





ABA Professional Development




# ABA/ABA Money Laundering Enforcement Conference

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Washington, DC



## FinCEN Rules

- The 2009 CARD Act directed FinCEN to issue rules regarding the sale, issuance, redemption or international transport of stored value, including stored value cards
- On July 26, 2011, FinCEN issued its final rule addressing prepaid access
- On October 17, 2011, FinCEN issued a proposed rule modifying the definition of monetary instrument to cover certain types of prepaid access as to cross-border reporting



## Prepaid Access Rule

- The rule establishes a comprehensive regulatory framework for “prepaid access” (which replaces the term “stored value”) in that it expands the parties subject to the BSA to include providers and sellers of prepaid access and expands the obligations of the parties involved in the distribution of prepaid access



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## Deadlines

- The effective date of the rule was September 27, 2011, except for the new MSB registration requirement for providers of prepaid access, which will become effective January 29, 2012, following FinCEN’s adoption of a revised registration Form 107
- Subsequently, FinCEN delayed certain portions of the rule as to sellers of prepaid access to March 30, 2012



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## Scope

- The rule applies to “prepaid access” provided under a “prepaid program”
- The rule excludes from the definition of a prepaid program certain types of arrangements that FinCEN believes presents low or minimal risks



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## Prepaid Access

- “Prepaid access,” is defined as “[a]ccess to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number”



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## Closed Loop Prepaid Access

- “Closed loop prepaid access” means “[p]repaid access to funds or the value of funds that can be used only for goods or services involving a defined merchant or location (or a set of locations), such as a specific retailer or retail chain, a college campus, or a subway system.”



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## Wide Coverage

- The definitions of prepaid access and closed loop prepaid access cover a wide range of devices sold to provide future access to products and services (e.g., music downloads, calling cards, games credits, software, etc.)



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## Prepaid Program

- “Prepaid programs” are defined as arrangements in which one or more persons acting together provide(s) prepaid access
- The rule excludes the following types of programs from the definition of a prepaid program, on the basis that they are considered low-risk:
  - Closed loop Prepaid Access to funds not to exceed \$2,000 maximum value.



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## Prepaid Program

- Government funded prepaid access
- Flexible spending and dependent care funded prepaid access
  - This exclusion does not cover access to funds in Health Spending Accounts, because they allow the commingling of health and non-health related funds
- Prepaid access to employment benefits, incentives, wages, or salaries (as long as limited to employer funding)



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## Prepaid Access

- Prepaid access to funds not to exceed \$1,000 maximum value and from which no more than \$1,000 maximum value can be initially or subsequently loaded, used, or withdrawn on any day through a device or vehicle - If a program permits any of the following, it would be considered a prepaid program
  - The transmittal of funds or value internationally
  - Transfers between or among users of prepaid access within a prepaid program
  - Loading additional funds or the value of funds from non-depository sources.



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## Providers of Prepaid Access

- The rule permits the participants in a covered prepaid program to designate by contract the single party that will serve as the provider of prepaid access.
- The provider will serve as the principal conduit of information for the other members of the program and primary source of information about the program for FinCEN, regulators and law enforcement



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## Providers of Prepaid Access

- The party designated as the provider of prepaid access must register with FinCEN as a money service business (MSB)
- As part of the registration process, the provider must identify each prepaid program for which it is the provider
- FinCEN has released a proposed revision to Form 107 to reflect the prepaid access rule requirements and comments are due by December 5, 2011



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## Providers of Prepaid Access

- To address instances where the participants have not designated a provider, the rule sets forth five criteria to establish the activities that FinCEN will consider in determining the appropriate party to be deemed the provider:
  - Organizing the prepaid program
  - Setting the terms and conditions of the prepaid program and determining that the terms have not been exceeded



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## Providers of Prepaid Access

- Determining the other businesses that will participate in the Prepaid Program, which may include the issuing bank, the payment processor, or the distributor
- Controlling or directing the appropriate party to initiate, freeze, or terminate prepaid access
- Engaging in activity that demonstrates oversight and control of the prepaid program



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## Providers of Prepaid Access

- Query – banks are excluded from the rule, since they are already covered under existing BSA requirements, and the banking regulators, through their third-party guidance (and the OCC guidance on prepaid access) and payment network rules must maintain control over all aspects of the program
  - Are bank-issued programs excluded from the rule?



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## Sellers of Prepaid Access

- The rule regulates “sellers” of prepaid access as a type of MSB
- Sellers are not be required to register with FinCEN as MSBs
- The rule sets forth two circumstances in which a person could become a seller of prepaid access



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## Sellers of Prepaid Access

- If the person sells any prepaid access offered under any prepaid program, where the customer can use the prepaid access before verification of customer identification
  - A party is not a seller of prepaid access that
    - Does not fall within the definition of a prepaid program; or
    - Includes one or more features that would cause the prepaid access to fall within the definition of a prepaid program (i.e., international use, person-to-person transfers between users of the prepaid access, or reloads from a non-depository source), but does not make such features available prior to the collection and verification of customer identification



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## Sellers of Prepaid Access

- If a person sells prepaid access exceeding \$10,000 to any person during any one day, it is deemed a seller of prepaid access unless the selling entity has implemented policies and procedures reasonably adapted to prevent such sales
  - The \$10,000 threshold applies to any sale of any form of prepaid access even if the program is not considered a prepaid program under the rule (e.g., closed loop prepaid access)



## Sellers of Prepaid Access

- Retailers are quite concerned as to the impact of the rule on corporate bulk sales of their closed loop products (but the FinCEN FAQs provide some relief) and on what constitute reasonable policies and procedures to prevent sales in excess of \$10,000



## AML Program Requirements

- Providers and sellers of prepaid access are required to
  - Develop and implement an effective anti-money laundering program
  - Report suspicious activity
  - Comply with recordkeeping requirements relating to customer identifying information and transaction data; and
  - Respond to law enforcement requests



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## AML Program Requirements

- The rule imposes customer identification collection and recordkeeping requirements, including name, date of birth, address, and identification number, for both providers and sellers of prepaid access
- The rule requires a provider or seller of prepaid access to establish procedures to verify the identity of a person who obtains prepaid access under a prepaid program
  - Most retailers will not want to be subject to these requirements, so programs offered through retail channels will need to be designed to not constitute a prepaid program



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## AML Program Requirements

- Providers of prepaid access must collect and retain access to the identifying information for five years after the last use of the prepaid access
- Providers must maintain access to transactional records necessary to reconstruct prepaid access activation, loads, reloads, purchases, withdrawals, transfers, or other prepaid-related transactions, also for a period of five years
- Sellers of prepaid access which constitutes a prepaid program must collect and retain the identifying information for five years from the date of sale of the prepaid access



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## FAQs and Workshops

- Retailers have been quite vocal about the requirements the rule imposes on their involvement in selling prepaid access, including on closed loop products and if they provide reload services
- On November 2, 2011, FinCEN released FAQs to address some of these concerns



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## FAQs and Workshops

- Reasonable policies to prevent the sale of prepaid access in excess of \$10,000 to any one person
  - 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.”



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## FAQs and Workshops

- Are businesses deemed “sellers” under the rule for distributing prepaid access to other businesses?
  - 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



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## FAQs and Workshops

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



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## FAQs and Workshops

- 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 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



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## FAQs and Workshops

- Can a bank be an MSB, such as a provider of prepaid access?
  - No. 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



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## FAQs and Workshops

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



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## FAQs and Workshops

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



## FAQs and Workshops

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



## Monetary Instrument NPR

- On October 12, 2011, FinCEN issued an NPR to expand the definition of “monetary instrument” to include certain forms of prepaid access
- FinCEN’s proposal would add devices such as general use prepaid cards, certain gift cards, and potentially cell phones to the list of other monetary instruments that must be aggregated to determine if they exceed more than \$10,000 and included on the Currency and Monetary Instrument Report (CMIR), the form used to report international transport of funds at U.S. borders



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## Monetary Instrument NPR

- The NPR excludes from the proposal credit cards and debit cards, and codes and personal identification numbers or items like computers or web enabled cell phones, or other devices that are not dedicated to accessing specific prepaid funds



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## Monetary Instrument NPR

- Current regulations require that a CMIR be filed regarding the international transportation, mail, or shipment of currency or other monetary instruments – defined as coin or currency, traveler’s checks, checks, promissory notes, money orders in bearer form, and bearer bonds among others – in an aggregate amount that exceeds \$10,000



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## Monetary Instrument NPR

- The NPR asks for comments on eight broad questions
- The comment deadline in December 16, 2011



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Terrence P. Maher

Baird Holm LLP  
1700 Farnam Street  
Suite 1500  
Omaha, NE 68116  
402-636-8297  
tmaher@bairdholm.com

