

Banking - USA

FinCEN releases FAQs on pre-paid access rule

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On November 2 2011 the Treasury Department's Financial Crimes Enforcement Network (FinCEN) released a set of frequently asked questions (FAQs) to assist providers and sellers of pre-paid access in understanding certain aspects of the final pre-paid access rule that FinCEN issued on July 29 2011.⁽¹⁾ FinCEN makes clear that the FAQs are intended to provide interpretive guidance only, and do not supersede or replace any aspect of the pre-paid access rule. This update discusses certain aspects of the guidance that the FAQs provide with respect to the pre-paid access rule.

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Under the pre-paid access rule, a 'seller' of pre-paid access is defined as:

"any 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 sellers for purposes of the pre-paid access rule. Question 5 of the FAQs clarifies that the distribution of pre-paid access products to companies for sale to end-users or 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 pre-paid access rule's definition of 'seller' with respect to non-depository businesses engaged in reloading pre-paid access was not clear. The FAQs provide helpful guidance on this issue, explaining the circumstances under which a non-depository business reloading pre-paid access will and will not be deemed to be a seller for purposes of the pre-paid 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:

- reloads funds onto pre-paid access that is part of a pre-paid programme not subject to initial customer verification; or
- 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 identification information from customers that have already provided customer identification information with respect to the pre-paid access that they are reloading.

Bank Secrecy Act obligations

Question 9 of the FAQs addresses the obligations of banks and providers of pre-paid

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access when a participant in a pre-paid programme has registered with FinCEN as the provider of pre-paid access for the programme, even though a bank exercises "principal oversight and control" over it. According to this FAQ, no participant in a pre-paid programme is required to register with FinCEN if the bank is the entity exercising "principal oversight and control" over it. However, if a programme participant other than a bank chooses to register as the provider in such a situation, that participant must fulfil the obligations of the provider under the pre-paid access rule. Question 9 makes clear that registration by a participant in a pre-paid programme as a programme manager does not relieve a bank of its obligations under the Bank Secrecy Act.

Temporary card programmes

The pre-paid access rule did not squarely address temporary, non-reloadable pre-paid card programmes. Question 11 of the FAQs offers useful guidance on this issue, and provides that a programme for sale of temporary cards will not be a pre-paid programme under the pre-paid access rule if the cards:

- have a maximum value, use or withdrawal limit of less than \$1,000 on any day;
- cannot be used internationally;
- cannot be reloaded at a non-depository source; or
- cannot be 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 Title 31 of the Code of Federal Regulations.⁽²⁾ 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 (cash, cheque or credit card);
- wire transfers originating at money services businesses; and
- checks payable to a payee other than the provider of pre-paid access.

Transactional limitations attached to the closed-loop programme 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 pre-paid access rule excludes closed-loop pre-paid programmes from the 'pre-paid programme' definition if the closed-loop pre-paid 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 on that day the cardholder spends \$600 on the card and reloads \$600 to the card.

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Endnotes

(1) The FAQs are accessible at www.fincen.gov/news_room/nr/pdf/20111102.pdf. For further details please see "[FinCEN releases final rule on application of Bank Secrecy Act Regulations](#)".

(2) 31 CFR Section 1010.100(4)(iii)(D)(2)(iii).

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