

Comments of
National Consumer Law Center
(on behalf of its low income clients)
and
Consumer Action
Consumers Union
National Association of Consumer Advocates
To
CONSUMER FINANCIAL PROTECTION BUREAU
On
Electronic Fund Transfers
Intent To Make Determination of Effect on State Laws (Maine and Tennessee)
(Gift Card Expiration Dates and Escheat Law)

12 CFR Part 1005
Docket No. CFPB-2012-0036
77 Fed. Reg. 50404 (Aug. 21, 2012)

Submitted October 22, 2012

The National Consumer Law Center[®] (on behalf of its low income clients), Consumer Action, Consumers Union and the National Association of Consumer Advocates submit these comments on the Consumer Financial Protection Bureau's (CFPB) intent to make a preemption determination concerning state escheat laws as they apply to gift cards (as defined by Regulation E).¹ We agree that there is a conflict with the federal gift card protections, and the CFPB should preempt state escheat laws, but only to the extent that they permit gift card issuers to fail to honor cards before the cards may expire under federal law. This is a rare instance where preemption of state law may be desirable to avoid undermining consumer protections. Consumers would much rather have a gift card valid and usable for five years than an unusable card and funds that are reclaimable from the state, albeit indefinitely, only by following an obscure, difficult and unlikely process. However, it is not the escheatment itself that conflicts with federal law, but rather the issuer's denial of a card that should be valid. Federal and state law can be harmonized if the state laws are preempted only to the extent that they permit gift card issuers to reject cards once the funds have escheated; states could still require funds to escheat as long as the issuers must honor unexpired cards (and seek reimbursement from the state).

The Electronic Funds Transfer Act (EFTA) generally does not preempt state laws. The EFTA contains a provision governing Relations to State Laws that is supportive of complimentary state laws that protect consumers in the area of electronic fund transfers. The EFTA preempts only state laws that are

¹ Descriptions of the commenters are included in an Attachment to these comments. These comments were written by Lauren Saunders of the National Consumer Law Center.

inconsistent with EFTA's provisions and that do not provide greater protection to consumers.² The CFPB has the authority to determine if that standard is met.

Even if the preemption standard is met, state laws are preempted "only to the extent of the inconsistency."³ Thus, the EFTA mandates the minimum amount of preemption required to harmonize federal and state law.

One provision of the EFTA, added by the Credit CARD Act of 2009, prohibits the sale of gift cards with expiration dates shorter than five years from the date the card was issued or funds were loaded.⁴ The purpose of this provision was to ensure that consumers have ample time to use their gift cards and that card funds do not expire prematurely.

On the other hand, the state laws of Maine and Tennessee could require a consumer's gift card to be escheated to the state, and permit the issuer to deny use of the card, before the card expires. If a gift card has not been used for two years, issuers must turn funds over to the state at the end of the calendar year and are absolved of liability for failing to honor the card. Thus, a consumer could have a gift card that should be holding funds that are still good under federal law, yet find that the funds have disappeared and the card is unusable because the funds were transferred to the state.

Federal law is more protective of consumers than state law under that circumstance. As the CFPB points out, a consumer holding an empty gift card would have to (1) figure out why the card is empty, (2) determine which state holds the funds, which may not be the consumer's state, (3) know that there is a process to reclaim the funds and figure it out, (4) take the time and expense to complete the required forms, (5) prove something that may be unprovable: that a card not registered in the consumer's name belongs to the consumer, and (6) wait for the funds to be returned. It is highly unlikely that consumers would be able to reclaim their gift card funds.

² "Relation to State laws. This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter. The Bureau shall, upon its own motion or upon the request of any financial institution, State, or other interested party, submitted in accordance with procedures prescribed in regulations of the Bureau, determine whether a State requirement is inconsistent or affords greater protection. If the Bureau determines that a State requirement is inconsistent, financial institutions shall incur no liability under the law of that State for a good faith failure to comply with that law, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. This subchapter does not extend the applicability of any such law to any class of persons or transactions to which it would not otherwise apply." 15 U.S.C. § 1693q.

³ *Id.*

⁴ 15 U.S.C. § 1693l-1(c).

However, as the Bureau's Notice describes, some aspects of state law could provide some protection to consumers. Funds that have escheated may be reclaimable indefinitely, whereas a card that has expired after five years as permitted under federal law is gone forever. Funds that escheat to the state after two years also stop incurring any inactivity fees, which are permitted under federal law if the card has been inactive for 12 months. Finally, funds that have escheated are protected against the bankruptcy of the holder of the funds.

None of these benefits are significant enough to warrant depriving the consumer of use of the card for up to three years longer than permitted under federal law. Once the funds have escheated, in all likelihood the consumer will never retrieve them. Thus, if the card is unusable, escheatment is worse than any of the risks of expired funds, inactivity fees or bankruptcy.

But it is not the escheatment itself that interferes with federal law but rather the permission for an issuer to reject a card that cannot legally expire. It is possible to harmonize federal law and state escheat laws by preempting state law "only to the extent of the inconsistency."

As the Bureau points out, a gift card issuer could turn over escheated funds to the state but nonetheless honor the gift card and request reimbursement from the state, as permitted under Maine law.⁵ State law is inconsistent with the EFTA if the issuer can choose, as Maine law permits, to deny the card and put the consumer through the impossible escheat process. But if the issuer is *required* to honor the card until it may expire under federal law, then the consumer would receive the full protection of the EFTA while also enjoying the benefits of having the funds escheat.

The gift card issuer is in a much better position to seek reimbursement from the state escheat fund than a consumer is. As described above, the task is likely impossible for a consumer. Even if it were not, the state would be required to process the paperwork of every individual consumer who seeks funds. On the other hand, a gift card issuer who has turned funds over to the state could easily, at the end of each year for example, submit a single request documenting the escheated cards that have been honored. The issuer will have no trouble showing that the escheated funds belong to the issuer and should be returned.

Thus, to provide maximum protection to consumers and to preempt the minimum amount of state law required to avoid inconsistency with federal law, the CFPB should preempt state escheat laws only to the extent that they permit gift card issuers to fail to honor cards that cannot legally expire under the EFTA and Regulation E. States could still require funds to escheat as long as gift card issuers must honor the cards and seek reimbursement from the state.

⁵ See 33 M.R.S. § 1961.

Attachment: Descriptions of Commenters

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. By providing financial education materials in multiple languages, a free national hotline and regular financial product surveys, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. More than 8,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials, and support.

Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications. Its advocacy division, **Consumers Union**, works for health reform, food and product safety, financial reform, and other consumer issues in Washington, D.C., the states, and in the marketplace.

The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.