NYC Department of Consumer Affairs

December 21, 2009

The New York City Department of Consumer Affairs'
Comments to Docket No. R-1377, Regulation E
Submitted to
The Board of Governors of the Federal Reserve System

Introduction

With 40 years of experience enforcing laws protecting consumers from unfair and deceptive trade practices, the New York City Department of Consumer Affairs ("DCA") offers the following comments on the rules proposed by the Federal Reserve Board of Governors (the "Board") to implement the prepaid products provisions of the Credit CARD Act of 2009 (the "Act").

The promise and peril of such products is significant. Gift cards, the most common of such products, are a multi-billion dollar industry, with consumers spending 87 billion dollars on them in 2009 alone.[1] However, consumers lost over six billion dollars, in large part because of issuer practices such as expiration dates and fees designed to drain these cards of their initial value.[2]

DCA commends the Act and the Board's proposed rules which address the need for enhanced regulation of the gift card industry to protect consumers from unknown and onerous terms and conditions. Importantly, the Act and the proposed rules will impact segments of the gift card industry that were largely unregulated, specifically bank issued general-use prepaid cards. The rules also reflect the Board's recognition that the disclosure of terms and conditions is critical for both gift card purchasers and gift card recipients.

While the rules go a long way to protect both groups of consumers, DCA urges the Board to strengthen the disclosure requirements to enable gift card purchasers to make truly informed shopping choices and to enable gift card recipients to use their cards wisely. DCA also urges the Board to put a halt to terms that deprive consumers of the fair value of their gift cards by: prohibiting the expiration of general-use prepaid cards and gift cards before the expiration of the underlying funds; capping fees to one dollar per month; adopting rules protecting consumer use of prepaid products during bankruptcy; allowing consumers to register their cards; and requiring issuers to allow consumers to cash out their cards when only a five- dollar balance remains.

Background on DCA

New York City's Charter charges DCA with planning, making recommendations, conducting research and developing programs for consumer education and protection; facilitating the exchange and dissemination of information in consultation with other agencies, federal and state officials, commercial interests, private groups and others working in this field; and coordinating the consumer protection activities of other city agencies.[3] Among other functions, the Charter grants DCA the obligation to enforce all laws relating to advertising the offering of goods and services and to receive, evaluate, and investigate consumer complaints.

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[1] Jennifer Davies, *Gift cards considered, naughty, and nice*, San Diego Tribune, (December 14, 2009), http://www.signonsandiego.com/news/2009/dec/14/gift-cards-considered-naughty-nice/
[2] Chuck Jaffe, MarketWatch, No gifts, please, (November 18, 2009), http://www.marketwatch.com/story/gift-card-fees-keep-on-giving-to-card-issuers-2009-11-18.
[3] New York City Charter, Chapter 64, § 2203(a).

To ensure a fair and vibrant marketplace for consumers and businesses, DCA licenses more than 71,000 businesses in 57 different industries; mediates thousands of individual consumer complaints annually; educates consumers and businesses through press releases, press conferences, educational materials, community outreach and public hearings; and works with other city, state and federal law enforcement agencies to protect consumers from deceptive practices. DCA's Office of Financial Empowerment ("OFE") is the first local government initiative in the nation aimed expressly at educating, empowering, and protecting those with low incomes so they can build assets and make the most of their financial resources. Launched in December 2006, OFE was the first initiative to be implemented under Mayor Michael R. Bloomberg's Center for Economic Opportunity ("CEO"), a comprehensive, research-driven effort to design and implement innovative poverty-reduction strategies. OFE spearheads an array of efforts designed with potential for scale: protecting New Yorkers with low incomes from unfair and predatory practices; designing and disseminating safe financial products; conducting large-scale public education campaigns; implementing innovative asset-building strategies; and coordinating a dynamic Citywide network of quality financial service providers including one-on-one professional financial counseling centers.

In the last five years alone, DCA has inspected more than 1,000 businesses for compliance with New York laws on gift cards, issuing over 500 violations and collecting tens of thousands of dollars in fines. To fully safeguard consumers and ensure that the disclosure requirements are meaningful, DCA's settlement agreements with violative businesses compel chain-wide compliance with the gift card laws and require businesses to post disclosures at each point of purchase stating that terms and conditions apply to the gift card. It is DCA's broad and varied experience that informs these comments.

Impact of Federal Laws and Regulations on Gift Cards

The multi-billion dollar gift card industry comprises two distinct types of cards—retail issued and general-use prepaid cards or certificates. Retail issued gift cards are issued by an individual retailer and can only be used at that retailer or a group of affiliated retailers. States have regulated retail issued gift cards for years.[4] General-use prepaid cards include cards issued by banks or credit card companies that are accepted by unaffiliated merchants. In contrast to retail issued gift cards, states have not regulated general-use prepaid cards because of preemption. The Act and the Board's proposed rules appropriately bring retail issued cards and general-use prepaid cards under the same regulatory umbrella.[5]

Bank issued general-use prepaid cards account for eight percent of the gift card industry each year and in the last two years, a third of consumers gave or received them.[6] According to a survey by the Consumer Federation of America and the National Association of Consumer Agency Administrators, 17% of consumers with bank issued general-use prepaid cards had trouble spending the funds on the card because stores refused a split payment on purchases greater than the card's balance and 46% did not realize that a monthly fee is often charged against the balance of the card within six to 12 months of its purchase.[7] The Board's regulation of this relatively unregulated portion of the gift card industry will

[4] New York, like other states, only regulates retail issued gift cards or gift certificates. New York law requires that if terms and conditions apply to gift cards, that fact be disclosed clearly and conspicuously to consumers prior to purchase. N.Y. Gen. Bus. Law § 396-i(2-a) (2009). Certain terms and conditions, including the expiration date and fees assessed against the balance of the gift card, must be disclosed clearly and conspicuously on the gift card. N.Y. Gen. Bus. Law § 396-i(3) (2009). Importantly, New York recently amended its gift card law to prohibit merchants from refusing to honor a valid gift card during defunct business sales or closing out sales. N.Y. Gen. Bus. Law § 396-i (2009).

[5] DCA is also concerned about the current lack of protections afforded to consumers using reloadable general-use prepaid cards not marketed or labeled as gift cards. The Board should propose rules under the EFTA and other appropriate laws to establish meaningful requirements regarding disclosures, fees and other protections associated with reloadable prepaid cards. DCA suggests minimum disclosure requirements in part I.(B.) for these products, but notes that further action by the Board is required.

[6] Matthew Hathaway, *Instead of cash, this year give the gift of interest and expiration*, St. Louis Post-Dispatch (October 26, 2009), http://www.stltoday.com/blogzone/the-savvy-consumer-blog/shoppers-beware/2009/10/instead-of-cash-this-year-give-the-gift-of-interest-and-expiration/.

[7] Id.

provide consumers of bank issued general-use prepaid cards the same minimum protections as consumers of retail issued gift cards or gift certificates.

DCA Recommendations

I. Disclosures

The Act and the Board's proposed regulations require that issuers of general-use prepaid cards, gift cards, and gift certificates (collectively referred herein as "gift cards") disclose terms and conditions applicable to the expiration date of gift cards and fees assessed against the balance of the gift cards both prior to the purchase of the gift cards and on the actual gift cards. Gift cards are distinguishable from other products because the consumer who purchases the card is generally not the intended user. Therefore, it is equally necessary that both purchasers and the ultimate users of gift cards know and understand that gift cards may expire and fees may be assessed against their initial balance.

A. Pre-purchase disclosures

The Board's Notice to the Federal Register (the "Notice") recognizes that although the purchaser is not generally the user of the gift card, the purchaser must be aware of any potential costs to the user and the amount of time permissible to use the gift card.[8] The Board's proposed rule § 205.20(c)(3) requires that vendors of gift cards disclose terms and conditions about expiration dates and fees assessed against the balance of the gift cards prior to purchase. All disclosures must be clear and conspicuous pursuant to the Board's proposed rule § 205.20(c)(1). The Board's Notice recognizes that gift cards may be purchased in person, via the Internet, and over the telephone and its pre-purchase disclosure rules attempt to take these various methods of sale into account.[9] Accordingly, the Board's proposed rule § 205.20(c)(2) permits oral disclosures prior to purchase. DCA applauds the Board's recognition that disclosures must be given during telephonic transactions.[10] The Board's proposed comment § 205.20(c)(2)-1 also provides that electronic disclosures for gift cards purchased on the Internet may not be provided through a hyperlink or in manner that may be bypassed by the consumer. Finally, pursuant to the Board's proposed comment § 205.20(d)-3, a vendor's obligation to make disclosures prior to purchase is satisfied if a consumer can view the terms and conditions on the gift card without removing packaging or other materials sold with the gift cards.

► *Pre-purchase disclosures must be in writing at each point of purchase*.

Disclosures must be tailored to the context in which they are made. A vendor who sells gift cards via the telephone must necessarily be permitted to make pre-purchase disclosures orally to ensure that the disclosure is made at the time of the sale. This same rationale is inapplicable in the context of gift card sales made in "brick and mortar" stores where point of sale signage can effectively apprise consumers of the information to be disclosed. In contrast to oral disclosures, written disclosures are transparent; are not subject to individual employee understanding and transmission; do not require ongoing training of staff; and most importantly, can be easily enforced on the basis of observation, without issues of credibility or availability of witnesses interfering with enforcement.

New York law, for example, requires that vendors disclose conspicuously, in writing to consumers, prior to the purchase, that terms and conditions apply to the gift card.[11] DCA inspectors patrolling businesses for

[8] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60997 (November 20, 2009).
[9] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60996 (November 20, 2009).
[10] DCA regulates disclosures during telephonic transactions. Specifically, the Department's laws governing debt collection require debt collectors to disclose to consumers a call-back number to a phone answered by a natural person, the name of the debt collection agency, the originating creditor of the debt, the name of the person to call back, and the amount of the debt at the time of the communication. Title 20, New York City Charter and Administrative Code, § 20-493.1.
[11] N.Y. Gen. Bus. Law § 396-i(2-a) (2009).

compliance with consumer protection laws are thus easily able to determine if businesses comply with pre-purchase disclosures without engaging in time consuming investigation. Based on this "on the ground" experience, DCA recommends that the Board implement rules requiring the in-person seller of gift cards to issue pre-purchase disclosures clearly and conspicuously in writing at the point of purchase.

► *Internet pre-purchase disclosures must appear prior to the point of purchase and in a manner that ensures consumers have read them*.

The Board's proposed comment § 205.20(c)(2)-1 prohibits Internet disclosures through a hyperlink or in another manner that a purchaser may bypass. DCA supports this standard, but recommends that it be further strengthened. Experience with online privacy policies has demonstrated that businesses will manipulate font size and placement of links to obscure such policies on their websites.[12] DCA urges the Board to promulgate comprehensive rules regarding the type size, contrast, prominence, and timing of the Internet disclosures that reflect current best practices in the area of web disclosures. The Board should adopt rules specifying both when and how gift card issuers must provide Internet disclosures. Specifically, the Board should require that the Internet disclosures must appear prior to the point of purchase and should require Internet vendors of gift cards to have a check box that consumers fill after they have read the required disclosures.

► *Pre-purchase disclosures cannot just be stated on the gift card*.

DCA objects to the Board's proposed comment § 205.20(d)-3 permitting a vendor to satisfy the pre-purchase disclosure requirement if a consumer can view the terms and conditions on the gift card without removing packaging or other materials sold with the gift cards. The Board's Notice acknowledges that gift cards are generally small.[13] Disclosures that are clear and conspicuous when a consumer holds the gift card are not necessarily clear and conspicuous when the gift card is on a stand or other display. DCA recommends instead that vendors who sell gift cards to consumers in person post a clear and conspicuous sign at each point of purchase stating the terms and conditions applicable to fees assessed against the balance of the gift cards and the expiration date.

B. Disclosures for excluded products

A number of products are excluded from the Act's definitions of gift cards despite their resemblance to gift cards. DCA nonetheless urges the Board to adopt rules that provide purchasers of these excluded products with sufficient knowledge about the nature of the product they are purchasing.

DCA supports the Board's proposed rule § 205.20(a)(4)(ii) requiring issuers of loyalty, award, or promotional gift cards, which are excluded from definitions of gift cards, to disclose on the card the expiration date and any fees. DCA agrees with the Board's finding that consumers receiving loyalty, award, or promotional gift cards from one merchant may be surprised to find fees and expiration dates that differ from a gift card purchased directly from that same merchant.[14] As such, consumers receiving loyalty, award, or promotional gift cards should, at a minimum, receive clear and conspicuous disclosures about any expiration date or fees that may be assessed.

The Board solicits comment on whether it provides sufficient guidance for distinguishing products excluded from the Act, specifically a product that is reloadable and not marketed or labeled as a gift card. The issuer of an excluded product does not have to comply with the Act and the Board's regulations on expiration dates and fees assessed against the balance of the gift cards. The Board's proposed

[12] Ciocchetti, Corey A., "The Future of Privacy Policies: A Privacy Nutrition Label Filled with Fair Information Practices," 26 J. Marshall J. Computer & Info. L. 1, Fall 2008.
[13] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60997 (November 20, 2009).
[14] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60994 (November 20, 2009).

comment § 205.20(b)(2)-4 recommends that the issuer of a product that is reloadable and not marketed or labeled as a gift card adopt policies and procedures preventing consumers from mistaking their product as a gift card; reasonable policies and procedures include the issuer entering into a contract with the retailer prohibiting the retailer from marketing the product as a gift card and creating a display for the excluded product separate from the gift card display. The Board acknowledges that creating a separate display may not be practicable in all cases, particularly for retailers with limited space.[15] As such, the Board solicits comment with specific examples of measures that may be utilized to ensure that a reasonable consumer would not believe that an excluded product is a gift card.

► *Basic disclosures must be stated on excluded products*.

The Board is appropriately seeking to prevent consumers from confusing a reloadable product not marketed or labeled as a gift card with a gift card because both in terms of appearance and use, these products often resemble gift cards. DCA recommends that the Board adopt an affirmative rule pursuant to its authority under 15 U.S.C. § 1693l-1(d)(1)(B) requiring issuers of a product that is reloadable and not marketed or labeled as a gift card to state, in minimum 10-point type size: "This is not a gift card. User fees may apply." Thus, similar to a consumer receiving a loyalty, award, or promotional gift card with disclosures on the card, the consumer receiving a reloadable card not marketed or labeled as a gift card knows upfront that the product is not a gift card and that fees may apply. This statement on the card itself does not pose problems for retailers with limited space. Finally, this statement also protects consumers from retail staff who may accidentally place this product with regulated gift cards.

C. Clear and conspicuous disclosures

Given that the ultimate user of a gift card is frequently not the purchaser, important terms and conditions such as fees assessed against the underlying balance of the gift cards and the expiration date should appear on the gift card, as required by both New York and federal law.[16] Pursuant to the Board's proposed rule § 205.20(c)(1), disclosures required by the Act must be stated clearly and conspicuously. Pursuant to the Board's proposed comments § 205.20(c)(1)-1, disclosures stated clearly and conspicuously are readily understandable and the location and type size are readily noticeable to consumers. The Board requests comment on whether the clear and conspicuous standard should include a type size or prominence requirement as gift cards vary in size and may create issues for disclosures even on standard-sized cards because space is limited.

► *Disclosures must be stated in 10-point type size*.

DCA recommends that the expiration date and any fees assessed against the balance of the gift card must be disclosed in a minimum 10-point type size both to draw consumers' attention and emphasize the importance of the information stated.[17] To alleviate the Board's concern that standard-sized gift cards have limited space for disclosures, DCA notes that at least eight states require that these disclosures appear in the 10-point type size.[18] Thus, issuers of gift cards can and already are complying with the 10-point type size.

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[15] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60993 (November 20, 2009).
[16] See N.Y. Gen. Bus. Law § 396-i (2009); 15 U.S.C. § 1693l-1.
[17] DCA's own regulations contain type size requirements in various contexts. For example, car rental businesses must post a sign with letters not less than one inch high informing consumers to contact DCA with any complaints. See 6 RCNY § 5-46. In the tax preparation industry, tax preparers are required to post a sign stating their identification and qualifications; this sign must be in upper case black characters at least half an inch high. See 6 RCNY § 5-172.
[18] Eight states--Arkansas, California, Louisiana, Maryland, Nevada, New Jersey, Oregon, and South Carolina --require disclosures in 10-point type size on the gift card. See, e.g., Ark. Stat. Ann. § 4-88-703 (2009); Cal. Civil Code § 1749.5 (2009); La. Rev. Stat. Ann. § 51:1423 (2009); Md. Commercial Code § 14-1319 (2009); Nev. Rev. Stat. § 598.0921 (2009); N.J. Rev. Stat. § 56:8-110 (2009); Or. Rev. Stat. § 646A.278; and S.C. Code Ann. § 39-1-55 (2009).

► *Expiration dates and fees must be disclosed prominently*.

DCA further recommends that if terms and conditions other than those about expiration dates and fees also appear in 10-point type size, issuers must ensure that disclosures about the expiration date and fees are more prominent than the other terms and conditions, either appearing in capital letters or in bold font. Because disclosures about expiration dates and fees have the most impact on a consumer's use of gift cards, the Board must ensure their prominence.

D. Expiration dates

The Board requests comment on disclosures for expiration dates, specifically where the actual gift card expires prior to the underlying funds. The Board's Notice states that it is not prohibiting the expiration of gift cards prior to the expiration of the underlying funds because certain network systems may not be able to support products that do not carry expiration dates or that a gift card may not remain useable for the lifespan of the funds.[19] DCA questions the Board's determination to permit actual gift cards to expire before the underlying funds as that will result in consumer confusion from conflicting, competing expiration date disclosures on the gift cards or inadequate safeguards against proliferation of soon-to-expire gift cards in the market place.

► *Gift cards must have and disclose only one expiration date*.

Generally, retail issued gift cards have moved away from expiration dates either voluntarily or through regulation by states.[20] However, bank issued general-use prepaid cards usually expire within one or two years.[21] Bank issued general-use prepaid cards look and are used much like credit or debit cards. Like credit or debit cards, general-use prepaid cards may expire before the underlying funds expire. Issuing banks and credit card associations claim to impose expiration dates on credit and debit cards to protect against fraud and magnetic strip deterioration.[22] However, expiration dates were reportedly effective for fraud prevention when transactions were processed manually, but are less significant for currently common electronically authorized transactions.[23] Indeed, according to American Express, their general-use prepaid cards have a "valid thru" date just to demonstrate the life of the magnetic strip for the card, although funds on the cards never expire.[24] Moreover, according to American Express, the "[s]helf life for the mag[netic] strip is about five years. If you have a card with a past valid thru date, just call and you'll get a new card."[25] Therefore, there remains little reason why gift cards should expire prior to the expiration of the underlying funds.

DCA recommends that the Board prohibit expiration of gift cards prior to expiration of the underlying funds and require gift cards to have and disclose only one expiration date. This would ensure clarity of disclosures on the gift cards, limit the variety of disclosures stated on gift cards, and provide a fair and consumer friendly choice.[26]

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[19] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60998 (November 20, 2009).
[20] See Ellen Cannon, Bankrate.com, 2009 Gift Card Study, (October 12, 2009), http://www.bankrate.com/finance/credit-cards/2009-gift-card-study-1.aspx; and Kristin Arnold, Bankrate.com, Expire gift cards: Whose money is it?, (January 27, 2006), http://www.bankrate.com/brm/news/cc/20060127a1.asp.
[21] Leslie McFadden, Bankrate.com, How the CARD Act impacts gift cards, (November 11, 2009), http://www.bankrate.com/finance/credit-cards/how-the-card-act-impacts-gift-cards.aspx.
[22] Dana Dratch, Bankrate.com, Why do credit cards expire?, (February 2, 2005), http://www.bankrate.com/brm/news/cc/20050202a1.asp.
[23] Id.
[24] Ellen Cannon, Bankrate.com, 2009 Gift Card Study, (October 12, 2009), http://www.bankrate.com/finance/credit-cards/2009-gift-card-study-1.aspx.
[25] Id.
[26] If the Board continues to have concerns about the technology and security issues raised by the industry, DCA recommends that the Board engage in further study and propose additional rules based on an assessment of the technology and security issues and consumer impact.

E. Disclosure of other fees

The Board's proposed rule § 205.20(f) permits that disclosures of fees other than dormancy or service fees do not have to be disclosed on gift cards if a toll-free telephone number is stated on the gift cards. The Board's proposed comments § 205.20(a)(6)-1 define a service fee to include any periodic fees such as a monthly maintenance fee, a transaction fee, a reload fee, or a balance inquiry fee. All other fees need not be disclosed on the gift card.[27]

► *Fees should be limited and disclosed on gift cards*.

Bank issued general-use prepaid cards can impose, according to some estimates, over 50 different fees.[28] With consumers losing over six billion dollars in unused gift card funds, fees depleting the value of gift cards need to be disclosed and limited. Many states like New York already require that all fees assessed against the balance of gift cards must be stated thereon.[29] By requiring that any fee assessed against the underlying funds of a gift card be disclosed on the gift cards, the Board, like New York, can effectively restrict the number of fees that deplete the value of gift cards. Therefore, DCA recommends that the Board prohibit issuers from disclosing fees other than dormancy and service fees on accompanying materials.

► *Gift card issuers should disclose all possible fees imposed by third parties*.

Although the Board's proposed rule § 205.20(f) requires issuers to disclose any fee that may be imposed in connection with gift cards, the current rules and the Act are silent on fees assessed against the balance of the gift card by third parties. DCA notes that consumers may be assessed fees on the balance of the gift card that are not imposed by the issuer. For example, general-use prepaid cards can be used at an ATM not administered by the issuer. In such cases, the consumer may be charged a service fee by a party that is not the issuer. DCA recommends that the Board clarify proposed rule § 205.20(f) to require disclosures of fees assessed by third parties on the gift card.

II. Fees against the balance of the gift cards

The Act and the Board's proposed regulations prohibit issuers of gift cards from charging dormancy or service fees against the balance of the gift cards unless the gift cards have been inactive for one consecutive year, there is proper disclosure that the fee may be assessed, and not more than any one fee is charged.[30] The Board's proposed comments § 205.20(a)(6)-1 define a service fee to include any periodic fees such as a monthly maintenance fee, a transaction fee, a reload fee, or a balance inquiry fee. The Board's proposed comment § 205.20(d)(3)-5 states that if a fee is not a dormancy or service fee, it may be charged in the same month as a dormancy or service fee. The Board's Notice states that it is choosing not to limit the amount of dormancy or service fees an issuer may charge because the average of such fees has decreased from $1.73 per month to $1.38 cents per month.[31] Because bank issued general-use prepaid cards have gone largely unregulated issuers were able to charge consumers a myriad of fees while bank issued general-use prepaid cards generally expire after a year or two.[32] With restrictions on expiration dates and dormancy fees now imposed on bank issued general-use prepaid

[27] Electronic Fund Transfers, 74 Fed. Reg. 60986, 61001 (November 20, 2009).
[28] Leslie McFadden, Bankrate.com, How the CARD Act impacts gift cards, (November 11, 2009), http://www.bankrate.com/finance/credit-cards/how-the-card-act-impacts-gift-cards.aspx.
[29] N.Y. Gen. Bus. Law § 396-i (3) (2009).
[30] Electronic Fund Transfers, 74 Fed. Reg. 60986, 60997 (November 20, 2009).
[31] Electronic Fund Transfers, 74 Fed. Reg. 60986, 61002 (November 20, 2009).
[32] Leslie McFadden, Bankrate.com, How the CARD Act impacts gift cards, (November 11, 2009), http://www.bankrate.com/finance/credit-cards/how-the-card-act-impacts-gift-cards.aspx.

cards, experts predict that issuers will introduce other fees not used in the past to combat costs of managing dormant cards.[33]

DCA strongly urges that the Board immediately limit the amount of dormancy or service fees a gift card issuer can charge.

► *Permissible fees should be capped to a maximum of one dollar per month*.

As noted earlier, while the average monthly fee may have decreased, more than six billion dollars of gift card funds go unused.[34] Consumers are unable to use gift card funds for a variety of reasons. For example, many retailers do not permit consumers to split payments for purchases that cost more than the balance of the gift card.[35] Also, for bank issued general-use prepaid cards, a block on the funds is often placed making it harder for consumers to use the gift card quickly.[36] Other times, a consumer simply does not use a gift card and ensuing fees deplete the value of the gift card over time. In total, eight percent of every gift card goes unused.[37]

A cap on fees that may be assessed against the balance of the gift card is needed even if the average monthly fee has decreased to $1.38.[38] In order to protect consumers' money from a host of fees, at least five states, California, Louisiana, Nevada, New Jersey, Oklahoma, and Washington cap monthly fees.[39] All except New Jersey cap the monthly fees to one dollar. Unless fees are capped by the Board, the five year expiration date is meaningless because the underlying value of the average gift card is depleted at most in three years from a host of permissive fees.[40] DCA recommends that the Board follow the example set by California, Louisiana, Nevada, Oklahoma, and Washington and cap the total of permissible fees to one dollar per month.

III. Protections of gift cards during bankruptcy and liquidation sales

In these rough economic times, an increasing number of businesses are closing or filing for bankruptcies. In the last few years, major retailers entering bankruptcy include Fortunoff, KB Toys, Circuit City, Eddie Bauer, Linens 'N Things, Mervyns, Sharper Image, Mrs. Fields Cookies, Shoe Pavilion, Tweeter, Bennigan's and Steak & Ale Restaurants, Value City Department Store, Steve & Barry's, and Boscov's Department Store.[41] Indeed, "weakened and bankrupt retailers may leave consumers stranded with [100 million dollars] of worthless gift cards this year..."[42]

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[33] Id.
[34] Chuck Jaffe, MarketWatch, No gifts, please, (November 18, 2009), http://www.marketwatch.com/story/gift-card-fees-keep-on-giving-to-card-issuers-2009-11-18.
[35] Matthew Hathaway, *Instead of cash, this year give the gift of interest and expiration*, St. Louis Post-Dispatch (October 26, 2009), http://www.stltoday.com/blogzone/the-savvy-consumer-blog/shoppers-beware/2009/10/instead-of-cash-this-year-give-the-gift-of-interest-and-expiration/.
[36] Id. ("For example, many cards have a policy that requires a hold of 50% of the check amount at a restaurant in order to cover a tip ... Take a general-purpose gift card to your local sandwich shop and the 50% tip-hold may be in place, even if you order carry-out and aren't planning a tip at the pick-up window. As a result, if you have eight bucks left on a card, you may not be able to use it to buy a $6 lunch ...").
[37] Id.
[38] The average monthly fee (of $1.38) is still three percent of the average gift card amount of $46.00. See Ellen Cannon, Bankrate.com, 2009 Gift Card Study, (October 12, 2009), http://www.bankrate.com/finance/credit-cards/2009-gift-card-study-1.aspx.
[39] See, e.g., Cal. Civ. Code § 1749.5 (2009); La. Rev. Stat. Ann. § 51:1423 (2009); Nev. Rev. Stat. §598.0921 (2009); N.J. Rev. Stat. § 56:8-110 (2009); Okla. Stat. tit. 15, § 797 (2009); Wash. Rev. Code § 19.240.040 (2009).
[40] For example, once dormancy and service fees start to apply, the average gift card of $46.00 is diminished in value by $3.68 (eight percent of unused funds) and $1.38 in permitted dormancy or services fees. This is more than 10% of the average gift card. In one year, the consumer will end up losing close to 45% of an average gift card's value.
[41] Liz Moyer, Forbes, Beware of Gift Cad 'Gotchas', (November 21, 2008), http://www.forbes.com/2008/11/21/retail-giftcards-bankruptcy-biz-commerce-cx_lm_1121giftcards.html.
[42] Id.

New York State and local law recognize that consumers need special protections when stores are going out of business or claim to be. In New York City, DCA requires businesses conducting liquidation or any sale anticipatory to the termination, closing, liquidation, wind-up, discontinuance, removal, conclusion, or abandonment of business to obtain a license so that consumers receive protection from deceptive and unfair trade practices.[43] New York State law requires businesses to honor valid gift cards during closing out sales or defunct business sales. [44] Most consumers outside New York State are not afforded such protections; only five states, including New York, protect gift card consumers during out-of-business sales. When a retailer files for bankruptcy-court protection, gift card holders are considered unsecured creditors and it is up to the retailer to ask the bankruptcy court to allow the retailer to continue accepting gift cards.[45] If the retailer does not make such a request to the bankruptcy court, or the court denies it, gift card holders have to get in line behind other creditors and file a claim with the court.[46]

► *Retailers must accept gift cards during bankruptcy and liquidation sales*.

DCA recommends that the Board adopt rules protecting gift card use during bankruptcy and liquidation sales pursuant to its authority under the Electronic Fund Transfers Act to provide individual consumers rights.[47] Specifically, DCA recommends that the Board adopt rules requiring businesses to honor valid, current gift cards without restrictions during bankruptcy or liquidation sales unless they are imposed by the bankruptcy court. Second, DCA recommends that the Board require the bankrupt retailer to specifically request the bankruptcy court to allow it to continue to accept valid, current gift cards. Finally, DCA recommends that the Board require retailers in bankruptcy to stop third party vendors from selling that retailer's gift cards once the retailer files for bankruptcy.

IV. Other recommendations

DCA offers two additional recommendations to protect consumers and the value of their gift card funds.

► *Gift card issuers must set up a gift card registration system and warn consumers to protect gift cards like cash*.

Consumers with gift cards, unlike credit cards, have little protection if gift cards are lost or stolen. In such circumstances, gift cards are much like cash; once lost or stolen, the consumer is unable to recover the value. Registration provides many benefits to consumers: the consumer's gift card balance is protected if the card is stolen or lost, the consumer is able to check the balance of the gift card for free, and the consumer is often able to make secure online purchase. Many gift card issuers, including American Express, Starbucks, and Crate & Barrel allow consumers to register their gift cards. Therefore, DCA recommends that the Board enact a rule requiring gift card issuers to allow consumers to register their cards. DCA urges the Board to require issuers to state clearly and conspicuously on the gift card: "Protect your gift card like cash. Register your card to protect balance if gift card is stolen or lost."

► *Gift cards should be redeemable for cash when five dollars or less remains on the card*.

Finally, DCA recommends that once the balance of the gift card dips below five dollars, consumers should be able to redeem the remaining value for cash. 17% of general-use prepaid card users have trouble spending the balance of their gift card because many vendors refuse to split payment on a

[43] Title 20, New York City Charter and Code § 20-308.
[44] N.Y. Gen. Bus. § 396-i (2009).
[45] Sandra Block, USA Today, You'd better watch out: Gift cards can be lumps of coal, (November 17, 2008), http://www.usatoday.com/money/perf/columnist/block/2008-11-17-gift-cards-cash-block_N.htm.
[46] Id.
[47] 15 U.S.C. § 1693 (2009).

purchase that was greater than the balance of the gift card.[48] Eventually, through non-use and dormancy fees, these gift cards will be depleted in value without benefit to the consumer. Therefore, at least four states, including California, Maine, Massachusetts, and Vermont permit consumers to cash out the value of their gift card once the balance is below a certain amount.[49] DCA recommends that the Board follow these states and permit consumers to cash out the balance of their gift card once the underlying balance of the gift card is five dollars or less.

Conclusion

DCA applauds the strides that the Board's proposed rules make towards carrying out Congress's intent to improve fairness and clarity in gift card transactions by prohibiting expiration dates within five years and disclosing and limiting fees assessed against balance of the gift card. At the same time, DCA emphasizes that the Board's proposals can be further strengthened in order to more adequately inform, empower, and protect consumers. The Board should adopt strong requirements for better consumer disclosures about fees, both prior to purchase and during the span of consumer use. The Board should also protect against the depletion of gift card value by capping the fees issuers are permitted to deduct each month. Finally, the Board should protect consumers' money when a retailer is liquidating or filing for bankruptcy.

Gift cards remain a huge and profitable industry – and consumers deserve a fair return on the money they're spending. DCA appreciates the opportunity to encourage the Board to enact regulations that will significantly improve fairness and transparency in the gift card industry.

Respectfully submitted,

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Commissioner
New York City Department of Consumer Affairs

[48] Matthew Hathaway, *Instead of cash, this year give the gift of interest and expiration*, St. Louis Post-Dispatch (October 26, 2009), http://www.stltoday.com/blogzone/the-savvy-consumer-blog/shoppers-beware/2009/10/instead-of-cash-this-year-give-the-gift-of-interest-and-expiration/.

[49] The minimum balance of a gift card before it may be redeemed for cash varies. California permits that a gift card may be redeemed for cash when the remaining balance of the gift card is $10.00. See Cal. Civ. Code § 1749 et seq. (2009). Maine and Massachusetts permit cash redemption when the remaining balance of the gift card is five dollars. See Me. Rev. Stat. Ann. tit. 33, § 1953 (2009); Mass. Ann. Laws ch. 200A, § 5D (2009). Vermont permits cash redemption when the remaining balance of the gift card is one dollar. See Vt. Stat. Ann. tit. 8, § 2704 (2009).