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Part III

Federal Reserve System

**12 CFR Part 205
Electronic Fund Transfers; Proposed 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:** Proposed rule; request for public comment.

SUMMARY: The Board is proposing to amend 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 proposal restricts a person's ability to impose dormancy, inactivity, or service fees for certain prepaid products, primarily gift cards. In addition, the proposal generally prohibits the sale or issuance of such products if they have an expiration date of less than five years. The proposed amendments implement statutory requirements set forth in the Credit Card Accountability Responsibility and Disclosure Act of 2009 that are effective on August 22, 2010.

DATES: Comments must be received on or before December 21, 2009.**ADDRESSES:** You may submit comments, identified by Docket No. R-1377, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- *Fax:* (202) 452-3819 or (202) 452-3102.

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

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Ky Tran-Trong, Counsel, Vivian Wong, Senior Attorney, or Mandie Aubrey or Dana Miller, Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

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 915 and 916 of the EFTA for financial institutions and other persons subject to the Act who act in conformity with the Board's commentary interpretations. 15 U.S.C. 1693m(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 Board must prescribe rules implementing EFTA Section 915 within nine months after enactment of the Credit Card Act. 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 point-of-sale 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 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

² *See* Comdata, 2007 Adult Gift Card Study (available at: http://storedvalue.com/assets/pdf/study/2007/study_adult_gift_card_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); "Loyalty is Closed-Loop Gift Card's 'Second Wind,'" *The Green Sheet*, at 53 (May 29, 2009) (citing an Aite Group estimate of 904 million closed-loop gift cards sold in 2007).

¹ Public Law 111-24, 123 Stat. 1734 (2009).

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 may not be reloaded with additional value after card issuance. With closed-loop gift cards, 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. Merchants may also derive revenue from the imposition of certain fees, such as from monthly maintenance or transaction-based fees or from interest earned from unused card balances.

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, open-loop gift card transactions are processed over the debit or credit card networks. Fourth, open-loop gift cards may carry additional, and in some cases higher, fees than closed-loop gift cards as a result of higher compliance and customer service costs. Fifth, 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, and used either for the purchaser's own purposes or given to 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 loyalty or frequent buyer program. Merchants and product manufacturers may also issue gift cards to consumers to provide a rebate for the consumer's purchase of a particular product instead of sending 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.⁴ 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 form, many State laws do not apply to open-loop bank-issued cards.⁵

III. Summary of Proposal

Restrictions on Dormancy, Inactivity, or Service Fees

Under the proposed 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 issuer or vendor must provide these disclosures to the purchaser before the certificate or card is purchased.

Expiration Date Restrictions

The proposed rule would also provide 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.

Two proposed alternative approaches are set forth to minimize potential confusion for consumers if the expiration date on a certificate or card and the expiration date for the underlying funds differ. The first alternative would prohibit 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 require policies or procedures 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.

The proposed rule would also require 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. In addition, the proposed rule would prohibit 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.

Additional Disclosure Requirements Regarding Fees

In addition to the statutory restrictions for dormancy, inactivity, or service fees, the proposed rule would require the disclosure of all other fees imposed in connection with a gift

⁴ 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>).

⁵ See, e.g., Ark. Code § 4-88-704; Cal. Civil Code § 1749.45; Fla. Stat. § 501.95; and Md. Commercial Code Ann. § 14-1320.

certificate, store gift card, or general-use prepaid card. These disclosures would have to be provided on or with the certificate or card and disclosed prior to purchase. The proposed rule would also require 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 use to obtain fee information or replacement certificates or cards.

Exclusions

Consistent with the statute, the proposed rule excludes certain card 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, would not be subject to the substantive restrictions on imposing dormancy, inactivity, or service fees, or on expiration dates. However, under the proposal, disclosures of all fees, including any dormancy, inactivity, or service fees, and any expiration date that may apply, would be required for certificates or cards issued through a loyalty, award, or promotional program.

IV. Legal Authority

Section 401 of the Credit Card Act creates a new Section 915 of the EFTA and prohibits any person from charging dormancy, inactivity, or service fees with respect to a gift certificate, store gift card, or general-use prepaid card, as those terms are defined in the Act, 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 U.S.C. 1693m(b). 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).

Section 401(d)(1) of the Credit Card Act requires the Board to prescribe rules to carry out the new requirements. This section also 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). 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.

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 the Board deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance.

V. Section-by-Section Analysis

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. To clarify that this standard is one of general application, the Board is proposing to revise § 205.4(a)(1) to provide that for certain disclosures required by the regulation, different disclosure standards may apply when specified in the rule.

For example, as further discussed below, the disclosures for certain prepaid cards set forth in this proposal are subject to a “clear and conspicuous” standard, consistent with new Section

915 of the EFTA, rather than the “clear and readily understandable” standard that generally applies under Regulation E. *See* proposed § 205.20, discussed below. Similarly, under § 205.11(c), notices provided by financial institutions to satisfy the error investigation requirements may be provided orally or in writing. *See* comment 11(c)–1.

Section 205.12 Relation to Other Laws

Section 920 of the EFTA (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. 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 Section 920 of the EFTA 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 is proposing to amend § 205.12(b) of Regulation E and comment 12(b)–1 to conform with the amendments to Section 920 of the EFTA made by the Credit Card Act.

Section 205.20 Requirements for Gift Cards and Gift Certificates

20(a) Definitions

New 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, Section 915 applies to gift certificates, store gift cards, and general-use prepaid cards as those terms are defined in the statute. In addition, new EFTA Section 915(a)(1) defines a dormancy fee, inactivity charge or fee, and new EFTA Section 915(a)(3) defines a service fee. *See* 15 U.S.C. 1693m(a). Proposed § 205.20(a) defines the following terms: gift certificate; store gift card; general-use prepaid card; loyalty, award, or promotional gift card; dormancy fee, inactivity charge or fee; and service fee.

The proposed definitions of gift certificate, store gift card, and general-use prepaid card generally track the definitions set forth in the statute. However, the Board is proposing certain adjustments to the statutory definitions pursuant to its authority under EFTA Section 904(c) to provide clarity and to harmonize key terms throughout the rule. In general, these adjustments are not intended to make substantive changes to the statutory definitions.

As an initial matter, the Board notes that new 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.”

The Board does not believe that distinguishing the types of products covered by the rule by, for instance, the material that is used to produce a payment card would 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.⁶

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. The Board does not believe that an issuer that, for example, chooses to use non-plastic biodegradable materials to create a more environmentally-friendly product should be precluded from relying on an exclusion solely because its payment device is not made of plastic. Therefore, the proposed rule generally refers to “cards, codes, or other devices” to avoid such arbitrary distinctions and to provide consistency across the definitions.

Proposed comment 20(a)–1 clarifies that the requirements of § 205.20 generally apply to all cards, codes, or other devices that meet the 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 would apply even if a physical card or

certificate is not issued. The proposed comment clarifies that products not issued in card form, such as an account number or bar code that enables the consumer to access underlying funds, would be subject to § 205.20 if they otherwise meet the definition of gift certificate, store gift card, or general-use prepaid card. Similarly, § 205.20 would apply to a device with a chip or other embedded mechanism which links the device to stored funds, such as a mobile phone or sticker containing a contactless chip, if the device otherwise meets the definition of gift certificate, store gift card or general-use prepaid card.

In addition, 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). The Board does not believe, however, that there is a meaningful distinction between electronic promises and cards, codes, or other devices that can be used as payment mechanisms. Instead, the Board views an electronic promise as a commitment to pay that is itself manifested or represented by a “card, code, or other device,” rather than as a distinct payment mechanism. Proposed comment 20(a)–2 clarifies 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.”⁷ The proposed comment further provides that the promise is 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. Thus, the proposal contemplates that the term “card, code, or other device” when used in the regulation also incorporates the statutory reference to “electronic promises.” 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 would be a card, code, or other device covered by § 205.20. See proposed comment 20(a)–2.

Last, 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.” One way to reconcile the use of these different terms in the statute is to interpret “specified” as referring to cards that are issued in a predenominated amount (e.g., a \$50 gift card), and to interpret “requested” as referring to a consumer-requested amount (e.g., where the consumer states the amount to load on a gift card). Such an interpretation would mean that gift certificates and store gift cards issued in a consumer-requested amount and general-use prepaid cards issued in a predenominated amount would be excluded from the rule. The Board does not believe that such a result would be consistent with the statute’s purpose.

The Board believes that consumers should receive the same protections when purchasing gift cards or gift certificates regardless of whether the amount on the card or certificate is determined by the issuer or the consumer. Thus, the Board is interpreting the statutory definitions of gift certificate, store gift card, and general-use prepaid card broadly to cover both predenominated and consumer-designated certificates or cards. Therefore, the proposed rule uses 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 a consumer-requested, or variable load, amount.

The Board notes that 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 cards issued for non-business purposes. The Board solicits comment on whether it is appropriate to limit the scope of the final rule so that it does not apply to cards issued for business purposes. Any such limitation, however, would presumably not exclude cards that are purchased by a business for the purposes of redistribution or resale to consumers for consumers to use. For example, a program manager may purchase gift cards directly from an issuing merchant and sell those cards through the program manager’s retail outlets. Or, a corporation may give gift cards it has purchased directly from the issuing merchant to consumers pursuant to a reward or other incentive program. In such cases, the Board believes that because the end use of the gift card is for consumer purposes, the consumer protections provided by the Credit Card Act should apply, unless the card is otherwise excluded. (See EFTA Section 915(a)(2)(D) and proposed § 205.20(b), discussed below.) Accordingly, given

⁶Products issued in paper form only are excluded under new EFTA Section 915(a)(2)(D)(v) and proposed § 205.20(b)(5).

⁷ See, e.g., UCC 3–106(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.”)

that issuers would have to adopt controls and potentially monitor the distribution or sale of gift cards to ensure that the end use is for business purposes, comment is also requested regarding the overall utility of, or need for, such a scope provision in the final rule.

20(a)(1) Gift Certificate

Proposed § 205.20(a)(1) defines the term “gift certificate” as a card, code, or other device that is: (a) Issued 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 proposed definition generally tracks the definition set forth in the statute, but modifies the terms to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(B).

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 each other 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* proposed comment 20(a)(2)–2.

20(a)(2) Store Gift Card

Proposed § 205.20(a)(2) defines the term “store gift card” as a card, code, or other device that is: (a) Issued to a consumer in a specified amount, whether or not that amount may be increased or reloaded by the cardholder, in exchange for payment; and (b) redeemable upon presentation at a single merchant or an affiliated group of merchants for goods and services. The proposed definition generally tracks the definition set forth in the statute, but modifies the terms to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(C). Under the proposed rule, closed-loop cards generally would be 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 proposed § 205.20(a)(2) qualifies as a “store gift card,” whether or not the cardholder may later add more funds to the card, code, or other device. Thus, because

“store gift card” includes non-reloadable cards, codes, or other devices that are redeemable at single merchants or affiliated groups of merchants, proposed comment 20(a)(2)–1 clarifies and illustrates by way of example that a gift certificate as defined in § 205.20(a)(1) would be a type of store gift card.

Proposed comment 20(a)(2)–2 provides guidance on the term “affiliated group of merchants.” Under new 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 within the statute. However, in other contexts, “affiliate” is used to describe 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. *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)). The Board believes that such a concept should similarly apply to the term “affiliate” when used in the proposed rules. Accordingly, the terms “gift certificate” and “store gift card” generally include cards, codes, or other devices that are redeemable at some or all of the companies that are related by virtue of common ownership or common corporate control and that share the same name, mark, or logo. An “affiliated group of merchants” would also include franchisees because franchisees generally are subject to a common corporate set of policies or practices under the terms of their franchise licenses.

Under some retail card programs, merchants that honor the same certificate or card may not be owned or otherwise controlled by the same parent company. For instance, two unrelated companies may be engaged in complementary businesses and agree to operate a common gift card program in which cardholders may use the same certificate or card at either of the two businesses. To illustrate, 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 and for a meal preceding or following the movie. While such companies would not be considered “affiliates” in other contexts, the Board believes that it is appropriate to treat such arrangements like gift card programs operated by retailers with the

same parent company or under common corporate control. Accordingly, proposed comment 20(a)(2)–2 provides that the term “affiliated group of merchants” would include two or more merchants or other persons that agree among each other, 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* proposed comment 20(a)(3)–2 regarding mall cards, discussed below.) The proposed comment clarifies, however, that merchants or other persons would not be 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 would not be considered affiliated with a hardware store merely because they both agree to accept Visa or MasterCard-branded cards.

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

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

Proposed § 205.20(a)(3) defines “general-use prepaid card” as a card, code, or other device that is: (a) Issued to a consumer in a specified amount, whether or not that amount may be increased or reloaded by the cardholder, 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 proposed definition generally tracks the definition set forth in the statute, but modifies the terms to simplify and clarify the definition. *See* EFTA Section 915(a)(2)(A). Under the proposed 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.

Proposed 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 generally 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 of the mall. Proposed comment

20(a)(3)–2 provides that a mall card could be considered a store gift card or a general-use prepaid card depending on the locations in which the card may be redeemed. That is, if use of the mall card is limited to the retailers at the associated shopping mall, the card is more likely to be considered a store gift card. If the mall card also carries the brand of a payment network and can be used at any retailer accepting that brand, the card would be considered a general-use prepaid card. Regardless, the substantive and disclosure requirements of § 205.20 would 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

New 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. Proposed § 205.20(a)(4) generally defines 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.

As an initial matter, the Board notes that the proposed definition generally applies to any card, code, or other device issued pursuant to a loyalty, award, or promotional program, regardless of whether the consumer has provided any form of payment or other value to obtain the card. The proposed definition covers, 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. The definition also covers cards provided by employers to reward job performance. Proposed comment 20(a)(4)–1 provides examples of loyalty, award, or promotional programs.

Under proposed § 205.20(b)(3), further discussed below, if a card, code, or other device is deemed to be a loyalty, award, or promotional gift card, it would not be subject to the substantive restrictions on imposing dormancy, inactivity or service fees, or the requirement to have expiration dates of at least five years. Accordingly, to mitigate potential consumer surprise

from unexpected fees or expiration dates for these cards, proposed § 205.20(a)(4)(iii) provides that in order to qualify as a “loyalty, award, or promotional gift card,” certain disclosures regarding the fees and expiration dates applying to such cards must also be provided to the consumer. These disclosures are discussed in more detail below under § 205.20(b)(3).

20(a)(5) Dormancy or Inactivity Fee

New section 915(a)(1) of the EFTA 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.” Proposed § 205.20(a)(5) implements this definition with non-substantive wording modifications to improve readability. Because the Board believes the terms “charge” and “penalty” are synonymous with “fee” as used in this definition, the proposal simplifies the definition by not including the references to “charge” or “penalty” used in the statute.

20(a)(6) Service Fee

New 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.” Proposed § 205.20(a)(6) implements this definition using substantially the same language as the statute. Because the Board believes the terms “charge” and “penalty” are synonymous with “fee” as used in this definition, the proposal simplifies the definition by not including the statutory references to “charge” or “penalty” used in the statute.

In addition, proposed comment 20(a)(6)–1 clarifies 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. 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. Transaction fees include, for example, fees imposed each time a transaction is conducted with the certificate or card and foreign transaction fees.

The Board considered an alternative interpretation of a “periodic fee” as 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 notes, however, that the statutory definition of “service fee” refers to the “use” of a gift

certificate, store gift card, or general-use prepaid card. *See* new EFTA Section 915(a)(3)(A) (15 U.S.C. 1693m(a)(3)(A)). Therefore, the Board believes that Congress intended to also capture consumer-initiated fees such as transaction fees and reload fees in the definition of “service fee.” Moreover, the Board is concerned that a narrow interpretation of “service fee” would lead to circumvention by issuers and 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. The Board believes that interpreting the term “service fee” broadly, and thus limiting the imposition of such fees, will improve the transparency and predictability of costs to the consumer.

Consistent with new EFTA Section 915(a)(3)(B), proposed comment 20(a)(6)–1 also clarifies that a one-time initial issuance fee is not a service fee. Proposed comment 20(a)(6)–1 also provides examples of other one-time fees that are not service fees, including cash-out fees.

20(b) Exclusions

New 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 promise, card, code, or device 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 disclosure requirements in the statute.

Proposed § 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 meet any of the six conditions specified in the statute. As noted above, the proposed rule uses the term “card, code, or other device,” instead of the term “electronic promise, plastic card, or payment code or device” for clarity and no substantive difference is intended.

Proposed comment 20(b)–1 provides guidance on the effect of meeting any of the specified exclusions. The comment

states that an excluded card, code, or other device is not subject to any of the substantive restrictions and disclosure requirements regarding the imposition of dormancy, inactivity, or service fees, or expiration dates. The proposed comment also provides that the additional disclosures in proposed § 205.20(f) regarding other fees imposed in connection with a card, code, or other device do not apply to an excluded card, code, or other device.⁸

Proposed comment 20(b)–2 clarifies that a card, code, or other device may qualify for one or more exclusions. For example, a corporation may award its employees with a gift card that is marketed solely to businesses for incentive-related purposes. Under this example, the card, code, or other device may qualify for the exclusion for loyalty, award, or promotional gift cards, or for the exclusion for cards, codes, or other devices not marketed to the general public. Even if a card, code, or other device does not qualify for a particular exclusion, it may still fall outside the rule under a different exclusion. Thus, for example, if the gift card awarded by the corporation is of a type that can also be purchased directly from a merchant, the gift card may fall outside coverage under the rule because it is a loyalty, award, or promotional gift card (provided that certain disclosures are provided with the card as proposed under § 205.20(a)(4)(iii)), even though the card would not qualify as a card that is not marketed to the general public because it can also be obtained through retail channels. See proposed § 205.20(b)(4), discussed below.

The six specific exclusions are discussed below.

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

Proposed § 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). Proposed comment 20(b)(1)–1 contains examples of products that fall within this exclusion, such as prepaid cards for long-distance telephone service and prepaid cards for wireless telephone service. The proposed comment further clarifies 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.

The Board notes that mobile phones today are capable of a number of

different functions in addition to voice communications, including providing consumers the ability to send text messages and to access the Internet. Accordingly, the Board solicits comment on whether it should exercise its authority under EFTA Section 904 to expand the proposed 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. 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”). The Board is concerned that interpreting the exclusion narrowly may have the unintended effect of reducing the availability or variety of prepaid telephone certificates or cards in the market.

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

Proposed § 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).

Consistent with the statute, the card, code, or other device 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 is not excluded, even if it is not marketed or labeled as a gift card or gift certificate, unless a different exclusion applies. Similarly, a reloadable card that is marketed as a gift card or gift certificate does not qualify for the exclusion. Proposed comment 20(b)(2)–1 provides that a card, code, or other device is “reloadable” if it has the capability of having more funds added by a consumer after the initial purchase or issuance.

Proposed comment 20(b)(2)–2 clarifies the meaning of the term “marketed or labeled as a gift card or gift certificate.” Under the proposed comment, 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. Moreover, whether the exclusion applies does not depend on the type of entity that is making 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),⁹

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 certificate or card, including a general-purpose reloadable card, may also be deemed to be marketed or labeled as a gift card or gift certificate even if it is primarily marketed for another purpose. 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.

Proposed comment 20(b)(2)–3 provides positive and negative examples of the term “marketed or labeled as a gift card or gift certificate.” 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. In contrast, a card, code, or other device is not marketed or labeled as a gift card or gift certificate if the issuer, vendor, 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 proposed comment 20(b)(2)–3. The Board solicits comment on whether additional guidance on marketing is necessary to provide clarity with respect to the activities that may trigger coverage under the rule and the activities that would not.

As discussed above, a gift card may be sold directly to the consumer by a 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 issuer can be expected to have substantial control over all facets of the card program, including how the card is sold or marketed.

⁸ See, however, proposed § 205.20(a)(4)(iii) with respect to loyalty, award, or promotional gift cards.

⁹ Thus, a card would not be deemed to be marketed or labeled as a gift card or gift certificate

solely because the purchaser gives the card to another consumer as a “gift.”

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 from 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.¹⁰ 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. An exclusion that depends upon how a card is marketed therefore poses substantial compliance risk for an issuer that cannot fully control how 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 provides that the exclusion for a card, code, or other device that is reloadable and not marketed or labeled as a gift card or gift certificate applies if the individual card, code, or other device is not marketed or labeled as a gift card or gift certificate and if entities subject to the rule maintain policies and procedures reasonably designed to avoid such marketing. The proposed comment provides illustrative examples of procedures that would qualify and not qualify for the exclusion for reloadable

cards, codes, or other devices that are not marketed or labeled as gift cards or gift certificates.

Under the first example, an issuer or program manager distributes a general-purpose reloadable card through retailers and enters into a contract with the retailer to establish the terms and conditions under which the card will be sold and marketed at the retailer. The contract includes restrictions prohibiting the general-purpose reloadable card from being sold or otherwise marketed as a gift card or gift certificate, and requirements for policies and procedures to regularly monitor or otherwise verify that the cards are not being sold or marketed as such. The issuer or program manager then sets up one promotional display at the retailer for gift cards and another physically separated display for excluded products under proposed § 205.20(b), including the general-purpose reloadable cards, such that a reasonable consumer would not believe that the excluded cards are gift cards. Under these circumstances, 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 because the issuer or program manager maintains policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable card as a gift card or gift certificate. See proposed comment 20(b)(2)–4.i.

In the second example, the same facts apply, except that the issuer or program manager has set up a single promotional display at the retailer on which a variety of prepaid cards, including store gift cards, general-purpose reloadable cards, and wireless telephone cards, are sold. A sign stating “Gift Cards” appears prominently at the top of the display. Under proposed comment 20(b)(2)–4.ii, any general-purpose reloadable cards sold under such circumstances would not qualify for the exclusion in proposed § 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.

The Board solicits comment on whether the proposed comment provides sufficient guidance regarding procedures that could enable an issuer, program manager, or other covered entity to comply with the rule with respect to an excluded product under proposed § 205.20(b)(2). In particular, comment is requested on practical issues that may arise in a retail environment, for example, in areas

where there may not be sufficient space for covered and non-covered products to be separately displayed, such as a checkout lane. Commenters are urged to provide specific examples of measures that may be utilized to ensure that a reasonable consumer would not believe that a card that would otherwise be excluded, such as a general-purpose reloadable card, is a gift card or gift certificate.

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 initially sold as a non-reloadable open-loop 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 may be sent to the cardholder.

The Board understands that under one model, the cardholder may use the temporary non-reloadable card to conduct 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 to make 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 arrives in the mail and is activated by the cardholder.

Under either model, the temporary card would not appear to qualify for the reloadable and not marketed as a gift card or gift certificate exclusion because it is non-reloadable. If the rule were to provide that such products were to fall within the exclusion notwithstanding the issuance of the initial non-reloadable card, then consumers that elect not to register the card (and therefore do not obtain a reloadable card) would not be given the statutory protections under the Credit Card Act. Conversely, if the rule were to provide that such products do not qualify for the exclusion at any point even if the card is ultimately replaced by a reloadable card, then the exclusion in EFTA Section 915(a)(2)(D)(ii) and proposed § 205.20(b)(2) would effectively be eliminated for most, if not all, general-purpose reloadable cards, given existing business models and other regulatory considerations.

Under a third approach, the restrictions on assessing dormancy, inactivity, or service fees, and on expiration dates could be applied solely to the initial non-reloadable card, but

¹⁰ 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.

not to the reloadable replacement card. While the third approach may provide certain flexibility for some issuers, the Board is concerned that consumers may be confused or surprised when they receive new terms regarding dormancy, inactivity, or service fees and expiration dates for the reloadable card that differ from the terms previously disclosed at the initial purchase. Given these considerations, the Board solicits comment on the appropriate treatment of these products.

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

Proposed § 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). As discussed above, proposed § 205.20(a)(4) generally defines a “loyalty, award, or promotional gift card” as a card, code, or other device that is issued in connection with a loyalty, award, or promotional program.

In contrast to gift cards purchased at a store, loyalty, award, and promotional gift cards typically are not funded by 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. Prepaid 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 through retail channels.

From a consumer’s perspective, 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 substantially from a 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.

Consistent with the statutory exclusion in EFTA Section 915(a)(2), the proposed rule does not impose substantive restrictions on dormancy, inactivity, or service fees, or on expiration dates, for cards, codes, or other devices issued pursuant to a loyalty, award, or promotional program.

Nonetheless, the Board believes that clear and conspicuous disclosures of the terms that apply to a loyalty, award, or promotional gift card are necessary to help consumers avoid surprise from unexpected dormancy, inactivity, or service fees or from short expiration dates.

Accordingly, the Board is proposing to exercise its authority under new EFTA Section 915(a)(2)(D)(iii) to define loyalty, award or promotional gift cards to require that consumers are given clear and conspicuous disclosures about any fees, including dormancy, inactivity, or service fees, or expiration dates, that may apply when they receive a gift card through a loyalty, award, or promotional program. This requirement would be implemented in proposed § 205.20(a)(4)(ii). Thus, in order to be deemed a “loyalty, award, or promotional gift card,” and therefore qualify for the exclusion in proposed § 205.20(b)(3), the card, code, or other device must set forth disclosures regarding any fees and expiration dates that may apply to the card, code, or device. While disclosures regarding dormancy, inactivity, or service fees, expiration dates, and a toll-free number and Web site for additional information must be on the card, code or other device, disclosures regarding other fees may accompany the card, code, or other device. *See also* proposed §§ 205.20(d)(2), (e)(2), and (f), discussed below. The proposed rule is intended to strike a balance between the competing considerations of enabling companies to manage the costs of providing consumers gift cards in connection with loyalty, award, or promotional programs, and limiting potential consumer confusion or surprise arising from the different terms that may apply to such cards.

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

Proposed § 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). 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. *See* proposed comment 20(b)(4)-1. A card, code, or other device may be marketed to the general public regardless of the advertising medium, including television, radio, newspaper, the Internet, or signage.

In determining whether the exclusion applies to a particular card, code, or other device, proposed comment

20(b)(4)-1 provides that a number of factors must 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 device, and whether the availability of the card, code, or device is advertised or otherwise promoted in the marketplace. Thus, the Board does not view the method of distribution by itself as dispositive in determining whether a card, code, or other device is marketed to the general public.

Proposed comment 20(b)(4)-2 provides examples illustrating the exclusion. For instance, a merchant may sell its gift cards at a discount to a business, either directly or indirectly through a third party. The business that purchases the cards may give them to employees or loyal consumers as incentives or rewards. In determining whether the gift card is marketed to the general public, the merchant-issuer must consider whether the card is of a type that is advertised or made available to consumers generally or can be easily obtained elsewhere. If the card may also be purchased through retail channels, the exclusion in § 205.20(b)(4) does not apply, even if the consumer obtained the card as an incentive or reward. *See* proposed comment 20(b)(4)-2.i. In these cases, consumers could be confused when 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. Of course, other exclusions under the proposed rule, such as the exclusion for cards issued in connection with a loyalty, award, or promotional program, may apply to such cards. *See* proposed § 205.20(b)(3).

Similarly, the Board has also considered whether cards issued or sold by a business pursuant to a marketing campaign that targets a specific subset of consumers would fall within the exclusion. The Board is concerned that 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. For example, a national retail chain could decide to market its gift cards only to members of its frequent buyers program. However, if any member of the general public may become a member of the program, the general public would still be able to obtain the cards. Thus, the Board believes such cards would be covered by the rule in those circumstances, unless another exclusion applies. *See* proposed comment 20(b)(4)-2.ii. Similarly, a reloadable card advertised

to teenagers to help them manage their everyday expenses and for emergencies, or marketed to parents to enable them to monitor spending would be a card marketed to the general public. *See* proposed comment 20(b)(4)-2.iii.

In contrast, where the availability of the 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 card is not marketed to the general public. Proposed comment 20(b)(4)-2 includes four 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.

Whether a non-reloadable tax refund card is marketed to the general public will depend upon the 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 would be 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 would not be exempt under this exclusion. *See* proposed comment 20(b)(4)-2.vii.

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

Proposed § 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). As explained in proposed comment 20(b)(5)-1, the exclusion applies where the sole means of issuing the card, code, or other device is by paper. Examples of excluded paper gift certificates or cards include paper certificates distributed by restaurants or spas that are redeemable for a specific service or a specified dollar amount, and paper vouchers valid for tickets or events.

To prevent potential circumvention of the rule, the proposed commentary 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 or card or certificate number sent electronically to a consumer and redeemable for goods or services is not issued in paper form, even if it may be reproduced or otherwise printed on paper by the consumer.¹¹ Similarly, § 205.20(b)(5) would not apply where an on-line retailer electronically mails a certificate redeemable for goods or services to a consumer, which the consumer could print out on a home printer. In these circumstances, 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.

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

Comment is requested regarding whether this aspect of the proposal creates an undue risk of circumvention. For example, a paper certificate or card that is encoded with a magnetic stripe might qualify for the exclusion. Other than the material on which the magnetic stripe is printed or produced, however, there is no meaningful distinction between a plastic card with a magnetic stripe and a paper certificate or card with a magnetic stripe encoded on the paper.

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

Proposed § 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).

Under the proposed rule, 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. In addition, the exclusion applies to cards, codes, or other devices that entitle consumers to obtain goods or services, in conjunction with admission to an event or venue. *See* EFTA Section 915(a)(2)(D)(vi). For example, the consumer might purchase a certificate or card that entitles the recipient to one ticket to an amusement park plus a dollar amount that can be spent on concessions at the park.

Consistent with the statute, the proposed exclusion in § 205.20(b)(6) would also cover 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 a consumer to gain admission to an amusement park and to receive a souvenir of the occasion at a retailer affiliated with the park and located within or nearby the park.

While the exclusion would apply 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 with an affiliated 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.

The Board is concerned that 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 proposed rule would not apply the exclusion to a card that can be redeemed in a specified amount towards admission to an event or venue. In this regard, the Board notes that the statute refers to cards, codes, or other devices that are redeemable *solely* for

¹¹ 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).

admission to events or venues at a particular location or group of affiliated locations. See EFTA Section 915(a)(2)(D)(vi).

The proposed exclusion in § 205.20(b)(6) also would not apply to other payment devices that do not have a specified monetary value but are redeemable for a specified product or service, other than admission to an event or venue. For example, an issuer or retailer may sell a certificate or card that is redeemable for a spa treatment or for a hotel stay. In such circumstances, the certificate or card is not applied to obtain admission to the spa or hotel itself, but is used to pay for services at those locations. The exclusion does not apply to such cards because they are not redeemable solely for admission to an event or venue. See EFTA Section 915(a)(2)(D)(vi). Nonetheless, other exclusions in the rule may apply in these circumstances. See, e.g., proposed § 205.20(b)(3).

Proposed comment 20(b)(6)–1 provides examples to illustrate the exclusion in § 205.20(b)(6). In addition to the examples discussed above, the proposed comment also provides an example of cards that are redeemable solely for membership to a buyer's club or warehouse or to a gym. Such cards would fall within the exclusion in § 205.20(b)(6) because memberships are necessary for entry or admission to those locations. The exclusion would not apply if the card has value that could be applied either for a membership or for goods or services at the warehouse or gym. See comment 20(b)(6)–1.v.

20(c) Form of Disclosures

20(c)(1) Clear and Conspicuous

New EFTA Sections 915(b)(3)(A) and (c)(2)(B) (15 U.S.C. 1693m(b)(3)(A) and (c)(2)(B)), as added by Section 401 of the Credit Card Act, require that the disclosures made pursuant to those paragraphs be clear and conspicuous. The Board believes it is also appropriate to apply the clear and conspicuous standard to the disclosures the Board is proposing under § 205.20(f). Thus, pursuant to the Board's authority under new EFTA section 904, proposed § 205.20(c)(1) applies the clear and conspicuous standard to all disclosures required under § 205.20.

Proposed comment 20(c)(1)–1 clarifies the meaning of the term “clear and conspicuous” for the purposes of this section. Specifically, as the proposed comment explains, disclosures are 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. Disclosures need not, however, be located on the front of the certificate or card 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, the proposed comment states that a disclosure on the back of a card that is printed on top of indentations from embossed type on the front of the card is not likely to be conspicuous if it obstructs the readability of the type. The proposed comment clarifies that oral disclosures, to the extent they are permitted, meet the clear and conspicuous standard when they are given at a volume and speed sufficient for a consumer to hear and comprehend them.

Though the proposal requires that the prescribed disclosures be clear and conspicuous, it does not include a specific type size or prominence requirement, except where otherwise noted. As discussed below in proposed § 205.20(e)(3)(iii), certain disclosures regarding funds expiration are required to be made with equal prominence and in close proximity to the certificate or card expiration date on a certificate or card. The Board included this requirement because of its specific concerns related to customer confusion with respect to a certificate or card expiration date that may differ from the expiration date for the underlying funds. However, the Board believes requiring every disclosure on a certificate or card to have an equal prominence or a minimum type size standard is impractical, because the size of certificates or cards will vary. Therefore, a general type size that is appropriate for one card may not fit on a smaller card, due to the limited amount of space. Moreover, such standards would present issues for disclosures even on standard-sized cards, because the amount of space on such cards is limited.

The Board requests comment on whether 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 is appropriate. The Board also requests comment on whether there are alternatives to a type size or prominence requirement that could ensure that

disclosures on a card are clear and conspicuous to a consumer.

Proposed § 205.20(c)(1) states that the disclosures required by this section may contain commonly accepted or readily understandable abbreviations or symbols. Proposed comment 20(c)(1)–2 provides illustrative examples, stating that the use of abbreviations and symbols such as “mo.” for month or a “/” to indicate “per” is permissible. The proposed comment notes 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.”

20(c)(2) Format

Proposed § 205.20(c)(2) states that disclosures required by this section generally must be provided to the consumer in written or electronic form. Because the disclosures are not required to be in written form, proposed comment 20(c)(2)–1 clarifies that electronic disclosures made under 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 U.S.C. 7001 *et seq.*), which only applies when information is required to be provided to a consumer in writing. The comment clarifies that electronic disclosures may not be provided through a hyperlink or in another manner by which the purchaser can bypass the disclosure. An issuer or vendor is not required to confirm that the consumer has read the electronic disclosures.

Proposed comment 20(c)(2)–2 addresses disclosure requirements in circumstances where no physical certificate or card is issued. Under the proposed comment, disclosures would be required to accompany the code, confirmation, or other written or electronic document provided to the consumer.

Proposed § 205.20(c)(2) states that only disclosures provided under § 205.20(c)(3) may be provided orally. Allowing oral disclosures is necessary because, in some circumstances, disclosures cannot be made prior to purchase unless made orally, such as when a certificate or card is purchased by telephone. Even where oral disclosures are permitted, written or electronic disclosures must still be provided on or with the certificate or card. See proposed §§ 205.20(d)(2), (e)(3), and (f).

20(c)(3) Disclosures Prior to Purchase

New EFTA Section 915(b)(3)(B) (15 U.S.C. 1693m(b)(3)(B)), requires that dormancy, inactivity, or service fees be

disclosed before a gift certificate, or store gift card, or general-use prepaid card is purchased. In addition, the Board proposes to use its authority under EFTA Section 904 to require the disclosure of additional fees under § 205.20(f)(1), discussed below, and the terms and conditions of expiration of the funds prior to purchase of the certificate or card. *See* proposed §§ 205.20(e)(3) and (f)(1), discussed below. These requirements are implemented in proposed § 205.20(c)(3).

The Board believes that consumers contemplating the purchase of a certificate or card need 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, the Board believes that 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. Making this type of information available to purchasers may also foster competition.

Proposed comment 20(c)(3)–1 clarifies 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.

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

Proposed § 205.20(c)(4) addresses the requirements in § 205.20 that certain disclosures be provided on the certificate or card itself. *See* proposed §§ 205.20(d)(2), 205.20(e)(3), and 205.20(f)(2). The paragraph states 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.

The Board believes this interpretation is consistent with new EFTA Section 915(b)(3)(A), which requires that a gift certificate, store gift card, or general-use prepaid card clearly and conspicuously state any dormancy, inactivity, or service fee and the conditions under which they can be imposed. Requiring the fees and conditions to be disclosed on the certificate or card ensures that the consumer and, if applicable, the gift recipient will always have access to the disclosures, because they cannot be separated from the certificate or card. Moreover, a number of State laws already require certain fee and expiration date disclosures on

certificates or cards.¹² Pursuant to its authority under new EFTA Section 915(d)(1)(A), and as discussed below in §§ 205.20(e)(3) and (f)(2), the Board is proposing to extend the requirement that certain disclosures be on the certificate or card itself to certain additional disclosures. Specifically, the proposal states that the certificate or card itself must state the terms and conditions of expiration of the funds; a toll-free telephone number a consumer may call for fee information or replacement certificates or cards; and, if one is maintained, a Web site a consumer may access for fee information or replacement certificates or cards.

The Board recognizes that the proposed requirements regarding disclosures that must appear on a covered certificate or card may present implementation challenges with respect to certain products, particularly those that are small and have little space on which to print required disclosures. The Board seeks comment regarding any approaches or solutions that could avoid potential impediments to innovation while still providing consumers clear and conspicuous disclosures. The Board also seeks comment regarding how issuers currently provide disclosures and how issuers comply with State laws which have similar disclosure requirements to those set forth in the proposed rules.

20(d) Prohibition on Imposition of Fees or Charges

New EFTA Sections 915(b)(1) and (2) generally prohibit 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 12-month period ending on the day the charge is imposed; (b) certain disclosure requirements have been met; (c) only one such fee is charged in any given month; and (d) the certificate or card complies with any additional requirements the Board may establish. *See* 15 U.S.C. 1693m(b)(1) and (2). Regarding the disclosure requirements noted above, new EFTA Section 915(b)(3) provides 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. *See* 15 U.S.C. 1693m(b)(3). Moreover, the issuer or vendor of such certificate or card must inform the purchaser of such charge or fee before such certificate or card is purchased, regardless of whether the certificate or card is purchased in person, over the Internet, or by telephone. *See* 15 U.S.C. 1693m(b)(3)(B).

Proposed § 205.20(d) generally implements new EFTA Sections 915(b)(1), (2), and (3) while proposed § 205.20(c)(3), discussed above, implements new EFTA Section 915(b)(3)(B).¹³ The Board notes that although “dormancy or inactivity fee” is defined separately from “service fee,” for improved readability, proposed § 205.20(d) and associated commentary refer to these fees collectively as “dormancy, inactivity, or service fees.” As discussed above, proposed § 205.20(c)(3) also requires the issuer or vendor to inform the purchaser about certain other terms prior to purchase.

The Board is proposing several comments to clarify the provisions in § 205.20(d). Proposed comment 20(d)–1 illustrates with examples how to determine when a dormancy, inactivity, or service fee may be imposed. Proposed comment 20(d)–2 clarifies the meaning of “activity” for purposes of proposed § 205.20(d)(1). Specifically, any action by the consumer to increase, decrease or otherwise make use of the funds underlying a certificate or card constitutes activity. For example, the purchase and activation of a card or the reloading of funds onto a card constitutes activity for purposes of § 205.20(d)(1). However, activity with respect to a certificate or card would not include the imposition of a fee, the replacement of an expired, lost, or stolen certificate or card, or a balance inquiry. The Board solicits comment on whether there are any other actions taken by a consumer that should be considered “activity” for purposes of proposed § 205.20(d)(1).

Proposed § 205.20(d)(2) and (c)(3) require similar, but not identical, disclosures. Proposed comment 20(d)–3 clarifies the interaction between these provisions. Specifically, the proposed

¹³ The proposed rule does not separately implement the exclusion in new EFTA Section 915(b)(4) 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. The Board believes this exclusion is already effectively implemented through the definition of “gift certificate” in proposed § 205.20(a)(1)(iii) and the exclusion in proposed § 205.20(b)(3) for loyalty, award, or promotional gift cards.

¹² *See, e.g.*, Ark. Code § 4–88–703 and Neb. Rev. Stat. §§ 69–1305.03(e) and (f) (requiring expiration date and certain fees to be disclosed on the gift certificate or card), and Or. Rev. Stat. § 646A.278 (requiring expiration date to be disclosed on the gift card).

comment provides that depending on the context, a single disclosure regarding dormancy, inactivity, or service fees imposed 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 also meet the requirements of § 205.20(c)(3). If, however, the disclosure does not meet the requirements of both §§ 205.20(d)(2) and (c)(3), proposed comment 20(d)–3 states that a dormancy, inactivity, or service fee may need to be disclosed multiple times or in multiple locations 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 or other materials 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 or in other manner visible to the consumer to meet the requirements of § 205.20(c)(3).

Proposed §§ 205.20(d)(2), (e)(3), and (f)(2) require certain disclosures to be made on the certificate or card itself, as applicable. Proposed comment 20(d)–4 clarifies that in addition to 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.

Finally, proposed comment 20(d)–5 clarifies the prohibition in § 205.20(d)(3) against charging more than one dormancy, inactivity, or service fee in any given calendar month. Specifically, proposed comment 20(d)–5 provides that if a dormancy, inactivity, or service fee is already imposed in a given calendar month, a second dormancy, inactivity, or service fee may not be imposed that month. If more than one dormancy, inactivity, or service fee is possible on a given day, the person assessing the fee may choose which dormancy, inactivity, or service fee to impose. The proposed comment also clarifies that the restriction in proposed § 205.20(d)(3) applies only to dormancy, inactivity, or service fees. As a result, a fee that is not a dormancy, inactivity, or service fee may be imposed in addition to a dormancy, inactivity, or service fee in a given month. Proposed comment

20(d)–5 would also provide examples with specific dates to illustrate these concepts.

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

New 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). Proposed § 205.20(e) implements new EFTA Section 915(c).

Application of EFTA Section 915(c) to Certificate or Card Expiration and Funds Expiration

New EFTA Section 915(c) does not specify whether the restrictions apply to the expiration of the certificate or card itself or the underlying funds. It is the Board's understanding that for many general-use prepaid cards, and perhaps some gift certificates and store gift cards, the expiration date for the certificate or card differs from the expiration date for the underlying funds. For example, the underlying funds of some network-branded cards, which are required to have card expiration dates under card network rules and systems, never expire.

In order to ensure that consumers receive the full protection established by the statute with respect to the value of the certificate or card, proposed § 205.20(e)(2) would require that funds be available for 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) until the certificate or card expiration date.

In addition, to prevent consumer confusion, the proposed rule addresses the potential mismatch and resulting disconnect between a stated expiration or valid through date of the certificate or card and the date the funds expire. Specifically, consumers may assume that once the certificate or card expiration date has passed, the underlying funds are no longer valid or available. Presumably, a certificate or card expiration date that matches the funds expiration date would not cause confusion among consumers. However, a certificate or card expiration date that is identical to the funds expiration date may not be feasible. First, at the time a certificate or card expiration date is printed on a certificate or card, it may

be impossible to predict the funds expiration date, which would, under the Board's proposed rule, depend on when a consumer purchases the certificate or card or adds funds to a reloadable card. For example, if the certificate or card expiration date is printed during the certificate or card manufacturing process, this process may occur several months prior to the date the consumer purchases the certificate or card and activates it for use. Second, because the expiration date required under new EFTA Section 915(c) for store gift cards and general-use prepaid cards must be calculated from the date the funds were last loaded, this would mean, in practice, that funds underlying a reloadable card might never expire.

The Board considered prohibiting the use of expiration or valid through dates for gift certificates, store gift cards, and general-use prepaid cards. However, the Board understands that certain network systems may not be able to support products that do not carry expiration or valid through dates because of fraud and security concerns. In addition, card expiration dates may be necessary for other business reasons, such as to ensure that a card can remain usable for its lifespan. Moreover, merchants have become accustomed to looking for, or, in the case of telephone or on-line purchases, requesting, certificate or card expiration dates. Mandating certificates or cards without expiration or valid through dates could create significant confusion among merchants, which in turn, could result in problems for consumers' use of gift certificates, store gift cards, and general-use prepaid cards at such merchants. Therefore, to harmonize, to the extent feasible, the certificate or card expiration date and the funds expiration date, the Board is proposing two alternative approaches for applying new EFTA Section 915(c) to the expiration of a certificate or card in § 205.20(e)(1).

Under Alternative A of proposed § 205.20(e)(1), the Board is proposing that a person may 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. The Board understands that there are some issuers and retailers of prepaid cards with systems and procedures currently in place to prevent the sale or issuance of a certificate or card unless there is a minimum amount of time left before the certificate or card expiration date; for example, 12 to 18 months from the date of sale or issuance. These issuers and retailers may currently employ

inventory controls or point-of-sale procedures to prevent sales of certificates or cards that do not meet the minimum time. For these issuers and retailers, compliance with Alternative A would likely only involve altering their systems and procedures to accommodate the five-year time period instead of the current minimum time frame. However, the Board is concerned that it may not be operationally feasible for all issuers and retailers of gift certificates, store gift cards, and general-use prepaid cards to institute these types of systems and procedures by the mandatory compliance date of the final rule.

Alternative B of proposed § 205.20(e)(1) would instead require entities involved in issuing, distributing, and selling certificates or cards 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. Proposed comment 20(e)-1 under Alternative B would set forth 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. For example, a person subject to this rule would comply with Alternative B of proposed § 205.20(e)(1) if a card is printed with an expiration date that is six years from the date the card was produced and on a display rack at a retail store within six months of the date the card was produced. Similarly, a person would comply with Alternative B of proposed § 205.20(e)(1) if a card is printed with an expiration date that is seven years from the date the card was produced and on a display rack at a retail store within one year and six months of the date the card was produced. However, a person would not comply with Alternative B of proposed § 205.20(e)(1) if a card is printed with a card expiration date six years from the date it was produced and is stored in a distribution warehouse for more than one year before being made available for sale.

Unlike Alternative A of § 205.20(e)(1), Alternative B would not require a person to confirm that a certificate or card is in fact sold or issued to a consumer with at least five years before the certificate or card expiration date. As a result, the expiration date reflected on the certificate or card may, in some cases, be less than five years from the date of sale or issuance. While the consumer would still have use of the underlying funds for a minimum of five years from the date of sale or issuance,

as would be required under proposed § 205.20(e)(2), the Board is concerned that a certificate or card reflecting a certificate or card expiration date earlier than the funds expiration date could prompt consumers to dispose of the certificate or card before the funds expiration date.

The Board believes that Alternative A would provide the greatest precision in matching the certificate or card expiration date with the funds expiration date, though Alternative B may be easier to implement than Alternative A. Given that persons subject to the rule may be able to comply with Alternative B more rapidly than Alternative A, the Board also solicits 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.

While either Alternative A or 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 proposing to address this issue by requiring certain disclosures related to the expiration of the underlying funds. As discussed more fully below in the supplementary information to proposed § 205.20(e)(3), the Board is proposing that the terms and conditions of expiration of the underlying funds be disclosed on the certificate or card, including, where 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. *See* proposed § 205.20(e)(3)(iii).

The Board also solicits comment on whether an additional or alternative substantive solution to the proposed notice in § 205.20(e)(3) may be warranted. Specifically, the Board is requesting comment on whether it should also or alternatively 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. The Board understands that for some reloadable cards, issuers currently collect certain information from the consumer, including name and address, before the consumer may be permitted to reload funds to the card, or in some cases, use the card at all. Thus, these issuers would have the information necessary to send replacement cards

before the card expiration date, much as issuers currently do for credit cards, which would avoid consumer confusion as to whether the underlying funds may still be available. The Board is concerned, however, that not all issuers of reloadable cards may have the systems in place to collect name and address information and that establishing such systems could be prohibitively expensive for these issuers. Furthermore, if a consumer does not notify the gift card issuer of changes in address, the issuer may not have a reliable current address to which it could send a replacement card. The Board seeks comment on operational considerations and the feasibility of implementing this requirement for reloadable cards.

Disclosures Related to Certificate or Card Expiration and Funds Expiration

New EFTA Section 915(c)(2)(B), which the Board proposes to implement in § 205.20(e)(3), requires that the terms and conditions of expiration be clearly and conspicuously stated. *See* 15 U.S.C. 1693m(c)(2)(B).

Under proposed § 205.20(e)(3), three disclosures must be stated on the certificate or card, as applicable. First, proposed § 205.20(e)(3)(i) provides 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 under the statute and the Board's proposed rule 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, 2010, the funds may expire on or after January 15, 2015. However, if a consumer loads more funds onto the card on July 15, 2012, the funds may not expire until on or after July 15, 2017. To accommodate this circumstance, proposed comment 20(e)-1 under Alternative A (comment 20(e)-2 under Alternative B) clarifies that § 205.20(e) does not require disclosure of the precise date the funds will expire. 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 requests comment on whether these sample disclosures would effectively communicate how long a consumer has

access to funds underlying a certificate or card.

Proposed comment 20(e)-2 under Alternative A (comment 20(e)-3 under Alternative B) clarifies that if the certificate or card and the underlying funds do not expire, that fact need not be disclosed. The Board believes that disclosing the fact that the underlying funds do not expire is 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.

Second, proposed § 205.20(e)(3)(ii) provides that the disclosures must also 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 be available. Requiring a toll-free telephone number to be maintained for purposes of obtaining a replacement card is appropriate because, as discussed above, a certificate or card expiration date may be earlier than the funds expiration date.¹⁴ While the proposed rule does not similarly require that a Web site be maintained for such purposes, if one is maintained, that Web site must also be disclosed under § 205.20(e)(3)(ii). By requiring contact information to be on the certificate or card itself, the Board believes that consumers will more easily be able to obtain a replacement certificate or card should the certificate or card expire before the underlying funds.

Proposed comment 20(e)-3 under Alternative A (comment 20(e)-4 under Alternative B) clarifies that 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 proposed § 205.20(e)(3)(ii) need not be stated on the certificate or card. A toll-free telephone number and a Web site may still be required to be disclosed, however, pursuant to proposed § 205.20(f)(2) if the certificate or card has fees. Proposed comment 20(e)-4 under Alternative A (comment 20(e)-5 under Alternative B) clarifies that the same toll-free telephone number and Web site may be used to comply with the requirements of §§ 205.20(e)(3)(ii) and (f)(2).¹⁵ In addition, the proposed

comment provides 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.

Finally, proposed § 205.20(e)(3)(iii) would require, 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 is designed to ensure that consumers are alerted to any distinction between the certificate or card expiration date and the funds expiration date so that they do not mistakenly believe the funds are no longer available during the minimum five-year period set forth in the statute.

Proposed § 205.20(e)(3)(iii) also requires the statement to be disclosed with equal prominence and in close proximity to the certificate or card expiration date. While other required disclosures in this section are not subject to similar prominence and proximity requirements, the Board believes that such requirements are appropriate for the disclosures required under proposed § 205.20(e)(3)(iii). Typically, the expiration date for a certificate or card may be printed on the certificate or card in a prominent location and type size, which enables the merchant to easily verify the validity of the card at point-of-sale and the consumer to find this date when making telephone or on-line purchases. Thus, the Board is concerned that the prominence of the expiration date on the certificate or card (without any additional protections) may lead consumers to assume that once the certificate or card itself expires, the underlying funds will be unavailable. The disclosures proposed under § 205.20(e)(3)(iii) regarding expiration 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. Therefore, 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.

As clarified in proposed comment 20(e)-5 under Alternative A (comment 20(e)-6 under Alternative B), close proximity, in the context of a certificate or card, means that the disclosure must appear on the same side as the certificate or card expiration date so that consumers do not automatically assume

funds are not available after the certificate or card expiration date. For example, many card expiration dates are stated on the front of a card. If the disclosure alerting the consumer to the fact that this expiration date does not apply to the underlying funds is printed on the back of the certificate or card, the consumer may not notice the disclosure if he or she does not have reason to look for an additional disclosure. However, if the disclosure is on the front of the card 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.

Proposed comment 20(e)-5 under Alternative A (comment 20(e)-6 under Alternative B) also clarifies 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. 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 Board believes these format standards would sufficiently ensure that most consumers can determine whether an expiration date for a certificate or card is different from the funds expiration date.

Proposed comment 20(e)-5 under Alternative A (comment 20(e)-6 under Alternative B) provides examples regarding how a disclosure may inform a consumer of the distinction between the certificate or card expiration and the funds expiration. The disclosure may 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 believes these disclosures, used 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 recognizes that the amount of space available for disclosures near the certificate or card expiration date is limited. The Board requests comment regarding the feasibility of disclosing the sample disclosures or similar statements "in close proximity" to the certificate or card expiration date. The Board also requests comment on whether the "equal prominence"

¹⁴ As discussed below under proposed § 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.

¹⁵ The contact information may also be the same contact information provided for any or all customer service issues or questions relating to the certificate or card.

standard is appropriate in the context of certificates or cards, or if the Board should prescribe a minimum type-size requirement and, if so, what type size is appropriate. Finally, the Board requests comment on other effective methods of notifying consumers that underlying funds may continue to be available after a certificate or card itself expires.

Finally, the Board notes that proposed §§ 205.20(d)(2), (e)(3), and (f)(2) (as discussed below) require certain disclosures to be made on the certificate or card itself, as applicable. Proposed comment 20(e)–6 under Alternative A (comment 20(e)–7 under Alternative B) thus clarifies 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.

Other Protections and Clarifications

To ensure that consumers have full use of the funds loaded on a certificate or card for the minimum five-year period set forth in the statute, the Board proposes to use its authority under EFTA Section 904(c) to restrict the imposition of fees to replace an expired certificate or card if the funds loaded on the certificate or card have not expired. *See* 15 U.S.C. 1693b(c). Proposed § 205.20(e)(4) under both alternatives thus ensures that consumers retain a cost-free means to access funds if a certificate or card expires before the funds have expired. Proposed § 205.20(e)(4) contains an exception, however, for certificates or cards that have been lost or stolen. As a result, a fee to replace a certificate or card before the expiration date of the funds may be imposed for a lost or stolen certificate or card, to the extent otherwise permitted under law. Proposed comment 20(e)–7 under Alternative A (comment 20(e)–8 under Alternative B) clarifies that although a fee is permitted to be charged to replace a lost or stolen certificate or card under proposed § 205.20(e)(4), the rule does not create a substantive requirement that issuers replace a lost or stolen certificate or card.

Proposed comment 20(e)–8 under Alternative A (comment 20(e)–9 under Alternative B), clarifies that a certificate or card is not considered to be issued or loaded with funds until it has been activated for use. The Board understands that gift card issuers often produce gift cards for display on retail shelves and racks or for mailing to consumers. However, for security reasons, these cards cannot be used until the card has been activated by a retail employee or by telephone. The proposed comment clarifies that

although a certificate or card may have been produced, it is not considered to be “issued” or to have had funds “loaded” for purposes of § 205.20(e) until that card has been activated for use.

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

EFTA Section 905(a)(4) (15 U.S.C. 1693c(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. Pursuant to its authority under new EFTA Section 915(d)(2) (15 U.S.C. 1693m(d)(2)) to determine the extent to which the individual provisions of the EFTA and Regulation E should apply to gift certificates, store gift cards, and general-use prepaid cards, the Board is proposing § 205.20(f) to require additional fee-related disclosures for such certificates and cards.

20(f)(1) Fee Disclosures

The Board believes it is important for consumers to be aware of the fees that may be imposed before they use a certificate or card. As a result, proposed § 205.20(f)(1) would require that, for each type of fee that may be imposed in connection with a gift certificate, store gift card, or general-use prepaid card, certain information concerning fees must be disclosed on or with the certificate or 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 must be disclosed. The provision excludes dormancy, inactivity, and service fees, which must be disclosed under proposed § 205.20(d)(2). Therefore, fees other than dormancy, inactivity, or service fees, such as one-time initial issuance fees and cash-out fees, must be disclosed under proposed § 205.20(f)(1). Furthermore, in light of the other disclosures that must be provided on the certificate or card itself and because the size of a certificate or card may limit the disclosures that may be clearly and conspicuously disclosed on the certificate or card, the proposal permits this additional information to be disclosed either on or with the certificate or card. In addition, similar to the disclosure requirements for dormancy, inactivity, and service fees, the Board proposes to require the disclosure of these fees prior to purchase, as discussed above in the supplementary information to § 205.20(c)(3).

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

The Board also proposes to use its authority under new EFTA Sections 915(c)(2)(B) and 915(d)(1)(A), and EFTA Section 904 to require that a toll-free telephone number and, if one is maintained, a Web site, for information on fees be disclosed clearly and conspicuously on a gift certificate, store gift card, or general-use prepaid card. *See* 15 U.S.C. 1693m(c)(2)(B); 15 U.S.C. 1693m(d)(1)(A); 15 U.S.C. 1693b. Under proposed § 205.20(f)(2), a toll-free telephone number must be maintained to provide information on fees required to be disclosed under proposed §§ 205.20(d)(2) and (f)(1). The proposed rule does not similarly require that a Web site be maintained for such purposes, but if one is maintained, that Web site must also be disclosed under § 205.20(f)(2).

As discussed above, given the limited space on a certificate or card, the Board anticipates that issuers may opt to disclose some fee information on materials accompanying the certificate or card, as opposed to on the certificate or card itself. If such information accompanies the certificate or card, the disclosure may 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 proposal seeks to ensure that consumers 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.

Furthermore, the Board believes requiring the telephone number to be toll-free is appropriate. Because gift certificates, store gift cards, and general-use prepaid cards may be given by the purchaser to another person, the end user of the certificate or card may not reside in the area where the certificate or card was initially purchased. In addition, the majority of certificates or cards sold in the United States are issued by large retailers or large banks whose customer service centers are not necessarily located in the area where the certificate or card was purchased or will be used. A toll-free telephone number would provide consumers with a means to access fee and replacement certificate or card information without cost no matter where in the United States the user of the certificate or card may utilize 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. Issuers maintaining toll-free telephone numbers or Web sites often provide this information directly on the certificates or cards they issue. As a result, the Board believes the proposed rule would not impose additional burden on many issuers.

The proposal contains several comments to clarify proposed § 205.20(f). Proposed comment 20(f)–1 clarifies that if a certificate or card does not have any fees, the disclosure required by § 205.20(f)(2) need not be disclosed on the certificate or card. A telephone number and a Web site may still be required 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.

Proposed 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).¹⁶ 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.

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

Additional Issues

Authority To Adopt Additional EFTA Protections

New EFTA Section 915(d)(2) directs the Board 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). As discussed in proposed § 205.20(f), the Board is proposing to exercise this authority to mandate for each type of fee that may be imposed (such as a transaction fee, a balance inquiry fee, or an issuance fee), disclosure of the type of fee, the amount of the fee, and the conditions under which such fee may be imposed. These disclosures must be provided on or with a gift certificate, store gift card, or general-use prepaid card subject to the rule. This

¹⁶ The contact information may also be the same contact information provided for any or all customer service issues or questions relating to the certificate or card.

requirement is consistent with the requirement in EFTA Section 905(a)(4) (15 U.S.C. 1693c(a)(4)) and Regulation E § 205.7(b)(5) to disclose any charges for EFTs or for the right to make transfers.

The Board is not proposing at this time to apply to gift certificates, store gift cards, or general-use prepaid cards, any other requirements that generally apply to accounts under the EFTA and Regulation E, such as periodic statement disclosures or error resolution obligations. See, e.g., EFTA Sections 906(c) and 908; 15 U.S.C. 1693d(c) and 1693f. The Board believes that it is more appropriate to make any such determination in the context of a broader rulemaking that covers prepaid cards generally 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 in many cases are marketed as substitutes for accounts subject to the EFTA and Regulation E.

At this time, the Board is also not proposing to exercise the authority under new EFTA Section 915(d)(1) to limit the amount of dormancy, inactivity, or service fees, or the balance below which such fees or charges may be assessed. See 15 U.S.C. 1693m(d)(1). The Board understands that dormancy and inactivity fees in connection with retail gift cards have trended downward over time. For example, the most recent survey by one government agency indicates the median inactivity fee has decreased from \$1.73 per month to \$1.38 per month from 2003 to 2007.¹⁷ Given this trend, there does not appear to be a need for the Board to adopt additional restrictions at this time. Moreover, the statute only permits one such fee per month if there has been no activity over the preceding 12-month period. The Board will continue to monitor the development of the gift card

¹⁷ See Montgomery County Office of Consumer Protection, Gift Card Reports, 2003–2007 (available at: <http://www.montgomerycountymd.gov/ocptmpl.asp?url=/content/ocp/consumer/azgiftcardreports.asp>). One major issuer of a network-branded gift cards has recently announced plans to eliminate monthly fees altogether. See Andrew Martin, “American Express to End Monthly Fees on Gift Cards,” *New York Times*, October 1, 2009, at B2. In addition, the Retail Gift Card Association which is comprised of nine of the top retail merchant issuers of retail closed-loop gift cards includes in its Code of Principles, the elimination of dormancy or inactivity fees and of expiration dates. See Retail Gift Card Association, Code of Principles (available at: http://www.thergca.org/uploads/Code_of_Principles_PDF.pdf).

market and could take action to address dormancy, inactivity, or service fees at a later time, if appropriate.

Transition Issues

As discussed above, the Credit Card Act requires the Board to adopt final rules implementing new EFTA Section 915 within nine months of the date of enactment, or no later than February 22, 2010. These final rules must become effective no later than August 22, 2010.

In light of the pending effective date of the final rule, the Board seeks comment on the potential costs that would be incurred if issuers and other program participants 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 solicits comment on whether it should consider rules to grandfather gift certificates, store gift cards, or general-use prepaid cards, as those terms are defined, that are in the marketplace as of the effective date of the rule from some or all of the requirements set forth in this rulemaking. For example, the Board 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. To the extent such relief would be provided, however, the Board believes it would be appropriate to do so only for cards that are sold in physical retail channels, but not to cards that are purchased on-line or by telephone, as they may not present the same operational challenges in replacing existing card stock compared to the former. In addition, if the Board were to permit certificates or cards that are available on retail shelves or in distribution warehouses to be sold to consumers after the effective date, comment is requested regarding how issuers or vendors could alert consumers to the changed terms regarding dormancy, inactivity, or service fees and funds expiration dates. The Board also solicits comment on an appropriate transition period after which all certificates or cards must fully comply with the new rules.

V. Initial 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 proposed rule is not likely to have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Statement of the need for, and objectives of, the proposed 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).

The Board is proposing revisions to Regulation E to implement Title IV of the Credit Card Act which would generally prohibit any person from imposing 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 proposed rule would require 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 state a toll-free telephone number and, if one is maintained, a Web site that a consumer may contact 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 proposed rule.* The number of small entities affected by this proposal is unknown. Under the proposed rule, a person would be 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 vendor must provide these disclosures to the purchaser before the certificate or card is purchased.

The proposed rule would also provide 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 given prior to purchase.

Two proposed alternative approaches are set forth to minimize potential confusion for consumers if the certificate or card expires before the underlying funds expire. The first alternative would prohibit 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 require entities subject to the rule to maintain policies or procedures to ensure that a consumer has 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 proposed rule would also prohibit 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 proposed rule would require the disclosure of all other fees imposed in connection with a gift certificate, store gift card, or general-use prepaid card. These disclosures would have to be provided on or with the certificate or card and given prior to purchase. The proposed rule would also require 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 contact to obtain fee information or replacement certificates or cards.

Overall, to comply with the proposed rule, all persons involved in issuing, distributing or selling a gift card program may need to review and potentially revise disclosures that appear on or with a certificate or card. In addition, under either alternative approach to the rule addressing potential inconsistencies between card expiration dates and funds expiration dates, issuers, sellers, and distributors of gift certificates, store gift cards, and general-use prepaid cards will have to review and potentially revise their inventory distribution and management policies and controls to minimize the possibility that a consumer may purchase a card with an expiration date of less than five years from the date of purchase.

For gift certificates and store gift cards in particular, the proposed rule would potentially cover all merchants to the extent that they issue or sell gift certificates or store gift cards. According to the U.S. Census Bureau, there were over 3 million businesses that are involved in retail or food services as of September 2009.¹⁸ These businesses are potential issuers of gift certificates or store gift cards.¹⁹

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.²⁰ Of the over 3 million retail or food services businesses, the Board expects that well

¹⁸ See U.S. Census Bureau, Press Release, "Advance Monthly Sales for Retail and Food Services—September 2009," (available at: http://www.census.gov/retail/marts/www/marts_current.pdf).

¹⁹ The Board is unaware of any industry data regarding the number of merchants that issue gift certificates, store gift cards, or general-use prepaid cards. Nonetheless, the Board believes the actual number of merchants that issue such certificates or cards is likely to be far fewer than the number of businesses that are involved in retail or food services overall.

²⁰ See SBA, Summary of Size Standards by Industry (available at: <http://www.sba.gov/contractingopportunities/officials/size/summaryofssi/index.html>).

over 90% of these businesses qualify as small businesses under the SBA's standards.²¹ Consequently, a very large number of small entities across all retail trade or food categories could be subject to the proposed rules.

Nonetheless, the proposed requirements would only apply 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.²² Moreover, smaller merchants are more likely to issue gift certificates in paper form only. Such certificates are excluded from coverage by the statute and proposed rule. *See* proposed § 205.20(b)(5). Thus, the Board believes the proposed rule would not impact a significant number of merchants that issue store gift cards or gift certificates. Similarly, the Board believes the proposed 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 proposed rule would potentially cover 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 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 would be more likely to be impacted by the proposed rule.

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 because they

are reloadable and not marketed or labeled as a gift card or gift certificate. Moreover, as noted 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 number of cards issued and the dollar value of the amounts loaded. Thus, although the Board is not aware of any data regarding entities that issue or otherwise sell general-use prepaid cards, the Board does not believe that, overall, the rule is 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 proposed revisions to Regulation E.

4. *Significant alternatives to the proposed revisions.* The Board solicits comment on any significant alternatives that would reduce regulatory burden associated with this proposed rule on small entities.

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the 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 proposed 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 proposed 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. Loyalty, award, and promotional gift cards also must state disclosures regarding applicable fees and expiration dates.

Entities subject to the 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 proposed 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

²¹ *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).

²² *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).

separate final rulemaking (Docket No. R-1343).

Proposed § 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 proposed comment 205.20(b)(2)-4.i., institutions would qualify for this exclusion so long as 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 are established and maintained. The Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve would take, on average, 40 hours (one-business week) to implement written policies and procedures and provide training associated with proposed § 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 would take an average of 8 hours annually to maintain their policies and procedures.

The Federal Reserve is proposing two alternative approaches for applying new EFTA Section 915(c) to the expiration of a certificate or card in § 205.20(e)(1). Alternative A proposes that institutions may 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. Alternative B would require institutions involved in issuing, distributing, and selling certificates or cards 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. With either alternative the Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve would take, on average, 40 hours (one-business week) to implement or modify written policies and procedures and provide training associated with proposed § 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 proposed § 205.20(e)(3), three disclosures must be stated on the certificate or card, as applicable: (1) Disclosures must state the terms of expiration of the underlying funds or, if the underlying funds do not expire, that fact; (2) Disclosures must also 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 be available; (3) The terms and conditions of funds expiration required to be disclosed must also include 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. The Federal Reserve estimates that the 1,205 respondents regulated by the Federal Reserve would 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 section 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 Federal Reserve estimates the proposed rule would 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 proposed rule would impose a one-time increase in the estimated annual burden for such institutions by 2,752,000 hours. On a continuing basis the proposed rule would increase in the estimated annual

burden for such institutions by 275,200 hours. The proposal total annual burden for the respondents regulated by the Federal financial agencies is estimated to be 4,430,659 hours.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; (b) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95-A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced brackets.

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 proposes to amend 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 205.4(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.

* * * * *

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

§ 205.12 Relation to other laws.

* * * * *

(b) * * *

(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 to dormancy, inactivity, or service fees, or expiration dates, of gift certificates, store gift cards, or general-use prepaid cards◀.

* * * * *

4. 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 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 to a consumer in a specified amount, whether or not that amount may be increased or reloaded by the cardholder, 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 to a consumer in a specified amount, whether or not that amount may be increased or reloaded by the cardholder, 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 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 disclosures specified in paragraphs (d)(2), (e)(2), and (f)(2) of this section and provides the disclosures specified in paragraph (f)(1) of this section on or with 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.

(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;

(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. 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, the issuer or vendor of such certificate or card must disclose to the consumer the information required by paragraphs (d)(2), (e)(3), and (f)(1) of this section.

(4) *Disclosures on the certificate or card.* Paragraphs (d)(2), (e)(3), and (f)(2) of this section require that certain

information be disclosed on the certificate or card. 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.

(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.

Alternative A—Paragraph (e)

(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 certificate or card expiration date, if any, is at least five years after the date the certificate or card was sold or issued to a consumer;

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

(i) Five years after the date the gift certificate was issued, or five years after 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) A statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, 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; and

(4) No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card prior to the funds expiration date, unless such certificate or card has been lost or stolen.

Alternative B—Paragraph (e)

(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 policies and procedures in place 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;

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

(i) Five years after 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

(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) A statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, 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; and

(4) No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card 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.* Additional disclosures must be provided in connection with a gift certificate, store gift card, or general-use prepaid card, as applicable, as indicated below:

(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.

5. In Supplement I to part 205.

a. Under § 205.12 Relation to other laws, under (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, dormancy, inactivity, or service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards 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 section 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) of this section, even if it is not issued in card form. Section 205.20 would apply, for example, to the issuance of an account number or bar

code that can access underlying funds. Similarly, § 205.20 would apply to a device with a chip or other embedded mechanism, linking the device to stored funds, such as a mobile phone or sticker containing a contactless chip, if the device otherwise meets the definition of gift certificate, store gift card or general-use prepaid card.

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 would be a card, code, or other device covered by § 205.20.

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 certificates” 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 would include 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 each other, 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 theatres and the restaurants would be considered to be an affiliated group of merchants, and the cards would be considered to be “store gift cards.”

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 which are generally 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 locations in 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 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 would be considered general-use prepaid cards.

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

1. *Examples of loyalty, award, or promotional programs.* Section 205.20(a)(4) defines a loyalty, award, or promotional gift card as a card, code, or other device that is issued in connection with a loyalty, award or promotional program. Such cards, codes, or other devices are excluded from the definitions of “gift certificate,” “store gift card,” and “general-use prepaid card” under § 205.20(b)(3), provided that the disclosures specified in paragraphs (d)(2), (e)(2), and (f) of this section are given to the consumer, on or with the card, as specified in § 205.20(a)(4)(iii). Examples of loyalty, award or promotional programs include:

i. Loyalty or consumer retention programs operated or administered by a merchant that provide to consumers cards redeemable for goods or services

or other monetary value as a reward for certain purchases at or visits to the participating merchant;

ii. Rebate programs operated or administered by a merchant or product manufacturer that provide cards redeemable for 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.

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

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

v. Incentive programs through which an employer may provide cards redeemable for goods or services or other monetary value to employees, for example, to recognize job performance, such as increased sales.

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, 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. A service fee does not include a one-time fee, such as an initial issuance fee or a cash-out fee.

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 fall within more than one exclusion. If a card, code, or other device falls within any exclusion, it generally is not covered by § 205.20, even if another exclusion may not apply. Thus, for

example, a corporation may award its employees with a gift card of a type that can also be purchased directly from the merchant. While the card may 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 may nevertheless be 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.)

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 analogous in function to a telephone, 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 it has the capability of having more funds added by a cardholder after the initial purchase or issuance.

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 or certificate, 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 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.

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

- i. Displaying the word “gift” or “present” on a card, certificate, or accompanying material, including documentation, packaging and promotional displays;
- ii. 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;
- iii. 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.

The term does not include:

- i. Representing that a card or certificate can be used as a substitute for a checking, savings, or deposit account;
- ii. 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;
- iii. Representing that a card or certificate can be used as a substitute for travelers’ checks or cash by the purchaser;
- iv. Representing that a card or certificate can be used as a budgetary tool or to cover emergency expenses.

4. *Reasonable procedures regarding marketing.* The exclusion for a card, code, or other device is reloadable and is not marketed or labeled as a gift card or gift certificate in § 205.20(b)(2) applies if an individual card, code, or other device is not marketed or labeled as a gift card or gift certificate and if entities subject to the rule maintain policies and procedures reasonably designed to avoid such marketing. 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 include restrictions prohibiting the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and requirements for 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 even if a retail clerk inadvertently stocks or places some of the general-purpose reloadable cards on the gift card display notwithstanding the issuer or program manager’s maintenance of policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates.

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, general-purpose reloadable cards, and wireless telephone cards. A sign stating “Gift Cards” appears prominently at the top of the display. The issuer or program manager does not qualify for the exclusion in § 205.20(b)(2) with respect to the general-purpose reloadable card 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.

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 regardless of the advertising medium, including television, radio, newspaper, the Internet, or signage. 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 illustrating exclusion for cards, codes, or other devices “not*

marketed to the general public.” The following examples illustrate application of the exclusion in § 205.20(b)(4) for cards, codes, or other devices not marketed to the general public.

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. If any member of the general public may become a member of the program, the card does not fall within the exclusion in § 205.20(b)(4) because the general public has the ability to obtain the cards.

iii. An issuer of prepaid cards 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.

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. An employer provides a prepaid card to its employees to cover travel expenses and per diem. Because the prepaid card is simply the means for distributing travel expenses and per diem and the availability of the card is not advertised or available to the general public, the exclusion in § 205.20(b)(4) applies.

vi. 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.

vii. A tax preparation company elects to distribute tax refunds to its clients by issuing non-reloadable 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 or card or certificate number sent electronically 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. Similarly, an on-line retailer may electronically mail a certificate redeemable for goods or services to a consumer, which the consumer could print out on a home printer. In these circumstances, 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. However, a paper certificate that bears a bar code or account number may fall within the exclusion in § 205.20(b)(5) if the bar code or account number is not issued in any form other than on the paper. In addition, the exclusion in § 205.20(b)(5) would continue 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).

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

1. *Examples.* The exclusion for payment 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 for admission for entry to an event or venue. The exclusion also covers a card, code, or other device that is usable to purchase of goods or services purchased 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. The following examples illustrate the scope of § 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 does not state a monetary value and may only be used for entry to the park. The card qualifies for the exclusion in § 205.20(b)(6) because it is redeemable solely for admission or entry to an event or venue.

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 but alternatively can also apply the value on the card 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 the substantive and disclosure requirements of §§ 205.20(d), (e), and (f), unless a different exclusion applies.

iv. A consumer purchases a gift card that is redeemable for a particular service such as a spa treatment or for a one-night hotel stay. The card is not eligible for the exclusion in § 205.20(b)(6) because it is not redeemable for admission to an event or venue (in this case, the spa or hotel), but instead for a specified service at the spa or hotel. The card meets the definition of “store gift card” and is therefore subject to the substantive and disclosure requirements of §§ 205.20(d), (e), and (f), unless a different exclusion applies.

v. A consumer purchases a gift card that is redeemable solely for a one-year membership to a buyer’s club or warehouse, or to a gym. The card falls

within the exclusion in § 205.20(b)(6) because it is redeemable solely for membership to the club or gym and the membership is necessary for entry or admission to the club or gym. The exclusion would not apply, however, if the card has value that could be applied *either* to membership or for goods or services at the warehouse or gym.

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 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 it obstructs the readability of the type. 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 U.S.C. 7001 *et seq.*). Electronic disclosures may not be provided through a hyperlink or in another manner by which the purchaser can bypass the disclosure. An issuer or vendor is not required to

confirm that the consumer has read the electronic disclosures.

2. *Non-physical certificates and cards.* If no certificate or card is issued, the disclosures must accompany the code, confirmation, or other written or electronic document provided to the consumer.

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

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

20(d) Prohibition on Imposition of Fees or Charges

1. *One-year period.* Section 205.20(d) provides, in part, that a person may not impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card until 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. 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 not be imposed on the certificate or card until January 15 of year two.

ii. A certificate or card is purchased on February 29 of a leap year. 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 not be imposed on the certificate or card until February 28 of the following year.

iii. 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.

iv. 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. Under this circumstance, another dormancy,

or service fee could not be imposed until January 31 of year three at the earliest, assuming there has been no activity on the certificate or card since January 31 of year two.

2. *Activity.* Any action by a consumer to increase, decrease, or otherwise make use of the funds underlying a gift certificate, store gift card, or general-use prepaid card constitutes activity for purposes of § 205.20(d). For example, the purchase and activation of a certificate or card or the reloading of funds onto a store gift card or general-use prepaid card constitutes activity. However, neither the imposition of a fee, the replacement of an expired, lost, or stolen certificate or card, nor a balance inquiry constitutes activity with respect to a gift certificate, store gift card, or general-use prepaid card.

3. *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 an issuer or vendor of 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 or in multiple locations 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 or other materials 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 or in other manner visible to the consumer to meet the requirements of § 205.20(c)(3).

4. *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.

5. *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 performs a balance inquiry on January 1, 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 January 1, following a year of inactivity. If a consumer cashes out the funds on a general-use prepaid card on January 15, a cash-out fee may be imposed at that time because a cash-out fee is not a dormancy, inactivity, or service fee.

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

Alternative A

1. *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.”

2. *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.

3. *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).

4. *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 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.

5. *Distinguishing between certificate or card expiration and funds expiration.* If applicable, § 205.20(e)(3)(iii) requires a disclosure to be made on the certificate or card that notifies a consumer 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. The disclosure must be made with equal prominence and in close proximity to the certificate or card expiration date. 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. 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, “Valid thru 09/2016. Call for new card.”; “Active thru 09/2016. Call for replacement card.”; or “Call for new card after 09/2016.”

6. *Relationship between §§ 205.20(d)(2), (e)(3), and (f)(2).* In addition to 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.

7. *Replacement of a lost or stolen certificate or card not required.* Section 205.20 does not require the replacement of a certificate or card that has been lost or stolen.

8. *Date of issuance or loading.* A certificate or card is not issued or loaded with funds until the certificate or card is activated for use.

Alternative B

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 or procedures in place to ensure that a consumer has a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date. The following examples illustrate reasonable and unreasonable opportunities for consumers to purchase a certificate or card with at least five years remaining

until the certificate or card expiration date:

i. A card would comply with § 205.20(e)(1) if it is printed with a card expiration date six years from the date it was produced and is on a display rack of a retail store within six months of the date the card was produced.

ii. A card would comply with § 205.20(e)(1) if it is printed with a card expiration date seven years from the date it was produced and is on a display rack of a retail store within one year and six months of the date the card was produced, the card would comply with § 205.20(e)(1).

iii. A card would not comply with § 205.20(e)(1) if it is printed with a card expiration date six years from the date it was produced and is stored in a distribution warehouse for more than one year after the date the card was produced.

2. *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.”

3. *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.

4. *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).

5. *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 underlying funds do not expire.

6. *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. 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. 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, “Valid thru 09/2016. Call for new card.”; “Active thru 09/2016. Call for replacement card.”; or “Call for new card after 09/2016.”

7. *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.

8. *Replacement of a lost or stolen certificate or card not required.* Section 205.20 does not require the replacement of a certificate or card that has been lost or stolen.

9. *Date of issuance or loading.* A certificate or card is not issued or loaded with funds until the certificate or card is activated for use.

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 required by § 205.20(f)(2) need not be stated 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 fulfill §§ 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 underlying funds do not expire.

3. *Relationship between §§ 205.20(d)(2), (e)(3), and (f)(2).* In addition to any disclosures required to be made 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.

By order of the Board of Governors of the Federal Reserve System, November 13, 2009.

Jennifer J. Johnson,
Secretary of the Board.

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