



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### BACKGROUND:

##### Gift Certificates or Gift Cards

##### *Unclaimed Property Status*

Most state regulation regarding gift cards or certificates relates to unused gifts, when they escheat to the state under unclaimed property laws. All states have escheat laws and generally unclaimed property reverts to the state in three or five years, although some states have up to seven years.<sup>1</sup> Gift certificates and cards are covered as unclaimed property except in the following states: Arizona, Arkansas, Florida, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, North Dakota, Ohio, Oklahoma, and Oregon. The law in Texas does not specifically include gift certificates but gift certificates are treated as unclaimed property and escheat after three years.<sup>2</sup> California and New Hampshire do not escheat certain gift certificates as delineated in their respective laws.<sup>3</sup>

The Uniform Act of 1995 provides that gift certificates escheat to the state three years after December 31 of the year the certificate was sold. The amount presumed to be abandoned is 60% of the face value of the gift certificate if the certificate can be redeemed only for merchandise. If a consumer does not use a certificate within the time period of the state's escheat law, generally, the issuer must pay the state the value of the certificate. If nothing was paid for the certificate, the amount abandoned is the certificate's "fair value" or 60% of its value if the state is operating under the Uniform Act of 1995.<sup>4</sup>

A National Retail Federation survey estimated that holiday shoppers spent \$17.24 billion on gift cards in 2003 and that one out of 10 consumers never redeems his or her gift card.<sup>5</sup>

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<sup>1</sup> According to a report on gift certificates and the laws of escheat, most states have adopted escheat laws based on the 1966 version of the Uniform Disposition of Unclaimed Property Act. Some states have adopted escheat laws based on the 1981 or 1995 Uniform Unclaimed Property Act. Under the 1995 Act, tangible as well as intangible property escheats to the state normally within five years, although this time frame can be anywhere from three to seven years.

<sup>2</sup> Information obtained from Jeanne Mejeur, Research Manager, National Conference of State Legislatures, April, 2004.

<sup>3</sup> In California, gift certificates are not subject to escheat except for those purchased before 1997 which have expiration dates. Cal. Civ. Proc. Code ss. 1520(a) and 1520.5. In New Hampshire gift certificates of less than \$100 may not have an expiration date and are not subject to escheat. Also, gift certificates for which no monetary consideration is given or that are distributed to consumers for promotional purposes are not subject to escheat. N.H. Rev. Stat. ss. 358-A:2(XIII) and 471-C:16.

<sup>4</sup> "Gift Certificates and the Laws of Escheat," George B. Delta, Esq., Counsel to the Incentive Federation, Inc., September 15, 2003.

<sup>5</sup> "Gift Cards Would Keep on Giving Under Rhode Island Proposal", Ryan McBride, The Westerly Sun, March 8, 2004.

## ***Regulation of Expiration Dates, Dormancy or Maintenance Fees, & Refunds***

### California

In 1997, California made significant changes to the regulation of gift certificates with subsequent changes in law over the next few years. California law prohibits the sell of a gift certificate to a purchaser that contains an expiration date or a service fee, including, but not limited to, a service fee for dormancy. The restriction on dormancy fees, however, does not apply to a fee on a gift card that:

- Has a remaining value of five dollars or less each time the fee is assessed,
- Has a fee that does not exceed one dollar per month,
- Had no activity for 24 consecutive months, including, but not limited to, purchases, the adding of value, or balance inquiries,
- Allows the holder to reload or add value to the gift card, and
- Has a statement printed on the card in at least 10-point font stating the amount of the fee, how often the fee will occur, that the fee is triggered by inactivity of the gift card, and at what point the fee will be charged.

Additionally, the expiration date prohibition does not apply to the following gift certificates provided the expiration date appears in capital letters in at least 10-point font on the front of the gift certificate:

- Gift certificates distributed by the issuer to a consumer at no charge for use pursuant to an awards, loyalty, or promotional program,
- Gift certificates sold below face value at a volume discount to employers or to nonprofit and charitable organizations for fundraising purposes, if the expiration date on those certificates is for not more than 30 days after the date of sale; or
- Gift certificates issued for a food product.

Any gift certificate sold after January 1, 1997, is redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder. A gift certificate without an expiration date is valid until redeemed or replaced. The law provides that nothing precludes the issuer from including a provision that entitles the purchaser to a full refund of the amount paid for the certificate upon the occurrence of certain events.

The California law also provides that the gift certificate constitutes a value held in trust by the issuer on behalf of the beneficiary and that the value of the certificate belongs to the beneficiary of the representative of the beneficiary. The law provides for standing in instances of bankruptcy and that the terms of the certificate may not make its use or redemption invalid in such instances. Finally, the law states what an issuer is not required to do, that the law does not create a fiduciary or quasi-fiduciary relationship between the beneficiary of the gift certificates and the issuer, and that the issuer has no obligation to pay interest on the value of the gift certificate held in trust under s. 1749.5 of the California Civil Code.

The California law has been used by other states, in whole or in part, in their laws or proposed revisions to law.

### Other State Laws and Legislative Proposals<sup>6 7</sup>

In addition to California, the states of Connecticut and Washington prohibit the use of expiration dates on gift certificates or gift cards, except under certain circumstances. Rhode Island prohibits dining establishments from using expiration dates on gift certificates and requires specific records keeping requirements for certificates valued in excess of \$50.

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<sup>6</sup> Information on legislation in other states was based upon a report by the National Conference of State Legislatures entitled, "2002-2004 Gift Certificates Legislation," March 29, 2004, as well as an internet search of state legislatures..

<sup>7</sup>"Gift Certificates and the Laws of Escheat," George B. Delta, Esq., Counsel to the Incentive Federation, Inc., September 15, 2003.

A few other states have specific rules involving expiration periods for gift certificates. For example, New Hampshire prohibits expiration dates on gift certificates with a face value under \$100, Massachusetts prohibits dates for less than seven years, and Hawaii prohibits dates for less than two years. Additionally, Massachusetts law states that gift certificates not clearly marked with an issuance and expiration date are valid indefinitely.

With regard to dormancy fees, Connecticut and New Hampshire specifically prohibit the use of dormancy fees. California and Washington laws prohibit service fees, including, but not limited to, dormancy fees but then provide certain exceptions for the use of dormancy fees on certain gift certificates. The states of Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, New York, and Utah are among the several states that impose various restrictions on the use of dormancy fees.<sup>8</sup>

In 2004, 29 states have legislation relating to gift certificates or gift cards filed for consideration by the various legislatures.<sup>9</sup> The issues included consideration as unclaimed property; prohibition of, extension of, or requirement for disclosure of expiration dates; prohibition of various fees, limitation on excessive fees, or disclosure of fees; redemption for cash or another card, under certain conditions; requirements for standards of businesses issuing cards; and, penalties and enforcement agencies. In some states, such as New York, several bills were filed with one prohibiting fees and expiration dates and another permitting such. Fifteen states have had legislation filed pertaining to prohibition of expiration dates and fees, although there is not uniformity on what fees are to be prohibited. Nine states have legislation that provides for redemption for cash value. Only two bills have passed the legislative bodies. Washington passed HB 3036 on March 11, 2004 and sent the bill to the Governor. The bill mirrors the California law discussed above and much of what is included in HB 1053 filed in Florida. Iowa passed H.F. 2306 which was signed by the Governor on March 18, 2004. The Iowa bill amends the definition of "gift certificate" to include electronic gift cards with regard to disposition of unclaimed property and prohibits an issuer of a gift card from deducting a fee from a gift card that is not presented for redemption in a timely manner where no valid contract exists to deduct the fee.

In 2003 and 2002, 16 states and 11 states, respectively, introduced legislation related to the same topics as legislation introduced in 2004. In 2003, seven bills were enacted and in 2002, three bills were enacted.<sup>10</sup>

### **Chapter 501, F.S. – Consumer Protection**

Chapter 501, F.S., is divided into six parts: General Provisions, Deceptive and Unfair Trade Practices, Aftermarket Crash Parts Act, Florida Telemarketing Act, Miscellaneous Provisions, and Unfair or Deceptive Acts or Practices relating to Vehicles.

Enforcement of the provisions of the chapter vary within some of the parts as well as between the parts. Both Part I, General Provisions, and Part V, Miscellaneous Provisions, have sections regulated by the Department of Agriculture and Consumer Services and others regulated by the Department of Legal Affairs. Part II, the Deceptive and Unfair Trade Practices Act, Part III, the AfterMarket Crash

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<sup>8</sup> For example, Maine prohibits dormancy fee use as long as the gift certificate is used before it expires, but permits the fees after expiration. Massachusetts does not allow the use of dormancy or any fee that reduces a gift certificate's value for seven years. Hawaii prohibits fees for the same reason as Massachusetts but for two years. The dates for Massachusetts and Hawaii correspond to the requirements for expiration dates in the respective states.

<sup>9</sup> Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, and Wisconsin.

<sup>10</sup> California, Connecticut, Maine, Massachusetts (2 acts), New Hampshire, and Tennessee passed legislation that became law in 2003. The changes in the Connecticut law were passed as part of its budget act and became effective August 16, 2003. California, Iowa, and New Jersey passed legislation in 2002 that became law.

Parts Act, and Part VI, the Unfair or Deceptive Acts or Practices related to Vehicles are enforced by the Department of Legal Affairs or the office of the state attorney depending upon jurisdiction. The Telemarketing Act, Part IV, is enforced by the Department of Agriculture and Consumer Services and the office of the state attorney.

The Division of Consumer Services within the Department of Agriculture and Consumer Services is the state's clearinghouse for consumer information, protection, and complaints. The division is authorized under s. 570.544, F.S., to, among other things, assist consumers through consumer studies, consumer education programs, and by offering conferences related to consumer services to consumers. Currently, the division handles inquiries and complaints regarding businesses regulated by the Department of Agriculture and Consumer Services or by other governmental entities. Inquiries and complaints relating to regulation under the purview of other governmental entities are forwarded to those entities for resolution. Prior to July 1, 2003, the division had statutory authority to process and mediate consumer complaints filed against businesses that are not regulated or under the jurisdiction of any federal, state, or local governmental agency. For the prior three years, the number of complaints related to non-regulated businesses totaled approximately 25,000 to 27,000 per year. According to the division, consumers have benefited by approximately \$1 million to \$1.8 million annually through such voluntary mediation with non-regulated businesses. Since July 1, 2003, approximately 10,000 complaints on non-regulated businesses were received and referred to another agency, primarily the Attorney General's Office, but could not be acted upon by the division. Information was included in the complaint and inquiry data base maintained by the division on these complaints with no indication on validity or complaint resolution. The division also maintains a data base including complaints on regulated and non-regulated entities that assisted consumers in their inquiries. In Special Session A, the division's authority to assist the public with complaints regarding unregulated entities was removed by the FY 2003-04 budget implementing bill for one year. The budget also eliminated seven full-time-equivalent (FTE) positions used to support this activity. The maintenance of the non-regulated entity data base was shut down. However, the authority removed in the FY 2003-04 implementing bill will revert back at the end of this fiscal year, and the department has requested that if the division is required to assist consumers with unregulated complaints, the division's seven FTE positions be returned and funded. Currently, the House of Representatives budget restores the power and responsibilities but does not include funding or FTE restoration for the program while the Senate budget has provided the FTE and funding for the positions from the General Inspection Trust Fund.

### **Consumer Complaints in Florida Concerning Gift Certificates or Gift Cards**

According to Mr. J.R. Kelley, Director of the Division of Consumer Services of the Department of Agriculture and Consumer Services, the division receives minimal, if any, inquiries or complaints concerning gift certificates or gift cards.

### **EFFECT OF PROPOSED CHANGES:**

The bill, as amended, makes it unlawful for any person or entity to sell a gift certificate that contains an expiration date of less than five years or a service fee, including, but not limited to a service fee for dormancy. "Gift certificate" is defined to include plastic cards or other electronic payment instruments which are prefunded, for which the issuer has received payment for the full value of the card for the purposes of future delivery of consumer goods or services and to include paper documentation or other written promises for which the issuer has received payment for the full value of the certificate for the purposes of future delivery of consumer goods or services. The term "gift certificate" specifically excludes electronic payment cards issued only by a bank or other similarly regulated financial institution or by a licensed transmitter.

The bill, as amended, provides that a gift certificate without an expiration date is valid until redeemed or replaced. The gift certificate constitutes value held in trust by the issuer on behalf of the holder and the value of the certificate does not belong to the issuer but to the holder or to the legal representative of the holder, to the extent provided by law. On the grounds that the value of a gift certificate constitutes

trust property of the holder, the issuer of a gift certificate who is in bankruptcy is required to honor any certificate issued prior to the date of filing for bankruptcy.

The bill, as amended, does not alter the terms of a gift certificate, except that bankruptcy cannot invalidate its redemption or use. The issuer is not required under the bill to replace a gift certificate that has been lost or stolen or to maintain a separate account for the funds used to purchase the gift certificate; however, the bill states that it does not alter those requirements if they are mandated in any other provision of law. Unless otherwise required in law, the issuer has no obligation to pay interest on the value of a gift certificate held in trust under the provisions of the bill.

The bill, as amended, does not create an interest in favor of the holder of a gift certificate in any specific property of the issuer or a fiduciary or quasi-fiduciary relationship between the holder and the issuer.

The bill, as amended, states that an issuer may assess a fee of up to \$1 for each certificate issued to cover costs associated with printing or producing the gift certificate. The fee, however, must be paid by the purchaser of the gift certificate and cannot be deducted from the value of the gift certificate. The bill does not prohibit fees customarily charged for or practices customarily associated with prepaid calling cards issued only to provide an access number and authorization code for prepaid telecommunication services.

The provisions of the bill, as amended, do not apply to gift certificates issued after July 1, 2004, if the expiration date or dormancy fee information appears in at least a 10-point font on the front of the gift certificates and the gift certificates are:

- Distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program without any money or other thing of value being given in exchange by the consumer;
- Sold below face value at a volume discount to nonprofit and charitable organizations for fundraising purposes or to employees of the issuer; or
- Issued by a food outlet as defined in s. 500.03(1)(o), F.S., for a specific food product.

The bill, as amended, takes effect July 1, 2004.

#### C. SECTION DIRECTORY:

Section 1. Creates s. 501.95, F.S., relating to gift certificates; providing prohibited activities, general provisions, applicability, construction, fee assessed by issuer, definition of "gift certificate," and penalties for violation and enforcement.

Section 2. Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

See "Fiscal Comments."

##### 2. Expenditures:

See "Fiscal Comments."

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

The fiscal impact of the bill, as amended, on government is unable to be determined because it is unknown what the workload will be for the Department of Legal Affairs or for local offices of the state attorney.

Additionally, at this time, it is not known how many business entities in Florida issue gift certificates that would not meet the requirements of the bill or the fiscal impacts on businesses in Florida to comply with the requirements by the effective date. Nor is it known what, if any, hardships the requirements or the timeframe for implementation will have on businesses in the state. According to the Florida Retail Federation, the bill, as amended, will have a negative impact on businesses in the state that offer gift certificates.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require expenditure of funds by local governments, does not reduce the authority to raise revenue, nor reduce the percentage of state tax shared with local governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

N/A

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 14, 2004, the Committee on Commerce adopted a strike all amendment to HB 1053 offered by Representative Ambler. The Committee on Commerce reported the bill as amended unfavorably. The bill as amended differed from the original bill in the following ways:

- Removed the cash redemption provision.
- Amended the prohibition of an expiration date to prohibition of an expiration date for less than five years.
- Changed the exemption for gift certificates for food products to relate only to those issued by a food outlet as defined in s. 500.03(1)(o), F.S., for a specific food product.
- Excluded prepaid electronic payment cards issued only by a bank or other similarly regulated financial institution or by a licensed transmitter from the definition of "gift certificate".
- Changed reference to "beneficiary" to "holder."

- Redefined the term “gift certificate” to include plastic cards or other electronic payment instruments which are prefunded, for which the issuer has received payment for the full value of the card for the purposes of future delivery of consumer goods or services and to include paper documentation or other written promises for which the issuer has received payment for the full value of the certificate for the purposes of future delivery of consumer goods or services.
- Provided that violation of the bill is a deceptive and unfair trade practice under part II of Chapter 501, F.S., and is subject to the penalties and enforcement of remedies as provided under that part.