



JANUARY 2012

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## Special Report: Third Circuit NJ Gift Card Law Ruling: New Jersey Retail Merchants Association v. Sidamon-Eristoff

If you issue or sell "stored value cards," colloquially referred to as "gift cards," in the state of New Jersey, take note: on January 5, 2012 the U.S. Court of Appeals for the Third Circuit ("Third Circuit") issued a long awaited decision in *New Jersey Retail Merchants Association v. Sidamon-Eristoff* that will impact your data collection practices by requiring you to collect, at a minimum, ZIP codes from the purchasers of gift cards. Many retailers do not currently have processing systems in place to collect ZIP codes, and if they sell merchandise in California, have already begun to implement policies and systems that specifically require retailers *not* to request ZIP codes from purchasers of merchandise to comply with the California Supreme Court's 2011 ruling in *Pineda v. Williams-Sonoma Stores, Inc.*, which held that California's Song-Beverly Credit Card Act prohibits businesses from requesting and recording ZIP codes from consumers in connection with credit card transactions. If you sell or issue gift cards nationally, the steps you must take to comply with the patchwork of state laws just became more challenging.

By way of background, in the summer of 2010, New Jersey passed a controversial new gift card law that amended the state's unclaimed property law to: (1) assume a gift card can be expired after two years of no activity ("expiration provision"); (2) require those who issue or sell gift cards in New Jersey to record the name and address, or at a minimum the ZIP code, of persons who buy gift cards ("data collection provision"); (3) assume for reporting purposes to the state of New Jersey that the address of an unknown purchaser is the address of where a gift card was sold or issued in New Jersey ("place-of-purchase presumption"); and (4) provide the NJ State Treasurer with authority to modify the provisions of the new gift card law ("Treasurer provision"). Prior to passage of the law, New Jersey's escheat law did not cover gift cards, and issuers were not required to collect name and address information from gift card purchasers. Under the plain language of the statute, the new gift card law applies to entities that sell gift cards in New Jersey even if the gift card processor is not located in the state. The law includes two exceptions, however, and does not apply to: (1) gift cards issued under promotional or customer loyalty programs or charitable programs where no monetary or other consideration is tendered; or (2) issuers that have sold less than \$250,000 in gift cards in any given year.

Shortly following the enactment of the new gift card law, the NJ Treasurer issued several guidelines interpreting the statute. Specifically with respect to the law's "place-of-purchase" provision, the NJ Treasurer found that:

- **Gift Cards Issued Prior to Guidance Where Purchaser Address Unknown – Issuer Domiciled in NJ.** If the issuer *is domiciled* in New Jersey, unredeemed balances of gift cards issued *prior to* the date of the Treasurer's guidance where the purchaser's/owner's address is unknown must be *reported to New Jersey*.

- **Gift Cards Issued Prior to Guidance Where Purchaser Address Unknown – Issuer Not Domiciled in NJ but Domicile State's Escheat Law Covers Gift Cards.** If the issuer *is not domiciled* in New Jersey, unredeemed balances of gift cards issued *prior to* the date of the Treasurer's guidance where the purchaser's/owner's address is unknown should be *reported to the issuer's state of domicile in accordance with that state's unclaimed property laws*.

- **Gift Cards Issues Prior to Guidance Where Purchaser Address Unknown – Issuer Not Domiciled in NJ and Domicile State's Escheat Law Does Not Cover Gift Cards.** If the issuer *is not domiciled* in New Jersey and the issuer's *state of domicile exempts gift cards from the unclaimed property statute*, unredeemed balances of gift cards issued prior to the date of the Treasurer's guidance where the purchaser's/owner's address is unknown *must be reported to New Jersey* if the gift cards were issued or sold in New Jersey. In such cases, the issuer must maintain the address of the business where the gift card was purchased.

Immediately following the enactment of the new NJ gift card law and the issuance of the NJ Treasurer's guidance, both became embroiled in litigation. On November 13, 2010, the U.S. District Court for the District of New Jersey preliminarily enjoined the retroactive application of the law to gift cards redeemable for merchandise or services issued prior to the law, and enjoined the prospective enforcement of the "place of presumption" provision under the law and guidance. The District Court, however, declined to prospectively enjoin the "data collection provision." Industry immediately appealed the decision to the Third Circuit, during which time both the "place-of-presumption" provision and "data collection provision" were enjoined pending the outcome of the litigation.

On January 5, 2012, the Third Circuit affirmed the District Court's ruling, and found that (1) the NJ gift card law may not be applied retroactively, and (2) New Jersey may not enforce the NJ gift card law's "place-of-purchase" presumption, which would have permitted New Jersey to escheat gift cards purchased in the state after two years of inactivity if the address of the purchaser was unknown. Significantly, the Third Circuit (3) upheld the law's "data collection provision" requiring retailers to collect name and address (at a minimum ZIP code) information from gift card purchasers. The Third Circuit reasoned that the retroactive provision of the law and Treasurer's guidance likely violated the Contract Clause of the Constitution, and found that the "place-of-purchase" presumption was likely preempted by federal common law. However, the Third Circuit held that the "data collection provision" was severable from the "place-of-purchase" provision, and therefore properly was not enjoined by the District Court.

Due to the case's significant implications for companies selling or issuing gift cards in New Jersey, the aftermath of the Court's decision remains to be seen. Legislative solutions have been pursued, but to date, no NJ bill has been passed to repeal the NJ gift card law. The NJ Treasurer's Office has indicated that enforcement of the law will *not* begin immediately, and additional guidance may be forthcoming following further analysis of the Third Circuit's decision. Please contact us to help navigate this new terrain.

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