

Loyalty Programs: Legal Issues

This overview highlights some key legal concerns that commonly arise in customer loyalty programs. This list is not exhaustive and does not necessarily apply to all programs.

"Gift Certificate" Laws

- **Issue:** A majority of states have consumer protection laws that restrict expiration dates or fees on "gift certificates," require conspicuous disclosure of material terms, and/or require that issuers provide cash back to consumers for partially redeemed gift certificates. Many of these laws apply to gift cards, and some may apply to points, credits, and other aspects of loyalty programs. Dozens of states have adopted or revised such laws in recent years.
- **Example:** Maine defines a "gift obligation" as an obligation of a business to provide goods or services at a future date, including gift certificates, gift cards, online gift accounts or other representations or evidence of the obligation. Maine prohibits fees (other than fees for issuing or adding value to a gift obligation) and expiration dates on gift obligations. Me. Rev. Stat. tit. 33, §§ 1951 *et seq.*

Unfair and Deceptive Trade Practices

- **Issue:** Federal and state laws prohibit merchants from engaging in "unfair" or "deceptive" trade practices, which broadly includes such activities as selling or promoting to consumers in a fraudulent or misleading way, failing to disclose important information to consumers clearly and conspicuously, and failing to meet reasonable consumer expectations and assumptions.
- **Example:** The Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

"Trading Stamp" (Coupon) Laws

- **Issue:** Loyalty programs that offer discounts off the purchase of goods or services may need to comply with state "trading stamp" laws, which sometimes require discount coupons to have cash redemption values or issuers of discount coupons to give certain disclosures clearly and conspicuously to consumers.
- **Example:** Florida law requires "trading stamps" (which generally includes discount coupons issued in connection with the retail sale of merchandise or service) to have a cash value legibly on their face, and requires businesses to redeem them in cash when presented with a total value of at least 25 cents. Fla. Stat. § 559.03.

Sweepstakes and Contests

- **Issue:** Federal and state laws regulate the advertising and operation of sweepstakes and contests, such as promotional giveaways based on chance or contests based on skill. Various laws also prohibit most forms of gambling, which involves risking or spending something of value for a chance to win a prize.
- **Example:** New York and Florida require sweepstakes operators offering over \$5,000 in prizes to register with the state, post a bond, and comply with certain other requirements regarding promoting and operating the sweepstakes. N.Y. Gen. Bus. Law § 369-e; Fla. Stat. § 849.094.

Unclaimed Property

- **Issue:** A state generally may take possession of a customer's personal property held by a business if "unclaimed" by the customer for several years. In many states, this could include funds associated with gift cards, however it is unclear whether points, credits, accrued discounts or other features of loyalty programs would be treated as property subject to these laws.
- **Example:** Under Delaware law, a business owner that holds unclaimed property owned by Delaware residents for 5 years may have an obligation to report and turn over the property to the state. Del. Code Ann., tit. 12, § 1198.
- **Example:** Arizona specifically exempts "merchandise points" from property subject to the state's unclaimed property law. Ariz. Rev. Stat. § 44-301(15)

Privacy and Data Security

- **Issue:** State and federal laws regulate how businesses collect, store, use or disclose personal information about consumers, especially information about children, financial information, information about consumer purchases, and other sensitive information.
- **Example:** Illinois law prohibits disclosing the identity of shoppers' club discount card applicants or members, or the actual purchases of such members, to third parties without consent. Ill. Comp. Stat. 505/2JJ.
- **Example:** The federal Children's Online Privacy Protection Act imposes specific parental consent and other obligations on Internet websites that collect personal information and are either directed toward children under age 13 or knowingly collect such information from children under 13. U.S.C. § 6501 *et seq.*

Payment Instruments and Stored Value

- **Issue:** Loyalty programs that allow consumers to accumulate value that can be spent with third-party merchants, such as through an "open loop" prepaid card, could in certain circumstances be subject to laws regarding "money transmission" and the issuance of "payment instruments," money laundering, and unlicensed banking activities. Requirements may include obtaining licenses, posting bonds, satisfying minimum net worth requirements, and/or compliance with certain additional obligations.
- **Example:** To issue or sell "payment instruments," which includes any instrument or service for the payment of money to persons other than the issuer, Texas's money transmitter statute requires a business to obtain a license, post a bond, satisfy a minimum net worth requirement, and comply with certain other obligations. Tex. Fin. Code § 151.301 *et seq.*