



Evolving Payments Regulation In the United States

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Financial Regulation Reform 2009

- There is significant interest in the U.S. in reforming regulation of the financial services industry
- Emphasis on:
 - » Regulation of “Systemic Risk”
 - » Consolidation of regulatory agencies
 - » Consumer financial protection (mortgages, credit cards)
- E-money, prepaid debit, stored value are NOT the focus, but are affected
- Proposed Consumer Financial Protection Act would expand Federal regulation of nonbank financial services providers.

Credit CARD Act of 2009

- Credit Card Accountability Responsibility and Disclosure Act of 2009 (May 22, 2009)
- Effective Date: February 22, 2010
- Gives the Federal Reserve Board power to regulate inactivity fees and expiration dates for prepaid cards, gift cards and stored value products
- The Board issued proposed regulations on November 20, 2009

Proposed Amendments to Reg. E

Board of Governors of the Federal Reserve System (FRB)

- Central Bank of the United States
- Supervises and regulates financial institutions
- Regulates electronic funds transfers through Regulation E (Reg E)

Proposed Amendments to Reg. E

- Proposed amendments dealing with general use prepaid cards and store gift cards on November 20, 2009
- Public comment will be accepted through December 21, 2009
- Regulates
 - » dormancy or inactivity fees
 - » expiration dates of cards and underlying funds
- Overlaps with many state laws increasing confusion as to which law controls

Proposed Amendments to Reg. E

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.

Proposed Amendments to Reg. E

Alternative A -- No person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an **expiration date**, unless:

- (1) The **expiration date, if any, is at least five years** after the date 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 on which funds were last loaded to a store gift card or general-use prepaid card; or
 - » (ii) The card expiration date, if any;
- (3) Certain disclosure are made regarding the expiration date of the card, the underlying funds, and how to obtain a new card if card but not funds have expired.

Proposed Amendments to Reg. E

Alternative B -- 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 on which funds were last loaded to a store gift card or general-use prepaid card; or
 - » (ii) The card expiration date, if any;
- (3) Certain disclosure regarding the expiration date of the card, the underlying funds, and how to obtain a new card if card but not funds have expired.

Proposed Amendments to Reg. E

- *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.

Proposed Amendments to Reg. E

- *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.

Proposed Amendments to Reg. E

- *“Gift Card” and “General Use Prepaid Card” exclude cards:*
 - » (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.

Proposed Amendments to Reg. E

- The term “marketed or labeled as a gift card” means directly or indirectly offering, advertising or otherwise suggesting the potential use of a card as a gift for another person.
- A card, including a general-purpose reloadable card, is marketed as a gift card even if it is only occasionally marketed as a gift card.

Proposed Amendments to Reg. E

- Examples of marketed or labeled as a gift card or gift certificate include:
 - » i. Displaying the word “gift” or “present” on a card or accompanying material, including packaging and promotional displays;
 - » ii. Suggesting that a card can be given to another person, for example, as a “token of appreciation” or a “stocking stuffer”;
 - » iii. Incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or congratulatory message, on a card.

Proposed Amendments to Reg. E

- *“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) Complies with certain disclosure requirements.

Credit CARD Act of 2009

- Directed FinCEN to issue regulations under the Bank Secrecy Act regarding the “sale, issuance, redemption, or international transport of stored value, including stored value cards”.
- Proposed regs not issued yet, BUT
- Proposed regs were issued which would require foreign located MSBs with a U.S. presence must comply with U.S. AML rules.



Financial Crimes Enforcement Network (FinCEN)

- Safeguards the financial system from terrorist financing, money laundering, and other financial crimes.
- Administers the Bank Secrecy Act.
- Gathers and analyzes financial intelligence and shares with law enforcement agencies.



- Under the Bank Secrecy Act, FinCEN regulates nonbank “**Money Services Businesses**” (MSBs) which includes currency exchanges, check cashers, money transmitters and sellers and redeemers of stored value.



- Under the Bank Secrecy Act, “**stored value**” means “funds or monetary value represented in digital electronics format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically.”

Proposed Amendments to MSB Regs

- FinCEN issued proposed amendments to the MSB rules on May 12, 2009.
- Comment period has closed.
- Final regulations have not yet been issued.

Proposed Amendments to MSB Regs

Proposed amendment to MSB regulations:

- *Foreign-located money services business.* Each **foreign-located person engaged in activities in the United States** as a money services business shall designate the name and address of a person who resides in the United States and is authorized, and has agreed to be an agent to accept service of legal process with respect to compliance with this part and shall identify the address of the location within the United States for records pertaining to paragraph (b) (1)(iii) of this section.

Proposed Amendments to MSB Regs

Commentary to Proposed amendment:

- Technological advances make it increasingly possible for MSBs to offer financial services through mechanisms other than “brick and mortar” locations. Foreign entities can and do offer services in the U.S. through other instrumentalities, such as the Internet or a U.S.-based bank account.

Proposed Amendments to MSB Regs

Commentary to Proposed amendment:

- We intend to include an entity that has a presence in the U.S. by means of the **internet** or similar mechanism, or by means of an **account with a U.S. financial institution** and who, for instance, is transmitting money through the account with U.S. customers or recipients.

Proposed Amendments to MSB Regs

Commentary to Proposed amendment:

- If a foreign-located business is an MSB according to our regulations, then it will have the **same reporting and recordkeeping and other requirements** as an MSB with a physical presence in the United States, with respect to its U.S. activities.

Interchange

- Credit Card Act ordered a study on Interchange Fees
- Report, issued in November, concludes:
 - » Interchange fees are up
 - » Cards provide benefits to merchants
 - » While options to lower fees exist, they face significant implementation challenges and impact on consumers would be mixed
- Several legislative proposals exist to modify how interchange is set

Emerging Issue

Asset Forfeiture and Prepaid Debit

- Law Enforcement has authority to seize “instrumentalities” and “proceeds” of crime in certain situations
- After legal appropriate legal proceedings, seized assets are forfeited to government
- Forfeited assets supplement Law Enforcement budgets

Emerging Issue

Asset Forfeiture and Prepaid Debit

- When drug dealers, prostitutes etc. are arrested, commonly possess prepaid cards and/or reload network “packs” instead of cash.
- Law Enforcement is interested in seizing funds tied to confiscated prepaid products
- Nevada has new state law which allows for forfeiture of prepaid cards

Emerging Issue

Asset Forfeiture and Prepaid Debit

- Asset forfeiture law not easy to apply to prepaid products
 - » Forfeiture based on “*in rem*” jurisdiction over object rather than owner
 - » While the card may be present, the funds linked to the card may not be within the jurisdiction
 - » Cards used by bad guys may be forged

Emerging Issue

Asset Forfeiture and Prepaid Debit

- Unclear if current asset forfeiture laws work to seize funds outside a jurisdiction based solely on card's presence
- If law enforcement seizes prepaid card preventing the "bad guy" from getting the funds, but does not take the funds -- **who gets the money?**