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## CONSUMER PROTECTION BILL 19D OF 2008

### PREPAID CERTIFICATES, CREDITS AND VOUCHERS

19 February 2009

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## TOPICS

- ▶ The nature of prepaid cards
- ▶ The effect of the Consumer Protection Bill on prepaid cards
- ▶ The effect of the Consumer Protection Bill on pre-existing agreements related to prepaid cards
- ▶ The current regulatory environment -
  - System operators
  - Banks Act 94 of 1990
  - Position paper on electronic money issued by the South African Reserve Bank
  - Financial Intelligence Centre Act 38 of 2001



## PREPAID CARDS

- ▶ An alternative for the unbanked – also known as stored value cards
- ▶ Market is growing and evolving rapidly from closed loop cards to multipurpose open loop cards which are reloadable.
- ▶ Closed loop/system– gift card/certificate/voucher which may be used at a single retailer
- ▶ Semi closed - card can be used at multiple merchants such as merchants in a particular shopping mall
- ▶ Semi open – Branded card accepted by merchants and linked to a pooled account at a bank. Do not allow cash from an ATM
- ▶ Open loop – linked to the customer's account and used for multiple purposes at multiple points of sale (purchases, paying accounts), plus ATM functionality



## PREPAID CARDS

- ▶ Cards may be used on line or off line.
- ▶ Different products: reloadable prepaid cards (consumer funded) vs “business to employee” (payroll cards in the US).
- ▶ Substitute for a bank account?



## CONSUMER PROTECTION BILL

- ▶ 63. (1) This section applies only to a transaction in which a supplier—
  - ▶ (a) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and
  - ▶ (b) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it,
- ▶ but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services.



## EXPIRY DATE

- ▶ (2) A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) does not expire until the earlier of—
  - ▶ (a) the date on which its full value has been redeemed in exchange for goods or services or future access to services; or
  - ▶ (b) three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.



## THE PROPERTY OF THE BEARER

- ▶ (3) Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services.
- ▶ The consideration paid is the property of the bearer of the card, and not that of the consumer who paid the consideration.
- ▶ Open loop vs closed loop transactions



## SUPPLIER TO HOLD AND ACCOUNT FOR CONSUMER'S PROPERTY

- ▶ 65. (1) Subsection (2) does not apply to a supplier that is—
- ▶ (a) a bank, as defined in the Banks Act, 1990 (Act No. 94 of 1990);
- ▶ (b) a mutual bank, as denned in the Mutual Banks Act, 1993 (Act No. 124 of 1993); or
- ▶ (c) any other financial institution that is similarly licensed and authorised to conduct business and take deposits from the public in terms of any national legislation.



## SUPPLIER TO HOLD AND ACCOUNT FOR CONSUMER'S PROPERTY

- ▶ (2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier—
  - ▶ (a) must not treat that property as being the property of the supplier;
  - ▶ (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
  - ▶ (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).



## THE SUPPLIER IS LIQUIDATED

- ▶ (3) A person who assumes control of a supplier's property as administrator, executor or liquidator of an estate—
  - ▶ (a) has a duty to the consumer—
    - ▶ (i) to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier; and
    - ▶ (ii) to ensure that any such money or property is dealt with for the consumer's benefit in accordance with this section; and
  - ▶ (b) is liable to the consumer for any loss, unless that person has acted—
    - ▶ (i) in good faith; and
    - ▶ (ii) without knowledge of the existence of the consumer's interest.



## PRE-EXISTING AGREEMENTS

- ▶ The general effective date: 18 months after the date on which the President signed the Act.
- ▶ “ Schedule 2: Item 3. “ (1) Except to the extent expressly set out in this item, this Act does not apply to—
- ▶ (a) the marketing of any goods or services before the general effective date;
- ▶ (b) any transaction concluded, or agreement entered into, before the general effective date; or
- ▶ (c) any goods supplied, or services provided, to a consumer before the general effective date.



## PRE-EXISTING AGREEMENTS

- ▶ “(2) The sections of this Act listed in the first column of the following table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if that pre-existing agreement—
- ▶ (a) would have been subject to this Act if this Act had been in effect at the time the agreement was made; and
- ▶ (b) contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date...”
- ▶ Clause 65: Applies only with respect to an amount paid or payable by the consumer, or to property that comes into the possession of the supplier, on or after the general effective date.



## PREPAID CARDS: REGULATORY ENVIRONMENT

- ▶ Issued by banks and non-banks: terms and conditions determined by contractual arrangements
- ▶ Banks may outsource transaction processing to third parties, who may be regarded as system operators for purposes of the National Payment System Act 78 of 1998 .
- ▶ A system operator is a person, authorised by PASA to provide services to two or more persons in respect of payment instructions
- ▶ System operators must comply with Directive 2/2007 issued by the SARB.
- ▶ This directive governs a system operator ("SO") in respect of the services it provides to any two or more persons in respect of payment instructions, including the delivery to and/or receipt of payment instructions from a bank and/or a PCH system operator.



## PREPAID CARDS: SYSTEM OPERATORS

- ▶ In terms of the Directive the SO must –
  - meet the criteria set by PASA;
  - have a written agreement with each person to whom the services are rendered in terms of which it is appointed as a system operator;
  - keep the information in respect of the services rendered to any person confidential and separate;
  - in respect of the bank accounts from which funds are to be paid from or to which funds are to be transferred to, only act in accordance with instructions issued by the person to whom the service is rendered, and not pay such funds from or transfer such funds to its own account;



## SYSTEM OPERATORS

▶ The SO must also -

- keep separate and distinct the business divisions of that person who provides system operator services from the other business divisions of that person who provides payments to third persons (see Directive 1 of 2007);
- refrain from providing services which allow the offsetting of mutual obligations by trading partners or persons for whom they are processing payment instructions; and
- keep records of each and every payment instruction processed by it for a period of five (5) years



## TRANSACTION PROCESSING ON OWN BEHALF

- ▶ Persons who process payment instructions, including the delivery to and/or receipt of payment instructions from a bank and/or a PCH system operator, on their own behalf, are not considered system operators in terms of this directive.
- ▶ Such persons are, however, required to meet the same level of compliance with operational and technical requirements as required in terms of sections 3.4.1 to 3.4.4 of the Criteria for System Operators. In terms of those criteria, such a person must -
- ▶ have tested its systems to ensure it is operationally and technically capable of providing the service, and to this end -
  - that its system are interoperable with the relevant banks and/or PCH system operator; and
  - must be confirmed by the appropriate PCH system operator or if relevant, each of the banks concerned;



## TRANSACTION PROCESSING ON OWN BEHALF

- ▶ Such a person must also -
- ▶ in the event of providing a service in respect of payment instructions issued by means of cards issued by any card association, ensure that it has been certified and/or registered with such a card association. This must be confirmed by the relevant card association;
- ▶ provide confirmation to PASA from its chief executive office, managing director or equivalent on the board of directors, that it has –
  - an appropriate documented business continuity plan in place in respect the service; and
  - an appropriate disaster recovery plan in place that is tested and audited regularly (at least once a year).



## BANKS ACT 94 OF 1990

- ▶ In terms of section 11(1) of the Banks Act 94 of 1990 ("Banks Act"), no person may conduct "the business of a bank" unless such a person is a public company and is registered as a bank in terms of the Banks Act. Any person who contravenes the prohibition is guilty of an offence and if convicted, is liable to a fine or to imprisonment for a period not exceeding then years or to both a fine and such imprisonment (section 91(4)).
- ▶ The business of a bank includes, amongst others, the acceptance of "deposits" from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question as well as the soliciting of or advertising for deposits.



## BANKS ACT 94 OF 1990

- ▶ The main part of the definition of a "deposit" reads as follows:
- ▶ "... an amount of money paid by one person to another person subject to an agreement in terms of which-
- ▶ (a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and
- ▶ (b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise...".



## BANKS ACT 94 OF 1990

- ▶ If the consideration paid by the consumer remains the property of the bearer (who could also be the consumer), does this mean that the bearer would be entitled to redeem the card for cash “to the extent that the supplier has not redeemed it in exchange for goods and services”?
- ▶ If a merchant issues pre-paid debit cards to consumers, and such cards are also redeemable for cash at the merchant, the merchant may be regarded as conducting “the business of a bank”: The amount paid for the card will be regarded as the acceptance of a deposit as defined, because the amount of money paid is subject to an agreement in terms of which an equal amount or a part thereof will be conditionally or unconditionally repaid.



## BANKS ACT 94 OF 1990

- ▶ Wide powers of exemption are granted to the Minister under paragraphs (cc) and (dd) of the definition: The business of a bank does not include -
- ▶ "(cc) any activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Registrar, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine in the relevant notice;
- ▶ (dd) any activity contemplated in paragraph (a), (b) or (c)-
- ▶ performed by any institution registered or established in terms of, by or under any other Act of Parliament and designated by the Minister by notice in the Gazette; or
- ▶ (ii) performed in terms of any scheme authorized and controlled by, and conducted in accordance with the provisions of, any other Act of Parliament and so designated by the Minister,
- ▶ provided such activity is performed in accordance with such conditions as the Minister may determine in the relevant notice..."
- ▶ The Registrar of Banks thus has the power, with the approval of the Minister of Finance, to designate particular activities as activities which do not fall within the meaning of the business of a bank. Any activity so exempted will have to be performed in accordance with such conditions as the Registrar may, with approval, of the Minister determine in the relevant notice.



## POSITION PAPER ON ELECTRONIC MONEY

- ▶ The National Payment System Department of the South African Reserve Bank ("SARB") has issued a Position Paper on Electronic Money (Position Paper NPS 01/2006).
- ▶ The Position Paper defines "electronic money" as "monetary value represented by a claim on the issuer which is stored on an electronic device and which is widely accepted as a means of payment by persons other than the issuer". This definition is very wide, and could certainly be interpreted to include prepaid debit cards or stored value cards.
- ▶ It is not clear whether the definition is intended to also regulate the use of "electronic devices" in a closed loop environment, since in a closed loop environment only the issuer accepts the device as means of payment, and it is not intended to be accepted by persons other than the issuer.



## POSITION PAPER

- ▶ Electronic money products will be subject to rules and regulations imposed by the SARB in terms of its role as overseer of the National Payment System ("NPS").
- ▶ The introduction of such products is thus subject to approval by the SARB. The criteria for consideration of proposals for the introduction of such products into the NPS will include, inter alia the following:
  - The rights and obligations of the respective participants in an electronic money scheme must be clearly defined and disclosed. Participants include issuers, operators, merchants, and customers;
  - the proposed electronic money scheme must not be in contravention of any legislation, with specific reference to the –
    - South African Reserve Bank Act 90 of 1989;
    - Banks Act 94 of 1990; and
    - National Payment System Act 78 of 1998.



## POSITION PAPER

- ▶ In order to protect the integrity of the NPS, the SARB, in its role as overseer of the NPS, will require insight into risk-related information. Of particular interest would be how vulnerable the product is to compromise and how the scheme will prevent, or detect and recover from, such a situation.
- ▶ The SARB reserves the right to prescribe risk management and security measures prior to implementation of a scheme. The SARB may also require that mechanisms be available to measure and manage the supply of rand-denominated electronic money.



## POSITION PAPER

- ▶ Although the Position Paper states that only banks will be permitted to issue electronic money, gift cards, which are similar to prepaid cards, have been issued in South Africa by non-banks. Also, some merchants have been allowed to issue prepaid debit cards after having been authorised by the SARB. In these instances, the values of the cards have been limited to R5000.00.
  
- ▶ The SARB will has indicated in the Position Paper that it will –
  - support the development of a banking industry vision for electronic substitutes for physical banknotes and coin;
  - support the development of national standards to enable interoperability of electronic money products and devices; and
  - participate in initiatives aimed at providing secure payment instruments for the general public, including the unbanked and rural communities of South Africa and the Southern African region.



## FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 ("FICA")

- ▶ Money laundering concerns -
- ▶ The majority of anti-money laundering ("AML") obligations under FICA apply to "accountable institutions". These are institutions that fall within any of the categories of institutions listed in Schedule 1 to FICA.
- ▶ Schedule 1 specifically lists, apart from banks, the following:
  - ▶ "a person who issues, sells or redeems travellers' cheques, money orders or similar instruments" (item 13);
  - ▶ "a person who carries on the business of a money remitter" (item 19).
- ▶ Could it be said that a prepaid card loaded with foreign currency is similar to a traveller's cheque in that it also enables travellers to pay a supplier of goods and services in a foreign currency without having to carry the foreign currency itself?
- ▶ Merchants issuing prepaid cards for local use are not listed as accountable institutions.



## Financial Intelligence Centre Amendment Act 11 of 2008

- ▶ "'bearer negotiable instrument', for the purposes of this Act, means any instrument that may on demand by the bearer thereof be converted to the currency of the Republic or that of another country, and includes, amongst, others, cheques, promissory notes or money orders"
- ▶ "A person who intends conveying or who has conveyed or who is conveying an amount of cash or a bearer negotiable instrument in excess of the prescribed amount to or from the Republic must, on demand, report the prescribed particulars concerning that conveyance to a person authorised by the Minister for this purpose." (section 30(1)).



# QUESTIONS



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