UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Advertising Practices

Mary K. Engle
Associate Director

June 3, 2010

VIA FEDERAL EXPRESS
Michelle Jun, Esq.
Consumers Union
101 Truman Avenue
Yonkers, NY 10703-1057

Re: *Petition for Rulemaking and Other Agency Actions Relating to Retail Gift Cards*

Dear Ms. Jun:

This letter supplements the Commission's November 14, 2008 response to your September 11, 2008 letter on behalf of the Consumers Union, Consumer Federation of America, the National Consumer Law Center, and U.S. PIRG. Your letter requests that the Federal Trade Commission ("FTC" or "Commission") promulgate a new rule and take other actions to address consumer protection concerns raised by the sale of gift cards by retailers that subsequently file for bankruptcy. Principally, you ask the FTC to require retailers to segregate and hold in trust gift card funds, and declare the failure to do so an unlawful and deceptive practice. The intended result of this action would be to guarantee that consumers are able to obtain the value of their gift cards in the event the issuing retailer files for bankruptcy.

In that November 14, 2008, interim response, then-Chairman Kovacic highlighted our law enforcement actions against Kmart Corp. and Darden Restaurants, Inc. relating to dormancy fees, and our efforts to educate consumers about gift cards so that they make informed purchasing decisions. That letter also informed you that we needed to conduct further study before responding fully to your letter. We have had an opportunity to engage in such study.

Your letter focuses on issues that arise when gift cards are sold prior to a retailer's filing for bankruptcy ("pre-petition"), as well as issues arising from the sale of gift cards while a company is in bankruptcy ("post-petition"). With respect to such pre-petition sales, the Bankruptcy Code establishes a series of priorities for unsecured creditors. In establishing the Bankruptcy Code, Congress weighed the priorities and placed consumer creditors at a lower priority than employees' wages and contributions to employee benefit plans. *See* 11 U.S.C. § 507(a). Your request to have retailers set up a trust for gift card funds that would be outside the bankruptcy estate would in effect place pre-petition gift card holders at a higher priority than all other unsecured creditors. Given the legislative background, it would not appear appropriate for the FTC to effectively modify the creditor priorities set forth in the Bankruptcy Code. Rather, such a change should be considered by Congress, a body that could reassess the priority afforded to gift card holders with due consideration for all other unsecured creditors.

We share your concerns about the post-petition sale of gift cards by bankrupt retailers. The Commission addressed this issue in two recent matters, Crabtree & Evelyn, Ltd., FTC Matter No. 092-3177 ("Crabtree & Evelyn") and The Oceanaire, Inc., The Oceanaire Restaurant Co., Inc., Oceanaire Texas Restaurant Co., L.P., and Oceanaire Minneapolis Restaurant Co., LLC, FTC Matter No. 092-3176 (collectively "The Oceanaire").

The Commission investigated Crabtree & Evelyn for possible violations of Section 5 of the FTC Act concerning its alleged failure to disclose, after its bankruptcy filing, its bankrupt status to consumers who purchased gift cards. The staff issued a letter closing the matter after considering a number of factors. Letter from Mary K. Engle to Colleen Cording (Dec. 22, 2009), http://www.ftc.gov/os/closings/091222crabtree-evelyncletter.pdf. At the Commission's request, Crabtree & Evelyn included in its bankruptcy filings an agreement that, upon emerging from bankruptcy, it would honor all gift cards whether purchased pre- or post-bankruptcy filing. Additionally, although Crabtree & Evelyn closed a number of its stores, consumers were able to redeem their gift cards throughout the bankruptcy by calling its customer service department.

The Commission also investigated The Oceanaire for similar potential violations. The staff issued a letter closing the matter after considering a number of factors. Letter from Mary K. Engle to Steve Scheinthal (May 13, 2010), http://www.ftc.gov/os/closings/100513oceanaireletter.pdf. First, for the majority of time that The Oceanaire was in bankruptcy, at the Commission's request, it provided clear and prominent disclosures of its bankruptcy status prior to a consumer's online or in-restaurant purchase of a gift card. Second, The Oceanaire made gift cards purchased during its bankruptcy refundable. Further, in its bankruptcy filings, The Oceanaire agreed, upon emerging from bankruptcy, to honor all gift cards whether purchased pre- or post-bankruptcy filing. Both Crabtree & Evelyn and The Oceanaire successfully emerged from bankruptcy and continue to honor their gift card obligations.

Greater legal protections for gift card holders are also on the way. As you know, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act"), which in relevant part regulates the imposition of fees and expiration dates for gift cards. Pub. L. No. 111-24, 123 Stat. 1734 (2009). The Act makes it unlawful to impose a dormancy fee, inactivity charge or fee, or service fee unless there has been no activity on the gift card within a 12-month period, no more than one fee is charged per month, and there are clear and conspicuous disclosures regarding the fees. Further, the Act prohibits the sale of gift cards with expiration dates unless the expiration date is at least five years after the date the gift certificate was issued or the date funds were last loaded, and unless the terms of expiration are clearly and conspicuously disclosed. The law is to take effect August 22, 2010. The Federal Reserve Board prescribed regulations to implement the gift card provisions of the law. 75 Fed. Reg. 16,580 (Apr. 1, 2010) (to be codified at 12 C.F.R. pt. 205).

The Commission appreciates the concerns raised by Consumers Union and looks forward to working together in the future.

Sincerely,

Mary K. Engle

Mary K. Engle
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cc: Jean Ann Fox, Consumer Federation of America
Lauren Saunders, National Consumer Law Center
Ed Mierzwinski, U.S. PIRG