



*Outreach to the  
Prepaid Access Industry*





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## **Introduction**

In the summer of 2011, FinCEN issued new rules defining prepaid access which would bring some additional entities newly under FinCEN's regulatory framework. Shortly thereafter, as part of FinCEN's ongoing commitment to engage in dialogue with the financial industry and continually learn more about the industries that we regulate, FinCEN announced in October 2011 its interest in holding town hall style meetings in its Vienna, Virginia offices with representatives from the prepaid access industry.<sup>1</sup>

The town halls were designed to hear feedback on the implications of recent regulatory responsibilities imposed on this industry, and to receive industry's input on where additional guidance would be helpful to facilitate compliance. This outreach was intended as a part of FinCEN's overall efforts to increase knowledge and understanding of the regulated industry and how its members are affected by regulations, and thereby help FinCEN most efficiently and effectively work with regulated entities to further the common goals of the detection and deterrence of financial crime.

In response to the open invitation, FinCEN was contacted by 49 entities expressing an interest in attending the town hall meetings. Based on the information provided by the entities, FinCEN selected a representative cross-section of 16 entities that described themselves as engaging in activities that would likely fall under FinCEN's new regulatory definition of providers of prepaid access, or that acted as service providers to banks or likely providers of prepaid access.

This report summarizes the discussions that took place at FinCEN's two town hall meetings, held at FinCEN's offices on November 17 and 29, 2011. FinCEN also anticipates that additional guidance will be forthcoming related to issues raised during the course of the meetings and through other ongoing requests for clarification and guidance on the new regulations.

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<sup>1</sup> See <http://www.fincen.gov/whatsnew/pdf/20111005.pdf>.

## **Background**

In July of 2011, FinCEN issued a final rule that puts in place suspicious activity reporting (SAR), and customer and transactional information collection requirements on providers and sellers of certain types of prepaid access. This final rule amended and updated some of the existing provisions of FinCEN's money services business (MSB) rules as they related to certain products previously defined as "stored value."

The final rule:

- Renames "stored value" as "prepaid access" to more aptly describe the underlying activity.
- Adopts a targeted approach to regulating sellers of prepaid access products, focusing on the sale of prepaid access products whose inherent features or high dollar amounts pose heightened money laundering risks.
- Exempts prepaid access products of \$1,000 or less and payroll products if they cannot be used internationally, do not permit transfers among users, and cannot be reloaded from a non-depository source.
- Exempts closed loop prepaid access products sold in amounts of \$2,000 or less.
- Excludes government funded and pre-tax flexible spending for health and dependent care funded prepaid access programs.
- Clarifies that a "provider" of "prepaid access" for a prepaid access program can be designated by agreement among the participants in the program or will be determined by the degree of oversight and control exercised over the program – including organizing, offering, and administering the program. Providers are required to register with FinCEN.

On September 9, 2011, FinCEN extended the compliance date for certain provisions of the final rule.<sup>2</sup> Initial requirements went into effect on September 27, 2011; full compliance was required by March 31, 2012. On November 2, 2011, FinCEN published guidance in the form of Frequently Asked Questions on the Prepaid Access Final Rule.<sup>3</sup>

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2 See <http://www.fincen.gov/whatsnew/pdf/20110909.pdf>.

3 See "Frequently Asked Questions Related to Prepaid Access Final Rule," [http://www.fincen.gov/news\\_room/nr/html/20111102.html](http://www.fincen.gov/news_room/nr/html/20111102.html).

In developing these rules, FinCEN sought to achieve a balance that would not unduly stifle innovation in this rapidly growing area of consumer payments.<sup>4</sup> While prepaid access is most often associated with a card product similar to a credit card or debit card, the new rule was designed to be technology neutral and is meant to be adaptable to a range of products, including those using magnetic-stripe cards, internet systems, and mobile phone networks.

Through extensive regulatory, law enforcement, and industry consultations, FinCEN identified a number of risk indicia—such as whether a product is reloadable, can be used to transfer funds to other consumers, or can be used to transfer funds outside the United States—that determine whether products will be subject to the requirements of the prepaid access rule.

The final rule addresses regulatory gaps that have resulted from the proliferation of prepaid access innovations over the preceding 12 years since the promulgation of the original MSB rules, and the increasing use of prepaid access as an accepted payment method. FinCEN's prepaid access regulations also provide a balance to empower law enforcement with the information needed to attack money laundering, terrorist financing, and other illicit transactions through the financial system while preserving innovation and the many legitimate uses and societal benefits offered by prepaid access.

## **General Comments and Observations**

Several entities expressed that they welcomed the new rule. It levels the playing field. One noted it was already doing what the rule required, particularly as related to the collection and maintenance of information; however, several entities stated that more *prescription* would be helpful. Since this is a new area, making it risk-based may not be the best approach.

Entities also noted that at the time the regulation still needed to be *operationalized* – entities were working in the months leading up to the compliance date to build computer systems to collect and maintain the required data.

Entities requested that FinCEN please process and issue for general consumption administrative rulings on this subject as quickly as possible.

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4 For a more detailed discussion of the background leading up to the prepaid access rule, see Prepared Remarks of FinCEN Director James H. Freis, Jr. delivered before the Money Transmitter Regulators Association (September 1, 2010), [http://www.fincen.gov/news\\_room/speech/pdf/20100901.pdf](http://www.fincen.gov/news_room/speech/pdf/20100901.pdf).

Several entities commented that the November 2011 Frequently Asked Questions document was helpful.<sup>5</sup> Suggested FAQs to consider for the future: As products merge and the industry evolves, what do we have to collect? Which regulation will apply – money transmitter or prepaid access for products that are both? What will companies be required to do if they sell a product that fits within more than one bucket?

The participants focused predominantly on card-based prepaid access products with which they had the most experience.

## **Bank-Centered Programs vs. Non-Bank Programs**

A major topic of discussion at each of the two town halls was the relationship and interrelationship of banks and other entities involved in prepaid access products, leading to questions as to the respective responsibilities of the different parties under FinCEN's regulations. As background, under FinCEN's regulations, a "bank" and a "provider of prepaid access" are mutually exclusive categories, each being responsible for appropriate controls on certain prepaid access products on the basis of risk. For a bank, this is part of applying its anti-money laundering (AML) program to all of its products and services; for a provider of prepaid access, this will be in accordance with the requirements of the new rule.

As noted in the Frequently Asked Questions published by FinCEN in November 2011:

"The BSA regulations preclude a bank from being deemed any category of MSB; accordingly, a bank cannot be a provider of prepaid access subject to the requirements of the Rule. In situations in which a bank exercises "principal oversight and control," no participant is required to register as the provider of prepaid access; however, if a participant other than a bank chooses to register, that participant is the provider of prepaid access and has the responsibilities under the rule notwithstanding the bank's participation in the prepaid program. The Rule does not relieve banks of their existing BSA obligations, including with respect to prepaid programs with which they are involved."<sup>6</sup>

After the discussion of the issuance of the final rule, the town hall participants described their experience in determining the applicability of the new rules to their products.

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5 See [http://www.fincen.gov/news\\_room/nr/pdf/20111102.pdf](http://www.fincen.gov/news_room/nr/pdf/20111102.pdf).

6 See [http://www.fincen.gov/news\\_room/nr/pdf/20111102.pdf](http://www.fincen.gov/news_room/nr/pdf/20111102.pdf) (Question 9, page 4).

One entity stated that an argument can be made that all programs are bank programs. The entity appreciated FinCEN's list of factors within the rule, but in its view the bank typically is doing all of the functions that FinCEN listed as factors. How does FinCEN expect it to play out if everyone or most programs determine that the bank is the entity in the activities that FinCEN delineated in the five factors? There are fewer banks in the pre-paid business today – five years ago more players were jumping in but, today, the fringe players are gone.

The participants elaborated further. Banks are exerting more control – and programs are becoming bank-centered. Banks are putting requirements into contracts and defining fees. Most banks contractually control the programs. With a program heavily bank-dominated, they will tell us not to register as a prepaid provider since the bank has oversight but the bank may not want to put this in the contract.

One entity indicated that they are asserting themselves as the provider, explaining that if the company has a problem or issue, they want to control it themselves.

Another entity agreed that banks are exerting more control, but still requiring program managers to register and be the point of contact for law enforcement. The banks want to push those programs downstream. However, providers are concerned, because if it is a bank-centered program, and the bank has oversight and control, the providers do not want the liability without the responsibility.

Another entity noted that the rule provides a challenge for the issuing bank, as regulators expect the bank to have primary oversight and control over the pre-paid program and oversight of branded products has increased. Another entity raised the issue that their bank “sees this as an opportunity to shift all risk and responsibility to the program manager.” Another asked, “What happens when some program managers step-up and agree to be the provider for bank cards, but other program managers do not?”

One entity explained they are in the position where their bank is not really saying one way or another if the bank is going to acknowledge it has responsibility for provider requirements, so the program manager is unsure if they should register themselves. For a bank with 20 program managers, what if some register and some do not? The entity explained they were “stuck” as none of their contracts cover this. If the bank really has primary oversight and control, can a program manager register in good faith? Who would submit the SARs: the bank or the program manager?



The foregoing observations, however, were overwhelmingly referring to card-based prepaid access products and all participants acknowledged that the situation is likely different for other prepaid access covered by the rule, now and in the future.

One entity noted that new technologies, such as online virtual games, will not be bank programs because not all of the new technologies actually involve transactions with a bank. The fact that a product may not be plastic does not change how it operates—it could still be controlled by a bank.

FinCEN appreciated that given the variety of prepaid program arrangements, there may be a need in the future for greater clarity on expectations between bank and non-bank participants in a prepaid program.

## **Customer Identification Programs (CIP)**

FinCEN inquired if there was anything about the rule that was going to change how providers collect CIP information. The response was “no.”

One entity commented they were appreciative of FinCEN’s “flexible approach,” but said it makes it harder because there is more risk. However, a prescriptive approach would hurt the lower end of the business that they serve.

Another agreed, but suggested a minimum set of standards. Another said that while it sounds good in theory, the challenge is in the lowest common denominator versus the highest. Another entity suggested applying CIP rules like those applicable to banks, based on the requirements set by the issuing bank—the bank has different standards for different products. A one-size-fits-all approach would be too restrictive.

Entities want more clarity on what CIP means. A risk-based approach that permits the industry to decide how to do CIP may not be the best approach. There will always be an inherent conflict on what things mean, which will put those that develop cheaper CIP processes at a competitive advantage. Computer systems need to be built to collect, verify, and store information, which is a significant cost to industry, but as long as everyone knows what they need to do, no one will be disadvantaged competitively.

## **SAR Filings**

Participants also raised questions about relative responsibilities and possible overlap with respect to suspicious activity reporting requirements.

Issuers, providers, and sellers may all be filing SARs. This could lead to confusion. Collaboration among entities is needed to discuss if a SAR filing is necessary. As a result, one entity noted that all three may file, leaving it to FinCEN to “sort it out.” FinCEN noted that the joint SAR form and new technology may make joint filing easier in cases such as this.

One entity noted that the bank view is to provide a brief summary in the SAR filing and then go to the processor if more information is needed. The SAR includes information on the program so law enforcement would know who to contact for more details.

In terms of costs, one entity noted that they were not SAR filers before, so they are updating their program, developing training and independent review procedures, and have hired an additional staff member to oversee compliance. The entity also noted that the cost is “more than FinCEN’s estimates in the rule.”

## **MSB Registration Form**

At the time of the meeting, the new form was still out for public comment. FinCEN expressed its interest in hearing the views of the prepaid provider community by the time the comment period closed (December 5, 2011).

One commenter opined that the MSB registration will not give law enforcement what it needs and that law enforcement really needs to match the card numbers to the prepaid program on the spot. Others recognized such a law enforcement interest, but questioned the practicality (also noting this as more of a card-specific issue) and whether this was an appropriate matter for regulation.

On March 14, 2012, FinCEN released the new Registration of Money Services Business (RMSB), FinCEN Form 107, through the BSA E-Filing System.<sup>7</sup> The new report, which will be used by MSBs, facilitates registration by foreign-located MSBs and providers of prepaid access.

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<sup>7</sup> See [http://www.fincen.gov/news\\_room/nr/pdf/20120314.pdf](http://www.fincen.gov/news_room/nr/pdf/20120314.pdf).

The new FinCEN Form 107 RMSB is only available electronically, and foreign-located MSBs and providers of prepaid access must file it within the compliance deadlines. All other MSBs may continue to file the legacy FinCEN Form 107 as required by FinCEN until March 31, 2013. The issuance of the new RMSB does not change any underlying registration requirements or timing for renewals of a registration.

## **Global Comparisons**

One entity stated that the United States is “ahead of the curve” in regulating prepaid access as compared to other countries. The entity noted, however, that Australia’s stringent CIP procedures are very helpful as it is “very clear” what is required. This entity noted that they do not see the same types of controls in Latin American countries. When regulations are not clearly defined there is always an increased cost of doing business because of the increased risk.

Entities raised some issues with regard to international prepaid requirements. For example, if a product is sold on military bases, is it an international transaction? What happens if it is redeemed off base? Non-reloadable incentive programs for employees can be used internationally—how will the rule affect them?

## **Support to Retailers**

One entity noted that they often receive questions and requests from their retailer networks for assistance. They feel that training their agents is an important part of their responsibility, but would appreciate more guidance on how to assist their retailers and answer their questions, which include: Are we selling covered products? How do we put in place reasonable policies and procedures? Do we aggregate across business lines? FinCEN noted that the MSB manual will be updated to reflect the new rules. The entities indicated that they intend to communicate to their retailers whether or not their products are covered.

Another entity noted that they are also seeing the seller coming to the provider looking for regulatory information, such as “does the seller need to conduct CIP on reloads?”

Entities expressed that more information would be helpful.

## **Market Changes**

FinCEN asked if any of the providers are seeing sellers leaving the market as a result of the new rules. One entity stated “no” because the biggest change between the notice of proposed rulemaking and the final rule took the concern (voiced in public comment letters) with the point of sale issue off the table. That “fix” changed the conversation from “we won’t sell it” to more operational discussions of “how can we sell it without violating the rule.”

FinCEN also asked how the rule impacts current business operations and whether providers are leveraging their current fraud systems to assist with meeting the new requirements. One entity noted that while the rule does have an impact on business operations, as they are bringing under products not previously covered (such as closed loop cards); they are able to utilize their current fraud and AML systems to comply. Entities noted that the March 31 extension was helpful.

## **Depository vs. Non-Depository Reloads**

There was discussion about determining the risk levels of non-depository reloads, since banks regulate and examine these a bit differently. Bank products such as credit cards, payroll checks, retail GPR cards, were also mentioned and entities asked why wouldn’t these products be considered a depository re-load? Entities asked that we walk them through our analysis on why non-depository re-loads are high-risk. Another comment – why can’t it stay consistent with the bank process?

One provider commented, “If you can load a prepaid access card with \$100 from an ATM, what is the difference between doing that and doing so from your debit card at a grocery store?” One provider noted that considering them to be at different risk levels makes sense because of the difference between bank and non-bank controls.

Additional prescriptive guidance was requested in this area.

## **Payroll Cards**

Presumed providers sought FinCEN's thought process on including open-loop, branded payroll cards within the regulatory framework. FinCEN noted that law enforcement had a strong interest due to the possible money laundering risks/potential fraud. Some providers noted that the payroll cards are more prominently used internationally than some other products. They also noted that open loop incentive/bonus cards present special challenges if they are going to be subject to a CIP requirement, because the recipients are not typically known prior to distribution.

## **Fraud/Engagement with Law Enforcement**

There was some discussion of law enforcement investigations involving the use of prepaid cards, included a case in which a Colombian-based organization employing operatives in the United States funneled millions of dollars in drug proceeds from the United States to Medellin, Colombia. The money was laundered using a variety of techniques, including prepaid cards, which allowed cardholders to deposit U.S. dollars into accounts locally, and then withdraw the funds from banks in Medellin in the form of Colombian pesos.<sup>8</sup>

Providers noted they are seeing tax refund fraud and gang related activity in some cases. Also, some point of sale activation fraud, counterfeit/skimming, as well as identity theft. One provider noted that it would be helpful to share information on these frauds, as well as what law enforcement is seeing, so they can be better positioned to identify this activity.

During the discussion FinCEN highlighted its October 2011 *SAR Activity Review – Trends, Tips, and Issues*, that included an assessment of financial institutions reporting on the misuse of international prepaid cards, along with related SAR filings.<sup>9</sup> FinCEN also issued an advisory on March 30, 2012 regarding tax refund fraud,<sup>10</sup> designed to assist financial institutions with identifying and reporting this activity through the filing of SARs.

Entities discussed how they engage with law enforcement, including sharing information upon request, such as information derived from interviews with customers as part of a fraud investigation.

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8 See <http://www.justice.gov/usao/ct/Press2010/20100809.html>.

9 See [http://www.fincen.gov/news\\_room/rp/files/sar\\_tti\\_20.pdf](http://www.fincen.gov/news_room/rp/files/sar_tti_20.pdf) (pages 7-13).

10 See [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2012-A005.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-A005.pdf).

Entities noted that law enforcement has expressed concerns about how challenging it is to determine where they can go to get more information about a particular prepaid card that might be a part of an investigation. One entity noted that registering as the program provider does not assist in this area. The program manager would provide law enforcement information on where to call to get information they need, whether or not the program manager is actually registered as a provider.

## **Regulatory Issues**

Another entity noted that many companies are waiting for the first enforcement action to see where the lines are drawn.

For state regulatory reasons, many prepaid providers and sellers are forced into an agency relationship with banks. But some states do not recognize bank agents.

One entity said that state examiners going into a provider will expect them to know which agents are sellers. Another entity noted that it needs to determine where it fits and then look at possible sellers. Contracts will then need to be modified to reflect this.

One entity stated while it would not recommend a prescriptive approach with respect to CIP, there may be room for prescription or further guidance on what policies and procedures are reasonably adapted to prevent the sale of more than \$10,000 of any type of prepaid access to any one person on any one day. FinCEN responded by referencing the preamble to the final rule, which explains that all retailers should already be familiar with longstanding reporting requirements for cash transactions exceeding \$10,000.

Another entity noted its intent to consider itself a seller of prepaid access, because with its extensive retail network, it could not reasonably say that it could effectively prevent the sale of over \$10,000 per person, per day. However, the entity doubted that other retailers planned to take a similar decision, and this caused concerns about a level playing field. A FinCEN representative noted that this rule will present unique compliance changes in that it contains the definition, "If ABC Company does not conduct activity A, it is not X." Most rules work on the converse premise; "If ABC conducts activity A, it is X."

One entity also suggested that "seller" status should not necessarily apply to an entire business for all time. Rather, this entity suggested, a business should be allowed to designate several internal "tracks," not all of which would necessarily be "sellers," even if one definitely was. This entity also suggested that "seller" status (whether track-delineated or not) should be subject to periodic reconsideration.

