



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 541

February 15, 2017

Whether a gift card to an online retailer is considered to be cash or a negotiable instrument for purposes of section 36.10(a)(6) of the Penal Code, and related questions. (AOR-619)

The Texas Ethics Commission has been asked whether a gift card to an online retail store is considered cash or a negotiable instrument for purposes of section 36.10(a)(6) of the Penal Code, and other related questions.

Background

The requestor of this opinion is an employee of a state agency that contracted with an information technology company (“IT company”) to provide paperless filing software to the agency. The IT company also provided to agency employees a training program for the filing software, and employees participated in the training during agency work hours. The requestor states that the IT company would like to give each agency employee who completed the training program a gift card to an online retailer with a value ranging from \$20 to \$60. The gift card could be used to purchase goods or services from the retailer in an amount equal to its value. The requestor asks us to assume that the IT company is not required to register as a lobbyist under Chapter 305 of the Government Code and is not regulated by the agency, and that the only law at issue in this opinion is section 36.10(a)(6) of the Penal Code.

Penal Code Restrictions

Section 36.08 of the Penal Code, in relevant part, prohibits a state employee who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government from accepting any benefit from a person the state employee knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his or her discretion. Penal Code

§ 36.08(d).¹ Under the requestor’s facts, the gift card would be offered to agency employees by the IT company that is interested in a contract with the agency. Therefore, we assume that the employees exercise discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government and that section 36.08(d) of the Penal Code prohibits the employees from accepting a benefit from the IT company.²

A “benefit” includes “anything reasonably regarded as pecuniary gain or pecuniary advantage.” *Id.* § 36.01(3). The gift card to an online retailer is a benefit. *See* Ethics Advisory Opinion Nos. 97 (1992) (an engraved clock worth \$50 is a benefit), 60 (1992) (a \$60 restaurant meal is a benefit). However, there is an exception to the prohibitions in section 36.08 of the Penal Code for “an item with a value of less than \$50, *excluding cash* or a negotiable instrument as described by Section 3.104, Business & Commerce Code.” *Id.* § 36.10(a)(6) (emphasis added).³ The issue in this opinion is whether the gift cards are “cash” for purposes of that exception. If the gift cards are considered “cash,” then the exception would not permit the agency employees to accept the gift cards.

Meaning of “Cash” in Section 36.10 of the Penal Code

The Penal Code does not define the term “cash,” and we are not aware of another Texas statute defining the term. However, in *Hardy v. State*, the Supreme Court of Texas examined the meaning of “cash” when considering whether a gift certificate to a retailer valued at five dollars was a “noncash merchandise prize” under section 47.01(4)(B) of the Penal Code.⁴ *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003). In *Hardy*, the court defined “cash” as either “ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)” or “money or its equivalent paid immediately or promptly after purchasing.” 102 S.W.3d at 131 (quoting Webster’s Third New Int’l Dictionary 346 (1961)) (internal quotations omitted). The court stated that the gift certificates were “an equivalent of money” redeemable for merchandise that “may be used in precisely the same manner as five-dollar bills.” *Id.* The court reasoned that the gift certificates did not qualify as “noncash merchandise prizes” because they operated “in the same manner as legal tender in a retail establishment.” *Id.* at

¹ *See also* § 36.09, Penal Code (a person may not offer a benefit to a public servant who he knows is prohibited by law from accepting it).

² The facts presented by the requestor do not implicate either the bribery or honoraria provisions in chapter 36 of the Penal Code. Penal Code §§ 36.02(a), 36.07. Thus, we consider only the application of the gift prohibitions in section 36.08 of the Penal Code to the requestor’s circumstances.

³ Section 36.10 of the Penal Code includes several additional exceptions to the benefit prohibitions in section 36.08. However, the requestor limits this opinion to section 36.10(a)(6), and we therefore do not address the possible application of other exceptions.

⁴ Section 47.01(4)(b) of the Penal Code provides an exception to the definition of a gambling device for certain machines that reward players “exclusively with noncash merchandise prizes, toys, or novelties.” Penal Code § 47.01(4)(B).

132. Thus, the court held that the gift certificates were rewards of “‘cash’ or its equivalent.” *Id.* See also Tex. Att’y Gen. Op. No. GA-0812 (2010) (concluding gift certificates redeemable only at bingo establishments are not noncash prizes because they are redeemable for merchandise that would otherwise cost money); Tex. Att’y Gen. Op. No. GA-0527 (2007) (concluding that a stored-value card is a money equivalent because the amount of value stored on the card equates to an amount or value that can be exchanged for merchandise).

Regarding the gift cards to the online retailer, the question is whether the gift cards are considered “cash” for purposes of section 36.10(a)(6) of the Penal Code. We note that the legislature did not define the term “cash,” but we think it is reasonable to interpret it in a manner consistent with the *Hardy* opinion. Accordingly, we think the term “cash” includes a gift card that operates in the same manner as legal tender in a retail establishment, including an online retailer, and that equates to an amount or value that can be exchanged for merchandise or services of an equivalent value that otherwise would have cost money. Thus, in our opinion, a gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code.⁵ Therefore, the state employees may not accept the gift cards offered by the IT company under that exception.

The requestor also asks whether a prepaid debit card is cash for purposes of section 36.10(a)(6) of the Penal Code. We do not see any material distinction between a prepaid debit card that can be used at a variety of retail establishments and a gift card that is limited to a specific retail establishment. Thus, a prepaid debit card is also cash for purposes of section 36.10(a)(6) of the Penal Code.⁶

SUMMARY

A prepaid debit card or gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code.

⁵ Because we conclude that a gift card is “cash” for purposes of section 36.10(a)(6) of the Penal Code, we do not address whether a gift card is a “negotiable instrument as described by Section 3.104, Business & Commerce Code.” *Id.* § 36.10(a)(6).

⁶ We conclude that a prepaid debit card or gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code, and we therefore do not need to address the requestor’s remaining questions.