



What's the Deal with Gift Cards Today?

Regulating Traditional Promotional Devices at the Nexus of Developing Technologies

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Overview of Laws Regulating Gift Certificates and Gift Cards

Four primary types of laws on the books regulating GCs:

- Consumer Protection/Unfair and Deceptive Trade Practices Statutes
- Escheat or Abandoned Property Laws
- Banking Laws
- Privacy Laws

Taxonomy—Gift Certificates/Cards vs. Coupons

Understanding Terms:

What is a Gift Card?

- “Closed System” versus “Open System” Gift Cards
- Fixed denomination, prepaid (but, reloadable, usable at an ATM?)
- Anonymous or identified by purchaser?
- How does merchant/user track value?



What is a Coupon?

- Not prepaid
- Financial discount or rebate when purchasing
- *Less heavily regulated; generally about disclosures*
- **Another term: voucher** (generally exchanged for services)

Characteristics may determine how it is regulated and whether federal or state law applies

Taxonomy—The Hybrid Daily Deal (“Groupon”)

Understanding Terms: What Is a Daily Deal (“Groupon”)?

- Prepaid Amount at Point of Sale
- Additional Discount
 - Ex. “Pay \$25.00 for \$50.00 worth of salon services.”
- Promotional Value Expiration
 - Usually within a few months to one year

**Gift Card issues superimposed on
Traditional Coupon**



Federal Gift Card Law

Federal Law

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD” Act):

- Does not preempt state gift card laws, except if state laws are inconsistent with the Act.
 - *Floor*, rather than a *ceiling*, on gift card regulation.
- Applies broadly to gift cards, stored value cards, and general use prepaid cards.
- **Exclusions:**
 - Loyalty, award, or promotional gift cards;
 - Gift cards used solely for telephone services;
 - Gift cards that are reloadable, not marketed or labeled as a GC;
 - Gift cards that are not marketed to the general public;
 - Gift certificates issued only in paper; or
 - Gift cards redeemable only for admission to events or venues at particular locations.

Federal Gift Card Law

Federal Law (cont.)

- **Expiration Dates:** card may not expire earlier than five years after the date on which it was issued, and expiration date must be clearly and conspicuously stated.
- **Fees prohibited** unless:
 - there has been no activity on the certificate or card for 12 months;
 - required disclosures have been made;
 - only one fee is charged per month; and
 - additional requirements determined by the Board of Federal Reserve System (the “Board”) are met.

Note: Since the implementation of the CARD Act, breakage has been significantly reduced → higher redemption rates.

Consumer Protection/Unfair and Deceptive Trade Practices Statutes

State Law -- Expiration Dates

Much recent state legislative activity relating to gift cards has focused on the permissibility of imposing expiration dates and fees.

States have taken a variety of approaches to the imposition of expiration Dates:

- Growing trend – prohibit expiration dates altogether. *E.g.*, CA, CT, FL, IL, ME, MN, MT, NH, NJ, RI, and WA.
- Permit expiration dates, but require clear disclosure and/or that gift card must be valid for a minimum number of years. *E.g.*, AR (2 years), KS (5 years), KY (1 year), MA (7 years), MI (5 years), ND (6 years), NM (5 years), OH (2 years), OK (5 years), and TN (2 years).
- Require clear and conspicuous disclosure of expiration date on gift card, or permit issuer to provide a phone number or web address where information can be obtained. *E.g.*, NV, OR, VA, IL, UT.
- Provide that gift cards will be subject to state escheat laws only if the gift card has an expiration date. *E.g.* HI, NE, PA.

Consumer Protection/Unfair and Deceptive Trade Practices Statutes

State Law -- Fees

The question of whether a gift card issuer may charge dormancy and/or service fees on gift cards after a certain period of time has passed is also being hotly debated today, and variation in state law reflects this debate.

State approaches to the imposition of fees:

- Prohibit fees. *E.g.*, CT, FL, HI, IL, LA (except \$1 handling fee), MA (if they reduce the value of the gift card), MN, MT, NH, ND, NJ, NM, OR, RI, and VT.
- Allow fees but require that they be clearly disclosed.
- Allow fees under very particular circumstances, or when a certain time period has elapsed.
 - *E.g.*, CA permits fees only when remaining value is \$5 or less, fee is not more than \$1 per month, gift card is inactive for 24 months, and gift card is reloadable.



Consumer Protection/Unfair and Deceptive Trade Practices Statutes

Misc. Issues

- **Date of Issue.** A few states require that the date of issuance must be printed on card.
- **Toll-Free Numbers.** Some states require or allow gift card issuers to disclose a toll-free number that holders may call to find out balance, expiration date and other terms and conditions.
- **Forms of Redemption.** Some states regulate how a gift card may be redeemed.
 - Most common=cash redemption requirement, e.g., unused de minimis portions of the gift card must be redeemable in cash.
 - In CA, gift cards sold after 1997 must be redeemable in cash for their full value.
 - In 2008, Maine and Massachusetts passed new laws requiring that certain remaining balances be redeemable in cash to the gift card holder.
- **Common Exemptions from State Laws:**
 - GCs issued for use with multiple sellers. *E.g.*, CA, IL, LA, MD, MT, NV, ND. *But see* NY.
 - GCs issued under customer loyalty programs. *E.g.* AZ, AR, CA, FL, GA, HI (expiration date must appear on gift card or receipt), IL, LA, MD, MA, MT, NV, NH, NJ, NM, ND, OH, OK, RI, TN, TX, VT, WA. In some states, GCs issued under consumer loyalty programs are arguably exempt because they are not *purchased*.
 - GCs issued below face value for fundraising purposes. *E.g.*, AZ, CA, HI, IL, LA, NV, NY, OK, TX, VT, WA.

Recent Gift Card Litigation & Settlements

Groupon Settlement [*In re Groupon Marketing and Sales Practices Litigation*, U.S. Dist. No. 11-md-02238 (S.D. Cal. Mar. 29, 2012)]

- 17 Lawsuits consolidated into MDL alleging
 - Expiration dates violated federal CARD Act prohibition of expiration dates less than 5 years.
 - Failure to sufficiently disclose terms (e.g., single use limit, not valid for cash).
- Settlement valued at **\$8.5 M**;
 - Current holders may redeem expired Groupons or, if they cannot, value plus 25%
 - \$75k to charity;
 - Only 10% of future deals may have expiration dates of <6 months;
 - Must clearly and conspicuously disclose:
 1. The difference between the promotional value expiration and the purchase price expiration; and
 2. The expiration date after which customers may not redeem the portion of the voucher that is only the promotional value;
 3. Exceptions: certain types of offers, e.g., travel, ticketed events.

Recent Gift Card Litigation & Settlements

Geoff Chaitt et al. v. Chipotle Mexican Grill Inc. et al., No. BC470810 (Cal. Super. Ct. Oct. 3, 2011).

- Proposed class action settlement claims that Chipotle “tricked” California residents into believing they could not redeem gift cards worth less than \$10.00 in cash.
- Asks court to order Chipotle to honor all gift card holders’ requests for the cash value of cards that have a balance of less than \$10.00 and to promptly post notices in all of its California stores to alert customers and employees about the gift card law.

Note: Class action bar is growing more sophisticated – looking beyond expiration date issues. For example, plaintiffs in *Chaitt* are targeting the “cash-back” requirement in California gift cards law that specifies that balance of less than \$10.00 must be refunded in cash at the customer’s request.

Recent Gift Card Litigation & Settlements

Johnson v. Apple, Inc., No. 1-09-CV-146501 (Cal. Super. Ct. 2/10/12).

- Plaintiffs claimed Apple advertised that all songs bought with the card would cost 99¢, but raised the price of certain songs and refused to honor the 99¢ price when the cards were redeemed, continuing to sell cards that said “Songs are 99¢”.
- Consumers who were overcharged are eligible to receive an iTunes Store credit.

Boundas, et al. v. Abercrombie & Fitch Stores, Inc., No. 10-04866 (N.D. Ill. 8/3/10).

- Ongoing nation-wide class action centering around a 2009 promotion in which the retailer issued nearly 200,000 gift cards that said: this gift card is redeemable at all Abercrombie & Fitch locations. No expiration date.”
- Abercrombie voided the gift cards around 1/30/10, explaining that cards were enclosed in sleeves containing that expiration date.

Amway [Adell v. Quixtar Inc. et al], No. BC 405420 (Cal. Super. Ct. 3/8/11)]. Amway sold and marketed gift cards nationwide that contained a notation instructing consumers to “redeem before” a certain date.

- Plaintiffs argued this violates state laws that bar expiration dates for gift cards because many consumers believed their gift cards had expired and either disposed of them or never redeemed them.
- Consumers may redeem some \$20 million worth of expired gift cards.

Banking Laws

Why Do Banking Laws Apply to GCs?

Because of the deposit-based nature of gift cards, the merchant may be deemed to be a “bank” or “financial institution” under some state and federal laws, even if it is not a traditional bank.

Moreover, because many cards are reloadable, the federal government is concerned that the cards may be used for money-laundering purposes.

The law in this area has been in flux.





Banking Laws

Federal Banking Laws

Bank Secrecy Act/Anti-Money Laundering/OFAC. GC providers should take into account the regulations of the Office of Foreign Assets Control (OFAC) prohibiting any U.S. person from conducting transactions with certain entities and persons listed on OFAC's specially designated and blocked persons list.

- GC providers should consider risk-based internal controls to screen private information against the OFAC list to avoid liability.
- GC issuers may be required to report suspicious activity, and to have policies/procedures in place to comply with the duty to file
 - (1) Reports of currency transactions in excess of \$10,000 per day;
 - (2) Reports of international transportation of foreign currency/monetary instruments; and
 - (3) Reports of foreign bank and financial accounts.

USA PATRIOT Act. The Act requires all "financial institutions" to establish and maintain a customer identification program to ensure that the person whom the institution is accepting as a customer is who they say they are. Issuers of disposable, fixed denomination gift cards are not currently required to comply, but open system reloadable prepaid cards must require customer identification.

FinCEN Regulations Affecting Sellers of Prepaid Cards



- July 2011: U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) issued a **final rule** implementing the Bank Secrecy Act (BSA) applicable to Money Services Businesses (MSBs).
- Providers of Prepaid Access ("Provider") and Sellers of Prepaid Access ("Sellers") are subject to new registration, customer identification and verification, reporting and recordkeeping obligations; will also be required to adopt and maintain anti-money laundering programs and respond to law enforcement requests for information.
- Rule is meant to curtail money laundering activities and includes certain exceptions – for example, for cards that cannot exceed \$1,000 in value and are marked accordingly, or cards that can only be used at one store.

Developments in Federal Gift Card Law

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)

- Established the new Consumer Financial Protection Bureau (CFPB), an independent agency with authority to issue regulations, supervise depository and non-depository institutions, enforce consumer financial protection laws, and prevent “unfair,” “deceptive,” and “abusive” acts and practices (UDAAP) by financial service firms.
- CFPB has ...
 - Authority under to make rules and supervise and enforce compliance with the Electronic Fund Transfer Act (EFTA) and CARD Act. (i.e., to enforce the federal gift card laws);
 - Authority to enforce UDAAP/promulgate rules identifying unfair, deceptive and abusive practices.
- So, what does this mean? CFPB is likely to follow established guidelines for what constitutes “unfair” and “deceptive” practices, though it is unknown how it will define “abusive” behavior.
 - This likely will be answered in the coming months with the issuance of implementing rules and regulations by the newly confirmed CFPB Director, Richard Cordray.
 - So far, the CFPB has not actively pursued gift card law supervision and enforcement.

Escheat Law Overview

- Escheat law provides that property may be presumed abandoned if there is no activity with respect to the property for a specified period of time. The abandoned property must be turned over to the state pursuant to the state's reporting system.
- What typically constitutes abandoned property? Examples: Uncashed payroll checks, deposits, refunds to consumers, dividends, etc.
- Important issue – penalties and interest for failure to escheat can be significant



EMERGING TENSION: Escheat v. Privacy

Escheat Law Overview (cont.)

States have reached different conclusions on the issue of whether unused GCs are abandoned property that escheats to the state:

- **Majority Approach:** Unused GCs are abandoned property that will escheat.
- **Minority Approaches:**
 - Exclusion of GCs from abandoned property laws.
 - Legislation deleting references to “gift certificates” from the unclaimed property provisions.
 - Exemptions for specifically defined types of GCs.
 - Linking of unclaimed property issue and expiration date/fee issue – exempt GCs without expiration dates, or those where expiration is not enforced, or where no fees. E.g., **Hawaii**. 100% of the value of a gift card is presumed abandoned after 5 years, but the abandonment provision *does not* apply to gift cards without enforced expiration dates or fees.

An increasing number of states are moving to exclude or exempt GCs from the escheat laws

EMERGING TENSION: Escheat v. Privacy

New Jersey Gift Card Law-- Effective July 1, 2010, new state law

- Prohibited dormancy fees and provided for an abandonment period of only two years, broadening the definition of "stored value cards" to include unclaimed gift certificates, gift card balances, and rebate cards for the purposes of escheat.
- Required sellers to collect address, or at minimum zip code information, from purchasers to facilitate escheat
- Provided for a "place of purchase" presumption such that when the address of the holder or purchaser was unknown, GCs would escheat to NJ.
- Challenged by the New Jersey Retail Merchants Association (NJRMA) and American Express (*NJRMA v. Sidamon-Eristoff et al.* (Civil No.10-5059), *New Jersey Food Council v. New Jersey, et al.* (Civil No. 5123), and *Amer. Exp. Prepaid Card Mgmt. Corp. v. Sidamon-Eristoff, et al.* (Civil No. 10-5206) (together, the "AmEx Litigation").



EMERGING TENSION: Escheat v. Privacy

New Jersey Gift Card Law (cont.)

- On January 5, 2012, the Third Circuit held the following: (i) the retroactive application of the provision in the law requiring escheatment of outstanding stored value cards issued prior to enactment of the law is unconstitutional, (ii) the “place-of-purchase” presumption is invalid, and (iii) the “third priority rule” is unconstitutional. However, the Court **upheld the data collection provision in the law, which requires issuers or sellers of gift cards in NJ to collect address gift card purchasers’ information or, at a minimum, ZIP codes from gift card purchasers.**
 - It is unclear when gift card sellers will actually be required to begin collecting address/zip code information; the Treasurer has promised to issue guidance on the subject.
- A Democrat-sponsored bill (A1871) to repeal the law (A3002) was passed in the NJ Assembly in March 2012. All Democrats voted in favor of the bill (to repeal the law) while all Republicans voted against the bill. The NJ Senate will debate and vote on the bill when they reconvene at the end of May. The NJ Senate is split 20-20 (Dem/Rep), so it is unknown whether the bill will pass.

EMERGING TENSION: Escheat v. Privacy

Response to New Jersey Gift Card Law

- **GC Sellers**: The new zip code record-keeping requirement is too onerous and may even be illegal due to privacy issues.
 - American Express became the first company pull its GCs from the state, calculating that the legal risk and compliance burden was too great.
 - By the first week of April 2012, at least two more companies (third-party providers of gift cards) had announced they were pulling their GCs.
- **GC Purchasers**: Privacy concerns --- When and how will my zip code information be used? Will it be sold? Isn't my zip code personal identification information ("PII")?
- **State**: NJ Treasury Department issued a Press Release on April 4, 2012 that stated:
"[t]he large card companies would have [NJ citizens] believe that the State is 'grabbing' or 'taxing' gift cards. That is a total fabrication and nothing more than part of a misinformation campaign designed to protect giant card issuers' anti-consumer business practices and unjustifiable profit-grabs from abandoned or forgotten gift cards."

EMERGING TENSION: Escheat v. Privacy

Privacy Overview

- The purchase of a GC may require the collection of consumer personal information that will implicate consumer privacy concerns under federal and state law.
- Gift card issuers may qualify as “financial institutions” under federal and state laws regulating the ability of a financial institution to use and distribute a consumer’s personal information.
- Applicable privacy obligations may include:
 1. self-imposed restrictions, such as an internet privacy policy;
 2. statutory obligations governing online data collection and offline data practices; and/or
 3. state data security breach notification laws.



EMERGING TENSION: Escheat v. Privacy

State Privacy Laws

California Song-Beverly Credit Card Act ("Song-Beverly Act"), Cal. Civ. Code § § 1747.00 et seq.

- Song-Beverly Act restricts the requesting and recording of "personal identification information" ("PII") with credit card transactions made at brick-and-mortar stores. The law also restricts the use of preprinted forms with spaces specifically designated for PII in any credit card transaction. PII is defined to mean *"information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number."*
- In 2011, the California Supreme Court overturned a lower court decision (*Party City. Corp. v. Superior Court*) and held that **"a cardholder's ZIP code, without more, constitutes personal identification information within the meaning of [the Song-Beverly Act]."** *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612, 616 (Cal. 2011).

EMERGING TENSION: Escheat v. Privacy

State Privacy Laws (cont.)

- In addition to California, 13 other states and the District of Columbia have similar laws to California's Song-Beverly Act:
 - Delaware, District of Columbia, Georgia, Kansas, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin.
- Of the states that maintain Song-Beverly Act laws, Georgia, Nevada, and Ohio limit their restrictions to the recording of telephone numbers.
- Each of the other state statutes (Delaware, District of Columbia, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, and Wisconsin) apply to ***address information***. However, none of these states have relevant case law elaborating on the meaning of PII or the timing of when PII may or may not be collected in connection with a credit card transaction.
- Note that FinCEN and state money transmitter laws may also require PII collection at the federal level.

EMERGING TENSION: Escheat v. Privacy

New Jersey and the Conflict Between Privacy and Escheat

The potential for privacy issues arising in the sale of gift cards has been highlighted with the aforementioned New Jersey gift card law, which requires that gift card sellers collect and retain the consumer's zip code at the point of sale, which is arguably at odds with the New Jersey Restrictions on Information Required to Complete Credit Card Transactions Statute.

- The NJ Restriction Statute, like California's Song-Beverly Act of 1971, restricts the seller's ability to request and record personal identification information (PII) in connection with credit card transactions made at brick-and-mortar stores.
- There is no case law clearly delineating an exception, although there may be exceptions for online and "special purpose" uses.

EMERGING TENSION: Escheat v. Privacy

What Are Some of the other Applicable Privacy Laws?

Unless collecting personal information through the Internet from a CA resident, there is no general privacy law requiring Web sites to post a privacy policy. But, most Web sites voluntarily post a privacy policy, which subjects them to liability for violation of federal and state laws against deceptive practices. Typically applicable:

- **Section 5 of the FTC Act** -- A company defines the information to which Section 5 applies by the scope of the company's own representations in its privacy policy.
- **California Online Privacy Protection Act** -- has become a *de facto* national standard to the extent that Web sites anticipate collecting data from California residents.
- **Gramm-Leach Bliley Act** -- At a minimum, gift card issuers should be aware of GLBA requirements, should have a privacy policy and provide it to purchasers of their cards and provide proper opt-out procedures. To the extent that a gift card issuer is providing a product that truly "acts like a bank card," the issuer should be prepared to comply.
- **FACTA/FCRA and the "Red Flags Rule"** – Again, whether GC issuers are covered depends on whether they meet a narrow definition of covered institutions, generally, those using "consumer reports" for various purposes.

What's on the horizon?

- Continued activity in state legislatures and regulatory enforcement; possible activity by CFPB?
- More activity on the consumer class action front (on all GC provisions), with plaintiffs targeting both daily deal vendors and retailers.
- Implementation (or possible repeal) of New Jersey's information collection provisions as applied to GCs; possible push-back on the New Jersey law.
- FinCEN implementation

