



# Department of the Treasury Financial Crimes Enforcement Network

## FREQUENTLY ASKED QUESTIONS

### Final Rule – Definitions and Other Regulations Relating to Prepaid Access

The Financial Crimes Enforcement Network (“FinCEN”) is issuing these Frequently Asked Questions (“FAQs”) to assist providers and sellers of prepaid access in understanding the scope of the final rule imposing certain recordkeeping and reporting requirements under the Bank Secrecy Act (the “BSA”). The Prepaid Access Final Rule (the “Rule”) was issued July 29, 2011<sup>1</sup> and has generated many questions. These FAQs are intended to provide interpretive guidance for the Rule; they do not supersede or replace any part of it.

The Rule establishes a more comprehensive approach for regulating prepaid access and requires providers and sellers of prepaid access to (1) file suspicious activity reports (“SARs”), (2) collect and retain customer and transactional information and (3) maintain an anti-money laundering program. These BSA requirements are similar to those that apply to other categories of Money Services Businesses (“MSBs”). The Prepaid Access Rule amends some of the provisions within FinCEN’s MSB regulations.

#### **1. What types of prepaid access arrangements are covered under the Rule?**

The Rule defines a “prepaid program” as “an arrangement of one or more persons acting together to provide prepaid access.” Prepaid access arrangements can vary greatly, ranging from travel programs to university campus programs to public transportation programs and many others, all with specific features and characteristics targeted to different audiences and activities. The Rule details types of activities that would and would not subject a specific prepaid access arrangement to BSA requirements. The Rule excludes certain low-risk prepaid access arrangements from being subject to regulation.

Three types of prepaid access arrangements are excluded from the definition of a prepaid program under the Rule, those that: 1) provide closed loop prepaid access to funds not to exceed \$2,000 maximum value on any day; 2) provide prepaid access solely to funds provided by a government agency; or 3) provide prepaid access solely to funds from certain pre-tax flexible spending arrangements for health care or dependent care expenses, or from Health Reimbursement Arrangements for health care expenses.

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<sup>1</sup> Definitions and Other Regulations Relating to Prepaid Access, 76 FR 45403 (July 29, 2011). [Final Rule - July 29, 2011](#)

There are two types of prepaid access arrangements that have a qualified exclusion but that, if they can be used in any of three particular capacities, are not entitled to that exclusion and are therefore prepaid programs subject to regulation. The rationale is that the expanded capacities may obscure financial transparency. Open loop prepaid access that does not exceed \$1,000 maximum value on any day, and prepaid access to employment benefits, incentives, wages or salaries (“payroll”), are not prepaid programs subject to BSA regulatory requirements so long as the prepaid access cannot (1) be used internationally, (2) allow transfers of value from person to person within the arrangement, or (3) be reloaded from a non-depository source. If any one of these features is part of the arrangement, it will be covered as a prepaid program under the Rule.

## **2. Who is a provider of prepaid access?**

A provider of prepaid access can be determined in one of two ways under the Rule.

A. The provider of prepaid access for a prepaid program is the participant in that prepaid program who registers with FinCEN as the provider of prepaid access for that program. Determination of which participant should register is a matter left to the participants. However, it is presumed that the participant registering as the provider of prepaid access has agreed to perform all of the duties required for providers of prepaid access under the Rule.

B. If none of the participants in a prepaid program registers with FinCEN as the provider of prepaid access for that program, the provider of prepaid access is the participant in the program with principal oversight and control over the program.

See also question 9 below.

## **3. Who is, and who isn’t, a “seller of prepaid access” under the Rule?**

A person that accepts payments for an initial or subsequent loading of prepaid access, including a general purpose retailer such as a pharmacy, convenience store, supermarket, or discount store, is not considered a “seller of prepaid access” if:

- (a) it does not sell prepaid access under a prepaid program that can be used before the user’s identification needs to be verified; *and*
- (b) it has policies and procedures in place that 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.

Such a person *is* considered a “seller of prepaid access” if it *either* sells prepaid access described in item (a) above *or* doesn’t have policies and procedures, and does engage in sales, described in item (b) above.

## **Seller Questions:**

### **4. How do I know whether my policies and procedures are “reasonably adapted” to prevent a sale of more than \$10,000 to any person during any one day?**

There is no one set of policies and procedures that is “reasonably adapted” to prevent sales of prepaid access that exceed \$10,000 to any person during any one day. Such policies and procedures must be risk-based and appropriate to the particular retailer in question, taking into account facts such as its typical customers, its location(s), and the volume of its prepaid access sales. The fact that a retailer sells over \$10,000 in prepaid access to one person in one day does not in and of itself mean that the retailer’s policies and procedures are not “reasonably adapted to prevent such a sale.”

### **5. Are businesses deemed “sellers” under the Rule for distributing prepaid access to other businesses ?**

No. Distribution of prepaid access products 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. This type of activity would not subject a business to the prepaid access regulation regardless of whether the activity exceeded \$10,000 to one business (i.e., person) in one day. The definition of “seller” is intended to address sales to the end user/consumer of the prepaid access product, not to apply to businesses in the distribution channels that move the prepaid access products to the market.

### **6. Are businesses deemed “sellers” if they provide non-depository reloads to prepaid access under the Rule?**

It depends. An entity reloading prepaid access from a non-depository source is a “seller,” subject to the provisions of the Rule, if it (1) reloads funds onto prepaid access that is part of a prepaid program not subject to initial customer verification, or (2) both 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.

Persons providing non-depository reloads of funds or the value of funds to prepaid access are not sellers if:

- they reload less than \$10,000 of prepaid access that is not part of a prepaid access program covered under the Rule for any person on any given day;
- they reload less than \$10,000 of prepaid access that is part of a prepaid program covered under the Rule, but is subject to verification procedures after the initial sale of the prepaid access, for any person on any given day; and
- they have policies and procedures reasonably adapted to prevent the reloading of \$10,000 for any person on any given day.

**7. What does the Rule require sellers to do with respect to non-depository reloads? Do these requirements include customer information collection requirements?**

A person that qualifies as a “seller of prepaid access” because of the person’s reload business (see question 6 above) has the same obligations as any other “seller of prepaid access,” including AML program, SAR filing, and recordkeeping requirements. However, such a seller does not have to obtain customer identification information under 31 C.F.R. 1022.210 from customers that have already provided customer identification information with respect to the prepaid access that they are reloading.

**8. What are the Rule’s requirements for “sellers of prepaid access?”**

Sellers of prepaid access will need to develop and implement an effective AML program, report suspicious activity, and comply with recordkeeping requirements related to customer identifying information and transactional data. Sellers, as agent MSBs, will not have to register with FinCEN as MSBs.

**9. Can a bank be an MSB, such as a provider of prepaid access?**

No. 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.

**10. Is a prepaid access program manager that is a participant in a prepaid program subject to the Rule if it is not the provider of prepaid access for that prepaid program (i.e., another party has registered as the provider of prepaid access)?**

A program manager that is not the provider of prepaid access has no obligations under the Rule.

**Prepaid Program Questions:**

**11. Is an arrangement that provides reloadable temporary prepaid access devices a “prepaid program?”**

Such an arrangement is excluded from the definition regardless of whether the temporary device is reloadable or not, so long as the features of that device are limited in specific ways. If its maximum value, use, or withdrawal limit is less than \$1,000 on any day, and

it cannot be used internationally, reloaded at a non-depository source, or used to transfer value among the users, it is not subject to the Rule. Its temporary or reloadable nature is irrelevant in this analysis.

**12. Is a provider or seller of phone cards subject to the Rule as a prepaid program provider or seller of prepaid access?**

It depends. There is no specific exclusion from the Rule for phone cards. A provider or seller of phone cards usable solely to obtain phone service is providing or selling closed loop prepaid access. A provider of closed loop prepaid access is not a prepaid program provider unless the amount of the closed loop prepaid access associated with any one prepaid access device exceeds \$2,000. Note that the ability to use the device internationally – which we understand is often the case with phone cards – would not change this analysis for closed loop prepaid access. The closed loop exclusion applies irrespective of whether the prepaid access can be used internationally.

A seller of phone cards that are usable solely to obtain phone service is a seller of prepaid access if it both sells in excess of \$10,000 in phone cards to any person on any given day, and does not have policies and procedures reasonably adapted to prevent such sales to any one person on any one day. If so, it is deemed an agent MSB and does not have any registration requirements.

**13. Are devices sold for future access to products or services (e.g., songs, iTunes, telephone minutes, megabytes, wireless top-up, games, software, etc.) prepaid access devices under a prepaid program subject to the Rule?**

Many of these products would likely be considered prepaid access. However, depending on the structure of the program, they would probably be considered closed loop prepaid access and as such would not be part of a prepaid program under the Rule unless they allowed maximum value or loads above the \$2,000 threshold.

**14. What does “loading additional funds or the value of funds from non-depository sources” mean?**

“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. An arrangement under which prepaid access devices can be reloaded in this manner is a prepaid program under the Rule. Re-loads that are made through a depository institution would include but are not limited to ACH transfers from a bank account, cash or other deposit at a bank, or a check drawn on a bank and payable to the provider of prepaid access. Re-loads that are not made through a depository institution would include but are not limited to, 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.

**Closed Loop Questions:**

**15. Is closed loop prepaid access that can be used domestically and internationally subject to the Rule if it is below threshold?**

No, closed loop prepaid access below the \$2,000 threshold that can be used internationally is not part of a prepaid program.

**16. Is it correct that the \$2,000 threshold for closed loop prepaid access attaches to the device or vehicle, not the person?**

Yes, that is correct. The \$2,000 threshold for closed loop prepaid access is per device or vehicle. It does not require aggregation of all purchases of separate (i.e. distinct) closed-loop prepaid access devices or vehicles bought by an individual in a single day. Note, however, that businesses that sell more than \$10,000 of any type of prepaid access to an individual in a day may be sellers of prepaid access under the Rule.

**17. How does the Rule's \$2,000 daily limit apply to closed loop prepaid access that can be reloaded?**

No more than \$2,000 can be associated with each closed loop prepaid access device or vehicle in one day. Accordingly, if the closed loop prepaid access arrangement permits either individual reloads of more than \$2,000 per device, or cumulative reloads per device that total more than \$2,000 in one day, the arrangement no longer qualifies for the "closed loop prepaid access" exception from the definition of a prepaid program under the Rule.

For example, if a closed loop prepaid access device or vehicle has a value of \$1,500, and the holder spends \$1,000 and subsequently reloads \$600 before the end of the day, this prepaid access would fall within the definition of a prepaid program because \$2,100 has been associated with the prepaid access within one day.

**18. Is FinCEN developing a special SAR form for providers and sellers of prepaid access?**

No, providers and sellers will use FinCEN Form 109, the same SAR form that all MSB filers use.

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Financial institutions with questions about the frequently asked questions may contact the Financial Crimes Enforcement Network's regulatory helpline at 1-800-949-2732.

