

Financial Institutions Client Service Group

To: Our Clients and Friends

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FinCEN Issues FAQs and Holds Webinar On Prepaid Access Rule

FinCEN recently released a set of Frequently Asked Questions (FAQs) related to the final rule on prepaid access that was issued on July 29, 2011 (the Rule). The 18-item FAQs state that they “are intended to provide interpretive guidance for the Rule; they do not supersede or replace any part of it.” In addition, FinCEN recently gave a webinar presentation entitled, “Definitions and Other Regulations Relating to Prepaid Access,” during which Koko Ives, Cindy Baltierra, and Lee Davis, each from FinCEN’s Office of Regulatory Policy, offered additional guidance.

The most significant clarifications regarding the Rule made by FinCEN are discussed below.

FAQ # 9 - - Bank-centered programs do not require a registered provider of prepaid access

The FAQs reiterate that banks cannot be MSBs, and thus cannot be providers of prepaid access subject to the Rule. Where a bank exercises “principal oversight and control” over a prepaid program, no participant is required to register as the provider of prepaid access. However, if another program participant nonetheless chooses to register as the provider for a prepaid program, that entity has all the responsibilities of a provider under the Rule for that program. In addition, the FAQs clarify that even when there is a registered provider, the Rule does not relieve banks of their existing BSA obligations.

Because the FAQs did not address the Rule’s application to retailers/sellers of prepaid access where a bank exercises principal oversight and control of the program, it appears that the distinction between “bank-centered” programs and “registered-provider” programs would not impact on a seller’s obligations under the Rule.

FAQ # 5 - Business to Business bulk sales are not intended to be covered by the Rule

The FAQs state that “[d]istribution of prepaid access to other businesses for further distribution or sale to end users/consumers by those other businesses is not the type of activity intended to be covered by the Rule,” regardless of whether the activity exceeds \$10,000 to one business in a day. FinCEN states that the definition of the term seller is meant to address sales to end users/consumers of prepaid

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access products, and not to apply to businesses in the distribution channels that move such products to market.

FAQs # 6 and 7 - Reloads for cards that have initially been subject to ID verification, do not require separate customer identification/verification

FinCEN appears to have concluded that every reload does not require separate customer identification and/or verification, provided the cardholder has already been verified, although its wording of the two relevant FAQs is perhaps a bit inartful.

The FAQs state that a person who is a *seller of prepaid access* by virtue of its non-depository reload business “does not have to obtain customer identification information ... *from customers that have already provided customer identification information* with respect to the prepaid access that they are reloading.” (*Emphasis added.*)

The FAQs separately provide that a retailer who reloads prepaid access from a non-depository source *is a seller of prepaid access* if it: (1) reloads funds onto a card that is part of a prepaid program *not subject to initial customer verification*, or (2) (a) reloads funds in excess of \$10,000 for any person in a day, and (b) does not have policies and procedures reasonably adapted to prevent such reloads.

Conversely, retailers offering non-depository reloads *are not sellers* if they: (1) reload less than \$10,000 of prepaid access for any person on any day that is not part of a prepaid program; (2) reload less than \$10,000 of prepaid access for any person on any day that is part of a covered prepaid program *but that is subject to verification procedures after the initial sale of the card*; and (3) have policies and procedures reasonably adapted to prevent reloads of over \$10,000 for any person on any day.

FAQ # 14 - Depository/non-depository reloads explained

The FAQs explain that the phrase “loading additional funds or the value of funds from non-depository sources,” as used in the limitation to the open loop card exemption, means providing funds “intended for prepaid access by means of an entity that is not a depository institution, where that entity will then arrange for the funds to be available through the prepaid access.”

During the webinar, FinCEN vaguely mentioned that reloads occurring through a bank or credit union qualify for the exemption. However, the FAQs clarified this point, providing examples of reloads that are made through a depository institution: ACH transfers from a bank account, cash or other deposit at a bank, or a check drawn on a bank and made payable to the provider of prepaid access.

Reloads that are not made through a depository institution include: reloads through retail store transactions (such as by cash, check or credit card), wire transfers originating at MSBs, or checks made payable to a payee other than the provider of prepaid access.

FAQ #4 - “Reasonably adapted” policies and procedures to prevent \$10,000+ sales must be risk-based

FinCEN declined to provide specific guidance on what might constitute policies and procedures that are “reasonably adapted” to prevent sales of more than \$10,000 to any person during any day, stating

instead that such policies and procedures must be risk-based and must be appropriate for that retailer, taking into account such facts as its typical customers, its location(s) and the volume of its prepaid access sales.

Interestingly, FinCEN states that the fact that a retailer does sell over \$10,000 in prepaid access to one person in a day *does not in and of itself* mean that the retailer's policies and procedures are not "reasonably adapted" to prevent such sales.

FinCEN added during the webinar that such policies must be disseminated and explained to a company's staff. However, they emphasized that the policies need not be 100% full-proof in order for them to be reasonably adapted.

FAQ # 10 - Program managers who are not providers are not subject to the Rule

The FAQs clarify that a program manager that is not the provider of prepaid access for its prepaid program(s) does not have any obligations under the Rule. *[However, please note that, law enforcement will still be looking at your procedures to consider whether you have been "willfully blind" or otherwise "aided and abetted" the criminal conduct, even if you otherwise comply with the prepaid access Rule.]*

FAQ #11 - Temporary reloadable cards are not necessarily part of a prepaid program

The FAQs explain that a temporary reloadable card is not considered part of a prepaid program, so long as the features of that card are limited so that the maximum value associated with it does not exceed \$1000 in a day, it cannot be used internationally, it cannot be reloaded at non-depository sources, and it cannot be used for P2P transfers. Whether a card is temporary or reloadable is not relevant in determining whether it is prepaid access under a prepaid program.

FAQs # 15, 16 and 17 - - Clarifications made on closed loop issues

The FAQs address a number of issues related to closed loop prepaid access, including the following:

- No more than \$2000 can be associated with a single closed loop card in one day in order for the card to qualify for the closed loop exemption. Thus, if the card permits either individual reloads over \$2000, or multiple reloads that bring the total amount associated with that card over \$2000 in one day, the card is no longer exempt. (E.g., a card with a \$1500 balance where \$1000 was spent and then an additional \$600 reloaded in the same day would have a "value" of \$2100 and would therefore not be exempt from the Rule.)
- The \$2000 threshold for the closed loop exemption is per card. It does not require aggregation of separate/distinct closed loop cards bought by an individual in a single day. (This is separate from the \$10,000 seller threshold, of course.)
- Cards sold for future access to products and services, such as for songs, iTunes, telephone minutes, wireless top-ups, games, software, etc. would likely be considered prepaid access, but probably would be exempt closed loop prepaid access (so long as it does not allow loads/reloads over the \$2000 threshold).

Finally, FinCEN clarified the following additional points during the webinar:

- For any maximum load requirements under the Rule, a day is determined by each company's policies and procedures. In other words, it is not a rolling 24 hours, but rather a 24 hour period as determined by each company.
- Cash redemptions are allowed, but only up to the highest value that any state requires for de minimus cash redemptions in order to maintain the closed loop exclusion from the Rule. When asked whether a closed loop issuer would remain exempt if it instituted a national cash redemption policy based on the highest common denominator (e.g., \$10 cash back policy in all 50 states, even though only a few state laws require such), FinCEN's response was ambiguous. FinCEN suggested that the closed loop exception is lost if cash redemption is provided other than what is called for by state law.
- With respect to the exemption relating to prepaid access solely to funds provided by government agencies, it is not possible to combine such program with another exempt program (such as a payroll card program) since the funds would not be accessible solely from one source. A product would only be excluded if it qualifies under one exemption, and then converts to another type of product that is also excluded.

The FAQs are available at http://www.fincen.gov/news_room/nr/html/20111102.html.

FinCEN's webinar is available at <http://treas.yorkcast.com/webcast/Viewer/?peid=65574c79c238460888609760473589dc1d>.

If you have any questions or would like more information about FinCEN's prepaid access rule, please contact Kris Andreassen, Margo Strahlberg or Judie Rinearson.

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