

# *Gift Certificates, Pre Paid and Value-Added Cards*

## **NAST Southern State Treasurers & National Association of Unclaimed Property Administrators Annual Conference**

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# Overview

- 2004 NYS Gift Certificate Legislation – Passed
- What the Business Community Has to Say
- What Industry Insiders Are Saying
- What the Consumer Advocates Have to Say
- What People Are Saying



# Overview

- What Shall We Do?
- Consumer Friendly Features
- 2005 NYS Gift Certificate Legislation – Failed
- What the Retail Council Said
- Getting Out Front



# Overview

- Considering the Other Side
- Unclaimed Funds Is Consumer Protection
- How Much? Some Numbers
- Three Steps to Protect
- Operational Impact on Unclaimed Funds Office
- The Tertiary Rule – Maybe?



# Proposed Gift Card Legislation in NYS in 2004

- Eighteen bills were introduced in 2003-2004.
  - Fifteen of the bills provided for no expiration date and no service fees
  - One bill allowed gift certificates to expire after 7 years and the date had to be printed on the certificate



# Passed Gift Card Legislation in NYS in 2004

- Two Bills Passed in 2004 Dealing With Gift Certificates/Cards
- One bill broadened the definition of gift certificates in Section 396-I, Chapter 170 of the General Business Law and Section 103 of the Abandoned Property Law.



“Gift certificate” shall mean a written promise or electronic payment device that:

- Is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo, or is usable at multiple, unaffiliated merchants or service providers
- Is issued in a specified amount



“Gift certificate” shall mean a written promise or electronic payment device that:

- May or may not be increased in value or reloaded
- Is purchased and/or loaded on a prepaid basis for the future purchase or delivery of any goods or services
- Is honored upon presentation



# And

- Further amended Section 396i of the General Business Law:



# Terms and conditions on gift certificates must be disclosed to purchasers

- On a sign conspicuously posted that states “Terms and conditions are applied to gift certificates sold here”
- Conspicuously stated in an offer made by mail
- For purchases via electronic, computer or telephonic means, the statement “Terms and conditions are applied to gift certificates” shall be stated prior to the customer’s purchase of the gift certificate or conspicuously written within the electronic message offering the gift certificate



# Terms and conditions on gift certificates must be disclosed to purchasers

- All advertisements or promotions for gift certificates what include “Terms and conditions are applied to gift certificates”
- The terms and conditions of a gift certificate must be clearly and conspicuously stated on the certificate and include:
  - The expiration date
  - Whether any fees are assessed against the balance of the gift certificate



# Terms and conditions on gift certificates must be disclosed to purchasers

- Whether a fee will be charged for the replacement of a gift certificate that is lost, stolen, or destroyed
- Additional terms and conditions including, but not limited to, policies related to refunds, warranties, and changes in terms and conditions



# Terms and conditions on gift certificates must be disclosed to purchasers

- The terms and conditions must be conspicuously printed:
  - On the gift certificate
  - On an envelope or packaging containing the gift certificate, provided that a toll free telephone number to access the additional terms and conditions is printed on the gift certificate



# Two exceptions, for gift certificates:

- Sold below face value at a volume discount to employees, to nonprofit and charitable organizations, or educational institutions for fundraising purposes;
- Distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program without any consideration being given in exchange for the gift certificate by the consumer.



# The other bill amended section 396i of the General Business Law to:

- Prohibit the assessment of retroactive fees
- Prohibit the assessment of monthly service fees until the 13 month of dormancy



# But the changes still:

- Do not prohibit service fees

Note: We hold that service fees are governed under Section 1415 of the APL, and to be permissible, must meet certain conditions.

- Do not address expiration dates



# What the Business Community Has to Say

- There are more cards in circulation and people are holding them longer
- Businesses lose money on cards that are not used and don't expire, because they are deprived of the profit they would have made if the cards were used and because they have expenses



# What the Business Community Has to Say

*And...*

- Because gift cards are treated as a liability until they are used, the amounts must be tracked on the companies' books
- The longer the amounts have to be tracked, the more expensive it is



# What the Business Community Has to Say

*And...*

- Tracking owner information is expensive and may require computer system changes to do it
- Capturing and holding information about card purchasers is burdensome, especially for smaller retailers
- Capturing information is an invasion of privacy to the consumer



# What the Business Community Has to Say

So...

- Services fees are a legitimate expense, and needed to offset costs
- Keeping the balance on expired cards just offsets the costs incurred.



# What Industry Insiders Are Saying

- From Valtec Card Solutions “Program Benefits & Sales Emphasis” Sales Guide
  - “The term “Breakage” is used in our industry to define the amount of value that has been prepaid but then is never redeemed.”
  - Valtec estimates 10-12% breakage, which is shown as an increase in net revenue



# What Industry Insiders Are Saying

- On the Service Fee Debit Process
  - “In some states, merchants are able to eliminate the need to forfeit (*that is, report escheatable funds*) these funds by automatically deducting a monthly amount of value from the card balance after a specified period of inactivity. This period can be determined by the merchant.”



# What Industry Insiders Are Saying

*(cont.)*

- “For example: If the card is inactive for twelve months, our system can deduct \$3.00 monthly from the value of the card until the value of the card is depleted. With this service fee debit process, the deducted amount moves from the liability portion of the financials to the revenue portion.” *(underlining added)*



# What Industry Insiders Are Saying

- From [123giftcards.com/html/statistics.htm](http://123giftcards.com/html/statistics.htm)
  - Estimates 15% Breakage from unredeemed gift cards and treats it as an increase in net revenue



# What Industry Insiders Are Saying

- How to Avoid Reporting Unredeemed Gift Cards, from “Make Sure Your Gift Card Program complies with State Law” Shopping Center Management Insider June 2004
  - “Don’t collect personal information”
  - “Set up separate corporation to issue gift cards in state that excludes gift cards from reporting requirements”



# What the Consumer Advocates Have to Say

- Gift cards give the sellers immediate cash flow
- Sellers earn interest on the float of cards that have been sold but not redeemed



# What the Consumer Advocates Have to Say

- Administrative costs are negligible and service fees are an unfair attempt to erode the value of a product for which they have already received fair payment
- Many sellers already capture owner information, especially for cards purchased on-line and/ or with credit cards



# Note:

- According to a 2004 Holiday buying survey by the National Retail Federation, holiday gift buying breaks down by the following:

Cash	25.9%
Check	9.9%
Debit card/check card	34.7%
Credit card	29.5%

- If a similar pattern holds for the purchase of gift cards and certificates, sellers are already capturing owner information for about 2/3's of their sales.



# Gift cards give sellers a big business boost

- 10% of the people using them are new customers to a store
- 40% of the people using gift cards spend more than the face value of the cards
- 12% never use the card
- 15% of every dollar spent on gift cards is never redeemed



# What People Are Saying

- Comptroller Hevesi Goes to the Movies
- Mom and Dad Go Out to Eat
- Tina's Patience Expires: "You give them your money and they give you nothing in return. That's like stealing!"



# What Shall We Do?



# It's About the Consumer, Stupid!

(with apologies to James Carville)



# Consumer Friendly Features that Could Be Legislated:

- Define Gift Certificates Broadly
- Prohibit Service and Dormancy Fees
- Prohibit Expiration Dates
- Refund Small Remaining Balances in Cash to the Customer



# Consumer Friendly Features that Could Be Legislated:

- Capture Owner Information at Point of Sale
- Reconsider Dormancy Periods (3 Years)
- Enforce Reporting of Dormant Accounts to Unclaimed Funds Offices



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- The bill passed the State Senate but the State Assembly failed to act on the bill.



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- The bill would have amended Section 1315 of the Abandoned Property Law by:
- Reducing the dormancy period for gift certificates from 5 years to 3 years
- Including gift certificates that have a service value and making the value the cost of the service at the time of original purchase



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- The bill would have amended Section 396i of the General Business Law by:
- Prohibiting expiration dates
- Prohibiting service fees



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- Requiring the seller of the gift certificate to record the sale and keep an accurate record for four years
- The record must include:
  - The date of sale
  - The full value of the certificate
  - The identification number of the certificate
  - The state in which the sale took place
  - The state in which the apparent owner resides
  - (But not the owner's name)



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- For gift certificates valued over \$50, the seller must provide a written and numbered receipt
- Violation of the statute would result in a fine on not more than \$500



# Proposed Gift Card Senate Legislation in NYS in 2005 –

- The gift certificate is reportable to New York if:
  - Last known address of apparent owner is in New York
  - Owner unknown, last known address is in New York
  - The holder is in New York
  - Address of owner is in a state that does not provide for escheat of gift certificates, holder is in New York
  - Address of owner is in a foreign country, holder is in New York
  - Holder is in a state that does not provide for escheat of gift certificates, address unknown but the transaction occurred in New York



# What the NYS Office of Unclaimed Funds Thought

- It had some good provisions
  - Prohibit Expiration
  - Prohibit Service Fees
  - Dormancy Period at 3 Years
- It has some problems
  - Record Retention Out of Synch with Current Law
  - Fines
  - Owner Names Not Captured
  - What Goes Where



# What the Retail Council Said

- Use it or lose it: New York wants your gift card money
- (March 14, 2005)
- Senate's budget bill would **grab** gift card cash after three years
- Albany, N.Y.– Use those gift cards, New Yorkers, because the state Senate wants to take the money if you don't.
- Amended budget language expected to win Senate approval this week would take unused gift card balances away from New Yorkers after three years and give it to the state to spend. The state would take the money even from those cards that today carry no expiration date.
- Adding insult to injury, the bill would require retailers to **collect massive amounts of personal information** from every consumer who purchases a gift card – including the address of the intended recipient.
- Retail Council of New York State President and Chief Executive Officer James Sherin blasted the Senate plan as **“disastrously anti-consumer and anti-retail.”**
- “This is the state government applying a three-year expiration date to every single gift card sold in New York,” Mr. Sherin said. “It’s a use-it-or-lose it standard that is absolutely unacceptable.”



# What the Retail Council Said

- The language serves up a double standard that on one hand would prohibit retailers from applying expiration dates or service charges to gift cards, but on the other would find New York applying a de facto three-year expiration date to all gift cards sold in the state.
- “It’s the state of New York **reaching in to every wallet and pocketbook and snatching the gift card right out of it,**” Mr. Sherin said.
- “Then to require consumers to give up personal information for a sale that today is quick and anonymous runs completely counter to all the demands coming out of this Legislature to protect consumer privacy,” Mr. Sherin said.
- Mr. Sherin said the Retail Council is unaware of the amount of money the state expects to receive from gift card proceeds.
- “Whatever they’re anticipating, they’re way too optimistic,” Mr. Sherin said. “Once shoppers **get wind of this scheme, they’ll stop buying gift cards** or make sure that they use them right away.”
- The Senate’s budget legislation stands in stark contrast to the highly-touted new state laws enacted five months ago that properly protects consumers and purchasers of gift cards in New York State (Chapters 170, 171, and 507 of the Laws of 2004).



# **Retail Council of New York State**

Retail Council Building

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# Getting Out Front

- Stress Consumer Protection
- Educate the public
  - Consumer Affairs Reporters – Press, Radio and TV
  - Timing – November Sweeps and Pre-Holiday Buying
  - Stay on Message:
    - » When Is \$50 Not \$50?
    - » It's Your Money!
- Consider Forming a Strong Pro-Consumer Coalition
  - Consumer Advocate Groups
  - Elected Officials
  - The Public



# Considering the Other Side

- Exempting Mom and Pop's from POS Owner Information Collection
  - Yearly Revenues
  - Number of Employees
  - Number of Cards Sold



# Considering the Other Side

- Not All Gift Cards Are Alike –
  - Closed, Semi-Closed, Semi-Open and Open Systems
    - Closed cards are bought and redeemed at single merchant, in fixed amounts, not re-loadable, bearer instruments.
  - (see “Prepaid Card Markets & Regulation” by Mark Furletti, a Discussion Paper from a workshop at the Payment Cards Center of the Federal Reserve Bank of Philadelphia, February, 2004, lead by Judith Rinearson, chief counsel to American Express’ electronic stored-value business since 1995.)
  - Maybe 2 out of 3 Ain’t Bad (Apologies to Meatloaf)



# Considering the Other Side

- Allow Upfront Fees that Do Not Diminish the Value of the Gift



# Unclaimed Funds Is Consumer Protection

- Holder will perform Due Diligence before reporting your account
- It's all in one place
- Your name is on the account
- It's publicized by the states
- It doesn't "expire" or get written off to "Net Revenue" - You can always claim it
- No cost to get it back



# Gift Cards – How Much for New York State?

- In 2004, approximately \$44 billion<sup>[1]</sup> was spent on gift cards nationwide.

<sup>[1]</sup> This estimate was given by Dr. Daniel Horne a gift card expert at Providence College. Bain & Company, a Boston based consulting firm and Consumer Reports backs up this estimate.



# Gift Cards – How Much for New York State?

- Experts<sup>[2]</sup> report that 10 to 15 percent goes unclaimed each year. The average of estimates is about 12 percent.

<sup>[2]</sup> ACS Unclaimed Property Clearing House; Nationwide Payment Systems; and Anthony Andreoli, national director of unclaimed property practices at Deloitte.



# Gift Cards – How Much for New York State?

- So if 12 percent of the \$44 billion goes unclaimed that equals \$5.28 billion going unclaimed in 2004.
- If the \$5.28 billion in unclaimed gift cards was proportional to each states population New York State, which represents 6.9 percent of the population of the U.S. would have **\$364.3** million of unclaimed gift cards in 2004.



# How Much Was Reported to NYS in FY 2004 – 2005?

**\$4.88 million**



# Why?

- Unknowns Should Go Elsewhere
- Holders Are Failing to Comply



# To Fully Protect the Consumers:

- Legislate
- Educate
- Enforce



# Operational Impact on Unclaimed Funds Office

- Increased Reports
- Increased Claims – more imaging, processing, and phone calls
- Claims Could Be More Complicated by Owner – Recipient Issue
  - Primarily Name and Address Information
  - Who Submits the Instrument?
  - Duplicate Claims?



# The Tertiary Rule – Maybe?

- Cooperation and Agreement Among the States?
- Petition Congress?

