

## Financial Institutions Group & Retail Team

To: Our Clients and Friends

May 3, 2011

### Avoiding Legal Traps When Offering “Groupon” or “Living Social”-like Discounted Certificates

We have heard from many retailers and service providers who are interested in building up new business by offering a deeply-discounted “Groupon” or “Living Social”-like promotional certificate program. This is how these work: emails go out to local residents letting them know, for example, that for \$30 they can get a certificate worth \$60 towards food at the French Bistro, a local restaurant. However, the discounted certificate almost always has a short expiration date: like a manufacturer’s coupon, the consumer must take advantage of the offer within a few weeks or months.

And that’s the problem. Of course, a short expiration date makes perfect sense from a marketing perspective. But these are different from the manufacturer’s coupons you get in your Sunday paper, because the consumer has had to pay for them. Even though the consumer pays less than full value, they are still paying. That is why, although these programs are highly popular, there has also been a spate of class action lawsuits because certain expiration dates may violate certain federal or state laws.

The good news is that there is a way to offer a discounted Groupon-like promotional certificate program, without getting on the wrong side of the law. Here’s how.

#### I. The Issues Under Federal Law.

In 2009, Congress passed the CARD Act, which among other things, regulates gift cards and gift certificates. Under the CARD Act, both open and closed loop gift certificates and gift cards are prohibited from expiring prior to five years from date of issuance.

However, there is an important exclusion for loyalty, award and promotional cards (referred to collectively as “promotional cards”). Expiration dates are permitted on promotional cards provided that the fact that it is a “promotional card” and the expiration date are both clearly disclosed on the front of the card or certificate.

The tricky part is making sure that your discounted gift certificate program falls within the definition of “promotional programs”. To meet the definition, the card must be issued to a consumer “in connection with a loyalty, award, or promotional program.” To make sure you can demonstrate that

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you have issued your discounted certificate in connection with an award, loyalty or promotional program, make sure you put appropriate language in your contract with your discounted coupon provider stating that the discounted certificates are issued “in connection” with a promotional program. Also, make sure you include on your website, advertising and other marketing materials language that confirms that the discounted certificate is offered in connection with a promotional, loyalty or award program.

So, when it comes to federal law, you can still have an expiration date on your discounted certificate as long as you clearly and conspicuously indicate on the front of your discounted certificate that it is a “promotional” or “award” or “loyalty” certificate, and the expiration date. In addition, since these discounted certificate programs are offered and purchased online, the “promotional” nature of the certificate and its expiration date must be clearly and conspicuously indicated in the actual offer (i.e., on the website page that displays the offer for purchase or in the email that advertises the offer). If you do all of this, and are as clear and transparent as possible (no hidden expiration dates; no mouse type disclosures), you should be reasonably compliant with federal law.

## II. The Issues Under State Laws.

Just because you are compliant with federal law, don’t think you are off the hook. Unfortunately, a lot of state laws also restrict or even prohibit expiration dates altogether. Moreover, most of the state laws do not simply exclude loyalty, award and promotional cards in the same manner that the federal laws do. Instead, many state laws add an additional requirement; in order to be eligible for the promotional or reward card exemption, the consumer must not have paid value or “consideration” for the certificate. For example, although the laws from the state of Ohio do not permit an expiration until two years after issuance, there is an exception for promotional cards, but only if the card is “distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program without any money or anything of value being given in exchange for the gift card by the consumer.” (Ohio Consumer Protection law - ORC §1349.61(C)(1) (emphasis added)).

The problem is this: While a promotional program is exempt under federal law, it may not be exempt under state law, because generally, in the Groupon-like discounted certificate program, the consumer has to pay a fee for the discounted certificate. There are a lot of states that have this kind of law on the books; you’ll need to check the local laws applicable in your state to know for sure.

So, how do you offer a Groupon-like discounted certificate without running afoul of your local state laws? The answer is simple, but it must be done right. You need to separate the paid gift card or gift certificate from the free, limited time, promotional offer. It works like this:

- In our example, when the consumer pays \$30 for the discounted certificate to the French Bistro, the consumer receives a \$30 gift card or gift certificate that does not expire.
- Together with the gift certificate, the consumer also receives a limited time promotional offer: for three months that \$30 gift card is worth \$60. However at the end of three months, the promotional offer (i.e, the doubling of the value of the gift certificate) expires. There is no reason why the promotional offer cannot expire.

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- However, even after three months, the consumer still has a \$30 gift certificate that continues to be valid until it is used. The consumer never loses the value of the \$30 that has been paid.

To make this work and to be effective against regulatory or class action claims, your online offer must disclose very clearly and carefully all of the terms and conditions, the expiration date that applies to the promotional offer, and, of course, the fact that the paid gift certificate or gift card does not expire, even if the promotional offer does.

With care in structuring the programs, and with good clear disclosures in all offers and marketing materials, these Groupon or Living Social-like promotional certificate programs can be a true win-win for both consumers and retailers.

If you have any questions on discounted promotional certificate programs, please feel free to contact us.

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