

# Client Alert

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## CFPB Uses Novel Interpretation, Increases Compliance Burden for Gift Card Issuers Through its First Preemption Determination

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On April 19, 2013, the Consumer Financial Protection Bureau (“CFPB”) announced it was making a determination to preempt a provision of Tennessee unclaimed property law that it deemed inconsistent with the federal Electronic Fund Transfer Act (“EFTA”), as implemented by Regulation E. The Tennessee interpretation, which has the potential to create operational and compliance issues for gift card issuers, was issued jointly with analysis that concluded Maine law is not inconsistent with the EFTA or Regulation E and, therefore, not preempted (“Determination”). The Determination marks the first time the CFPB has used its statutory authority to issue a Determination about the consistency of state and federal law.

### OVERVIEW OF FEDERAL GIFT CARD PROTECTIONS FOR CONSUMERS

The EFTA and its implementing Regulation E require gift card issuers to provide consumers with specific protections and disclosures relating to when gift card funds may expire. Section 1005.20(e)(2) of Regulation E provides that “[t]he expiration date for the underlying funds” on a prepaid card must be the later of “[f]ive years after the date the gift certificate was initially issued, or the date on which the funds were last loaded to a store gift card or general-use prepaid card.” Section 1005.20(e)(3) of Regulation E also requires an issuer to disclose: (1) the expiration date for the underlying funds or, if the underlying funds do not expire, that fact, and (2) a toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement card after the card expires if the underlying funds may be available.

### DETERMINATION TO PREEMPT TENNESSEE ABANDONED PROPERTY LAW

Tennessee law provides, among other things, that a gift card “is presumed abandoned if it remains unclaimed by the owner upon the *earlier* of: (1) the expiration date of the certificate; or (2) two (2) years from the date the certificate was issued.”<sup>1</sup> Tennessee law requires that such funds then be transferred to the state, and permits issuers the choice of honoring gift cards where funds have been transferred to the state or directing the consumer to the state to reclaim the abandoned funds.<sup>2</sup>

The Determination acknowledges that Tennessee law and the protections of the EFTA and Regulation E are inconsistent. However, rather than focus on the conflict between a gift card issuer’s state law obligation to

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<sup>1</sup> Tenn. Code Ann. § 66-29-135(a).

<sup>2</sup> *Id.* at § 66-29-115 and § 66-29-116.

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transfer funds to the state and federal law obligation to preserve funds for the customer as required by Regulation E, the CFPB decided instead to focus on whether the state and federal laws provide consumers with the ability to use their gift cards at the point of sale. Specifically, the CFPB writes that:

the primary concern of . . . the EFTA is to ensure that consumers will be able to use their gift cards for the prescribed periods of time. So long as consumers can continue to use their cards at the point-of-sale for as long as Federal law guarantees, the fact that issuers may face an increased burden or cost to comply with both Federal law and the Tennessee Act—at least to the degree of burden the commenters discussed—does not change the Bureau’s conclusion.

Based on this rationale, the Determination concluded that gift card issuers who provide products to Tennessee consumers may not refuse to honor a gift card after transferring funds to the state so long as the card is presented during the five-year or other period required by Section 1005.20(e)(2) of Regulation E.

### DETERMINATION WITH RESPECT TO MAINE’S UNCLAIMED PROPERTY LAW

Maine’s unclaimed property law provides that gift card funds are considered abandoned two years after December 31st of the year in which the obligation 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-value card.<sup>3</sup>

Maine law also provides that “[a] period of limitation may not be imposed on the owner’s right to redeem the gift obligation or stored-value card.”<sup>4</sup> A separate provision absolves a gift card issuer from liability under the law after the issuer transfers the unclaimed funds to the state,<sup>5</sup> and provides that gift card issuers who return unclaimed funds to the state “may subsequently make payment to a person reasonably appearing to the holder to be entitled to payment.”<sup>6</sup>

These provisions had been interpreted by commenters to permit gift card issuers the option of honoring a consumer’s gift card after a transfer of funds or directing the consumer to seek the funds directly from the state. However, in the course of the CFPB’s review, the Treasurer of the State of Maine informally told the CFPB that Maine law requires a gift card issuer to honor a consumer’s gift card, even after the issuer has transferred unused and unclaimed funds to the state. The Treasurer also noted that Maine does not provide funds directly to consumers and instead redirects consumers to the gift card issuer, which is then free to recover the funds that had been previously transferred to the state.

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<sup>3</sup> Me. Rev. Stat. Ann. tit. 33, § 1953(1)(G).

<sup>4</sup> Me. Rev. Stat. Ann. tit. 33, § 1953(1)(G)(3).

<sup>5</sup> See Me. Rev. Stat. Ann. tit. 33, § 1961(2), which provides that “[a] holder who pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property.”

<sup>6</sup> Me. Rev. Stat. Ann. tit. 33, § 1961(3).

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Based on the informal interpretation provided by the Treasurer of Maine, the CFPB concluded that Maine's law is not inconsistent with the provisions of the EFTA or Regulation E. Specifically, the CFPB concluded that the federal and state provisions are consistent because a Maine consumer may access the funds at the point of sale for the amount of time required by Regulation E. While several commenters expressed concern that Maine's seizure of funds creates constitutional due process concerns, the CFPB chose not to address the issue.

## SIGNIFICANCE OF THE CFPB'S DETERMINATION

Pursuant to the Determination, gift card issuers must escheat funds to Maine or Tennessee at the time such funds would be considered abandoned under either state's law. At the same time, gift card issuers must honor any gift cards presented by Maine or Tennessee consumers after the underlying funds have been transferred to the state for the period required by Regulation E. The Determination follows a CFPB August 2012 notice of intent to make a preemption determination on whether provisions of the abandoned property laws in Maine and Tennessee relating to gift cards were preempted by the EFTA, as implemented by Regulation E. In issuing the Determination, the CFPB exercised its authority under Section 922 of the EFTA,<sup>7</sup> which provides that the "Bureau shall, upon its own motion or upon the request of any financial institution, State, or other interested party . . . determine whether a State requirement is inconsistent or affords greater protection." However, by focusing on the consumer's use of the card, the CFPB appears to have ignored its statutory requirement to determine whether the requirements of Maine or Tennessee law are inconsistent with federal law. This appears to signal the CFPB's unwillingness to preempt state law, even where the plain language of a state's statute is inconsistent with the requirements of federal law.

Under the auspices of issuing its Determination, the CFPB has essentially contorted the state laws of Maine and Tennessee to impose a new obligation on gift card issuers where none appears to exist. And, as a result, gift card issuers who provide gift cards to Maine and Tennessee consumers are effectively required to make available twice the value of funds that had been originally loaded onto the gift card—the amount escheated to the state and the amount provided to the cardholder. The Determination does not address whether gift card issuers will have the same logistical issues as consumers when attempting to claim funds from Maine or Tennessee.

CFPB Blog Post on the Determination: <http://www.consumerfinance.gov/blog/gift-cards-clarifying-the-laws-in-maine-and-tennessee/>

CFPB Determination: [http://files.consumerfinance.gov/f/201304\\_cfpb\\_Preemption-Determination.pdf](http://files.consumerfinance.gov/f/201304_cfpb_Preemption-Determination.pdf)

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<sup>7</sup> 15 U.S.C. § 1693q.

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