



Bailey Cavalieri LLC  
ATTORNEYS AT LAW

# CLIENT ALERT

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## Gift Card Issuer Legislation Update August 2011

This month's Client Alert addresses recent federal legislative action relative to certain gift card issuers. On July 29, 2011, the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued its final rule (the "Rule") applicable to providers and sellers of "prepaid access." Gift card issuers that issue gift cards in denominations above \$2,000 may be subject to the requirements of the Rule.

### Purpose of the Rule

The overall purpose of the Rule is to establish a comprehensive regulatory scheme with respect to prepaid access due to the fact that technological advances have outpaced existing regulation. The Rule amends the Bank Secrecy Act ("BSA") regulations by imposing reporting, recordkeeping and transaction information requirements on both "providers" and "sellers" of prepaid access. Through the implementation of the Rule, FinCEN seeks to regulate providers of prepaid access to bring those entities in line with the reporting, recordkeeping and registration requirements of "money service businesses" in order to ensure that providers of prepaid access do not become vehicles for criminal enterprises to launder money and finance terrorist activities.

### Applicability of the Rule

The Rule generally applies to retailers and prepaid program administrators who issue gift cards above certain dollar thresholds, irrespective of the payment method used to load the funds on to the gift card (i.e. cash, credit or merchandise return). Specifically, the Rule applies to:

- Gift Card issuers that issue closed loop gift cards in amounts greater than \$2,000 to the same person in a single day ("Closed Loop Access"). "Closed Loop" gift cards are gift cards that are typically issued by retailers and may only be redeemed for goods or services at a single retailer or group of retailers who share common ownership;
- Gift Card issuers that issue open loop gift cards in amounts greater than \$1,000 to the same person in a single day if: (i) more than \$1,000 can be subsequently loaded on to the gift card, (ii) funds loaded on to the gift card may be transmitted internationally, (iii) funds loaded on the card may be transferred among users of the same prepaid access program, and (iv) additional funds may be loaded on to the card from non-depository sources ("Open Loop Access"). "Open Loop" gift cards are gift cards that are typically issued by a bank or credit card company and may be redeemed for goods or services from any merchant;

- Gift Card issuers that sell Closed Loop Access or Open Loop Access under a prepaid program that can be used before verification of customer identification; and
- Gift Card issuers that sell open or closed loop gift cards in denominations greater than \$10,000 to a single person in a single day.

**Registration, Reporting and Recordkeeping Requirements for Providers and Sellers of Prepaid Access**

Gift card issuers who issue Closed Loop Access, Open Loop Access as described above are considered “providers” or “sellers” of “prepaid access” and are subject to additional reporting requirements under the Rule. Irrespective of whether the gift card issuer is considered a “provider” or “seller” of prepaid access, the same registration, reporting and recordkeeping requirements apply. These requirements include:

- Establishment of Anti-Money Laundering Policies and Programs;
- Reporting of Suspicious Transactions;
- Registration with FinCEN; and
- Maintenance of Transaction Records for Five Years.

In addition, gift card issuers who process single gift card transactions of \$10,000 to a single person in a single day are also subject to additional BSA and IRS reporting requirements. We can provide you with additional detail about the specifics of these reporting, registration and recordkeeping requirements upon request.

**Analysis**

In drafting the Rule, FinCEN made a distinct effort to exclude most traditional retail gift card programs from the reporting and registration requirements of the Rule. The purpose of the dollar thresholds for Open Loop Access and Closed Loop Access is to provide traditional retailers with a window of opportunity to craft their gift card programs around the Rule’s exclusions because gift cards issued in lower dollar amounts present a much lower risk of being used by a criminal enterprise as a vehicle for money laundering or funding of terrorist activities. Accordingly, many traditional retailers should have little trouble adjusting their gift card programs to avoid being subject to the requirements of the Rule.

Nevertheless, retailers that continue to provide high-dollar prepaid access through their gift card programs (or in connection with merchandise returns) after the Rule’s effective date of September 27, 2011 will be required to register with FinCEN and comply with the other requirements of the Rule. We can assist you with establishing internal protocols for compliance with the Rule should that be necessary.

Please contact us if you have any specific questions or concerns regarding the applicability of the Rule to your company’s gift card program.

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