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DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

U.S. Consumer Financial Services and Financial Institutions and Services Litigation Alert

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Many of us have had a similar experience. We receive a gift card, put it in a “safe” place with other gift cards, and forget it exists. Inevitably, we uncover the gift card and find ourselves asking questions such as: Does this card still have any value? Has it expired? Can it expire? Will I be charged a fee for use (or non-use)? Should I call the 800 number? The experience invariably ends by putting the card aside and promising to deal with it later. But, what really does happen to the value of those cards?

Gift cards issued by retailers and other merchants are prevalent throughout the United States. They are given and received by consumers for birthdays, holidays, and other events year-round. Retailers provide them as part of special promotions, in exchange for returns of merchandise, and for customer service purposes. The popularity and widespread use of gift cards continue to increase.

Reports indicate that in 2015, gift card sales in the United States alone totaled an estimated \$130 billion.¹ A survey by the National Retail Federation found that gift cards were “the most requested gift” during the holiday seasons for the past nine years in a row.² Moreover, a recent study conducted by the Wharton School Baker Retailing Center and the NPD Group found that gift cards are very popular with so-called “Millennials,”³ who make up approximately one-third of the United States population and “are the largest and youngest shopper generation.”⁴ These reports highlight the importance of gift cards to retail merchants’ businesses.

As an integral part of many merchants’ businesses, assessing potential liability in developing and implementing gift card practices is critical and worthy of frequent review. While gift cards and related products are subject to a variety of state laws and regulations, this alert focuses primarily on the overarching provisions of federal law as codified in the Electronic Fund Transfers Act (“EFTA”)⁵ and Regulation E.⁶

¹ See Denise Dahlhoff, *Gift Cards’ Appeal to Millennials*, RETAILING TODAY.COM, Feb. 19, 2016, at 2 (available at <http://www.retailingtoday.com/article/gift-cards-appeal-millennials>).

² *Id.* (citing National Retail Federation Survey at <https://nrf.com/media/press-releases/early-promos-great-deals-put-traditional-gift-card-buyers-gift-wrapping-mode>).

³ Millennials are roughly defined to include individuals born in the early 1980s through the early 2000s (*i.e.*, 1982-2004). See Wikipedia, at <https://en.wikipedia.org/wiki/Millennials>.

⁴ Dahlhoff, *Gift Cards’ Appeal to Millennials*, at 2; see also Denise Dahlhoff and Sarah Wittenborn, *Exploring Cross-Generational Buying Behavior at a Time of Complex Change in Retail Landscape*, A Joint Report by the NPD Group and the Baker Retailing Center at the Wharton School (February 2006), at 3-4 (available at <https://bakerretail.wharton.upenn.edu/research-publications/publications/consumer-studies/>).

⁵ See 15 U.S.C. §§ 1693, *et seq.*

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

Background

In May 2009, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act").⁷ The CARD Act, in relevant part, amended the EFTA⁸ to add sections addressing and governing the use of gift cards.⁹ Those amendments became effective on August 22, 2010,¹⁰ and apply only to gift cards sold or provided to consumers on or after August 22, 2010.¹¹ Regulation E was later amended and new regulations promulgated to implement the gift card provisions of the EFTA.¹²

The EFTA applies to three separate, yet-related gift card products: "general-use prepaid cards," "gift certificates," and "store gift cards."¹³

First, "general-use prepaid cards" are cards, payment codes, or payment devices that are (1) "redeemable at multiple, unaffiliated merchants or service providers," (2) "issued in a requested amount, whether or not that amount may . . . be increased in value or reloaded," (3) "purchased or loaded on a prepaid basis," and (4) "honored . . . by merchants for goods or services."¹⁴ These are also referred to as "open-loop" gift cards, and they tend to run on credit-card-based systems. The most common examples would be Visa or MasterCard prepaid gift cards.

Second, "gift certificates" are electronic promises that are (1) "redeemable at a single merchant or an affiliated group of merchants" (2) "issued in a specified amount that may not be increased or reloaded," (3) "purchased on a prepaid basis in exchange for payment," and (4) "honored . . . by such single merchant or affiliated group of merchants for goods or services."¹⁵

Third, "store gift cards" are electronic promises, plastic cards, or other payment codes or devices that are (1) "redeemable at a single merchant or an affiliated group of merchants," (2) "issued in a specified amount, whether or not that amount may be increased in value or reloaded," (3) "purchased on a prepaid basis in exchange for payment," and (4) "honored . . . by such single merchant or affiliated group of merchants for goods or services."¹⁶

Store gift cards and gift certificates are the traditional form of single retailer (or affiliate retailers) gift card, and are also known as "closed-loop" cards. While similar in most respects, the key distinctions are clear. Both a store gift card and a gift certificate are

⁶ See 12 C.F.R. §§ 1005.1, *et seq.* (regulations issued by the Consumer Financial Protection Bureau ("CFPB")); 12 C.F.R. §§ 205.1, *et seq.* (regulations issued by the Board of Governors of the Federal Reserve System). The two sets of regulations are substantively identical, and the subsections in each set of regulations match up closely. For ease of reference we will cite to the CFPB regulations herein.

⁷ Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009).

⁸ The EFTA is a consumer protection statute that is designed to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." 15 U.S.C. § 1693(b).

⁹ See *id.* at 1751-1754, §§ 401-403.

¹⁰ *Id.* at 1754, § 403 (the EFTA amendments become effective "15 months after the date of enactment" on May 22, 2009).

¹¹ 12 C.F.R. § 1005.20(g)(1) ("the requirements of this section apply to any gift certificate, store gift card, or general-use prepaid card sold to a consumer on or after August 22, 2010, or provided to a consumer as a replacement for such certificate or card").

¹² See generally 12 C.F.R. § 1005.20.

¹³ See 15 U.S.C. § 1693l-1.

¹⁴ *Id.* § 1693l-1(a)(2)(A).

¹⁵ *Id.* § 1693l-1(a)(2)(B).

¹⁶ *Id.* § 1693l-1(a)(2)(C).

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

redeemable only at one merchant (or one family of affiliated merchants), whereas a general-use prepaid card is redeemable at multiple, unaffiliated merchants. However, consumers can increase the value of store gift cards and general-use prepaid cards, whereas the value of a gift certificate cannot be increased. We also note that open-loop, general-use, prepaid cards raise a number of practical and legal issues not directly confronted by the closed-loop cards. While those issues are not the subject of this alert, we will address these and other related subjects in future publications. Otherwise, these three products differ only in form and method of transmission.¹⁷ We will refer to all three products collectively as “gift cards.”

Restrictions and Disclosures under the EFTA: Dormancy Fees, Service Fees, and Expiration Dates

The EFTA restricts three general practices concerning issuance of gift cards. Those are: (1) charging dormancy or inactivity fees; (2) charging service fees; and (3) setting expiration dates.¹⁸ Each is discussed below.

Dormancy, Inactivity, and Service Fees

The EFTA treats dormancy fees, inactivity fees, and service fees similarly. A dormancy or inactivity fee is defined as any “fee, charge, or penalty for non-use or inactivity of a” gift card.¹⁹ A service fee is defined as “a periodic fee, charge, or penalty for holding or use of a” gift card.²⁰ The EFTA prohibits the assessment of either type of fee, except in limited circumstances.²¹

A merchant may charge a dormancy, inactivity, or service fee only where (1) the consumer has not used the gift card for at least a 12-month period, (2) the merchant has complied with the EFTA’s disclosure requirements, (3) the merchant does not charge more than one fee in any given calendar month, and (4) the merchant complies with any additional requirements established by the Consumer Financial Protection Bureau (“CFPB”).²²

To satisfy the EFTA, a merchant must disclose the existence of such fees at least twice.²³ First, the gift card itself must “clearly and conspicuously” state that a fee may be charged, the amount of the fee, how often the fee may be charged, and that such fee is assessed for inactivity.²⁴ The gift card must also display a telephone number and, if maintained, a

¹⁷ Notably, the EFTA expressly exempts from the definitions of “general-use prepaid cards,” “gift certificates,” and “store gift cards,” a number of different categories of similar products, including, but not limited to, devices used solely for telephone services, reloadable cards not marketed or labeled as a gift card or gift certificate, and a loyalty, award, or promotional gift card. See 15 U.S.C. § 1693I-1(a)(2)(D). While exempted from the EFTA definitions, Regulation E provides for certain required disclosures for “loyalty, award, or promotional gift card[s].” See 12 C.F.R. § 1005.20(a)(4).

¹⁸ See generally 15 U.S.C. § 1693I-1.

¹⁹ *Id.* § 1693I-1(a)(1).

²⁰ *Id.* § 1693I-1(a)(3)(A). A “service fee” does not include “a one-time initial issuance fee” for a general-use prepaid card. *Id.* § 1693I-1(a)(3)(B).

²¹ See *id.* § 1693I-1(b) (“Except as provided under [the EFTA], it shall be unlawful for any person to impose a dormancy fee, an inactivity charge or fee, or a service fee with respect to a gift certificate, store gift card, or general-use prepaid card.”).

²² *Id.* § 1693I-1(b)(2).

²³ 15 U.S.C. § 1693I-1(b)(3).

²⁴ *Id.* § 1693I-1(b)(3)(A).

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

website, that a consumer may use to obtain information about any chargeable fees.²⁵ Second, the merchant must inform the purchaser of the potential charges and fees **before** the gift card is purchased, regardless of the manner of purchase (whether in person, over the Internet, or by telephone).²⁶

Expiration Dates

The EFTA prohibits the sale or issuance of a gift card “that is subject to an expiration date.”²⁷ The statute, however, contains an express exception, such that a gift card may contain an expiration date if: (1) “the expiration date is not earlier than 5 years after the date” on which the gift certificate was issued or the date on which funds were last loaded to a store gift or general-use prepaid card; and (2) the expiration date is “clearly and conspicuously stated.”²⁸ While the EFTA speaks in terms of a “prohibition,” in actuality it sets a 5-year minimum for an acceptable expiration date. The EFTA does not distinguish between expiration of the underlying funds and expiration of the payment device; that distinction is left to the regulations.

Pursuant to Regulation E, a merchant seeking to issue a gift card subject to an expiration date must also comply with additional requirements.²⁹ Those include the following: (1) the merchant establishes “policies and procedures to provide consumers with a reasonable opportunity to purchase a [gift card] with at least five years remaining until the [card] expiration date;” and (2) the expiration date for the underlying funds (as opposed to the expiration of the actual certificate or card) must be, at a minimum, the later of either (a) 5 years after initial issuance of the gift certificate or 5 years after the date on which funds were last loaded to a general-use prepaid or store gift card, or (b) the certificate or card expiration date, if any.³⁰ Accordingly, the underlying funds cannot expire before the expiration of the physical gift card itself.

Where the gift card expires before the underlying funds expire, a merchant must also provide a mechanism through which a consumer can obtain a replacement card or recover the remaining funds on the card.³¹ A merchant must ensure that the gift card itself discloses the expiration date of the underlying funds, or otherwise discloses the fact that the funds do not expire, and that it displays a toll-free telephone number and, if applicable, a website for the consumer to obtain a replacement card if the card expires before the funds.³² A merchant must also disclose “with equal prominence and in close proximity” to the gift card’s expiration date, the fact that the gift card expires, but that “the underlying funds either do not expire or expire later than the . . . card.”³³ Finally, a gift card must also disclose the fact that the consumer may obtain a replacement card, and that no fee or charge will be imposed for

²⁵ See 12 C.F.R. § 1005.20(f)(2). Notably, Regulation E also requires certain disclosures be contained on the gift card with respect to fees other than dormancy, inactivity, or service fees, including information regarding the type of fee, the amount of the fee or its method of calculation, and the conditions under which the fee may be assessed. See *id.*

²⁶ See 15 U.S.C. § 1693l-1(b)(3)(B).

²⁷ *Id.* § 1693l-1(c)(1).

²⁸ *Id.* § 1693l-1(c)(2).

²⁹ See generally 12 C.F.R. § 1005.20(e).

³⁰ *Id.*

³¹ See, e.g., *id.*

³² *Id.* § 1005.20(e)(3).

³³ *Id.* § 1005.20(e)(3)(iii). Note that this section also contains an exception for gift cards that disclose an expiration date that is at least 7 years from the date of manufacture. *Id.*

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

obtaining a replacement gift card or for the provision of the remaining balance in some other manner prior to the funds expiration date (except where the gift card is lost or stolen).³⁴

Form of Required Disclosures

Importantly, neither the EFTA nor Regulation E expressly defines or provides direct guidance as to what constitutes a “clear and conspicuous” disclosure. Nevertheless, Regulation E does provide additional detail as to the necessary form of the required disclosures of fees and expiration dates. Specifically, disclosures must typically be in writing or in an electronic form that is “retainable” by the consumer, and disclosures must contain “commonly accepted or readily understandable abbreviations or symbols.”³⁵ The one exception is for disclosures that are required to be provided before purchase (i.e., dormancy, inactivity, or service fee information); those disclosures may be provided orally.³⁶ Importantly, the “fees and terms and conditions of expiration” that must be disclosed before purchase “may not be changed after purchase.”³⁷ For these reasons, merchants should consider developing clear policies and procedures for sales representatives to follow to ensure that the required disclosures are made before the sale of gift cards.

With respect to disclosures that must be made on the certificate or card itself, Regulation E reinforces the strictness of the “on the card” requirements. It expressly provides that disclosures contained in a separate, but accompanying, terms-and-conditions document, disclosures made on the packaging of or on a sticker or label affixed to the gift card “**do[] not constitute a disclosure on the certificate or card.**”³⁸ In other words, it is not enough to provide the required information to the consumer or substantially comply with the disclosure requirements; the information must be contained on the physical certificate or card.³⁹ Such strict disclosure requirements can present a litigation minefield for the unprepared.

Potential Civil Liability Exposure for Violation of the EFTA

The potential exposure for a merchant accused of violating the EFTA may be substantial, especially in a putative class-action context. Indeed, the EFTA provides for a private right of action by consumers for any failure to comply with the gift-card provisions of the statute.⁴⁰

In an individual action, a merchant may be liable for “the **sum** of” (1) actual damages sustained by the consumer, (2) statutory damages of not less than \$100.00 and not more than \$1,000.00, and (3) reasonable attorneys’ fees and costs.⁴¹ The potential liability exposure in a class action differs only with respect to the available statutory damages. Statutory damages for putative class members may be apportioned in “such amount as the court may allow,” are not limited to the \$100.00 minimum amount for individual class members, and are subject to a cap of the lesser of \$500,000.00 or 1% of the net worth of the

³⁴ *Id.* § 1005.20(e)(4).

³⁵ *Id.* § 1005.20(c)(1), (c)(2).

³⁶ *Id.* § 1005.20(c)(2), (c)(3).

³⁷ *Id.* § 1005.20(c)(3).

³⁸ *Id.* § 1005.20(c)(4).

³⁹ *See id.* That conclusion holds true for physical and electronic forms of gift cards. *Id.* (“For an electronic certificate or card, disclosures must be provided electronically on the certificate or card provided to the consumer.”).

⁴⁰ *See* 15 U.S.C. § 1693m(a).

⁴¹ *See id.* § 1693m(a).

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

merchant.⁴² While the class-action-statutory-damages cap does reduce potential exposure, it does not limit the amount of actual damages or attorneys' fees and costs that a successful class could recover on top of a capped statutory-damages award.⁴³ Accordingly, the EFTA's cumulative damages provisions present a risk of substantial exposure for merchants that run afoul of the gift-card provisions of the statute.

Importantly, the EFTA does not require that a consumer - whether in an individual or a class action - establish actual damages to state a claim for relief and recover statutory damages and attorneys' fees and costs.⁴⁴ And, in practice, consumers may have difficulty in establishing actual damages. As with other federal consumer protection statutes, these factors raise the issue of whether a plaintiff must demonstrate actual harm to satisfy constitutional standing requirements (in particular, the injury-in-fact requirement), or whether a plaintiff and/or putative class may recover damages predicated solely on an alleged technical violation of the statute. The majority of federal courts that have considered the issue to date have found that a plaintiff seeking statutory damages under the EFTA need not allege or prove actual injury to satisfy constitutional standing requirements.⁴⁵ However, this issue is currently pending before the United States Supreme Court in connection with a different federal statute, and the Supreme Court's resolution could serve to restrict or expand the universe of potential EFTA lawsuits based on alleged violations of the EFTA.⁴⁶

Statutory Defenses to Liability

Despite the civil liability risk under the EFTA, merchants have additional shields at their disposal, statutory and otherwise, to help blunt the impact of those liability provisions.

First, the EFTA has a short statute-of-limitations period. The EFTA provides that actions must be brought "within one year from the date of the occurrence of the violation."⁴⁷ This naturally leads to the question of when does a violation "occur?"

As to the charging of prohibited fees, a violation could occur, and the limitations period likely begins to run, as of the date the fee is charged or assessed (or, at its most generous, possibly when the consumer learns of the charge or assessment).⁴⁸ The expiration date prohibitions, however, provide a more convoluted factual scenario. Does the statute-of-limitations clock start ticking upon the purchase of the gift card (possibly, if a less than 5-year expiration date is disclosed on or with the card) or on the invalid expiration date? What if an expiration date violation occurs solely based on an inadequate disclosure? Does the limitations period begin upon the provision of the inadequate disclosure, the purchase of the

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See, e.g., Traylor v. United Cash Sys., LLC*, No. 3:12-cv-01006 (MPS), 2014 WL 7404558, at *2-3 (D. Conn. Nov. 10, 2014) ("There can be an Article III injury-in-fact entitling a plaintiff to statutory damages under the EFTA even if the plaintiff does not or cannot seek actual economic damages."); *Mabary v. Hometown Bank, N.A.*, 888 F. Supp. 2d 857, 860 (S.D. Tex. 2012) (noting that the majority of district courts had found Article III injury-in-fact satisfied based solely on a technical statutory violation of the EFTA).

⁴⁶ *See Spokeo, Inc. v. Robins*, No. 13-1339 (U.S.) (argued on Nov. 2, 2015) (addressing the Article III standing issue in the context of an action under the Fair Credit Reporting Act).

⁴⁷ 15 U.S.C. § 1693m(g).

⁴⁸ *See Park v. Webloyalty.com, Inc.*, No. 12cv1380-LAB (JMA), 2014 WL 4829465, at *5-6 (S.D. Cal. Sept. 29, 2014) (discussing EFTA statute of limitations as applied to unauthorized subscription charges assessed to consumer's bank account); *see also Wike v. Vertrue, Inc.*, 566 F.3d 590, 593-95 (6th Cir. 2009) (finding that electronic funds transfer-based cause of action under the EFTA accrued when the first transfer actually occurred).

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

card (if at a different time), or on the expiration date itself (based on an argument that, absent the disclosures, no expiration date is permitted)?

With respect to gift cards, the Courts have not had an opportunity to answer these questions, and Regulation E provides no additional guidance. Yet, the answers could be significant in assessing potential exposure under the EFTA. From a class-action perspective, however, the class period applicable to any putative class claim would likely reach back only one year from the filing of a complaint, which, even given the open questions above, would still limit the size of any putative class accordingly.

Second, the EFTA contains three express statutory defenses. A merchant is not liable where: (1) an alleged violation was unintentional, resulted from a bona fide error, and occurred despite “the maintenance of procedures reasonably adapted to avoid any such error;”⁴⁹ (2) the merchant’s allegedly non-compliant act or omission was done “in good faith conformity” with any agency rule, regulation, or interpretation;⁵⁰ or (3) before the filing of a lawsuit, the merchant notified the consumer of a potential violation, complied with the applicable statutory provisions implicated, made any required adjustments to the consumer’s account, and paid actual damages to the consumer.⁵¹

Finally, merchants may seek to limit their potential liability through the use of mandatory arbitration provisions and class-action waivers. Indeed, some merchants provide “terms and conditions” documents with a gift card purchase (either provided as an insert with the gift card or as an electronic agreement) that expressly require most, if not all, disputes between the consumer and the merchant be resolved in individual (as opposed to class) arbitration. While the case law addressing arbitration clauses contained in gift-card terms is sparse, courts have generally enforced arbitration agreements and class action waivers under the Federal Arbitration Act in other consumer contexts. Accordingly, if a mandatory arbitration provision contained as part of the terms of a gift card purchase is sufficient to form a binding agreement between consumer and merchant, there is a strong likelihood that such an agreement would be enforced and individual arbitration compelled.

Beware State Law; the EFTA Sets the Minimum Rules for Gift Card Use

A gift-card-issuing merchant cannot ignore the additional potential restrictions and regulations under various state laws. The EFTA provides the minimum requirements that apply across the United States, but those minimum requirements can be significantly expanded by more consumer-protective state laws. That is because while the EFTA does preempt, and thus preclude enforcement of, some state laws, it does not preempt all state laws.⁵² Instead, the EFTA preempts state laws only “to the extent that those laws are inconsistent” with its provisions, and it does not preempt state laws that provide consumers with protections “greater than the protection[s] afforded by” the EFTA.⁵³ Regulation E further

⁴⁹ *Id.* § 1693m(c).

⁵⁰ *Id.* § 1693m(g).

⁵¹ *Id.* § 1693m(e). While this defense requires a merchant to pay out actual damages to a potentially aggrieved consumer, it permits the merchant to remove the risk of an award of statutory damages (whether individually or in a class action) and an award of attorneys’ fees and costs by doing so. *See id.* This defense would also likely serve as a means to limit, or completely moot, the consumer’s ability to assert putative class action claims under the EFTA by paying out actual damages before a lawsuit is filed. *See id.*

⁵² *See* 15 U.S.C. § 1693q.

⁵³ *Id.*

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

defines “inconsistent” to mean, in relevant part, state law that “requires or permits a practice or act prohibited by federal law.”⁵⁴

For example, the applicable laws in some states prohibit inactivity fees and/or expiration dates on gift cards in most, if not all, circumstances.⁵⁵ The EFTA would likely not preempt such a law. As such, a gift-card-issuing merchant must consider these state-specific differences in its regulatory compliance overlay and in any liability and litigation risk assessment.

Additionally, a merchant must also consider the possibility of liability pursuant to claims brought under state consumer protection and unfair-and-deceptive-acts-and-practices statutes (collectively “UDAP statutes”). State UDAP statutes typically apply to a broad range of conduct, are normally governed by longer statutes of limitation than the EFTA, and often provide for a consumer to recover additional statutory, punitive, and/or multiple damages awards. As a result, such state statutes may not only fill in liability gaps in the scope of the EFTA, but may also provide a consumer with additional damages on top of any recovered under the EFTA.

In short, a merchant cannot expect that compliance with the EFTA is a panacea that immunizes it from all potential gift-card-based litigation or liability.

Administrative Enforcement Actions

In addition to civil liability, the EFTA also provides for administrative enforcement of its provisions.⁵⁶ The EFTA provides robust enforcement authority to a number of different agencies, including the CFPB, the Federal Trade Commission (“FTC”), the federal banking agencies, and the Securities and Exchange Commission.⁵⁷ In exercising that authority, regulators have a wide array of enforcement tools at their disposal (often wielded through the mechanism of federal UDAP claims), including cease and desist orders, the imposition of civil money penalties, and restitution to injured consumers.

To date there has been little EFTA-specific enforcement action relating to gift cards. Prior to the CARD Act amendments in 2009, the FTC settled at least two enforcement actions brought against large merchants - a national retailer and a national restaurant company - predicated on allegedly deceptive gift card practices.⁵⁸ Both of those actions involved the alleged failures to adequately disclose fees and expiration dates applicable to the subject gift cards, and their resolutions appear to have heralded the later prohibitions of the EFTA.⁵⁹

⁵⁴ 12 C.F.R. 1005.12(b).

⁵⁵ See, e.g., Minn. Stat. § 325G.53, subd. 2 (“[i]t is unlawful for any person or entity to sell a gift certificate that is subject to an expiration date or a service fee of any kind, including, but not limited to, a service fee for dormancy”); Conn. Gen. Stat. § 3-65c (entities “may not impose on the property a dormancy charge or fee, . . . inactivity charge or fee, or any similar charge, fee or penalty for inactivity with respect to the property”); Cal. Civ. Code § 1749.5 (prohibiting expiration dates and dormancy fees for gift cards and gift certificates).

⁵⁶ See 15 U.S.C. § 1693o. Moreover, in some cases, violation of the EFTA may also warrant criminal prosecution and punishment. See *id.* § 1693n (describing potential criminal fines and imprisonment periods for “knowingly and wilfully” failing to comply with the EFTA).

⁵⁷ See *id.* § 1963o(a).

⁵⁸ See Gift Cards, Federal Trade Commission Website, available at: <https://www.ftc.gov/news-events/media-resources/truth-advertising/gift-cards> (last accessed March 17, 2016).

⁵⁹ See *id.*

DON'T LOOK A GIFT CARD IN THE MOUTH: BEWARE OF LIABILITY UNDER THE ELECTRONIC FUND TRANSFERS ACT

The federal agencies with authority to enforce the EFTA otherwise have been relatively quiet. Nevertheless, the potential for broad enforcement actions, particularly those brought by active regulators, remains a critical consideration in assessing gift-card-related liability risk.

Conclusion

In light of the EFTA's civil damages and administrative enforcement provisions and the prevalence of gift cards in retailers' and other merchants' businesses, merchants that issue gift cards should stay abreast of the requirements of the EFTA and related state law, and should be proactive in developing sound and logical practices to comply with those provisions.

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