DORNBUSH SCHAEFFER STRONGIN & VENAGLIA, LLP

FALL 2012

NEWSLETTER

To our clients and colleagues:

Welcome. As the summer winds down and fall approaches, we at Dornbush Schaeffer Strongin & Venaglia are gearing up for a busy season. We continue to provide the best possible services for all of our clients. Our attorneys have remained active throughout the summer, working closely with our clients to develop creative, cost effective solutions to the broad range of issues that continue to arise.

The present issue of the DSSV newsletter offers articles on a variety of topics. A court in the Southern District of New York recently ruled that the expansion of whistleblower protections contained in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, providing remedies to employees of subsidiaries of public companies, applies retroactively to the whistleblower provisions in the earlier Sarbanes-Oxley Act. Learn what this means for businesses in "Dodd-Frank Whistleblower Protections Ruled to Apply Retroactively."

Consumers and businesses face a growing body of laws and regulations related to gift card and discount voucher programs. Read more in this issue about new state and federal legal developments in this arena.

Recent decisions by the United States District Court for the Southern District of New York provide further guidance in the complex and developing area of electronic discovery in litigation. Read more inside about these rulings on "predictive coding", and their effects on companies and lawyers as they search for and produce electronically stored information in the course of litigation.

All of us at DSSV hope that you had a successful and relaxing summer.

Richard Schaeffer
Partner

Dodd-Frank Whistleblower Protections Ruled to Apply Retroactively

Jessica Rubin

In a decision dated July 9, 2012, Judge Paul Oetken of the United States District Court for the Southern District of New York ruled that the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act's expansion of whistleblower protections to employees of subsidiaries of public companies (not only employees of the public companies themselves) was a mere "clarification" of the Sarbanes-Oxley Act of 2002, and thus could be applied retroactively to protect whistleblowers who were retaliated against prior to the enactment of Dodd-Frank.

The Sarbanes-Oxley Act of 2002 included a provision protecting whistleblowers

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Recent Legal Developments Affecting Gift Cards and Discount Voucher Programs

Pat Downes

Vijay Shroff

With the advent of Groupon and its competitors, businesses are participating in gift card and discount voucher programs with increasing frequency. The firm has recently advised several of its clients on regulatory and transactional issues with respect to such

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Recent Legal Developments Affecting Gift Cards and Discount Voucher Programs

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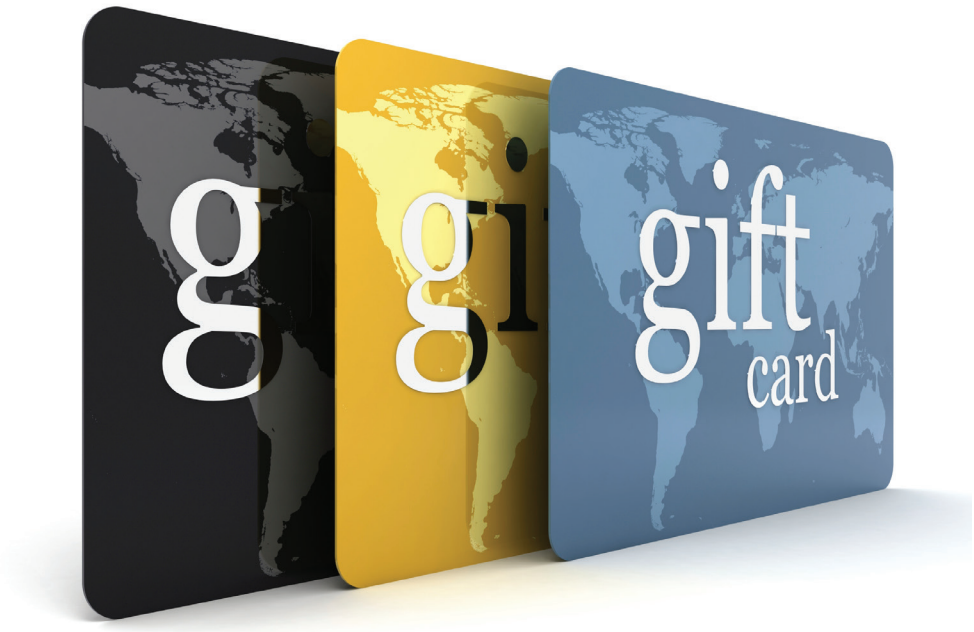
programs and we invite you to contact us to discuss the issues described in this note as well as all other legal issues you may have with respect to gift cards and discount programs.

A complicated patchwork of state and federal laws and regulations govern the use of gift cards and, to a certain extent, these rules also affect Groupon-style discount vouchers. Certain federal and state laws regulate the expiration of gift cards and discount vouchers, impose conditions under which inactivity fees may be assessed, and require that any applicable terms and conditions appear on the cards themselves. Recent activity at the state and federal levels has introduced further complexity.

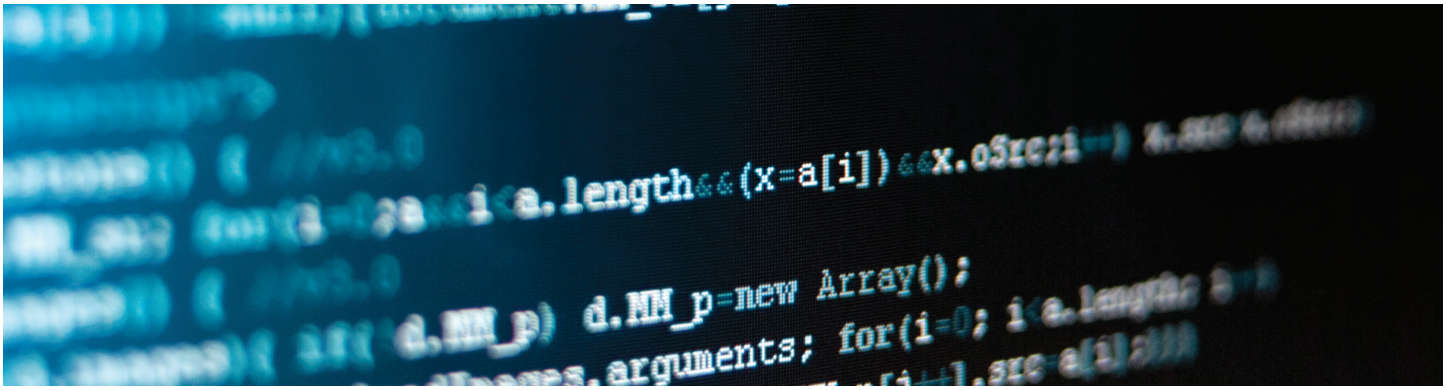
By way of example, the Department of Treasury's Financial Crimes Enforcement Network has recently begun enforcing anti-money laundering regulations that apply to "closed loop" gift cards (i.e., cards redeemable only from a defined merchant, location or set of locations). As a result, sellers of closed loop gift cards with values of $2,000 or more, and sellers of multiple gift cards whose total value meets or exceeds $10,000 to a single person (or entity) on a single day must comply with certain regulatory requirements, including the implementation of anti-money laundering programs, the collection of personal information from purchasers, and the monitoring and reporting of certain transactions.

A state level example, New Jersey Senate Bill 1928, was signed by Governor Christie on June 29, 2012. This legislation provides that balances on gift cards that remain outstanding for 5 years will be deemed abandoned and must be reported and remitted to the state (similar "escheatment" laws exist in several states, including New York). This statute amends a controversial law passed in 2010 that provided for escheatment after only two years. The new statute also provides that, effective September 1, 2012, balances of less than $5 on gift cards may be refunded in cash at the customer's request, and effective December 1, 2012, New Jersey will prohibit the imposition of certain post-purchase fees applied to gift card balances. Finally, the new law also retains the controversial but never enforced requirement from the 2010 law that gift card issuers obtain the purchasers' names and addresses, and maintain a record of purchasers' zip codes. However, enforcement of this new provision is delayed pursuant to the statute for forty-nine months (until July 1, 2016).

Gift card liability also presents issues when buying or selling a business. In several recent transactions, the firm advised clients on how to provide for an adjustment to the purchase price of a business to reflect unused gift card liabilities existing as of the closing date. Additionally, we have helped purchasers of businesses negotiate and obtain reimbursement agreements from the sellers with respect to the redemption of gift cards issued prior to closing.



Federal District Courts in New York Approve "Predictive Coding" to Facilitate Electronic Discovery



Jessica Rubin

In a world of rapidly evolving technology, companies that find themselves involved in litigation face the inevitable challenge of maintaining, locating and producing electronically stored information (ESI) requested by other parties as part of the discovery process. The courts continue to grapple with, and attempt to refine, the evolving obligations of litigants to produce in discovery what may often be voluminous electronic records and data. Based on two recent federal court opinions in the Southern District of New York, it appears that a search methodology known as "predictive coding" may be the latest step toward a manageable approach to electronic discovery in larger scale litigations. It is an approach that could significantly reduce litigation costs for companies involved in complex discovery.

While predictive coding has many definitions, at its most basic level, it is a form of automated document review that organizes potentially relevant documents in a way that reduces the time necessary for human review of documents. Computer algorithms retrieve a set of documents based on criteria determined by lawyers. The reviewing lawyers may determine that some results are not relevant and request that the algorithm pass through additional search iterations. As the computer learns to distinguish what is relevant, each iteration produces a smaller subset of relevant documents.

Earlier this year, Magistrate Judge Andrew Peck (S.D.N.Y.), ruled that predictive coding could be considered "judicially-approved for use in appropriate cases." Da Silva Moore v. Publicis Groupe & MSL Group, Case No. 11 Civ. 1279, Feb. 24 2012 Opinion and Order. In the Da Silva Moore case, Judge Peck urged that predictive coding "should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review." Id. On appeal, District Judge Andrew Carter, Jr. confirmed Judge Peck's ruling. Da Silva Moore v. Publicis Groupe & MSL Group, Case No. 11 Civ. 1279 (S.D.N.Y. April 26, 2012), observing that predictive coding "provides that the search methods [for ESI] will be carefully crafted and tested for quality assurance, with Plaintiffs participating in their implementation." Id.

Recently, Judge Shira A. Scheindlin, who has issued several influential decisions on electronic discovery, acknowledged the practical advantages of predictive coding. In National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al., 2012 U.S. Dist. Lexis 97863 (S.D.N.Y. July 13, 2012), which concerned the adequacy of searching and self-collection by government entities in response to a request under the Freedom of Information Act, Judge Scheindlin wrote with approval of predictive coding: "Through iterative learning, these methods (known as 'computer-assisted' or 'predictive' coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches." Id. Quoting Judge Peck, Judge Scheindlin also recognized the continuing failure of current electronic discovery practices: "In too many cases, however, the way lawyers choose keywords is the equivalent of the child's game of 'Go Fish' . . . keyword searches usually are not very effective." Id.

Though the use of predictive coding in the context of litigation is at an early stage, these endorsements of the methodology will likely have a significant impact on how companies and their lawyers search and produce ESI in a broad range of litigations. The result likely will be a significant reduction in the cost of electronic discovery to litigants.

Dodd-Frank Whistleblower Protections Ruled to Apply Retroactively

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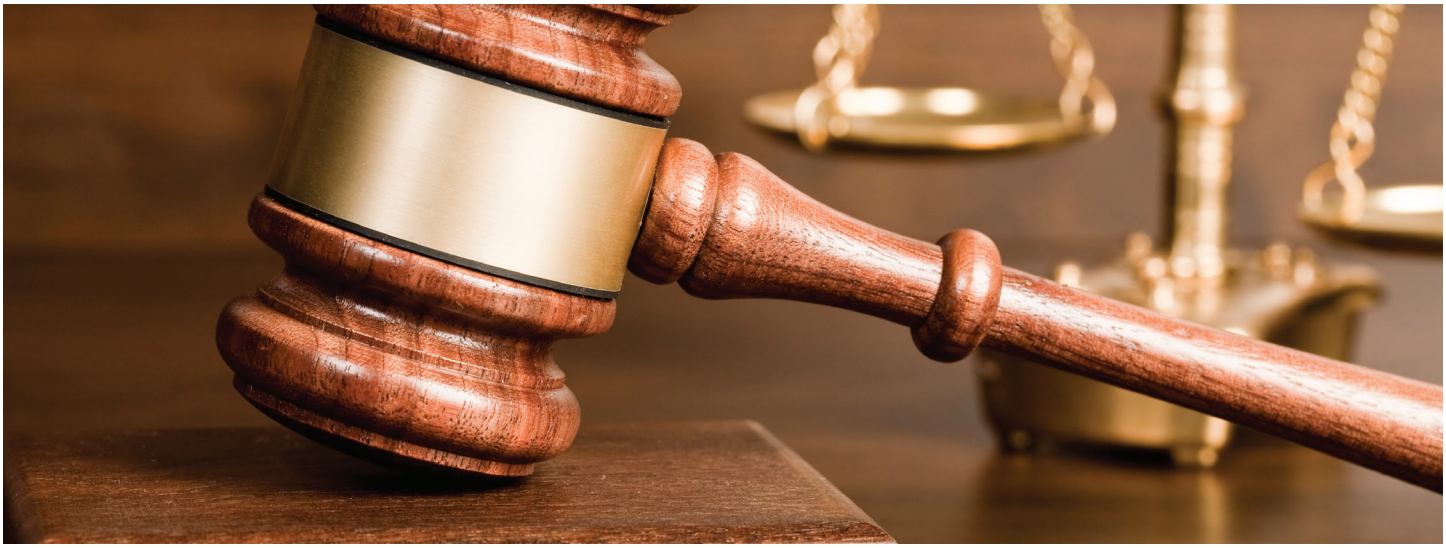

at publicly traded companies from retaliation. Specifically, Section 806 of that Act confers legal protection to employees of public companies who report suspected violations of a range of federal offenses. Subsequently, Dodd-Frank made clear that the provision also protects employees of wholly owned subsidiaries of public companies. However, it remained uncertain whether that protection would apply retroactively.

In Leshinsky v. Telvent GIT SA et al., 10 Civ. 04511 (JPO), plaintiff Phillip Leshinsky, a former employee of a non-public subsidiary of Telvent GIT, a United States-listed technology company headquartered in Spain, alleged that he was fired in retaliation for bringing a whistleblower complaint under Section 806 of the Sarbanes-Oxley Act. Defendants argued that because Leshinsky had been an employee of Telvent GIT's privately-owned subsidiaries, rather than a direct employee of the publicly traded parent, Section 806 did not apply. Leshinsky countered that Dodd-Frank's 2010 amendments, expanding the scope of Section 806 to cover not only employees of publicly traded companies but also the employees of their privately held subsidiaries, applied retroactively to afford him protection.

Holding that the protection afforded by the Dodd-Frank amendment to Section 806 of the Sarbanes-Oxley Act applied retroactively, Judge Oetken explained that, "[b]ecause the amendment is a clarification of Congress's intent with respect to the Sarbanes-Oxley whistleblower provision . . . it applies retroactively." He reasoned that "[t]he legislative history of Sarbanes-Oxley reinforces Congress's view of the importance of whistleblowers to the exposure of financial fraud within large, complexly structured corporations," adding, "The bill's sponsors also recognized the important roles that subsidiaries and corporate veils can play in facilitating corporate malfeasance." Leshinsky v. Telvent GIT SA et al., 10 Civ. 04511.