



The Commonwealth of Massachusetts

Office of the Commissioner of Banks

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April 26, 2005

BETH LINDSTROM
DIRECTOR
OFFICE OF CONSUMER AFFAIRS AND
BUSINESS REGULATION

Grayson J. Derrick, Esq.
Baird Holm
Attorneys at Law
1500 Woodmen Tower
Omaha, Nebraska 68102-2068

Dear Mr. Derrick:

This letter is in response to your correspondence of December 20, 2004 to the Division of Banks (the "Division") relative to the laws in the Commonwealth of Massachusetts governing bank-issued, prepaid stored value products.

Your letter states that you represent a marketer that desires to offer bank-issued, prepaid stored value products ("Prepaid Cards") through retail channels in the Commonwealth. Through a contractual relationship with a financial institution chartered under state law and FDIC insured, your client will contract with various retailers throughout Massachusetts to offer Prepaid Cards to consumers. The card to be offered, known as a general purpose card, is a Visa or MasterCard-branded reloadable Prepaid Card, which can be used anywhere Visa or MasterCard debit cards are accepted. The general purpose card, which is issued through a financial institution, may be acquired and value may be loaded onto the Prepaid Card at retailers from coast to coast. When a consumer desires to acquire a Prepaid Card, the consumer purchases an activation card packet at a retail location. The consumer pays the retailer their purchase price for the Prepaid Card, which is established by the retailer. In addition, the consumer pays the retailer the amount that the consumer wants to load onto the Prepaid Card. Once the purchase price and initial value load are paid to the retailer, the retailer transmits an electronic message to either the financial institution or its processor indicating that an activation card packet was sold and the amount of the initial value load. Following purchase the consumer must contact the marketer in order to complete the activation process. The consumer must agree to the terms and conditions of the card prior to the activation of the card. The contractual relationship regarding the issuance of the Prepaid Card is between the financial institution and the consumer. The program marketer typically provides activation, customer service and marketing services for the financial institution issuer and established the retail network for the sale of the cards. Other information was provided in your correspondence.

The cards are reloadable and if the consumer elects to place additional funds onto a Prepaid Card, the consumer may accomplish a value reload at a location of the retailer that sold the activation card. As the Prepaid Cards are used to make purchases, the issuer uses the funds in the funding account to effectuate settlement, through the Visa or MasterCard interchange settlement system, to the merchants that accepted the Prepaid Card. At no time does the program marketer have any right, title or interest in or to the funds representing value loans on the Prepaid Cards, nor does the program marketer have the ability to access funds held in the funding account.



You inquire as to whether a license would be required for your client, the marketer, under Section 4 of G.L. c. 167F governing the business of selling, issuing or registering checks or money orders. You also inquire as to the applicability of the Division's foreign money transmitter licensing scheme where your client does not transmit money to foreign countries.

The Division has not taken the position that the issuance of stored value cards, bank issued or otherwise, is considered to be the business of selling, issuing or registering checks or money orders and thus an activity requiring a license under the provisions of G.L. c. 167F, §4. The Commonwealth's money transmittal statute, G. L. c. 169, applies to persons receiving deposits of money for the purpose of transmitting money or equivalents to foreign countries. According to your correspondence, your client will not be engaged in transmitting money to foreign countries. Accordingly, the foreign money transmitter licensing requirements of said chapter 169 are not applicable.

As you may be aware, Massachusetts has a gift certificate law applicable to instruments within the definition of gift certificate. You should review G.L. c. 200A §5D and the following definition for applicability as the Prepaid Cards may be subject to the gift certificate law. G.L. chapter 255D, section 1 defines a "gift certificate" as follows:

a writing identified as a gift certificate purchased by a buyer for use by a person other than the buyer not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods or services supplied by the seller. A gift certificate shall include an electronic card with a banked dollar value, a merchandise credit, a certificate where the issuer has received payment for the full face value for the future purchase or delivery of goods or services and any other medium that evidences the giving of consideration in exchange for the right to redeem the certificate,

Additionally, please be advised that the Massachusetts Attorney General filed suit against Simons Mall in November 2004 for selling gift cards allegedly in violation of the Commonwealth's Consumer Protection Law and the Gift Certificate Law. The Division is also aware of other such actions pending in other jurisdictions.

Historically, you may be aware that the Federal Reserve Board has considered certain regulatory action in this area as evidenced by its 1996 proposed amendments to Regulation E¹, which implements the Electronic Fund Transfer Act². Included among those amendments were provisions under which many stored-value products would be exempt from Regulation E, and others would be covered under limited requirements.³ No final action was taken on the proposed amendments. At that time Congress directed the Board to conduct a study on whether application of the provisions of the regulation would adversely affect the cost, development, and operation of stored-value products. The report concluded that full Regulation E coverage of stored-value products would likely impose substantial operating and opportunity costs of compliance. The Board noted that given the limited experience at that time it was difficult to predict whether the benefits to consumers from any particular provision of Regulation E would outweigh the corresponding costs of compliance.⁴ As noted above, the 1996 proposal was never finalized.

¹ 12 C.F.R. § 205 (1996).

² 15 U.S.C. § 1693 (1996).

³ 61 Fed. Reg. 19,696 (1996).

⁴ Report to the Congress of the Application of the Electronic Fund Transfer Act to Electronic Stored-Value Products (March 1997).

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Additionally, certain amendments were proposed to Federal Regulation E in November of 2004 which, in part, addressed the increased usage of payroll cards and proposed revisions to Regulation E to include payroll cards, like electronic benefit transactions or "EBT" products, within the coverage of Regulation E. To the Division's knowledge, this proposal has not been finalized.

In summary, the issuance of stored value cards does not fall within the licensing requirements of G.L. c. 167F, §4 requiring the licensing for selling, issuing, or registering checks or money orders. The Commonwealth's statute governing gift certificates may be applicable and should be reviewed.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

A handwritten signature in dark ink, appearing to read "Joseph A. Leonard, Jr.", written in a cursive style.

Joseph A. Leonard, Jr.
Deputy Commissioner of Banks
And General Counsel