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CORPORATE LAW NEWSLETTER

Cloud Computing, Part II

by Robert E. Braun

In our winter edition of the JMBM Corporate Law Newsletter, we discussed some of the benefits of cloud computing. While there are a number of advantages which make cloud computing attractive, there are also a number of business and strategic challenges of cloud computing which need to be considered. While these challenges are not unique to cloud computing, the qualities of accessing software and data through the Internet does raise concerns that need to be addressed by users. This article briefly reviews some of those challenges, and will conclude in the next edition of the JMBM Corporate Law Newsletter with legal considerations and resolutions to these challenges.

What is Cloud Computing?

"Cloud computing" commonly refers to delivering computing services – software, storage capacity or other products and services – over the Internet. We use these products and services regularly, including off-site data storage (such as Internet-based automatic file backup), online banking, Gmail, online search engines and online photo albums. Most of us use the cloud every day, by accessing search engines, social networks and email.

Cloud computing, however, is different. While most of these functions are for convenience, businesses using cloud computing may transfer essential functions from in-house operations to Internet-based services.

Challenges of Cloud Computing

In our last edition, we discussed some of the advantages of cloud computing, including cost savings, staffing benefits, scalability, mobility, information security and regulatory compliance. However, cloud computing also raises some concerns for business:

Is Cloud Computing Cheaper in the Long Run? Because cloud computing negates the need to purchase hardware and operating software, the initial costs are almost always less than setting up a proprietary equivalent from scratch, and lower cost is one of the key drivers to cloud computing, particularly for companies with limited resources. Over time, however, companies may find that their costs may be less or more than an in-house system, particularly since the customer of a cloud provider has little, if any, leverage on fees. That lack of leverage is magnified since, as described below, transferring from a cloud provider may be so difficult or expensive that it is possible to be handcuffed to a particular vendor.

Flexibility and Termination. Probably the last thing a potential cloud computing convert thinks of when considering a new provider is what will happen when it's time to end the relationship. Most software users know that it is difficult and expensive to change systems, often requiring operating multiple systems for testing, retraining personnel, and dealing with inevitable problems. However, cloud computing adds an additional complication, since the software and data is in a third party's hands, and remote – often very remote – from the user. The very things that make cloud computing attractive and solution-oriented are the factors that will create complications on termination. This is the case especially if the cloud provider is unable to meet its commitments generally. Consequently, users of cloud computing systems may be handcuffed to their programs.

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Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit Card Act"): New Gift Card Legislation

by Martin H. Orlick

More than half (55%) of people asked in a survey requested a gift card as their gift of choice last holiday season. Shoppers, on average, spent $139.91 on gift cards this year and 77.2% of people bought at least one

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gift card during the holidays, according to a survey by the National Retail Federation and BIGresearch.

According to the Code of Federal Regulations, "A gift card is a prepaid card that is designed to be purchased by one consumer and given to another consumer as a present or expression of appreciation or recognition. When provided in the form of a plastic card, a user of a gift card is able to access and spend the value associated with the device by swiping the card at a point-of-sale terminal, much as a person would use a debit card. Among the benefits of a gift card are the ease of purchase for the gift-giver and the recipient's ability to choose the item or items ultimately purchased using the card."

JMBM has been defending retailers in complex gift certificate and gift card consumer class actions for more than a decade.

While gift cards have been successful for retailers in attracting new customers and keeping old ones, implementing them requires retailers to follow state and federal laws which are often complex and conflicting. California and an increasing number of states have already enacted gift certificate and gift card laws restricting transaction, maintenance and dormancy fees and prohibiting expiration. By now, few, if any, retailers sell gift certificates or gift cards that will expire. Some leading retailers have even eliminated dormancy and maintenance fees altogether.

Now in conjunction with these state laws, the recent federal Credit Card Act tightens the restrictions on dormancy, inactivity, and service fees with a particular emphasis on disclosure.

The Credit Card Act

The Credit Card Act applies to both closed-looped cards, cards that are honored by a single merchant or group of merchants (such as a chain of bookstores), and open-looped cards, cards issued by financial institutions (such as Visa or American Express) and can be redeemed at a variety of merchants who accept the brand. These parameters do not include loyalty reward or promotional program devices that are reloadable and not marketed as a gift card or gift certificate.

Under the Credit Card Act, dormancy, inactivity or service fees for a gift card cannot be imposed unless: 1) there is no activity on the card within the one-year period prior to the imposition of the fee; 2) only one such fee is given out every month; and 3) vendors clearly and conspicuously state the terms and details of the fee. Such conspicuous disclosure of fees imposed must be provided on the card and disclosed prior to purchase with a toll-free number and, if applicable, a Web site which a consumer can use to obtain fee information or replacement cards.

Furthermore, gift certificates, store gift cards, and general-use prepaid cards can no longer expire for at least 5 years from the date of purchase. If there is an expiration date, it must "include a disclosure alerting consumers to the difference between the [gift] certificate or card expiration date and the funds expiration date, if any, and [call out a notice] that the consumer may contact the issuer for a replacement card," according to the Code of Federal Regulations.

These changes will go into effect by federal mandate on August 22, 2010, just in time for the 2010 holiday season. The Credit Card Act will change the way retailers issue and administer gift cards. State laws differ, make sure you are in compliance with current or new gift cards programs.

JMBM has been defending retailers in complex gift certificate and gift card consumer class actions for more than a decade and we have watched the cases and legislation evolve over that time. We invite you to discuss how the Credit Card Act might affect your gift card program with us. ■

Martin H. Orlick is a transactional and trial partner in the Real Estate Department of Jeffer Mangels Butler & Marmaro's San Francisco office. He is a member of the American College of Real Estate Lawyers (ACREL) and has been a member of the International Council of Shopping Centers (ICSC) for over 20 years. He has defended gift certificate, consumer class actions, and more than 300 ADA cases for shopping center developers, banks, retailers, restaurants, hotel owners, wineries, public entities, parking companies, and other commercial businesses. He can be reached at 415.984.9667 or MOrlick@JMBM.com

EVENTS

THE JMBM CORPORATE COUNSEL ROUNDTABLE - YOU ARE INVITED

Once a month, the Corporate Department at Jeffer Mangels Butler & Marmaro LLP hosts an informative breakfast roundtable addressing current issues affecting the corporate world. There is no charge for in-house counsel to attend the MCLE approved Corporate Counsel Roundtable. Complimentary parking and breakfast is provided.

June 16, 2010 Roundtable: Practical Steps In-House Counsel Can Take To Protect Themselves From E-Discovery
This program will feature a roundtable discussion on the practical steps in-house counsel can take to prepare for, be ready to respond to, and minimize the impact of e-discovery demands. The discussion will be led by Bill Capps, Chair of JMBM's Corporate Department, Dan Sedor, Co-Chair of JMBM's Discovery Technology Group, and special guest Michael Pontrelli, Director of Applied Discovery, Inc. **If you would like to attend this roundtable, please contact Jessica Hekmatjah at 310.201.3567 or jh7@jmbm.com.**