

December 22, 2011

Dear Retail Clients and Friends,

On July 29, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued the "Prepaid Access Final Rule" (the Final Rule), which applied anti-money-laundering requirements to certain prepaid cards, including some gift cards. More recently, FinCEN issued guidance about the new rule in the form of a collection of frequently asked questions. The new rule takes full effect on **March 31, 2012**, so all retailers should take steps now to ensure they are in compliance with the rule's requirements by that date. This edition of ***Morgan Lewis Retail Did You Know?*** describes the Final Rule and its application to retailers' gift card programs.

Background

The Final Rule was designed to eliminate a potential loophole in anti-money-laundering restrictions by requiring "providers" and "sellers" of certain prepaid access cards to develop and maintain an anti-money-laundering program.

The Final Rule

The Final Rule applies to both "providers" and "sellers" of prepaid cards. Unless an exception applies, the Final Rule requires retailers to implement internal procedures designed to minimize risks of money laundering, including requirements for (a) verifying customer identification, (b) filing necessary reports, (c) creating and retaining records, and (d) responding to law enforcement requests.

FinCEN has indicated that retailers with closed-loop gift card programs could structure their programs to avoid being "providers." In particular, the Final Rule exempted closed-loop gift cards sold in or reloaded with amounts of less than \$2,000. Moreover, retailers can avoid being considered "sellers" under the Final Rule if they take precautions to avoid sales of gift cards worth more than \$10,000 to any one person in the same day.

This latter requirement generated some concern among retailers since many retailers make bulk sales of gift cards to third-party vendors. The language of the Final Rule suggested that such sales would need to be limited to \$10,000 per day, or the retailers would be subject to the requirements and have to implement an anti-money-laundering program.

However, FinCEN's recently issued guidance makes it clear that the requirement does not apply to the sale of gift cards to other businesses for distribution or sale to end users/consumers by those businesses. In those circumstances, the risk of gift cards being used for money-laundering purposes is considered sufficiently low.

The Final Rule was initially set to go into effect on September 27, 2011, but industry representatives had expressed concerns that an IT lock-down on financial systems surrounding the back-to-school and holiday season would prevent making changes necessary to comply with or exempt themselves from the law. Responding to those concerns, FinCEN announced that it would not take compliance action against "sellers" or "providers" until March 31, 2012.

Practical Advice

Retailers should review their gift card programs to ensure they have the necessary limitations in place to avoid the need to develop anti-money-laundering programs. To accomplish this, retailers would need to limit their gift cards to values of \$2,000 or less, and prevent sales of gift cards worth more than \$10,000 to any one person in the same day.

How We Can Help

Morgan Lewis regularly advises clients regarding their gift card programs and handling gift card–related litigation. We can assist our clients with an efficient review of their gift card programs, recommending changes necessary to comply with the Final Rule. We apply our experience and up-to-date knowledge of retail industry best practices.

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis attorney or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 22 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

About *Morgan Lewis Retail Did You Know?* This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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