



Bailey Cavalieri LLC
ATTORNEYS AT LAW

CLIENT ALERT

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About the Authors:

Jamie Ryan is a member of the Board of Directors of Bailey Cavalieri LLC, where he focuses his practice on Corporate, Banking, Retail, and Unclaimed Property Law.

He can be reached at 614/229-3247, or at jamie.ryan@baileycavalieri.com

Jameel S. Turner is an attorney with Bailey Cavalieri LLC in the corporate and business department, where he focuses his practice on Corporate, Privacy and Unclaimed Property Law.

He can be reached at 614/229-3260, or at jameel.turner@baileycavalieri.com

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This month's Client Alert addresses updates and clarifications on two federal laws that impact our retail clients. First, this Alert summarizes recent clarification from the Financial Crimes Enforcement Network ("FinCEN") regarding the scope of FinCEN's Final Rule for Prepaid Access ("FinCEN Final Rule"). Second, this Alert provides a summary of recent amendments to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule ("MTOMR") that seek to clarify the scope of the MTOMR as it applies to Internet merchandise orders.

Clarification Regarding FinCEN Final Rule and Bulk Gift Card Sales

As we reported to you earlier this year, the FinCEN Final Rule took effect on September 27, 2011. The purpose of the FinCEN Final Rule is to bring gift card issuers and other issuers of various prepaid access devices under the scope of the Bank Secrecy Act, which requires providers of various money services to take appropriate measures to prevent their services from being used as avenues for money laundering. Subsequent guidance issued by FinCEN delayed the application and enforcement of most aspects of the FinCEN Final Rule until March 31, 2012. One purpose in delaying the enforcement of the Final Rule was so that FinCEN could entertain commentary from the retail industry regarding the FinCEN Final Rule's impact on gift card issuers and how those gift card issuers could tailor their gift card programs to avoid being subject to the FinCEN Final Rule's recordkeeping and reporting requirements.

Accordingly, over the course of the past few weeks, FinCEN has engaged in dialogue with gift card issuers and recently issued guidance clarifying the scope of the FinCEN Final Rule as it applies to retail gift card issuers in the context of "bulk sales." Typically, a bulk sale occurs when a gift card issuer contracts with another business for the purchase of a large volume of gift cards for resale. Under previous guidance issued by FinCEN, bulk sales could be interpreted to fall under the scope of the FinCEN Final Rule because any sale of prepaid access "in excess of \$10,000 to any one person on any one day" triggered the reporting and registration requirements of the FinCEN Final Rule.

On October 27, 2011, FinCEN issued new guidance specifically excluding "bulk sales between businesses" from the scope of the FinCEN Final Rule. According to FinCEN, "distribution of prepaid access products to other businesses for further distribution or sale to end users/consumers by those other businesses is not the type of activity intended to be covered by the [FinCEN Final] Rule. This type of activity would not subject a business to the [FinCEN Final Rule] regardless of whether the activity exceeded \$10,000 to one person in one day. The definition of 'seller' is intended to address sales to the end user/consumer of the prepaid access product, not to apply to businesses in the distribution channels that move the prepaid access products to the market."

Consequently, while the FinCEN Final Rule does not apply to retail gift card issuers that make bulk sales to other businesses, the FinCEN Final Rule applies to the bulk purchaser if that purchaser will distribute the gift cards to consumers. Thus, it is incumbent upon gift card issuers making bulk sales to ensure that the bulk purchasers are aware of their obligations under the FinCEN Final Rule. We have advised our retail clients making bulk sales to include representations and warranties regarding knowledge of the FinCEN Final Rule's regulations in their contracts with bulk purchasers in order to cut off any potential liability of the bulk seller; please contact us if you need proposed language for your bulk sales contracts. Nevertheless, the fact that FinCEN has clarified that bulk sales between businesses are not intended to be covered by the FinCEN Final Rule is an important development for retailers.

Beware of Non-Depository Prepaid Access "Reloads"

Another issue addressed by FinCEN's recent guidance regarding the FinCEN Final Rule is the issue of "non-depository reloads." Essentially, these are reloads of prepaid access that take place anywhere other than a depository institution, such as a bank. Entities that provide reloads of prepaid access are subject to the FinCEN Final Rule's regulations if they: (i) reload funds onto prepaid access that is part of a prepaid program not subject to initial customer verification, or (ii) provides reloads in excess of \$10,000 to any one person in one day and the entity does not have policies and procedures in place reasonably adapted to prevent such reloading for any person on any given day.

What does this mean? Practically speaking, this means that retailers providing reloads must tailor their reloading programs to ensure that: (i) no one person on any one day can reload more than \$10,000 of prepaid access that is not part of a prepaid access program, (ii) no one person on any one day can reload more than \$10,000 of prepaid access that is part of a prepaid access program and the customer is subject to customer verification procedures after the sale, and (iii) the entities must have policies and procedures in place reasonably adapted to prevent the reloading of \$10,000 for any one person on any given day.

In summary, retail gift card issuers must take appropriate measures to ensure that sales of gift cards to individuals must not exceed \$10,000 in any one day or the gift card issuer could be subject to the registration and reporting requirements of the FinCEN Final Rule. Retailers can avoid many issues if they simply prohibit reloading of gift cards.

Amendments to the Mail or Telephone Order Merchandise Rule

Effective September 30, 2011, the Federal Trade Commission (FTC) published the amended MTOMR. The rule, issued in 1975, requires that marketers who solicit buyers to order merchandise through the mail or telephone must have a reasonable basis to expect that they can ship ordered merchandise within the time they advertise, or, if no time frame is specified, within 30 days. The MTOMR also requires that, when a seller cannot ship within the promised time, the seller must obtain the buyer's consent to a delay in shipping or refund payment for the unshipped merchandise.

The initial amendments, effective September 30, merely reorganized the MTOMR by alphabetizing the definitions and moving them to the beginning of the MTOMR. Also on September 30, 2011, the FTC announced a notice of proposed rulemaking for the MTOMR aimed at: (i) clarifying that the MTOMR covers all Internet merchandise orders regardless of whether the buyer accesses the Internet through a telephone line, (ii) allowing sellers to provide refunds and refund notices to buyers by any means at least as fast as and reliable as first class mail, (iii) clarify sellers' obligations under the MTOMR for sales made using payment methods not specifically enumerated in the MTOMR, and (iv) requiring sellers to process any third party credit card refund within seven working days of a buyer's right to a refund vesting.

We believe item (ii) above, permitting the use of alternate methods of providing notices to buyers, would be of particular import to our retail clients. The amendment permits notices to be delivered by electronic mail instead of U.S. Mail, which could mean big savings for retailers subject to the MTOMR. At the time the FTC issues the proposed rules, retailers subject to the MTOMR will have the opportunity to comment and provide feedback. We recommend that our

retail clients contact their lobbyist and make every effort to provide positive feedback to the FTC regarding the proposed rules.

For more information, please contact:

Jamie Ryan, Esq. at Jamie.Ryan@baileycavalieri.com or (614) 229-3247 or

Jameel Turner, Esq. at Jameel.Turner@baileycavalieri.com or (614) 229-3260.