



Advertising & Promotions Law

ALERT

MARCH 2007

LOEB & LOEB adds Knowledge.

Kmart Settles with FTC over Gift Card Program; Utah Enacts Gift Card Law

On March 12, the Federal Trade Commission announced that Kmart has agreed to settle charges that it engaged in deceptive practices by providing inadequate disclosures on its gift cards and misrepresenting the cards in advertising. This is the FTC's first law enforcement action involving gift cards and provides important guidance for structuring and advertising a gift card program.

The FTC claimed that Kmart's failure to adequately disclose dormancy fees was a deceptive practice and that advertisements that promoted the card as equivalent to cash and as never expiring were false and misleading.

According to the complaint, when a gift card was not used for 24 consecutive months, Kmart retroactively deducted a monthly fee of \$2.10 for each of the past 24 months, which immediately reduced the value of the card to zero if the balance were \$50.40 or less. The FTC stated that this fact would be material to consumers and that Kmart failed to disclose it or did not adequately disclose it. Specifically, Kmart's disclosures on each gift card about dormancy fees were inadequate because they were in fine print (approximately 5 point font), on the back of the card, phrased in a way that would not be understandable to an ordinary consumer, and imbedded in the Terms and Conditions paragraph. In some cases, the disclosures were not visible before purchase, such as for cards sold online and for some cards sold in stores that were affixed to cardstock that obscured the on-card disclosure.

The FTC also alleged that Kmart promoted the cards as equivalent to cash and represented that the gift cards never expired. The FTC claimed that the retroactive dormancy

fee had the same effect as an expiration date for cards valued at less than \$50.40, so that advertising the cards as not having an expiration date was false and misleading.

As of May 1, 2006, Kmart stopped charging a dormancy fee on all Kmart gift cards.

Under the proposed settlement, which is subject to public comment, Kmart must clearly and prominently disclose, in all advertising and on the front of the gift card, any expiration date or fees. In addition, Kmart must disclose at the point of sale and before purchase any material terms and conditions of any expiration date or fee, and Kmart is prohibited from collecting dormancy fees on any gift card sold before the proposed order is issued.

The proposed settlement also includes onerous record-keeping requirements and instructs Kmart to reimburse dormancy fees for consumers and publicize the refund program on its Web site.

New Gift Card Law in Utah Requires Certain Disclosures

Utah recently enacted House Bill 261 which requires expiration date and fee disclosures on a gift certificate and applies to any supplier who issues a "gift certificate, instrument or other record in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount." The law takes effect May 1, 2007.

This publication may constitute "attorney advertising" under the New York Code of Professional Responsibility.

The law does not apply to gift certificates, instruments or other records that are usable at multiple, unaffiliated sellers of goods or services as long as an expiration date is printed on the gift certificate, instrument or other record.

Although the bill contained the title "This bill prohibits the issuance of a gift certificate that expires sooner than five years after issuance" it does not actually prohibit expiration dates less than 5 years after issuance.

For more information on the content of this alert, please contact a member of Loeb & Loeb's Advertising and Promotions Group.

If you received this alert from someone else and would like to be added to the distribution list, please send an email to alerts@loeb.com and we will be happy to include you in the distribution of future reports.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2007 Loeb & Loeb LLP. All rights reserved.

Advertising and Promotions Group

IVY KAGAN BIERMAN	IBIERMAN@LOEB.COM	310.282.2327
CHRISTIAN D. CARBONE	CCARBONE@LOEB.COM	212.407.4852
MARC CHAMLIN	MCHAMLIN@LOEB.COM	212.407.4855
CRAIG A. EMANUEL	CEMANUEL@LOEB.COM	310.282.2262
KENNETH R. FLORIN	KFLORIN@LOEB.COM	212.407.4966
DANIEL D. FROHLING	DFROHLING@LOEB.COM	312.464.3122
JAMES P. GOODKIND	JGOODKIND@LOEB.COM	310.282.2138
DAVID W. GRACE	DGRACE@LOEB.COM	310.282.2108
MARY E. INNIS	MINNIS@LOEB.COM	312.464.3133
BRUCE L. ISHIMATSU	BISHIMATSU@LOEB.COM	310.282.2322
MICHAEL MALLOW	MMALLOW@LOEB.COM	310.282.2287

DOUGLAS N. MASTERS	DMASTERS@LOEB.COM	312.464.3144
DOUGLAS E. MIRELL	DMIRELL@LOEB.COM	310.282.2151
DANIEL G. MURPHY	DMURPHY@LOEB.COM	310.282.2215
TERRI J. SELIGMAN	TSELIGMAN@LOEB.COM	212.407.4985
BARRY I. SLOTNICK	BSLOTNICK@LOEB.COM	212.407.4162
BRIAN R. SOCOLOW	BSOCOLOW@LOEB.COM	212.407.4872
JAMES D. TAYLOR	JTAYLOR@LOEB.COM	212.407.4895
EDWARD G. WIERZBICKI	EWIERZBICKI@LOEB.COM	312.464.3155
PO YI	PYI@LOEB.COM	212.407.4045
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960