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October 19, 2012

Via E-mail

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW.
Washington, DC 20552

Attention: CFPB Docket No. CFPB-2012-0036

Re: Comment Letter on Notice of Intent to Make Preemption Determination Seeking Comment on State Abandoned Property Laws

Dear Madam:

This letter is submitted to the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) on behalf of the Network Branded Prepaid Card Association (“NBPCA”) in response to the notice of intent to make preemption determination (“Notice”) regarding whether certain State laws relating to unclaimed gift certificates, store gift cards or general-use prepaid cards (herein referred to as “gift cards”) are inconsistent with and preempted by the requirements of the Electronic Fund Transfer Act (“EFTA”) and Regulation E, as they relate to gift cards, set forth in 12 C.F.R. § 1005.20. The Notice was published in the *Federal Register* on August 21, 2012, at 77 *Fed. Reg.* 50404-50407 (“Request for Comments”). The NBPCA considers the State laws at issue inconsistent with the provisions in the EFTA and Regulation E relating to gift card expiration dates (“Federal Law”). Furthermore, the NBPCA believes that the State laws do not afford greater protection to consumers. For these reasons, as set forth in further detail below, the NBPCA respectfully urges the CFPB to decide in favor of federal preemption.

The NBPCA is a non-profit trade association representing a diverse group of organizations that take part in delivering network branded (often referred to as “open loop”) prepaid cards and other forms of prepaid access used by consumers, businesses and governments. The NBPCA’s members include prepaid access providers and sellers, in addition to depository institutions, card organizations, processors, program managers, marketing and incentive companies, card distributors, law and media firms. The NBPCA is active on behalf of its members to inform and educate government officials, the media and consumers about these important payment products that provide critical access to financial services for the underbanked and a growing segment of

“Generation Y” consumers, as well as convenience, security and efficiency to a wide-range of users. In its role as a leader in the prepaid industry, the NBPCA works with members to establish and encourage best practices that benefit card users and industry participants while at the same time, protect our financial systems from misuse and abuse.¹ We welcome the opportunity to respond to the Request for Comments.

Background

The Notice seeks input on whether Federal Law preempts unclaimed property law provisions in Maine and Tennessee relating to gift cards. Under Federal Law, it is prohibited for a gift card to have a funds expiration date prior to five years from the date of issuance or last load, whichever is later.² Under Maine’s unclaimed property law, stored value cards are presumed abandoned two years after December 31 of the year in which the obligation occurred or the most recent transaction occurred, whichever is later.³ Under Tennessee’s unclaimed property law, gift certificates are presumed abandoned upon the earlier of the expiration date or two years from the date of issuance.⁴ Once presumed abandoned, the card issuer is responsible for transferring the appropriate unclaimed amount to the State, at which point in time the State assumes custody of such unclaimed funds until claimed by the card’s rightful owner. Under both State Laws, the presumption of abandonment takes place prior to the five year mark under Federal Law.

Generally speaking, preemption may be established if a State’s laws are inconsistent with Federal law, so long as the State’s laws do not afford consumers greater protection than the Federal law. The EFTA and Regulation E explicitly provide that a preemption determination shall be made by the Bureau with respect to State laws relating to gift cards.

The Bureau has requested comments on whether there is any inconsistency between Maine and Tennessee’s unclaimed property laws (“State Laws”) vis-à-vis the expiration date provisions of the EFTA and Regulation E and, if so, the nature of the inconsistency. In addition, the Bureau seeks information on whether and how gift card issuers can comply with both Federal and State law in general. Finally, the Notice seeks input on whether the State Laws afford consumers greater protection than the Federal Law.

Inconsistencies Between the State Laws and Federal Law

Inconsistent Time Periods. The most prominent inconsistency between the State Laws and Federal Law results from the conflicting time periods. The State Laws require a gift card issuer to surrender an unclaimed gift card’s underlying funds after two years of inactivity or two years

¹ This letter does not necessarily represent the position of each of the organizations that is a member of the NBPCA. While we share our general views in this letter, given the wide diversity of our membership, we understand that many of our individual members also will submit specific comments to address how the issues presented in the Request for Comment impacts their respective organizations.

² 15 U.S.C. § 16931-1(c).

³ 33 MRSA § 1953.

⁴ Tenn. Code Ann. § 66-29-135. See § 66-29-135(c) for exemptions.

after the date of issuance, at which point in time the issuer is relieved of all liability arising thereafter with respect to the gift card. Federal Law, on the other hand, requires a gift card issuer to honor a gift card for five years from the date of issuance or date of last load, whichever is later.

It is important to note that the Federal Law emphasizes the importance of the consumer's perspective and experience. The consumer is expected to have a "reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date."⁵

An issuer's inability to honor a gift card due to escheat impacts consumers exactly as an expiration date would: In most cases,⁶ the consumer is unable to utilize the gift card after a certain point in time. Thus, the State Laws requirement to escheat after two years is inconsistent with the Federal Law's prohibition on expiration dates of less than five years.

Inconsistent Understanding of Card Usage. There is additional inconsistency between the State Laws and Federal Law with respect to a consumer's perspective regarding the period of time in which a gift card will be honored. Based upon the Federal Law, consumers are led to believe that they have access to the underlying funds on their gift cards up to the expiration date printed on the card, at a minimum (which is at least a full five years from the date of issuance), and possibly longer depending on the date of last load. However, upon compliance with the State Laws, the issuer no longer holds such underlying funds and, as further discussed below, is no longer required to honor the gift card. This inconsistency creates unnecessary confusion and results in consumers not being able to use seemingly valid gift cards and not understanding if and how they can regain access to their funds. Consequently, one of the primary goals of the gift card related provisions of the EFTA and Regulation E – clear and conspicuous disclosures for the purpose of better understanding by consumers – is defeated.

Inconsistent Source for Funds Retrieval. The State Laws provide that gift card issuers have no further obligation to the cardholders after unclaimed funds are escheated to the State. As a result, consumers who are unable to use their gift cards after two years may not be able to simply contact the issuer to "reactivate" a dormant card. In such cases, they would have to determine which State unclaimed funds were reported to and then follow the established procedures to claim the funds. Determining which State to contact to reclaim funds corresponding to an unclaimed gift card is a complex legal issue⁷ and properly submitting unclaimed property claim

⁵ 12 CFR § 1005.20(e)(1).

We note that the funds underlying certain gift cards do not ever actually expire.

⁶ Under State Laws, an issuer can elect, instead of declining a purchase transaction on a card with escheated funds, to honor the card. In those instances, the issuer must approach the State and request a reimbursement for the funds paid on behalf of the consumer, and then wait often many months (or for some States, more than a year) to be reimbursed. In addition, the issuer's cost to recover such funds may well equal or exceed the amount recovered. While this scenario is a possibility, we believe it far more likely that the issuer will decline to honor the card and will direct the consumer to contact the State.

⁷ According to the priority scheme established by the U.S. Supreme Court, and codified into each state's abandoned property statute, unclaimed property first goes to "the State of the last known address of the owner, as shown by the

forms can be tedious and time-consuming. Thus, once escheated, the ease in which a consumer may access and retrieve previously unclaimed funds disappears, and the consumer is left alone to figure out whom to contact and what to do.

Inconsistent Ability to Retrieve Funds. Finally, consumers will be unable to establish rightful ownership over unclaimed funds in cases where their names and/or addresses are not registered with the gift card number since the existing processes for claiming unclaimed property relies on a property owner's name and address. Most gift cards are sold on an anonymous basis and do not require registration, and so the only information an issuer would be able to report to a State would be the gift card number and the amount of underlying funds. No State would be able to publish such information to assist consumers in the retrieval process without opening itself up to fraudulent claims from criminal elements who could use such data to falsely claim the escheated funds. Ultimately, it is unlikely that most consumers will be able to establish rightful ownership over the gift card and thus obtain a return of their funds.

Compliance

Gift card issuers are unable to simultaneously comply with both the Federal Law and State Laws without subjecting themselves to additional significant burdens. An issuer has two choices if a consumer attempts to use a gift card to make a purchase after the previously unclaimed card balance has been escheated to a State: (1) decline the purchase at the point of sale (causing embarrassment and confusion to the consumer) and then (if asked by the consumer about the denial) inform the consumer that in accordance with State Laws, it no longer holds the funds and that the consumer should contact the State, or (2) honor, re-issue or re-activate the gift card for the consumer and seek reimbursement from the State for the funds it has now paid out twice. Under the first scenario, the issuer not only risks upsetting the consumer, but the intended goal of the Federal Law's expiration date provision is thwarted since the consumer is prevented from using the gift card prior to five years from the date of issuance or date of last activity.⁸ Under the second scenario, the issuer is forced to temporarily set aside double the amount of gift card funds – once to the State and once to the cardholder – until such time that the issuer is able to obtain a refund from the State. It is certainly possible, or even likely, that the issuer's cost to recover such funds will equal or exceed the amount recovered. Both options constitute poor business results. The latter choice may permit compliance with both laws, but it imposes a significant financial burden on issuers.

State Law Does Not Provide Greater Protection for Consumers

Based upon the inconsistencies set forth above, neither State Law affords consumers greater protection than the protections offered by Federal Law. Federal Law affords consumers with a

holder's books and records," and second, where the holder has no record of an address at all or the last known address is in a state which does not provide for escheat of the unclaimed property, the state of corporate domicile of the holder has the right to the unclaimed property. Furthermore, determining the true "holder" (i.e., the party ultimately responsible for escheating unclaimed funds) is not always obvious on its face.

⁸ In addition, the first scenario opens up gift card issuers to the threat of litigation stemming from consumers' misunderstanding that Federal Law may have been violated.

longer redemption period, less confusion regarding card usage and a single source (i.e., the gift card issuer) for funds access. More specifically:

- Consumers will not have the full five-year period mandated under Federal Law to use their gift cards since the State Laws provide for a two year escheatment period. When buying a gift card, consumers will not be confident that they (or their gift recipients) will be able to use the card for the full five years. While it may be true that consumers have an indefinite opportunity to reclaim unclaimed gift card funds from the State, the reality is that the number of gift cards reclaimed after years of inactivity is minuscule. This is true, in part, because unregistered cards are virtually impossible to reclaim at all.
- Consumers who attempt to use their unexpired cards after the two year escheatment period may be declined, and in the vast majority of cases, they will not be aware that the funds have been transferred to the State as required by law. Few consumers are familiar with State abandoned property laws and the application of these laws to gift cards. If a consumer discovers an unexpired gift card that now has a zero balance, they will likely not know to check if there were remaining funds that have been escheated to the State, nor will they necessarily know that they are able to reclaim these funds from the State.
- The processes established for consumers to recover unclaimed funds from a State's unclaimed property department are complex and time-consuming. Allowing a full five years of access to the funds, as provided by the Federal Law, is much more consumer-friendly than permitting only two years of access via the issuer and then requiring the consumer to obtain subsequent access through the States.
- Additionally, consumers would not necessarily know which State would be holding their unclaimed funds, thus causing even more unnecessary consumer confusion.

Contrary Arguments

The Request for Comment noted a few arguments for the proposition that a two year escheat period might actually benefit consumers because (1) the gift card value would never expire once it has been escheated – even after five years; and (2) no service fees could be debited from the gift card value after it has been escheated, thus protecting the base amount of the gift card from erosion due to fees.

We must respectfully disagree with these positions. Taking this from purely the perspective of the consumer, we believe consumers will virtually always prefer to be able to use the gift card when it is convenient up until the expiration date disclosed on the card, rather than face the embarrassment of a decline at the point of sale and the concomitant hassle of having to submit a claim for reimbursement. This is especially true when the card still appears, on its face, to be valid.

Consumers want the benefit of their bargain. They purchased or received a gift card with a stated expiration date that may or may not be subject to service fees. All such terms and restrictions are disclosed up front in the packaging and terms and conditions, and on the gift card itself. The States are terminating a consumer's ability to use the card at the point of sale, years before its expiration and contrary to the card's terms and conditions, all under the pretext of

“protecting the consumer.” However, the primary beneficiaries of such laws are the States that impose this escheat policy at an unusually early date and thereby increase their own revenues.⁹

We wish to emphasize that we are not suggesting that States should never impose an escheat requirement on gift cards. However, the 5 year validity requirement set forth by Congress under the CARD Act recognizes that many consumers still wish to use their gift for a full 5 years and therefore gift cards unused after 3 or 4 years should not be deemed as truly “abandoned.” State escheat laws should apply to gift cards only after 5 years in order to better serve the public. If the escheat laws are allowed to stand prior to 5 years, it is primarily consumers who will suffer the consequences.

Conclusion

For all of the reasons set forth above, the NBPCA respectfully urges the CFPB to decide in favor of federal preemption.

Thank you, once again, for this opportunity to provide input and guidance regarding this subject matter. The NBPCA supports the innovation, growth and success of gift cards in the economy in a manner which meets your goals of safety and transparency. Our members not only seek to meet consumer product demand, but they also strive to achieve the highest level of consumer confidence and satisfaction.

If you have any further questions, please do not hesitate to contact us at (201) 746-0725.

Very truly yours,



Kirsten Trusko
President and Executive Director

Network Branded Prepaid Card Association (NBPCA)

⁹ For example, the Fiscal Note and the Assembly Budget Committee Statement to NJ A 3002 (the bill proposing New Jersey’s controversial unclaimed property law) provided that the escheatment of stored value cards inactive for two years would “produce an annual revenue gain to the State General Fund” estimated between \$32,900,000 to \$54,900,000. Fiscal Note and Assembly Budget Committee Statement, NJ A 3002, July 28, 2010.