



460 Nichols Rd., Suite 300
Kansas City, MO 64112
(913) 871-7430 Main Phone
(866) 498-1735 Fax

March 18, 2015

Via Email to wendy.simons@state.or.us

House Committee on Consumer Protection
and Government Effectiveness
Oregon State Capitol
900 Court Street NE, Room 453
Salem, Oregon 97301

Re: House Bill 2543

Dear Committee Members:

This letter is provided by Card Compliant, LLC ("*Card Compliant*"). It submits comments regarding the House Bill 2543 ("*HB 2543*") that concerns amending the Oregon Unclaimed Property Act to require gift cards to escheat to Oregon, which is currently pending before the House Committee on Consumer Protection and Government Effectiveness (the "*Committee*").

Card Compliant is a regulatory compliance company that provides regulatory compliance services in North America and Europe regarding many electronic prepaid card programs including gift card programs. Card Compliant supports a wide variety of clients including clients with gift card programs in United States. Some clients issue or sell gift certificates or gift cards that are redeemable only at a single retailer's stores (commonly referred to as closed loop gift cards). Other clients (such as financial institutions or program managers) issue or sell gift cards that operate on the major card networks (such as MasterCard or Visa); these cards either are redeemable at all of the multiple unaffiliated merchants that accept the network's cards (sometimes referred to as open loop gift cards) or are redeemable at a limited specified group of multiple unaffiliated retailers such as the stores located in a shopping center (sometimes referred to as restricted authorization gift cards). Among the services provided by Card Compliant in the United States are services regarding compliance with unclaimed property laws.

Card Compliant appreciates the opportunity to comment on the HB 2543. Card Compliant recognizes that the Committee will receive numerous comments regarding all aspects of the HB 2543. In this letter we will not address the entirety of the HB 2543. Instead, we will focus our comments upon the application of the HB 2543 to gift certificates and gift cards (collectively, "*gift cards*"). In particular, we respectfully request that HB 2543 be amended to specifically exclude gift cards from the Unclaimed Property Act (the "*Act*") or at the very least be reported unfavorably out of the Committee.



460 Nichols Rd., Suite 300
Kansas City, MO 64112
(913) 871-7430 Main Phone
(866) 498-1735 Fax

GIFT CARDS SHOULD BE SPECIFICALLY EXCLUDED FROM HB 2543

In Section 3 of the HB 2543, a gift card is presumed to be abandoned if it is unclaimed by the apparent owner within 3 years, and the amount abandoned is the card's balance at the time of abandonment. We respectfully submit that HB 2543 should, at the very least, be reported unfavorably out of the Committee or HB 2543 should be amended to specifically exclude gift cards from the Unclaimed Property Act in an exclusion section of Act. We take this position for several reasons, which include the following:

1. Gift Cards are Not Cash Equivalents. Many practitioners believe that gift cards, by their nature, are not property that should be considered intangible property for the purpose of unclaimed property laws. This thesis is based in part upon the premise that an unclaimed property law governing gift cards requires the card issuer to escheat *cash* to the government even though the actual intangible property right held by the card issuer *is not a cash equivalent*. By its terms, the typical gift card is not redeemable or refundable for cash. Instead, it is redeemable only for goods and/or services and only at specified merchants - which is usually a single retailer in the case of a typical retailer's closed loop gift card.¹ As a result, a gift card is not a cash equivalent.

The actual intangible property right held by the card owner is a limited and restricted non-cash right to redeem goods and services from designated retailers who will profit from such use. If anything, it is that limited property right that should escheat to the government. Yet, unclaimed property laws often confuse gift cards with cash equivalents and require card issuers to escheat cash instead of the non-cash property right created by the cards. In doing so, the law improperly inserts an additional step in the unclaimed property process of requiring the card issuer first to liquidate a non-cash instrument into cash and then transmit the resultant cash to the government. For other types of non-cash equivalent property (such as stock certificates and property in a safety deposit box), this added step of cash liquidation is not applied. Like those types of property, the cards themselves should be escheated to the government and held for the card owners who may use them if reclaimed from the government.²

This thesis is further supported by the premise that a state government typically should step into the shoes of the property owner with respect to property escheated to the government. The conversion of a non-cash instrument to cash is inconsistent with this premise because it

¹ In Oregon, certain types of gift cards at the option of the cardholder are redeemable for cash when the gift card's balance is less than \$5. ORS 646A.276(1)(d) and (2).

² With respect to stock certificates, the issuing company is not required to redeem the certificate and send cash to the government. Instead, the government acquires the rights of the stock certificate holder. While the government may have the right to sell the stock on the market in exchange for cash from third parties, the cash liquidation process is completely different from requiring the stock issuer to effectively redeem the stock and send cash to the government at the value of the stock. If gift cards were handled in the same manner, the card issuer would escheat the cards themselves to the government which could liquidate them on the market in exchange for cash from third parties. That process is different from requiring the card issuer itself to effectively redeem the cards and send cash to the government.



460 Nichols Rd., Suite 300
Kansas City, MO 64112
(913) 871-7430 Main Phone
(866) 498-1735 Fax

changes the nature of the property right held by the cardholder. Under the terms of the contract between the card issuer and cardholder, the resulting intangible property right held by the cardholder is a right to redeem the card for goods and services, which, in turn, results in an intangible property right in the card issuer to receive profit from the use of the card. Requiring the card issuer to escheat cash at the face value of the card after the passage of time amends these rights and alters the contractual relationship between card issuer and cardholder.

In light of these premises, many governments have elected not to subject gift cards (redeemable for goods and services only) to their unclaimed property acts. Approximately 32 states have done so in some form or another. See Section 7 below. In the alternative, recognizing the non-cash nature of gift cards and preserving the card issuers right to have the card used to buy merchandise in accordance with its terms, other states have enacted legislation which requires the card issuer to only escheat a limited amount (such as 60%) to the state.³

2. Management Problems and Costs. Another reason for excluding gift cards from the HB 2543 focuses upon the management problems inherent with the State being a custodian of such instruments under the unclaimed property laws. The typical gift card is a single load card with an average starting balance usually ranging from about \$10 for fast food restaurants to \$65 for high end retailers. Many of these cards are partially used resulting in de minimis balances that commonly is only pennies. Many gift card programs issue thousands of such cards to consumers annually. The card issuers and processors have equipment and accounting systems designed to manage these high-volume and low-dollar card accounts. As the custodian of such items, Oregon would need to create and maintain similar systems in place to hold and process claims from the cardholders. The cost of such systems, and related human resources to manage the items, may be prohibitive. In many cases, the government's cost of issuing checks to the card owners may exceed the amount remitted. Many other states have avoided these management problems by declining to include gift cards in their unclaimed property statutes and regulations. Many states have also exempted low-dollar cards from escheat. The Committee should either unfavorably report HB 2543 or HB 2543 should be amended to specifically exclude gift cards from the Unclaimed Property Act in an exclusion section of Act.

3. Information Security Problems. Electronic gift cards operate like financial instruments and, as such, are subject to fraud activities. When gift cards are escheated to a government, the card numbers are often provided (and may be required) to facilitate reclamation by the card owner. If those card numbers fall into the hands of the wrong person, they can be used to commit fraud through use of the card numbers to purchase merchandise or engage in other illicit activities. This fraud problem is compounded by the fact that many retailers may elect to escheat the cards in an active state so that the cards can continue to be used after escheat, with the card issuer seeking a refund from the government. As custodian of the card numbers for

³ States enacting legislation requiring the escheat of only 60% of a card's face value include Alabama, Maine, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Tennessee and West Virginia. The 40% retention acknowledges the non-cash equivalent nature of the cards and the right of the card issuer to a contractual profit. Delaware addressed this issue head on and requires the card issuer to escheat cards at a value that is net of profit.



460 Nichols Rd., Suite 300
Kansas City, MO 64112
(913) 871-7430 Main Phone
(866) 498-1735 Fax

escheated cards, the government should be required to maintain systems with state of the art security features to avoid fraud originating from the government data bases. In the private sector, this is a costly and continuing problem. The Committee should continue to avoid these issues by declining to include gift cards in the Unclaimed Property Act.

4. Anonymous Cards. Gift cards should also be excluded from the HB 2543 because it will be difficult for Oregon to return these properties to their owners. The main purpose of the Unclaimed Property Act is to reunite the abandoned property with the owner. Unlike a bank account, gift cards typically are anonymous in that they are purchased without the purchaser providing any personal identifiable information to the card issuer. A record of the apparent owner typically is used to return the property to its properly identified owner. Without record of the apparent owner, it will be difficult to return the property to the apparent owner. Additionally most consumers purchase gift cards to give and receive gift cards as presents. The gifting of gift cards adds to the difficulty of determining the rightful owner. In the United States, many states have avoided these issues by declining to include gift cards in their unclaimed property laws and regulations.

5. Consumer Issues. In Oregon, many types of gift cards are prohibited by consumer protection laws from expiring or charging a dormancy fee.⁴ These consumer statutes reflect the public policy of allowing the consumer to have unfettered use of the gift cards after purchase for unlimited periods of time. While escheat is not an expiry date, it operates like one in that it may cut-off or hinder the consumer's use of their card.⁵ Once a gift card is escheated to Oregon, the gift card may be rendered unusable by the consumer and be declined when presented for goods and services. If gift cards are excluded from the HB 2543, the owner may present the gift card at any time to redeem its value for goods and services. Recognizing the relationship between escheat and the consumer protection concepts of no fees and expiration dates, many states, including Oregon, have chosen to exempt gift cards from escheat because the gift cards are prohibited from having fees or expiry dates. It is sometimes suggested that escheating gift cards is of positive value to consumers in that the gift cards are held by the government in the event that the card issuer becomes insolvent. This concept again confuses the non-cash equivalent nature of gift cards. If the gift card itself is escheated to the government (as opposed to cash), the card owner would receive no protection from subsequent insolvency of the card issuer in that the card owner would reclaim the right to use a card at an insolvent issuer. Furthermore, the unclaimed property law is an inefficient means to provide insolvency protection in that it would only protect unknown and long gone card owners who purchased the cards beyond the abandonment date but not protect the active card owners who purchased the cards within the abandonment date.

⁴ ORS 646A.276(1)(a) – (c).

⁵ "Electronic Funds Transfers; Determination of Effect on State Laws Maine and Tennessee," Consumer Financial Protection Bureau, 78 Fed. Reg. 24386 (25 April 2013), pp. 24386 -24391. Found at <https://www.federalregister.gov/articles/2013/04/25/2013-09751/electronic-fund-transfers-determination-of-effect-on-state-laws-main-and-tennessee>.



460 Nichols Rd., Suite 300
Kansas City, MO 64112
(913) 871-7430 Main Phone
(866) 498-1735 Fax

6. Economics. As stated above, most gift cards are consumer friendly in that they do not have expiration dates or back-end fees. Most non-bank cards do not have front-end fees. The removal of these fee/expiry features impacted the business models for the card programs (a) by removing revenue from the expirations and/or fees, and (b) by adding the costs of maintaining cards for consumers for longer periods of time. In exchange for that, the card issuers were able to maintain revenue from the non-cash equivalent nature of the cards in that the consumer was required to use the cards to purchase goods or services, thereby causing a stream of revenue. The banning of traditional sources of revenue (fees or expirations) when coupled with escheat for cash at the card's face value places a disproportionate economic burden on the card issuers. Many states avoid this problem by syncing the removal of consumer unfriendly revenue sources for gift card programs with a non-escheat policy for gift cards.

7. Other Jurisdictions. Card Compliant has substantial experience with respect to the laws of other jurisdictions regarding the treatment of gift cards as unclaimed property. In the United States, certain types of gift cards were excluded in some fashion or another in the unclaimed property statutes of at or about 32 states. Those states include the following: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. The rationale behind the decisions of these jurisdictions was well reasoned after substantial experience in escheating various forms of intangible property.

CONCLUSION

For these reasons, we respectfully request that that HB 2543 be amended to specifically exclude gift cards from the Act or at the very least be reported unfavorably out of the Committee. We have substantial information regarding this subject. Therefore, if you desire additional information regarding our experience with escheat, do not hesitate to contact our offices.

Respectfully submitted,

Card Compliant, LLC

A handwritten signature in blue ink, appearing to read 'Phillip C. Rouse', written over the printed name.

By: Phillip C. Rouse
Chairman