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Summary of CFPB Notice of Intent for Gift Card Preemption Determinations

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On August 21, 2012, the Consumer Financial Protection Bureau ("CFPB") published a notice of intent to make a preemption determination on whether provisions of abandoned property laws in Maine and Tennessee relating to gift cards should be preempted by the federal Electronic Fund Transfer Act ("EFTA"), as implemented by Regulation E ("Notice"). In issuing the Notice, the CFPB is exercising its authority under Section 922 of the EFTA, which provides that the "Bureau shall, upon its own motion or upon the request of any financial institution, State or other interested party . . . determine whether a State requirement is inconsistent or affords greater protection."

Morrison & Foerster LLP submitted the request to preempt Tennessee law in May on behalf of concerned representatives of the payment card industry. The firm also submitted a similar request with respect to New Jersey law, which was mooted by a recent change in New Jersey law.

CFPB TO FOCUS ON WHETHER STATE LAWS PROVIDE CONSUMERS GREATER PROTECTIONS

The CFPB specifically solicits comment on whether the Maine and Tennessee statutes offer greater consumer protection than federal law.[1] In particular, the CFPB asks whether there are inconsistencies between the abandoned property provisions of these state laws and the expiration date provisions of the EFTA and Regulation E and, if so, requests comment on the nature of such inconsistencies. The CFPB also solicits comment on whether gift card issuers can comply with both federal and state law, for example, by honoring unclaimed cards and requesting reimbursement from Maine or Tennessee.[2] The CFPB questions whether it is possible for an issuer to relinquish funds to a state, and (1) allow a consumer to redeem a gift card during the remainder of the five-year period provided by Regulation E Section 1005.20, while (2) the issuer subsequently requests reimbursement from the state.

On the question of whether Maine and Tennessee law provide greater consumer protections, the CFPB appears to acknowledge the potential difficulty a consumer would have in recovering funds from the state. Specifically, the CFPB highlights the time- and expense-related barriers consumers could encounter when submitting claims for abandoned funds to Maine or Tennessee. The CFPB also acknowledges that there may be confusion in determining which state to contact for abandoned fund claims. For example, the CFPB explains that, depending on where the issuer had incorporated, a New York consumer may need to file an abandoned property claim with either Maine or Tennessee, rather than filing a claim with New York.

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[1] The CFPB interprets Maine law to consider gift certificates, gift cards and stored value cards (excluding prefunded bank cards) abandoned two years after December 31st of the year in which the last card transaction occurred, including any transaction that added value to the card. Separately, the CFPB interprets Tennessee law to consider a gift certificate abandoned when it remains unclaimed by the earlier of (1) the expiration date or (2) two years from when the certificate was issued.

[2] Under the laws of Maine and Tennessee, generally issuers must transfer funds to the state by May 1st of the year after such funds are considered abandoned. At such time, the state assumes responsibility for the funds, thereby absolving the issuer from any future liability. If a customer attempts to redeem abandoned funds from the issuer, the issuer may either (1) honor the transaction and request reimbursement from the state or (2) direct the customer to seek reimbursement from the state.

The CFPB also highlights a Catch-22 type situation in which consumers could find themselves when attempting to claim abandoned funds. For instance, if an issuer does not maintain records of a gift card owner's address, unused funds will transfer back to the issuer's state of corporate domicile. In order to successfully claim abandoned gift card funds from a state, a consumer must prove he or she is the proper recipient of those funds. However, because many issuers are unable to provide name or address information for holders of gift cards, states such as Maine and Tennessee will not have sufficient information to verify ownership of the abandoned funds. Such a process could effectively preclude recovery of funds, thereby leaving consumers, for all practical purposes, with an approximate two-year period to access funds under either Maine or Tennessee law, rather than the five-year period available under Regulation E.

In connection with its evaluation of whether state law is more protective, the CFPB suggests that state laws may provide some meaningful benefits to consumers. As an example, the CFPB indicates that funds transferred to either state would be protected from inactivity fees or potential loss due to the issuer's bankruptcy. The CFPB also indicates that a consumer who is able to successfully recover funds may benefit by receiving cash instead of store credit.

In an August 16, 2012 press release, Director Cordray indicated the notice "gives the public an opportunity to comment on a decision that could affect how consumers use their gift cards." Interested parties may submit comments through October 22, 2012.

NOTICE EXCLUDES NEW JERSEY UNCLAIMED PROPERTY LAWS

Morrison & Foerster's request to preempt New Jersey law is not considered in the Notice, since the CFPB says the request has been mooted by recent amendments to New Jersey's escheat law that will lengthen the time period for abandoned property from two to five years.[3] In this regard, New Jersey's amendments were deemed effective upon enactment, providing immediate relief to prepaid card issuers.

PRESS RELEASE

http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-seeks-input-on-gift-card-laws/

NOTICE OF INTENT TO MAKE PREEMPTION DETERMINATION

http://www.gpo.gov/fdsys/pkg/FR-2012-08-21/pdf/2012-20531.pdf

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[3] N.J. Stat. § 46:30B-42.1 as amended by 2012 N.J. ALS 14 on June 29, 2012.

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