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New Federal Gift Card Regulations

Margaret Breen on 6.2.11 | Posted in Food and Beverage, Hotels

After some delay, the new federal regulations giving gift card holders greater protections took effect recently, adding to a patchwork of state consumer laws already in place. The new regulations apply to both issuers and sellers of store gift cards, gift certificates, and general use prepaid cards, such as prepaid Visas or Mastercards, sold after August 22, 2010. We've seen our clients consider conflicts between state and federal law, advertising policies for resellers, tax recognition on gift card income, and unclaimed property laws.

The FTC's regulations under the Credit Card Accountability Responsibility and Disclosure Act (Credit CARD Act) broadly cover most electronic merchandise cards. A gift card (which is defined as reloadable) or gift certificate (a nonreloadable card) cannot expire for at least five years after its date of purchase; the card itself may expire five years after its date of initial purchase, but the underlying funds may not expire sooner than five years after the date of purchase or the last reload of value, so the holder of a card expired on its face may be entitled to a new card or to a refund. If the card medium and the loaded funds have different expiration dates, that must be disclosed on the card in a "clear and conspicuous" way as well as disclosed before purchase.

Dormancy and service fees are also regulated. A card must disclose "clearly and conspicuously" before purchase that such fees may be charged, the amount, how often, and that they may be charged for inactivity. These fees can be charged only once monthly, and only once a year has passed since the last activity. Fees cannot be changed after issue, or imposed retroactively, and must include a toll-free number for consumer questions. However, the federal law does not limit the size of the fee.

The new regulations do not apply to telephone cards, promotional or award cards, cards not marketed to the general public, admission tickets to events or venues, and, most important, reloadable cards not marketed as gift cards or paper certificates. Issuers such as Starbucks offer reloadable cards targeted to use by the buyer; some might think that this offers a loophole for exemption. But the Commentary from the Federal Reserve Board Staff says that the regulations apply to cards "directly or indirectly" marketed as gift cards, so suggestions of transferability, or poor advertising control by resellers, could lead to loss of the exclusion. The regulations are too recent to have seen any enforcement action, so how the Commentary will be put into practice is uncertain.

The federal regulations do not preempt state law, except where state rules are inconsistent, and explicitly say that a state law that is more protective of a consumer is not preempted for inconsistency. They add to the protections that consumers already have under state laws, and the most protective provisions remain in place. For example, gift cards may not expire in Washington, even after five years, and the holder may redeem small balances for cash; On-line registration may bring state privacy laws into play. Planning a gift card program, particularly one that may span several states, requires looking at these considerations, as well as B&O and income tax segregation, and “conspicuous disclosure” requirements may mean redesigning a card itself.

The escheat requirements of state laws mean an issuer has to tread carefully. Washington, for example, requires the issuer to transfer unredeemed balances to its unclaimed property fund after five years; in some states, it’s three years – but a card holder may have a claim for a longer time period. About half the states have taken the regulations into account and exempted gift cards from their unclaimed property laws, but a conflict remains in others.

These gift card provisions of the Credit CARD Act were made a part of the Electronic Funds Transfer Act. A merchant acting in violation of the regulations can be liable to the consumer for actual damages, penalties of up to $1000 per sale, and attorney fees. The Federal Trade Commission has enforcement responsibility, and can also issue a cease and desist order against a company that the FTC believes is violating or will likely violate the regulation.

If you have questions about this, or any of the items referenced in this blog, please contact Greg.

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