

STATE OF NEW HAMPSHIRE
EXECUTIVE BRANCH ETHICS COMMITTEE



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Advisory Opinion

2009-001

Question Presented

Are gift cards or gift certificates “gifts” as defined by RSA 15-B:2, V?

Summary Answer

Yes. Gift cards and gift certificates fall within the definition of “gift” as money in the form of a non-negotiable instrumentality for the transfer of money.

Legal Authority

RSA 15-B.

Analysis

RSA 15-B:3 makes it unlawful for an elected official, public official, public employee, constitutional official, or legislative employee to knowingly accept, directly or indirectly, any gift, as defined in this chapter. “Gift” is defined by RSA 15-B:2, V to mean

- (1) Money in any amount, whether in the form of cash, check or any other negotiable or non-negotiable instrumentality for the transfer of money.
- (2) Any other tangible thing, intangible thing, service, or the use thereof having more than insignificant economic value. Any such item with a value of less than \$25 is presumed to be of insignificant economic value.

“The people’s government, made for the people, made by the people, and answerable to the people.”

Daniel Webster, Jan. 16, 1830

Although the nature and use of gift cards are changing with time, there are two primary types of gift cards. One is a so-called “closed loop” or “store-branded” gift card, and can only be used at the store (or chain of stores) from which it was purchased. A gift certificate works in the same manner as a closed loop gift card. The other type of gift card is the “open loop” or “network-branded” gift card. Open loop gift cards are typically issued by a financial institution and can be used anywhere the particular network card brand is accepted. Thus, a bank gift card with a Visa® logo can be used anywhere a Visa® Card is accepted. As a result, the giver of the gift card does not restrict or control how the gift card is used or what is purchased with the gift card.

It is the Committee’s opinion that all forms of gift cards, whether they be open loop or closed loop, and all gift certificates, are gifts as defined by RSA 15-B:2, V, (1). The recipient of a gift certificate or gift card is receiving the functional equivalent of cash. It is, therefore, the Committee’s conclusion that all forms of gift cards and gift certificates are gifts as defined by RSA 15-B:2, V(1). Because the definition of gift under RSA 15-B:2, V(1) does not contain an “insignificant economic value” threshold, gift cards and gift certificates of any value would fall within the definition of “gift.”

In its deliberations, the Committee considered the fact that closed loop gift cards can only be used at the store branded on the card, and thus may be construed to be more consistent with the giving of a “tangible thing” in RSA 15-B:2, V(2). In addition, when a closed loop gift card is purchased, the money received by the store is retained by the store. Thus, analyzing the statute narrowly, it could be argued that RSA 15-B:2, V(1) does not apply because there is no subsequent “transfer of money” when the subsequent holder of the gift card makes a purchase. The Committee, however, has chosen to perform a more pragmatic, functional analysis. In this era of superstores where anything can be purchased under one roof, from food, clothes, electronics and furniture, the closed loop gift card can be the functional equivalent of an open loop gift card. It is the Committee’s opinion that the legislature did not intend RSA 15-B:2, V(1) to be narrowly construed.

When analyzing whether a particular thing is a gift, the analysis must also include a review of the list of exclusions to the definition of “gift” in RSA 15-B:2, V (b). The determination of whether the receipt of a particular gift card or certificate is excluded from the definition of “gift” is highly fact specific, and must be considered in light of the particular facts and circumstances of each transaction. Specific facts and circumstances may also give rise to a prohibited conflict of interest, as defined by RSA 21-G:21, II. Both the exclusion analysis and the conflict of interest analysis are outside the scope of this advisory opinion, and must be evaluated on a case-by-case basis.


Conclusion

Gift cards and gift certificates of any value fall within the definition of “gift” as defined by RSA 15-B:2, V(1).

This Advisory Opinion is issued by the Executive Branch Ethics Committee on March 4, 2009 pursuant to RSA 21-G:30, I (c).



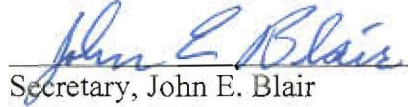
Chairman, Deborah J. Schachter



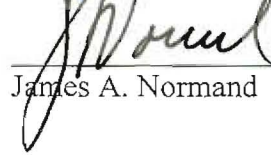
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