

# Gift Cards, Coupons and Loyalty Programs: Today's Landscape, Tomorrow's Rules



## BRAND ACTIVATION ASSOCIATION ANNUAL LAW CONFERENCE NOVEMBER 19, 2013

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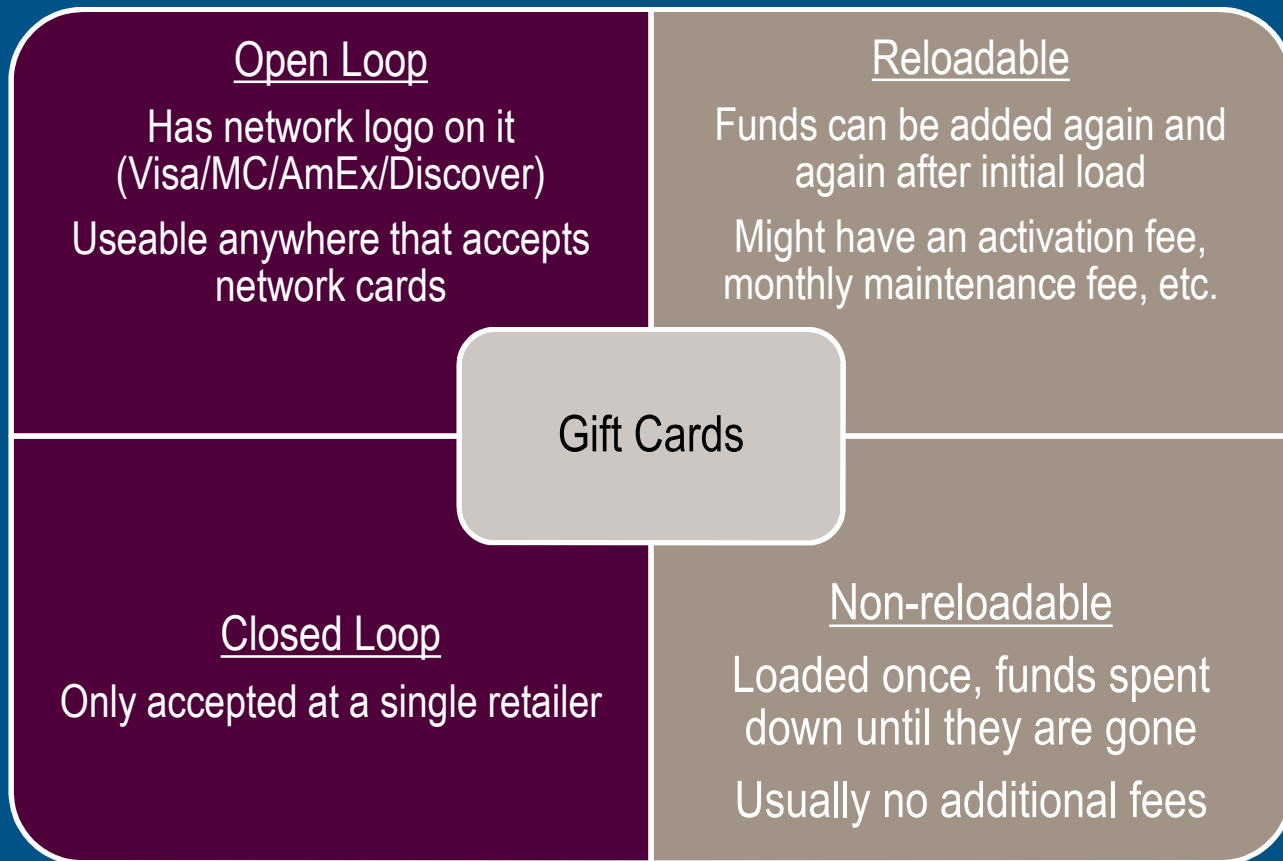
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# Agenda

- **Taxonomy**
- **Federal & State Gift Card Laws: Consumer Protection**
  - Federal Laws: The CARD Act and the Consumer Financial Protection Bureau (“CFPB”)
  - State Gift Card Laws
  - Recent Gift Card Litigation and Settlements
- **Coupons and Promotional Loyalty Promotions**
- **Gift Cards as Unclaimed Property**
- **Banking Laws**
- **Privacy Laws**
- **Intellectual Property Laws**
- **Hypothetical**



# Taxonomy --Considerations in Choosing a Card Type

- Features/functionality
  - Payment Processor
  - Issuer
  - Channel – traditional card, mobile, internet
  - Compliance controls
- Regulatory
  - CFPB: UDAAP and Reg E
  - FinCEN: Prepaid Access
  - FTC: UDAP
  - CARD Act
  - Gramm-Leach-Bliley: Reg P (and other applicable privacy laws)
  - Applicable state laws/ regs

## Federal & State Gift Card Laws – Federal Laws

### Credit Card Accountability Responsibility and Disclosure (CARD) Act

- Does not preempt state gift card laws -- *floor*, rather than a *ceiling*
- Applies broadly: GCs, stored value cards, general use prepaid cards
- **Exclusions:**
  - **Loyalty, award, or promotional gift cards;**
  - Cards used solely for telephone services;
  - Reloadable cards not marketed/labeled as a GC;
  - Cards not marketed to the general public;
  - Paper certificates; or
  - Cards redeemable only for admission to events/venues
- **Expiration Dates:** Card may not expire earlier than 5 years after date issued; expiration date must be clearly and conspicuously stated
- **Fees prohibited** unless:
  - No activity for 12 months;
  - Required disclosures made;
  - Only one fee charged per month; and
  - Additional requirements determined by Fed Res. Bd are met



## Federal & State Gift Card Laws –Federal Laws

### Consumer Financial Protection Bureau (CFPB):

- Independent agency with broad 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)
  - Centralized authority to enforce the federal gift card requirements, but yet to actively do so. Has started to look at GPR cards.
- 2012: CFPB examined whether Maine, Tennessee gift card laws were preempted by federal provision stating must be honored for at least 5 years.
  - **Maine– Not preempted:** State laws providing for 2 year abandonment period, no expiration dates, process pursuant to which consumer may always go to issuer to redeem cards (who then goes to state for reimbursement)
  - **Tennessee-- Preempted:** State escheat provision providing GC expires earlier of expiration date or 2 years from issuance acts as “effective expiration date” as consumer must go to state to redeem

# Federal & State Gift Card Laws – State Laws

## Gift Card State Consumer Protection Laws

- **Expiration Dates:** Some states prohibit altogether (e.g., CT, ME, RI), but majority permit w/ extra requirements:
  - Permissible, but clear disclosure required (AZ, GA, NV)
  - Permissible, but must be valid for a certain no. of years (KS [5], OH [2], ND [6])
  - Permissible, but need clear disclosure AND time requirement (AR, HI, MD, MA)
- **Dormancy and Service Fees:** States may
  - Prohibit fees (e.g., CO, CT, FL, HI),
  - Permit but require clear disclosure (e.g., AZ, GA, SC, VA), or allow only under specific circumstances or after certain time period (e.g., AR, CA, IA, ME)
- **Specific disclosure requirements**
  - **Most important:** *provisions requiring seller to provide “Cash-back” redemption upon request, e.g., fully redeemable in cash (CA), or unused portions redeemable in cash, usually \$5 (CO, ME, MT, NJ)*
  - Date of issue (HI, MA)
  - Toll-free numbers (CT, IL, MA, VA)
- **Common Exemptions**
  - **GCs issued under loyalty program (AZ, NH, NJ, NM, TX)**
  - GCs issued for multiple sellers (CA, ND, TN)
  - GCs issued below face value for fundraising (HI, OK, WA)



## Federal & State Gift Card Laws –State Laws

### *New State Laws: Enacted*

- **New Jersey:** After lengthy litigation and much controversy, the petition for writ of certiorari in *NJRMA v. Sidamon-Eristoff* denied by Supreme Court. SB 1928, which was enacted on June 29, 2012 and provided for:
  - 5 year abandonment period
  - Cash-back provision
  - Prohibition of post-purchase fees and expiration dates
  - Disclosure requirements
  - Collection of ZIP codes from purchasers (stayed until July 29, 2016)
- **Vermont:** Amendment adds key provisions relating to loyalty, award and promotional certificates and embraces a Groupon model treating promotional/ paid values differently changes minimum expiration period from 3 to 5 years, adding an exemption for GCs donated to charitable organizations
- **Illinois:** Definition of GC now includes a credit slip issued to consumer for returned goods.
- **Rhode Island:** 1-year expiration date for donated GCs
- **Very active area: Nearly a dozen states proposed new legislation in 2013**





## 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 CARD Act prohibition of expiration dates earlier than 5 yrs and failure to sufficiently disclose terms
- Settlement valued at **\$8.5 M**
- Must clearly and conspicuously disclose:
  1. Difference between promotional value expiration and purchase price expiration; and
  2. Expiration date after which customers may not redeem portion of the voucher that is only promotional value;
  3. Exceptions: certain types of offers, e.g., travel, ticketed events
- Only 10% of future deals may have expiration date of <6 months
- Daily deal issues—hybrid of coupon and gift card

## Recent Gift Card Litigation & Settlements

### ***Law suit trend: Failure to comply with cash-back provisions***

#### ***People v. Starbucks, Case No. 2009-166948 (Cal. Sup. Ct., 2009)***

- County DAs' Offices initiated an investigation based on company's failure to honor CA's law requiring refund of GC balance on request when less than \$10.00 remains
- Starbucks agreed to pay \$225,000 in civil penalties, costs, and restitution, change signage add button to cash registers/other POS, train employees on how and when to redeem GCs

#### ***People v. Rite Aid, Case No. 37-2012-00083218 (Cal. Super. Ct., 2012)***

- Complaint alleged Rite Aid should have cashed GCs for customers whose balances fell under \$10.00. Plaintiffs asked Court to fine Rite Aid \$2,500 per violation.
- Judge ordered Rite Aid to pay \$800,000 for misleading customers about benefits of its customer rewards program and gift cards; Rite Aid must clearly state when its +UP Rewards and Wellness Card holders are entitled to receive coupons, disclose expiration dates or limitations on rewards, train employees to properly cash GCs

## Recent Gift Card Litigation & Settlements

### ***More litigation on cash-back requirements: Cindy Maxwell, et al. v. Toys R Us***

- Plaintiffs alleged that Toys R Us violated CA cash-back requirement by selling gift cards with misleading language about their cash value redemption – “Not redeemable for cash, except as required” (back of card).
- Trial court ruled that Toys R Us was under no obligation to inform gift card holders of their rights under CA law. Ruling has been appealed.
- Most of the cash-back provisions put the onus on the consumer to request a refund, but this is a twist, particularly when read in conjunction with the reasoning in the *Shelton* case (below).



# Coupons & Promotional Loyalty Programs

## Coupon Elements

1. Expiration Date
2. Per Purchase Limit
3. Item Restriction
4. Redemption Location
5. Trading Stamp Disclosures.



Coupons often look similar to a gift card in terms of applicable laws and regulations, but purely promotional in nature.

- Percentage off or discount
- May apply only to services or merchandise
- Make sure terms and conditions are clear

# Coupons & Promotional Loyalty Programs

## Loyalty programs:

- Have in place comprehensive terms and conditions – and remember, the Ts and Cs are a contract
- Ensure that advertising for the rewards program is consistent with the terms and conditions
- Disclose any material changes to the terms and conditions and check (the rules) before you change
- Is notice required before terminating the program or parts of the program? How much?
- Is the program so complicated it may be deceptive and misleading? **Walgreens** investigation in Missouri

## Recent Litigation

***Shelton v. Restaurant.com (2013)*** – NJ law requires all gift cards/certificates to be valid at least 2 years. Each coupon stated “the certificate expires one (1) year from the date of issue, except . . . where otherwise provided by law” and “void to the extent prohibited by law.” NJ Supreme Court ruled that online coupons are “written consumer contracts” subject to state law.

***John Myers v. BJ's Wholesale (2013)*** and ***Brian Farneth v. Wal-Mart (2013)***- Class actions in Pennsylvania state court accuses the defendants of charging and collecting sales tax on the full price items when customers use discount coupons. State regulations say businesses can't apply sales tax coupon discounts if the coupon and items purchased are listed on the customer's receipt.

# Gift Cards as Unclaimed Property



## 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 reported/turned over to the state
- Question of whether GCs should be escheatable when cannot be redeemed for cash, only food, merchandise, etc.—some states exempt
- Penalties and interest for failure to escheat can be significant, yet some companies have structured programs that rely on “breakage” or unredeemed gift cards as part of financial model

# Gift Cards as Unclaimed Property

## Do Gift Cards Escheat? States split:

- **Gift cards that have been unused for a certain period of time must be reported as abandoned property** (AK (3 yrs), DE (5 yrs), ME (2 yrs))
- **Exclusion of GCs from abandoned property laws** (AZ, CT, MD, ND, UT)
- **Legislation deleting references to “gift certificates” from the unclaimed property provisions** (KS, MA, SC, WI)
- **Exemptions for specifically defined types of GCs.**
  - AL. Gift card presumed abandoned three years after June 30 of the year it was sold unless it is issued or maintained by a person engaged primarily in the business of selling tangible personal property at retail; if it is redeemable in merchandise only, redeem at 60% of face value
  - CO. Escheat laws apply to any gift card issued by a business that is redeemable in cash, except that gift cards issued for food, products, goods or services are exempt
  - FL. Gift cards exempt from reporting requirements of Florida's UPTA unless issued by a financial institution or money transmitter and redeemable by multiple unaffiliated merchants
- **Connecting the unclaimed property issue to the expiration date/and or fee issue** (CA, IL, NC, PA)



## Gift Cards as Unclaimed Property

### *Where should you report unredeemed gift cards (and should you report them at all)?*

- **Federal Common Law** (*Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972); and *Delaware v. New York*, 507 U.S. 490 (1993))
  - **1<sup>st</sup> Priority** – State of owner’s “last known address”
  - **2<sup>nd</sup> Priority** – State where Holder is incorporated
- **UUPA and Transaction-Based Test**
  - **3<sup>rd</sup> Priority** - State where the transaction occurred.
    - NOTE: Third Circuit held in *NJRMA v. Sidamon-Eristoff* that the third priority rule is *unconstitutional* and the US Supreme Court priority rules *apply*.



# Gift Cards as Unclaimed Property

## Penalties and Settlements

- **VERY COSTLY.** Assess interest (and sometimes penalties) on unreported or unpaid amounts.
  - E.g., California imposes penalties of \$100 per day up to \$10,000 for willful failure to report abandoned property and \$5,000 to \$50,000 for willful failure to deliver abandoned property to the state, and assess 12% interest on undelivered abandoned property.
  - **Long Look-Back Periods** (up to 20 years). DE goes back to 1981.
  - Voluntary Disclosure Agreements (“VDA”) – Shorten look-back, but could increase risk (i.e., Staples settlement).
  - More than 80% of states are using third-party auditors; contractors often work for contingency fees (10% of property recovered)
- **Settlements**
  - **No [public ] settlements re: gift cards to date.**
  - **Cost Examples**
    - Staples (Sept. 2012): \$8.9 million (rebates)
    - AIG (Oct. 2012): Multi-state settlement for estimated \$300 million
    - MetLife (Apr. 2012): \$700 million



### Bank Secrecy Act/Anti-Money Laundering/OFAC

- **FinCEN Prepaid Access Final Rule (July 2011):** Implements Bank Secrecy Act (BSA) applicable to Money Services Businesses (MSBs) by expanding parties subject to law to include providers and sellers of prepaid access. Rule meant to curtail money laundering activities.
  - MSBs subject to new registration, customer identification and verification, reporting and recordkeeping obligations
  - Required adoption and maintenance of AML programs
  - Includes key exceptions for closed loop access programs with not to exceed \$2,000 max value associated with a card on any day, so long as the seller has “implemented policies and procedures reasonably adapted to prevent” the sale of over “\$10,000 to any person during any one day.”
- **OFAC Screening:** Office of Foreign Assets Control (OFAC) prohibits any U.S. person from conducting transactions with certain entities and persons listed on specially designated and blocked persons list.
  - Certain “financial institutions” issuing gift cards may have a duty to establish and maintain customer identification information
  - Not likely true for issuers of disposable, fixed denomination gift cards, cards that are not reloadable and have no cash access.

## Privacy Overview

- The purchase of a GC may trigger collection of consumer PII
- 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



## Developing Tensions in Privacy and Treatment of Gift Cards

- Escheat laws discouraging collection of customer information
- FinCEN and state money transmitter laws that require collection of customer identification information
- California Song-Beverly Credit Card Act (“Song-Beverly Act”), Cal. Civ. Code § § 1747.00 et seq and similar laws prohibiting collection of zip codes with credit card transactions
- New Jersey gift card law requiring collection of zip codes post-2016

## The Virtual Gift Card (eGift Card)

1. Like normal gift cards, but electronically delivered
2. May include patents
3. Other issues: disclosure of terms and conditions?

### Patents

- Unique approaches for enabling customers to personalize eGift Cards with messaging, text, and images.
- Software for processing and secure delivery of eGift Cards (e.g., mobile-optimized eGift purchases)

### Example

USPTO granted issuance of Patent No. 8,442,866 to CashStar in June 2013. CashStar powers a network of nearly 300 leading retailer and restaurant brands (Best Buy, Pottery Barn, Sephora, etc.). Consumer demand for eGifts has exploded, with 1<sup>st</sup> quarter sales more than double the same period in 2012.

# Intellectual Property

## Patent Litigation

***Alexsam v The Gap, Inc.*** – Plaintiff, a “patent troll,” sued The Gap for violating two patents that cover systems and methods for putting money on to a store gift card and activating it at POS. After six months of litigation, the infringement claims were rejected by a jury. This decision follows a similar non-infringement determination for Barnes & Noble.

***Alexsam v. Pier 1 Imports***– Texas Federal Circuit unanimously upheld a TX federal jury’s verdict that Pier 1 Imports gift card system does not infringe on two Alexsam patents.



“Thank Goodness for Gift Cards  
Or  
Melly’s Excellent Thanksgiving Shopping  
Adventure”

Come to Deerfield Mall this Thursday Night!!!  
DOORBUSTERS at 8pm!

**FREE GIFT!\***  
**GUARANTEED**  
**SATISFACTION!\***

MEMBER OF THE NATIONAL ASSOCIATION OF RETAILERS



## Part 1.

- **What did the ad say?**
  - “Free Gift” (vs. a sweepstakes)
  - “Guaranteed Satisfaction”
- The “Card” itself
  - What is it?
    - Purchase vs. Promotional/loyalty coupons and the differences in how they are regulated
    - Gift cards vs. Groupons
  - What does it say? Disclosures on coupons.
- Melly’s Mobile Coupon Experiences
  - Problems with the “Amazing Pass”
  - Smartphone coupons

## Part 2.

### **Issues associated with collecting zip codes in the sale of gift cards**

- The Song-Beverly Act and the *Williams-Sonoma* case
- NJ's amendment to its gift card law to require collection of zip codes (stayed until 2016)
- FinCEN rules
- Practical issues with paying for a gift card with a gift card
- Prohibitions/restrictions on the ability to expire gift cards; exceptions for gift cards issued in conjunction with promotional or loyalty cards where no consideration is paid
- What is consideration—what about nonmonetary? Is standing in line consideration?

## Part 3.

### **Rewards certificates and disclosures:**

- Rewards certificate failed to disclose that it could not be redeemed for gift certificate—does it need to when it was disclosed in the rewards program terms and conditions?
- Regulation of rewards programs is more relaxed, but can a certificate still be regulated as gift card? A promotional/loyalty card? Is it paper certificate?
  - Paper certificates are an exception under CARD Act, but not state laws.
- Can you have disclosures for rewards program at tear pads at cash registers/online?
- What are the font size requirements for terms and conditions disclosures? Some state laws require 10 point disclosures

## Part 4.

### **Gift cards and coupons sent by text message**

- How do you get express written consent to send a gift card or coupon by text message to a customer? Rules got stricter in 10/2013
  - “Prior express written consent” means consumer’s agreement – in writing and signed, either on paper or as allowed electronically under the E-SIGN Act – that clearly authorizes the seller to deliver calls or messages using ATSD and states the number to which calls or messages may be delivered.
  - Written agreement must include a clear and conspicuous disclosure that (a) consumer is authorizing calls to be delivered using ATSD, and (b) the consumer is not required to provide consent as a condition of purchasing any property, goods, or services
- How do you make disclosures for cards in text message when space limited—FTC update of Dot.com Disclosures

## Part 5.

### **Dormancy fees and expiration date s:**

- Dormancy fees and expiration date prohibited or restricted under many state laws, as is “expiration by dormancy fee”– and have been several class actions involving these factual circumstances, e.g., charging dormancy fees without properly disclosing until gift card was effectively expired. (*Five Guys, Shell Oil*)
- CARD Act permits dormancy fees but restricts number and specifies how to disclose.
- When card have escheated, some states permit companies to redeem card and then go back to state to get money

## Part 6.

### **Cash-back requirements:**

- Several states have laws that require that companies provide cash refunds to consumers requesting them
- Statutes requiring cash back(e.g., CA, CO, ME, MA, MN, NJ, OR, RI, VT, WA) generally require redemption only upon request when balance is less than \$5 (sometimes \$10)
- Starbucks case brought by DA in Napa, CA, more recent case brought against Rite Aid, and several additional consumer class actions (Chipotle, Toys R Us) have involved a failure by seller to make proper refunds. High risk area receiving a lot of attention
- May require employee training—often employees are not aware of legal requirement, and class action attorneys are playing “gotcha”

## Part 7.

### **Other issues:**

- E-gift cards
- Preventing fraud
- How to properly make disclosures

***QUESTIONS???***