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States Consider Action on Gift Card Laws

More than 20 states are currently considering legislation on gift cards and gift certificates, with proposals ranging from laws on unclaimed funds and abandoned property to laws addressing loyalty programs and expiration dates.

Some of the states' proposals are an attempt to align their laws with the gift card provisions of the federal [Credit Card Accountability, Responsibility, and Disclosure \(CARD\) Act of 2009](#), which established disclosure requirements and set limits on dormancy and service fees. Others, however, go further – [Missouri](#), New Jersey, and [Virginia](#) are all considering laws that would prohibit the use of expiration dates or service fees for gift cards in those states.

Below is a summary of some of the proposed state laws.

California

On January 19, the California Senate was presented with [SB885](#), a bill on gift certificate redemption. The proposed legislation would require that a gift certificate with a specified amount be redeemable for its cash value, and that the gift certificate contain a statement to that effect. The bill would also do away with several exceptions in the existing statute that prohibit the sale of a gift certificate containing a dormancy fee.



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Illinois

In Illinois, [HB4702](#) was referred to the House Rules Committee in early January. The bill would amend the state's Consumer Fraud and Deceptive Business Practice Act to provide that the holder of a gift certificate issued on or after January 1, 2011, that has a balance of less than \$10, must be given the option of receiving that balance in cash.

Nebraska

The Nebraska legislature is considering a bill addressing customer loyalty or incentive programs. Pursuant to [LB720](#), if a retail business establishes a customer loyalty, bonus, or incentive program that provides a general-use prepaid card, the business would also be required to offer the incentive in the form of cash or a negotiable check. In addition, the prepaid card would not expire for a specific time and its value could not be decreased for administrative, shipping, or handling fees.

New Jersey

New Jersey is considering several pieces of [legislation](#) regarding gift cards, including [A638](#), a bill that would prohibit the display of gift card account numbers and make it illegal to sell a gift card unless it is packaged or displayed so that the card number cannot be viewed prior to purchase. The state is also considering [A1635](#), a bill that would create an exception for prepaid bank cards that disclose their expiration dates and dormancy fees from the statute regulating gift cards.

Why it matters: The recent enactment of the CARD Act has not deterred states from considering their own gift card laws. While some of the statutes would harmonize individual states' laws with federal law, others are continuing to chart their own course, sometimes with greater limitations and restrictions. Companies need to be aware that several states are considering action and that Congress is also considering an amendment to the CARD Act, H.R. 3639, which would establish an earlier effective date for gift card provisions.

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ICC Releases Guidelines on International Green Marketing

The International Chamber of Commerce (ICC) recently released guidelines on green marketing that include a checklist and a chart to help guide international marketers.

The "Framework for Responsible Environmental Marketing Communications" is an addition to the ICC's existing guidance on marketing, and was developed in response to an increase in environmental claims made in advertisements.

UPCOMING EVENTS

February 9, 2010
FDA Virtual News Conference
Topic: "Serious Adverse Event Reporting for OTCs and Dietary Supplements: Confusion Reigns and Labeling Enforcement Looms"
Speaker: [Ivan Wasserman](#)
[for more information](#)

February 12, 2010
New York City Bar
Topic: "Understanding and Complying with Sweepstakes, Promotions and Marketing Law"
Speaker: [Terri Seligman](#)
New York, NY
[for more information](#)

February 23-25, 2010
Digital Signage Expo 2010
Topic: "Opt-in or Opt-out? Navigate the Consumer Privacy Issue for Future Profit"
Speaker: [Linda Goldstein](#)
Las Vegas, NV
Las Vegas Convention Center
[for more information](#)

March 9-10, 2010
Social Media Marketing Summit
Speaker: [Anthony DiResta](#)
[for more information](#)

March 13, 2010
Supply Expo 2010
Topic: "Live from D.C.: It's Make Your Claims Right!"
Speaker: [Ivan Wasserman](#)
[for more information](#)

March 15-17, 2010
Practising Law Institute CLE Program
Topic: "Counseling Clients in the Entertainment Industry"
Speakers: [Alan Brunswick](#), [Kenneth Kaufman](#)
New York, NY
PLI New York Center

“[E]nvironmental claims should be based on sound, appropriate scientific information relevant to actual use, operation or disposal of the advertised product,” the guidelines state.

The guidelines include definitions of some of the more common terms used in green advertising, such as “recyclable” and “energy efficient.”

For specific guidance, advertisers can use the checklist, which posts questions such as “Do your proposed claims address the effect of the product, component or package on water? On solid waste? On energy usage?”

In addition, the guidelines contain a chart that compares the ICC’s general advertising and marketing provisions with its provisions specific to environmental marketing, as well as other environmental marketing considerations.

The guidelines also advise advertisers to use particular caution when making claims of “sustainability,” a term that the new guidelines do not define. The ICC suggests that advertisers making “sustainable” or “sustainably produced” claims make sure that their marketing claims are “carefully couched and appropriately qualified and substantiated.”

To read the guidelines, checklist, and chart, click [here](#).

Why it matters: Companies must be careful to substantiate environmental claims about their products. The new guidelines can help with the process when considered in conjunction with the Federal Trade Commission’s Guides for the Use of Environmental Marketing Claims, which are currently under review. Revised FTC Guides are expected this Spring.

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The Little “i” That Could

Following months of research, the Future of Privacy Forum introduced a new icon that advertisers may use to designate Internet ads based on Web surfing activity.

The “power i,” a white letter in a circle on a blue background, will appear on Internet advertisements accompanied by text such as “Interest Based Ad,” “Ad Choice,” or “Why did I get this ad.”

When consumers click on the “i” they will be taken to an explanatory page about how the advertiser used their past Web activity and demographics to deliver the ad.

Trade groups and advertisers hope the symbol will help to ward off federal regulation of behavioral advertising. Last summer, a coalition of advertising trade groups announced new voluntary guidelines for behavioral marketing and the use of a symbol was announced, pending design. The “i” was chosen after several potential icons produced by an ad agency were presented to focus groups for feedback.

[for more information](#)

March 18-19, 2010
Minority Corporate Counsel Association
9th Annual CLE Expo 2010
Topic: "Green Litigation & Corporate Sustainability Programs: Beware the Trojan Horse"
Speaker: [Linda Goldstein](#)
Chicago, IL
Chicago Marriott Downtown
[for more information](#)

April 14-15, 2010
American Conference Institute
Advertising, eMarketing & Promotions for the Pharmaceutical Industry
Speaker: [Linda Goldstein](#)
Philadelphia, PA
The Union League
[for more information](#)

April 21-23, 2010
ABA Antitrust Law Spring Conference
Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"
Speaker: [Tom Morrison](#)
Washington, DC
[for more information](#)

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Our Practice

“We support industry efforts to develop a consistent symbol and message that would help educate consumers about online advertising,” Maneesha Mithal, associate director for the division of privacy and identity protection at the Federal Trade Commission, said in a statement. “We hope they will share data, such as click-through and opt-out rates, that will inform the debate.”

There is no legal requirement that advertisers use the symbol, but trade groups such as the Interactive Advertising Bureau and the Direct Marketing Association are urging companies to begin using it later this year, once the landing page for the explanatory information is complete.

Why it matters: The new symbol should help consumers to better understand behavioral advertising and provide standardized notice when it occurs.

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Twitter Defamation Suit Dismissed – Tweets Are “Rambling Hyperbole”

An Illinois judge dismissed a defamation lawsuit brought by a landlord over a tenant’s Twitter post.

Apparently unhappy with her lodging, Amanda Bonnen took to her Twitter account and wrote “Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s okay.”

In reply, her landlord filed suit. Despite the fact that Bonnen’s Twitter account had only 20 followers, the landlord claimed that its reputation had been greatly injured and sought \$50,000 in damages.

Bonnen filed a motion to dismiss, arguing that her tweet was an opinion and not a factual assertion. She claimed that based on her other tweets – such as “To run or not to run? The temp says 93. I might die out there,” and “A dog smaller than a pigeon tried to attack me this morning” – the post about her landlord “exists within a context of random and imprecise hyperbolic comments void of explanation.”

Judge Diane Larsen agreed, dismissing the suit, ruling that Bonnen’s tweet was nonactionable as a matter of law.

To read the complaint, click [here](#).

To read the court’s opinion dismissing the suit, click [here](#).

Why it matters: The dismissal of the suit in the early stages shows that a single blog post or tweet doesn’t necessarily result in a viable lawsuit. Social media users should, however, remain cautious of their online commentary.

Whether you’re a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

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Trade Groups Wary of Increased FTC Power

Twenty-nine advertising industry trade groups joined together in a letter sent to the Senate Committee on Commerce, Science and Transportation last week, expressing concern that the Federal Trade Commission could become too powerful if given more rulemaking authority.

Organizations such as the Interactive Advertising Bureau, the Association of National Advertisers, the American Association of Advertising Agencies, the American Advertising Federation, and the Direct Marketing Association sent the letter in response to pending legislation.

The Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173) would remove existing limits on the FTC's rulemaking capability and expand its enforcement powers. Although the Senate version of the bill did not contain similar provisions, the trade groups remain concerned about the potential for greater FTC clout.

"While we support the FTC's mission to prevent and punish unfair and deceptive acts or practices, we believe that the current limits on the FTC's discretion are appropriate," the letter said.

Because of the breadth of the FTC's jurisdiction, the coalition wrote that the current checks and balances on its power were reasonable and appropriate, and that eliminating these safeguards could give the FTC free rein to regulate at will.

Further, the enhanced enforcement powers under H.R. 4173 – such as independent litigation authority to seek civil penalties and a new violation for "substantial assistance" in committing an unfair or deceptive act or practice – would give the FTC "unprecedented and sweeping powers."

The proposed provisions "grant such sweeping powers that the FTC could essentially act as an unelected legislature governing industries and sectors across the economy," the letter states, asking the Senate to discard the provisions.

To read the letter in its entirety, click [here](#).

To read the proposed Act, H.R. 4173, click [here](#).

Why it matters: The FTC has indicated that it would like to strengthen its existing power, and the recent roundtable discussions held by the FTC indicate the potential for increased regulation in the future.

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