



Bailey Cavalieri LLC
ATTORNEYS AT LAW

CLIENT ALERT

September 2010

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Gift Certificate/Gift Card Legislation Update September 2010

This month's Client Alert addresses recent state legislative action relative to gift cards. On August 26, 2010, the State of New Jersey delayed the effective date of its most recent gift card legislation until October 1, 2010, pending a review of the legislation's impact on gift card issuers and consideration of potential exemptions from the legislation. This week, the New Jersey State Treasurer published an announcement (the "Announcement") regarding the results of that review and provided additional guidance for compliance for businesses who issue stored value cards in New Jersey.

New Jersey Bill A3002

As we reported in July, New Jersey Bill A3002 (the "New Law") significantly changes New Jersey's gift card law. The New Law requires issuers of "stored value cards" (i.e. gift cards) to report unredeemed balances of cards as unclaimed property where there has been no activity on the card or contact with the owner of the card for a two-year period. In addition, the New Law requires gift card issuers to obtain and maintain the name and address of the purchaser or owner of each gift card sold and, at a minimum, to record the zip code of the purchaser or owner.

The Announcement reports the results of the State Treasurer's initial review of current processes, technologies and reporting practices and industry guidance submitted by businesses impacted by the New Law. Several retailers and other businesses expressed concerns regarding the new address record-keeping requirement due to the fact that the requirement would impose an undue administrative burden on businesses that do not normally obtain names and addresses of purchasers of gift cards.

The Announcement identifies several findings and determinations made by the State Treasurer as a result of its review and consultation with businesses impacted by the New Law. Moreover, the Announcement provides specific guidance regarding the implementation of the unclaimed property reporting requirements to address any confusion in the industry for issuers domiciled both in and outside of New Jersey.

The Announcement identifies the following findings and determinations that are effective as of November 1, 2010:

- Prepaid telephone cards are exempt from the requirements of the New Law pending further review of the use and issuance of such cards.

- Gift card issuers who obtain name and street address of purchasers in the ordinary course of business are required to continue to collect and maintain such information.
- Gift card issuers who do not obtain names and street addresses in the ordinary course of business are exempt from the record-keeping requirement imposed by the New Law, BUT such issuers must obtain and maintain the zip code of the purchaser.
- For issuers domiciled in New Jersey, unredeemed balances of gift cards issued before September 27, 2010, where the names and addresses or zip code of the purchasers or owners were not recorded, must be reported to New Jersey.
- For issuers domiciled outside of New Jersey, any unredeemed balances of gift cards issued before September 27, 2010, where the names and addresses of the purchasers or owners were not recorded, should be reported to the state in which the issuer is domiciled in accordance with that state's unclaimed property laws.
- If the issuer is not domiciled in New Jersey and the issuer's state of domicile exempts gift cards from its unclaimed property statute, any unredeemed balances of gift cards issued prior to September 27, 2010, where the names and addresses of the purchaser were not recorded, must be reported to New Jersey if the gift cards were issued or sold in New Jersey.
- No dormancy charge or fee, abandoned property charge or fee, escheat charge or fee, in activity charge or fee, or any similar charge, fee or penalty for inactivity with respect to the property is permitted.

Analysis and Recommendations

Some of the State Treasurer's guidance for compliance with the New Law is troubling and contrary to current federal common law rules with respect to unclaimed property reporting. In addition, the administrative burdens of the record-keeping requirement of the New Law outweigh the State's interest in collecting the information. We expect both of the following provisions of the New Law to be challenged at some point in the near future.

Enactment of a "Third Rule" of Priority.

Through the New Law, New Jersey is attempting to circumvent the unclaimed property priority rules established by the Supreme Court in *Texas v. New Jersey*. In that case, the Supreme Court specifically rejected the notion of basing a state's ability to assert jurisdiction over unclaimed property upon the location of the transaction. Thus, the New Law is in direct conflict with the Supreme Court's guidance in *Texas*. By requiring gift card issuers not domiciled in New Jersey to report unredeemed balances that are owner-unknown to New Jersey, the State is attempting to legislate around the Primary and Secondary Rules established in *Texas*.

New Jersey is not the first state to pass legislation that permits the state to attempt to claim unclaimed property that is owner-unknown based on the location of the transaction – this type of legislation is commonly referred to as the "Third Rule." In fact, as many as 41 states have some type of "Third Rule" legislation on their books. Nevertheless, because of the Third Rule's conflict with the federal common law rules on unclaimed property priority issues, many states only attempt to assert Third Rule claims against holders who are ignorant to the Supreme Court's priority rules or who do not have the financial wherewithal to challenge the state's claim. In effect, what New Jersey has done by enacting its form of the Third Rule is providing its State Treasurer and unclaimed property administrators with a statutory weapon to be used against unsuspecting holders. In other words, even though the enforceability of the transaction-based priority rule in the New Law is questionable at best, New Jersey has decided to add this provision to its statutory scheme, despite the fact that this provision of the law would likely be preempted by federal law if challenged.

In the past, we have assisted our clients with challenging the enforceability of state unclaimed property claims based on the location of the transaction. We can provide you with a detailed legal opinion outlining the federal common

law arguments against the enforceability of the Third Rule to help you get a better understanding of these arguments for purposes of establishing your company's gift card reserve.

Recording Names and Addresses of Purchasers or Owners.

The Announcement relaxes the New Law's requirement that gift card issuers record names and street addresses of purchasers or owners if that information is not collected in the ordinary course of business; however, the New Law mandates that the purchaser's or owner's zip code must be collected. Thus, even though the language of the New Law speaks in terms of "name and address," collecting and maintaining the purchaser's or owner's zip code is deemed compliance with the address requirement. If the purchaser's or owner's zip code cannot be obtained or is intentionally withheld by the purchaser or owner, the zip code for the physical location where the gift card was purchased is to be used.

While we do not dispute the State's authority to enact consumer-protection laws that mandate record-keeping, we question the utility of collecting the zip code of a "purchaser" of a gift card since gift cards are typically purchased to be given to another person (the "recipient"), who is the true owner of the gift card for unclaimed property reporting purposes. We expect the State of New Jersey to enforce the record-keeping requirement through a combination of consumer protection law and unclaimed property law. The Announcement refers to typical unclaimed property interest and penalty provisions as potential avenues for enforcement; thus, willful noncompliance with the record-keeping requirement could result in fines and/or other penalties. Therefore, we are advising our retail clients to comply with this provision of the law.

Compliance with the record-keeping portion of the New Law should be accomplished by developing protocols to collect and maintain the zip code of the purchaser of gift cards when the purchaser agrees to provide that information. In instances where the purchaser's zip code cannot be obtained, the address of the physical location where the gift card was sold should be used. The State of New Jersey will have no basis for allegations of noncompliance with this provision of the New Law in instances where record-keeping protocols are in place to comply.

Moreover, it is likely that retail associations or advocates will challenge enforcement of the address collection provisions of the New Law based on the fact that collection of the purchaser's zip code is an ineffective means of tracking the gift card's true owner. Thus, from an unclaimed property perspective, the zip code of the purchaser does not provide any information about the card's true owner due to the fact that gift cards are typically not intended to be used by the purchaser. Accordingly, the administrative burden that zip code collection places on gift card issuers simply does not justify the collection of such legally insignificant information, since it is the recipient of the gift card who is the true owner for unclaimed property reporting purposes.

The New Law fails to address if or how it applies to online sales of gift cards to New Jersey residents. Since online gift cards are not sold from any physical location, it is unclear how the New Law's default zip code provision would apply. Therefore, at this point we are not advising our clients who issue online gift cards to alter their online programs as a result of the New Law.

Please contact us for more detailed legal advice regarding how your business will properly address these changes to New Jersey's gift card law.

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