



Navigating Through Prepaid Regulation & Legislation: Payments Regulations

Presented at: The Prepaid Press Expo 2012

Speaker Bio

Allison D. Rule is a Senior Attorney at The *CommLaw* Group and co-chairs the firm's Communications Taxes and Fees Practice. Ms. Rule specializes in federal and state telecom and technology matters, with a concentration in stored value/prepaid, as well as communications taxes, Universal Service Fund (USF), E-911 and regulatory fee issues. As Chair of the firm's Litigation and Dispute Resolution practice, Ms. Rule also maintains an active administrative and civil litigation docket, including representing taxpayers in sales, use, excise and other tax audit proceedings in a variety of jurisdictions.

About the Firm. The *CommLaw* Group is unique among its peers, offering clients a scope of capabilities rarely found in boutique law firms. With a headcount rivaling the Telecom Practice Groups of most major law firms, we boast a team of attorneys, paraprofessionals and consultants possessing the skills, focus and resources necessary to serve the communications law needs of Fortune 100 companies, all without sacrificing the range of services and affordability which makes us the "go to" firm for new entrants and service providers of all sizes.

In association with The *Compliance* Group, which specializes in fixed-fee licensing & compliance services tailored to the communications industry, The *CommLaw* Group offers businesses the "[Full Spectrum](#)" of legal, regulatory, administrative and consultative services.

State Escheat Laws:

A Sign of the Times

- States across the country continue to face mounting budget short falls
- The budget crisis has resulted in two major impacts with regard to state unclaimed property (“escheat”) laws
 - An expansion of the property subject to escheat laws
 - More aggressive pursuit of unclaimed property audits
 - Use of contingent-fee auditors
 - Use of aggressive estimation methodologies

State Escheat Laws:

The Basics

- What do escheat laws require?
 - After property has been “abandoned” for a number of years, the “holder” of the property must pay to the state funds “abandoned” by the “owner.”
- What is the purpose of escheat laws?
 - To provide for the safekeeping of abandoned property and its return to its owner.

State Escheat Laws:

What Property Is Covered?

- Historically used to claim both real and intangible property
- Today, escheatment applies mainly to intangible personal property to allow for greater potential revenue generation
 - For example, in Delaware, escheatment revenue is the third largest source of revenue in the state.

State Escheat Laws:

What Property Is Covered?

- “[P]ersonal property, ... of every kind or description, tangible or intangible, in the possession or under the control of a holder, as hereinafter defined, and includes, but not by way of limitation,... (iv) credits, including wages and other allowances for services earned or accrued...”

Del. Code Ann. tit. 12, § 1198(11)

- "Property" includes, but is not limited to, money, rights to claim, refunds or rebates, postal savings deposits, bonds, notes, certificates, policies of insurance, other instruments of value, choses in action, obligations whether written or unwritten, and any thing of value of any nature whatsoever.

N.Y. ABP. LAW § 1214

State Escheat Laws:

What Property Is Covered?

- Most state escheatment laws do not specifically address electronic forms of commerce.
- Enforcement of escheatment laws against prepaid providers is dependent on decades old common law.
- States often treat prepaid products similar to traditional banking mechanisms that are fixed within a certain institution and location.
 - Place of incorporation becomes very significant for prepaid providers with transitory or unregistered customers.

State Escheat Laws: *Which State Gets Paid?*

The U.S. Supreme Court has stated that

- (a) the State of the last known address of the owner of intangible property has the primary right to take custody, and
- (b) if there is no last known address of the owner, or that State does not assert a right to the abandoned intangible property, the State of incorporation of the holder has a secondary right to take custody, but
- (c) Congress may, by legislation, change these two rules

Texas v. New Jersey, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972);
Delaware v. New York, 507 U.S. 490 (1992)

State Escheat Laws:

New Jersey Cuts in Line

- 2010 New Jersey Legislation
 - Applied unclaimed property law to gift cards
 - Two-year abandonment period
 - Created “Place of Purchase Presumption”
 - Zip code requirement
- SB1928
 - Signed into law June 2012
 - Applies to gift cards
 - Five-year abandonment period
 - Moratorium on zip code requirement

Pending Federal Legislation and Regulation: *Prepaid Card Consumer Protection Act*

- Status of legislation
 - Introduced into the 112th Congress by Sen. Robert “Bob” Menéndez [D-NJ] on December 17, 2011
 - Waiting to be considered by the Committee
- Purpose
 - Eliminate some of the most egregious hidden fees and let consumers know what the fees are before they buy the cards.
 - Let consumers get their money back if the cards are lost, stolen, or the company goes bankrupt.

Pending Federal Legislation and Regulation: *Prepaid Card Consumer Protection Act*

Key provisions

- Full **disclosure** is required of all fees before the consumer buys the card, including a wallet-sized summary of all fees and a toll-free telephone number.
- Regulation E protection against **loss or theft**.
- **FDIC insurance** to protect consumers' money if the card company goes bankrupt.
- **Dormant account** provisions requiring a prepaid card account be closed and remaining funds returned to the consumer after twelve months of inactivity.
- **Disclosures** must be both clear and conspicuous and “easily understood.”
- **Periodic statement.** Requires a number of new conditions in order to be relieved of the obligation to provide consumers with written periodic statements.

Pending Federal Legislation and Regulation: *Prepaid Card Consumer Protection Act*

Prohibited Fees

- ✓ Annual fees
- ✓ Dormancy fees
- ✓ Overdraft fees
- ✓ Usage fees,
- ✓ Declined transaction
- ✓ In-network ATM
- ✓ Balance inquiry or to access transaction information
- ✓ Customer service inquiry
- ✓ Account closing fees,
- ✓ Any fee prohibited by applicable state law
- ✓ Any fee that would result in a negative card balance.

Permitted Fees

- ✓ \$5 or less or the first replacement card
- ✓ Expedited delivery of replacements
- ✓ Periodic fees not more than the monthly fee
- ✓ Reload fee (if the issuer provides a “reasonable alternative” non-fee method for adding value to the account)
- ✓ Transfers to an account not associated with the card
- ✓ Bill payment, certain out-of-network ATM fees,
- ✓ Activation, initiation or enrollment fee.

Pending Federal Legislation and Regulation: *Prepaid Card Consumer Protection Act*

Possible Impact On Prepaid Industry

- More litigation (from implementing the new concept of “easily understood”)
- Higher priced cards
- Fewer customers (if buying a prepaid card becomes too time consuming or complex)
- Unanticipated effects (including from regulations yet to be implemented)

Pending Federal Legislation and Regulation: *FTC Privacy Report*

- FTC issued preliminary staff report in December 2010 on privacy.
- FTC issued final report in 2011, approved by a 3-1 vote.
- The Final Report :
 - Sets forth best practices for businesses
 - Provides recommendations for Congress

Pending Federal Legislation and Regulation: *FTC Privacy Report*

Key parts of the Report for Business

- **Privacy Protections** at every stage, including reasonable security for consumer data, limited collection and retention of data, and procedures for data accuracy.
- Companies should give consumers the option to decide what information is shared about them, and with whom, including a **Do-Not-Track** mechanism.
- **Data Brokers** who compile consumer data for marketing purposes should create a centralized website where consumers get various information.
- Companies should provide consumers with **choice** about how their data is used, depending on the extent to which the practice is consistent with the context of the transaction or the consumer's existing relationship.

Pending Federal Legislation and Regulation: *FTC Privacy Report*

Recommendations for Congress

- **Do-Not-Track.** Supports legislation to force companies to offer consumers a similar option to stop tracking if companies are not able to get the technology launched by the end of the year.
 - Bills introduced in the House and the Senate specifically address the creation of Do Not Track mechanisms.
- **Data security and breach notification.** To help deter violations, such legislation should authorize the Commission to seek civil penalties.

Pending Federal Legislation and Regulation: *FTC Privacy Report*

Key Provisions for Prepaid Industry (1 of 3)

- The framework should not apply to companies that collect and do not transfer only non-sensitive data from fewer than 5,000 consumers a year.
- Data is not "reasonably linked" to the extent that a company (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data.
- To the extent that strong privacy codes are developed, when companies adhere to these codes, the FTC will take that into account in its law enforcement efforts.
- There are five categories of "commonly accepted" information collection and use practices for which companies need not provide consumers with choice: product fulfillment, internal operations, fraud prevention, legal compliance and public purpose, and first-party marketing.

Pending Federal Legislation and Regulation: *FTC Privacy Report*

Key Provisions for Prepaid Industry (2 of 3)

- Retention periods, however, can be flexible and scaled according to the type of relationship and use of the data; for example, there may be legitimate reasons for certain companies that have a direct relationship with customers to retain some data for an extended period of time.
- In determining when to dispose of data, as well as limitations on collection described above, companies should also take into account the nature of the data they collect.
- It takes a flexible, technology-neutral approach.
- Commission calls on industry sectors to come together to develop standard formats and terminology for privacy statements applicable to their particular industries.

Pending Federal Legislation and Regulation: *FTC Privacy Report*

Key Provisions for Prepaid Industry (3 of 3)

- Companies do not need to provide choice before collecting and using consumers' data for commonly accepted practices, such as product fulfillment.
- Affiliates are third parties, and a consumer choice mechanism is necessary unless the affiliate relationship is clear to consumers.
- For practices requiring choice, companies should offer the choice at a time and in a context in which the consumer is making a decision about his or her data. Affirmative express consent should be obtained before (1) using consumer data in a materially different manner than claimed when the data was collected; or (2) collecting sensitive data for certain purposes.

Existing Statutes and Regulations: *Bank Secrecy Act*

What is the Bank Secrecy Act?

Under the Bank Secrecy Act (BSA), sellers or redeemers of stored value are covered under the definition of the term MSBs.

MSBs are generally required to:

- (1) Establish written anti-money laundering (AML) programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities;
- (2) File Currency Transaction Reports and Suspicious Activity Reports; and
- (3) Maintain certain records, including those relating to the purchase of certain monetary instruments with currency, transactions by currency dealers or exchangers, and certain transmittals of funds.

Existing Statutes and Regulations: *Bank Secrecy Act*

How has the BSA evolved?

- BSA was amended by The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) in 2009.
- A Final Rule was issued in 2011 for “implementing the Bank Secrecy Act, regarding the sale, issuance, redemption, or international transport of stored value, including stored value cards.”

Existing Statutes and Regulations:

The Card Act

What is The Card Act?

- Extends the law beyond physical prepaid and gift cards to electronic codes meeting the other requirements of the Act to credit card providers and restricts fees applied to gift certificates, store gift cards and general-use prepaid cards.
- The law excludes paper (i.e., non-electronic) gift certificates, prepaid telephone or calling cards, promotional, loyalty and award cards, and certain reloadable cards not marketed as gift cards. Specifically, it extends to “electronic promises” represented by a card, code or other device.

Existing Statutes and Regulations:

The Card Act

The Final Rule amends the BSA's regulations with respect to MSB (1 of 2)

- Replaced “stored value” with “prepaid access” to more aptly describe the underlying activity, without narrowing or broadening the meaning of the term.
- Deleted the terms “issuer” and “redeemer” of stored value.
- Clarified that prepaid access is a financial service that provides consumers with access to the financial system, and as such, should be subject to an appropriate level of regulation to prevent misuse.
- Imposed suspicious activity reporting, customer information and transaction information recordkeeping requirements on both providers and sellers of prepaid access.
- Adopted a targeted approach to regulating sellers of prepaid access products, focusing on the sale of prepaid access products whose inherent features or high dollar amounts pose heightened money laundering risks.

Existing Statutes and Regulations:

The Card Act

The Final Rule Amends the BSA's regulation of MSBs (2 of 2)

- While sellers are not required to register with FinCEN (just as no MSB that operates solely as an agent for another MSB is required to register), they must maintain an AML program if (1) the prepaid access product offered is covered by the Final Rule and can be used without a later activation process that includes customer identification or (2) if the sold prepaid access products (regardless of whether offered under a prepaid program) provide a portal to funds that exceed \$10,000 to any person during any one day.
- Exempts closed loop prepaid access products sold in amounts of \$2,000 or less.
- Excludes prepaid access used to pay government benefits and pre-tax flexible spending for health and dependent care funded prepaid access programs.

Existing Statutes and Regulations:

The Card Act

How is a provider or seller of phone cards subject to the Rule?

- There is no specific exclusion from the Rule for phone cards.
- A provider or seller of phone cards usable solely to obtain phone service is providing or selling closed loop prepaid access.
- A provider of closed loop prepaid access is not a prepaid program provider unless the amount of the closed loop prepaid access associated with any one prepaid access device exceeds \$2,000. The ability to use the device internationally does not change this analysis for closed loop prepaid access.
- Seller of phone cards that are usable solely to obtain phone service is a seller of prepaid access if it both sells in excess of \$10,000 in phone cards to any person on any given day, and does not have policies and procedures reasonably adapted to prevent such sales to any one person on any one day. If so, it is deemed an agent MSB and does not have any registration requirements.

Existing Statutes and Regulations:

The Card Act

What types of prepaid access arrangements are covered under the Rule?

- A “prepaid program” is an arrangement of one or more persons acting together to provide prepaid access but excludes certain low-risk prepaid access arrangements.
- Three types of arrangements are excluded from the definition of a prepaid program:
 - Closed loop prepaid access to funds not to exceed \$2,000 maximum value on any day;
 - Prepaid access solely to funds provided by a government agency; or
 - Prepaid access solely to funds from certain pre-tax flexible spending arrangements for health care or dependent care expenses, or from Health Reimbursement Arrangements for health care expenses.
- Open loop prepaid access that does not exceed \$1,000 maximum value on any day, and prepaid access to employment benefits, incentives, wages or salaries (“payroll”), are not prepaid programs subject to BSA regulatory requirements so long as the prepaid access cannot (1) be used internationally, (2) allow transfers of value from person to person within the arrangement, or (3) be reloaded from a non-depository source.

Existing Statutes and Regulations:

The Card Act

Who is a provider of prepaid access?

- The provider of prepaid access for a prepaid program is the participant in that prepaid program who registers with FinCEN. Determination of which participant should register is a matter left to the participants. It is presumed that the participant registering as the provider of prepaid access has agreed to perform all of the duties required for providers of prepaid access.
- If none of the participants in a prepaid program registers with FinCEN as the provider of prepaid access for that program, the provider of prepaid access is the participant in the program with principal oversight and control over the program.
- Businesses are not deemed “sellers” under the Rule for distributing prepaid access to other businesses.
- An arrangement that provides reloadable temporary prepaid access devices is not a “prepaid program.”

Existing Statutes and Regulations:

The Card Act

Preemption

- The statutes do not preempt state laws that require greater protection for consumers. The legislation sets a baseline minimum for general-use prepaid, gift card and gift certificate issuers and merchants.
- Those states that currently impose more exacting requirements will remain unaffected by the new laws.
- For example, California and Connecticut prohibit any expiration date upon gift cards. Because the federal law does not preempt this requirement, if you are issuing cards to California or Connecticut consumers, you may not include an expiration date. Similarly, California allows only dormancy fees on gift cards, proscribing any other fees.
- Likewise, Connecticut prohibits gift card service fees. Hawaii also prohibits service fees. Some state laws will become obsolete. For example, CARD's five-year minimum preempts the Arkansas and New Mexico laws which require that an expiration date be set a minimum of two years after issuance or sale of a gift card.

Existing Statutes and Regulations: *Office of Foreign Assets Control*

Overview

- OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against entities such as targeted foreign countries, terrorists, and international narcotics traffickers.
- OFAC has been delegated responsibility by the Secretary of the Treasury for developing, promulgating, and administering U.S. sanctions programs.
- It blocks accounts and other property of specified countries, entities, and individuals and rejects unlicensed trade and financial transactions with specified countries, entities, and individuals.
- All U.S. persons, including U.S. banks, bank holding companies, and nonbank subsidiaries, must comply with OFAC's regulations.

Existing Statutes and Regulations:

Regulation E

Regulation E: Electronic Fund Transfers

- Regulation E provides a basic framework that establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer systems such as automated teller machine transfers, telephone bill-payment services, point-of-sale (POS) terminal transfers in stores, and preauthorized transfers from or to a consumer's account (such as direct deposit and social security payments).
- The term "electronic fund transfer" (EFT) generally refers to a transaction initiated through an electronic terminal, telephone, computer, or magnetic tape that instructs a financial institution either to credit or to debit a consumer's asset account.



WWW.COMMLAWGROUP.COM