
Note

The Gift That Keeps on Taking: How Federal Banking Laws Prevent States from Enforcing Gift Card Laws

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Despite it potentially being a social taboo,¹ Catherine Grams is one of a growing number of American consumers who chooses to give gift cards during the holiday season.² According to Grams, gift cards allow her to avoid “not knowing what to get someone, (and) if they’re going to like it.”³ Over the past few years, gift cards have overcome their stigma to become the “it” gift—finding their way under many families’ Christmas trees because of the convenience and flexibility they provide to both the giver and recipient.⁴ Indeed, consumers spent \$26.3 billion on gift cards during the 2007 holiday season.⁵

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1. Giving a gift card is often seen as similar to giving cash, which has been viewed as an impersonal method of gifting. See Stephen J. Dubner & Steven D. Levitt, *The Gift-Card Economy: When You Buy Somebody a Present, Who Really Comes Out Ahead?*, N.Y. TIMES, Jan. 7, 2007, § 6 (Magazine), at 17.

2. Allison Linn, *Little Bits of Plastic Changing the Holiday Season: Retailers Adjust Strategy to Account for Booming Popularity of Gift Cards*, MSNBC (Dec. 27, 2006), <http://www.msnbc.msn.com/id/16370481/>.

3. *Id.*

4. See CBS News Online, *Gift Cards: Beware the Hidden Fees* (Dec. 10, 2004), <http://www.cbsnews.com/stories/2004/12/10/eveningnews/consumer/main660396.shtml>.

5. Press Release, National Retail Federation, *Gift Cards More Popular Than Ever*, According to NRF (Nov. 13, 2007), available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=410.

Although gift cards make gift-giving easier, recipients are realizing that gift cards are not always the convenient present they once thought them to be. Mary Reardon is one consumer who is fed up after a negative experience with a gift card. Reardon's son received a \$10 gift card from his school, but by the time Reardon went to spend the card, it had already expired.⁶ "There are so many instructions and rules for these things," says Reardon.⁷ "I don't know how they expect anyone to use these."⁸ Like Reardon, consumers may discover hidden expiration dates or fees imposed by card issuers, often disclosed, if disclosed at all, in extremely small print on the back of the card. With little notice, the once convenient gift becomes a valueless gesture.

Reardon is not the only consumer stuck with a worthless gift card. According to the financial-services research firm TowerGroup, consumers spent \$80 billion purchasing gift cards in 2006, but about \$8 billion will never be redeemed.⁹ By the time consumers attempt to redeem a card, the card may have already expired or accrued so many fees that the value of the card has been reduced to nothing.¹⁰ In order to protect consumers, state legislatures reacted by passing gift-card laws that regulate the use of expiration dates and certain types of fees, most notably dormancy fees (fees that accrue due to inactivity).¹¹ As of July 29, 2008, thirty-seven states had some type of gift-card law with a provision relating to, at a minimum, expiration dates or fees.¹² In 2008, twenty-two states considered new or additional legislation related to gift-card regulation, with six states debating whether to join the majority of states that regulate expiration dates or fees for gift cards.¹³ The Fed-

6. CBS News Online, *supra* note 4.

7. *Id.*

8. *Id.*

9. Mark Chediak, *Darden to Repay Fees on Gift Cards for Its Restaurants*, ORLANDO SENTINEL, Apr. 4, 2007, at A1; Dubner & Levitt, *supra* note 1, at 16.

10. Daniel R. Horne, *Gift Cards: Disclosure One Step Removed*, 41 J. CONSUMER AFF. 341, 342-43 (2007).

11. Paul Grimaldi, *As Popularity of Gift Card Grows, So Do Calls for More Regulation*, PROVIDENCE J., Dec. 26, 2004, at F.01; Bruce Mohl, *Bill Could Run Bank Gift Cards Out of Mass.*, BOSTON GLOBE, Apr. 9, 2006, at A1.

12. NAT'L CONFERENCE OF STATE LEGISLATURES, GIFT CARDS AND GIFT CERTIFICATES STATUTES AND RECENT LEGISLATION (2008), <http://www.ncsl.org/programs/banking/GiftCardsandCerts.htm>. The vast majority of states have statutes with provisions relating to escheatment and abandonment. *Id.*

13. *Id.*

eral Trade Commission has also chimed in on the issue, bringing and settling complaints in 2007 against retailer Kmart and restaurant chain Darden Restaurants for failing to provide adequate disclosures to purchasers of their gift cards.¹⁴

Despite the volume of state legislative activity aimed at protecting consumers, gift-card purchasers and recipients may still be confused regarding the lost value of their cards. Even though retailers may stop imposing service fees and expiration dates in compliance with state law, many retailers may also choose to avoid state laws by letting national banks issue their gift cards and taking a commission from the banks. In 2007, two circuit courts agreed that this tactic is legal because gift cards issued by national banks are exempt from state gift-card laws if the national bank controls the gift-card term or condition at issue.¹⁵ According to this line of cases, the National Bank Act,¹⁶ which governs nationally chartered banks, allows banks to charge fees of their choosing for their banking products, including gift cards.¹⁷ The National Bank Act was designed to create uniformity of national bank regulation and preempts any state law attempting to regulate national banks that conflicts with the main objectives of the Act.¹⁸

As a result of these judicial opinions, state gift-card laws are the latest class of consumer-protection legislation to have lessened power in protecting consumers.¹⁹ Since the National

14. Press Release, Fed. Trade Comm'n, Kmart Settles with FTC over Gift Card Sales Practices (Mar. 12, 2007), available at <http://www.ftc.gov/opa/2007/03/kmart.shtm> [hereinafter Kmart Press Release]; Press Release, Fed. Trade Comm'n, National Restaurant Company Settles FTC Charges for Deceptive Gift Card Sales (Apr. 3, 2007), available at <http://www.ftc.gov/opa/2007/04/darden.shtm>.

15. SPGGC, LLC v. Blumenthal, 505 F.3d 183, 191–92 (2d Cir. 2007) (holding that the National Bank Act does not preempt state law prohibiting service fees charged by Simon Malls for gift cards issued by national banks but vacating and remanding on the issue of whether the National Bank Act preempts Connecticut's law prohibiting expiration dates if Bank of America imposed the expiration date); SPGGC, LLC v. Ayotte, 488 F.3d 525, 531–32, 536 (1st Cir. 2007), cert. denied, 128 S. Ct. 1258 (2008) (holding that the National Bank Act preempts the New Hampshire Consumer Protection Act's prohibitions on expiration dates and administrative fees when the filing institution is a national bank).

16. 12 U.S.C. § 1–604(a) (2006).

17. Ayotte, 488 F.3d at 531–32 (explaining that national banks may issue stored value cards under the National Bank Act's grant of incidental powers).

18. Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1566–67 (2007).

19. See Stephanie Mencimer, *No Account: The Nefarious Bureaucrat Who's Helping Banks Rip You Off*, NEW REPUBLIC, Aug. 27, 2007, at 14, 14–15 (explaining that after recent court rulings, state predatory lending laws have

Bank Act can preempt state gift-card laws, all a retailer has to do to avoid being subject to state law is issue gift cards in conjunction with a national bank instead of issuing the card itself, with the bank controlling card terms and conditions that conflict with state consumer-protection laws. Simon Malls, for instance, initially charged consumers directly for inactivity and service fees associated with their gift cards, which violated Connecticut's gift-card laws prohibiting expiration dates and service fees.²⁰ Later, however, Simon Malls changed its gift-card program so that a national bank charged fees and imposed an expiration date.²¹ In exchange, the national bank paid Simon Malls a per-card commission.²² This scheme was allowed because the National Bank Act preempts state gift-card laws from regulating national banking products like the gift cards at issue.²³

Naturally, retailers have an incentive to collaborate with national banks to issue gift cards because retailers doing business in several states would benefit from having an easy-to-manage, uniform gift-card system unfettered by various contradictory state laws.²⁴ Simon Property Group, Inc., a major player in the mall industry,²⁵ discovered this loophole while defending its own gift-card program against accusations of violating state gift-card laws.²⁶ Once all retailers move to have their gift cards issued by national banks, state gift-card laws will be

little ability to protect consumers).

20. SPGGC, Inc. v. Blumenthal, 408 F. Supp. 2d 87, 93–94 (D. Conn. 2006), *aff'd in part, vacated in part, remanded by* 505 F.3d 183 (2d Cir. 2007).

21. SPGGC, Inc. v. Ayotte, 443 F. Supp. 2d 197, 200–01 (D.N.H. 2006), *aff'd*, 488 F.3d 525 (1st Cir. 2007), *cert denied*, 128 S. Ct. 1258 (2008).

22. *Id.* at 201.

23. SPGGC, LLC v. Ayotte, 488 F.3d 525, 533–36 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

24. *See* Horne, *supra* note 10, at 344.

25. *See* Simon Prop. Group, Inc., Annual Report (Form 10-K), at 7 (Feb. 28, 2007). Simon Property Group, Inc. has the largest portfolio, measured by gross leasable area, of any publicly traded retail real estate investment trust. *Id.* Simon Property Group, Inc. also owns or has interest in more regional malls than any other publicly traded real estate investment trust. *Id.*

26. Simon Malls learned that to invoke National Bank Act preemption protection from state gift card laws, it would need to have a national bank charge the customers the fees it wanted to charge. *See Ayotte*, 488 F.3d at 533–36. *Contra Blumenthal*, 408 F. Supp. 2d at 95 (“If the [Bank of America (BOA)] was the plaintiff in this case, a different analysis might be required, but the BOA is not a plaintiff. As a result, the protections of the [National Bank Act (NBA)] simply do not apply to SPGGC, and therefore the [Connecticut gift card law], as applied against SPGGC, is not preempted by the NBA.”).

virtually moot, leaving consumers unprotected from expiration dates and fees that deprive them of the full value of their gift cards.

This Note argues that the only way consumers will truly be protected from expiration dates and service fees is if Congress and the federal courts close this loophole in consumer-protection law. Part I explains the context for federal preemption of state consumer-protection laws and how preemption now prevents state legislatures from effectively protecting consumers from exorbitant gift-card fees and short expiration dates. Part II analyzes how the federal court system improperly found state gift-card laws to be preempted, and how Congress's silence on the issue allowed national bank issuers of gift cards to operate without regulation. Part III concludes that Congress and the federal courts should take action to protect consumers from those using preemption as a means to avoid state consumer-protection laws. In particular, the courts should hold that state gift-card laws are general applicability laws that apply to national banks and are not preempted. Congress should also pass a version of the Fair Gift Card Act that ensures consumers are getting the full value of the gift cards they own.

I. THE CONFLICT BETWEEN STATE GIFT-CARD LAWS AND FEDERAL BANKING LAWS

Despite their popularity, some gift cards come with expiration dates and dormancy fees that can deplete the value of a gift card before a consumer attempts to use it.²⁷ To combat such anticonsumer behavior by gift-card issuers, states began passing laws that prohibit or limit the use of expiration dates and service fees.²⁸ Unfortunately, these state gift-card laws have no effect on the gift cards issued by national banks because the Office of the Comptroller of the Currency, which regulates national banks, issued regulations stating that gift cards are a national bank product and state regulation is preempted by the National Bank Act.²⁹ Furthermore, two circuit courts upheld this viewpoint that national banks may impose fees and expiration dates, despite state law prohibitions.³⁰ This Section dis-

27. Horne, *supra* note 10, at 342–43.

28. Grimaldi, *supra* note 11.

29. 12 C.F.R. §§ 7.5002(a)(3), 555.200(a) (2008).

30. SPGGC, LLC v. Blumenthal, 505 F.3d 183, 191–92 (2d Cir. 2007) (holding that the National Bank Act does not preempt state law prohibiting fees charged by Simon Malls, but vacating and remanding on the issue of

cusses what gift cards are, the problems they create for consumers, and how those problems lack a satisfactory resolution in light of the recent finding of preemption by federal courts.

A. GIFT-CARD DEFINITIONS

A gift card is a prepaid card that one purchases with the intent to give it as a gift to another consumer.³¹ Individual states, in regulating gift cards, have developed their own definitions that often include gift certificates but exclude other types of prepaid cards.³² There are three main kinds of gift cards: closed-loop, semi-closed-loop, and open-loop gift cards.³³ Closed-loop gift cards are specific to the retailer that issued them.³⁴ For example, Target's gift card is issued by Target and can only be redeemed at Target stores.³⁵ The revenue from closed-loop cards is tied to the merchandise that is ultimately purchased using the card—the revenue is based on the markup of the item purchased.³⁶ The unused balances of cards account for very little of a retailer's overall income from the

whether the Act preempts Connecticut's law prohibiting expiration dates if the expiration date was imposed by Bank of America); *Ayotte*, 488 F.3d at 531–32 (holding that New Hampshire's gift card laws are preempted by the National Bank Act).

31. Comptroller of the Currency, Gift Card Disclosures: Guidance on Disclosure and Marketing Issues, OCC Bulletin 2006-34 (Aug. 14, 2006), *available at* <http://www.occ.treas.gov/ftp/bulletin/2006-34.doc>.

32. See CONN. GEN. STAT. § 3-56(a) (2007) (“[A] record evidencing a promise, made for consideration, by the seller or issuer of the record that goods or services will be provided to the owner of the record to the value shown in the record . . . , but ‘gift certificate’ does not include prepaid calling cards regulated under section 42-370 or prepaid commercial mobile radio services, as defined in 47 C.F.R. Sec. 20.3”); N.J. STAT. ANN. § 56:8-110(c) (West 2008) (A gift card is a “tangible device, whereon is embedded or encoded in an electronic or other format a value issued in exchange for payment, which promises to provide to the bearer merchandise of equal value to the remaining balance of the device. ‘Gift card’ does not include a prepaid telecommunications or technology card, prepaid bank card or rewards card”).

33. These terms are used to differentiate prepaid cards in general, not just gift cards. See MARK FURLETTI, FEDERAL RESERVE BANK OF PHILADELPHIA PAYMENT CARDS CENTER, PREPAID CARD MARKETS & REGULATION 2–8 (2004), http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/prepaid_022004.pdf. For prepaid cards, there is also a distinction between semi-open and open-loop cards: semi-open cards do not allow their holders to withdraw cash from an ATM but open-loop cards do. *Id.* at 7–8. Examples of open-loop cards include payroll cards, teen cards, and travel cards. *Id.* at 8.

34. Horne, *supra* note 10, at 345; see also FURLETTI, *supra* note 33, at 2.

35. See Horne, *supra* note 10, at 345.

36. *Id.* at 345–46.

cards.³⁷ Thus, when a consumer goes to redeem a \$50 Target gift card, Target's profit amounts to \$50 minus the cost of the goods sold to the consumer and other overhead.³⁸

Open-loop gift cards are issued by nationally chartered banks, like Bank of America, and can be redeemed at any merchant that accepts credit cards because the cards bear credit card logos like Visa, MasterCard, Discover, or American Express.³⁹ Unlike closed-loop gift cards, open-loop cards are not tied to the merchandise purchased, and instead rely on fees in order to generate revenue.⁴⁰ These fees can include an issuance fee, which is an interchange fee for use of the credit network and any "bank end" charges from dormancy or expired, unused balances.⁴¹

Semi-closed loop gift cards are a hybrid of the other two types. Like open-loop gift cards, they are issued by third parties (typically banks and money transmitters), may be redeemed at multiple merchants, and function on and carry the logo of a branded card network.⁴² Similar to closed-loop gift cards, the number of merchants at which the cards are redeemable is limited to those participating in the program.⁴³ Mall gift cards are an example of semi-closed gift cards, because they carry a credit card logo and can only be redeemed at stores operating in the mall.⁴⁴ The mall benefits from issuing such a card by bringing foot traffic into its mall, the participating merchants benefit because a consumer may purchase more than the card is worth, and issuers benefit from lower risk of fraud since the cards are only redeemable at a small number of locations.⁴⁵

Although these types of gift cards are slightly different in operation, they all may charge dormancy fees that diminish the value of the card through incremental charges for nonuse after the card has been inactive for a certain period of time, and impose expiration dates that limit the time period for use and may result in a consumer forfeiting the entire value of the card

37. *Id.* at 345.

38. *Id.* at 345–46.

39. *Id.* at 345; *see also* FURLETTI, *supra* note 33, at 6–8.

40. Horne, *supra* note 10, at 345.

41. *Id.*

42. FURLETTI, *supra* note 33, at 4.

43. *See id.*

44. *See id.*

45. *See id.* at 4, 6.

for not having used it by a certain date.⁴⁶ Although all three types of cards may engage in practices that ultimately diminish the value of a gift card to a consumer, the biggest difference between open and closed-loop gift cards is that only closed-loop gift cards have been found to be subject to state gift-card laws.⁴⁷ State gift-card laws, which attempt to protect consumers from losing the value of their gift cards by prohibiting expiration dates and dormancy fees, have been found by the courts to not apply to open-loop or semi-closed cards because they are issued by nationally chartered banks governed by the National Bank Act, which preempts any conflicting state law.⁴⁸ Nevertheless, open-loop and semi-closed gift cards continue to be immensely popular.

B. POPULARITY OF GIFT CARDS

Gift cards are an increasingly popular form of gift giving, largely because they make buying presents easier on the card purchaser and increase the likelihood that the recipient will receive a useful or desired present.⁴⁹ For the card purchaser, the convenience stems from being able to quickly buy a gift without the anxiety that the gift will be disliked or go unused.⁵⁰ For the recipient, a gift card is as good as cash—the recipient can choose her own gift from among many different choices, increasing the chance that she will actually want or need the gift.⁵¹ The recipient may also view the gift card as a significant discount for a higher-priced item, allowing the recipient to purchase something she may not have otherwise been able to.⁵² Thus, both purchasers and recipients can benefit from gift cards.

Open-loop gift cards appear to be topping the list of gift-card types as the most popular. According to a survey conducted by Professor Dan Horne of Providence College, reci-

46. Horne, *supra* note 10, at 342.

47. *Id.* at 345.

48. *Id.*

49. *See id.* at 342.

50. *See id.*

51. *See id.*

52. Ellen Cannon, *2007 Gift Card Study: Tops for Holidays*, BANKRATE, Nov. 12, 2007, http://www.bankrate.com/brm/news/cc/20071112_gift_card_study_analysis_a2.asp?caret=1biz.yahoo.com/brn/071112/23713.html?.v=1. Retailers call this practice “upspending,” where consumers purchase an item that is more expensive than the gift card’s value. Dubner & Levitt, *supra* note 1, at 17.

ipients appreciate “network-branded gift cards (NBGCs),” or open-loop gift cards, because the NBGCs give the receiver the freedom to purchase the perfect gift.⁵³ Professor Horne’s study of the survey results estimates that about 28.9 percent of the general population received an open-loop gift card during the 2007 holiday season.⁵⁴ The study also finds that most surveyed purchasers “trusted that the NBGCs Terms & Conditions of use would be fair,” perhaps not realizing there would be fees and expiration dates imposed.⁵⁵

C. THE CATCH: HIDDEN FEES AND EXPIRATION DATES

For retailers, gift-card sales are not necessarily as advantageous as they appear. Despite gift cards’ popularity, retailers cannot immediately benefit from the sale of a gift card because of certain accounting rules. For accounting purposes, retailers cannot recognize the sale of gift cards until they have been redeemed by the consumer.⁵⁶ In other words, because of this accounting requirement, the sale of a gift card does not appear as an income-generating transaction on a retailer’s income statement until the gift card has been redeemed, or, depending on the retailer’s policies and relevant state law, the expiration of the redemption time period.⁵⁷ When gift-card sales can account for as much as fifteen percent of holiday sales, retailers risk not knowing their own financial gain or loss over the holiday shopping season when they cannot account for gift-card sales.⁵⁸

With an estimated \$8 billion worth of gift cards purchased in 2006 that will never be redeemed,⁵⁹ and estimates of non-redemption to be about ten percent of all gift cards,⁶⁰ retailers have turned to imposing expiration dates and inactivity fees in order to incentivize consumers to redeem their gift cards faster.⁶¹ Expiration dates require that a consumer use the gift card by a certain time or risk losing the entire value of the card. Af-

53. DAN HORNE, NETWORK BRANDED PREPAID CARD ASS’N, ATTITUDES AND PURCHASING BEHAVIORS OF RECIPIENTS OF NETWORK BRANDED GIFT CARDS 10 (2008), <http://www.nbpca.com/docs/NBGC-Recipients-Behaviors-Rpt.pdf>.

54. *Id.* at 4.

55. *Id.* at 14.

56. Horne, *supra* note 10, at 344.

57. *Id.*

58. *See id.*

59. Dubner & Levitt, *supra* note 1, at 16.

60. Horne, *supra* note 10, at 348.

61. *Id.* at 344.

ter the expiration date passes, a retailer may claim the unused balance of the card as income,⁶² although some states restrict retailers claiming unused balances as income because the balances are viewed as abandoned property subject to escheatment to the state.⁶³ As an alternative, retailers may impose inactivity fees, also known as dormancy fees, which slowly deplete the balance of a gift card if it has not been used within a certain period of time.⁶⁴ Inactivity fees may be preferable to expiration dates because the fees would appear as income for retailers and not be subject to state escheat laws. Both methods deprive the gift-card holder of the full value of the card.

If disclosed at all, inactivity fees and expiration dates are often disclosed on a gift-card point-of-purchase display, on the backs of gift cards in extremely small print, or on a separate leaflet accompanying the card.⁶⁵ These methods arguably give some notice to the gift-card purchaser of the terms and conditions of the card, but usually it is the gift-card *recipient* who needs to be aware of the fine print in order to redeem the card without losing any of its value.⁶⁶ Unfortunately, gift-card recipients may be unaware of the terms and conditions of the card, either because the purchaser fails to pass on any accompanying disclosures or the recipient does not understand the disclosures as provided.⁶⁷ This disconnect between what should be disclosed to the recipient and what actually is disclosed causes general confusion and displeasure regarding gift cards.⁶⁸ Recognizing that many consumers are unsure about how gift cards operate, consumer-protection agencies and advocates

62. *Id.* at 342.

63. *Id.* at 344. For a survey of how various states treat unused gift card balances as abandoned property laws, see Phillip W. Bohl et al., *Prepaid Cards and State Unclaimed Property Laws*, 27 FRANCHISE L.J. 23 (2007). States will enforce abandoned property laws on unused gift card balances—as of 2008, New York had collected \$19 million of unused gift card balances in three years. Nanette Byrnes, *The Scramble for Gift-Card Cash: Who Gets It When It Goes Unclaimed? States and Retailers Are Duking It Out*, BUS. WK., Feb. 4, 2008, at 60.

64. Horne, *supra* note 10, at 342.

65. *See id.* at 347.

66. *See id.* at 349.

67. *Id.* at 347–48. As an example of difficulty with understanding disclosures provided, the disclosures accompanying an American Express Gift Card were written at a high school graduate's reading level or higher. *Id.* at 348.

68. *See* Posting of Caroline Mayer to The Checkout, http://blog.washingtonpost.com/thecheckout/2006/08/cracking_down_on_gift_cards.html (Aug. 16, 2006, 07:00 EST) (explaining why federal efforts to address consumer complaints about expiration dates and hidden fees may not be sufficient).

created guides that attempt to clarify or at least warn of potential pitfalls regarding gift cards.⁶⁹ State legislatures also passed legislation limiting the use of expiration dates and dormancy fees.⁷⁰ Before analyzing these state laws and their treatment by the courts, a discussion of federal banking laws is required to understand how state laws are preempted.

D. THE OFFICE OF THE COMPTROLLER OF THE CURRENCY AND THE NATIONAL BANK ACT

The Office of the Comptroller of the Currency (OCC) is a bureau under the U.S. Department of the Treasury that is responsible for chartering, regulating, and supervising the national banks.⁷¹ One of the OCC's primary functions is to "issue[] rules, legal interpretations, and corporate decisions concerning banking, bank investments, bank community development activities, and other aspects of bank operations."⁷² The National Bank Act of 1864 is the federal law that allows the OCC to charter national banks.⁷³

The OCC created regulations that allow national banks to issue stored value cards,⁷⁴ including gift cards.⁷⁵ The OCC adopted the stance that issuing gift cards is an authorized banking activity under the National Bank Act.⁷⁶ As a result,

69. See, e.g., CONSUMER PROTECTION DIV., COMMONWEALTH OF MASS. OFFICE OF THE ATTORNEY GEN., GUIDE TO GIFT CARDS AND CERTIFICATES (2007), available at <http://www.mass.gov/Cago/docs/Consumer/giftcards.pdf>; DIV. OF CONSUMER AND BUS. EDUC., FED. TRADE COMM'N, FTC CONSUMER ALERT: BUYING, GIVING, AND USING GIFT CARDS (2006), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt010.pdf>. With state gift card laws and the efforts of consumer advocacy groups limiting the circumstances under which fees and expiration dates can be imposed, many issuers of *closed-loop* gift cards have chosen to issue cards without fees and expiration dates but *open-loop* card issuers are subject to less regulation and more often have these limitations. Horne, *supra* note 10, at 344–45; Nancy Trejos, *Gift Cards Coming with Fewer Strings*, WASH. POST, Dec. 16, 2007, at F1.

70. Grimaldi, *supra* note 11.

71. OCC, About the OCC, <http://www.occ.treas.gov/aboutocc.htm> (last visited Oct. 17, 2008).

72. *Id.*

73. 12 U.S.C. §§ 1–604(a) (2006).

74. Stored value cards are prepaid plastic cards that look like a credit or debit card, but are not tied to credit or a deposit account. Christopher B. Woods, *Stored Value Cards*, 59 CONSUMER FIN. L.Q. REP. 211, 211 (2005). Examples of stored value cards include gift cards, phone cards, teen cards, travel cards, and public transportation cards. *Id.*

75. 12 C.F.R. §§ 7.5002(a)(3), 555.200(a) (2008).

76. Brief for Office of the Comptroller of the Currency as Amicus Curiae Supporting Appellee at 8–9, SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir.

state gift-card laws, which attempt to regulate national banks by regulating the issuance of gift cards, are preempted and do not apply to national banks.⁷⁷ In reaction to complaints that the OCC has effectively prevented the protection of consumers in this area, the OCC issued a guide to national banks asking that banks give adequate disclosures to consumers regarding the terms and conditions of the gift cards they issue.⁷⁸ These guidelines are inadequate to protect consumers because they fail to require certain standards for disclosure (such as font size, clarity of writing, and location for disclosures) that would ensure that consumers are fully aware of the terms and conditions of their gift cards.⁷⁹ In this context of federal preemption, state gift-card laws exist but fail to protect consumers.

E. STATE GIFT-CARD LAWS AND CASES PREEMPTING THEM

State gift-card laws vary widely in their scope and subject matter. According to the Center for Policy Alternatives, six states prohibit expiration dates, while another fifteen states require expiration dates to exceed a certain minimum period.⁸⁰ Nine states also prohibit service fees.⁸¹ Other states have chosen not to impose any prohibitions, but instead require disclosure of expiration dates and service fees.⁸² Only the statutes

2007) (No. 06-2326). There is some debate about whether these regulations are valid in preempting state law. Compare Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 229–30 (2004) (arguing that the OCC's new rules exceed statutory authority and intent by attempting to create “de facto ‘field preemption’”), with Howard N. Cayne & Nancy L. Perkins, *National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 365, 367 (2004) (arguing that the OCC's new rules are well within its authority and “serve[] the goals of Congress”).

77. Brief for Office of the Comptroller of the Currency as Amicus Curiae Supporting Appellee, *supra* note 76, at 17.

78. Comptroller of the Currency, Gift Card Disclosures: Guidance on Disclosure and Marketing Issues, OCC Bulletin 2006-34 (Aug. 14, 2006), available at <http://www.occ.treas.gov/ftp/bulletin/2006-34.doc> (reminding national banks to disclose the terms and conditions of their gift cards so as not to violate the Federal Trade Commission Act's prohibition against unfair and deceptive trade practices).

79. See Horne, *supra* note 10, at 349.

80. Center for Policy Alternatives, Gift Card Consumer Protection, <http://www.stateaction.org/issues/issue.cfm/issue/GiftCardConsumerProtection.xml> (last visited Oct. 17, 2008).

81. *Id.*

82. *Id.*

prohibiting expiration dates and fees are problematic according to the OCC, as they are the statutes that limit a national bank's professed authorized activities.⁸³

Until 2007, it was unclear whether the state gift-card laws or the OCC stance on preemption would prevail.⁸⁴ Then two cases decided in 2007 addressed the issue. Both involved semi-closed gift cards sold by Simon Malls, the country's largest mall operator,⁸⁵ and issued by national banks that imposed fees and expiration dates. The Second Circuit issued a decision that, while upholding a Connecticut law regulating gift-card fees, left open on remand the question of whether state regulation of gift-card expiration dates were preempted.⁸⁶ The First Circuit went further, holding that New Hampshire's laws regulating gift-card fees and expiration dates were both preempted.⁸⁷ Each case alleged a violation of that state's gift-card law and sought compliance with varying levels of success. A brief discussion of each case and its implications follows.

1. *SPGGC, LLC v. Blumenthal* (Connecticut)

In November 2004, the State of Connecticut attempted to enforce its gift-card laws by threatening an enforcement action against Simon Malls and its parent company, SPGGC.⁸⁸ In response, Simon Malls filed in federal district court, seeking a declaratory judgment against Richard Blumenthal, the Attorney General of Connecticut, arguing that Connecticut's gift-card laws were preempted by the National Bank Act.⁸⁹ The gift-

83. Nondisclosure of the terms and conditions of gift cards are seen as a deceptive act prohibited by another federal statute, the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006). See Kmart Press Release, *supra* note 14. The OCC agrees that national banks are subject to the Act, and must make adequate disclosures. Williams, *supra* note 78, at n.4.

84. In 2004, industry analysts were still unsure of whether preemption played a role in the gift card market. See FURLETTI, *supra* note 33, at 17. By November 2006, after trial courts in the Simon Malls cases issued their opinions, practitioners were still unsure of the "scope of federal preemption" of state gift card laws. See Sarah Jane Hughes et al., *Developments in the Law Concerning Stored Value and Other Prepaid Payment Products*, 62 BUS. LAW. 229, 249–50 (2006).

85. Simon Prop. Group, Inc., Annual Report, *supra* note 25, at 7.

86. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191–92 (2d Cir. 2007).

87. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 525 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

88. *Blumenthal*, 505 F.3d at 187.

89. See *SPGGC, Inc. v. Blumenthal*, 408 F. Supp. 2d 87, 91–92 (D. Conn. 2006), *aff'd in part, vacated in part, remanded by* 505 F.3d 183 (2d Cir. 2007). Simon Malls' federal case and the state enforcement action were later consoli-

card system at issue in this case involved prepaid gift cards with the Visa logo issued by Bank of America and sold to consumers by Simon Malls.⁹⁰ Simon Malls charged consumers monthly maintenance fees on the gift cards,⁹¹ which violated Connecticut's prohibition on services fees.⁹² Bank of America did not receive any profit from charging maintenance fees—the fees went straight to Simon Malls.⁹³ The gift cards also expired within one year, which violated Connecticut's ban on expiration dates.⁹⁴ Simon Malls argued that Bank of America was allowed to charge its customers fees under the National Bank Act and the OCC's regulation in 12 C.F.R. § 7.4002(a).⁹⁵ Because of its business relationship with Bank of America, Simon Malls argued that it too could charge the purchasers of its gift cards fees.⁹⁶ The court disagreed, finding that Simon Malls, no matter its business relationship with Bank of America, was not a bank and thus there was no conflict between the National Bank Act or the OCC's regulation and Connecticut's gift-card laws.⁹⁷

On appeal, the Second Circuit in part affirmed the district court's ruling, holding that since Simon Malls, not Bank of America, imposed inactivity and service fees on purchasers of gift cards, the Connecticut gift-card laws were not preempted by the National Bank Act.⁹⁸ The Second Circuit vacated and remanded the district court's dismissal of Simon Malls' claim that the National Bank Act preempted the Connecticut gift-card law prohibiting expiration dates.⁹⁹ In doing so, the Second Circuit held that it was possible that the expiration date may have been imposed by Bank of America in order to comply with Visa requirements.¹⁰⁰ If this twist in the facts were true, then the Connecticut gift-card law as it pertains to expiration dates could have been preempted by the National Bank Act because

dated. *Blumenthal*, 505 F.3d at 188.

90. *Blumenthal*, 408 F. Supp. 2d at 94.

91. *Id.*

92. See CONN. GEN. STAT. § 3-65c (2007).

93. *Blumenthal*, 408 F. Supp. 2d at 94.

94. See CONN. GEN. STAT. § 42-460(a) (2007).

95. *Blumenthal*, 408 F. Supp. 2d at 93–95; 12 C.F.R. § 7.50027.4002(a) (2008) (authorizing national banks to charge “non-interest charges and fees”).

96. *Blumenthal*, 408 F. Supp. 2d at 94.

97. *Id.*

98. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191 (2d Cir. 2007).

99. *Id.* at 191–92.

100. *Id.*

of its interference with a national banking product.¹⁰¹ The Second Circuit remanded on this issue alone to allow the district court to determine whether the National Bank Act preempts Connecticut's prohibition on expiration dates,¹⁰² but Simon Malls still had one more chance to validate its gift-card scheme.

2. *SPGGC, LLC v. Ayotte* (New Hampshire)

Several months after Simon Malls lost in federal court in Connecticut, it managed to convince a different court that state gift-card laws should be preempted by federal banking laws.¹⁰³ After being notified by New Hampshire's Attorney General Kelly Ayotte, on November 1, 2004, that its gift-card program violated New Hampshire's gift-card law, Simon Malls filed in federal district court for declaratory and injunctive relief on November 12, 2004.¹⁰⁴ The banks that issued its gift cards—U.S. Bank, a national bank, and MetaBank, a federal savings bank—intervened on Simon Malls' behalf.¹⁰⁵ Arguing the same legal theories as in the Connecticut case, Simon Malls prevailed.¹⁰⁶

How could the same legal theories fail in one federal court but succeed in another? Simon Malls had learned its lesson—by the time this case was heard in the United States District Court for the District of New Hampshire, Simon Malls had tweaked its gift-card program. It had learned from the earlier litigation in Connecticut that the National Bank Act protections only apply to national banks.¹⁰⁷ Under its new gift-card program, Simon Malls did not impose maintenance fees itself, but asked the banks to impose those fees.¹⁰⁸ Simon Malls now made its profits through a sales-based commission paid to it by

101. *See id.*

102. *Id.* at 192.

103. *Compare* *SPGGC, LLC v. Blumenthal*, 408 F. Supp. 2d 87, 91 (D. Conn. 2006), *aff'd in part, vacated in part, remanded by* 505 F.3d 183 (2d Cir. 2007) (denying SPGGC's motion for reconsideration), *with* *SPGGC, LLC v. Ayotte*, 443 F. Supp. 2d 197, 199 (D.N.H. 2006), *aff'd*, 488 F.3d 525 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008) (holding New Hampshire's gift card law preempted by National Bank Act).

104. *Ayotte*, 443 F. Supp. 2d at 201.

105. *Id.* at 199.

106. *Id.* at 203–05, 208.

107. *Blumenthal*, 408 F. Supp. 2d at 93–95.

108. *Ayotte*, 443 F. Supp. 2d at 206.

the issuing banks.¹⁰⁹ As a result of this factual difference between the case brought in Connecticut and the one in New Hampshire, the U.S. District Court for the District of New Hampshire held that the gift cards were national banking products, and as such the state gift-card law was preempted.¹¹⁰ The District Court's decision was affirmed by the First Circuit on May 30, 2007.¹¹¹ A petition for writ of certiorari was filed with the U.S. Supreme Court on December 14, 2007 and denied February 19, 2008,¹¹² thus ending any hope in the short-term that state gift-card laws will be enforced by the federal courts.

II. PREVENTING STATES FROM ENFORCING GIFT-CARD LAWS

The Simon Malls cases illustrate how easily a business can evade state gift-card laws by partnering with a national bank and hiding behind that bank's rights under the National Bank Act.¹¹³ This Section argues, however, that the National Bank Act does not preempt state gift-card laws because the First Circuit did not consider whether Congress intended the National Bank Act to preempt state consumer-protection laws.¹¹⁴ Consumer-protection laws are laws of general applicability;¹¹⁵ as such, state gift-card laws should apply equally to national banks as they do to other businesses. Thus, the First Circuit incorrectly held that the National Bank Act preempted New Hampshire's gift-card law because it failed to examine congressional intent and apply Supreme Court precedent regarding laws of general applicability.

109. *Id.*

110. *Id.* at 207–08.

111. SPGGC, LLC v. Ayotte, 488 F.3d 525, 536 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

112. SPGGC, LLC v. Ayotte, 128 S. Ct. 1258 (2008) (denying petition for writ of certiorari).

113. *Compare* SPGGC, LLC v. Blumenthal, 505 F.3d 183, 191–92 (2d Cir. 2007) (holding that the National Bank Act does not preempt Connecticut's gift card laws with respect to Simon Malls' gift card fees, but remanding on the question of whether gift card expiration dates are preempted), *with Ayotte*, 488 F.3d at 525 (holding that New Hampshire's gift card laws are preempted by the National Bank Act).

114. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring a "clear and manifest purpose of Congress" before a state law issued in an area traditionally regulated by the states could be preempted).

115. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1581 (2007) (citing *Rice*, 331 U.S. at 230); *id.* (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896)) (explaining that state laws of general applicability apply to national banks).

Furthermore, Congress has chosen not to directly regulate the gift-card industry, further exacerbating the problem by allowing the courts to rule that the National Bank Act preempts state gift-card laws. In particular, Congress has had numerous opportunities to regulate in this area,¹¹⁶ but neglected to settle the issue of National Bank Act preemption. The First Circuit's error, along with Congress's inaction, led to a preemption regime where consumers are left unprotected from exorbitant fees and short expiration dates that deprive them of the full value of their gift cards.

A. THE FIRST CIRCUIT ERRONEOUSLY HELD THAT NEW HAMPSHIRE'S GIFT-CARD LAW IS PREEMPTED BY THE NATIONAL BANK ACT

In holding that New Hampshire's gift-card law was preempted by the National Bank Act, the First Circuit examined whether the gift-card law frustrated a national bank's power to issue gift cards with fees and expiration dates and sell the cards through a third party.¹¹⁷ By examining the issue in this way, the First Circuit did not perform a preemption analysis consistent with Supreme Court preemption standards applied to state consumer-protection laws.¹¹⁸ Additionally, the First Circuit did not view the gift-card law as a law of general applicability that should not be preempted by the National Bank Act.¹¹⁹ Because of these two errors, the First Circuit should not have held that the New Hampshire gift-card law was preempted by the National Bank Act.

116. For example, Congress considered, but did not pass, the Fair Gift Card Act. *See* 150 CONG. REC. S10,986 (daily ed. Oct. 9, 2004) (introducing the Fair Gift Card Act); *see also* Preservation of Federalism in Banking Act, S. 1502, 109th Cong. (2005) (preventing the preemption of state consumer-protection laws by the National Bank Act); Preservation of Federalism in Banking Act, S. 2973, 108th Cong. (2004) (same); FURLETTI, *supra* note 33, at 11 (explaining that Congress had considered regulation of prepaid cards, but the industry requested that Congress not act so that the industry would not be prematurely hindered by regulation).

117. SPGGC, LLC v. Ayotte, 488 F.3d 525, 531 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

118. *See Rice*, 331 U.S. at 230 (requiring a "clear and manifest purpose of Congress" before a state law issued in an area traditionally regulated by the states could be preempted).

119. *See Watters*, 127 S. Ct. at 1567 (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896)) (explaining that state laws of general applicability apply to national banks).

1. The First Circuit Did Not Follow the Supreme Court's Requirement of a Clear and Manifest Intent Before Holding That New Hampshire's Gift-Card Law Is Preempted

Consumer protection is an area of the law traditionally regulated by the states.¹²⁰ The Supreme Court established that when federal regulation touches upon areas which have traditionally been regulated by the states, the Court will assume that “the historic police powers of the States” are not preempted unless there is a “clear and manifest purpose of Congress” to do so.¹²¹ In other words, the Court follows a two-step process when evaluating the federal regulation at issue: first, does a state law impair a federal scheme; and second, did Congress intend to preempt the state law?¹²² Since consumer protection is an area of law traditionally regulated by the states,¹²³ a court performing preemption analysis should consider whether Congress intended to preempt *all* consumer-protection laws with the National Bank Act.

Yet, the First Circuit did not consider whether Congress intended to preempt all consumer-protection laws when it held that the National Bank Act preempted New Hampshire's gift-card law. Rather, the First Circuit only considered if the gift card statute in question conflicted with the National Banking Act to the extent that “compliance with the state statute would frustrate the purposes of the federal scheme.”¹²⁴ This analysis does not follow Supreme Court precedent because it only considers the first step in consumer-protection preemption analysis—impairment. By not performing the second step of the analysis—intent—the First Circuit incorrectly held that the National Bank Act preempts state gift-card laws that touch upon actions of a national bank.

2. The First Circuit Failed to Consider New Hampshire's Gift-Card Law as a Law of General Applicability Exempt from Preemption by the National Bank Act

The Supreme Court has repeatedly recognized that “[f]ederally chartered banks are subject to state laws of general

120. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990).

121. *Rice*, 331 U.S. at 230.

122. *See Watters*, 127 S. Ct. at 1579–80 (explaining that significant impairment is not the only factor in preemption analysis).

123. *Gen. Motors Corp.*, 897 F.2d at 41.

124. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Bank Act].”¹²⁵ The Court also held that a state law will only be preempted when “the State law incapacitates the banks from discharging their duties to the government.”¹²⁶ Areas of state law that have been applied against national banks include contracts, property, torts, criminal law, tax, zoning, and employment law.¹²⁷

Although the Supreme Court has not yet considered whether consumer-protection laws should be categorized as laws of general applicability exempt from National Bank Act preemption, at least one district court ruled that state attorneys general can enforce consumer-protection laws against national banks.¹²⁸ In *Minnesota v. Fleet Mortgage Corp.*, the District Court of Minnesota denied Fleet Mortgage’s motion to dismiss on the theory that states can enforce non-banking specific laws against national banks.¹²⁹ Fleet Mortgage, a subsidiary of Fleet National Bank, was accused of engaging in a telemarketing scheme in violation of state consumer-protection laws.¹³⁰ The District Court held that Minnesota could enforce its consumer-protection laws against Fleet Mortgage.¹³¹ Even though the National Bank Act provides that state laws will be enforced against a national bank by the OCC,¹³² the court held that the OCC does not have exclusive enforcement authority when state consumer-protection laws “do not directly concern a banking practice and the alleged illegal actions are not banking industry specific.”¹³³

Under this rationale, the First Circuit should have found that New Hampshire’s gift-card law was not preempted by the National Bank Act. When the First Circuit performed its impairment analysis, it incorrectly found that New Hampshire’s

125. *Watters*, 127 S. Ct. at 1567 (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896)); *see also* *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 222–23 (1997); *Nat’l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 361–62 (1869).

126. *Atherton*, 519 U.S. at 223 (quoting *Nat’l Bank*, 76 U.S. (9 Wall.) at 362).

127. *Id.*; 12 C.F.R. §§ 7.4009(c), 34.4(b) (2008).

128. *See* *State v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001).

129. *Id.* at 964, 966.

130. *Id.* at 964–65.

131. *Id.* at 966.

132. 12 U.S.C. § 36(f)(1) (2006).

133. *Fleet Mortgage Corp.*, 158 F. Supp. 2d at 966.

gift-card law was preempted because it “regulates the activities of a national bank.”¹³⁴ New Hampshire’s gift-card law should instead be considered a law of general applicability because it is a consumer-protection law that regulates all issuers of gift cards, not national banks in particular.¹³⁵ Like telemarketing in *Fleet Mortgage Corp.*, the issuance of gift cards is not an activity specific to the banking industry because a retailer, resort, or mall operator may also issue gift cards. Furthermore, the gift-card law does not prohibit the issuance or sale of gift cards in New Hampshire, which would be viewed as impairing a national bank’s ability to conduct bank business.¹³⁶ Rather, the law requires that all issuers of gift cards, including national banks, abide by the same fair business practices.¹³⁷ Thus, the First Circuit erroneously held that New Hampshire’s gift-card law was preempted by the National Bank Act because it failed to view the law as one of general applicability. Since the Supreme Court has denied New Hampshire’s petition for writ of certiorari, Congress alone has the power to protect consumers.

B. CONGRESS HAS REMAINED SILENT ON GIFT CARDS FOR TOO LONG

Prepaid, stored value cards like gift cards have not been directly regulated at the federal level even though they have been around since the mid-1990s.¹³⁸ Congressional silence allows the courts to rule that the National Bank Act preempts state gift-card laws,¹³⁹ resulting in a preemption scheme that protects national banks and harms consumers.¹⁴⁰ The silence

134. See *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 533 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008).

135. See New Hampshire Consumer Protection Act, N.H. REV. STAT. ANN. § 358-A:1 IV-a (2007).

136. See *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1567 (2007) (“States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank’s or the national bank regulator’s exercise of its powers.”).

137. See New Hampshire Consumer Protection Act § 358-A:2 XIII.

138. FURLETTI, *supra* note 33, at 11.

139. After the First Circuit’s decision in the New Hampshire Simon Malls Case, the Second Circuit followed the same preemption analysis in remanding to the district court regarding the issue of whether expiration dates could be featured on Simon Malls’ gift cards. See *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191–92 (2d Cir. 2007).

140. National banks that issue gift cards harm consumers by depriving them of the full value of the cards through the imposition of expiration dates and fees. See *Horne*, *supra* note 10, at 348.

harms consumers because they do not have the benefit of state gift-card laws that were enacted to protect them from fees and expiration dates.¹⁴¹ Furthermore, congressional silence encourages traditional issuers of closed-loop gift cards, namely retailers, to pair with a national bank to issue their gift cards in order to avoid state regulation.¹⁴² The likely result is that all gift cards will become semi-closed or open-loop cards issued by national banks, severely limiting consumer choice and increasing consumer exposure to fees and expiration dates that decrease the value of the cards.

1. Congress Failed to Fully Consider the Fair Gift Card Act

On October 9, 2004, Senator Schumer introduced the “Fair Gift Card Act” to the Committee on Banking, Housing, and Urban Affairs¹⁴³ in response to concerns that fees and expiration dates unfairly deprive consumers of the full value of their gift cards.¹⁴⁴ The Fair Gift Card Act defined three items: gift certificates, store gift cards, and “general-use prepaid card[s].”¹⁴⁵ Gift certificates and store gift cards are defined similarly, except that a gift certificate is defined as a written promise whereas a store gift card is a plastic prepaid card.¹⁴⁶ In all other respects, the definition of the two items matches the definition of a closed-loop gift card, being prepaid and usable at only one retailer.¹⁴⁷ The bill also defined general-use prepaid cards similarly to open-loop gift cards, where the cards are issued by a bank and usable at multiple merchants.¹⁴⁸ The bill did not, however, define or mention a gift card that is issued by a bank

141. See Grimaldi, *supra* note 11.

142. The Simon Malls gift card program is a prime example of such a switch. Compare Blumenthal, 505 F.3d at 191 (holding that the National Bank Act does not preempt Connecticut’s gift card laws with respect to fees charged by Simon Malls’ gift card program), with SPGGC, LLC v. Ayotte, 488 F.3d 525, 536 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008) (holding that New Hampshire’s gift card laws are preempted by the National Bank Act to the extent they restrict fees charged by national bank card issuers).

143. 150 CONG. REC. S10,986 (2004).

144. See Jeff Grossman, *The Gift That Just Stops Giving: Growing Ire Over Westchester Mall Cards That Lose Their Value*, N.Y. TIMES, Feb. 20, 2005, at WE3.

145. 150 CONG. REC. S10,986–87 (daily ed. Oct. 9, 2004).

146. *Id.* at S10,987.

147. Compare *id.*, with Horne, *supra* note 10, at 345 (defining closed-loop gift card).

148. Compare 150 CONG. REC. S10,987 (daily ed. Oct. 9, 2004), with Horne, *supra* note 10, at 345 (defining open-loop gift card).

but usable at a limited number of merchants, or a semi-closed gift card.¹⁴⁹

As for substantive protection from fees, the bill prohibited dormancy fees on all three prepaid items defined in the bill unless five conditions are met.¹⁵⁰ A dormancy fee may be charged if the value of the card or certificate is less than five dollars; the fee is not more than one dollar; there has been no activity for at least twenty-four consecutive months; the card or certificate holder can reload or add value to the card; and the certificate or card clearly discloses the conditions in which a fee will be charged and card/certificate issuer informs the purchaser of such conditions before purchase.¹⁵¹ The bill also prohibited expiration dates that are shorter than five years, and required that if a longer one is imposed, it must be disclosed in accordance with the bill.¹⁵² Lastly, the bill included a provision stating that the Fair Gift Card Act does not supersede state gift-card laws.¹⁵³

Unfortunately, the bill went unconsidered by the Committee or Congress.¹⁵⁴ Although a spokesman for Senator Schumer stated that the senator intended to sponsor a revised federal gift-card law in 2005,¹⁵⁵ no such bill has been introduced. Despite the benefits of the bill, it is hard to say if consumers would have been better off under a Fair Gift Card Act system.¹⁵⁶ Although the bill addressed the main problems of fees and expiration dates, the Committee or Congress should have found several flaws with the bill as written. First, the Fair Gift Card Act did not account for semi-closed gift cards issued by national banks.¹⁵⁷ By not including them as a type of gift card subject to the Act, semi-closed gift cards could potentially flourish. Gift-card programs like the one operated by Simon Malls would be free from federal *and* state regulation. Second, although the bill included a provision stating that it would not

149. Compare 150 CONG. REC. S10,987 (daily ed. Oct. 9, 2004), with FURLETTI, *supra* note 33, at 4 (defining semiclosed gift card).

150. 150 CONG. REC. S10,987 (daily ed. Oct. 9, 2004).

151. *Id.*

152. *Id.*

153. *Id.*

154. See Horne, *supra* note 10, at 348.

155. Grossman, *supra* note 144.

156. See Horne, *supra* note 10, at 348–49 (arguing that the Fair Gift Card Act is not sufficient to account for all unfair practices related to gift cards).

157. See *id.*

supersede state gift-card laws,¹⁵⁸ it did not address National Bank Act preemption with respect to those state laws. If Congress had passed this Act as written, the issue of whether the National Bank Act preempts state gift-card laws might continue to be resolved as the First Circuit resolved the issue—by finding state gift-card laws are preempted. Furthermore, the bill also left open the question of whether the Fair Gift Card Act would apply in a situation where the National Bank Act preempted a state gift-card law. Thus, the bill would actually create more confusion with regard to which regulations would apply to bank-issued gift cards.

Despite the failings of the Fair Gift Card Act, consumers would still have been better off if the Committee or Congress had considered and debated the bill. While in committee, the bill could have been revised to account for the shortfalls mentioned above. Even if the bill had been passed as written, consumers could have benefited from the law because the bill provided clear guidance regarding disclosure requirements and placed limits on fees and expiration dates.¹⁵⁹ By doing so, the bill provided consumers with notice of a gift card's terms and conditions, as well as protected the monetary value of the gift card for a certain period of time. Because no circuit courts have disagreed with the First Circuit's holding that National Bank Act preemption may apply to some applications of state gift-card laws,¹⁶⁰ Congress's failure to pass the Fair Gift Card Act leaves consumers unprotected in this arena.

2. Congressional Silence Encourages Forum Shopping in the Form of Issuing Gift Cards Through National Banks.

As long as Congress continues bucking the issue of preemption and gift cards, there is a large loophole in consumer-protection law. The lesson from the Simon Malls cases is clear: get a national bank to issue your gift cards, charge your fees, give you a kickback in return, and you have the makings

158. 150 CONG. REC. S10,987 (daily ed. Oct. 9, 2004).

159. *See id.*

160. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191–92 (2d Cir. 2007) (holding that although the National Bank Act does not preempt state law prohibiting service fees charged by Simon Malls, it may preempt Connecticut's law prohibiting expiration dates as applied to expiration dates imposed by Bank of America); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 536 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008) (holding that New Hampshire's gift card laws are preempted by the National Bank Act with respect to cards issued by national banks).

of a great gift-card program with no worries about state gift-card laws.¹⁶¹ So long as Congress fails to act on the issue, retailers are free to partner with national banks to issue gift cards and avoid state gift-card laws.

Such an arrangement spells disaster for consumers. State legislatures passed gift-card laws because consumers complained that their gift cards unexpectedly and unfairly diminished in value.¹⁶² One angry consumer, after discovering her \$20 gift card was only worth \$2.50 because of dormancy fees, explained her disbelief: "I acted like a crazy lady . . . I think they would have called security to remove me, because I started saying, 'I have a gift card from you and it loses value.'"¹⁶³ Consumer advocates blame the gift-card issuers for perpetuating an asymmetrical information gap between themselves and gift-card recipients.¹⁶⁴ Even under the OCC's guidance on gift-card disclosures,¹⁶⁵ most disclosures are made only to the purchaser of the gift card—that is, the gift giver.¹⁶⁶ The recipient may be completely in the dark about what fees or expiration dates apply.¹⁶⁷ According to one survey, most consumers do not know about gift-card dormancy fees accompanying bank-issued gift cards, and would not have bought them had they known about the fees.¹⁶⁸ Furthermore, because some retailers issue cards with different terms in different markets, a gift-card originating in one state may be subject to different terms when used in another state.¹⁶⁹ Lastly, the OCC's guidance is hardly satisfactory, as it offers little in the way of how disclosure is to be made or whether it even has to be understandable to a consumer.¹⁷⁰ Thus, undoing the protection states have created will only further the asymmetrical gap in information between the gift-card issuer and recipient.

161. *Compare Blumenthal*, 505 F.3d at 191 (holding that the National Bank Act does not preempt Connecticut's gift card laws with respect to Simon Malls' gift card program), *with Ayotte*, 488 F.3d at 536 (holding that New Hampshire's gift card laws are preempted by the National Bank Act).

162. Grimaldi, *supra* note 11.

163. Grossman, *supra* note 144.

164. *See Trejos*, *supra* note 69.

165. Williams, *supra* note 78.

166. *See Horne*, *supra* note 10, at 341–42.

167. *See id.*

168. David Breitkopf, *Dormancy Fees a Growing Issue for Gift-Card Issuers*, AM. BANKER, Sept. 3, 2004, at 5.

169. Horne, *supra* note 10, at 345.

170. *Id.* at 349.

III. DOING AWAY WITH PREEMPTION: PASSAGE OF THE FAIR GIFT CARD ACT

In order to ensure that consumers receive the full value of their gift cards, the National Bank Act should not preempt state gift-card laws. So long as the First Circuit's decision stands and Congress fails to act on the issue, preemption will continue unless Congress passes a revised version of the Fair Gift Card Act that accounts for National Bank Act preemption and semi-closed loop gift cards. Because the Supreme Court has already denied certiorari in the Simon Malls New Hampshire case, this Section argues that the only remaining action that would benefit consumers of gift cards is to pass the Fair Gift Card Act.

A. CONGRESS SHOULD REVISIT THE FAIR GIFT CARD ACT

Congress should, at a minimum, reconsider the benefits of passing a federal law that protects consumers in this area. Although the Fair Gift Card Act has its flaws,¹⁷¹ they could be corrected in a revised version of the bill. Such a revised bill would first need to account for National Bank Act preemption and semi-closed gift cards by including national bank issued gift cards.¹⁷² After such revisions, consumers would be better protected. First, a revised Fair Gift Card Act regime would make gift-card issuers provide clear guidelines for disclosure of fees and expiration dates to consumers so that can make informed decisions when purchasing gift cards.¹⁷³ Second, consumers would receive federal protection even in states that do not currently protect their consumers from losing value in their gift cards.¹⁷⁴ Third, Congress could require that if a state does have its own gift-card laws, those laws must require disclosure so that both the purchaser and recipient of the card are aware of the risks and benefits associated with purchasing and using the card in a certain geographic location.¹⁷⁵

Better still, Congress could issue a Fair Gift Card Act that preempts all state gift-card legislation. Congress could mandate that only the Fair Gift Card Act may regulate gift

171. See *supra* note 158 and accompanying text.

172. *Id.*

173. See 150 CONG. REC. S10,987 (daily ed. Oct. 9, 2004) (requiring disclosure of fees on the gift card in ten-point font and printing the expiration date on the card in at least ten-point font and capital letters).

174. See *id.*

175. See Horne, *supra* note 10, at 345.

cards and that all contradictory state laws would be invalid. Such a solution would eliminate the possibility of different policies across different states that may conflict with each other¹⁷⁶ and would provide a uniform system under which all gift-card issuers operate. Furthermore, passing a federal law would allow for regulation of bank-issued gift cards that are currently free from state regulation.¹⁷⁷ Although the passage of such a comprehensive bill may be unlikely,¹⁷⁸ Congress could effectively resolve consumer complaints as well as provide gift-card issuers with a uniform regulatory regime to follow by passing a revised Fair Gift Card Act that preempts all state gift-card laws.

B. THE ADVANTAGES TO CONSUMERS

If Congress passed a revised Fair Gift Card Act that preempted all state laws or passed a law mandating that the National Bank Act does not preempt state gift-card laws, there would be many advantages to consumers. First, the state laws and the Fair Gift Card Act require better disclosure than the OCC guidelines recommend to gift-card issuers.¹⁷⁹ Second, consumers would get the full value of their gift cards because most state gift-card laws and the Fair Gift Card Act prevent issuers from imposing unfair expiration dates and dormancy fees.¹⁸⁰ Lastly, all card issuers would operate on a level playing field because national banks would not have immunity from state gift-card laws or the Fair Gift Card Act, providing more choices in gift cards to consumers without the fear of cards losing value.

1. Better Disclosure: Preventing a Widening of the Asymmetrical Gap in Information Between Gift-Card Issuers and Recipients

Consumer advocates have long argued for more disclosure, based on the idea that a well-informed consumer will be better able to consider the risks and benefits before purchasing a

176. *See id.* at 347.

177. *Id.* at 349.

178. Special interest groups have intervened to prevent regulation previously. *See FURLETTI, supra* note 33, at 11. Additionally, the previous version of the Fair Gift Card Act failed to leave committee. Horne, *supra* note 10, at 348.

179. Horne, *supra* note 10, at 349.

180. *See, e.g.,* MASS. GEN. LAWS ch. 200A, § 5D (1994 & Supp. 2008) (providing that gift cards remain valid for not less than seven years).

product.¹⁸¹ With gift cards, traditional disclosure to the purchaser may not be sufficient because the purchaser is not the ultimate user of the card.¹⁸² Rather, the recipient is the one who will end up presenting a gift card that has little or no remaining value due to unknown dormancy fees or expiration dates. State legislatures enacted gift-card laws to deal with this issue of inadequate notice by prohibiting fees and expiration dates or requiring a certain level of disclosure.¹⁸³ A revised Fair Gift Card Act would create the same results. By requiring a scheme ranging from no expiration dates and fees to detailed instructions on how disclosures must be made in order to reach the eventual recipient, gift-card recipients would be protected.¹⁸⁴

State gift-card laws or a Fair Gift Card Act would limit the information asymmetry now prevalent in the gift-card industry. The enforcement of state laws or a federal law would lead to an increase in the disclosures aimed at reaching the gift-card recipient. The states that have enacted such laws often detail how and what disclosures must be made, ultimately benefiting the consumer.¹⁸⁵ The Fair Gift Card Act has similar requirements. Thus, under either regulatory scheme, consumers would benefit from better disclosure.

2. Increasing Utility of Gift Cards to Consumers

Although consumers benefit from gift cards because it eases the burden of gift giving, this benefit is only one-sided. Purchasers of gift cards benefit from the availability of gift cards because they can easily pick a gift without feeling guilty that the recipient will dislike the present. Their interaction with the gift card ends there. Recipients, on the other hand, may not be so lucky. They may initially believe that the gift card gives them more freedom than another useless scarf, but once the fees and expiration dates kick in, the freedom to purchase a gift is significantly diminished. If an individual receives a \$50 gift card, but upon redemption finds it is only worth \$25, she has lost fifty percent of the gift's value. Conversely, if the same in-

181. See Horne, *supra* note 10, at 341.

182. *Id.* at 341–42.

183. Breitkopf, *supra* note 168, at 5.

184. Horne, *supra* note 10, at 349.

185. See, e.g., MASS. GEN. LAWS ANN. ch. 200A, § 5D (requiring card issuers to disclose the date of issuance and expiration date on a sales receipt or through a website or toll free information telephone line).

dividual receives a \$50 unwanted gift and promptly goes to exchange or receive store credit for it, she retains the full value of the gift. Consequently, gift-card *recipients* are not necessarily better off as a result of having access to gift cards that quickly and secretly lose value.

If state gift-card laws were protected from National Bank Act preemption or a Fair Gift Card Act were passed, gift-card recipients would receive better disclosure about the fees and expiration dates that plague their cards. In the few states that restrict fees or expiration dates, recipients receive the full utility of their gift cards.¹⁸⁶ In states that only require disclosure, recipients still receive a marginal increase in utility because the recipients are better informed about the decreases in value and can counteract those decreases.¹⁸⁷ Under a revised Fair Gift Card Act, gift-card recipients would receive the full value of their cards for at least five years and be given clear disclosures if expiration dates and fees apply. Under either regulatory scheme, gift-card recipients would receive more utility from gift cards.

3. Allowing All Issuers of Gift Cards to Operate on a Level Playing Field

As the current regulatory scheme stands, issuers of closed-loop cards are at a serious disadvantage. All types of card issuers suffer the same accounting issues that pressure them to institute expiration dates and fees in the first place.¹⁸⁸ National Bank Act preemption of state gift-card laws affords national bank gift-card issuers protection from state regulation.¹⁸⁹ As a result, closed-loop card issuers are subject to varying state laws and enforcement actions by state attorneys general.¹⁹⁰ On the other hand, national banks can impose expiration dates, dormancy fees, and minimal disclosures with no penalty.¹⁹¹

This regime creates incentives for national banks to be even more callous toward consumers. Because they are not subject to state regulation, they stand to benefit from charging exorbitant fees and imposing abnormally short expiration

186. *See, e.g., id.* (requiring that gift cards must be valid for at least seven years after the date of issuance).

187. Breitkopf, *supra* note 168, at 5; Horne, *supra* note 10, at 349.

188. *See* Horne, *supra* note 10, at 344.

189. *See id.* at 345.

190. *See id.*

191. *See id.* at 345–46.

dates.¹⁹² As an example, a \$50 bank-issued card will be subject to a \$4 issuance fee, plus the interchange fee each time the card is used on a credit card network (two percent, or another dollar per transaction).¹⁹³ But the profits for a national bank do not stop there—if the issuer imposes an extremely short expiration date, the issuer will then collect the unused balance.¹⁹⁴ Thus, the best gift card to such an issuer is “one that is never used.”¹⁹⁵

Retailers, who often issue closed-loop cards, usually have different incentives for issuing a gift card than straight profits from tricking consumers. Such incentives include attracting new customers, increasing store traffic and customer spending, and reducing price sensitivity.¹⁹⁶ Because they are subject to varying state gift-card laws, national chains will find it hard to resist collaborating with a national bank to issue their gift cards. Preemption of state gift-card laws encourages big-box retailers¹⁹⁷ to align with a national bank to issue one gift card nationwide, rather than several that are market-specific and in compliance with state laws.¹⁹⁸ Imposing the exorbitant fees required to make a gift card worthwhile to a national bank may decrease customer loyalty and garner bad press, making a retailer appear unfriendly to consumers.¹⁹⁹ Nevertheless, the bottom line of having a simpler gift-card program may outweigh such fears.

All gift-card issuers could compete on a level playing field in the gift-card issuing market if all issuers were subject either to state or to federal regulation. Closed-loop gift-card issuers would not need to seek safe harbor from state laws by cooperating with national banks and could continue to issue cards that meet their needs. National banks might not reap the same profits from issuing gift cards as before, but they will also not be

192. *See id.* at 342.

193. *See id.* at 346.

194. *See id.*

195. *Id.*

196. *Id.*

197. Big-box retailers are those that sell their goods in large-scale retail facilities that occupy between 20,000 and 200,000 square feet. THEODIS L. PERRY, JR., MD. DEP'T OF PLANNING, “BIG-BOX” RETAIL DEVELOPMENT 3 (2001), available at http://www.mdp.state.md.us/mgs/bigbox/bigbox_v3.pdf.

198. *See* SPGGC, LLC v. Ayotte, 488 F.3d 525, 536 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008) (holding that gift cards issued by a national bank are not subject to state gift card laws).

199. Kmart is one such retailer. *See, e.g.*, Kmart Press Release, *supra* note 14.

stealing from consumers. Consumers ultimately benefit because they may use different types of cards for different types of gifts. Forcing all gift-card issuers to follow the same rules, whether they are state or federal, would ensure that consumers have more choices in the types of cards they can purchase and would equalize competition among issuers.

CONCLUSION

So long as the First Circuit decision holding that the National Bank Act preempts state gift-card laws is valid, consumers will be left unprotected because national banks may charge fees and impose expiration dates with little notice to consumers. Although the Supreme Court has chosen not to review the First Circuit's ruling, Congress should act by passing a revised version of the Fair Gift Card Act in order to truly aid consumers. Until then, consumers should be wary of buying and receiving gift cards.