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### Gift Card Update – FTC Announces Second Settlement Involving Gift Cards; Arkansas Enacts New Gift Card Law

#### FTC Announces Second Settlement Involving Gift Cards

The FTC recently announced a proposed settlement with Darden Restaurants which owns restaurant chains Olive Garden, Red Lobster, Smokey Bones, and Bahama Breeze. The FTC claimed that Darden engaged in deceptive advertising by failing to adequately disclose dormancy fees before purchase for cards sold in its restaurants and online, and that the dormancy fee disclosure was on the back of the gift cards, in fine print, and obscured by miscellaneous other information or by a semi-transparent sleeve.

As part of the settlement, Darden is required to restore all fees to gift cards that it sold (which it has completed), publicize the fee restoration, and adequately disclose fees or expiration dates in the future at point of sale and on the card.

The FTC's first proposed settlement involving gift cards and inadequate disclosure of dormancy fees - against Kmart - was announced in March. The FTC invited public comments on the Kmart settlement, and several consumer groups criticized the settlement agreement for not requiring Kmart to disgorge its revenues from the dormancy fees.

Both cases signal the FTC's increased interest in gift card programs which, typically, have been the subject of state rather than federal enforcement action. As yet, there is no federal regulation prohibiting expiration dates or fees on gift cards (though bank-issued cards are subject to federal banking law and guidance by the Office of the Controller of the Currency). However, in initiating an action against gift card issuers, the FTC is exercising its traditional authority

over consumer marketing programs and devices that do not contain adequate disclosures or are misleading.

#### Arkansas Enacts Law Requiring Gift Card Disclosures and Limiting Expiration Dates

The Arkansas Fair Gift Card Act (H.B. 1455) was signed into law on March 16 and will take effect around August 1, 2007 (the law takes effect 90 days after the Arkansas legislature adjourns, which is expected to be around May 1.)

The law prohibits selling a gift certificate or a store gift card with an expiration date less than 2 years after issuance or that is subject to a dormancy fee, an inactivity charge or a service fee within 2 years of issuance.

Expiration dates and post-sale fees (including service fees, dormancy fees, account maintenance fees, cash-out fees, replacement fees, activation fees, and reactivation fees) may only be imposed after two years from the date of the card's or certificate's issuance and must be clearly and conspicuously disclosed on the front or back of the certificate or card in at least 10 point font. Disclosures about fees must include the amount of the fee, the circumstances under which the fee will be imposed, the frequency with which the fee will be imposed, and whether the fee is triggered by inactivity.

If the required disclosures are hidden by the packaging of the certificate or card, the seller or issuer must give the

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purchaser a written statement of the disclosures before purchase.

Terms contained in the disclosures cannot be changed after purchase or issuance of the certificate or card unless such change benefits the holder.

The law excludes from these prohibitions and restrictions gift certificates, store gift cards, and general use prepaid cards that:

1. are usable with multiple, unaffiliated sellers of goods or services and are issued by a financial institution, or
2. are distributed pursuant to an award, loyalty, or promotional program and for which there is no money or other value exchanged, or
3. expire not later than thirty days after the date they are sold and are sold below the face value of the card to an employer, or to a nonprofit or charitable organization for fundraising purposes.

Upon informal inquiry, the Assistant Attorney General who assisted in drafting the bill stated that general use prepaid cards that are issued by a financial institution are excluded from the bill's coverage under the first exemption listed above, even though they appear to be specifically included in the first part of the bill describing the prohibitions and restrictions.

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The bill also has an unusual provision directing the state bank department to promulgate rules regulating gift cards issued by state-chartered banks, based on the gift card guidance issued by the Office of the Controller of the Currency in 2006.

The definitions of gift certificate, store gift card and general use prepaid card also specifically exclude cards used solely for telephone services.

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