cards can be received through a loyalty, award, or promotional program. For example, a merchant may distribute its own closed-loop gift card to encourage consumers to visit the store or for customer retention purposes, such as through a frequent buyer program. Merchants and product manufacturers may also provide gift cards to consumers as a means of issuing a rebate for the consumer's purchase of a particular product instead of sending paper rebate checks. Employers may provide gift cards to their employees as a reward for good job performance.

Concerns have been raised regarding the amount of fees associated with gift cards, the expiration dates of gift cards, and the adequacy of disclosures. Consumers who do not use the value of the card within a short period of time may be surprised to find that the card has expired or that dormancy or service fees have reduced the value of the card. Even where fees or terms are disclosed on or with the card, the disclosures may not be clear and conspicuous.

At the state level, more than 40 states have enacted laws applicable to gift cards in some fashion. Most commonly, state gift card laws may 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.[5] 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. However, while all state gift card laws address closed-loop gift cards in some manner, many state gift card laws do not apply to open-loop bank-issued cards.[6]

III. The Board's Proposed Revisions to Regulation E

Summary of Proposal

In November 2009, the Board published a proposal to amend Regulation E and the official staff commentary to implement the gift card provisions of the Credit Card Act (November 2009 Proposed Rule).[7] The proposal applied to gift certificates, store gift cards, and general-use prepaid cards, as these terms were defined in the proposal. The proposal also implemented statutory exclusions for certain prepaid products that are not considered gift certificates, store gift cards, or general-use prepaid cards under the rule. The proposed exclusions applied to, among other things, cards, codes, or other devices that are reloadable and not marketed or labeled as a gift card or gift certificate and loyalty, award, and promotional gift cards.

Consistent with the statute, the proposal would have prohibited any person from imposing dormancy, inactivity, or service fees with respect to gift certificates, store gift cards, and general-use prepaid cards, unless certain conditions were satisfied. These conditions were that: (1) There must be at least a one-year period of inactivity with respect to the certificate or card prior to the imposition of the fee; (2) not more than one fee may be charged per month; and (3) disclosures regarding dormancy, inactivity, or service fees are stated clearly and conspicuously on the certificate or card and given prior to purchase. The Board also proposed to interpret the term "service fee" to include any fees that may be imposed from time to time, which would include transaction-based fees (such as ATM, balance inquiry, and card reload fees) as well as monthly maintenance fees.

The November 2009 Proposed Rule provided that a gift certificate, store gift card, or general-use prepaid card may not be sold or issued unless the expiration date of the funds underlying the certificate or card is at least five years after the date of issuance (in the case of a gift certificate) or five years after the date of last load of funds (in the case of a store gift card or general-use prepaid card). In addition, the proposal would have required information regarding the terms of expiration to be stated clearly and conspicuously on the certificate or card and disclosed prior to purchase.

The November 2009 Proposed Rule set forth two proposed alternative approaches regarding the sale of a certificate or card to minimize potential confusion for consumers in circumstances where the expiration date on a certificate or card and the expiration date for the underlying funds differ. The first alternative would have prohibited the sale or issuance of a certificate or card that has a printed expiration date that is less than five years from the date of purchase. The second alternative would have prohibited the sale or issuance of a certificate or card, unless a person has policies and procedures in place to ensure that a consumer has a reasonable opportunity to purchase a certificate or card that has an expiration date that is at least five years from the date of purchase. In addition, the proposed rule would have prohibited the imposition of any fees for replacing an expired certificate or card where the underlying funds remained valid, to ensure that consumers are able to access the underlying funds for the full five-year period.

In addition to requiring the disclosure of dormancy, inactivity, or service fees, the proposed rule would have required the disclosure of all other fees imposed in connection with a gift certificate, store gift card, or general-use prepaid card. These disclosures would be provided on or with the certificate or card and disclosed prior to purchase. The proposed rule also would have required the disclosure on the certificate or card of a toll-free telephone number and, if one is maintained, a Web site,

[4] *See, e.g.,* Montgomery County Office of Consumer Protection, Gift Card Report 2007 (available at: *http://www.montgomerycountymd.gov/content/ocp/giftcards2007final.pdf*) (reporting that 18 out of 22 closed-loop gift cards surveyed do not impose fees or carry expiration dates). *See also* Retail Gift Card Association, Code of Principles (available at: *http://www.thergca.org/uploads/Code_of_Principles_PDF.pdf*) (recommending the elimination of dormancy or inactivity fees and of expiration dates as a best practice).

[5] *See, e.g.,* Consumers Union, State Gift Card Consumer Protection Laws (available at: *http://www.consumersunion.org/pub/core_financial_services/003889.html*); National Conference of State Legislatures, Gift Cards and Gift Certificates Statutes and Recent Legislation (available at: *http://www.ncsl.org/programs/banking/GiftCardsandCerts.htm*).

[6] *See, e.g.,* Ark. Code section 4–88–704; Cal. Civ. Code section 1749.45; Fla. Stat. section 501.95; and Md. Comm. Code Ann. section 14–1320.

[7] 74 FR 60986 (Nov. 20, 2009).

that a consumer may use to obtain fee information or replacement certificates or cards.

Overview of Public Comments

The Board received over 230 comment letters on the proposal. The majority of the comment letters were submitted by industry commenters, including card issuers, card networks, industry trade associations, retailers, and prepaid card program managers and distributors. In addition, letters were submitted by individual consumers, consumer groups, a city government entity, and one state attorney general.

Many individual consumers urged the Board to prohibit any and all fees in connection with gift certificates, store gift cards, and general-use prepaid cards as well as the expiration of any funds added to such certificates or cards to ensure that consumers do not lose any value on certificates or cards they have purchased. The state attorney general commenter and city government entity commenter asserted that the final rule should include restrictions on the fees that may be imposed in connection with covered certificates or cards as well as stringent standards regarding the size and prominence of the prescribed disclosures. The state attorney general commenter also encouraged the Board to include rules to make clear that more stringent state protections are not preempted by Federal law.

To minimize the fees that could be imposed on a gift certificate, store gift card, and general-use prepaid card, consumer group commenters urged the Board to adopt an expansive definition of "service fee" and to broadly interpret "activity" for purposes of determining when a consumer's gift card has been used. Consumer group commenters also requested that the Board exercise its new authority under the Credit Card Act to set caps on dormancy, inactivity, and service fees and to set floor amounts above which fees could not be charged. Finally, consumer groups asked the Board to extend EFTA and Regulation E protections to all prepaid cards, including general-purpose reloadable cards that may be used as account substitutes by the unbanked.

Industry commenters asserted that the Board should limit its interpretation of the term "service fee" to monthly maintenance fees, and thus exempt activity-based fees, such as per transaction, ATM, balance inquiry, and reload fees, from the substantive restrictions regarding the imposition of service fees. In addition, industry commenters expressed concern that because of space constraints, the broad definition of "service fee" would make it impossible for issuers to comply with the requirement to disclose all such fees on the certificate or card itself.

With respect to the expiration date restrictions, industry commenters generally supported the Board's decision to apply the five-year expiration date requirement to the underlying funds, rather than the card itself. Industry commenters were divided on the appropriate alternative approach regarding the sale of certificates or cards subject to the rule. However, a slight majority favored the flexibility afforded by the proposed alternative approach that would allow certificates or cards to be sold so long as the consumer has a reasonable opportunity to purchase a certificate or card with at least five years remaining before expiration.

Industry commenters also expressed concerns regarding the proposed guidance regarding the exclusion for cards, codes, or other devices that are reloadable and not marketed or labeled as a gift card or gift certificate. Industry commenters believed that the Board's proposed examples were overly restrictive in terms of whether and how general-purpose reloadable cards could be sold in the same location as gift cards. Specifically, these commenters noted that the proposed examples requiring retailers to use separate displays for gift cards and excluded prepaid cards, including general-purpose reloadable cards, may lead some retailers to decide to stop selling general-purpose reloadable cards altogether. According to these commenters, this would limit consumer choice to the detriment of unbanked consumers who may use general-purpose reloadable cards as a substitute for a traditional debit card tied to a checking or savings account. Industry commenters also urged the Board to exclude from the final rule temporary cards issued in connection with general-purpose reloadable cards, even if the temporary card was issued as a non-reloadable card.

Finally, industry commenters urged the Board to grandfather certificates or cards sold or issued prior to the effective date of the final rule of August 22, 2010 from all requirements under the rule, as well as to provide relief for certificates or cards that have been distributed, but not sold, as of August 22, 2010 to avoid significant costs associated with printing new cards and replacing old stock.

IV. Summary of Final Rule

Scope of Rule

The final rule applies to gift certificates, store gift cards, and general-use prepaid cards, as those terms are generally defined in the Credit Card Act, with certain adjustments to the statutory definitions for consistency and clarity. The scope of the final rule is generally limited to gift certificates, store gift cards, or general-use prepaid cards sold or issued to consumers primarily for personal, family, or household purposes, consistent with the general scope of the EFTA and Regulation E.[8] Thus, the rule does not apply to cards, codes, or other devices[9] where the end use is for business purposes, such as to pay for business travel expenses or office supplies. However, the fact that a person may sell cards, codes, or other devices to a business does not by itself exclude the cards, codes, or other devices from the scope of the rule. Such cards, codes, or other devices are subject to the rule if the business purchaser resells or distributes the cards, codes, or other devices to consumers primarily for personal, family, or household purposes, unless the cards, codes, or other devices are otherwise excluded under § 205.20(b).

Restrictions on Dormancy, Inactivity, or Service Fees

Under the final rule, no person may impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless three conditions are satisfied. First, such fees may be imposed only if there has been no activity with respect to the certificate or card within the one-year period prior to the imposition of the fee. Second, only one such fee may be assessed in a given calendar month. Third, disclosures regarding dormancy, inactivity, or service fees must be clearly and conspicuously stated on the certificate or card, and the person issuing or selling the certificate or card must provide these disclosures to the

[8] Loyalty, award, and promotional gift cards, as defined in § 205.20(a)(4) and discussed below, are subject to certain disclosure requirements under the final rule, but not to the substantive restrictions on imposing dormancy, inactivity, or service fees, or on expiration dates.

[9] The final rule and accompanying supplementary information generally use the term "certificate or card" to refer to a gift certificate, store gift card, or general-use prepaid card that is subject to the requirements under § 205.20. In other places, the term "card, code, or other device" is generally used to refer more broadly both to covered certificates or cards as well as other prepaid products which may fall outside the rule under an exclusion in § 205.20(b).

purchaser before the certificate or card is purchased.

As in the proposal, the final rule includes in the definition of "service fee" both account maintenance fees that are charged on a recurring basis as well as activity-based fees which may occur from time to time, such as per transaction, balance inquiry, ATM, and reload fees.

Expiration Date Restrictions

The final rule provides that a gift certificate, store gift card, or general-use prepaid card may not be sold or issued unless the expiration date of the funds underlying the certificate or card is no less than five years after the date of issuance (in the case of a gift certificate) or five years after the date of last load of funds (in the case of a store gift card or general-use prepaid card). In addition, information regarding whether funds underlying a certificate or card may expire must be clearly and conspicuously stated on the certificate or card and disclosed prior to purchase.

Consumers may be confused if the expiration date on a certificate or card differs from the expiration date for the underlying funds. The final rule thus provides that no person may sell or issue a certificate or card unless the person has established policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card that has an expiration date that is at least five years from the date of purchase. A person who has established policies and procedures to prevent the sale of a certificate or card with less than five years from the date of purchase also satisfies the requirement.

The final rule also generally requires a certificate or card to include a disclosure alerting consumers to the difference between the certificate or card expiration date and the funds expiration date, if any, and that the consumer may contact the issuer for a replacement card. This disclosure must be stated with equal prominence and in close proximity to the certificate or card expiration date. Non-reloadable certificates or cards that bear an expiration date on the certificate or card that is at least seven years from the date of manufacture need not include this disclosure, however.

The final rule further prohibits the imposition of any fees for replacing an expired certificate or card if the underlying funds remain valid, to ensure that consumers are able to access the underlying funds for the full five-year period. The final rule also provides, however, that in lieu of sending a replacement certificate or card, issuers may remit, without charge, the remaining balance of funds to the consumer.

Additional Disclosure Requirements Regarding Fees

In addition to the statutory restrictions for dormancy, inactivity, or service fees, the final rule requires the disclosure of all other fees, such as initial issuance fees and cash-out fees, imposed in connection with a gift certificate, store gift card, or general-use prepaid card. These disclosures must be provided on or with the certificate or card and disclosed prior to purchase. The final rule also requires disclosure on the certificate or card of a toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain fee information or replacement certificates or cards.

Exclusions

Consistent with the statute, the final rule excludes certain prepaid products from the definitions of gift certificate, store gift card, or general-use prepaid card. For example, cards, codes, or other devices that are issued in connection with a loyalty, award, or promotional program, or that are reloadable and not marketed or labeled as a gift card or gift certificate, are not subject to the substantive restrictions on imposing dormancy, inactivity, or service fees, or on expiration dates. The final rule provides that the exclusion for cards, codes, or other devices that are reloadable and not marketed or labeled as a gift card or gift certificate applies also to temporary cards issued solely in connection with a general-purpose reloadable card, even if the temporary card is initially non-reloadable.

To mitigate potential consumer confusion, the final rule requires a loyalty, award, or promotional gift card to state on the front of the card both that it is issued for loyalty, award, or promotional purposes as well as any funds expiration date that may apply. In addition, all fees, including any dormancy, inactivity, or service fees, must be disclosed on or with the loyalty, award, or promotional gift card.

Mandatory Compliance Date

The mandatory compliance date for the rule is August 22, 2010 as set forth in the Credit Card Act. Under the final rule, certificates or cards sold on or after August 22, 2010 must fully comply with the requirements of this section, including any disclosure requirements that apply. In addition, loyalty, award, or promotional gift cards will be subject to the disclosure requirements discussed above if they are issued pursuant to a loyalty, award, or promotional program that begins on or after August 22, 2010.

V. Legal Authority

Section 401 of the Credit Card Act creates a new Section 915 of the EFTA. This provision prohibits any person from charging dormancy, inactivity, or service fees with respect to a gift certificate, store gift card, or general-use prepaid card, unless there have been at least 12 months of inactivity with respect to the certificate or card, not more than one fee is charged in any given month, and certain disclosures regarding such fees are provided to the consumer. *See* EFTA Section 915(b); 15 USC 1693m(b). *See also* § 205.20(d). In addition, Section 401 of the Credit Card Act makes it unlawful for any person to sell or issue a gift certificate, store gift card, or general-use prepaid card that is subject to an expiration date, unless the expiration date is at least five years after the date on which a gift certificate is issued or five years after funds are last loaded on a store gift card or general-use prepaid card, and the terms of expiration are clearly and conspicuously disclosed. *See* EFTA Section 915(c); 15 U.S.C. 1693m(c). *See also* § 205.20(e).

Section 401(d)(1) of the Credit Card Act requires the Board to prescribe rules to carry out the new requirements. These requirements are implemented in new § 205.20 in the final rule. Sections 205.20(a) and (b) of the final rule define the products subject to the new requirements and implement statutory exclusions set forth in the Credit Card Act. The Board has also used the authority under EFTA Section 915(a)(2)(D)(iii) to adopt certain disclosure requirements for loyalty, award, and promotional gift cards in § 205.20(a)(4)(iii). *See* 15 U.S.C. 1693m(a)(2)(D)(iii).

Section 401(d)(1) of the Credit Card Act gives the Board the authority to prescribe rules addressing the amount of dormancy, inactivity, or service fees that may be imposed, and the balance below which such fees may be assessed. *See* EFTA Section 915(d)(1); 15 U.S.C. 1693m(d)(1). In addition, Section 401(d)(2) of 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. *See* EFTA Section 915(d)(2); 15 U.S.C. 1693m(d)(2). The Board has used this authority under Section 401(d)(2) of the Credit Card Act to require certain additional fee-related disclosures for covered certificates or cards. *See*

§ 205.20(f)(1). Lastly, Section 402 of the Credit Card Act amends EFTA Section 920 to provide that the EFTA does not preempt any state laws that address dormancy, inactivity, or 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. *See* § 205.12(b).

In addition to the statutory mandates set forth in the Credit Card Act, Section 904(a) of the EFTA authorizes the Board to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA are to establish "the rights, liabilities, and responsibilities of participants in electronic fund transfer systems" and to provide "individual consumer rights." *See* EFTA Section 902(b); 15 U.S.C. 1693. Section 904(c) of the EFTA further provides that regulations prescribed by the Board may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers that in the judgment of the Board are necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance. The Board has exercised its authority under EFTA Sections 904(a) and 904(c) to adopt additional requirements in §§ 205.20(c), 205.20(e)(1), 205.20(e)(3)(ii)–(iii), 205.20(e)(4) and 205.20(f)(2), to make conforming changes to §§ 205.3(a) and 205.4(a)(1), and where otherwise specifically stated in the Section-by-Section analysis to effectuate the purposes of and facilitate compliance with the EFTA. The Section-by-Section analysis and Final Regulatory Flexibility Analysis serve as the economic impact analysis pursuant to EFTA Section 904(a)(2).

VI. Section-by-Section Analysis

Section 205.3 Coverage

3(a) General

Section 205.3(a) is revised to provide that the new gift card provisions in § 205.20 apply to any person. The revision reflects that the scope of the Credit Card Act's gift card provisions is not limited to financial institutions. For example, EFTA Section 915(b) prohibits "any person" from imposing a dormancy, inactivity, or service fee in connection with a gift certificate, store gift card, or general-use prepaid card unless certain conditions are met. *See* § 205.20(d). Similarly, EFTA Section 915(c) generally prohibits "any person" from selling or issuing a gift certificate, store gift card, or general-use prepaid card that is subject to an expiration date. *See* § 205.20(e). Thus, § 205.20 applies to any of the parties in a certificate or card distribution chain, including but not limited to a card issuer, a program manager, and a retailer of prepaid cards, to the extent they engage in any of the acts covered by that section with respect to gift certificates, store gift cards, or general-use prepaid cards, or to loyalty, award, or promotional gift cards.

Section 205.4 General Disclosure Requirements; Jointly Offered Services

Section 205.4 contains the general disclosure requirements under Regulation E, including provisions relating to the form of disclosure. Section 205.4(a)(1) provides that disclosures required by the regulation shall be clear and readily understandable, in writing, and in a form that the consumer may keep. The Board proposed to revise § 205.4(a)(1) to provide that for certain disclosures required by the regulation, different disclosure standards may apply. The revision to § 205.4(a)(1) is adopted as proposed.

As revised, § 205.4(a)(1) clarifies that the requirement that disclosures be clear and readily understandable, in writing, and in a form the consumer may keep is one of general application, and that different requirements apply when specified in the rule. For example, as further discussed below, the disclosures for certain prepaid cards set forth in the final rule are subject to a "clear and conspicuous" standard, consistent with Section 915 of the EFTA, rather than the "clear and readily understandable" standard that generally applies under Regulation E. *See* § 205.20, discussed below. Similarly, under current § 205.11(c), notices provided by financial institutions to satisfy the error investigation requirements of Regulation E may be provided orally or in writing. *See* comment 11(c)–1.

Two industry commenters recommended that the Board revise § 205.4(a)(1) to explicitly provide that the consumer consent provisions of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 *et seq.*) do not apply to gift card disclosures provided electronically. Section 205.4(a)(1) currently provides that disclosures required by the regulation may be provided electronically, subject to compliance with the consumer consent provisions of the E-Sign Act. The E-Sign Act consumer consent provisions only apply when a statute or regulation provide that the sole means of providing disclosures is in writing. The Board believes the current regulation is clear that a person need not obtain E-Sign consent to provide gift card disclosures electronically because the final rule permits gift card disclosures to be provided in writing, orally, or electronically.[10] Thus, the final rule does not contain the suggested revisions.

Section 205.12 Relation to Other Laws

EFTA Section 920 (as redesignated by the Credit Card Act) provides that the EFTA does not preempt any state laws relating to electronic fund transfers except to the extent that such laws are inconsistent with the EFTA's provisions. *See* 15 U.S.C. 1693r. Section 920 further clarifies that a state law is not inconsistent with the EFTA if the state law provides greater protection for the consumer than under the Act. Accordingly, Section 920 effectively creates a federal floor for the protections set forth in the Act (floor preemption). Section 205.12(b) of Regulation E implements this provision.

The Credit Card Act amended EFTA Section 920 to apply the EFTA's existing preemption provisions to state laws that address "dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards." *See* Section 402 of the Credit Card Act. Thus, state laws that provide greater protection for consumers than Title IV of the Credit Card Act as codified in the EFTA, are not preempted by the EFTA. The Board proposed to amend § 205.12(b) of Regulation E and comment 12(b)–1 to conform with the amendments to EFTA Section 920 made by the Credit Card Act. The final rule amends the regulation and commentary generally as proposed, with certain revisions for clarity.

One state attorney general commenter urged the Board to include additional rules to clarify that more stringent state protections are not preempted by federal law with respect to gift cards. The Board believes, however, that § 205.12(b)(1) already is clear that a state law is not preempted due to inconsistency with federal law if it is more protective of consumers.

Industry commenters did not comment on the Board's proposed revisions to § 205.12(b), but raised a separate issue relating to preemption in connection with state escheat laws. This issue is discussed later in the Section-by-Section analysis.

[10] Of course, a person providing gift card disclosures electronically must continue to satisfy the requirements under §§ 205.20(c)(3) and (c)(4).

Section 205.20 Requirements for Gift Cards and Gift Certificates

20(a) Definitions

EFTA Section 915(a)(2) generally defines the scope of gift cards and gift certificates that are subject to the Credit Card Act's restrictions on dormancy, inactivity, or service fees and the terms of expiration. Specifically, EFTA Section 915 applies to gift certificates, store gift cards, and general-use prepaid cards as those terms are defined in the statute. In addition, EFTA Section 915(a)(1) defines a dormancy fee, inactivity charge or fee, and EFTA Section 915(a)(3) defines a service fee. *See* 15 U.S.C. 1693m(a).

Section 205.20(a) of the final rule defines the following terms: Gift certificate; store gift card; general-use prepaid card; loyalty, award, or promotional gift card; dormancy or inactivity fee; service fee; and activity. Comments received regarding the definitions are generally discussed in connection with the relevant term below.

The definitions of gift certificate, store gift card, and general-use prepaid card generally track the definitions set forth in the statute. However, the final rule makes certain adjustments to the statutory definitions pursuant to the Board's authority under EFTA Section 904(c) to provide clarity and to harmonize key terms throughout the rule.

Card, Code, or Other Device

As discussed in the November 2009 Proposed Rule, EFTA Section 915 does not use consistent terminology to describe the payment devices covered by the statute. For example, the statutory definition of a general-use prepaid card refers to a "card or other payment code or device," while the statutory definition of a store gift card refers to an "electronic promise, plastic card, or other payment code or device." Distinguishing the types of products covered under the rule by, for instance, the material that is used to produce a payment card would not be consistent with the statute's overall purpose. The adoption of such distinctions would result in some gift card products being excluded from the rule altogether based on the type of material used to make the card. For example, if the definition of store gift card literally required a card to be made out of plastic, then a reloadable gift card that was made with a different material would neither be a store gift card nor fall under any of the other definitions of covered products.[11]

In addition, the exclusions in EFTA Section 915(a)(2)(D) apply to an "electronic promise, plastic card, or payment code or device" that meets certain specified criteria. *See* 15 U.S.C. 1693m(a)(2)(D). The Board does not believe that an issuer that, for example, chooses to use non-plastic biodegradable materials to create a more environmentally-friendly card product should be precluded from relying on an exclusion solely because its payment device is not made of plastic. Therefore, the proposed rule generally referred to "cards, codes, or other devices" to avoid such arbitrary distinctions and to provide consistency across the definitions. The Board did not receive any comments on this approach, and the final rule retains the proposed terminology.

Proposed comment 20(a)–1 clarified that the requirements of § 205.20 generally apply to all cards, codes, or other devices that meet the general definition of gift certificate, store gift card, or general-use prepaid card, even if they are not issued in card form. That is, the rule applies even if a physical card or certificate is not issued. The Board did not receive any comments on the proposed comment. Accordingly, it is adopted generally as proposed, with certain revisions to provide additional guidance.

Final comment 20(a)–1 clarifies that § 205.20 covers products even if they are not issued in card form, such as account numbers or bar codes that enable a consumer to access underlying funds. Similarly, § 205.20 applies to a device with a chip or other embedded mechanism that links the device to stored funds, such as a mobile phone or sticker containing a contactless chip that enables the consumer to access the stored funds. Section 205.20 also applies if a merchant issues a code that entitles a consumer to redeem the code for goods or services, regardless of the medium in which the code is issued, and whether or not it may be redeemed electronically or in the merchant's store. Thus, for example, if a merchant e-mails a code that a consumer may redeem in a specified amount either on-line or in the merchant's store, that code is covered under § 205.20, unless one of the exclusions in § 205.20(b) apply. *See* comment 20(a)–1.

The final comment also provides that a card, code, or other device may meet the definition of gift certificate, store gift card, or general-use prepaid card in § 205.20(a)(1) through (3), if it is an electronic promise, *see* comment 20(a)–2, discussed below, as well as a promise that is not electronic. *But see* § 205.20(b)(5).

Electronic Promise

The term "electronic promise" is used in several places in the statute to refer to a type of payment mechanism or device. *See* EFTA Sections 915(a)(2)(B), (a)(2)(C), and (a)(2)(D). As proposed, comment 20(a)–2 clarified that the term "electronic promise" means "a person's commitment or obligation communicated or stored in electronic form made to a consumer to provide payment for goods or services for transactions initiated by the consumer."[12] The proposed comment reflected the Board's view that an electronic promise reflects a person's commitment to pay that is itself represented by a "card, code, or other device," rather than a distinct payment mechanism. Commenters did not address the proposed comment, and it is adopted generally as proposed. Thus, for example, if a merchant issues a code that can be given as a gift and redeemed by the recipient in an on-line transaction for goods or services, that code represents an electronic promise by the merchant and is a card, code, or other device covered by § 205.20. *See* comment 20(a)–2.

Specified Amount

The statutory definitions of "gift certificate" and "store gift card" refer to products that are "issued in a *specified* amount." In contrast, the statutory definition of a "general-use prepaid card" refers to products that are "issued in a *requested* amount." *See* EFTA Sections 915(a)(2)(A), (a)(2)(B), and (a)(2)(C); 15 U.S.C. 1693m(a)(2)(A), (a)(2)(B), and (a)(2)(C). One possible interpretation of the statute's use of different terms could suggest that gift certificates and store gift cards issued in a consumer-requested amount and general-use prepaid cards issued in a predenominated (or specified) amount would be excluded from the rule. The Board does not believe that such a result would be consistent with the statute's purpose.

Accordingly, to ensure that consumers receive the same protections when purchasing gift cards or gift certificates regardless of whether the

[11] Products issued in paper form only are excluded under EFTA Section 915(a)(2)(D)(v) and § 205.20(b)(5), discussed below.

[12] *See, e.g.,* UCC 3–103(a)(12) (defining "promise" as a "written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.").

amount on the gift card is determined by the issuer or the consumer, the Board proposed to interpret the statutory definitions of gift certificate, store gift card, and general-use prepaid card broadly to cover certificates or cards whether the amounts are predenominated or consumer-designated. Therefore, the proposed rule used the term "specified" consistently across all three defined product terms to capture all certificates or cards whether they are issued in predenominated amounts or in an amount requested by a consumer in a particular transaction.

Commenters generally supported the Board's proposed reconciliation of the statutory terms, and the final rule retains this approach. Two industry commenters, however, noted that both the statute and the proposed rule appear to limit the scope of coverage to certificates or cards issued with specific currency denominations (for example, a $50 gift card or certificate). Accordingly, these commenters asked the Board to clarify that the rule does not apply to gift cards that entitle the cardholder to a specific "experience," such as a hotel stay or a golf lesson, rather than a monetary value that may be applied towards goods or services. These commenters were particularly concerned that if "experience" cards were subject to the five-year minimum expiration requirements, issuers or sponsors of such cards may have to raise prices to adjust for anticipated cost increases over a five-year period for the specified experience.

The Board agrees that such a clarification is appropriate in light of the statutory language referring to certificates or cards "issued in a specified [or requested] amount." This language suggests that the statute is intended to cover certificates or cards that are issued in a specified currency denomination.

Accordingly, new comment 20(a)–3 is added to clarify that cards, codes, or other devices redeemable for a specific good or service, or "experience," such as a spa treatment, hotel stay, or airline flight, generally are not subject to the requirements of § 205.20 because they are not issued to a consumer "in a specified amount." Similarly, a card, code, or other device that entitles the consumer to a certain percentage off the purchase of a good or service, such as a card offering 20% off of any purchase in a store, is not subject to the requirements of § 205.20 because it is not issued to a consumer in a "specified amount." Nonetheless, if the card, code, or other device is issued in a specified or predenominated amount that can be applied toward the specific good or service, or states a specific monetary value, such as "a $50 value," comment 20(a)–3 clarifies that the card, code, or other device is subject to this section, unless one of the exceptions in § 205.20(b) apply. *See, e.g.,* § 205.20(b)(3).

Personal, Family, or Household Purposes

Although the EFTA generally applies only to consumer accounts, the gift card provisions of the Credit Card Act do not expressly limit the scope of the new restrictions to certificates or cards issued primarily for personal, family, or household purposes. Accordingly, the Board solicited comment on whether it would be appropriate to limit the scope of the final rule so that it does not apply to certificates or cards issued for business purposes. The Board noted, however, that any such limitation likely would not exclude certificates or cards that are purchased by a business for the purposes of redistribution or resale to consumers primarily for personal, family, or household purposes. Given that the rule could therefore require issuers to adopt controls and potentially monitor the distribution or sale of gift cards to ensure that the end use is for business purposes, the Board also solicited comment regarding whether the rule should cover cards, codes, or other devices issued for business purposes.

Industry commenters urged the Board to exclude certificates or cards issued for business purposes from the rule, stating that such an approach would be consistent with the scope of the EFTA, which is generally limited to consumer-purpose products. Industry commenters also noted that the sophistication of commercial parties in a business-to-business transaction alleviated the need to mandate the protections set forth in the Credit Card Act for business-purpose certificates or cards. Consumer groups did not address the issue.

Industry commenters also asserted that the final rule should not require card issuers to adopt controls and monitor the distribution or sale of gift cards purchased by a business to ensure that the end use is for business purposes. Instead, industry commenters argued that it should be sufficient for issuers to rely on contractual provisions prohibiting the resale or redistribution of such products to the public. Industry commenters urged the Board to also grant a safe harbor from any liability if a certificate or card was sold or issued to consumers in violation of contractual provisions.

The final rule limits the scope of the rule to cards, codes, or other devices issued primarily for personal, family, or household purposes. Limiting the rule to cards, codes, or other devices issued primarily for personal, family, or household purposes is consistent with the scope of the EFTA. In addition, the Board understands that Title IV of the Credit Card Act was primarily intended to enable consumers to spend the full value on their gift cards within a reasonable time frame without having that value reduced by associated fees and expiration dates.[13] The Board is not aware of any similar concerns regarding business-purpose prepaid certificates or cards.

New comment 20(a)–4 clarifies that § 205.20 only applies to cards, codes, or other devices that are sold or issued to consumers primarily for personal, family, or household purposes. The comment provides, however, that a card, code, or other device may continue to be subject to the rule even if it is initially purchased by a business, if the card, code, or other device is purchased for redistribution or resale to consumers primarily for personal, family, or household purposes. In addition, the new comment provides that the fact that a card, code, or other device may be primarily funded by a business, for example, in the case of certain rewards or incentive cards, does not by itself mean that the card, code, or other device is outside the scope of § 205.20, if the card, code, or other device will be provided to a consumer primarily for personal, family, or household purposes. *See, however,* §§ 205.20(a)(4) and (b)(3).

New comment 20(a)–4 further states that whether a card, code, or other device is issued to a consumer primarily for personal, family, or household purposes will depend on the facts and circumstances. For example, if a program manager purchases store gift cards directly from an issuing merchant and sells those cards through the program manager's retail outlets, such gift cards are subject to the requirements of § 205.20 because the store gift cards are sold to consumers primarily for personal, family, or household purposes.

In contrast, a card, code, or other device generally would not be issued to consumers primarily for personal, family, or household purposes, and therefore would fall outside the scope of § 205.20, if the purchaser of the card, code, or device is contractually

[13] *See, e.g.,* "Schumer, Mark Udall Introduce Bill to Protect Consumers from Hidden Gift Card Fees Secretly Draining Shoppers' Pockets", Press Release, Mar. 27, 2009 (available at: *http://schumer.senate.gov/new_website/record.cfm?id=310799*).

prohibited from reselling or redistributing the card, code, or device to consumers primarily for personal, family, or household purposes, and reasonable policies and procedures are maintained to avoid such sale or distribution for such purposes. However, if an entity that has purchased cards, codes, or other devices for business purposes sells or distributes such cards, codes, or other devices to consumers primarily for personal, family, or household purposes, that entity does not comply with § 205.20 if it has not otherwise met the substantive and disclosure requirements of the rule or unless an exclusion in § 205.20(b) applies.

New comment 20(a)–5 provides examples of cards issued for business purposes.

Issued on a Prepaid Basis

The definitions of "gift certificate," "store gift card," and "general-use prepaid card" have each been revised in the final rule to clarify that the card, code, or other device must be issued on a "prepaid basis" to meet the particular definition, consistent with the statute. *See, e.g.,* EFTA Section 915(a)(2)(A)(iii); *See* 15 U.S.C. 1693m(a)(2)(A)(iii). For purposes of § 205.20, a card, code, or other device may be issued on a prepaid basis whether the card, code, or other device is loaded in advance by a consumer or by another person.

20(a)(1) Gift Certificate

Section 205.20(a)(1) defines the term "gift certificate" as a card, code, or other device that is: (a) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that may not be increased or reloaded in exchange for payment; and (b) redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services. The definition generally tracks the definition set forth in the statute, with modifications to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(B); 15 U.S.C. 1693m(a)(2)(B). The definition is adopted generally as proposed, except that, as discussed above, the scope of the definition is limited to cards, codes, or other devices issued to a consumer primarily for personal, family, or household purposes. In addition, the definition has been revised for consistency with the statute to clarify that the certificate must be issued on a "prepaid basis."

The term "affiliated group of merchants"—as further discussed below under the definition of "store gift card"—includes two or more merchants or other persons that are related by common ownership or common corporate control and share the same name, mark, or logo. The term also includes two or more merchants or other persons that agree among themselves to honor any card, code, or other device that bears the same name, mark, or logo (other than the mark or logo of a payment network) for the purchase of goods or services solely at such merchants or persons. *See* comment 20(a)(2)–2.

20(a)(2) Store Gift Card

Section 205.20(a)(2) defines the term "store gift card" as a card, code, or other device that is: (a) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (b) redeemable upon presentation at a single merchant or an affiliated group of merchants for goods and services. The definition generally tracks the definition set forth in the statute, with modifications to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(C); 15 U.S.C. 1693m(a)(2)(C). The definition is adopted generally as proposed, except that, as discussed above, the scope of the definition is limited to cards, codes, or other devices issued to a consumer primarily for personal, family, or household purposes. In addition, the definition has been revised for consistency with the statute to clarify that the card, code, or other device must be issued on a "prepaid basis." Under the final rule, closed-loop cards generally are considered "store gift cards" or "gift certificates," unless one of the exclusions in § 205.20(b), discussed below, applies.

A card, code, or other device that meets the requirements in § 205.20(a)(2) qualifies as a "store gift card," whether or not more funds may be added to the card, code, or other device. As proposed, the term "store gift card" included a card, code, or other device issued in a specified amount, "whether or not that amount may be increased or reloaded by a consumer." The final rule deletes the reference in proposed § 205.20(a)(2)(i) to the increasing or reloading of a card "by a consumer" to reflect that the amount on a card may be increased or reloaded by a person other than the consumer, such as the card issuer or a merchant. In addition, because "store gift card" includes non-reloadable cards, codes, or other devices that are redeemable at single merchants or affiliated groups of merchants, comment 20(a)(2)–1 clarifies and illustrates by way of example that a gift certificate as defined in § 205.20(a)(1) is a type of store gift card.

Comment 20(a)(2)–2 provides guidance on the term "affiliated group of merchants." Under EFTA Section 915(a)(2), both the definition of "gift certificate" and "store gift card" refer to certificates or cards that are redeemable at a single merchant or "an affiliated group of merchants that share the same name, mark, or logo." The term "affiliate" is not defined in the statute. The Board proposed to interpret the term "affiliate" to include both a relationship between two or more companies that is defined by some form of common ownership or common corporate control by one of the companies, consistent with the use of that term in other contexts.[14] The proposed term would also include an arrangement by which unrelated companies agree to operate a common gift card program in which cardholders may use the same certificate or card at any of the companies. No comments were received on the proposed comment, and it is adopted as proposed.

Accordingly, comment 20(a)(2)–2 provides that the term "affiliated group of merchants" means two or more affiliated merchants or other persons that are related by common ownership or common corporate control, and that share the same name, mark, or logo. Thus, for example, the term covers franchisees because franchisees generally are subject to a common corporate set of policies or practices under the terms of their franchise licenses.

Comment 20(a)(2)–2 also provides that the term "affiliated group of merchants" includes arrangements under which two or more merchants or other persons that agree among themselves, by contract or otherwise, to redeem cards, codes, or other devices bearing the same name, mark, or logo for purchases of goods or services solely at the establishments of such merchants or persons. *See also* comment 20(a)(3)–2 regarding mall cards, discussed below. For example, a movie theater chain and a restaurant chain may decide to operate a gift card program that enables cardholders to use the same gift card to pay for movie tickets or concessions at the theater, or for a meal at the restaurant. The Board believes that it is appropriate to treat such arrangements like gift card programs operated by retailers with the same parent company

[14] *See, e.g.,* 12 CFR 222.3(b) (defining "affiliate" under the Board's Regulation V (Fair Credit Reporting)); 12 CFR 223.2 (defining "affiliate" under the Board's Regulation W (Transactions Between Member Banks and Their Affiliates)).

or under common corporate control. Comment 20(a)(2)–2 clarifies, however, that merchants or other persons are not considered affiliated merely because they agree to accept a card that bears the mark, logo, or brand of a payment network. Thus, for example, a grocery store is not considered to be affiliated with a hardware store merely because they both agree to accept Visa or MasterCard-branded cards.

Comment 20(a)(2)–3 addresses mall cards and cross-references comment 20(a)(3)–2, discussed below.

20(a)(3) General-Use Prepaid Card

Section 205.20(a)(3) defines the term "general-use prepaid card" as a card, code, or other device that is: (a) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (b) redeemable upon presentation at multiple, unaffiliated merchants or service providers for goods or services, or usable at ATMs. The definition generally tracks the definition in the statute, with modifications to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(A); 15 U.S.C. 1693m(a)(2)(A). Under the final rule, open-loop cards generally are considered to be "general-use prepaid cards," unless one of the exclusions in § 205.20(b), discussed below, applies.

The definition is adopted generally as proposed, except that, as discussed above, the scope of the definition is limited to cards, codes, or other devices issued to a consumer primarily for personal, family, or household purposes. In addition, consistent with the revision to the definition of "store gift card," the definition of "general-use prepaid card" is revised to delete the reference in proposed § 205.20(a)(3)(i) to increasing or reloading of a card "by a consumer" to reflect that the amount on a card may be increased or reloaded by a person other than the consumer, such as the card issuer or a merchant. The definition has also been revised for consistency with the statute to clarify that the card, code, or other device must be issued on a "prepaid basis."

Comment 20(a)(3)–1 clarifies that a card, code, or other device is "redeemable upon presentation at multiple, unaffiliated merchants" if, for example, the merchants agree to honor the card, code, or device if it bears the mark, logo, or brand of a payment network, pursuant to the rules of the payment network.

One popular form of gift card is a mall gift card, which is intended to be used or redeemed at participating retailers located within the same shopping mall. In some cases, however, the mall card may also be network-branded, which permits the card to be used at any retailer that accepts that card brand, including retailers located outside the mall. Proposed comment 20(a)(3)–2 generally stated that whether a mall card is considered a store gift card or a general-use prepaid card depends on the locations in which the card may be redeemed. For example, if the use of the mall card is limited to the retailers located within the shopping mall, the card would be more likely to be considered a store gift card. In contrast, if the mall card was network-branded and could be used at any merchant that accepted that brand, the card would be considered a general-use prepaid card.

One industry commenter argued that a mall gift card should be considered a "general-use prepaid card" even if it does not carry a network brand. This commenter noted that mall cards are generally issued by a financial institution or member of a card network, and not by the mall or program sponsor, and that transactions using the mall card are authorized and settled over the payment networks just like other general-use prepaid cards. The commenter also stated that cards issued in connection with other forms of limited open-loop programs that are intended to encourage local residents to support the participating merchants within a community should similarly be viewed as "general-use prepaid cards" because such cards are generally bank-issued and carry similar costs as more traditional network-branded cards.

Comment 20(a)(3)–2 is adopted substantively as proposed. The Board does not believe that the fact that the entity issuing a particular card is a bank should be dispositive of whether the card is a general-use prepaid card. Instead, consistent with the statute, the determination turns on the degree of affiliation between the merchants honoring the card for goods or services. In general, a card, code, or other device is more likely to be considered to be a general-use prepaid card if the merchants honoring the card have no contractual relationship or agreement to redeem the card, code or other device except for the fact that they agree to honor any card, code, or other device carrying the brand of a payment network. *See* comments 20(a)(2)–2, 20(a)(3)–1. Nonetheless, the substantive and disclosure requirements of § 205.20 apply to mall cards whether they are considered store gift cards or general-use prepaid cards.

20(a)(4) Loyalty, Award, or Promotional Gift Card

EFTA Section 915(a)(2)(D)(iii) excludes an electronic promise, plastic card, or payment code or device from the definitions of "gift certificate," "store gift card," or "general-use prepaid card" if it is a loyalty, award or promotional gift card, as such term is defined by the Board. *See also* § 205.20(b)(3).

Proposed § 205.20(a)(4) generally defined the term "loyalty, award, or promotional gift card" as a card, code, or other device that: (a) Is issued in connection with a loyalty, award, or promotional program; (b) is redeemable upon presentation at one or more merchants for goods or services, or usable at ATMs; and (c) provides certain disclosures about any fees and expiration dates that may apply to the card, code, or other device. Proposed § 205.20(b)(3), discussed below, implemented the exclusion for loyalty, award, or promotional gift cards. The final rule adopts the proposed definition of loyalty, award, or promotional gift card in § 205.20(a)(4), substantially as proposed, but modifies the disclosure requirements, as discussed below. In addition, the scope of the definition is limited to cards, codes, or other devices issued on a prepaid basis primarily to a consumer for personal, family, or household purposes.

In contrast to gift cards purchased at a store, loyalty, award, and promotional gift cards typically are not funded through direct payment from the consumer, but instead are funded by the entity sponsoring the card program, such as a merchant, an employer, or a company. Cards issued through such programs may serve as cost-effective substitutes for traditional means of distributing funds through a promotion, such as rebate checks, vouchers, or cash awards.

Much like rebate checks, vouchers, and cash awards, gift cards distributed through a loyalty, award, or promotional program are typically redeemable for a limited period of time. Loyalty, award, or promotional gift cards thus generally carry shorter expiration dates compared to gift cards purchased by consumers through retail channels.

Consumers who receive a gift card redeemable at one merchant as part of a loyalty, award, or promotional program may be surprised to find that the fees and expiration date on the card differ significantly from the fees and expiration date on a substantially similar card that they may have purchased directly from that same merchant. Improved disclosure of these terms for cards subject to the exclusion

may help reduce consumer surprise or confusion.

The November 2009 Proposed Rule did not impose substantive restrictions on dormancy, inactivity, or service fees, or on expiration dates, with respect to loyalty, award, or promotional gift cards. To address potential consumer surprise or confusion, the Board proposed to impose additional disclosure requirements for loyalty, award, or promotional gift cards in § 205.20(a)(4)(iii). Specifically, in order to be deemed a "loyalty, award, or promotional gift card," and therefore qualify for the proposed exclusion in § 205.20(b)(3), the proposed rule would have required that the card, code, or other device set forth disclosures regarding any fees and expiration dates that may apply. While disclosures regarding dormancy, inactivity, or service fees, expiration dates, and a toll-free number and Web site for additional information would have been required to be on the card, code, or other device, disclosures regarding other fees could accompany the card, code, or other device.[15]

Industry commenters generally agreed that disclosures regarding the fees and expiration dates associated with a loyalty, award, or promotional gift card were appropriate. However, many industry commenters urged the Board to provide flexibility in how those disclosures could be provided. In particular, industry commenters urged the Board to permit such disclosures to be provided in accompanying terms and conditions or on a sticker affixed to the card, rather than mandate that the disclosures appear on the card itself.

A few industry commenters, however, believed that the proposed disclosures contravened Congressional intent to exclude loyalty, award, or promotional cards from *all* requirements of the gift card provisions of the Credit Card Act, including the disclosure requirements. These industry commenters also expressed concern that if loyalty, award, or promotional cards were required to carry the same or similar disclosures as those required for gift certificates, store gift cards, and general-purpose prepaid cards, consumers would be less able to clearly differentiate between the different prepaid products. Moreover, these industry commenters stated that in light of the proposed definition of "service fee" to broadly include fees other than monthly maintenance fees, requiring that such fees be stated on the card would effectively limit issuers' ability to charge such fees due to the space limitations on a card.

Some retailers that offer closed-loop gift cards may use the same card design for the gift cards they sell to the general public and cards that they sell at a discount to businesses for distribution as rewards. Likewise, card providers that offer program development and card fulfillment services for reward, promotional, or incentive card programs may offer standardized card designs to their corporate clients. The ability to standardize card designs enables businesses to attain cost savings when ordering a large volume of the same card design, and enhances the ability of the card provider to quickly produce cards to fulfill prepaid card orders. However, the standardization of card designs may also lead to consumer confusion because cards that otherwise appear to be the same may carry terms and conditions, including fees and expiration terms, that vary to a significant degree. Accordingly, the Board continues to believe that clear and conspicuous disclosures regarding the terms and conditions that may apply to loyalty, award, or promotional gift cards are necessary to help consumers avoid surprise from unexpected dormancy, inactivity, or service fees or from short expiration dates.

Based upon comments received and further analysis, the Board, pursuant to its authority under EFTA Section 915(a)(2)(D)(iii) to define "loyalty, award, or promotional gift card," is revising the disclosure requirements that must be met in order for a card, code, or other device to meet the definition of a "loyalty, award, or promotional gift card."

Specifically, the final rule in § 205.20(a)(4)(iii)(A) requires a loyalty, award, or promotional gift card to state on the card, code, or other device itself that it is issued for loyalty, award, or promotional purposes. This statement must be on the front of the card, code, or other device to enable consumers to easily identify the type of card and avoid potential consumer confusion arising from the fact that a loyalty, award, or promotional gift card may otherwise look identical to a gift card that a consumer may purchase directly from a merchant.

In addition, the final rule requires disclosure of the expiration date for the underlying funds to be stated on the front of a loyalty, award, or promotional gift card because such cards typically have shorter expiration dates than other certificates or cards subject to the rule. *See* § 205.20(a)(4)(iii)(B). Where the card and funds expiration date are the same, a single disclosure regarding the expiration dates satisfies the requirement in § 205.20(a)(4)(iii)(B).

As previously noted, loyalty, award, and promotional gift cards are intended to be usable for a limited amount of time to encourage consumers to use the card quickly, which enables the program sponsor to manage the costs of providing consumers gift cards in connection with loyalty, award, or promotional programs. In addition, loyalty, award, and promotional gift cards are typically used by the initial recipient and are not intended for gift-giving purposes. Therefore, loyalty, award, or promotional gift cards are less likely to be separated from the accompanying disclosures than a gift card or gift certificate that typically is given to and used by someone other than the original purchaser. The Board also understands that there tend to be fewer fees associated with loyalty, award, and promotional cards, because the costs associated with operating the card program are generally borne by the program sponsor. Therefore, the Board believes it is less critical that the fees imposed in connection with a loyalty, award, or promotional gift card be stated on the card itself.

Accordingly, § 205.20(a)(4)(iii)(C) in the final rule permits persons subject to the rule to disclose the amount of any fees that may be imposed in connection with the card, code, or other device, and the conditions under which they may be imposed, on or with the card, code, or device. For example, issuers and other persons subject to the rule may provide fee information in materials accompanying the card, code, or other device, such as a card carrier or a separate document containing applicable terms and conditions, or on a sticker affixed to the card. The revised disclosure requirements recognize that loyalty, award, or promotional cards are generally used by the person that initially obtained the card and are not intended to be given as a gift, thus increasing the likelihood that the user of the card can easily access the disclosures.

Nonetheless, to ensure that consumers will have a means to access fee information in connection with a loyalty, award, or promotional gift card even if they do not retain the fee disclosures, § 205.20(a)(4)(iii)(D) requires the disclosure on the card of a

[15] Proposed § 205.20(a)(4)(iii) would have required a loyalty, award, or promotional card to set forth, among other things, "the disclosures specified in paragraphs (d)(2), (e)(2), and (f)(2) of this section." Due to a scrivener's error, the proposal cross-referenced paragraph (e)(2) of the rule, rather than paragraph (e)(3) as was intended. In response to commenters' suggestions, however, the final rule states the specific disclosures that are applicable to loyalty, award, or promotional gift cards in § 205.20(a)(4)(iii) for clarity, instead of cross-referencing other disclosure requirements elsewhere in the rule.

toll-free telephone number and, if one is maintained, a Web site. The final rule does not require that this contact information appear on the front of the card, however.[16] Because many issuers already maintain toll-free telephone numbers and Web sites for consumers to use for further information and often provide this information on the cards they issue, this requirement in § 205(a)(4)(iii)(D) should not impose significant additional burden on issuers. Overall, the Board believes the revised disclosures in the final rule strike an appropriate balance between the competing considerations of limiting potential consumer confusion or surprise arising from the different terms that may apply to loyalty, award, or promotional gift cards, and avoiding unnecessary costs and burdens on companies that support or administer loyalty, award, or promotional programs.

Comment 20(a)(4)–1 provides examples of loyalty, award, or promotional programs. Under the November 2009 Proposed Rule, cards, codes, or other devices issued in connection with a loyalty, award, or promotional program would have included, for example, gift cards mailed to a consumer as a rebate on a product that a consumer has purchased in response to a sales promotion, and gift cards given by a merchant to reward frequent customers.

Industry commenters generally agreed with the proposed examples, particularly because they would apply regardless of whether the consumer has paid or provided any other value to obtain the card, as in the case of rebate cards. Industry commenters also urged the Board to include additional examples in the comment.

The final comment incorporates each of the proposed examples, with certain revisions in response to commenters' suggestions, and is amended to indicate that the list is not exclusive. Comment 20(a)(4)–1 also includes two new examples to address cards, codes, or other devices that may be distributed in connection with a sales promotion, or provided by companies to a charity or community group for the charity or group's fundraising purposes (for example, as a reward for a donation or as a prize in a charitable event).

Comment 20(a)(4)–2 provides examples of how a card, code, or other device may indicate that it is issued for loyalty, award, or promotional purposes for purposes of § 205.20(a)(4)(iii)(A). For example, the disclosure on the front of the card, code, or other device may state "Reward" or "Promotional."

Comment 20(a)(4)–3 provides that if no fees are imposed in connection with a loyalty, award, or promotional gift card, the disclosure on the card of a toll-free telephone number and Web site, if one is maintained, is not required.

20(a)(5) Dormancy or Inactivity Fee

EFTA Section 915(a)(1) defines a "dormancy fee," or an "inactivity charge or fee" as a fee, charge, or penalty for non-use or inactivity of a gift certificate, store gift card, or general-use prepaid card. *See* 15 U.S.C. 1693m(a)(1). In the November 2009 Proposed Rule, the Board proposed § 205.20(a)(5) to implement this definition with non-substantive wording modifications to improve readability. The Board did not receive any comments on proposed § 205.20(a)(5), which is adopted as proposed.

20(a)(6) Service Fee

EFTA Section 915(a)(3)(A) defines a "service fee" as a periodic fee, charge, or penalty for holding or use of a gift certificate, store gift card, or general-use prepaid card. *See* 15 U.S.C. 1693m(a)(3)(A). In the November 2009 Proposed Rule, the Board proposed to implement this definition in § 205.20(a)(6) using substantially the same language as the statute. Commenters did not oppose the language in § 205.20(a)(6).

The Board also proposed comment 20(a)(6)–1 to clarify that a periodic fee is a fee that may be imposed from time to time for holding or using a gift certificate, store gift card, or general-use prepaid card. The proposed comment also provided that such fees may include a monthly maintenance fee, a transaction fee, a reload fee, or a balance inquiry fee, whether or not the fee is waived for a certain period of time or is only imposed after a certain period of time. Proposed comment 20(a)(6)–1 also clarified that a one-time initial issuance fee is not a service fee, consistent with EFTA Section 915(a)(3)(B), and provided examples of other one-time fees that are not service fees, including cash-out fees.

The Board received numerous comments on the clarification proposed in comment 20(a)(6)–1. Consumer group commenters and one state attorney general commenter agreed with the Board's interpretation of "periodic fee." Several industry commenters, however, suggested that the Board's interpretation as set forth in the proposed definition of "service fee" is inconsistent with the statutory language, previous interpretations of the term "periodic" under other consumer financial services regulations, and state law interpretations of "service" fees. Industry commenters also noted that one consequence of the Board's interpretation is that issuers would be restricted from charging fees for certain transactions that carry network costs for the issuers, such as foreign transactions and reloads. These commenters argued that if issuers are generally not permitted to recoup the costs of providing these services, issuers may decide to limit the functionality of certificates or cards, such as by issuing domestic-use only cards or non-reloadable cards. Finally, industry commenters argued that the Board's interpretation would complicate disclosures because of the limited space on a certificate or card. Instead, industry commenters recommended that the Board interpret "periodic fee" to mean a fee that is imposed at regular intervals, which would include a monthly maintenance fee, but not transaction fees or reload fees that are triggered by consumer activity.

The Board continues to believe that the proposed interpretation of "periodic fee" as it applies to "service fee" is appropriate. As the Board noted in the November 2009 Proposed Rule, the statutory definition of "service fee" includes fees imposed for the "use" of a gift certificate, store gift card, or general-use prepaid card. *See* EFTA Section 915(a)(3)(A); 15 U.S.C. 1693m(a)(3)(A). Thus, under the statute, service fees are not limited to fees imposed for holding a certificate or card. The Board believes that the intent of the statute is to capture activity-based and other fees related to the use of the certificate or card, such as transaction fees, reload fees, and balance inquiry fees, in the definition of "service fee." In addition, the Board is concerned that a narrow interpretation of "service fee" would result in a shift in fee structures from fees imposed at regular intervals to fees that are imposed for a transaction or service associated with the certificate or card.

Industry commenters also argued that the Board's interpretation is contrary to the statute's intent because it effectively bans certain fees, instead of merely restricting how frequently such fees may be imposed. Specifically, these commenters suggested that because conducting a transaction constitutes activity, a transaction fee contingent on consumer activity could never be charged, and the Board's inclusion of such fees in the definition of "service fee" effectively prohibits such fees. *See*

[16] The toll-free telephone number and Web site may also be the same toll-free telephone number and Web site provided for customer service issues or questions relating to the loyalty, award, or promotional program.

EFTA Section 915(b)(2)(A); 15 U.S.C. 1693m(b)(2)(A).

The Board does not agree that its interpretation compels this result. The statute and the regulation permit a fee to be charged after one year of inactivity. Therefore, a fee could be charged contemporaneously with the first consumer activity after the one-year period of inactivity. For example, if an issuer charges a reload fee on a general-use prepaid card and a consumer reloads the card after one year of inactivity, the reload fee could be imposed at that time assuming no other fees have been imposed during that month.

As explained in the November 2009 Proposed Rule, the Board believes that interpreting the term "service fee" as proposed, and thus limiting when such fees may be imposed, will improve the transparency and predictability of costs to consumers. As a result, the interpretation of "periodic fee" as it applies to "service fee" is adopted as proposed, but has been moved from proposed comment 20(a)(6)–1 to § 205.20(a)(6) for clarity.

The Board also received comments requesting that the Board provide a complete list of all fees that are included in the meaning of "service fee." The list of fees in comment 20(a)(6)–1 is not meant to be an exhaustive list. Comment 20(a)(6)–1 references the most common fees associated with certificates and cards. In response to commenters' suggestions, the Board is including some additional examples in comment 20(a)(6)–1. In addition to providing that an ATM fee and a foreign currency transaction fee are included in the meaning of "service fee," the Board is providing examples of other fees that are not considered "service fees," as discussed below.

The Board recognizes that certain fees are unlikely to be imposed more than once while underlying funds are still valid, such as a supplemental card fee or a lost or stolen certificate or card replacement fee. The Board believes such fees are akin to one-time fees and should not be considered "periodic fees." Accordingly, the Board is amending comment 20(a)(6)–1 to clarify that these fees are not "service fees" for purposes of § 205.20.

20(a)(7) Activity

Under § 205.20(d), no person may impose a dormancy, inactivity, or service fee on a gift certificate, store gift card, or general-use prepaid card, unless there has been no "activity" with respect to the certificate or card, among other things. For clarity, the Board is adding a new § 205.20(a)(7) to define the term "activity" for purposes of § 205.20. Similar to the interpretation the Board previously proposed in comment 20(d)–2 in the November 2009 Proposed Rule, the Board is defining "activity" as any action that results in an increase or decrease of the funds underlying a certificate or card. The Board is also specifically providing that the imposition of a fee does not constitute activity. Furthermore, the Board is moving the guidance on "activity" from comment 20(d)–2 to new comment 20(a)(7)–1. In proposing comment 20(d)–2, the Board solicited comment on whether there were any other actions taken by a consumer that should be considered "activity."

Several industry commenters agreed that providing additional examples would be helpful. Based on the comments received, the Board is revising the language in proposed comment 20(d)–2, now comment 20(a)(7)–1, to include an example clarifying that if a consumer attempts a transaction with a gift certificate, store gift card, or general-use prepaid card, but the transaction fails due to technical or other reasons, such attempt does not constitute activity with respect to the certificate or card. Also, in response to commenters' suggestions, § 205.20(a)(7) provides that "activity" does not include an adjustment due to an error or a reversal of a prior transaction. Comment 20(a)(7)–1 further provides that if the funds underlying a gift certificate, store gift card, or general-use prepaid card are adjusted because there was an error or the consumer has returned a previously purchased good, the adjustment does not constitute activity with respect to the certificate or card.

20(b) Exclusions

EFTA Section 915(a)(2)(D) states that the terms "general-use prepaid card," "gift certificate," and "store gift card" do not include an electronic promise, plastic card, or payment code or device that falls into one of six specified categories. *See* 15 U.S.C. 1593m(a)(2)(D). For example, reloadable cards that are not marketed or labeled as a gift card or gift certificate are excluded from the statutory definitions. Similarly, prepaid cards that are not marketed to the general public are excluded from the statutory definitions. Thus, under the statute, an excluded product is not subject to the substantive restrictions regarding when a dormancy, inactivity, or service fee may be imposed, or on expiration dates. These excluded products also are not subject to the statute's disclosure requirements. *See, however,* § 205.20(a)(4)(iii).

Section 205.20(b) implements the statutory exclusions and provides that the terms "gift certificate," "store gift card," and "general-use prepaid card" do not include any cards, codes, or other devices that fall under any of the six exclusions specified in the statute. As noted above, § 205.20(b) of the final rule uses the term "card, code, or other device," instead of the term "electronic promise, plastic card, or payment code or device" for clarity. No substantive difference is intended.

Proposed comment 20(b)–1 provided guidance on the effect of qualifying for any of the specified exclusions. The comment stated that an excluded card, code, or other device generally is not subject to any of the substantive restrictions or disclosure requirements of the proposed rule. *See, however,* § 205.20(a)(4)(iii) with respect to loyalty, award, or promotional gift cards. The Board did not receive any comments on the comment as proposed, and it is adopted without change.

Proposed comment 20(b)–2 clarified that a card, code, or other device may qualify for one or more exclusions and that a card, code, or other device that falls within any of the exclusions generally is not covered by the rule. The comment is adopted generally as proposed, with modifications for clarity. For example, a corporation may give its employees a gift card that is marketed solely to businesses for incentive-related purposes, such as to reward job performance or promote employee safety. In this case, the card, code, or other device may qualify for the exclusion in § 205.20(b)(3) for loyalty, award, or promotional gift cards, or for the exclusion in § 205.20(b)(4) for cards, codes, or other devices not marketed to the general public.

In addition, comment 20(b)–2 states that as long as any one of the exclusions apply, a card, code, or other device generally is not covered by § 205.20, even if other exclusions do not apply. In the example, if the type of gift card given by the corporation can also be purchased by a consumer directly from a merchant, the card does not qualify as a card that is not marketed to the general public because it can also be obtained through retail channels. *See* § 205.20(b)(4), discussed below. Nonetheless, the gift card would nevertheless be exempt from the substantive requirements of § 205.20 because it is still a loyalty, award, or promotional gift card (provided that certain disclosures are provided on or with the card as required under § 205.20(a)(4)(iii)). For additional clarification, the final comment includes a second example addressing

reloadable spending cards that may be targeted to teenagers. Although such cards do not qualify for the exclusion for cards not marketed to the general public, they may nonetheless be excluded from the scope of the rule if they are not marketed as gift cards or gift certificates.

The six specific exclusions are discussed below.

20(b)(1) Usable Solely for Telephone Services

Section 205.20(b)(1) implements the exclusion for cards, codes, or other devices that are usable solely for telephone services. *See* EFTA Section 915(a)(2)(D)(i); 15 U.S.C. 1693m(a)(2)(D)(i). Proposed comment 20(b)(1)–1 set forth examples of products that fall within this exclusion, such as prepaid cards for long-distance telephone services and prepaid cards for wireless telephone service. The proposed comment further clarified that this exclusion also includes prepaid products that may be used for other services analogous in function to a telephone, such as prepaid cards for voice over Internet protocol (VoIP) access time. Section 205.20(b)(1) and comment 20(b)(1)–1 are adopted substantially as proposed.

Many mobile phones today are capable of a number of different functions in addition to voice communications, including sending text messages and accessing the Internet. Accordingly, the Board solicited comment on whether it should exercise its authority under EFTA Section 904 to expand the exclusion to cover other prepaid cards that may be redeemed for similar or related technology services, such as prepaid cards used to obtain mobile broadband or Internet access time.[17]

Industry commenters agreed that the Board should expand the exclusion as described to avoid restricting the types of prepaid products that may be offered today, as well as in the future. These commenters further urged the Board to expand the exclusion to cover prepaid cards that would enable cardholders to purchase applications that could be used on mobile telephones. The final rule does not incorporate the suggested revisions.

The Board generally believes that statutory exclusions should be interpreted narrowly to ensure that consumers receive the full protections contemplated in the statute. By its terms, EFTA Section 915(a)(2)(D)(i) excludes cards, codes, or other devices that are "usable *solely* for telephone services." *See* 15 U.S.C. 1693m(a)(2)(D)(i). While a consumer that purchases a card that can be applied toward Internet access time may use that time for telecommunications-related applications, it may also be used for other applications or purposes. The Board believes that if Congress had intended to exclude cards that may be redeemed for prepaid Internet access and similar technology services from the statutory provisions, it would have specified that intent in the statute. The Board is not aware of, and commenters did not identify, any evidence that Congress meant for consumers who purchase cards that may used for other technology-related services to be denied protection against dormancy, inactivity, or service fees, and expiration dates, unlike consumers who purchase cards that may be used for other goods or services. Thus, the Board declines to expand the exclusion.[18]

20(b)(2) Reloadable and Not Marketed or Labeled as a Gift Card or Gift Certificate

Section 205.20(b)(2) implements the exclusion for cards, codes, or other devices that are reloadable and not marketed or labeled as a gift card or gift certificate. *See* EFTA Section 915(a)(2)(D)(ii); 15 U.S.C. 1693m(a)(2)(D)(ii).

Consistent with the statute, the card, code, or other device generally must be both reloadable *and* not marketed or labeled as a gift card or gift certificate to qualify for the exclusion. Thus, a non-reloadable card generally is not excluded, even if it is not marketed or labeled as a gift card or gift certificate, unless a different exclusion applies.[19] Similarly, a reloadable card that is marketed as a gift card or gift certificate does not qualify for the exclusion.

"Reloadable"

Proposed comment 20(b)(2)–1 provided that a card, code, or other device is "reloadable" if it has the "capability of having more funds added by a cardholder after the initial purchase or issuance." Several industry commenters noted, however, that the proposed comment was too narrow given that many non-gift prepaid cards are reloadable, but by persons other than the cardholder. For example, many payroll cards, health savings account cards, and flexible spending account cards are reloadable solely by the employer. Similarly, university cards, teen cards, and insurance cards may also be reloadable by persons other than the cardholder. Accordingly, these commenters observed that the language of proposed comment 20(b)(2)–1 could lead to the unintended consequence of covering certain non-gift prepaid products under rules primarily intended to cover consumer gift cards.

The Board did not intend to limit the scope of the term "reloadable" in the manner suggested by commenters. Accordingly, comment 20(b)(2)–1 has been revised in the final rule to remove the limitation "by a cardholder" to take into account the fact that a card, code, or other device may be reloaded by persons other than a consumer cardholder.[20]

In addition, one industry commenter urged the Board to clarify that whether a card is reloadable should be determined by whether reloadability is permitted under the terms and conditions of the prepaid card, rather than by the technical ability of the issuer to add value to the card. This commenter was concerned that the proposed comment potentially implied that a card would be considered "reloadable" if the issuer or the processor can add functionality to the card allowing a card to be reloaded regardless of the terms and conditions of the card. The Board agrees with this suggestion. The final comment clarifies that a card, code, or other device is "reloadable" only if its terms and conditions allow for funds to be added after initial issuance or purchase, regardless of whether the card issuer or processor has the technical ability to add functionality to the card, code, or device that would permit the addition of funds.

"Marketed or Labeled as a Gift Card or Gift Certificate"

Proposed comment 20(b)(2)–2 clarified the meaning of the term "marketed or labeled as a gift card or gift certificate." The proposed comment

[17] *See, e.g.,* N.J. Rev. Stat. § 56:8–110 (excluding prepaid telecommunications and technology cards from the definitions of "gift card" and "gift certificate").

[18] The Board notes, however, that the fee and expiration date restrictions may cease to apply once a certificate or card has been fully redeemed and the funds are deducted from the certificate or card, even if the underlying funds are not used to contemporaneously purchase a specific good or service. *See, e.g.,* comment 20(e)–13, discussed below.

[19] As discussed below, a temporary non-reloadable card issued solely in connection with a general-purpose reloadable card still qualifies for the exclusion in § 205.20(b)(2), so long as the card is not marketed as a gift card or gift certificate. *See* § 205.20(b)(2) and comment 20(b)(2)–6.

[20] As discussed above, the Board has also revised the definitions of "store gift card" and "general-use prepaid card" in §§ 205.20(a)(2) and (a)(3) to remove references to increasing or reloading a card "by a consumer" to reflect that the amount on a card may be increased or reloaded by a person other than a consumer.

provided that the term means directly or indirectly offering, advertising, or otherwise suggesting the potential use of a card, code, or other device as a gift for another person. The proposed comment also stated that whether the exclusion applies does not depend on the type of entity that is making the promotional message—for example, the actions of the issuer, the retailer, the program manager, or the payment network on which a card is used could each promote the use of a card as a gift card or gift certificate and thus nullify the exclusion. Finally, the proposed comment stated that a certificate or card could be deemed to be marketed or labeled as a gift card or gift certificate even if it is primarily marketed for another purpose. Thus, for example, a reloadable network-branded card would be marketed or labeled as a gift card or gift certificate if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as "the perfect gift" during the holiday season.

Two industry trade associations urged the Board to use its exemption authority to limit the scope of the marketing provision to apply only to the actions of the issuer. Specifically, these commenters suggested that the Board clarify that the exclusion in § 205.20(b)(2) applies as long as a certificate or card was "reloadable and not labeled or marketed *by the issuer* as a gift card or gift certificate." These commenters expressed concern that the proposed rule could frustrate the efforts of an issuer seeking to avoid the labeling and the marketing of their cards as gift cards if actions by other parties in the supply chain, including a retailer or a merchandiser, could nullify the application of the exception. For example, these commenters noted that a general-purpose reloadable card could be deemed to be marketed as a gift card notwithstanding the issuer's actions if a store clerk incorrectly stocked the issuer's cards in a display or combined distinctly labeled cards in a single display. Other industry commenters urged the Board to clarify that issuers would be protected from liability for improper marketing of cards if they maintained appropriate policies and procedures regarding marketing. These commenters expressed concern that access to general-purpose reloadable cards for the unbanked and the underbanked could otherwise be restricted due to compliance concerns. One industry trade association commenter representing convenience stores urged the Board to exclude retailers from the rule altogether if they do not issue gift cards.

Comment 20(b)(2)–2 is adopted generally as proposed, with certain revisions for clarity. Under the final comment, a card, code, or other device is deemed to be marketed or labeled as a gift card or gift certificate if anyone (other than the consumer-purchaser of the card [21]), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used, promotes the use of the card as a gift card or gift certificate. Thus, the final rule does not limit the scope of the exclusion in § 205.20(b)(2) to the actions of the card issuer. The Board notes that the gift card provisions of the Credit Card Act broadly encompass the actions of "any person," and generally are not limited to the acts of the issuer, except in the case of disclosures that must be provided prior to purchase. *See, e.g.,* EFTA Section 915(b)(3)(B); 15 U.S.C. 1693m(b)(3)(B). Moreover, the Board believes that restricting application of the marketing provisions to issuer actions would undermine the consumer protection purposes of the statute. For example, even if an issuer of a general-purpose reloadable card were to avoid labeling or otherwise indicating on a certificate or card that it is intended for gift-giving purposes, the retailer or merchandiser may display the general-purpose reloadable card with store gift cards and gift certificates under a single sign that prominently indicated the availability of gift cards. Limiting the scope of the marketing provisions to issuer actions would not therefore sufficiently protect consumers acting reasonably under the circumstances from inadvertently purchasing the general-purpose reloadable card in the belief they were purchasing a gift card. Such consumers would then be surprised when the balance on the card is quickly drawn down by fees or short expiration dates which is contrary to the intent of the marketing provisions.

Nonetheless, the Board understands that the broad scope of the rule to also cover the actions of any party that may be involved in the distribution or promotion of a certificate or card may pose substantial compliance risks for issuers. As further discussed under comment 20(b)(2)–4, the exclusion in § 205.20(b)(2) continues to apply so long as a certificate or card is not marketed or labeled as a gift card or gift certificate and if persons subject to the rule maintain policies and procedures reasonably designed to avoid such marketing.

In addition, in response to some commenters' concerns, comment 20(b)(2)–2 clarifies that the mere mention that gift cards or gift certificates are available in an advertisement or on a sign that also indicates the availability of other excluded prepaid cards does not by itself cause the excluded prepaid cards to be marketed as a gift card or a gift certificate. The key consideration is whether a consumer acting reasonably under the circumstances could be led to believe that all certificates or cards referenced in the advertisement or the sign are gift cards or gift certificates. For instance, a retailer could state in an advertisement "Gift Cards and Prepaid Cards Sold Here" to promote the availability of gift cards and general-purpose reloadable cards in the store without causing the general-purpose reloadable card to be marketed as a gift card or gift certificate, provided that a consumer acting reasonably under the circumstances would not be led to believe that all certificates or cards referenced in the advertisement are gift cards or gift certificates. Similarly, the posting of a sign in a store which communicates the general availability of gift cards does not by itself constitute the marketing of other excluded prepaid cards that may also be sold in the store as gift cards or gift certificates, provided that a consumer acting reasonably under the circumstances is not led to believe that the sign applies to all prepaid products sold in the store. (*See, however,* comment 20(b)(2)–4.ii.) Such determinations would depend on the facts and circumstances of an individual sign or advertisement.

Proposed comment 20(b)(2)–3 provided positive and negative examples of the term "marketed or labeled as a gift card or gift certificate." The comment is adopted generally as proposed.

Under the final comment, positive examples of marketing or labeling as a gift card or gift certificate include displaying the word "gift" or "present," displaying a congratulatory message, and incorporating gift-giving or celebratory imagery or motifs on the card, certificate or accompanying material, such as documentation, packaging and promotional displays. *See* comment 20(b)(2)–3.i. In contrast, a card, code, or other device is not marketed or labeled as a gift card or gift

[21] Thus, a card would not be deemed to be marketed or labeled as a gift card or gift certificate as a result of actions by the consumer-purchaser. For example, if the purchaser gives the card to another consumer as a "gift," or if the primary cardholder contacts the issuer and requests a secondary card to be given to another person for his or her use, such actions do not cause the card to be marketed as a gift card or gift certificate.

certificate if the issuer, seller, or other person represents that the card, code, or other device can be used as a substitute for a checking, savings, or deposit account, as a budgetary tool, or to cover emergency expenses. Similarly, a card, code, or other device is not marketed as a gift card or gift certificate if it is promoted as a substitute for travelers checks or cash for personal use, or promoted as a means of paying for a consumer's health-related expenses. *See* comment 20(b)(2)–3.ii. The final rule removes the reference to use of a certificate or card as a substitute for a travelers check or cash "by the card purchaser" to reflect the fact that someone other than the purchaser may use the certificate or card for travel expenses. *See* comment 20(b)(2)–3.ii.C.

Policies and Procedures To Avoid Marketing as a Gift Card or Gift Certificate

As discussed above, a gift card usable at a particular merchant may be purchased by a consumer directly from the merchant at the merchant's store. In this type of arrangement, the merchant is typically the primary party involved in issuing the card and operating the card program. As such, the merchant-issuer can be expected to have substantial control over all facets of the card program, including how the card is sold or marketed.

In other cases, a gift card may be sold to consumers through another merchant or retailer, such as a grocery store or a drug store, on display racks that may make retail gift cards available alongside gift cards usable at other merchants and other types of prepaid cards, including general-purpose reloadable cards and telephone cards. In this type of arrangement, multiple parties are generally involved in the card distribution process. These parties may include: an issuer (whether it is a merchant or a bank); a program manager who works with issuers to administer any or all aspects of a card program, including transaction processing, distribution, and marketing; and a seller or distributor of the card.[22] A seller or distributor of the card can be an issuer, a program manager, or another party, such as a shopping mall or a retailer. In these arrangements, responsibilities for operating the program, including compliance with applicable laws or payment network rules, are generally allocated by contract.

When multiple parties are involved in a card program, the issuer may not play a significant role in the card distribution process and thus may have less control over how the card is displayed or marketed at the locations where the card is sold. A rule that depends upon how a card is marketed therefore may pose substantial compliance risks for an issuer that cannot fully control the venues and mediums in which its prepaid cards are marketed to consumers. For example, where a card is sold in a substantial number of retail outlets, the card issuer cannot verify in every instance how the card is displayed or marketed at each retail outlet to ensure that it is not being marketed as a gift card or gift certificate through signage, advertisements, or otherwise.

To address this issue, proposed comment 20(b)(2)–4 provided that a reloadable card, code, or other device is not marketed or labeled as a gift card or gift certificate if entities subject to the rule maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures would include contractual provisions prohibiting a general-purpose reloadable card from being marketed as a gift card and controls to regularly monitor or otherwise verify that the cards are not being marketed as such. The proposed comment also included positive and negative examples of the exclusion in § 205.20(b)(2).

One example of procedures in which a card, code, or other device is not marketed as a gift card or gift certificate was where the issuer or program manager sets up two physically separated displays at a retailer, one for gift cards and another for excluded products, including general-purpose reloadable cards, such that a reasonable consumer would not believe that the excluded cards are gift cards. Under this example, the exclusion in § 205.20(b)(2) applies even if a retail clerk inadvertently stocks or places some of the general-purpose reloadable cards on the gift card display.

In a second proposed example, the issuer or program manager sets up a single display that contains a variety of prepaid cards, including gift cards subject to the rule and otherwise excluded prepaid products, such as general-purpose reloadable cards. A sign stating "Gift Cards" appears prominently on top of the display. Under the second example, any general-purpose reloadable cards sold under those circumstances does not qualify for the exclusion in § 205.20(b)(2) because the issuer or program manager does not maintain policies and procedures reasonably designed to avoid the marketing of the general purpose reloadable cards as gift cards or gift certificates.

Several industry commenters urged the Board to include additional examples of the exclusion in § 205.20(b)(2). These commenters included card issuers, program managers and distributors of prepaid cards, retailers, and industry trade associations. In particular, these commenters stated that requiring two separate displays as contemplated in the proposed examples would create significant difficulties for retailers because of space constraints. Industry commenters expressed concern that instead of providing space for additional displays, some retailers may choose to stop selling general-purpose reloadable cards altogether. As a result, industry commenters believed that access to such products for the unbanked and underbanked could be reduced.

Industry commenters suggested various additional measures that could be undertaken to permit the sale of gift cards and otherwise excluded prepaid cards in the same retail display without causing the excluded cards to be marketed as a gift card or gift certificate. These measures included segregating general-purpose reloadable cards and gift cards on different sides of a display rack with a sign at the top of each side differentiating the products; using colors, design, and/or signage to differentiate between separate products on the same display (for example, signs indicating "reloadable cards" and "gift cards," as applicable); or requiring the display to indicate a generic label such as "prepaid cards."

Industry commenters also asserted that the final rule should expand the example of a retail clerk inadvertently stocking a general-purpose reloadable card inappropriately on a gift card display to apply to consumer actions as well. These commenters further stated that the final rule should permit inadvertent or bona fide errors in the placement of signage by a retail clerk or third-party merchandiser, such that the inadvertent placement of gift card advertising in the section of a display or portion of a rack for general-purpose reloadable cards does not nullify the exclusion in § 205.20(b)(2) for the general-purpose reloadable cards.

Comment 20(b)(2)–4 is adopted in the final rule generally as proposed with certain revisions for clarity. The final

[22] In addition to these parties, a processor may work with the issuer and the program manager to process card transactions, and in some cases provide Web site and telephone customer service. For open-loop card programs, the payment network operates the network and establishes operating rules for card issuers, processors, and merchants or ATMs that accept the card. The payment network may also review and approve a card program in order for the particular card to carry the network brand.

comment provides that the exclusion in § 205.20(b)(2) applies if a reloadable card, code, or other device is not marketed or labeled as a gift card or gift certificate and if persons subject to the rule, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures may include: contractual provisions prohibiting a card, code, or other device from being marketed or labeled as a gift card or gift certificate; merchandising guidelines or plans regarding how the product must be displayed in a retail outlet; and controls to regularly monitor or otherwise verify that the card, code, or other device is not being marketed as a gift card or gift certificate. The final comment further states that whether a person has marketed a reloadable card, code, or other device as a gift card or gift certificate will depend on the fact and circumstances, including whether a reasonable consumer would be led to believe that the card, code, or other device is a gift card or gift certificate.

The final comment also includes the two proposed examples discussed above with minor revisions. The example in comment 20(b)(2)–4.i, which sets forth the scenario where separate displays have been set up for gift cards and for other excluded prepaid cards, including general-purpose reloadable cards, has been revised to provide that the exclusion applies even if a consumer inadvertently places a general-purpose reloadable card on the gift card display. However, comment 20(b)(2)–4.i does not incorporate commenters' suggestions to apply the exclusion to circumstances where signage has been inadvertently placed on the wrong display (such as a sign stating "Gift Cards" placed on or near the general-purpose reloadable card display) because consumers acting reasonably under the circumstances would likely be led into believing that they are purchasing gift cards from the general-purpose reloadable card display.

The final comment includes two new examples to illustrate additional circumstances where a reloadable card, code, or device is not marketed or labeled as a gift card or gift certificate. The additional examples seek to strike a balance between protecting consumers from being misled regarding the type of prepaid cards that they are purchasing and the possibility that overly restrictive marketing provisions may present significant compliance challenges in retail environments where there may not be sufficient space for separate displays for covered and non-covered products.

The first new example is in comment 20(b)(2)–4.iii. In this example, the issuer or program manager sets up a single multi-sided display at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards, are sold. Gift cards are segregated from excluded cards, with gift cards on one side of the display and excluded cards on a different side of a display. Signs of equal prominence at the top of each side of the display clearly differentiate between gift cards and the other types of prepaid cards that are available for sale. The retailer does not use any other more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating "Gift Cards" at the top of the display or located near the display. The example illustrates that the exclusion in § 205.20(b)(2) applies to the general-purpose reloadable cards because of the maintenance of policies and procedures reasonably designed to avoid the marketing of the reloadable cards as gift cards or gift certificates, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card in the gift card section of the display.

Comment 20(b)(2)–4.iv., the second new example, addresses the sale of prepaid cards at a checkout lane where gift cards are sold side-by-side in the same lane along with excluded cards. In the example, the retailer does not use any signage or other indicia suggesting the general availability of gift cards on the display. In this case, the retailer has not affirmatively indicated or represented at the checkout lane that only gift cards or gift certificates are available for purchase. Accordingly, there has been no marketing of the excluded products as gift cards or gift certificates, and the exclusion in § 205.20 applies to the non-gift cards.

Several industry commenters stated that how the card and related card packaging is labeled and packaged should be the sole determining factor as to whether the card is marketed or labeled as a gift card or gift certificate. In this regard, these commenters stated that it should be sufficient to indicate clearly on packaging that an excluded card is "Not a Gift Card," "Not for Gift Giving Purposes," or similar words to that effect, to avoid marketing or labeling a prepaid product as a gift certificate or gift card. The Board believes, however, that merely labeling on outside packaging that a prepaid card product is "not a gift card" or that it is "not intended for gift purposes," is not sufficient to alert consumers that they are not buying a gift card if other indicia, including the signage used at the point of purchase or the manner in which cards are displayed, are inconsistent with the messaging on the packaging.

Given the various entities that may be involved in distributing or selling certificates or cards subject of the rule, the Board understands that several parties may be subject to the rule with respect to the same prepaid card program, including the issuer, the program manager, and the retailer. To the extent that more than one party may be liable under the final rule, those parties may contract among themselves to ensure compliance. *See, e.g.,* § 205.4(d) (stating that institutions providing EFT services jointly may contract among themselves to allocate requirements under the regulation). Thus, for example, disclosures required to be on a certificate or card by § 205.20(d)(2) and (e)(3) may be satisfied by the issuer, while disclosures that must be provided prior to purchase under § 205.20(c)(3) may be satisfied by another party, such as the retailer (assuming the issuer does not also provide the requisite disclosures on the packaging). Similarly, marketing responsibilities may be allocated by contract. Compliance by one party would satisfy the compliance obligations for any other person with respect to that certificate or card. However, if the party that has contractually agreed to satisfy a compliance obligation fails to do so, each of the parties is potentially accountable under the EFTA and the final rule. These parties could also allocate among themselves the financial obligation for any liability resulting from the failure.

A few industry commenters urged the Board to clarify that general-use reloadable cards may be offered for sale on Web sites that also sell gift cards so long as the consumer is given appropriate disclosure prior to purchase that the general-purpose reloadable card is not a gift card. These commenters believed that such a clarification is appropriate even if the Web site advertises "gift cards" or "gifting," or if its Web address incorporates a reference to gift cards or gifting.

The Board is not persuaded that the exclusion in § 205.20(b)(2) should apply in these circumstances. The Board believes that a Web site's display of a banner advertisement or a graphic on its home page that prominently displays "Gift Cards," "Gift Giving," or similar language without mention of other available products, or inclusion of the terms "gift card" or "gift certificate" in its Web address, creates the same potential for consumer confusion as a sign stating

"Gift Cards" at the top of a prepaid card display. A consumer acting reasonably under the circumstances may be led to believe that all prepaid products sold on the Web site are gift cards or gift certificates. Thus, under these facts, the Web site has marketed all such products, including any general-purpose reloadable cards that may be sold on the Web site, as gift cards or gift certificates, and the exclusion in § 205.20(b)(2) does not apply. New comment 20(b)(2)–5 provides this guidance.

Temporary Cards Issued in Connection With a General-Purpose Reloadable Card

Some general-purpose reloadable cards that are not intended to be marketed as a gift card, but rather as an alternative to a bank account (or account substitute), such as for the unbanked, may be sold initially as a temporary non-reloadable card. After the card is purchased, the cardholder may call the issuer to register the card. Once the issuer has obtained the cardholder's personal information, a new personalized, reloadable card is sent to the cardholder to replace the temporary card.

Under one model, the cardholder may use the temporary non-reloadable card to engage in transactions immediately after card purchase and up until the card is registered by the consumer and replaced with the personalized, reloadable card. Under another model, the temporary non-reloadable card may not be used by the consumer for purchases until the consumer calls to register the card. Under the second model, the temporary card can be used after registration until the personalized, reloadable card is received and activated by the consumer.

The Board solicited comment on the appropriate treatment of such temporary non-reloadable cards in light of the fact that the statute appears to cover all non-reloadable cards without exception. Under one proposed approach, the restrictions limiting fees and expiration dates would not apply either to the temporary non-reloadable card or to the reloadable replacement card. Under a second approach, the restrictions would apply during the full account relationship if the card is initially issued as a non-reloadable card. Under a third approach, the restrictions limiting fees and expiration dates would apply solely to the temporary non-reloadable card, but not to the reloadable replacement card.

The majority of industry commenters urged the Board to exclude temporary non-reloadable cards from the scope of the rule altogether because such cards are issued only in conjunction with general-purpose reloadable cards and are never marketed or sold as anything other than as a reloadable product. Several industry commenters also asserted that these cards are initially issued as non-reloadable cards to control fraud and to reduce the risk of money laundering. Thus, they argued that applying the rule to the card if it was initially non-reloadable, but not if the temporary card was reloadable, would unnecessarily limit issuers' ability to control for risks as issuers would shift to issuing the temporary card as a reloadable product to avoid application of the rule. Industry commenters and one nonprofit organization commenter focused on serving the unbanked also noted that covering the temporary non-reloadable card, but not the reloadable replacement card, could lead to consumer confusion because different fee and expiration date terms would apply to the different cards depending on whether or not the card was reloadable. The nonprofit organization commenter urged the Board not to cover temporary non-reloadable cards to avoid adversely impacting the business model for general-purpose reloadable cards and thereby restricting the availability of the product for the growing number of consumers that use these cards in place of bank accounts.

In contrast, consumer groups urged the Board to cover temporary non-reloadable cards issued in conjunction with reloadable cards that serve as account substitutes. Consumer groups cited consumer confusion caused by the fact that many of these products are sold on the same racks as gift cards.

One industry marketer and distributor of prepaid products and services also expressed concern about consumer confusion associated with the marketing of general-purpose reloadable cards. In particular, this industry commenter cited its own experience and industry data indicating that more than 60% of all consumers that purchase general-purpose reloadable cards in an unassisted environment (such as from a supermarket display) subsequently either never register or reload the card. In this commenter's view, the high rate of failure for registering or reloading the card suggests a high degree of consumer confusion with many consumers who intend to purchase a gift card inadvertently purchasing a general-purpose reloadable card instead. This commenter urged the Board to adopt the third approach and cover any temporary non-reloadable card issued in conjunction with a general-purpose reloadable card until the card is registered and replaced with a reloadable card. Under this approach, a consumer that inadvertently bought a general-purpose reloadable card thinking it was a gift card would be able to avoid most fees.

The final rule does not cover temporary non-reloadable cards issued solely in connection with a general-purpose reloadable card. Section 205.20(b)(2) has been revised in the final rule to provide that for purposes of the exclusion, the term "reloadable" also includes a temporary non-reloadable card if it is issued solely in connection with a reloadable card, code, or other device. New comment 20(b)(2)–6 provides additional guidance regarding temporary non-reloadable cards issued solely in connection with a general-purpose reloadable card.

The Board is persuaded that excluding temporary non-reloadable cards as a general-purpose reloadable card under § 205.20(b)(2) is appropriate to avoid consumer confusion if they are not marketed or labeled as a gift card or gift certificate. The Board believes that consumers likely will be confused if terms of the temporary non-reloadable card differ substantially from the terms of the replacement reloadable card. The Board also believes that any consumer confusion resulting from consumers inadvertently purchasing general-purpose reloadable cards instead of gift cards is more effectively addressed through policies and procedures designed to avoid the marketing of general-purpose reloadable cards as gift cards or gift certificates, *see, e.g.,* comment 20(b)(2)–4, rather than by covering temporary non-reloadable cards under the rule.

In addition, the Board is concerned that covering the temporary non-reloadable card may create regulatory incentives that would unduly restrict issuers' ability to address potential fraud. The Board understands that some issuers today issue temporary cards in non-reloadable form to encourage consumers to register the card and provide customer identification information for Bank Secrecy Act purposes and to enable the issuer to track which cards have been registered. A rule that would apply only if the temporary card was non-reloadable would therefore limit issuers' options without significant consumer benefit because issuers would likely shift to issuing reloadable temporary cards to avoid the rule's restrictions on dormancy, inactivity, and service fees and on expiration dates.

20(b)(3) Loyalty, Award, or Promotional Gift Card

Section 205.20(b)(3) implements the exclusion for cards, codes, or other devices for loyalty, award, or promotional gift cards. *See* EFTA Section 915(a)(2)(D)(iii); 15 U.S.C. 1693m(a)(2)(D)(iii). The Board did not receive comment on the exclusion as proposed and it is adopted without change.

As discussed above, the term "loyalty, award, or promotional gift card" is defined in § 205.20(a)(4). While certain disclosures must be provided to meet the definition, a loyalty, award, or promotional gift card is not subject to the substantive restrictions in § 205.20, including the restrictions on imposing dormancy, inactivity, or service fees, or on expiration dates. A loyalty, award, or promotional gift card also is not subject to the prohibition on charging fees to replace an expired card if funds remain valid under § 205.20(e)(4).[23]

20(b)(4) Not Marketed to the General Public

Section 205.20(b)(4) implements the exclusion for cards, codes, or other devices that are not marketed to the general public. *See* EFTA Section 915(a)(2)(D)(iv); 15 U.S.C. 1693m(a)(2)(D)(iv). As explained in proposed comment 20(b)(4)–1, whether a card is "marketed to the general public" depends on the facts and circumstances, but the term generally describes cards, codes, or other devices that are offered, advertised or otherwise promoted to the general public. The proposed rule and commentary provided guidance on factors to be considered in determining whether a card, code or device is marketed to the general public.

Commenters generally supported the proposed rule and commentary, although some industry commenters disagreed with or requested modifications to the commentary, including to certain of the examples, as discussed below. The final rule adopts § 205.20(b)(4) and the related commentary substantially as proposed, with an additional clarification regarding the posting of policies that funds will be disbursed through prepaid cards.

In the final rule, comment 20(b)(4)–1 states that a card, code, or other device may be marketed to the general public through any advertising medium, including television, radio, newspaper, the Internet, or signage. In determining whether the exclusion applies to a particular card, code, or other device, comment 20(b)(4)–1 identifies a number of factors that should be considered, including the means or channel through which the card, code, or device may be obtained by a consumer, the subset of consumers that are eligible to obtain the card, code, or other device, and whether the availability of the card, code, or device is advertised or otherwise promoted in the marketplace. The comment also makes clear that the method of distribution by itself is not dispositive in determining whether a card, code, or other device is marketed to the general public.

One commenter requested clarification that the posting of a company policy that funds may be disbursed by prepaid card (such as a sign posted at a cash register or customer service center that store credit will be issued by prepaid card) does not constitute the marketing of a card, code, or other device to the general public. Comment 20(b)(4)–1 has been modified accordingly. The Board believes such postings do not constitute marketing to the general public because they are not intended to advertise or promote the availability of prepaid cards. Rather, they are intended to disclose company policy to consumers who might otherwise expect cash refunds.

Comment 20(b)(4)–2, which is adopted substantively as proposed except as noted below, provides six examples illustrating the application of 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. *See* comment 20(b)(4)–2.i. Some industry commenters requested that the Board clarify that marketing to the general public does not include business-to-business advertisement of gift cards, where the business purchaser of the cards may in turn distribute such cards to consumers. The Board declines to make this revision. Consumers could be confused if they receive gift cards that appear substantially similar to those that they could have purchased directly from a merchant, but contain different terms and conditions, such as a shorter expiration date.[24]

Similarly, the Board also considered whether cards issued or sold pursuant to a marketing campaign that targets a specific subset of consumers should fall within the exclusion. Some industry commenters urged the Board to view sales of gift cards that are limited to existing customers as falling within the exclusion for cards not marketed to the general public because of the steps required to become a customer, and therefore, to become eligible to purchase a gift card from the merchant. However, the Board believes that such a broad interpretation of the exclusion for cards not marketed to the general public would create a loophole and undermine the protections afforded to consumers under the rule. Therefore, the example in comment 20(b)(4)–2.ii states that a national retail chain could decide to market its gift cards only to members of its frequent buyers' program. Similarly, a bank may decide to sell gift cards only to its customers. However, if any member of the general public may become a member of the program or a customer of the bank, the general public would still be able to obtain the cards and such cards are covered by the rule, unless another exclusion applies. *See* comment 20(b)(4)–2.ii.

Likewise, proposed comment 20(b)(4)–2.iii included reloadable cards advertised to teenagers to help them manage their everyday expenses and for emergencies, or marketed to parents to enable them to monitor their teenager's spending, as a card marketed to the general public. Some institutions argued that the example should be limited to "gift cards" advertised to teenagers in recognition that other types of cards, such as reloadable cards, marketed to teens may qualify for a different exclusion under the rule. The Board declines to so limit the example because a card's status as a gift card does not affect whether the card is marketed to the general public. However, as noted above, certificates or cards that do not qualify for one exclusion may nonetheless qualify for another exclusion. Comment 20(b)–2 has been revised, as discussed above, to address the application of other exclusions to teen cards.

In contrast to the above examples, where the availability of the certificate

[23] A card, code, or other device that qualifies for the exclusion in § 205.20(b)(3) as a loyalty, award, or promotional gift card remains exempt from the substantive restrictions of § 205.20 even if it also bears celebratory motifs or terms that would cause it to be marketed or labeled as a gift card or gift certificate under § 205.20(b)(2). *See also* comment 20(b)–2.

[24] Such cards may, however, qualify for the exclusion in § 205.20(b)(3) for loyalty, award, or promotional gift cards.

or card itself is not advertised or otherwise promoted, but rather, is merely used as the means through which funds are delivered to a consumer, the Board believes the certificate or card is not marketed to the general public. Proposed comment 20(b)(4)–2 included four additional examples of cards that may fall within the exclusion depending on the circumstances: (a) A card containing insurance proceeds provided by an insurance company to a customer to settle a claim; (b) a card containing travel expenses or per diem funds provided by a business to an employee; (c) a card containing store credit provided by a retailer to a customer following a merchandise return if the card states that it is issued for store credit; and (d) a card containing tax refunds provided by a tax preparer to a customer. *See* proposed comments 20(b)(4)–2.iv.–vii.

The final comment adopts three of the four proposed examples substantively as proposed. However, the Board is not adopting the proposed example regarding travel expense or per diem cards. Specifically, the Board had proposed as an example of a card not marketed to the general public a prepaid card provided by an employer to its employees to cover travel expenses and per diem. *See* proposed comment 20(b)(4)–2.v. These cards are intended to be used for business purposes. In light of the clarification in comment 20(a)–4 that the rule's scope is limited to cards, codes or other devices sold or issued to consumers primarily for personal, family, or household purposes, these cards would not be subject to the rule. Thus, to eliminate redundancies, the proposed per diem and travel expense example is not adopted.

While commenters generally supported the proposed examples, some industry commenters argued that the tax refund card example should be modified to specifically exclude tax refund cards that are available only by becoming a customer of the tax preparer. The Board does not believe that this fact is relevant because, although the card would only be available to consumers who become customers of a tax preparer, any member of the general public typically may become a customer. Such a scenario would be indistinguishable from the national retail chain example described in comment 20(b)(4)–2.ii. Instead, the Board believes that whether a tax refund card is marketed to the general public depends upon other facts and circumstances. For example, if a tax preparer merely provides the prepaid card as a mechanism for providing a tax refund to a consumer, and does not advertise or otherwise promote the ability to receive a tax refund through a prepaid card, the card is excluded because it is not marketed to the general public. However, if the tax preparer engages in a marketing campaign that touts the ability of a consumer to receive a prepaid card for "faster" access to their tax refund proceeds, the tax refund card is not exempt under this exclusion. *See* comment 20(b)(4)–2.vi.

20(b)(5) Issued in Paper Form Only

Section 205.20(b)(5) sets forth the exclusion for cards, codes, or other devices that are issued in paper form only. *See* EFTA Section 915(a)(2)(D)(v); 15 U.S.C. 1693m(a)(2)(D)(v). Proposed comment 20(b)(5)–1 explained that the exclusion applies where the sole means of issuing the card, code, or other device is in paper form. Examples of excluded paper gift certificates or cards included paper certificates or vouchers distributed by a merchant that are redeemable for a specified dollar amount.

A few industry commenters urged the Board to remove the proposed exclusion stating that the exclusion could adversely impact the gift card industry as some merchants may elect to revert back to using paper gift certificates to avoid the fee and expiration date restrictions set forth in the rule. Other industry commenters believed that, given the cost savings and enhanced features offered by electronic gift cards compared to paper certificates, retailers and gift card issuers would be unlikely to return to paper simply to avoid application of the rule.

The exclusion for cards, codes, or other devices that are issued in paper form only is statutory, and accordingly, § 205.20(b)(5) is adopted as proposed. Comment 20(b)(5)–1 is also adopted generally as proposed. The comment explains that the exclusion does not apply simply because a card, code, or other device is reproduced or otherwise printed on paper. For example, a bar code, card or certificate number, or certificate or coupon provided to a consumer electronically and redeemable for goods or services is not issued in paper form, even though it may be reproduced or otherwise printed on paper by the consumer.[25] In this circumstance, although the consumer might hold a paper facsimile of the card, code, or other device, the exclusion does not apply because the information necessary to redeem the value was issued to the consumer in electronic form.

The comment does not, however, preclude a paper certificate bearing a bar code or account number 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 issued to the consumer solely in paper form, the certificate qualifies for the exclusion. Similarly, a consumer may prepay for an item or service and receive a paper receipt with a numerical code that can for example, be used to access a car wash or entered into an electronic parking meter. The receipt bearing the code qualifies for the exclusion for cards, codes, or other devices issued in paper form only.

New comment 20(b)(5)–2 contains positive and negative examples illustrating the exclusion for cards, codes, or other devices issued in paper form only.

20(b)(6) Redeemable Solely for Admission to Events or Venues

Section 205.20(b)(6) excludes cards, codes, or other devices that are redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services, in conjunction with such admission, at the event or venue, or at specific locations affiliated with and in geographic proximity to the event or venue. *See* EFTA Section 915(a)(2)(D)(vi); 15 U.S.C. 1693m(a)(2)(D)(vi). The Board did not receive any comments on this exclusion, and it is adopted as proposed.

As clarified in comment 20(b)(6)–1, the exclusion in § 205.20(b)(6) is generally limited to cards, codes, or other devices that do not state a specific monetary value but instead are redeemable for an admission to an event or venue, such as a ticket to a sporting event or a pass to enter an amusement park.[26] In addition, the exclusion applies to cards, codes, or other devices that entitle the consumer to obtain goods or services, in conjunction with admission to an event or venue. *See* EFTA Section 915(a)(2)(D)(vi); 15 U.S.C. 1693m(a)(2)(D)(vi). For example, the consumer might purchase a certificate or card that entitles the recipient to one

[25] An issuer may, however, replace a gift certificate that was initially issued in paper form only with a plastic card or electronic code (for example, to replace a lost paper certificate) without falling outside the exclusion in § 205.20(b)(5).

[26] Such cards, codes, or other devices are also not covered by the rule because they are not issued in a specified amount. *See* comment 20(a)–3.

ticket to an amusement park plus a dollar amount that can be spent on concessions at the park. Consistent with the statute, the exclusion in § 205.20(b)(6) also covers circumstances where the consumer may obtain goods or services at specific locations affiliated with and in geographic proximity to the event or venue in conjunction with admission. For example, a certificate or card may enable the consumer to gain admission to an amusement park and to obtain a souvenir of the occasion at a retailer affiliated with the park located within or near the park.

While the exclusion applies to cards, codes, or other devices that are redeemable *for* admission to an event or venue, and for goods or services purchased in conjunction with that admission, the exclusion does not cover cards, codes, or other devices issued in a specified monetary value that could be applied *toward* such admission. For example, a merchant affiliated with an amusement park could issue a $25 gift card to a consumer that can be redeemed by the recipient to purchase goods at any of the merchant's retail outlets and its on-line store. Under the terms of the prepaid card program, however, the merchant could also allow the card to be provided as a form of payment to purchase tickets at the amusement park.

Permitting the exclusion to apply in these circumstances would create opportunities for circumvention because an issuer could simply list the purchase of tickets at the amusement park as one of several permitted uses of a gift card to avoid the consumer protections provided by the Credit Card Act. Accordingly, the final rule does not apply the exclusion to a card that can be redeemed in a specified amount towards admission to an event or venue. This approach is consistent with the statutory exclusion, which refers to cards, codes, or other devices that are redeemable *solely* for admission to events or venues at a particular location or group of affiliated locations. *See* EFTA Section 915(a)(2)(D)(vi); 15 U.S.C. 1693m(a)(2)(D)(vi).[27]

Comment 20(b)(6)–1 explains the exclusion in § 205.20(b)(6). Comment 20(b)(6)–2 (proposed as comment 20(b)(6)–1) provides examples to illustrate the exclusion. The comment and examples contained therein have been revised to reflect changes or additions elsewhere in the final rule. In addition, the examples in proposed comment 20(b)(6)–2.iv and .v have been deleted in light of the prior discussion regarding cards, codes, or other devices that are not issued in a specified amount. *See, e.g.,* comment 20(b)–3.

20(c) Form of Disclosures

Section 205.20(c) sets forth the general disclosure requirements that apply to gift certificates, store gift cards, and general-use prepaid cards, including provisions relating to the form of disclosures.

20(c)(1) Clear and Conspicuous

Proposed § 205.20(c)(1) implemented the clear and conspicuous standard required by EFTA Sections 915(b)(3)(A) and (c)(2)(B). *See* 15 U.S.C. 1693m(b)(2)(A) and (c)(2)(B). These statutory provisions require that a dormancy fee, inactivity charge or fee, or service fee and the terms of expiration, discussed in proposed §§ 205.20(d) and (e), must be disclosed clearly and conspicuously. In addition, the Board proposed that the clear and conspicuous standard would also apply to the disclosures in proposed § 205.20(f). Commenters agreed with the requirement to apply the clear and conspicuous standard to all disclosures required under § 205.20. Accordingly, section § 205.20(c)(1) is adopted substantially as proposed.[28]

Proposed comment 20(c)(1)–1 clarified the meaning of the term "clear and conspicuous." Specifically the proposed comment explained that disclosures would be clear and conspicuous for the purposes of this section if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to consumers. Except as otherwise required, disclosures would not need to be located on the front of the certificate or card to be considered clear and conspicuous. Under the proposed comment, disclosures would be clear and conspicuous if they are in a print that contrasts with and is otherwise not obstructed by the background on which they are printed. For example, disclosures on a card or computer screen would not likely be conspicuous if obscured by a logo printed in the background. Similarly, a disclosure on the back of a card that is printed on top of indentations from embossed type on the front of the card would not likely be conspicuous if the indentations obstruct the readability of the disclosure. The proposed comment clarified that oral disclosures, to the extent permitted, would meet the clear and conspicuous standard when they are given at a volume and speed sufficient for a consumer to hear and comprehend them. Commenters generally agreed that the proposed clear and conspicuous requirements were appropriate.

The November 2009 Proposed Rule did not include a specific type size or prominence requirement, except where otherwise noted. *See* proposed § 205.20(e)(3)(iii). The Board requested comment on whether a description of the clear and conspicuous standard in the final rule should include a type size or prominence requirement for all disclosures and, if so, what standard would be appropriate. The Board also requested comment on whether there were alternatives to a type size or prominence requirement that could ensure that disclosures on a card are clear and conspicuous to a consumer.

One commenter, a city government entity, believed the Board should require on-card disclosures in a 10-point type size and also impose font and type size requirements for on-line disclosures. Industry commenters, however, objected to adding a font or type size requirement. These commenters believed that issuers should have flexibility to tailor disclosures to specific certificates or cards and that it was not necessary to impose font or type size requirements to provide clear and conspicuous disclosures.

The Board believes that applying a prominence requirement or a minimum type size standard to every disclosure on a certificate or card is impractical. The Board believes it would be difficult to determine a type size standard that would be appropriate for all certificate or card programs, because the required disclosures on a certificate or card will vary depending upon the terms of the certificate or card. Moreover, particular features of a certificate or card, and perhaps the size of the certificate or card, may affect the type size of disclosures that could fit within the limited amount of space on the certificate or card. For example, a person making disclosures on a card with embossed type on the front of the card may need to adjust the type size to prevent the indentations from obstructing the readability of the disclosures. Thus, the final rule does not include a specific type size or

[27] While the exclusion in § 205.20(b)(6) does not apply to other payment devices that are redeemable for a specified product or service, other than admission to an event or venue, such as a certificate or card that is redeemable for a spa treatment or hotel stay, the devices may nevertheless fall outside the scope of § 205.20 if they are not issued in a specified dollar amount. *See* comment 20(b)–3. Other exclusions in the rule may also apply to such devices. *See, e.g.,* § 205.20(b)(3).

[28] Because the clear and conspicuous requirement applies to all disclosures provided under this section, disclosures provided in connection with loyalty, award, or promotional gift cards under § 205.20(a)(4)(iii) must also be clear and conspicuous.

prominence requirement. Comment 20(c)(1)–1 is adopted substantively as proposed.

Proposed § 205.20(c)(1) stated that the disclosures required by this section could contain commonly accepted or readily understandable abbreviations or symbols. Proposed comment 20(c)(1)–2 provided illustrative examples, stating that the use of abbreviations and symbols such as "mo." for month or a "/" to indicate "per" would be permissible. The proposed comment noted that it is sufficient under the clear and conspicuous standard to state, for example, that a particular fee is charged "$2.50/mo. after 12 mos." Commenters generally agreed with proposed comment 20(c)(1)–2. Accordingly, comment 20(c)(1)–2 is adopted as proposed.

20(c)(2) Format

Proposed § 205.20(c)(2) stated that disclosures required by this section generally would be required to be provided to the consumer in written or electronic form. Because the disclosures would not be required to be in written form, proposed comment 20(c)(2)–1 clarified that electronic disclosures made under this section would not be 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.*), which only applies when information is required to be provided to a consumer in writing. The proposed comment clarified that electronic disclosures could not be provided through a hyperlink or in another manner by which the purchaser can bypass the disclosure. Under the proposed rule, the Board stated that an issuer or vendor would not be required to confirm that the consumer has read the electronic disclosures.

Several industry commenters agreed with the clarification that electronic disclosures provided under § 205.20 would not be subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. One city government entity commenter believed the Board should require the issuer to confirm that the consumer has read the electronic disclosures. The Board believes requiring confirmation that a consumer has read the disclosures would be impractical. For example, it would be difficult to confirm that a consumer has read disclosures on a code or confirmation that is electronically mailed to a consumer because the transaction has already been completed.

Section 205.20(c)(2) and comment 20(c)(2)–1 are generally adopted as proposed, with revisions. Upon the Board's further analysis, the final rule requires that certain disclosures must also be in a form that a consumer could keep so consumers can retain them for later review if necessary. Therefore, section 205.20(c)(2) in the final rule provides that written and electronic disclosures must be in a retainable form. Comment 20(c)(2)–1 provides an example that clarifies how a person could fulfill this requirement in the context of electronic disclosures. The comment provides that a person may satisfy the requirement if it provides an on-line disclosure in a format that is capable of being printed. Comment 20(c)(2)–1 in the final rule also makes non-substantive wording modifications, for consistency.

Proposed § 205.20(c)(2) stated that only disclosures provided under § 205.20(c)(3) may be provided orally. The Board stated in the supplementary information to the proposal that permitting oral disclosures is necessary in limited circumstances where disclosures cannot be made prior to purchase unless made orally, such as when a certificate or card is purchased by telephone. Though disclosures required to be made prior to purchase could be made orally, the proposed rule would still require written or electronic disclosures to be provided on or with the certificate or card. *See* proposed §§ 205.20(d)(2), (e)(3), and (f).[29] Commenters generally agreed with this provision in proposed § 205.20(c)(2), and it is adopted as proposed.

Some industry commenters asked the Board to clarify how a person could fulfill the requirement in § 205.20(e)(3)(iii) to make clarifying statements regarding funds expiration "in close proximity" to the card expiration date, if such disclosures are made orally. As discussed below, the Board has clarified in comment 20(e)–7 that the "close proximity" requirement does not apply to oral disclosures made pursuant to this section.

Proposed comment 20(c)(2)–2 addressed disclosure requirements in circumstances where no physical certificate or card is issued. This comment has been removed in the final rule. Instead, the disclosure requirements applicable to non-physical certificates or cards are discussed under §§ 205.20(c)(3) and (c)(4) and their respective commentaries.

20(c)(3) Disclosures Prior to Purchase

Proposed § 205.20(c)(3) provided that disclosures for dormancy, inactivity, or service fees required under § 205.20(d)(2) must be made prior to the purchase of the certificate or card. *See* EFTA Section 915(b)(3)(B); 15 U.S.C. 1693m(b)(3)(B). The Board also proposed in § 205.20(c)(3) to apply the requirement that disclosures be made prior to purchase of the certificate or card to the disclosure of additional fees imposed in connection with a certificate or card and the terms and conditions of expiration of the funds, using its authority under EFTA Section 904. *See* proposed §§ 205.20(e)(3) and (f)(1), discussed below. Proposed comment 20(c)(3)–1 clarified that the disclosures required under this paragraph must be provided regardless of whether the certificate or card is purchased in person, on-line, by telephone, or by other means.

Some industry commenters believed that those disclosures required to be made prior to purchase would be redundant, because the same disclosures also would be required to be made on or with the card. However, a consumer group commenter and a city government entity commenter supported the requirement to provide these disclosures to consumers prior to purchase. The city government entity commenter believed that merchants that sell gift cards should also be required to post signage at the point of sale with gift cards' terms and conditions.

The Board believes that consumers contemplating the purchase of a certificate or card should be provided information about all fees and the terms and conditions of expiration before purchasing a certificate or card. Even if the purchaser is not the ultimate user of the certificate or card, a purchaser should be aware of any potential costs to the recipient and the amount of time the recipient has to use the funds underlying the certificate or card. The final rule does not separately require signage with gift cards' terms and conditions at the point of sale in addition to the disclosures provided on or with the certificate or card itself. Such a requirement could be impractical because a merchant may sell many different certificates or cards that each have different terms. Posting signage that discloses different terms for different cards could confuse consumers who may not know which disclosures apply to the certificate or card that they want to purchase.

[29] Because the requirement applies to all disclosures under this section other than those provided under § 205.20(c)(3), disclosures provided in connection with loyalty, award, or promotional gift cards under § 205.20(a)(4)(iii) must also be written or electronic.

For the foregoing reasons, § 205.20(c)(3) is adopted as proposed, with some revisions. One industry commenter requested that the Board clarify in the final rule that an issuer may modify the terms of the certificate or card after purchase, so long as the modifications are disclosed to the consumer. The Board believes permitting the modification of fees and terms and conditions of expiration for certificates or cards would be problematic because many certificates or cards are issued without obtaining the name or other information about the consumer. Moreover, the certificate or card may be given to another consumer after purchase. In such cases, it would be difficult to inform consumers that fees and terms and conditions of expiration for a certificate or card have changed, because the issuer would not have the consumer's contact information. Moreover, permitting an issuer to change the fees and terms and conditions of expiration for a certificate or card after purchase would undermine the purpose of disclosing those fees and terms of expiration prior to purchase. Consumers would be unable to rely on the fees and terms and conditions of expiration disclosed on different certificates or cards when comparing products. Therefore, § 205.20(c)(3) provides that fees and terms and conditions of expiration that are required to be disclosed prior to purchase may not be changed after purchase. The Board has also modified § 205.20(c)(3) to clarify that an issuer or vendor, as referenced in EFTA Section 915(b)(3)(B), is a person that issues or sells a certificate or card to a consumer.

Comment 20(c)(3)–1 is adopted substantively as proposed. The Board also added two comments in the final rule to clarify § 205.20(c)(3). Comment 20(c)(3)–2 clarifies how disclosures required under § 205.20(c)(3) may be provided electronically to the consumer prior to purchase. For certificates or cards purchased electronically, disclosures made to a consumer after the consumer has initiated an on-line purchase of a certificate or card, but prior to completing the purchase of the certificate or card, would satisfy the prior-to-purchase requirement. However, electronic disclosures made available on a person's Web site that may or may not be accessed by the consumer are not provided to the consumer and therefore would not satisfy the prior-to-purchase requirement.

Comment 20(c)(3)–3 clarifies how disclosures for non-physical certificates and cards may be provided prior to purchase. If no physical certificate or card is issued, the disclosures must be provided to the consumer before the certificate or card is purchased. For example, where a gift certificate or card is a code that is provided by telephone, the required disclosures may be provided orally prior to purchase.

20(c)(4) Disclosures on the Certificate or Card

The Board proposed that certain disclosures regarding dormancy, inactivity, or service fees be provided on the certificate or card, consistent with the requirements of EFTA Section 915(b)(3)(A). *See* proposed § 205.20(d)(2). The Board also proposed that the terms and conditions of expiration of the funds must be on the certificate or card itself. *See* proposed § 205.20(e)(3)(i). In addition, the Board proposed that certain additional disclosures not specified in the statute must also be on the certificate or card itself. Specifically, under the proposal, the following disclosures would have to be on the certificate or card itself: a toll-free telephone number a consumer may call for fee information or replacement certificates or cards (§§ 205.20(e)(3)(ii) and (f)(2)); a Web site a consumer may access for fee information or replacement certificates or cards, if one is maintained (§§ 205.20(e)(3)(ii) and (f)(2)); a disclosure that the certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card (§ 205.20(e)(3)(iii)); and the fact that the consumer may contact the issuer for a replacement card, if applicable (§ 205.20(e)(3)(iii)).

Proposed § 205.20(c)(4) implemented the requirement that certain disclosures under § 205.20 be provided on the certificate or card itself. Proposed § 205.20(c)(4) stated that a disclosure made in an accompanying terms and conditions document, on packaging, or on a sticker or other label affixed to the certificate or card does not constitute a disclosure on the certificate or card.

Some industry commenters urged the Board to limit the number of disclosures required to be on the certificate or card itself. These commenters argued that requiring additional disclosures to be on the certificate or card itself would impede consumer comprehension because there may be numerous disclosures required to fit within a limited amount of space on the certificate or card. Some commenters suggested that the Board only require contact information where a consumer could obtain fee and other information. Commenters also suggested permitting disclosures on packaging, on a disclosure that accompanies the card, or on a sticker affixed to the certificate or card, instead of on the certificate or card itself. Several commenters requested that the Board issue model forms in card size that illustrate compliance with the "on the card" disclosure requirement.

The Board recognizes that the amount of space in which to make disclosures on a standard sized certificate or card is limited. However, the Credit Card Act requires that certain disclosures regarding dormancy, inactivity, or service fees must be provided on the certificate or card. *See* EFTA Section 915(b)(3)(A); 15 U.S.C. 1693m(b)(3)(A). In addition, the Board believes that it is necessary to make the disclosures set forth in §§ 205.20(e)(3) and (f)(2) on the certificate or card itself to provide adequate and effective disclosure of key terms. Such disclosures would not be sufficient on packaging or a sticker affixed to the certificate or card, because the purchaser of the certificate or card may not be the user of the certificate or card and packaging or a sticker may be removed before a certificate or card is given to the user. The Board believes requiring the disclosures on the certificate or card itself ensures that the gift recipient receives these additional disclosures and will always have access to them, because they cannot be separated from the certificate or card.

The Board has provided issuers flexibility to tailor disclosures so that they fit on a particular certificate or card. Issuers may comply with the requirement to make disclosures on the certificate or card in a manner appropriate to a product, so long as the disclosures are clear and conspicuous. For example, issuers may be able to adjust type size and placement of disclosures to fulfill the disclosure requirements without disrupting the placement of an existing logo or magnetic stripe. Because the type and number of required disclosures will vary depending on a particular certificate or card, the Board believes it is not possible to provide a model certificate or card that would apply to every certificate and card subject to the final rule.

Therefore, § 205.20(c)(4) is adopted as proposed, with some revisions. The Board has added language to § 205.20(c)(4) to reflect the fact that the provision also applies to disclosures that must appear on a loyalty, award, or promotional gift card under § 205.20(a)(4)(iii). The paragraph also clarifies how disclosures required on the certificate or card may be provided for certificates and cards provided electronically or orally. The final rule provides that, for an electronic certificate or card, disclosures must be

provided electronically on the certificate or card provided to the consumer. An issuer that provides a code or confirmation to a consumer orally must provide to the consumer a written or electronic copy of the code or confirmation promptly, and the applicable disclosures must be provided on the written copy of the code or confirmation. The final rule further clarifies the treatment of non-physical certificates and cards by adding comment 20(c)(4)–1. The comment clarifies that if no physical certificate or card is issued, the disclosures required by § 205.20(c)(4) must be disclosed on the code, confirmation, or other written or electronic document provided to the consumer. For example, where a gift certificate or card is a code or confirmation that is provided to a consumer on-line or sent to a consumer's e-mail address, the required disclosures may be provided electronically on the same document as the code or confirmation.

Some industry commenters also suggested that the Board exclude any non-plastic cards, codes, or devices from the requirement to provide disclosures on the certificate or card. These commenters believed that disclosure on such devices, such as contactless stickers that can be placed on objects such as mobile phones, would be impossible and that the Board should instead permit the disclosures to be made on the packaging. Other industry commenters believed that the required disclosures could not fit on certain small form devices, such as plastic cards that are smaller than the standard gift card.

The Board believes that consumers of gift certificates, store gift cards or general-use prepaid cards should be given the protections provided under the Act, regardless of the form of the certificate or card. The Board agrees that certain devices may be issued in a form that is not conducive to providing fully compliant disclosures. Therefore, in the final rule, the Board has added comment 20(c)(4)–2 to clarify that a person may issue or sell a supplemental gift card that is smaller than a standard size and that does not bear the applicable disclosures if it is accompanied by a fully compliant certificate or card.

20(d) Prohibition on Imposition of Fees or Charges

Section 205.20(d) implements the statute's restrictions on imposing dormancy, inactivity, or service fees. *See* EFTA Sections 915(b)(1), (b)(2), and (b)(3); 15 U.S.C. 1693m(b)(1), (2), and (3). Proposed § 205.20(d) generally followed the statutory language with non-substantive wording and organizational changes, and is adopted as proposed.

Proposed § 205.20(d) prohibited the imposition of a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card or general-use prepaid card unless: (a) There has been no activity for the one-year period ending on the day the charge is imposed; (b) certain disclosure requirements have been met; and (c) only one such fee is charged in any given calendar month. Regarding disclosures, proposed § 205.20(d) provided that before a dormancy, inactivity, or service fee may be imposed, a certificate or card must clearly and conspicuously disclose: (a) That a dormancy, inactivity, or service fee may be charged; (b) the amount of the fee; (c) how often such fee or charge may be assessed; and (d) that such fee or charge may be assessed for inactivity.

Most commenters did not object to the text of proposed § 205.20(d). A few industry commenters suggested, however, that the restriction in § 205.20(d)(3) should apply to one *type* of fee per month. These commenters argued that this interpretation would be consistent with the legislative history of the Credit Card Act and certain state laws. The Board disagrees. The statute specifically provides that "not more than one [dormancy, inactivity, or service] fee may be charged in any given month." *See* EFTA Section 915(b)(2)(C); 15 U.S.C. 1693m(b)(2)(C). The Board believes that the better reading of this statutory provision is that only one fee may be charged in a given month and not that only one of each type of fee may be charged in a given month.

Some industry commenters recommended that the Board provide alternatives for disclosing service fees on a gift certificate, store gift card, or general-use prepaid card under § 205.20(d)(2). For example, one industry commenter suggested that the Board permit disclosure of a range of all fees that could be imposed, rather than listing the amounts for each fee. However, the Board believes that permitting such alternative disclosures would not be consistent with the statute and would not provide clear disclosures to consumers. Accordingly, § 205.20(d) is adopted as proposed.[30]

The Board proposed several comments to clarify the provisions in § 205.20(d). Proposed comment 20(d)–1 provided examples of how to determine when a dormancy, inactivity, or service fee may be imposed. The Board did not receive any comments on proposed comment 20(d)–1, and the comment is adopted largely as proposed, with minor clarifying amendments. The Board has also eliminated the proposed example concerning the determination of a one-year period when a fee is charged on February 29 of a leap year. The Board believes the other examples are sufficient to provide guidance to issuers.

Proposed comment 20(d)–2 elaborated on the meaning of "activity" for purposes of proposed § 205.20(d)(1). For organizational purposes, the Board has moved the substance of this comment to § 205.20(a)(7) and comment 20(a)(7)–1, discussed above. Consequently, the Board is renumbering proposed comments 20(d)–3 through 20(d)–5.

Proposed comment 20(d)–3 clarified the interaction between the disclosure requirements of proposed §§ 205.20(d)(2) and (c)(3). Specifically, the proposed comment provided that depending on the context, a single disclosure regarding dormancy, inactivity, or service fees that meets the clear and conspicuous requirement may satisfy both the requirement in § 205.20(d)(2) that the disclosures be provided on the certificate or card and the requirement in § 205.20(c)(3) that the disclosures be provided prior to purchase. For example, if the disclosures on a certificate or card, required by § 205.20(d)(2), are visible to the consumer without having to remove packaging or other materials sold with the certificate or card for a purchase made in person, the disclosures would also meet the requirements of § 205.20(c)(3). If, however, the disclosure would not meet the requirements of both §§ 205.20(d)(2) and (c)(3), proposed comment 20(d)–3 stated that a dormancy, inactivity, or service fee may need to be disclosed multiple times to satisfy the requirements of proposed §§ 205.20(d)(2) and (c)(3). For example, if the disclosures on a certificate or card, required by § 205.20(d)(2), are obstructed by packaging sold with the certificate or card for a purchase made in person, they would also be required to be disclosed on the packaging sold with the certificate or card to meet the requirements of § 205.20(c)(3).

[30] As discussed in the November 2009 Proposed Rule, the Board did not propose to separately implement the statutory exclusion from the dormancy, inactivity, or service fee restrictions for gift certificates distributed pursuant to an award, loyalty, or promotional program and with respect to which there is no money or other value exchanged. *See* EFTA Section 915(b)(4). The Board believes this exclusion is effectively implemented through the definition of "gift certificate" in § 205.20(a)(1)(i) and the exclusion in § 205.20(b)(3) for loyalty, award, or promotional gift cards.

The city government entity commenter asserted that disclosures on a certificate or card that are visible to the consumer prior to purchase should not be deemed disclosed prior to purchase, because disclosures on a card may be smaller than disclosures displayed on signage or packaging. The Board continues to believe that so long as disclosures on a certificate or card are clear and conspicuous, the requirement to make disclosures prior to purchase is satisfied if the disclosures are visible to the consumer. Therefore, proposed comment 20(d)–3, renumbered as comment 20(d)–2 in the final rule, is adopted substantively as proposed, with minor revisions for clarity.

Proposed comment 20(d)–4 clarified that in addition to the disclosures required under § 205.20(d)(2), any applicable disclosures under §§ 205.20(e)(3) and (f)(2) of this section must also be provided on the certificate or card. As discussed above, the Board believes that it is appropriate to require fee disclosures on the certificate or card itself, in addition to other applicable disclosures. Proposed comment 20(d)–4, renumbered as comment 20(d)–3 in the final rule, is therefore adopted as proposed.

Proposed comment 20(d)–5 clarified the prohibition in § 205.20(d)(3) against charging more than one dormancy, inactivity, or service fee in any given calendar month, with examples. The Board did not receive comment on proposed comment 20(d)–5, which is adopted as comment 20(d)–4 in the final rule with minor clarifying amendments.

Finally, the Board is adding a new comment 20(d)–5 to clarify that § 205.20(d) prohibits any person from accumulating or combining dormancy, inactivity, or service fees for previous periods into a single fee because such a practice would circumvent the limitation in § 205.20(d)(3) that only one fee may be charged per month. Specifically, this comment provides that an issuer may not retroactively impose fees on a consumer for prior months through a single fee assessed following a one-year period of inactivity. *See, e.g.,* U.S. Federal Trade Commission Complaint, In the Matter of Kmart Corporation, *et al.,* Docket No. C–4197. (Aug. 14, 2007). Comment 20(d)–5 contains an example to illustrate this prohibition.

20(e) Prohibition on Sale of Gift Certificates or Cards With Expiration Dates

EFTA Section 915(c) prohibits the sale of a gift certificate, store gift card, or general-use prepaid card subject to an expiration date unless: (a) the expiration date is not earlier than five years after the date on which a gift certificate was issued, or the date on which card funds were last loaded to a store gift card or general-use prepaid card; and (b) the terms of expiration are clearly and conspicuously stated. *See* 15 U.S.C. 1693m(c). The Board proposed § 205.20(e) to implement EFTA Section 915(c).

Application of EFTA Section 915(c) to Funds Expiration

As the Board discussed in the November 2009 Proposed Rule, EFTA Section 915(c) does not specify whether the restrictions apply to the expiration of the certificate or card itself or the underlying funds. *See* 15 U.S.C. 1693m(c). Proposed § 205.20(e)(2) would have required that the expiration date of the underlying funds be at least the later of: (a) Five years from the date the gift certificate was issued, or the date on which funds were last loaded to a store gift card or general-use prepaid card; or (b) the certificate or card expiration date.

Both consumer group and industry commenters agreed that the Board should apply the protections of EFTA Section 915(c) to the underlying funds. One industry commenter noted that if a certificate or card were replaced because the certificate or card had expired but the underlying funds were still valid, the funds should not be required to be valid from the date the replacement certificate or card is issued. Instead, the commenter believed that the five years should be measured from the date the certificate was first issued or the card was last loaded. The Board believes that this commenter's observation is consistent with the statute.

Accordingly, the Board is amending § 205.20(e)(2) with respect to gift certificates to state that the expiration date of the underlying funds must be at least the later of: (a) Five years from the date the gift certificate was *initially* issued, or (b) the certificate expiration date. In addition, with respect to store gift cards and general-use prepaid cards, the Board is adding a new comment 20(e)–2 in part to clarify that for purposes of determining the minimum expiration date under § 205.20(e)(2), funds are not considered to be loaded to a store gift card or general-use prepaid card solely because a replacement card has been issued or activated for use. As a result, issuers are not required to restart the five-year period in § 205.20(e)(2) when a replacement card is issued or activated.

Certificate or Card Expiration

Consumers may be confused about expiration dates because the expiration date for the certificate or card will differ from the expiration date for the underlying funds for many general-use prepaid cards, and perhaps some gift certificates and store gift cards. The Board proposed two alternative approaches in § 205.20(e)(1) to address potential consumer confusion about the certificate or card expiration date and the funds expiration date.

Under proposed Alternative A, a person could not sell a gift certificate, store gift card, or general-use prepaid card subject to an expiration date unless the certificate or card expiration date is at least five years after the date the certificate or card is sold or issued to a consumer. Under proposed Alternative B, persons that issue or sell a certificate or card would be required to adopt policies and procedures to ensure that a consumer will have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. The Board solicited comment on whether it should consider adopting Alternative B for a transitional period and adopt Alternative A as of a subsequent date in order to provide more time to implement Alternative A.

Commenters were divided on whether the Board should adopt Alternative A or Alternative B. Consumer group commenters and some industry commenters recommended that the Board adopt Alternative A because it is a precise and straightforward rule with less risk of misinterpretation or misapplication than Alternative B. Some of these commenters further suggested that if Alternative A were adopted, the need for disclosures to distinguish the certificate or card expiration date from the funds expiration date would no longer be necessary.

Several industry commenters supported Alternative B either as a transitional rule or as a permanent solution. Other industry commenters suggested that Alternative B should be provided as an option in addition to Alternative A. Commenters that generally favored Alternative B believed that Alternative B would provide for greater flexibility. In addition, several issuers commented that because the ability to comply with Alternative A relies almost exclusively on the sellers' ability to prevent the sale of a certificate or card that has less than five years remaining on the certificate or card expiration date, issuers may not have any control over these procedures.

Furthermore, commenters noted that the costs of implementing a more precise rule under Alternative A may not be warranted given that the vast majority of certificate and card users fully expend the underlying funds within a few years.

The Board believes that given the various entities involved in distributing a gift certificate, store gift card, or general-use prepaid card for sale and the operational challenges associated with implementing Alternative A, flexibility is warranted with respect to making certificates and cards available for sale with expiration dates that are closely aligned with, but not necessarily identical to, the funds expiration date. Therefore, the Board is adopting Alternative B of § 205.20(e)(1) substantively as proposed, with minor wording changes. However, persons that follow Alternative A are deemed to have adopted policies and procedures consistent with Alternative B. *See* comment 20(e)–1.i.

In adopting Alternative B, the Board recognizes that not all sellers, issuers, and distributors may be in a position to implement Alternative A without considerable costs and systems changes. For example, Alternative A may require programming and perhaps hardware changes at point-of-sale, to prevent a certificate or card from being sold with less than five years remaining before the certificate or card expiration date. Furthermore, the Board understands that a significant number of consumers spend down the funds underlying gift certificates, store gift cards, and general-use prepaid cards within a few years. Therefore, the Board believes that Alternative A is not necessary to ensure that the vast majority of certificate or cards will not be prematurely discarded while funds still remain valid. For the small number of consumers who retain certificates or cards that expire before their funds, the Board believes the other requirements in § 205.20(e) will be sufficient to ensure these consumers have the benefit of the funds for the minimum time the statute requires.

Proposed comment 20(e)–1 under Alternative B set forth both positive and negative examples of providing consumers a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. The Board did not receive any significant comment on these examples. However, the Board is amending comment 20(e)–1 for clarity by eliminating the examples and by specifying two ways in which the reasonable opportunity standard may be met. Specifically, comment 20(e)–1 provides that consumers are deemed to have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date if the certificate or card is available for purchase by a consumer with at least five years and six months before the certificate or card expiration date. Furthermore, as discussed above, the Board believes that compliance with Alternative A is a means of complying with Alternative B. Therefore, comment 20(e)–1 states that consumers are deemed to have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date if there are policies and procedures in place to prevent the sale of a certificate or card unless the certificate or card expiration date is at least five years after the date the certificate or card was sold or issued to a consumer.

Although Alternative B may adequately address potential consumer confusion regarding expiration dates with respect to non-reloadable cards, such protections may not be sufficient for reloadable cards where the funds expiration date changes each time the card is reloaded. The Board is addressing this issue by requiring certain disclosures related to the expiration of the underlying funds, as discussed more fully below in the supplementary information to § 205.20(e)(3). However, the Board requested comment on whether it should require issuers to automatically issue a replacement card to consumers prior to the card expiration date of a reloadable card if the underlying funds will not expire until after the card expiration date.

Several industry commenters opposed such a requirement, noting that since the rule is intended to cover gift cards, the person that purchases the card often is not the person ultimately using the card. Therefore, it may not be practical for issuers or sellers of reloadable cards to collect the name and address of the ultimate user at point of sale because the purchaser may not be in a position to provide this information. Furthermore, commenters stated that if a consumer does not notify the gift card issuer of a change in address, the issuer may not have a reliable current address to which it could send a replacement card. Given these operational complexities, the final rule does not require issuers to automatically replace expired reloadable cards.

Finally, the Board is adopting new comment 20(e)–2, in part, to incorporate a suggestion from an industry commenter regarding replacement certificates or cards, which are generally subject to all provisions in § 205.20, including disclosure requirements. This comment explains that because § 205.20(e)(1) requires issuers and sellers to have reasonable policies and procedures in place to provide a reasonable opportunity for a consumer to *purchase* a certificate or card with at least five years before the certificate or card expiration date, the provision does not apply to the issuance of a replacement certificate or card. Replacement certificates or cards may therefore have shorter expiration dates. If the certificate or card expiration date for a replacement certificate or card is later than the date set forth in § 205.20(e)(2)(i), then pursuant to § 205.20(e)(2), the expiration date for the underlying funds at the time the replacement certificate or card is issued must be no earlier than the expiration date for the replacement certificate or card.

For example, if a consumer purchases a non-reloadable general-use prepaid card with five years before the card expires and seven years before the underlying funds expire, the replacement card may have a card expiration date that is less than five years to correspond to the expiration date of the underlying funds. However, if the replacement card expiration date is later than the original seven-year expiration date of the underlying funds, the underlying funds expiration date must at a minimum match the replacement card expiration date.

Disclosures Related to Certificate or Card Expiration and Funds Expiration

Proposed § 205.20(e)(3) provided that three disclosures were required to be stated on the certificate or card, as applicable. First, proposed § 205.20(e)(3)(i) provided that the disclosures must state the expiration date for the underlying funds or, if the underlying funds do not expire, that fact. In some instances, the exact expiration date of the underlying funds may not be able to be determined. For example, in the case of reloadable cards, the funds expiration date is determined by the date the consumer last loaded funds onto the card. As a result, the funds expiration date adjusts each time the consumer reloads the card. For example, if a consumer purchases a reloadable card on January 15, 2012, the funds may expire on or after January 15, 2017. However, if a consumer loads more funds onto the card on July 15, 2014, the funds may not expire until on or after July 15, 2019. To accommodate this circumstance, proposed comment 20(e)–2 under Alternative B clarified that § 205.20(e) does not require disclosure of the precise date the funds

will expire. Under the proposed comment, it would be sufficient to disclose, for example, "Funds expire 5 years from the date funds last loaded to the card."; "Funds can be used 5 years from the date money was last added to the card."; or "Funds do not expire."

The Board continues to believe that a consumer should be informed when the funds on a certificate or card expire. Therefore, § 205.20(e)(3)(i) is adopted as proposed, and proposed comment 20(e)–2 under Alternative B is adopted as comment 20(e)–3 in the final rule.

Proposed comment 20(e)–3 under Alternative B clarified that if the certificate or card and the underlying funds do not expire, that fact need not be disclosed. The Board explained in the proposal that disclosing the fact that the underlying funds do not expire was not necessary in these situations because there is no risk of consumers confusing the expiration date of the certificate or card with that of the underlying funds.

The Board did not receive comments on the proposed comment. However, upon further analysis, the Board has added one further clarification to the comment to provide that if the certificate or card and the underlying funds expire at the same time, only one expiration date must be disclosed on the certificate or card. Because there is no risk that consumers would confuse the expiration date of the certificate or card with the expiration date of the underlying funds when those two dates are the same, distinguishing between the funds expiration date and the expiration date of the certificate or card is not necessary. Therefore, proposed comment 20(e)–3 under Alternative B is adopted as comment 20(e)–4, with the additional clarification.

Second, proposed § 205.20(e)(3)(ii) provided that the disclosures must include a toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires, if the underlying funds may still be available. The Board believed that requiring maintenance of a toll-free telephone number for purposes of obtaining a replacement card would be appropriate because, as discussed above, a certificate or card expiration date may be earlier than the funds expiration date.[31] Although the proposed rule did not similarly require maintenance of a Web site for such purposes, if one is maintained, that Web site would also have to be disclosed under § 205.20(e)(3)(ii). By requiring contact information to be on the certificate or card itself, the Board believed that consumers would be able to obtain a replacement certificate or card more easily if the certificate or card expires before the underlying funds.

Commenters did not object to the proposed paragraph. Thus, § 205.20(e)(3)(ii) is adopted as proposed, pursuant to the Board's authority under EFTA Section 904.

Proposed comment 20(e)–4 under Alternative B clarified that if a certificate or card does not expire, or if the underlying funds are not available after the certificate or card expires, a toll-free telephone number and, if maintained, a Web site address would not need to be stated on the certificate or card. However, a toll-free telephone number and a Web site would still be required to be disclosed if the certificate or card has fees. *See* proposed § 205.20(f)(2). Proposed comment 20(e)–5 under Alternative B clarified that the same toll-free telephone number and Web site could be used to comply with the requirements of proposed §§ 205.20(e)(3)(ii) and (f)(2).[32] In addition, proposed comment 20(e)–5 provided that neither a toll-free number nor a Web site must be maintained or disclosed on a certificate or card if no fees are imposed in connection with the certificate or card, and the certificate or card and underlying funds do not expire. The Board received no comments on the proposed comments 20(e)–4 and 20(e)–5 under Alternative B, which are adopted as comments 20(e)–5 and 20(e)–6, respectively, in the final rule.

Finally, proposed § 205.20(e)(3)(iii) would have required, if applicable, a statement that the certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and that the consumer may contact the issuer for a replacement card. This requirement was designed to alert consumers to any difference between the certificate or card expiration date and the funds expiration date so that they would not mistakenly believe the funds were no longer available if the certificate or card expired during the minimum five-year period set forth in the statute.

Proposed § 205.20(e)(3)(iii) also provided that the statement must be disclosed with equal prominence and in close proximity to the certificate or card expiration date. Typically, the expiration date for a certificate or card is printed on the certificate or card in a prominent location and type size. Thus, the Board was concerned that the prominence of the expiration date on the certificate or card, without any additional disclosures, could lead consumers to assume that once the certificate or card itself expires, the underlying funds would be unavailable.

Proposed comment 20(e)–6 under Alternative B clarified the meaning of close proximity in this context. Under the proposed rule, close proximity meant that the disclosure must appear on the same side as the certificate or card expiration date so that consumers would not automatically assume funds are not available after the certificate or card expiration date. The proposed comment also clarified in an example that if the disclosure is the same type size and is located immediately next to or directly above or below the certificate or card expiration date, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Under the proposal, the disclosure did not need to be embossed on the certificate or card to be deemed equally prominent, even if the expiration date was embossed on the certificate or card. The Board believed these format standards would sufficiently ensure that most consumers could determine whether an expiration date for a certificate or card is different from the funds expiration date.

One consumer group commenter agreed that consumers should be made aware of the distinction between the funds expiration date and the certificate or card expiration date, even if the Board adopted Alternative A and required that a certificate or card must not expire prior to five years from the date it was sold or issued to a consumer. This commenter noted that consumers still needed to be made aware of the discrepancy in instances, for example, where the funds expiration date changes when a consumer reloads a card. The city government entity commenter believed that the Board should prohibit certificates or cards from expiring before the funds, so that only one expiration date would be provided.

Many industry commenters believed that requiring the disclosures under proposed § 205.20(e)(3)(iii) would be burdensome. These commenters asserted that even the Board's proposed short disclosures would take up too much space on the front of the card, where expiration dates are typically printed. They believed that the

[31] As discussed below under § 205.20(f), the requirement that the telephone number be toll-free recognizes that the end user of a certificate or card may not reside in the area where the certificate or card was initially purchased.

[32] The toll-free telephone number and Web site may also be the same toll-free telephone number and Web site provided for customer service issues or questions relating to the certificate or card.

disclosures would have to be in a small font size to fit with equal prominence and in close proximity to the expiration date. Industry commenters thus urged the Board to eliminate the prominence and proximity requirement and to permit the disclosures to be made on the back of the card or with materials that accompany the card. Some industry commenters stated that changing the "Valid thru" verbiage on the front of the card to read "Expiration date" would sufficiently alert consumers the distinction between the funds expiration date and the date that the certificate or card expires. Other industry commenters stated that the requirement was unnecessary for most consumers of certificates or cards because most consumers use the entire balance of a gift card long before the funds expire.

The Board continues to believe that the prominence and proximity requirements are appropriate and necessary for the disclosures required under proposed § 205.20(e)(3)(iii). The disclosures are intended not only to inform consumers of their rights, but also to reduce potential consumer confusion that may occur if an expiration date for a certificate or card differs from the funds expiration date. The Board believes disclosures regarding the expiration of the funds require more specific format requirements than other disclosures that are required to be on the certificate or card, because they must counteract the disclosure of the certificate or card expiration date that a consumer may mistake for a funds expiration date. If the disclosure is in close proximity to the card expiration date, the consumer may be more likely to notice it and seek additional information regarding how the consumer could continue to use the card after the card expiration date. Moreover, the Board does not believe that the subtle changes to verbiage suggested by some commenters is sufficient for consumers to distinguish between the funds expiration date and the expiration date of the certificate or card.

For the foregoing reasons, the general format requirements are retained in the final rule, pursuant to the Board's authority under EFTA Section 904. Proposed comment 20(e)–6 is adopted substantially as proposed in comment 20(e)–7. Comment 20(e)–7 in the final rule clarifies, however, that the close proximity requirement does not apply to oral disclosures. *See* § 205.20(c)(3).

Proposed comment 20(e)–6 under Alternative B provided examples regarding how a disclosure may inform a consumer of the distinction between the certificate or card expiration and the funds expiration under proposed § 205.20(e)(3)(iii). Under the proposed comment, the disclosure could state on the front of the card, for example, "Valid thru 09/2016. Call for new card."; "Active thru 09/2016. Call for replacement card."; or "Call for new card after 09/2016." The Board believed these disclosures, in conjunction with other disclosures required to be on the card, such as a toll-free number that a consumer could call for a replacement card, would provide sufficient information to inform consumers that they may be able to continue using their funds after the certificate or card itself has expired.

The Board received no comments regarding the proposed sample disclosures, other than general concerns regarding how the disclosures would fit on the card if required to be made with equal prominence and in close proximity to the certificate or card expiration date. Upon further analysis, the Board has determined that some of the proposed sample disclosures may not sufficiently alert consumers to the distinction between the funds expiration date and the certificate or card expiration date. Therefore, in the final rule, comment 20(e)–7 has been revised to provide different sample disclosure language that more explicitly alerts consumers to the reason that they should contact the issuer for a new card. The disclosure may state, for example, "Funds expire after card. Call for replacement card." or "Funds do not expire. Call for new card after 09/2016."

Comment 20(e)–7 also clarifies that disclosures made pursuant to § 205.20(e)(3)(iii)(A) may also fulfill the requirements of § 205.20(e)(3)(i). For example, making a disclosure that "Funds do not expire." to comply with § 205.20(e)(3)(iii) would also fulfill the requirements of § 205.20(e)(3)(i).

The Board recognizes that the amount of space available for disclosures near the certificate or card expiration date is limited. The Board also understands that some disclosures could be difficult to provide clearly and conspicuously, if the disclosures are required to be in close proximity to the certificate or card expiration date. To address this concern, § 205.20(e)(3)(iii) has been revised to provide relief from these disclosures for a non-reloadable certificate or card that bears an expiration date that is at least seven years from the date of manufacture. The Board believes that the seven-year safe harbor for the disclosures under § 205.20(e)(3)(iii) for non-reloadable certificates and cards will provide the vast majority of consumers ample time to use the funds available on the certificate or card, thus making the disclosures under § 205.20(e)(3)(iii) unnecessary. For purposes of this safe harbor, new comment 20(e)–8 states that the date of manufacture is the date on which the certificate or card expiration date is printed on the certificate or card.

Notwithstanding this safe harbor provision with respect to the disclosures in § 205.20(e)(3)(iii), § 205.20(e)(1) would still prohibit the sale or issuance of such certificate or card unless there are policies and procedures in place to provide consumers with a reasonable opportunity to purchase the certificate or card with at least five years remaining until the certificate or card expiration date. In addition, under § 205.20(e)(2), the funds may not expire before the certificate or card expiration date, even if the expiration date of the certificate or card bears an expiration date that is more than five years at the date of purchase. *See* comment 20(e)–8.

In the event that a certificate or card bearing an expiration date of seven years or more at the time the certificate or card was manufactured is purchased with a certificate or card expiration date with less than five years remaining, the consumer would still have access to the funds for at least five years from the date of purchase, and the certificate or card would state the disclosures required under § 205.20(e)(3)(i) and (ii) alerting the consumer to the funds expiration date and contact information for obtaining a replacement card. Nonetheless, the Board expects that, based on its understanding of current industry practice, most consumers will purchase certificates or cards with more than five years remaining before the certificate or card expires.

Finally, the Board noted in proposed comment 20(e)–7 under Alternative B that proposed §§ 205.20(d)(2), (e)(3), and (f)(2) (as discussed below) would require certain disclosures to be made on the certificate or card itself, as applicable. The proposed comment thus clarified that in addition to any disclosures required under § 205.20(e)(3), any applicable disclosures under §§ 205.20(d)(2) and (f)(2) of this section must also be provided on the certificate or card. The Board received no comments on the proposed comment, which is adopted as comment 20(e)–9 in the final rule.

Other Protections and Clarifications

In the November 2009 Proposed Rule, the Board proposed § 205.20(e)(4) to prohibit the imposition of fees to replace an expired certificate or card if the funds loaded on the certificate or card have not expired. Proposed

§ 205.20(e)(4), however, contained an exception for certificates or cards that have been lost or stolen. Proposed comment 20(e)–8 under Alternative B clarified that although a fee would be permitted to be charged to replace a lost or stolen certificate or card under proposed § 205.20(e)(4), the rule did not create a substantive requirement that issuers replace a lost or stolen certificate or card.

Several commenters supported the Board's proposal to prohibit fees to replace an expired certificate or card if the underlying funds have not expired. Some industry commenters, however, opposed the Board's proposal, noting that the Credit Card Act did not specifically provide for this right. The Board believes that EFTA Section 904(c) provides the Board with the authority to enact regulations to carry out the purposes of the statutory protections. *See* 15 U.S.C. 1693b(c). Proposed § 205.20(e)(4) was meant to ensure that consumers would have full use of the funds loaded on a certificate or card for the minimum five-year period set forth in the statute by providing consumers with a cost-free means to access funds if a certificate or card expired before the underlying funds. The Board continues to believe this provision is integral to effectuating the protections afforded by the statute.

Consumer group commenters also suggested that the Board provide consumers with the right to one cost-free replacement for a lost or stolen certificate or card. Imposing a fee restriction for the replacement of a lost or stolen certificate or card goes beyond the protections afforded by the statute, and is not related to the expiration date of the card or certificate. Furthermore, the Board recognizes that there are costs to issuing a replacement certificate or card. Therefore, the final rule does not prohibit issuers from charging fees to replace a lost or stolen certificate or card.

Other industry commenters suggested that if a certificate or card expires but the underlying funds have not yet expired, an issuer should be permitted to return the balance of funds to the consumer instead of providing a replacement certificate or card. If the remaining amount on a certificate or card is small or if there is little time remaining before the expiration of the funds, an issuer may find it more cost-effective to return the balance of funds to the consumer, for example, by check, rather than issuing another certificate or card. Furthermore, certain state laws require an issuer to return the balance of funds to a consumer upon the occurrence of a triggering event with a certain remaining amount.

The Board notes that neither the statute nor the regulation specifically requires that a replacement certificate or card be issued. Therefore, issuers may, at their option in accordance with applicable state law, return the balance of funds to a consumer instead of issuing a replacement for an expired certificate or card. However, the Board believes that just as a fee may not be charged for replacing the certificate or card, similarly, no fee may be charged for refunding the balance of the funds. Consequently, the Board is amending § 205.20(e)(4) to provide that no fee may be charged for providing a certificate or card holder with the remaining balance prior to the funds expiration date, unless such certificate or card has been lost or stolen. A new comment 20(e)–10 is adopted to clarify this point. In addition, proposed comment 20(e)–8 under Alternative B is adopted in final as comment 20(e)–11.

Proposed comment 20(e)–9 under Alternative B clarified that a certificate or card is not considered to be issued or loaded with funds until it has been activated for use. As explained in the November 2009 Proposed Rule, issuers often produce gift cards for display on retail shelves and racks or for mailing to consumers, but, for security reasons, these cards cannot be used until the card has been activated by a retail employee or by telephone. The proposed comment was meant to clarify that although a certificate or card may have been produced, it is not considered to have been "issued" or to have had funds "loaded" for purposes of § 205.20(e) until that card has been activated for use. The Board did not receive comment on this issue. Therefore, proposed comment 20(e)–9 under Alternative B has been adopted in final, with one minor clarifying amendment, as comment 20(e)–12.

Finally, some industry commenters asked the Board to clarify how the expiration date restrictions may apply to certain gift cards that are redeemable for songs, media, or virtual goods.[33] The Board understands that for these types of cards, it is a common practice that once a consumer redeems the card, the full value is debited from the card and credited to another "account"[34] that is used specifically to buy such goods or services, even if the consumer does not purchase the goods or services at that time. The Board concludes that once a certificate or card has been fully redeemed, the five-year minimum expiration term no longer applies to the underlying funds. New comment 20(e)–13 sets forth this clarification. In addition, the comment provides that if the consumer only partially redeems the value of a certificate or card, the five-year minimum expiration term requirement continues to apply to the funds remaining on the certificate or card.

20(f) Additional Disclosure Requirements for Gift Certificates or Cards

EFTA Section 905(a)(4) and § 205.7(b)(5) of Regulation E require the disclosure of any fees imposed by a financial institution for electronic fund transfers or for the right to make such transfers. *See* 15 U.S.C. 1693c(a)(4). The Board has the authority under EFTA Section 915(d)(2) to apply the requirements of Regulation E to gift cards, store gift cards, and general-use prepaid cards. *See* 15 U.S.C. 1693m(d)(2). Using this authority, the Board proposed § 205.20(f) to require additional fee-related disclosures for gift certificates, store gift cards, and general-use prepaid cards.

20(f)(1) Fee Disclosures

Proposed § 205.20(f)(1) would have required certain disclosures to be provided on or with the certificate or card for each type of fee (other than dormancy, inactivity, or service fees) that may be imposed in connection with a gift certificate, store gift card, or general-use prepaid card. Specifically, the type of fee, the amount of the fee (or an explanation of how the fee will be determined), and the conditions under which the fee may be imposed would be required to be disclosed under the proposal. The proposed provision did not apply to dormancy, inactivity, and service fees because those fees were required to be disclosed under proposed § 205.20(d)(2). Therefore, proposed § 205.20(f)(1) would have required the disclosure of fees such as a one-time initial issuance fee and cash-out fee. The proposal permitted these fee disclosures to be provided either on or with the certificate or card in light of the limited space availability on a certificate or card and other disclosure requirements. In addition, the Board proposed to require the disclosure of these fees prior to purchase, as discussed above in the supplementary information to § 205.20(c)(3).

[33] Virtual goods are intangible digital items that can be purchased for use in on-line communities or on-line games. *See* Claire Cain Miller & Brad Stone, "Virtual Goods Start Bringing Real Paydays," *New York Times,* November 7, 2009, at A1.

[34] An "account" established by a merchant to purchase virtual goods would not be an account for purposes of Regulation E.

Commenters generally agreed that any fees that may be imposed should be disclosed to consumers. Industry commenters agreed that the fee disclosures under § 205.20(f)(1) should be permitted to be provided along with, rather than on, a certificate or card due to the limited amount of space on certificates and cards. Accordingly, § 205.20(f)(1) is adopted as proposed.

20(f)(2) Telephone Number for Fee Information

The Board also proposed § 205.20(f)(2) to require the clear and conspicuous disclosure of a toll-free telephone number and, if one is maintained, a Web site, for consumers to obtain information about fees. This disclosure had to be provided on a gift certificate, store gift card, or general-use prepaid card. Proposed § 205.20(f)(2) also required maintenance of a toll-free telephone number to provide information on the fees required to be disclosed under proposed §§ 205.20(d)(2) and (f)(1). The proposed rule did not require that a Web site be maintained for such purposes. However, if a Web site that provides information about fees is already maintained, proposed § 205.20(f)(2) would have required that the Web site must also be disclosed.

Given the limited space on a certificate or card, the Board anticipated that issuers would opt to disclose some fee information on materials accompanying the certificate or card, as opposed to on the certificate or card itself. In such cases, the disclosures accompanying the certificate or card could become separated from the actual certificate or card. By requiring the reference to the toll-free telephone number and, if one is maintained, the Web site, on the certificate or card, the Board sought to ensure that consumers would have an easy and cost-free means of obtaining fee information related to the certificate or card, even if the consumer no longer has the original disclosure.

One consumer group commenter agreed that a telephone number where consumers could obtain fee and other information should be available to consumers. This commenter believed that information should not be provided solely through a Web site because some consumers may not have access to the Internet.

Pursuant to the Board's authority under EFTA Sections 915(c)(2) and 915(d)(1)(A) and EFTA Section 904, § 205.20(f)(2) is adopted substantially as proposed. The Board believes it is appropriate to require maintenance of a toll-free telephone number, because it will provide consumers with a means to access important information about the certificate or card at no cost no matter where in the United States the consumer may use the certificate or card. Moreover, the Board understands that many issuers already maintain toll-free telephone numbers and Web sites for consumers to contact for further information and often provide this information directly on the certificates or cards they issue. As a result, the requirement should not impose additional burdens on many issuers.

The proposal contained several comments to clarify proposed § 205.20(f). The Board received no comments on the proposed comments to § 205.20(f), each of which is adopted substantially as proposed.

Comment 20(f)–1 clarifies that if a certificate or card does not have any fees, the § 205.20(f)(2) disclosure is not required on the certificate or card. However, a telephone number and a Web site may still have to be disclosed pursuant to § 205.20(e)(3)(ii) if funds underlying a certificate or card may be available after the certificate or card expires.

Comment 20(f)–2 clarifies that the same toll-free number and Web site may be used to fulfill the requirements of §§ 205.20(e)(3)(ii) and (f)(2).[35] The comment also clarifies that neither a toll-free number nor a Web site must be maintained or disclosed if no fees are imposed in connection with a certificate or card, and the certificate or card and underlying funds do not expire.

Sections 205.20(d)(2), (e)(3), and (f)(2) require certain disclosures to be provided on the certificate or card itself, as applicable. Comment 20(f)–3 clarifies that in addition to any disclosures required pursuant to § 205.20(f)(2), any applicable disclosures under §§ 205.20(d)(2) and (e)(3) of this section must be provided on the certificate or card.

20(g) Compliance Dates

As discussed above, the Credit Card Act provides that the final rules implementing the statutory gift card provisions must become effective August 22, 2010. Section 205.20(g) has been added to the final rule to address transition issues associated with implementing the rule by the August 22, 2010 effective date.

The Board solicited comment on the potential costs that would be incurred if issuers and other persons subject to the rule were required to remove and replace card stock, including cards that have already been placed into store inventory, to ensure that all products sold on or after August 22, 2010 fully comply with the new requirements. The Board also solicited comment on whether it should consider rules to provide relief for gift certificates, store gift cards, and general-use prepaid cards in distribution as of August 22, 2010 from some or all of the new requirements. For example, the final rule could require all such certificates or cards to comply with the substantive restrictions on imposing dormancy, inactivity, or service fees, and expiration dates, but otherwise permit such certificates or cards to be sold even if they do not contain the required disclosures. Finally, the Board solicited comment on an appropriate transition period after which all certificates or cards must fully comply with the new rules.

Industry commenters urged the Board to grandfather all physical cards already in the marketplace and in distribution, including cards that are sold on-line or via telephone, for a certain period of time, ranging from 180 days to 24 months. In particular, industry commenters noted that the short implementation period between the issuance of final rules and the statutory compliance date of August 22, 2010 would leave insufficient time for the industry to review the new rule requirements; design, produce, and merchandise new stock; and remove and replace old stock. In addition, industry commenters observed that the final rule could require the possible manufacture and installation of new displays and signage, each of which would require additional time.

Several industry commenters also questioned whether there would be adequate industry resources available either to produce sufficient compliant cards or to replace non-compliant cards prior to the effective date. As a result, some issuers and retailers may not have their orders filled in an amount sufficient to meet consumer demand, which could significantly reduce sales, especially if stock could not be replaced by the holiday season when the bulk of sales occur.

Some industry commenters estimated that replacing all card stock in inventory could cost an estimated $20 to $50 million per card issuer and/or distributor, including the costs of destroying existing card stock. One issuer of promotional and reward cards stated that it typically holds several million customized cards in inventory at any given point in time for

[35] The toll-free telephone number and Web site may also be the same toll-free telephone number and Web site provided for customer service issues or questions relating to the certificate or card.

promotional programs that may run a year or longer, and thus estimated that it would cost several hundred thousands of dollars to destroy current card inventory and order replacement inventory. Industry commenters further noted the adverse environmental impact from destroying large quantities of plastic card stock, which are only rarely made from recyclable or biodegradable materials.

In the interim, industry commenters noted that consumers would remain adequately protected if the Board required card issuers to comply with the substantive fee and expiration date restrictions in the Credit Card Act, and to provide adequate signage, displays, and/or customer service messaging apprising consumers of their new rights. In contrast, one state attorney general commenter urged the Board to prohibit the sale of "grandfathered" gift certificates and cards that do not contain the prescribed disclosures after the effective date of the Credit Card Act.

Industry commenters also urged the Board to confirm that § 205.20 does not apply to gift certificates and gift cards purchased by consumers prior to August 22, 2010 to avoid retroactive application of the rule. Industry commenters further noted that card issuers were unlikely to have contact information of consumers who have either purchased or received the cards, and therefore would be unable to provide those consumers with new disclosures.

Under Section 403 of the Credit Card Act, the gift card provisions must become effective 15 months after the date of enactment, or by August 22, 2010. Accordingly, the Board believes that the purpose and intent of these new provisions would be most effectively carried out by requiring full compliance with the final rule, including each of the substantive and disclosure requirements, by August 22, 2010. In this regard, the Board believes that there could be significant consumer confusion if gift cards sold after August 22, 2010 carried disclosures that were inconsistent with the substantive protections afforded by the Credit Card Act. In particular, consumers relying on a card expiration date that is shorter than five years from the date of issuance may elect to discard an expired gift card notwithstanding the fact that the underlying funds may remain valid after card expiration, and thus be denied the protections under the Credit Card Act.

Some industry commenters asserted that consumers could be apprised of their new rights through signage at the point of sale, or through communications via an issuer's toll-free telephone number or Web site, thereby mitigating any adverse effect from inconsistent card disclosures. However, the Board believes that such measures would not by themselves provide adequate protection. In the first instance, signage at the point-of-sale would be ineffective for the vast majority of gift card recipients as they would not be the consumers initially purchasing the cards. With respect to other proposed methods of communication, a consumer that had no reason to call the telephone number or visit the Web site would not receive the necessary disclosures. For example, a recipient may receive a card with an expiration date printed on it which may no longer apply after the effective date of the rule, and then dispose of the expired card without first calling the telephone number on the card.

Accordingly, new § 205.20(g)(1) provides that § 205.20 applies to any gift certificate, store gift card, or general-use prepaid card sold to a consumer on or after August 22, 2010, or provided to the consumer as a replacement for such certificate or card. However, the final rule does not apply the new requirements, including the restrictions on imposing dormancy, inactivity, or service fees and on expiration dates, or the disclosure requirements set forth in the Credit Card Act or the regulation, to certificates or cards sold or provided to a consumer prior to that date.

Section 205.20(g)(2) sets forth a transition rule for loyalty, award, and promotional gift cards, which are otherwise only subject to the disclosure requirements under § 205.20. Specifically, the final rule does not apply to any gift cards provided to a consumer through a loyalty, award, or promotional program where the period of eligibility for the program began prior to August 22, 2010. For these cards, the same concerns regarding the inconsistency of disclosures and substantive practices do not apply. Gift cards issued through a loyalty, award, or promotional program that begins on or after August 22, 2010 must comply with the disclosure requirements in § 205.20(a)(4)(iii) in order to qualify for the exclusion in § 205.20(b)(3). New comment 20(g)–1 provides additional guidance regarding the period of eligibility for a loyalty, award, or promotional program.

Additional Issues

Authority To Adopt Additional EFTA Protections

EFTA Section 915(d)(2) gives the Board the authority to determine the extent to which the individual definitions and provisions of the EFTA or Regulation E should apply to general-use prepaid cards, gift certificates, and store gift cards. *See* 15 U.S.C. 1693m(d)(2). In the November 2009 Proposed Rule, the Board proposed to exercise this authority to require the disclosure of any fees that may apply, and the conditions under which such fee may be imposed. *See, e.g.,* proposed § 205.20(f). However, the Board did not otherwise seek to apply any other provisions in the EFTA or Regulation E to gift certificates, store gift cards, or general-use prepaid cards. For example, the Board did not propose to apply the periodic statement disclosures or error resolution obligations under the EFTA or Regulation E to gift certificates, store gift cards, or general-use prepaid cards.

Industry commenters agreed that broader application of Regulation E requirements to gift certificates, store gift cards, and general-use prepaid cards was not appropriate, because it would lead to inconsistent treatment of the gift certificates or cards addressed by this rule and other prepaid card products, such as general-purpose reloadable cards that are used as account substitutes. One industry commenter observed that applying periodic statement requirements to non-reloadable gift cards, for example, would be problematic because such cards are typically issued anonymously and therefore customer information would generally not be available for providing statements.

Consumer groups, however, urged the Board to exercise the authority provided by EFTA Section 915(d)(1) to clarify that Regulation E covers general-use prepaid cards that consumers may use as a substitute for traditional bank accounts. *See* 15 U.S.C. 1693m(d)(1). While many of these cards currently carry voluntary protections that resemble Regulation E protections, consumer groups observed that such voluntary provisions could be rescinded at any time, unlike regulatory and statutory requirements such as those provided for debit cards under the EFTA and Regulation E. In particular, consumer groups believed that general-use prepaid cardholders should have the same protections against unauthorized transactions and be able to recover missing funds due to lost or stolen cards.

As stated in the proposal, the Board believes that it is more appropriate to make any determination whether to impose periodic statement requirements, error resolution obligations, and other protections set forth in the EFTA and Regulation E with respect to prepaid cards in the context of a separate rulemaking to avoid any regulatory gaps or inconsistencies. For

example, a requirement to impose some form of periodic statement or error resolution obligations for reloadable gift cards could lead to inconsistent treatment if similar requirements were not simultaneously adopted for general-purpose reloadable cards, which may serve as substitutes for accounts subject to the EFTA and Regulation E.

The Credit Card Act also granted the Board authority to limit the amount of dormancy, inactivity, or service fees, or the balance below which such fees or charges may be assessed. *See* EFTA Section 915(d)(1); 15 U.S.C. 1693m(d)(1). The Board did not propose to exercise this authority in light of downward trends in the amount of dormancy and inactivity fees in connection with retail gift cards over time.[36]

Consumer groups urged the Board to use its authority in order to restrict the size of dormancy, inactivity, and service fees to only cover the costs to maintain a gift card or gift certificate so as to ensure cards do not lose their entire value within a short period of time once the one-year inactivity period has run. Consumer groups also stated that the Board should limit the size and amount of other one-time fees, such as issuance and cash-out fees, to ensure that such fees are reasonable and proportional to a gift card's value. Finally, consumer groups believed the Board should establish a balance above which fees could not be assessed on gift cards and gift certificates so that consumers would not be penalized and lose most of their gift card's remaining value. Industry commenters supported the Board's decision not to impose any dollar caps on fees, or to establish a balance above which fees could not be assessed, in connection with gift certificates, store gift cards, and general-use prepaid cards.

The Board continues to believe that the need for additional restrictions on fees is not clear in light of the general downward trend in dormancy and inactivity fees for gift cards and gift certificates.[37] In addition, the statute only permits one such fee per month if there has been no activity over the preceding 12-month period, which may put downward pressure on the amount of fees assessed in connection with gift cards. The Board will continue to monitor the development of the gift card market as it adjusts to the new rules and could take action to impose other restrictions on dormancy, inactivity, or service fees at a later time, if appropriate.

Preemption

Several industry commenters urged the Board to clarify whether the new protections regarding funds expiration dates supersede state laws requiring the escheat of funds underlying gift cards and gift certificates. For example, certain state laws require issuers of unused gift cards to remit the remaining funds to the state where the cardholder resides or where the issuer is incorporated after a certain period of time—typically three to five years after the card is sold or last used. Industry commenters expressed concern that state escheat requirements could mean that in some states, issuers would be required to remit funds to the state after three years, while still remaining obligated to honor the funds under the gift card rules for up to two additional years, consistent with the requirement that funds remain valid for five years from the date of issuance or last load. Some commenters acknowledged that if a consumer used a certificate or card after the issuer had remitted funds to the state, but prior to the funds' expiration date, issuers could recover from the state the funds that already had been remitted. However, the commenters argued that this process was administratively burdensome and costly for the issuer. Thus, industry commenters asserted that the Board should preempt such state escheat laws for inconsistency with the final rule requirements to avoid putting card providers in a position where they would be unable to comply with both the final rule and state escheat laws.

Under the revised preemption provisions in § 205.12, discussed above, the Board may determine whether a state law relating to, among other things, expiration dates of gift certificates, store gift cards, or general-use prepaid cards is preempted by a provision of the regulation. However, a provision can only preempt a state law that is inconsistent with the provision and only to the extent of its inconsistency. Moreover, the regulation provides that a state law is not inconsistent with any provision if it is more protective of consumers.

State escheat laws vary significantly. For example, the number of years that may elapse before an issuer must remit funds to the state differs among the states. Moreover, some state laws do not require an issuer of gift certificates or gift cards to remit remaining funds to the state in certain circumstances. Some states may also provide a process through which an issuer may recover funds previously escheated to the state in the event the issuer subsequently honors a consumer's claim to funds. As such, the Board believes it is not feasible or prudent to make a preemption determination that applies generally to all states.

Upon request for a preemption determination with respect to a particular state's escheat law, the Board would apply the standards set forth in § 205.12(b)(2) to determine whether such a law is inconsistent with § 205.20. The Board's analysis would be published for notice and comment, and, if the Board determines the state law is preempted, the final determination would be published in the commentary to § 205.12.

VII. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities.

However, under section 605(b) of the RFA, the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this final rule is not likely to have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the rule.* The EFTA was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The Act expressly states that the Board's regulations may contain "such classifications, differentiations, or other provisions, * * * as, in the judgment of the Board, are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion [of the Act], or to facilitate compliance [with the Act]." 15 U.S.C. 1693b(c).

[36] For example, the most recent survey by one government agency indicates the median inactivity fee has decreased from $1.73 per month in 2003 to $1.38 per month in 2007. *See* Montgomery County Office of Consumer Protection, Gift Card Reports, 2003–2007 (available at: *http://www.montgomerycountymd.gov/ocptmpl.asp?url=/content/ocp/consumer/a-zgiftcardreports.asp*).

[37] One major issuer of network-branded gift cards recently announced plans to eliminate monthly fees altogether. *See* Andrew Martin, "American Express to End Monthly Fees on Gift Cards," *New York Times,* Oct. 1, 2009, at B2.

The Board is adopting revisions to Regulation E to implement Title IV of the Credit Card Act, which generally restricts a person's ability to impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card. Title IV also generally provides that a gift certificate, store gift card, or general-use prepaid card may not be sold or issued unless the expiration date is no less than five years from the date a gift certificate is issued or five years from the date funds were last loaded to a store gift card or general-use prepaid card.

In addition, the final rule requires the disclosure of all other fees imposed in connection with a gift certificate, store gift card, or general-use prepaid card. The certificate or card must also disclose a toll-free telephone number and, if one is maintained, a Web site that a consumer may access to obtain fee information or replacement certificates or cards.

The Board believes that the revisions to Regulation E discussed above are consistent with the Act, as amended by Title IV of the Credit Card Act, and within Congress's broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. *Small entities affected by the final rule.* The number of small entities affected by this proposal is unknown. Under the final rule, a person is prohibited from imposing a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless three conditions are satisfied. First, a dormancy, inactivity, or service fee may be imposed only if there has been no activity with respect to the certificate or card within the one-year period prior to the imposition of the fee. Second, only one such fee may be assessed in a given calendar month. Third, disclosures regarding dormancy, inactivity, or service fees must be clearly and conspicuously stated on the certificate or card, and the issuer or seller must provide these disclosures to the purchaser before the certificate or card is purchased. The final rule is limited in scope to certificates or cards sold or issued to consumers primarily for personal, family, or household purposes.

The final rule also provides that a gift certificate, store gift card, or general-use prepaid card may not be sold or issued, unless the expiration date of the funds underlying the certificate or card is no less than five years after the date of issuance (in the case of a gift certificate) or five years after the date of last load of funds (in the case of a store gift card or general-use prepaid card). In addition, information about whether funds underlying a certificate or card may expire must be clearly and conspicuously disclosed both on the certificate or card and prior to purchase.

Under the final rule, persons subject to the rule are required to maintain policies or procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with an expiration date that is at least five years from the date of purchase. The final rule also prohibits the imposition of any fees for replacing an expired certificate or card to ensure that consumers are able to access the underlying funds for the full five-year period.

In addition to the statutory fee restrictions described above, the final rule requires the disclosure of all other fees imposed in connection with a gift certificate, store gift card, or general-use prepaid card. These disclosures must be provided prior to purchase and on or with the certificate or card. The final rule also requires the disclosure on the certificate or card of a toll-free telephone number and, if one is maintained, a Web site that a consumer may access to obtain fee information or replacement certificates or cards.

For loyalty, award, or promotional gift cards, the final rule requires three disclosures on the card, as applicable: (1) A statement indicating that the certificate or card is issued for loyalty, award, or promotional purposes; (2) the expiration date of the underlying funds; and (3) a toll-free telephone number and, if one is maintained, a Web site that a consumer may access to obtain fee information. Fees imposed in connection with a loyalty, award, or promotional card must be disclosed on or with the card. A loyalty, award, or promotional gift card is not, however, subject to the substantive restrictions on imposing dormancy, inactivity, or service fees, or on expiration dates.

Overall, to comply with the final rule, all persons involved in issuing, distributing or selling gift cards and certificates (or loyalty, award, or promotional gift cards) may need to review and potentially revise disclosures that appear on or with the certificates or cards. In addition, issuers, sellers, and distributors of gift certificates, store gift cards, and general-use prepaid cards may have to review and potentially revise their inventory distribution and management policies and controls in order to provide consumers with a reasonable opportunity to purchase certificates or cards with an expiration date with at least than five years from the date of purchase.

The Small Business Administration (SBA) has defined a small business as one whose average annual receipts do not exceed $7 million or who have fewer than 500 employees.[38] The Board expects that well over 90% of all businesses qualify as small businesses under the SBA's standards.[39] Consequently, a very large number of small entities could be subject to the final rules to the extent that they issue or sell gift certificates, store gift cards, or general-use prepaid cards. The Board is unaware, however, of any industry data regarding the number of merchants that issue gift certificates or gift cards.

Nonetheless, the final requirements apply only to the extent that a certificate or card program imposes dormancy, inactivity, or service fees or establishes an expiration date with respect to the underlying funds. In this regard, the Board understands that the vast majority of gift certificates and store gift cards issued by merchants or retailers today do not carry such fees or expiration dates.[40] Moreover, smaller merchants are more likely to issue gift certificates in paper form only, and such certificates are not covered by the final rule. *See* § 205.20(b)(5). Thus, the Board believes the final rule would not impact a significant number of merchants that issue store gift cards or gift certificates. Similarly, the Board believes the final rule also would not significantly impact the entities that distribute or sell such cards or certificates on behalf of merchants. Moreover, the Board understands that given their size, such entities are unlikely to be "small businesses" as defined by the SBA.

In addition, the final rule potentially covers issuers of general-use prepaid cards, primarily financial institutions, card program managers that issue or distribute general-use prepaid cards, and distributors or retailers of such

[38] *See* SBA, Summary of Size Standards by Industry (available at: *http://www.sba.gov/contractingopportunities/officials/size/summaryofssi/index.html*).

[39] *See* Small Business Administration, Office of the Advocacy, Frequently Asked Questions (available at: http://web.sba.gov/faqs/faqindex.cfm?areaID=24); Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006 (available at: *http://www.sba.gov/advo/research/us06_n6.pdf*).

[40] *See* Montgomery County Office of Consumer Protection, Gift Cards 2007 (available at: *http://www.montgomerycountymd.gov/ocptmpl.asp?url=/content/ocp/consumer/a-zgiftcardreports.asp*) (reporting that 18 of 22 retail gift cards surveyed do not carry any fees or expiration dates). *See also* Retail Gift Card Association, Code of Principles (available at: *http://www.thergca.org/uploads/Code_of_Principles_PDF.pdf*) (recommending as a best practice for retail gift card programs that no fees or expiration dates should apply).

cards. General-use prepaid cards may be more likely to carry dormancy, inactivity, or service fees and expiration dates compared to gift certificates and store gift cards. Consequently, entities that issue, distribute or sell general-use prepaid cards will be more likely to be impacted by the final rule.

In the proposed regulatory flexibility analysis, the Board stated that the proposal would be unlikely to impact a substantial number of small entities with respect to the issuance or sale of general-use prepaid cards. In response, one industry trade association commenter representing convenience stores observed that many of its constituents, comprised of small, independent convenience stores, sold a variety of prepaid products, including store gift cards and general-purpose reloadable cards. Thus, because such retailers would have to adopt new controls to ensure that general-purpose reloadable cards are not marketed as a gift card or gift certificate, this commenter asserted the rule could have a significant impact on small businesses overall.

As an initial matter, the Board notes that cards that would otherwise be considered general-use prepaid cards may in many cases be exempt from the statute and proposed rule if they are reloadable and not marketed or labeled as a gift card or gift certificate. In addition, as discussed above, open-loop cards, which include general-use prepaid cards, make up a relatively small portion of the total prepaid card market in terms of the number of cards issued and the dollar value of the amounts loaded.

To the extent that a retailer may sell covered gift cards alongside general-purpose reloadable cards, the rule may require new signage or reorganization of product displays to avoid the marketing of the general-purpose reloadable cards as a gift card. Nonetheless, the Board understands that in many cases, a merchandiser working on behalf of a distributor of prepaid cards, rather than the retailer itself, may set up the prepaid card display, thereby mitigating the retailer's compliance burden. The Board has also provided additional examples in the final rule to illustrate how excluded cards, including general-purpose reloadable cards, may be sold alongside gift certificates or cards covered by the rule to further facilitate compliance.

For these reasons, although the Board is not aware of any data regarding entities that issue or otherwise sell general-use prepaid cards, the Board believes that, overall, the rule is not likely to have a significant impact on a substantial number of small entities with respect to the issuance or sale of general-use prepaid cards.

3. *Other federal rules.* The Board has not identified any federal rules that duplicate, overlap, or conflict with the revisions to Regulation E.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this final rule is found in 12 CFR part 205. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0200.

This information collection is required to provide benefits for consumers and is mandatory. *See* 15 U.S.C. 1693 *et seq.* Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for 24 months, but this regulation does not specify types of records that must be retained.

Title IV of the Credit Card Act prohibits any person from imposing a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless three conditions are satisfied. First, such fees may be imposed only if there has been no activity with respect to the certificate or card within the one-year period prior to the imposition of the fee or charge. Second, only one such fee may be assessed in a given month. Third, disclosures regarding dormancy, inactivity, or service fees must be clearly and conspicuously stated on the certificate or card, and the issuer or vendor must provide these disclosures before the certificate or card is purchased.

The Credit Card Act also provides that a gift certificate, store gift card, or general-use prepaid card may not be sold or issued unless the expiration date is no less than five years after the date of issuance (in the case of a gift certificate) or five years after the date of last load of funds (in the case of a store gift card or general-use prepaid card). In addition, the statute requires that the terms of expiration must be clearly and conspicuously stated on the certificate or card.

Any entities involved in the issuance, distribution, or sale of gift certificates, store gift cards, or general-use prepaid cards (or the issuance or distribution of loyalty, award, or promotional gift cards) potentially are affected by this collection of information because these entities will be required to provide disclosures regarding the fees imposed in connection with these certificates or cards and when the funds underlying a certificate or card expire. Under the final rule, gift certificates, store gift cards, and general-use prepaid cards must state certain disclosures about dormancy, inactivity, or service fees; expiration dates; and a telephone number and Web site, if one is maintained, for additional information. Disclosures about other fees must be provided on or with the certificate or card. In addition, disclosures about fees and expiration dates must be provided to the consumer prior to purchase. Consumers receiving loyalty, award, and promotional gift cards also must be given disclosures regarding applicable fees and expiration dates.

Entities subject to the final rule will have to review and revise disclosures that are currently provided on or with a certificate or card to ensure that they accurately state any fees and expiration dates that may apply.

The total estimated burden increase, as well as the estimates of the burden increase associated with each major section of the final rule as set forth below, represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size and complexity of the respondent. Furthermore, the burden estimate for this rulemaking includes the burden addressing overdrafts to Regulation E, as announced in a separate final November 2009 final rulemaking (Docket No. R–1343).

As discussed above, on November 20, 2009, a notice of proposed rulemaking was published in the **Federal Register** (74 FR 60986). The comment period for this notice expired on December 21, 2009. No comments specifically addressing the paperwork burden estimates were received. One comment referenced PRA; however the Federal Reserve believes the points raised were related to regulatory burden (beyond the scope of PRA). The estimates therefore will remain unchanged as published in the proposed rule.

Section 205.20(b)(2) implements the exclusion for cards, codes, or other devices that are reloadable and not marketed or labeled as a gift card or gift

certificate. As noted in comment 20(b)(2)–4, institutions will qualify for this exclusion so long as they establish and maintain policies and procedures reasonably designed to avoid the 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. The Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve will take, on average, 40 hours (one-business week) to review and implement written policies and procedures and provide training associated with § 205.20(b)(2). The Federal Reserve estimates the annual one-time burden for respondents to be 48,200 hours and believes that, on a continuing basis, respondents will take an average of 8 hours annually to maintain their policies and procedures.

Under § 205.20(e)(1), institutions involved in issuing and selling certificates or cards are required to adopt policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. The Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve will take, on average, 40 hours (one-business week) to implement or modify written policies and procedures and provide training associated with § 205.20(e)(1). The Federal Reserve estimates the annual one-time burden for respondents to be 48,200 hours and believes that, on a continuing basis, respondents would take an average of 8 hours annually to maintain their policies and procedures.

Under § 205.20(e)(3), three disclosures must be stated on the certificate or card, as applicable: (1) The terms of expiration of the underlying funds or, if the underlying funds do not expire, that fact; (2) a toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires, if the underlying funds may be available; (3) a statement that the certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and that the consumer may contact the issuer for a replacement card.

For loyalty, award, or promotional gift cards, § 205.20(a)(4)(iii) requires three disclosures on the certificate or card, as applicable: (1) A statement indicating that the certificate or card is issued for loyalty, award, or promotional purposes; (2) the expiration date of the underlying funds; and (3) a toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain fee information.

The Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve will take, on average, 80 hours (two-business weeks) to update their systems to revise disclosures and redesign certificates or cards to comply with the proposed disclosure requirements in § 205.20(e)(3). The Federal Reserve estimates the annual one-time burden for respondents to be 96,400 hours and believes that, on a continuing basis, there would be no additional increase in burden.

The number of respondents regulated by the Federal Reserve that sell or issue certificates or cards subject to the final rule is unknown. Accordingly, for purposes of this final Paperwork Reduction Act analysis, it is assumed that all of the respondents regulated by the Federal Reserve will be impacted by the new rule. The Federal Reserve estimates the final rule will impose a one-time increase in the annual burden under Regulation E for all respondents regulated by the Federal Reserve by 192,800 hours, from 526,520 to 719,320 hours. In addition, the Federal Reserve estimates that, on a continuing basis, the proposed requirements would increase the annual burden by 19,280 hours from 526,520 to 545,800 hours. The total annual burden would increase by 212,080 hours, from 526,520 to 738,600 hours.

The other federal financial agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimation methodology. Using the Federal Reserve's method, the current total estimated annual burden for all persons subject to Regulation E, including Federal Reserve-supervised institutions would be approximately 1,403,459 hours. The above estimates represent an average across all respondents and reflect variations between persons based on their size, complexity, and practices. All covered persons, including depository institutions (of which there are approximately 17,200), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA. The final rule imposes a one-time increase in the estimated annual burden for such institutions by 2,752,000 hours. On a continuing basis the rule will increase in the estimated annual burden for such institutions by 275,200 hours. The total annual burden for the respondents regulated by the Federal financial agencies is estimated to be 4,430,659 hours.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–0200), Washington, DC 20503.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 205 and the Official Staff Commentary, as follows:

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

■ 1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693b.

■ 2. Section 205.3(a) is revised to read as follows:

§ 205.3 Coverage.

(a) *General.* This part applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account. Generally, this part applies to financial institutions. For purposes of §§ 205.3(b)(2) and (b)(3), 205.10(b), (d), and (e), 205.13, and 205.20, this part applies to any person.

* * * * *

■ 3. Section 205.4(a)(1) is revised to read as follows:

§ 205.4 General disclosure requirements; jointly offered services.

(a)(1) *Form of disclosures.* Disclosures required under this part shall be clear and readily understandable, in writing, and in a form the consumer may keep, except as otherwise provided in this part. The disclosures required 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.*). A financial institution may use commonly accepted or readily understandable abbreviations in complying with the disclosure requirements of this part.

* * * * *

■ 4. Section 205.12(b)(1) is revised to read as follows:

§ 205.12 Relation to other laws.

* * * * *

(b) *Preemption of inconsistent state laws.*—(1) *Inconsistent requirements.* The Board shall determine, upon its own motion or upon the request of a state, financial institution, or other interested party, whether the act and this part preempt state law relating to electronic fund transfers, or dormancy, inactivity, or service fees, or expiration dates in the case of gift certificates, store gift cards, or general-use prepaid cards.

* * * * *

■ 5. Section 205.20 is added as follows:

§ 205.20 Requirements for gift cards and gift certificates.

(a) *Definitions.* For purposes of this section, except as excluded under paragraph (b), the following definitions apply:

(1) *Gift certificate* means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that may not be increased or reloaded in exchange for payment; and

(ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

(2) *Store gift card* means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.

(3) *General-use prepaid card* means a card, code, or other device that is:

(i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(ii) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines.

(4) *Loyalty, award, or promotional gift card* means a card, code, or other device that:

(i) Is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program;

(ii) Is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines; and

(iii) Sets forth the following disclosures, as applicable:

(A) A statement indicating that the card, code, or other device is issued for loyalty, award, or promotional purposes, which must be included on the front of the card, code, or other device;

(B) The expiration date for the underlying funds, which must be included on the front of the card, code, or other device;

(C) The amount of any fees that may be imposed in connection with the card, code, or other device, and the conditions under which they may be imposed, which must be provided on or with the card, code, or other device; and

(D) A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain fee information, which must be included on the card, code, or other device.

(5) *Dormancy or inactivity fee.* The terms "dormancy fee" and "inactivity fee" mean a fee for non-use of or inactivity on a gift certificate, store gift card, or general-use prepaid card.

(6) *Service fee.* The term "service fee" means a periodic fee for holding or use of a gift certificate, store gift card, or general-use prepaid card. A periodic fee includes any fee that may be imposed on a gift certificate, store gift card, or general-use prepaid card from time to time for holding or using the certificate or card.

(7) *Activity.* The term "activity" means any action that results in an increase or decrease of the funds underlying a certificate or card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction.

(b) *Exclusions.* The terms "gift certificate," "store gift card," and "general-use prepaid card", as defined in paragraph (a) of this section, do not include any card, code, or other device that is:

(1) Useable solely for telephone services;

(2) Reloadable and not marketed or labeled as a gift card or gift certificate. For purposes of this paragraph (b)(2), the term "reloadable" includes a temporary non-reloadable card issued solely in connection with a reloadable card, code, or other device;

(3) A loyalty, award, or promotional gift card;

(4) Not marketed to the general public;

(5) Issued in paper form only; or

(6) Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events or venues, at the event or venue or at specific locations affiliated with and in geographic proximity to the event or venue.

(c) *Form of disclosures*—(1) *Clear and conspicuous.* Disclosures made under this section must be clear and conspicuous. The disclosures may contain commonly accepted or readily understandable abbreviations or symbols.

(2) *Format.* Disclosures made under this section generally must be provided to the consumer in written or electronic form. Written and electronic disclosures made under this section must be in a retainable form. Only disclosures provided under paragraph (c)(3) of this section may be given orally.

(3) *Disclosures prior to purchase.* Before a gift certificate, store gift card, or general-use prepaid card is purchased, a person that issues or sells such certificate or card must disclose to the consumer the information required by paragraphs (d)(2), (e)(3), and (f)(1) of this section. The fees and terms and conditions of expiration that are required to be disclosed prior to purchase may not be changed after purchase.

(4) *Disclosures on the certificate or card.* Disclosures required by paragraphs (a)(4)(iii), (d)(2), (e)(3), and (f)(2) of this section must be made on the certificate or card, or in the case of a loyalty, award, or promotional gift card, on the card, code, or other device. A disclosure made in an accompanying terms and conditions document, on packaging surrounding a certificate or card, or on a sticker or other label affixed to the certificate or card does not constitute a disclosure on the certificate or card. For an electronic certificate or card, disclosures must be provided electronically on the certificate or card provided to the consumer. An issuer that provides a code or confirmation to a consumer orally must provide to the consumer a written or electronic copy of the code or confirmation promptly, and the applicable disclosures must be provided on the written copy of the code or confirmation.

(d) *Prohibition on imposition of fees or charges.* No person may impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless:

(1) There has been no activity with respect to the certificate or card, in the one-year period ending on the date on which the fee is imposed;

(2) The following are stated, as applicable, clearly and conspicuously on the gift certificate, store gift card, or general-use prepaid card:

(i) The amount of any dormancy, inactivity, or service fee that may be charged;

(ii) How often such fee may be assessed; and

(iii) That such fee may be assessed for inactivity; and

(3) Not more than one dormancy, inactivity, or service fee is imposed in any given calendar month.

(e) *Prohibition on sale of gift certificates or cards with expiration dates.* No person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless:

(1) The person has established policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date;

(2) The expiration date for the underlying funds is at least the later of:

(i) Five years after the date the gift certificate was initially issued, or the date on which funds were last loaded to a store gift card or general-use prepaid card; or

(ii) The certificate or card expiration date, if any;

(3) The following disclosures are provided on the certificate or card, as applicable:

(i) The expiration date for the underlying funds or, if the underlying funds do not expire, that fact;

(ii) A toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires if the underlying funds may be available; and

(iii) Except where a non-reloadable certificate or card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, that:

(A) The certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and;

(B) The consumer may contact the issuer for a replacement card; and

(4) No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card or for providing the certificate or card holder with the remaining balance in some other manner prior to the funds expiration date, unless such certificate or card has been lost or stolen.

(f) *Additional disclosure requirements for gift certificates or cards.* The following disclosures must be provided in connection with a gift certificate, store gift card, or general-use prepaid card, as applicable:

(1) *Fee disclosures.* For each type of fee that may be imposed in connection with the certificate or card (other than a dormancy, inactivity, or service fee subject to the disclosure requirements under paragraph (d)(2) of this section), the following information must be provided on or with the certificate or card:

(i) The type of fee;

(ii) The amount of the fee (or an explanation of how the fee will be determined); and

(iii) The conditions under which the fee may be imposed.

(2) *Telephone number for fee information.* A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain information about fees described in paragraphs (d)(2) and (f)(1) of this section must be disclosed on the certificate or card.

(g) *Compliance dates.*—(1) *Effective date for gift certificates, store gift cards, and general-use prepaid cards.* The requirements of this section apply to any gift certificate, store gift card, or general-use prepaid card sold to a consumer on or after August 22, 2010, or provided to the consumer as a replacement for such certificate or card.

(2) *Effective date for loyalty, award, or promotional gift cards.* The requirements in paragraph (a)(4)(iii) apply to any card, code, or other device provided to a consumer in connection with a loyalty, award, or promotional program if the period of eligibility for such program began on or after August 22, 2010.

■ 6. In Supplement I to part 205,

■ a. Under Section 205.12 Relation to other laws, under *12(b) Preemption of inconsistent state laws,* paragraph 1. is revised.

■ b. Section 205.20—Requirements for Gift Cards and Gift Certificates is added.

Supplement I to Part 205—Official Staff Interpretations

* * * * *

Section 205.12—Relation to Other Laws

* * * * *

(b) Preemption of Inconsistent State Laws

1. *Specific determinations.* The regulation prescribes standards for determining whether state laws that govern EFTs, and state laws regarding gift certificates, store gift cards, or general-use prepaid cards that govern dormancy, inactivity, or service fees, or expiration dates, are preempted by the act and the regulation. A state law that is inconsistent may be preempted even if the Board has not issued a determination. However, nothing in § 205.12(b) provides a financial institution with immunity for violations of state law if the institution chooses not to make state disclosures and the Board later determines that the state law is not preempted.

* * * * *

Section 205.20—Requirements for Gift Cards and Gift Certificates

20(a) Definitions

1. *Form of card, code, or device.* Section 205.20 applies to any card, code, or other device that meets one of the definitions in § 205.20(a)(1) through (a)(3) (and is not otherwise excluded by § 205.20(b)), even if it is not issued in card form. Section 205.20 applies, for example, to an account number or bar code that can be used to access underlying funds. Similarly, § 205.20 applies to a device with a chip or other embedded mechanism that links the device to stored funds, such as a mobile phone or sticker containing a contactless chip that enables the consumer to access the stored funds. A card, code, or other device that meets the definition in § 205.20(a)(1) through (a)(3) includes an electronic promise (*see* comment 20(a)-2) as well as a promise that is not electronic. *See, however,* § 205.20(b)(5). In addition, § 205.20 applies if a merchant issues a code that entitles a consumer to redeem the code for goods or services, regardless of the medium in which the code is issued (*see, however,* § 205.20(b)(5)), and whether or not it may be redeemed electronically or in the merchant's store. Thus, for example, if a merchant e-mails a code that a consumer may redeem in a specified amount either on-line or in the merchant's store, that code is covered under § 205.20, unless one of the exclusions in § 205.20(b) apply.

2. *Electronic promise.* The term "electronic promise" as used in EFTA Sections 915(a)(2)(B), (a)(2)(C), and (a)(2)(D) means a person's commitment or obligation communicated or stored in electronic form made to a consumer to provide payment for goods or services for transactions initiated by the consumer. The electronic promise is itself represented by a card, code or other device that is issued or honored by the person, reflecting the person's commitment or obligation to pay. For example, if a merchant issues a code that can be given as a gift and that entitles the recipient to redeem the code in an on-line transaction for goods or services, that code represents an electronic promise by the merchant and is a card, code, or other device covered by § 205.20.

3. *Cards, codes, or other devices redeemable for specific goods or services.* Certain cards, codes, or other devices may be redeemable upon presentation for a specific good or service, or "experience," such as a spa treatment, hotel stay, or airline flight. In other cases, a card, code, or other device may entitle the consumer to a certain percentage off the purchase of a good or service, such as 20% off of any purchase in a store. Such cards, codes, or other devices generally are not subject to the requirements of this section because they are not issued to a consumer "in a specified amount" as required under the

definitions of "gift certificate," "store gift card," or "general-use prepaid card." However, if the card, code, or other device is issued in a specified or denominated amount that can be applied toward the purchase of a specific good or service, such as a certificate or card redeemable for a spa treatment up to $50, the card, code, or other device is subject to this section, unless one of the exceptions in § 205.20(b) apply. *See, e.g.,* § 205.20(b)(3). Similarly, if the card, code, or other device states a specific monetary value, such as "a $50 value," the card, code, or other device is subject to this section, unless an exclusion in § 205.20(b) applies.

4. *Issued primarily for personal, family, or household purposes.* Section 205.20 only applies to cards, codes, or other devices that are sold or issued to a consumer primarily for personal, family, or household purposes. A card, code, or other device initially purchased by a business is subject to this section if the card, code, or other device is purchased for redistribution or resale to consumers primarily for personal, family, or household purposes. Moreover, the fact that a card, code, or other device may be primarily funded by a business, for example, in the case of certain rewards or incentive cards, does not mean the card, code, or other device is outside the scope of § 205.20, if the card, code, or other device will be provided to a consumer primarily for personal, family, or household purposes. *But see* § 205.20(b)(3). Whether a card, code, or other device is issued to a consumer primarily for personal, family, or household purposes will depend on the facts and circumstances. For example, if a program manager purchases store gift cards directly from an issuing merchant and sells those cards through the program manager's retail outlets, such gift cards are subject to the requirements of § 205.20 because the store gift cards are sold to consumers primarily for personal, family, or household purposes. In contrast, a card, code, or other device generally would not be issued to consumers primarily for personal, family, or household purposes, and therefore would fall outside the scope of § 205.20, if the purchaser of the card, code, or device is contractually prohibited from reselling or redistributing the card, code, or device to consumers primarily for personal, family, or household purposes, and reasonable policies and procedures are maintained to avoid such sale or distribution for such purposes. However, if an entity that has purchased cards, codes, or other devices for business purposes sells or distributes such cards, codes, or other devices to consumers primarily for personal, family, or household purposes, that entity does not comply with § 205.20 if it has not otherwise met the substantive and disclosure requirements of the rule or unless an exclusion in § 205.20(b) applies.

5. *Examples of cards, codes, or other devices issued for business purposes.* Examples of cards, codes, or other devices that are issued and used for business purposes and therefore excluded from the definitions of "gift certificate," "store gift card," or "general-use prepaid card" include:

i. Cards, codes, or other devices to reimburse employees for travel or moving expenses.

ii. Cards, codes, or other devices for employees to use to purchase office supplies and other business-related items.

Paragraph 20(a)(2)—Store Gift Card

1. *Relationship between "gift certificate" and "store gift card".* The term "store gift card" in § 205.20(a)(2) includes "gift certificate" as defined in § 205.20(a)(1). For example, a numeric or alphanumeric code representing a specified dollar amount or value that is electronically sent to a consumer as a gift which can be redeemed or exchanged by the recipient to obtain goods or services may be both a "gift certificate" and a "store gift card" if the specified amount or value cannot be increased.

2. *Affiliated group of merchants.* The term "affiliated group of merchants" means two or more affiliated merchants or other persons that are related by common ownership or common corporate control (*see, e.g.,* 12 CFR 227.3(b) and 12 CFR 223.2) and that share the same name, mark, or logo. For example, the term includes franchisees that are subject to a common set of corporate policies or practices under the terms of their franchise licenses. The term also applies to two or more merchants or other persons that agree among themselves, by contract or otherwise, to redeem cards, codes, or other devices bearing the same name, mark, or logo (other than the mark, logo, or brand of a payment network), for the purchase of goods or services solely at such merchants or persons. For example, assume a movie theatre chain and a restaurant chain jointly agree to issue cards that share the same "Flix and Food" logo that can be redeemed solely towards the purchase of movie tickets or concessions at any of the participating movie theatres, or towards the purchase of food or beverages at any of the participating restaurants. For purposes of § 205.20, the movie theatre chain and the restaurant chain would be considered to be an affiliated group of merchants, and the cards are considered to be "store gift cards." However, merchants or other persons are not considered to be affiliated merely because they agree to accept a card that bears the mark, logo, or brand of a payment network.

3. *Mall gift cards.* See comment 20(a)(3)–2.

Paragraph 20(a)(3)—General-Use Prepaid Card

1. *Redeemable upon presentation at multiple, unaffiliated merchants.* A card, code, or other device is redeemable upon presentation at multiple, unaffiliated merchants if, for example, such merchants agree to honor the card, code, or device if it bears the mark, logo, or brand of a payment network, pursuant to the rules of the payment network.

2. *Mall gift cards.* Mall gift cards that are intended to be used or redeemed for goods or services at participating retailers within a shopping mall may be considered store gift cards or general-use prepaid cards depending on the merchants with which the cards may be redeemed. For example, if a mall card may only be redeemed at merchants within the mall itself, the card is more likely to be redeemable at an affiliated group of merchants and considered a store gift card. However, certain mall cards also carry the brand of a payment network and can be used at any retailer that accepts that card brand, including retailers located outside of the mall. Such cards are considered general-use prepaid cards.

Paragraph 20(a)(4)—Loyalty, Award, or Promotional Gift Card

1. *Examples of loyalty, award, or promotional programs.* Examples of loyalty, award or promotional programs under § 205.20(a)(4) include, but are not limited to:

i. Consumer retention programs operated or administered by a merchant or other person that provide to consumers cards or coupons redeemable for or towards goods or services or other monetary value as a reward for purchases made or for visits to the participating merchant;

ii. Sales promotions operated or administered by a merchant or product manufacturer that provide coupons or discounts redeemable for or towards goods or services or other monetary value.

iii. Rebate programs operated or administered by a merchant or product manufacturer that provide cards redeemable for or towards goods or services or other monetary value to consumers in connection with the consumer's purchase of a product or service and the consumer's completion of the rebate submission process.

iv. Sweepstakes or contests that distribute cards redeemable for or towards goods or services or other monetary value to consumers as an invitation to enter into the promotion for a chance to win a prize.

v. Referral programs that provide cards redeemable for or towards goods or services or other monetary value to consumers in exchange for referring other potential consumers to a merchant.

vi. Incentive programs through which an employer provides cards redeemable for or towards goods or services or other monetary value to employees, for example, to recognize job performance, such as increased sales, or to encourage employee wellness and safety.

vii. Charitable or community relations programs through which a company provides cards redeemable for or towards goods or services or other monetary value to a charity or community group for their fundraising purposes, for example, as a reward for a donation or as a prize in a charitable event.

2. *Issued for loyalty, award, or promotional purposes.* To indicate that a card, code, or other device is issued for loyalty, award, or promotional purposes as required by § 205.20(a)(4)(iii), it is sufficient for the card, code, or other device to state on the front, for example, "Reward" or "Promotional."

3. *Reference to toll-free number and Web site.* If a card, code, or other device issued in connection with a loyalty, award, or promotional program does not have any fees, the disclosure under § 205.20(a)(4)(iii)(D) is not required on the card, code, or other device.

Paragraph 20(a)(6)—Service Fee

1. *Service fees.* Under § 205.20(a)(6), a service fee includes a periodic fee for holding

or use of a gift certificate, store gift card, or general-use prepaid card. A periodic fee includes any fee that may be imposed on a gift certificate, store gift card, or general-use prepaid card from time to time for holding or using the certificate or card, such as a monthly maintenance fee, a transaction fee, an ATM fee, a reload fee, a foreign currency transaction fee, or a balance inquiry fee, whether or not the fee is waived for a certain period of time or is only imposed after a certain period of time. A service fee does not include a one-time fee or a fee that is unlikely to be imposed more than once while the underlying funds are still valid, such as an initial issuance fee, a cash-out fee, a supplemental card fee, or a lost or stolen certificate or card replacement fee.

Paragraph 20(a)(7)—Activity

1. *Activity.* Under § 205.20(a)(7), any action that results in an increase or decrease of the funds underlying a gift certificate, store gift card, or general-use prepaid card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a prior transaction, constitutes activity for purposes of § 205.20. For example, the purchase and activation of a certificate or card, the use of the certificate or card to purchase a good or service, or the reloading of funds onto a store gift card or general-use prepaid card constitutes activity. However, the imposition of a fee, the replacement of an expired, lost, or stolen certificate or card, and a balance inquiry do not constitute activity. In addition, if a consumer attempts to engage in a transaction with a gift certificate, store gift card, or general-use prepaid card, but the transaction cannot be completed due to technical or other reasons, such attempt does not constitute activity. Furthermore, if the funds underlying a gift certificate, store gift card, or general-use prepaid card are adjusted because there was an error or the consumer has returned a previously purchased good, the adjustment also does not constitute activity with respect to the certificate or card.

20(b) Exclusions

1. *Application of exclusion.* A card, code, or other device is excluded from the definition of "gift certificate," "store gift card," or "general-use prepaid card" if it meets any of the exclusions in § 205.20(b). An excluded card, code, or other device generally is not subject to any of the requirements of this section. (*See, however,* § 205.20(a)(4)(iii), requiring certain disclosures for loyalty, award, or promotional gift cards.)

2. *Eligibility for multiple exclusions.* A card, code, or other device may qualify for one or more exclusions. For example, a corporation may give its employees a gift card that is marketed solely to businesses for incentive-related purposes, such as to reward job performance or promote employee safety. In this case, the card may qualify for the exclusion for loyalty, award, or promotional gift cards under § 205.20(b)(3), or for the exclusion for cards, codes, or other devices not marketed to the general public under § 205.20(b)(4). In addition, as long as any one of the exclusions applies, a card, code, or other device is not covered by § 205.20, even if other exclusions do not apply. In the above example, the corporation may give its employees a type of gift card that can also be purchased by a consumer directly from a merchant. Under these circumstances, while the card does not qualify for the exclusion for cards, codes, or other devices not marketed to the general public under § 205.20(b)(4) because the card can also be obtained through retail channels, it is nevertheless exempt from the substantive requirements of § 205.20 because it is a loyalty, award, or promotional gift card. (*See, however,* § 205.20(a)(4)(iii), requiring certain disclosures for loyalty, award, or promotional gift cards.) Similarly, a person may market a reloadable card to teenagers for occasional expenses that enables parents to monitor spending. Although the card does not qualify for the exclusion for cards, codes, or other devices not marketed to the general public under § 205.20(b)(4), it may nevertheless be exempt from the requirements of § 205.20 under § 205.20(b)(2) if it is reloadable and not marketed or labeled as a gift card or gift certificate.

Paragraph 20(b)(1)—Usable Solely for Telephone Services

1. *Examples of excluded products.* The exclusion for products usable solely for telephone services applies to prepaid cards for long-distance telephone service, prepaid cards for wireless telephone service and prepaid cards for other services that function similar to telephone services, such as prepaid cards for voice over internet protocol (VoIP) access time.

Paragraph 20(b)(2)—Reloadable and Not Marketed or Labeled as a Gift Card or Gift Certificate

1. *Reloadable.* A card, code, or other device is "reloadable" if the terms and conditions of the agreement permit funds to be added to the card, code, or other device after the initial purchase or issuance. A card, code, or other device is not "reloadable" merely because the issuer or processor is technically able to add functionality that would otherwise enable the card, code, or other device to be reloaded.

2. *Marketed or labeled as a gift card or gift certificate.* The term "marketed or labeled as a gift card or gift certificate" means directly or indirectly offering, advertising or otherwise suggesting the potential use of a card, code or other device, as a gift for another person. Whether the exclusion applies generally does not depend on the type of entity that makes the promotional message. For example, a card may be marketed or labeled as a gift card or gift certificate if anyone (other than the purchaser of the card), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used, promotes the use of the card as a gift card or gift certificate. A card, code, or other device, including a general-purpose reloadable card, is marketed or labeled as a gift card or gift certificate even if it is only occasionally marketed as a gift card or gift certificate. For example, a network-branded general purpose reloadable card would be marketed or labeled as a gift card or gift certificate if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as "the perfect gift" during the holiday season. However, the mere mention of the availability of gift cards or gift certificates in an advertisement or on a sign that also indicates the availability of other excluded prepaid cards does not by itself cause the excluded prepaid cards to be marketed as a gift card or a gift certificate. For example, the posting of a sign in a store that refers to the availability of gift cards does not by itself constitute the marketing of otherwise excluded prepaid cards that may also be sold in the store as gift cards or gift certificates, provided that a consumer acting reasonably under the circumstances would not be led to believe that the sign applies to all prepaid cards sold in the store. (*See, however,* comment 20(b)(2)–4.ii.)

3. *Examples of marketed or labeled as a gift card or gift certificate.*

i. Examples of marketed or labeled as a gift card or gift certificate include:

A. Using the word "gift" or "present" on a card, certificate, or accompanying material, including documentation, packaging and promotional displays;

B. Representing or suggesting that a certificate or card can be given to another person, for example, as a "token of appreciation" or a "stocking stuffer," or displaying a congratulatory message on the card, certificate or accompanying material;

C. Incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or congratulatory message, on a card, certificate, accompanying documentation, or promotional material;

ii. The term does not include:

A. Representing that a card or certificate can be used as a substitute for a checking, savings, or deposit account;

B. Representing that a card or certificate can be used to pay for a consumer's health-related expenses—for example, a card tied to a health savings account;

C. Representing that a card or certificate can be used as a substitute for travelers checks or cash;

D. Representing that a card or certificate can be used as a budgetary tool, for example, by teenagers, or to cover emergency expenses.

4. *Reasonable policies and procedures to avoid marketing as a gift card.* The exclusion for a card, code, or other device that is reloadable and not marketed or labeled as a gift card or gift certificate in § 205.20(b)(2) applies if a reloadable card, code, or other device is not marketed or labeled as a gift card or gift certificate and if persons subject to the rule, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures may include contractual provisions prohibiting a reloadable card, code, or other device from being marketed or labeled as a gift card or gift certificate, merchandising guidelines or plans regarding how the product must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the card, code or other device is not being marketed as a gift card. Whether a reloadable card, code, or other device has been marketed as a gift card or gift

certificate will depend on the facts and circumstances, including whether a reasonable consumer would be led to believe that the card, code, or other device is a gift card or gift certificate. The following examples illustrate the application of § 205.20(b)(2):

i. An issuer or program manager of prepaid cards agrees to sell general-purpose reloadable cards through a retailer. The contract between the issuer or program manager and the retailer establishes the terms and conditions under which the cards may be sold and marketed at the retailer. The terms and conditions prohibit the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and require policies and procedures to regularly monitor or otherwise verify that the cards are not being marketed as such. The issuer or program manager sets up one promotional display at the retailer for gift cards and another physically separated display for excluded products under § 205.20(b), including general-purpose reloadable cards and wireless telephone cards, such that a reasonable consumer would not believe that the excluded cards are gift cards. The exclusion in § 205.20(b)(2) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

ii. Same facts as in i., except that the issuer or program manager sets up a single promotional display at the retailer on which a variety of prepaid cards are sold, including store gift cards and general-purpose reloadable cards. A sign stating "Gift Cards" appears prominently at the top of the display. The exclusion in § 205.20(b)(2) does not apply with respect to the general-purpose reloadable cards because policies and procedures reasonably designed to avoid the marketing of excluded cards as gift cards or gift certificates are not maintained.

iii. Same facts as in i., except that the issuer or program manager sets up a single promotional multi-sided display at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards are sold. Gift cards are segregated from excluded cards, with gift cards on one side of the display and excluded cards on a different side of a display. Signs of equal prominence at the top of each side of the display clearly differentiate between gift cards and the other types of prepaid cards that are available for sale. The retailer does not use any more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating "Gift Cards" at the top of the display or located near the display. The exclusion in § 205.20(b)(2) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

iv. Same facts as in i., except that the retailer sells a variety of prepaid card products, including store gift cards and general-purpose reloadable cards, arranged side-by-side in the same checkout lane. The retailer does not affirmatively indicate or represent that gift cards are available, such as by displaying any signage or other indicia at the checkout lane suggesting the general availability of gift cards. The exclusion in § 205.20(b)(2) applies because policies and procedures reasonably designed to avoid marketing the general-purpose reloadable cards as gift cards or gift certificates are maintained.

5. *On-line sales of prepaid cards.* Some Web sites may prominently advertise or promote the availability of gift cards or gift certificates in a manner that suggests to a consumer that the Web site exclusively sells gift cards or gift certificates. For example, a Web site may display a banner advertisement or a graphic on the home page that prominently states "Gift Cards," "Gift Giving," or similar language without mention of other available products, or use a Web address that includes only a reference to gift cards or gift certificates in the address. In such a case, a consumer acting reasonably under the circumstances could be led to believe that all prepaid products sold on the Web site are gift cards or gift certificates. Under these facts, the Web site has marketed all such products, including general-purpose reloadable cards, as gift cards or gift certificates, and the exclusion in § 205.20(b)(2) does not apply.

6. *Temporary non-reloadable cards issued in connection with a general-purpose reloadable card.* Certain general-purpose reloadable cards that are typically marketed as an account substitute initially may be sold or issued in the form of a temporary non-reloadable card. After the card is purchased, the cardholder is typically required to call the issuer to register the card and to provide identifying information in order to obtain a reloadable replacement card. In most cases, the temporary non-reloadable card can be used for purchases until the replacement reloadable card arrives and is activated by the cardholder. Because the temporary non-reloadable card may only be obtained in connection with the general-purpose reloadable card, the exclusion in § 205.20(b)(2) applies so long as the card is not marketed as a gift card or gift certificate.

Paragraph 20(b)(4)—Not Marketed to the General Public

1. *Marketed to the general public.* A card, code, or other device is marketed to the general public if the potential use of the card, code, or other device is directly or indirectly offered, advertised, or otherwise promoted to the general public. A card, code, or other device may be marketed to the general public through any advertising medium, including television, radio, newspaper, the Internet, or signage. However, the posting of a company policy that funds may be disbursed by prepaid card (such as a sign posted at a cash register or customer service center stating that store credit will be issued by prepaid card) does not constitute the marketing of a card, code, or other device to the general public. In addition, the method of distribution by itself is not dispositive in determining whether a card, code, or other device is marketed to the general public. Factors that may be considered in determining whether the exclusion applies to a particular card, code, or other device include the means or channel through which the card, code, or device may be obtained by a consumer, the subset of consumers that are eligible to obtain the card, code, or device, and whether the availability of the card, code, or device is advertised or otherwise promoted in the marketplace.

2. *Examples.* The following examples illustrate the application of the exclusion in § 205.20(b)(4):

i. A merchant sells its gift cards at a discount to a business which may give them to employees or loyal consumers as incentives or rewards. In determining whether the gift card falls within the exclusion in § 205.20(b)(4), the merchant must consider whether the card is of a type that is advertised or made available to consumers generally or can be obtained elsewhere. If the card can also be purchased through retail channels, the exclusion in § 205.20(b)(4) does not apply, even if the consumer obtained the card from the business as an incentive or reward. *See, however,* § 205.20(b)(3).

ii. A national retail chain decides to market its gift cards only to members of its frequent buyer program. Similarly, a bank may decide to sell gift cards only to its customers. If a member of the general public may become a member of the program or a customer of the bank, the card does not fall within the exclusion in § 205.20(b)(4) because the general public has the ability to obtain the cards. *See, however,* § 205.20(b)(3).

iii. A card issuer advertises a reloadable card to teenagers and their parents promoting the card for use by teenagers for occasional expenses, schoolbooks and emergencies and by parents to monitor spending. Because the card is marketed to and may be sold to any member of the general public, the exclusion in § 205.20(b)(4) does not apply. *See, however,* § 205.20(b)(2).

iv. An insurance company settles a policyholder's claim and distributes the insurance proceeds to the consumer by means of a prepaid card. Because the prepaid card is simply the means for providing the insurance proceeds to the consumer and the availability of the card is not advertised to the general public, the exclusion in § 205.20(b)(4) applies.

v. A merchant provides store credit to a consumer following a merchandise return by issuing a prepaid card that clearly indicates that the card contains funds for store credit. Because the prepaid card is issued for the stated purpose of providing store credit to the consumer and the ability to receive refunds by a prepaid card is not advertised to the general public, the exclusion in § 205.20(b)(4) applies.

vi. A tax preparation company elects to distribute tax refunds to its clients by issuing prepaid cards, but does not advertise or otherwise promote the ability to receive proceeds in this manner. Because the prepaid card is simply the mechanism for providing the tax refund to the consumer, and the tax preparer does not advertise the ability to obtain tax refunds by a prepaid card, the exclusion in § 205.20(b)(4) applies. However,

if the tax preparer promotes the ability to receive tax refund proceeds through a prepaid card as a way to obtain "faster" access to the proceeds, the exclusion in § 205.20(b)(4) does not apply.

Paragraph 20(b)(5)—Issued in Paper Form Only

1. *Exclusion explained.* To qualify for the exclusion in § 205.20(b)(5), the sole means of issuing the card, code, or other device must be in a paper form. Thus, the exclusion generally applies to certificates issued in paper form where solely the paper itself may be used to purchase goods or services. A card, code or other device is not issued solely in paper form simply because it may be reproduced or printed on paper. For example, a bar code, card or certificate number, or certificate or coupon electronically provided to a consumer and redeemable for goods and services is not issued in paper form, even if it may be reproduced or otherwise printed on paper by the consumer. In this circumstance, although the consumer might hold a paper facsimile of the card, code, or other device, the exclusion does not apply because the information necessary to redeem the value was initially issued in electronic form. A paper certificate is within the exclusion regardless of whether it may be redeemed electronically. For example, a paper certificate or receipt that bears a bar code, code, or account number falls within the exclusion in § 205.20(b)(5) if the bar code, code, or account number is not issued in any form other than on the paper. In addition, the exclusion in § 205.20(b)(5) continues to apply in circumstances where an issuer replaces a gift certificate that was initially issued in paper form with a card or electronic code (for example, to replace a lost paper certificate).

2. *Examples.* The following examples illustrate the application of the exclusion in § 205.20(b)(5):

i. A merchant issues a paper gift certificate that entitles the bearer to a specified dollar amount that can be applied towards a future meal. The merchant fills in the certificate with the name of the certificate holder and the amount of the certificate. The certificate falls within the exclusion in § 205.20(b)(5) because it is issued in paper form only.

ii. A merchant allows a consumer to prepay for a good or service, such as a car wash or time at a parking meter, and issues a paper receipt bearing a numerical or bar code that the consumer may redeem to obtain the good or service. The exclusion in § 205.20(b)(5) applies because the code is issued in paper form only.

iii. A merchant issues a paper certificate or receipt bearing a bar code or certificate number that can later be scanned or entered into the merchant's system and redeemed by the certificate or receipt holder towards the purchase of goods or services. The bar code or certificate number is not issued by the merchant in any form other than paper. The exclusion in § 205.20(b)(5) applies because the bar code or certificate number is issued in paper form only.

iv. An on-line merchant electronically provides a bar code, card or certificate number, or certificate or coupon to a consumer that the consumer may print on a home printer and later redeem towards the purchase of goods or services. The exclusion in § 205.20(b)(5) does not apply because the bar code or card or certificate number was issued to the consumer in electronic form, even though it can be reproduced or otherwise printed on paper by the consumer.

Paragraph 20(b)(6)—Redeemable Solely for Admission to Events or Venues

1. *Exclusion explained.* The exclusion for cards, codes, or other devices that are redeemable solely for admission to events or venues at a particular location or group of affiliated locations generally applies to cards, codes, or other devices that are not redeemed for a specified monetary value, but rather solely for admission or entry to an event or venue. The exclusion also covers a card, code, or other device that is usable to purchase goods or services in addition to entry into the event or the venue, either at the event or venue or at an affiliated location or location in geographic proximity to the event or venue.

2. *Examples.* The following examples illustrate the application of the exclusion in § 205.20(b)(6):

i. A consumer purchases a prepaid card that entitles the holder to a ticket for entry to an amusement park. The prepaid card may only be used for entry to the park. The card qualifies for the exclusion in § 205.20(b)(6) because it is redeemable for admission or entry and for goods or services in conjunction with that admission. In addition, if the prepaid card does not have a monetary value, and therefore is not "issued in a specified amount," the card does not meet the definitions of "gift certificate," "store gift card," or "general-use prepaid card" in § 205.20(a). *See* comment 20(a)–3.

ii. Same facts as in i., except that the gift card also entitles the holder of the gift card to a dollar amount that can be applied towards the purchase of food and beverages or goods or services at the park or at nearby affiliated locations. The card qualifies for the exclusion in § 205.20(b)(6) because it is redeemable for admission or entry and for goods or services in conjunction with that admission.

iii. A consumer purchases a $25 gift card that the holder of the gift card can use to make purchases at a merchant, or, alternatively, can apply towards the cost of admission to the merchant's affiliated amusement park. The card is not eligible for the exclusion in § 205.20(b)(6) because it is not redeemable solely for the admission or ticket itself (or for goods and services purchased in conjunction with such admission). The card meets the definition of "store gift card" and is therefore subject to § 205.20, unless a different exclusion applies.

20(c) Form of Disclosures

Paragraph 20(c)(1)—Clear and Conspicuous

1. *Clear and conspicuous standard.* All disclosures required by this section must be clear and conspicuous. Disclosures are clear and conspicuous for purposes of this section if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to consumers. Disclosures need not be located on the front of the certificate or card, except where otherwise required, to be considered clear and conspicuous. Disclosures are clear and conspicuous for the purposes of this section if they are in a print that contrasts with and is otherwise not obstructed by the background on which they are printed. For example, disclosures on a card or computer screen are not likely to be conspicuous if obscured by a logo printed in the background. Similarly, disclosures on the back of a card that are printed on top of indentations from embossed type on the front of the card are not likely to be conspicuous if the indentations obstruct the readability of the disclosures. To the extent permitted, oral disclosures meet the standard when they are given at a volume and speed sufficient for a consumer to hear and comprehend them.

2. *Abbreviations and symbols.* Disclosures may contain commonly accepted or readily understandable abbreviations or symbols, such as "mo." for month or a "/" to indicate "per." Under the clear and conspicuous standard, it is sufficient to state, for example, that a particular fee is charged "$2.50/mo. after 12 mos."

Paragraph 20(c)(2)—Format

1. *Electronic disclosures.* Disclosures provided electronically pursuant to this section are not 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 USC 7001 et seq.). Electronic disclosures must be in a retainable form. For example, a person may satisfy the requirement if it provides an online disclosure in a format that is capable of being printed. Electronic disclosures may not be provided through a hyperlink or in another manner by which the purchaser can bypass the disclosure. A person is not required to confirm that the consumer has read the electronic disclosures.

Paragraph 20(c)(3)—Disclosure Prior to Purchase

1. *Method of purchase.* The disclosures required by this paragraph must be provided before a certificate or card is purchased regardless of whether the certificate or card is purchased in person, online, by telephone, or by other means.

2. *Electronic disclosures.* Section 205.20(c)(3) provides that the disclosures required by this section must be provided to the consumer prior to purchase. For certificates or cards purchased electronically, disclosures made to the consumer after a consumer has initiated an online purchase of a certificate or card, but prior to completing the purchase of the certificate or card, would satisfy the prior-to-purchase requirement. However, electronic disclosures made available on a person's Web site that may or may not be accessed by the consumer are not provided to the consumer and therefore would not satisfy the prior-to-purchase requirement.

3. *Non-physical certificates and cards.* If no physical certificate or card is issued, the disclosures must be provided to the consumer before the certificate or card is purchased. For example, where a gift certificate or card is a code that is provided

by telephone, the required disclosures may be provided orally prior to purchase. *See also* § 205.20(c)(2).

Paragraph 20(c)(4)—Disclosures on the Certificate or Card

1. *Non-physical certificates and cards.* If no physical certificate or card is issued, the disclosures required by this paragraph must be disclosed on the code, confirmation, or other written or electronic document provided to the consumer. For example, where a gift certificate or card is a code or confirmation that is provided to a consumer on-line or sent to a consumer's e-mail address, the required disclosures may be provided electronically on the same document as the code or confirmation.

2. *No disclosures on a certificate or card.* Disclosures required by § 205.20(c)(4) need not be made on a certificate or card if it is accompanied by a certificate or card that complies with this section. For example, a person may issue or sell a supplemental gift card that is smaller than a standard size and that does not bear the applicable disclosures if it is accompanied by a fully compliant certificate or card. *See also* comment 20(c)(2)–2.

20(d) Prohibition on Imposition of Fees or Charges

1. *One-year period.* Section 205.20(d) provides that a person may impose a dormancy, inactivity, or service fee only if there has been no activity with respect to a certificate or card for one year. The following examples illustrate this rule:

i. A certificate or card is purchased on January 15 of year one. If there has been no activity on the certificate or card since the certificate or card was purchased, a dormancy, inactivity, or service fee may be imposed on the certificate or card on January 15 of year two.

ii. Same facts as i., and a fee was imposed on January 15 of year two. Because no more than one dormancy, inactivity, or service fee may be imposed in any given calendar month, the earliest date that another dormancy, inactivity, or service fee may be imposed, assuming there continues to be no activity on the certificate or card, is February 1 of year two. A dormancy, inactivity, or service fee is permitted to be imposed on February 1 of year two because there has been no activity on the certificate or card for the preceding year (February 1 of year one through January 31 of year two), and February is a new calendar month. The imposition of a fee on January 15 of year two is not activity for purposes of § 205.20(d). *See* comment 20(a)(7)–1.

iii. Same facts as i., and a fee was imposed on January 15 of year two. On January 31 of year two, the consumer uses the card to make a purchase. Another dormancy, inactivity, or service fee could not be imposed until January 31 of year three, assuming there has been no activity on the certificate or card since January 31 of year two.

2. *Relationship between §§ 205.20(d)(2) and (c)(3).* Sections 205.20(d)(2) and (c)(3) contain similar, but not identical, disclosure requirements. Section 205.20(d)(2) requires the disclosure of dormancy, inactivity, and service fees on a certificate or card. Section 205.20(c)(3) requires that vendor person that issues or sells such certificate or card disclose to a consumer any dormancy, inactivity, and service fees associated with the certificate or card before such certificate or card may be purchased. Depending on the context, a single disclosure that meets the clear and conspicuous requirements of both §§ 205.20(d)(2) and (c)(3) may be used to disclose a dormancy, inactivity, or service fee. For example, if the disclosures on a certificate or card, required by § 205.20(d)(2), are visible to the consumer without having to remove packaging or other materials sold with the certificate or card, for a purchase made in person, the disclosures also meet the requirements of § 205.20(c)(3). Otherwise, a dormancy, inactivity, or service fee may need to be disclosed multiple times to satisfy the requirements of §§ 205.20(d)(2) and (c)(3). For example, if the disclosures on a certificate or card, required by § 205.20(d)(2), are obstructed by packaging sold with the certificate or card, for a purchase made in person, they also must be disclosed on the packaging sold with the certificate or card to meet the requirements of § 205.20(c)(3).

3. *Relationship between §§ 205.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required under § 205.20(d)(2), any applicable disclosures under §§ 205.20(e)(3) and (f)(2) of this section must also be provided on the certificate or card.

4. *One fee per month.* Under § 205.20(d)(3), no more than one dormancy, inactivity, or service fee may be imposed in any given calendar month. For example, if a dormancy fee is imposed on January 1, following a year of inactivity, and a consumer makes a balance inquiry on January 15, a balance inquiry fee may not be imposed at that time because a dormancy fee was already imposed earlier that month and a balance inquiry fee is a type of service fee. If, however, the dormancy fee could be imposed on January 1, following a year of inactivity, and the consumer makes a balance inquiry on the same date, the person assessing the fees may choose whether to impose the dormancy fee or the balance inquiry fee on January 1. The restriction in § 205.20(d)(3) does not apply to any fee that is not a dormancy, inactivity, or service fee. For example, assume a service fee is imposed on a general-use prepaid card on January 1, following a year of inactivity. If a consumer cashes out the remaining funds by check on January 15, a cash-out fee, to the extent such cash-out fee is permitted under § 205.20(e)(4), may be imposed at that time because a cash-out fee is not a dormancy, inactivity, or service fee.

5. *Accumulation of fees.* Section 205.20(d) prohibits the accumulation of dormancy, inactivity, or service fees for previous periods into a single fee because such a practice would circumvent the limitation in § 205.20(d)(3) that only one fee may be charged per month. For example, if a consumer purchases and activates a store gift card on January 1 but never uses the card, a monthly maintenance fee of $2.00 a month may not be accumulated such that a fee of $24 is imposed on January 1 the following year.

20(e) Prohibition on Sale of Gift Certificates or Cards With Expiration Dates

1. *Reasonable opportunity.* Under § 205.20(e)(1), no person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless there are policies and procedures in place to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. Consumers are deemed to have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date if:

i. There are policies and procedures established to prevent the sale of a certificate or card unless the certificate or card expiration date is at least five years after the date the certificate or card was sold or initially issued to a consumer; or

ii. A certificate or card is available to consumers to purchase five years and six months before the certificate or card expiration date.

2. *Applicability to replacement certificates or cards.* Section 205.20(e)(1) applies solely to the *purchase* of a certificate or card. Therefore, § 205.20(e)(1) does not apply to the replacement of such certificates or cards. Certificates or cards issued as a replacement may bear a certificate or card expiration date of less than five years from the date of issuance of the replacement certificate or card. If the certificate or card expiration date for a replacement certificate or card is later than the date set forth in § 205.20(e)(2)(i), then pursuant to § 205.20(e)(2), the expiration date for the underlying funds at the time the replacement certificate or card is issued must be no earlier than the expiration date for the replacement certificate or card. For purposes of § 205.20(e)(2), funds are not considered to be loaded to a store gift card or general-use prepaid card solely because a replacement card has been issued or activated for use.

3. *Disclosure of funds expiration—date not required.* Section 205.20(e)(3)(i) does not require disclosure of the precise date the funds will expire. It is sufficient to disclose, for example, "Funds expire 5 years from the date funds last loaded to the card."; "Funds can be used 5 years from the date money was last added to the card."; or "Funds do not expire."

4. *Disclosure not required if no expiration date.* If the certificate or card and underlying funds do not expire, the disclosure required by § 205.20(e)(3)(i) need not be stated on the certificate or card. If the certificate or card and underlying funds expire at the same time, only one expiration date need be disclosed on the certificate or card.

5. *Reference to toll-free telephone number and Web site.* If a certificate or card does not expire, or if the underlying funds are not available after the certificate or card expires, the disclosure required by § 205.20(e)(3)(ii) need not be stated on the certificate or card. *See, however,* § 205.20(f)(2).

6. *Relationship to § 226.20(f)(2).* The same toll-free telephone number and Web site may be used to comply with §§ 226.20(e)(3)(ii) and (f)(2). Neither a toll-free number nor a Web site must be maintained or disclosed if

no fees are imposed in connection with a certificate or card, and the certificate or card and the underlying funds do not expire.

7. *Distinguishing between certificate or card expiration and funds expiration.* If applicable, a disclosure must be made on the certificate or card that notifies a consumer that the certificate or card expires, but the funds either do not expire or expire later than the certificate or card, and that the consumer may contact the issuer for a replacement card. The disclosure must be made with equal prominence and in close proximity to the certificate or card expiration date. The close proximity requirement does not apply to oral disclosures. In the case of a certificate or card, close proximity means that the disclosure must be on the same side as the certificate or card expiration date. For example, if the disclosure is the same type size and is located immediately next to or directly above or below the certificate or card expiration date, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. The disclosure need not be embossed on the certificate or card to be deemed equally prominent, even if the expiration date is embossed on the certificate or card. The disclosure may state on the front of the card, for example, "Funds expire after card. Call for replacement card." or "Funds do not expire. Call for new card after 09/2016." Disclosures made pursuant to § 205.20(e)(3)(iii)(A) may also fulfill the requirements of § 205.20(e)(3)(i). For example, making a disclosure that "Funds do not expire" to comply with § 205.20(e)(3)(iii)(A) also fulfills the requirements of § 205.20(e)(3)(i).

8. *Expiration date safe harbor.* A non-reloadable certificate or card that bears an expiration date that is at least seven years from the date of manufacture need not state the disclosure required by § 205.20(e)(3)(iii). However, § 205.20(e)(1) still prohibits the sale or issuance of such certificate or card unless there are policies and procedures in place to provide a consumer with a reasonable opportunity to purchase the certificate or card with at least five years remaining until the certificate or card expiration date. In addition, under § 205.20(e)(2), the funds may not expire before the certificate or card expiration date, even if the expiration date of the certificate or card bears an expiration date that is more than five years at the date of purchase. For purposes of this safe harbor, the date of manufacture is the date on which the certificate or card expiration date is printed on the certificate or card.

9. *Relationship between §§ 205.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required to be made under § 205.20(e)(3), any applicable disclosures under §§ 205.20(d)(2) and (f)(2) must also be provided on the certificate or card.

10. *Replacement or remaining balance of an expired certificate or card.* When a certificate or card expires, but the underlying funds have not expired, an issuer, at its option in accordance with applicable state law, may provide either a replacement certificate or card or otherwise provide the certificate or card holder, for example, by check, with the remaining balance on the certificate or card. In either case, the issuer may not charge a fee for the service.

11. *Replacement of a lost or stolen certificate or card not required.* Section 205.20(e)(4) does not require the replacement of a certificate or card that has been lost or stolen.

12. *Date of issuance or loading.* For purposes of § 205.20(e)(2)(i), a certificate or card is not issued or loaded with funds until the certificate or card is activated for use.

13. *Application of expiration date provisions after redemption of certificate or card.* The requirement that funds underlying a certificate or card must not expire for at least five years from the date of issuance or date of last load ceases to apply once the certificate or card has been fully redeemed, even if the underlying funds are not used to contemporaneously purchase a specific good or service. For example, some certificates or cards can be used to purchase music, media, or virtual goods. Once redeemed by a consumer, the entire balance on the certificate or card is debited from the certificate or card and credited or transferred to another "account" established by the merchant of such goods or services. The consumer can then make purchases of songs, media, or virtual goods from the merchant using that "account" either at the time the value is transferred from the certificate or card or at a later time. Under these circumstances, once the card has been fully redeemed and the "account" credited with the amount of the underlying funds, the five-year minimum expiration term no longer applies to the underlying funds. However, if the consumer only partially redeems the value of the certificate or card, the five-year minimum expiration term requirement continues to apply to the funds remaining on the certificate or card.

20(f) Additional Disclosure Requirements for Gift Certificates or Cards

1. *Reference to toll-free telephone number and Web site.* If a certificate or card does not have any fees, the disclosure under § 205.20(f)(2) is not required on the certificate or card. *See, however,* § 205.20(e)(3)(ii).

2. *Relationship to § 226.20(e)(3)(ii).* The same toll-free telephone number and Web site may be used to comply with §§ 226.20(e)(3)(ii) and (f)(2). Neither a toll-free number nor a Web site must be maintained or disclosed if no fees are imposed in connection with a certificate or card, and both the certificate or card and underlying funds do not expire.

3. *Relationship between §§ 205.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required pursuant to § 205.20(f)(2), any applicable disclosures under §§ 205.20(d)(2) and (e)(3) must also be provided on the certificate or card.

20(g) Compliance Dates

1. *Period of eligibility for loyalty, award, or promotional programs.* For purposes of § 205.20(g)(2), the period of eligibility is the time period during which a consumer must engage in a certain action or actions to meet the terms of eligibility for a loyalty, award, or promotional program and obtain the card, code, or other device. Under § 205.20(g)(2), a gift card issued pursuant to a loyalty, award, or promotional program that began prior to August 22, 2010 need not state the disclosures in § 205.20(a)(4)(iii) regardless of whether the consumer became eligible to receive the gift card prior to August 22, 2010, or after that date. For example, a product manufacturer may provide a $20 rebate card to a consumer if the consumer purchases a particular product and submits a fully completed entry between January 1, 2010 and December 31, 2010. Similarly, a merchant may provide a $20 gift card to a consumer if the consumer makes $200 worth of qualifying purchases between June 1, 2010 and October 30, 2010. Under both examples, gift cards provided pursuant to these loyalty, award, or promotional programs need not state the disclosures in § 205.20(a)(4)(iii) to qualify for the exclusion in § 205.20(b)(3) for loyalty, award, or promotional gift cards because the period of eligibility for each program began prior to August 22, 2010.

By order of the Board of Governors of the Federal Reserve System, March 23, 2010.

Jennifer J. Johnson,

Secretary of the Board.

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