

BY JUDITH RINEARSON

Promotional Certificates: Avoiding Legal Traps

MANY RETAILERS ARE INTERESTED in building up new business by offering a deeply discounted “Groupon-like” gift certificate program. These programs market to local residents that, for example, for \$25 they can get \$50 worth of food at Fred’s Pub. To be effective, the discounted certificate almost always has a short expiration date, a few weeks or months.

That is the problem. Sure, a short expiration date makes perfect sense from a marketing perspective. But these are different from the coupons found in your Sunday paper, because the consumer has to pay for them. That is why, although these programs are highly popular, there has been a spate of class-action lawsuits claiming that the expiration dates violate applicable laws.

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

Issues under federal law

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

However, there is an important exclusion for loyalty, award, and promotional cards (“promotional cards”). Expiration dates are permitted on promotional cards—provided that 1) the fact that it is a “promotional card” and 2) the expiration date are *both* clearly disclosed on the *front* of the card or certificate.

The tricky part is making sure your discounted certificate program falls

within the definition of “promotional programs.” To meet the definition, the discounted certificate must be issued to a consumer “in connection with a loyalty, award, or promotional program.” Make sure you put appropriate language in your contracts, as well as on your advertising and marketing materials that confirms the discounted certificate is offered *in connection with* a promotional, loyalty, or award program.

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So, under federal law, you can 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. If you do all of this, and are as clear and transparent as possible (no hidden expiration dates, no mouse-sized type disclosures), you should be reasonably compliant with federal law.

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 expiration dates. Moreover, many state laws exempt promotional certificates only if the consumer has *not* paid for the certificate. For example, Ohio’s two-year restriction on expiration dates does not apply to promotional cards,

provided there is no “money or anything of value being given in exchange by the consumer.”

A lot of states have this kind of law. To know for sure, you’ll need to check the laws applicable in the state the certificate is offered.

So, if your discounted certificate program has an expiration date, how do you overcome this issue under state laws? The answer is simple, but it must be done right: you need to separate the paid gift certificate from the promotional offer. Here’s how it works:

- In our previous example, when the consumer pays for the \$25 Fred’s Pub certificate that is worth \$50, the consumer receives a \$25 gift certificate *that does not expire*.

- The consumer also receives a limited-time promotional offer: for two weeks that \$25 gift card is worth \$50. However, at the end of two weeks, the promotional offer expires.

- Even after two weeks, the consumer still has a \$25 gift certificate that continues to be valid until it is used.

- To make this work and to be effective against regulatory or litigation claims, you must disclose very clearly all of the terms, the expiration date that applies to the promotional offer, and, of course, the fact that the paid gift certificate does not expire, even if the promotional offer does.

With care in structuring these programs, and with good, clear disclosures in all marketing materials, these Groupon-like gift certificate programs can be a true win-win for both consumers and retailers. ■

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