

May 13, 2005

Re: Gift Cards Issued by Retail Stores

Dear \_\_\_\_\_ :

This is in response to your firm's letter to the Department of Banking (the "Department") in which you request the Department's position regarding the applicability of the Check Casher Licensing Act ("CCLA"), 63 P.S. § 2301 *et seq.*, the Money Transmitter Act ("MTA"), 7 P.S. § 6101 *et seq.*, or any other statute under the Department's jurisdiction to your client's gift card program.

*Factual Background*

You indicate in your letter that your client, a national retail store (the "Retailer"), is interested in offering gift cards to consumers nationwide. The gift card program (the "Program") is incidental to the Retailer's primary business of selling merchandise. The Program will operate in a "closed system," meaning that only the Retailer will issue and redeem the gift cards. The Program also contemplates that in many circumstances, the purchaser of the gift card will give the card to a third party as a gift. Consumers with Program gift cards will not be able to use the gift cards at any stores other than those owned and operated by the Retailer. In addition, the Retailer will offer the gift cards to consumers directly; no bank or other third party will be involved in the transaction or have access to any of the program funds. There are no expiration dates, dormancy fees or transaction costs associated with the Program.

You further indicate that, pursuant to state law considerations in certain jurisdictions, the Program will permit consumers to redeem their gift cards for cash. While the intent and strong preference of the Retailer is to have consumers redeem the gift card in exchange for store merchandise, certain state laws, combined with the imperative of having a uniform national program, compel the Retailer to offer cash redemptions of gift cards in all states including Pennsylvania.

*Legal Analysis*

Section 301(a) of the CCLA states that "[n]o person or business entity shall engage in the business of cashing checks for a fee without first obtaining a license under this act for each fixed location or mobile unit." 63 P.S. § 2311(a). A "check" is defined in Section 103 of the CCLA as "[a] type of negotiable

instrument as defined in 13 Pa.C.S. § 3104(f), (g) and (h) (relating to negotiable instrument) and domestic postal money orders.” 63 P.S. § 2303. It is the Department’s determination that the gift cards that the Retailer offers through the Program are not “checks” as that term is defined in Section 103 of the CCLA because the gift cards are not domestic postal money orders and are not drawn on a depository institution, thus failing to qualify as “checks” per the definition in 13 Pa.C.S. § 3104(f). Therefore, since the conduct of the Program in Pennsylvania does not involve the cashing of checks, the Retailer is not required to obtain a license under the CCLA in order to conduct the Program in Pennsylvania.

In regard to the MTA, Section 2 of that act states that:

[n]o person shall engage in the business of transmitting money *by means of a transmittal instrument* for a fee or other consideration without first having obtained a license from the Department of Banking nor shall any person engage in such business as an agent except as an agent of a person licensed or exempted under this act.

7 P.S. § 6102 (emphasis added). A “transmittal instrument” is defined in Section 1 of the MTA as “any check, draft, money order, personal money order or method for the payment of money or transmittal of credit, *other than a merchandise gift certificate sold in the regular course of business by a vendor of personal property or services.*” 7 P.S. § 6101 (emphasis added). It is the Department’s position that the gift cards issued under the Program are analogous to “merchandise gift certificates sold in the regular course of business by a vendor of personal property or services,” which are specifically excepted from the definition of “transmittal instrument” in Section 1 of the MTA. Therefore, the Retailer is not “transmitting money by means of a transmittal instrument” within the meaning of Section 2 of the MTA, and is not required to obtain a license under the MTA in order to conduct the Program in Pennsylvania.

Finally, based upon the facts as stated in this letter, it is the position of the Department that the Retailer is not accepting deposits from consumers as part of the Program, because the Retailer is prepaid through the Retailer’s sale of cards to consumers, under which sale the ownership of consumer funds passes from the consumers to the Retailer.<sup>1</sup> Additionally, based upon the inapplicability of the MTA to the conduct of the Program as addressed above, the Department will not view the Retailer’s conduct of the Program as constituting money transmission activity. Therefore, it is the position of the Department that the Retailer is not engaging in the “business of receiving money for deposit or transmission” within the meaning of Section 105(a) of the Banking Code of 1965, 7 P.S. § 105(a), by its conduct of the Program in Pennsylvania.

Please be advised that this letter provides the Department’s position on the applicability of the laws under the Department’s jurisdiction to the conduct of the Program, and does not address any other Federal or Pennsylvania law that is outside the Department’s jurisdiction that may be applicable to the Program or the Retailer’s conduct of the Program in Pennsylvania.

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<sup>1</sup> This view is consistent with that of the Federal Deposit Insurance Corporation (“FDIC”), which does not view the funds underlying gift cards offered by retailers in a “closed system” such as the Program as insurable deposits of the consumer cardholder. *See* 69 Fed. Reg. 20558 (April 16, 2004).

May 13, 2005  
Page 3

The Department's analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department's position. This letter has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

Please do not hesitate to contact me if you have any further questions regarding this matter.

Sincerely,

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Deputy Chief Counsel

cc: Timothy J. Blase  
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