



FINANCIAL INSTITUTIONS REGULATORY UPDATE

Financial Crimes Enforcement Network FAQs

On November 2, 2011, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") released a set of Frequently Asked Questions ("FAQs") to assist providers and sellers of prepaid access in understanding certain aspects of the final prepaid access rule that FinCEN issued on July 29, 2011 ("Prepaid Access Rule").¹ FinCEN makes clear that the FAQs are intended to provide interpretive guidance only, and do not supersede or replace any aspect of the Prepaid Access Rule. We discuss below certain aspects of the guidance that the FAQs provide with respect to the Prepaid Access Rule.

Distributors Not Covered

Under the Prepaid Access Rule, a seller of prepaid access is defined as "[a]ny person that receives funds or the value of funds in exchange for an initial loading or subsequent loading of prepaid access if that person (i) sells prepaid access offered under a prepaid program that can be used before verification of customer identification...; or (ii) sells prepaid access (including closed loop prepaid access) to funds that exceed \$10,000 to any person during any one day, and has not implemented policies and procedures reasonably adapted to prevent such a sale." The second prong of this definition created some ambiguity as to whether wholesale distributors would be deemed to be a "seller" for purposes of the Prepaid Access Rule. Question 5 of the FAQs clarifies that distribution of prepaid access products to companies for sale to end users/consumers by those other companies is not the type of activity intended to be covered by the "seller" definition, regardless of whether a distributor sells more than \$10,000 to one company in one day.

Treatment of Reloads

The scope of the Prepaid Access Rule's definition of "seller" with respect to non-depository businesses engaged in reloading prepaid access was not clear. The FAQs provide helpful guidance on this issue, explaining the circumstances under which a non-depository business reloading prepaid access will, and will not, be deemed to be a "seller" for purposes of the Prepaid Access Rule. For example, Question 6 of the FAQs clarifies that a non-depository business engaged in reloading will be deemed to be a seller if it: (i) reloads funds onto prepaid access that is part of a prepaid program not subject to initial customer verification, or (ii) reloads in excess of \$10,000 for any person on any given day, and does not have policies and procedures reasonably adapted to prevent such reloading for any person on any given day. Question 7 of the FAQs provides companion guidance that such entities do not have an obligation to obtain

¹ The FAQs are accessible at: http://www.fincen.gov/news_room/nr/pdf/20111102.pdf. Sidley's Update on the Prepaid Access Rule is accessible at: <http://www.sidley.com/sidleyupdates/Detail.aspx?news=07974074-da93-4246-b90e-01224fd2163d>

identification information from customers that have already provided customer identification information with respect to the prepaid access that they are reloading.

Bank Secrecy Act (“BSA”) Obligations

Question 9 of the FAQs addresses the obligations of banks and providers of prepaid access when a participant in a prepaid program has registered with FinCEN as the provider of prepaid access for the program, even though a bank exercises “principal oversight and control” over a program. According to this FAQ, no participant in a prepaid program is required to register with FinCEN if the bank is the entity exercising “principal oversight and control” over the program. But, if a program participant other than a bank chooses to register as the provider in such a situation, that participant must fulfill the obligations of the provider under the Prepaid Access Rule. Question 9 makes clear that registration by a participant in a prepaid program as a program manager does not relieve a bank of its obligations under the BSA.

Temporary Card Programs

The Prepaid Access Rule did not squarely address temporary, non-reloadable prepaid card programs. Question 11 of the FAQs offers useful guidance on this issue, and provides that a program for sale of temporary cards will not be a prepaid program under the Prepaid Access Rule if the cards have a maximum value, use or withdrawal limit of less than \$1,000 on any day, and cannot be used internationally, reloaded at a non-depository source, or used to transfer value among the users. Question 11 makes clear that the reloadable or non-reloadable nature of a temporary card is irrelevant to the analysis.

Clarification on Loading

Question 14 of the FAQs offers guidance on the kinds of loading activities that are captured by the exemption language in 31 C.F.R. § 1010.100(4)(iii)(D)(2)(iii). Specifically, Question 14 provides that the phrase “loading additional funds or the value of funds from non-depository sources” means “providing funds or the value of 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.” Among the examples given in Question 14 of loading activities that would meet this definition are reloads through retail store transactions (*e.g.*, cash, check or credit card), wire transfers originating at money services businesses, or checks payable to a payee other than the provider of prepaid access.

Transactional Limitations Attached to the Closed Loop Program Exemption

The interpretive guidance in Question 17 of the FAQs is likely to catch many in the industry by surprise, and may require those operating in the closed-loop space to retool their systems. By its terms, the Prepaid Access Rule excludes closed-loop prepaid programs from the “prepaid program” definition if the closed-loop prepaid access has a maximum value of \$2,000 or less on any day. In Question 17, FinCEN explains that the \$2,000 maximum value is not a daily balance limit, but rather a daily ceiling on card velocity. For example, a closed-loop card is not exempt if the card is loaded with \$1,500 in the morning and, that day, the cardholder spends \$600 on the card and reloads \$600 to the card.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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