

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

Docket No. CFPB-2012-0036

Electronic Fund Transfers; Intent to Make Determination of Effect on State Laws (Maine and Tennessee)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of intent to make preemption determination.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is publishing notice of its intent to consider and address requests received to determine whether certain provisions in the laws of Maine and Tennessee relating to unclaimed gift cards are inconsistent with and preempted by the requirements of the Electronic Fund Transfer Act and Regulation E.

DATES: Comments must be received on or before [INSERT DATE THAT IS 60 DAYS FROM THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2012-0036, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552.

All submissions must include the agency name and docket number for this notice. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW,

Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Gregory Evans or Courtney Jean, Counsels, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, at (202) 435-7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Electronic Fund Transfer Act (EFTA), as amended by the Credit Card Accountability and Responsibility and Disclosure Act of 2009, and as implemented by the Bureau's Regulation E, authorizes the Bureau to consider and address requests received to determine whether any inconsistency exists between the EFTA and State law "relating to," among other things, "expiration dates of gift certificates, store gift cards, or general-use prepaid cards."¹ Regulation E provides that State law is inconsistent with the requirements of the EFTA and Regulation E if, among other things, the State law "*requires or permits* a practice or act prohibited by the federal law."² If the State law is inconsistent, Federal law will preempt the State law only to the extent of the inconsistency.³ Furthermore, Federal law will not preempt a

¹ 15 U.S.C. 1693q; 12 CFR 1005.12(b). In this notice, these three categories are referred to collectively as "gift cards."

² 12 CFR 1005.12(b) (emphasis added).

³ 15 U.S.C. 1693q.

State law if the State law affords consumers greater protection than the Federal law.⁴ The EFTA and Regulation E provide that the Bureau shall make a preemption determination upon its own motion, or upon the request of any State, financial institution, or other interested party.⁵

The Bureau has received three requests for determinations as to whether provisions in the EFTA and Regulation E relating to gift card expiration dates preempt unclaimed property law provisions in Maine, Tennessee, and New Jersey relating to gift cards.⁶ The New Jersey request has been rendered moot by a subsequent change in State law.⁷ Therefore, the Bureau intends to issue a final determination in response only to the Maine and Tennessee requests after further considering the relevant provisions of Federal and State law as set forth below, as well as any comments received in response to this notice.⁸

II. The EFTA and Regulation E

Regulation E, which implements the EFTA, generally prohibits any person from selling or issuing a gift certificate, store gift card, or general-use prepaid card with an expiration date unless, among other things, the expiration date for the underlying funds is at least the later of (i) five years after the date the card was issued (or, in the case of a reloadable card, five years

⁴ *Id.*

⁵ *Id.*; 12 CFR 1005.12(b).

⁶ The requests relating to New Jersey's and Tennessee's laws came from payment card industry representatives. Maine's Office of the State Treasurer submitted a request relating to Maine's law to the Board of Governors of the Federal Reserve System. The Board did not respond to Maine's request before the Board's powers and duties relating to consumer financial protection functions transferred to the Bureau on July 21, 2011. The Bureau thus inherited responsibility for responding to Maine's pending request. The Maine, Tennessee, and New Jersey requests are available for public inspection and copying, subject to the Bureau's rules on disclosure of records and information. *See* 12 CFR Part 1070.

⁷ The New Jersey request sought a determination as to whether Federal law preempted the application to gift cards of New Jersey's unclaimed property law, which deemed gift cards abandoned after two years of nonuse. On June 29, 2012, however, New Jersey amended its unclaimed property law to lengthen the period after which a gift card would be presumed abandoned from two years to five years. Given the intervening amendment to State law, the Bureau views the New Jersey request as moot and does not intend to issue a response.

⁸ The Bureau issues this notice pursuant to the authority granted to it by section 922 of the EFTA, 15 U.S.C. 1693q; Regulation E, 12 CFR 1005.12(b); and sections 1022(a) and 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5512(a), (b)(1).

after the date that funds were last loaded onto the card) or (ii) the card's expiration date, if any.⁹ In addition, under the EFTA and Regulation E, such a card generally may not expire unless the terms of expiration are disclosed on the card.¹⁰

III. States' Unclaimed Property Laws as Applied to Gift Cards

General. States' unclaimed property laws set forth specific periods of time after which custody of particular categories of unclaimed personal property transfers from the entity holding that property to the State for safekeeping. In some States, unclaimed gift cards are one such category of property. The Supreme Court has articulated rules of priority that determine which State is entitled to claim unclaimed intangible property. Such property is transferred presumptively to the State of the last known address of the property owner. If that State does not provide for the transfer of the category of property at issue, or if the property owner's address is unknown, then custody is transferred to the State of incorporation of the entity that is obligated to make payment on the property.¹¹ The Bureau understands that, when the address of a gift card owner (*i.e.*, the gift card recipient) is unknown, unclaimed gift card funds typically transfer to the State of incorporation of the entity that issued the gift card.

Maine's Unclaimed Property Statute. Section 1953 of Maine's Uniform Unclaimed Property Act (the Maine Act) provides that a gift obligation or stored-value card is presumed abandoned two years after December 31 of the year in which the obligation arose or the most recent transaction involving the obligation or stored-value card occurred, whichever is later, including the initial issuance and any subsequent addition of value to the obligation or stored-

⁹ 15 U.S.C. 1693l-1(c); 12 CFR 1005.20(e). Certain categories of cards—notably gift certificates that are issued in paper form only and reloadable cards that are not marketed or labeled as gift cards or gift certificates—are exempt from the expiration date and other gift card provisions in the EFTA. *See* 15 U.S.C. 1693l-1(a)(2)(D); 12 CFR 1005.20(b). The Bureau's preemption determination would not apply to any such categories of cards.

¹⁰ 15 U.S.C. 1693l-1(c); 12 CFR 1005.20(e).

¹¹ *See Delaware v. New York*, 507 U.S. 490 (1993).

value card.¹² A business (*e.g.*, a gift card issuer) that has issued gift cards that Maine presumes to be abandoned as of the end of a calendar year must report and transfer the gift card funds to Maine by May 1 of the following year.¹³ Maine thereafter assumes custody of and responsibility for the unclaimed gift cards, and the Maine Act states that the gift card issuer is relieved of all liability arising thereafter with respect to the property.¹⁴ A business that has transferred unclaimed gift card funds to Maine may elect to make payment to the apparent owner of the card (*i.e.*, may honor the gift card) and may request reimbursement by filing an affidavit with the State.¹⁵ The Bureau understands that, if an issuer were to decline to honor the gift card, the consumer could attempt to reclaim his or her property by submitting an unclaimed property claim form to the Office of the State Treasurer of Maine. To properly submit an effective claim, the consumer would need to determine that Maine is the appropriate State to contact, which might not be obvious if the consumer lives and uses the card in another State. Based on outreach, the Bureau understands that Maine collects approximately \$2.6 million per year in funds relating to unclaimed gift cards.

Tennessee’s Unclaimed Property Statute. Section 66-29-135 of Tennessee’s Uniform Disposition of Unclaimed (Personal) Property Act (the Tennessee Act) provides that a “gift certificate”¹⁶ issued in the ordinary course of an issuer’s business is presumed abandoned if it

¹² 33 M.R.S. § 1953 (2011). The terms “gift obligation” and “stored value card” are defined in detail in the Maine Act and may differ in some respects from the terms “gift certificates, store gift cards, or general-use prepaid cards” as used in the EFTA. *Id.* § 1952. Under the Maine Act, “prefunded bank cards,” which generally include cards issued by a financial organization and usable at multiple merchants, are deemed abandoned after three years of non-use. *Id.* § 1953.

¹³ *Id.* § 1958. Under Maine’s law, only sixty percent of the gift obligation’s or stored-value card’s face value is reportable as unclaimed property. *Id.* § 1953. In addition, a gift card sold on or after December 31, 2011, is not presumed abandoned if it was among those sold by an issuer that sold no more than \$250,000 in gift cards during the preceding calendar year. *Id.*

¹⁴ *Id.* § 1961.

¹⁵ *Id.*

¹⁶ Pursuant to Tennessee’s Consumer Protection Act, the term “gift certificate” excludes prepaid telephone calling cards and prepaid cards usable at multiple, unaffiliated merchants or at automated teller machines (*i.e.*, “open-loop” gift cards). Tenn. Code Ann. § 47-18-127(e) (2012). In this discussion of Tennessee’s statute, “gift certificate”

remains unclaimed by the owner upon the *earlier* of: (1) the expiration date of the certificate; or (2) two years from the date the certificate was issued.¹⁷ A gift certificate is exempt from the Tennessee Act if the issuer of the certificate does not impose a dormancy charge and when the gift certificate (1) conspicuously states that the gift certificate does not expire; (2) bears no expiration date; or (3) states that any expiration date is not applicable in Tennessee.¹⁸ An issuer of gift certificates that Tennessee presumes to be abandoned as of the end of a calendar year must report and transfer the gift certificate funds to Tennessee by May 1 of the following year.¹⁹ Tennessee thereafter assumes custody and responsibility for the unclaimed gift certificates, and the issuer is relieved of all liability arising thereafter with respect to the property.²⁰ A business that has transferred unclaimed gift certificate funds to Tennessee may elect to honor the gift certificate and may request reimbursement by filing a request with the State.²¹ The Bureau understands that, if an issuer were to decline to honor the gift certificate, the consumer could attempt to reclaim the funds by submitting an unclaimed property claim form to the Tennessee Department of Treasury. As is true for Maine, to properly submit an effective claim, the consumer would need to determine that Tennessee is the appropriate State to contact, which might not be obvious if the consumer lives and uses the gift certificate in another State. The Bureau does not have precise data concerning the amount of money that Tennessee collects each

refers to the concept as used in Tennessee law. Aside from the exclusion for “open-loop” gift cards and prepaid telephone calling cards, the Bureau believes that “gift certificate” for purposes of Tennessee law generally includes gift cards and other similar electronic devices. However, the Tennessee definition of “gift certificate” may differ in some respects from that used in the EFTA.

¹⁷ *Id.* § 66-29-135.

¹⁸ *Id.*

¹⁹ *Id.* § 66-29-113. The amount presumed abandoned is the price paid by the purchaser, except that for gift certificates issued after December 31, 1996, and redeemable in merchandise only, the amount presumed abandoned is sixty percent of the purchase price. *Id.* § 66-29-135. The Bureau notes that a Tennessee trial court held in 2001 that Tennessee law requires transfer only of the right to claim merchandise by using the gift card (*i.e.*, not transfer of funds). *Service Merchandise Co. v. Adams*, No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. Ct. June 29, 2001). The statute nevertheless appears to require the transfer of funds.

²⁰ *Id.* § 66-29-116.

²¹ *Id.*

year in funds relating to unclaimed gift certificates. Given the limited card types that appear to be subject to Tennessee's law, however, the Bureau believes that the amount is likely to be relatively small.

IV. Request for Comment

Pursuant to the EFTA, the Bureau intends to consider and address the requests received to determine whether the application of Maine's and Tennessee's unclaimed property statutes to gift cards is inconsistent with the EFTA and Regulation E. In making its determination, the Bureau will consider whether Maine's and Tennessee's statutes may afford consumers greater protection than Federal law. The Bureau invites interested persons to submit comment on all or any aspects of this notice.

Maine's and Tennessee's laws presume gift cards to be "abandoned" and release businesses from the obligation to honor the gift cards during a time period when, pursuant to Federal law, consumers should be able to use the cards. The Bureau seeks public comment on whether there is any inconsistency between these provisions of state law and the expiration date provisions of the EFTA and Regulation E and, if so, on the nature of the inconsistency. As a related matter, the Bureau solicits public comment on whether and how gift card issuers can comply with both Federal and State law, for example by honoring unclaimed cards and requesting reimbursement from Maine or Tennessee.

The Bureau further seeks comment on whether Maine's and Tennessee's unclaimed property statutes as applied to gift cards afford consumers greater protection than Federal law. For example, the Bureau notes that, once the funds corresponding to a consumer's unclaimed gift card transfer to Maine or Tennessee, those funds presumably are protected from the risk of loss in the event that an issuer later files for bankruptcy. Unclaimed gift cards that have transferred to

Maine or Tennessee also should be protected from any inactivity fees that might otherwise be assessed on an unused card, to the extent permitted by Federal or State law.²² Finally, a consumer would have an indefinite opportunity to attempt to reclaim his or her unclaimed gift card funds from the State and, if successful, might be entitled to receive cash from the State, rather than the right to obtain merchandise.

On the other hand, if unclaimed gift card funds were transferred to Maine or Tennessee after two years of non-use, and if issuers were not required to honor the card, then a consumer might only be able to redeem his or her property by submitting an unclaimed property claim form to the State. At a minimum, a consumer first would need to determine that the card should still have been usable, and then would need to determine which State to contact to reclaim funds corresponding to the unclaimed gift card. As discussed above, when an issuer has no record of the gift card owner's name, unused funds for the card will transfer to the State of incorporation of the gift card issuer. Thus, for example, a consumer who purchases and uses in New York a gift card that was issued by a company incorporated in Maine or Tennessee may be required to contact Maine or Tennessee, rather than New York, to attempt to claim funds that have transferred to the State. It is not clear, however, how the consumer would know to do this. In addition, the consumer would be required to spend time and perhaps money completing and submitting any required claim form(s), as well as to wait perhaps several weeks or months to receive his or her property. Finally, the Bureau understands that Maine's and Tennessee's

²² Pursuant to the EFTA and Regulation E, inactivity fees or other service charges generally may not be assessed on gift cards unless there has been no activity on the gift card during the 12-month period ending on the date on which the fee is imposed. 15 U.S.C. 1693f-1; 12 CFR 1005.20(d). State laws may protect unused gift cards from inactivity fees for longer periods or indefinitely. For example, Maine law provides that fees or charges may not be imposed on gift obligations or stored-value cards, except that the issuer may charge a transaction fee for the initial issuance and for each occurrence of adding value to an existing gift obligation or card. 33 M.R.S. § 1953. Under Tennessee law, inactivity fees or other service charges are prohibited for two years after a gift certificate is issued. Tenn. Code Ann. § 47-18-127(b). Based on industry outreach, the Bureau understands that inactivity fees are rare in today's market, particularly for closed-loop cards (*i.e.*, cards usable only at a particular merchant or group of merchants).

existing processes for claiming unclaimed property generally rely on property owners' names and addresses. It may be difficult for gift card owners to locate and successfully claim their property under those processes, particularly if gift card issuers do not know, and thus do not report to the State, the names of the consumers who own the unclaimed cards (*i.e.*, the gift card recipients).

The Bureau notes that at least one judicial decision has weighed the relative benefits to consumers of the EFTA and Regulation E and States' unclaimed property laws as applied to gift cards. In January 2012, the U.S. Court of Appeals for the Third Circuit upheld a decision by the U.S. District Court for the District of New Jersey that declined to preliminarily enjoin the application to gift cards of New Jersey's unclaimed property law, which at the time presumed gift cards abandoned after two years of non-use.²³ The District Court concluded, and the Third Circuit agreed, that the plaintiffs were unlikely to prove that Federal law preempted New Jersey's unclaimed gift card law. The Third Circuit identified certain benefits of New Jersey's law that, in the court's view, weighed in favor of a conclusion that New Jersey's law was more protective of consumers than the EFTA and Regulation E.²⁴ Specifically, once New Jersey received unclaimed gift card funds, it would have held them for consumers indefinitely (*i.e.*, not merely for the minimum five years required under Federal law). In addition, a consumer who submitted a successful claim for his or her funds would have received cash back from the State, as opposed to a card solely redeemable for goods or services.²⁵ The Bureau notes that the court reached its conclusion in the absence of any specific guidance or determination from the Board of Governors of the Federal Reserve System or from the Bureau.

²³ See *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012), *reh'g denied* (3d Cir. Feb. 24, 2012).

²⁴ *Id.*

²⁵ *Id.*

As noted, the Bureau invites public comment on all or any aspects of this notice, including on the application of Maine's and Tennessee's unclaimed property laws to gift cards, on the nature of any inconsistency between those laws and the expiration date provisions of the EFTA and Regulation E, and on whether Maine's and Tennessee's laws afford consumers greater protection than Federal law. After the close of the comment period, the Bureau will analyze any comments received, conduct any further analysis that may be required, and will publish a notice of final action in the Federal Register.

**[THIS SIGNATURE PAGE PERTAINS TO THE NOTICE OF INTENT TO MAKE
PREEMPTION DETERMINATION TITLED “ELECTRONIC FUND TRANSFERS;
INTENT TO MAKE DETERMINATION OF EFFECT ON STATE LAWS
(MAINE AND TENNESSEE)”]**

Dated: August 16, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.