



### CFPB to Determine Whether CARD Act Preempts State Unclaimed Property Laws

The Consumer Financial Protection Bureau (CFPB) recently announced its intention to consider and address requests made by the Maine Office of the State Treasurer and payment card industry representatives to determine whether the federal Credit Card Accountability, Responsibility, and Disclosure Act (CARD Act), which, among other things, prohibits gift cards, gift certificates, store gift cards and general-use prepaid cards from expiring in less than five years, preempts the unclaimed property laws of Maine and Tennessee, which require that balances on these devices be reported and remitted after just two years. The Bureau's determination could have significant ramifications beyond the two states.

The CARD Act permits the enforcement of state laws that provide consumers greater protections than does federal law (e.g., states could potentially prohibit card expiration dates completely). The Act, however, will preempt enforcement of any state law that is less consumer protective - that is, that "requires or permits a practice or act prohibited by the federal law." 15 U.S.C. 1693q and 12 C.F.R. 1005.12(b).

Each of the states has an unclaimed property law that requires consumers' unclaimed account balances to be reported and remitted to the states after some period, a process referred to as "custodial escheatment." The state holds the value of the obligations against the possibility that the consumers might someday claim them from the state. In the meantime, the state may use the remitted funds as part of its general operating funds. As with many states, the unclaimed property laws of Maine and Tennessee explicitly include unredeemed balances on gift cards, gift certificates, stored-value cards and gift obligations as types of property

that can become subject to reporting and remittance. In Maine, unclaimed balances are presumed abandoned (and therefore subject to reporting and remittance) 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, whichever is later. In Tennessee, the abandonment or dormancy period for these balances is the earlier of the expiration date of the certificate or two years from the date of issuance. The Tennessee law includes an exemption if the issuer does not impose fees for non-use (dormancy fees) and if the certificate/card does not expire.

Because the Maine and Tennessee laws arguably require gift card/certificate holders to report and remit unclaimed balances within two years but the CARD Act prohibits the expiration of these cards/certificates for five years, the CFPB seeks comment on (1) whether the application of Maine's and Tennessee's unclaimed property statutes is inconsistent with the CARD Act, and if so, the nature of the inconsistency; and (2) how gift card issuers can comply with both federal and state laws.

Earlier this year, the U.S. Court of Appeals for the Third Circuit held that a provision of the unclaimed property law of New Jersey, similar to those of Maine and Tennessee, was not inconsistent with the CARD Act because it was more consumer protective. The court reasoned that the CARD Act protected balances for only five years, whereas the unclaimed property law rendered the balance recoverable from the state in perpetuity. Moreover, if otherwise imposed, dormancy fees do not apply to the balances once they are

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remitted to the state. However, the unclaimed property provisions could be considered less consumer protective because consumers are required to take the step of reclaiming their property from the state.

The CFPB's inquiry has implications beyond Tennessee and Maine. The unclaimed property statutes of many states, including Alaska, California, Iowa, Louisiana, Montana, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, Washington, West Virginia and Wyoming, explicitly cover at least some gift cards and gift certificates and have abandonment periods of three years, presenting the same possible preemption issue.

We will continue to monitor this issue and will track any developments and state-to-state variances in the relevant laws.

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