ABA Staff Analysis: Financial Crimes Enforcement Network
Final Rule – Prepaid Access
Released July 26, 2011

FinCEN has issued a final rule governing prepaid access programs. The rule is intended to address regulatory gaps with existing prepaid access programs and to meet a Congressional mandate in section 503 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). The final rule takes effect 60 days after publication in the Federal Register with final compliance required six months after publication.

In the final rule, FinCEN seeks to balance law enforcement concerns about potential abuse of these products with the need to protect legitimate uses and societal benefits prepaid programs offer. After extensive dialogue with industry representatives, the final rule made several important changes that should facilitate compliance.

The first change will change the term used in existing FinCEN rules from “stored value” to “prepaid access” to better reflect current industry practice.

It is important to recognize that the rules apply to money services businesses (MSBs) which by definition do not include depository institutions.

Definitions

- **Provider** – Responding to recommendations by ABA and others, the final rule clarifies that participants in a prepaid program may identify the entity that will be designated as the provider. The provider will serve as the principal recordkeeper and conduit to law enforcement for information. The designated provider must register with FinCEN.

- When no provider has been identified and registered with FinCEN, the following characteristics will be used to identify a provider (these factors are not exclusive and the identification of a provider will be based on all the facts and circumstances). A provider will basically be the entity that controls a prepaid access program by:
  - Organizing the program
  - Setting the terms and conditions of the program
  - Determining which businesses will participate
  - Controlling or directing initiation, freezing or terminating prepaid access
  - Engaging in activities that demonstrate oversight and control

- **Seller of Prepaid Access** – In addition to providers, the rule applies to certain sellers of prepaid access, since sellers have direct contact with purchasers. To address concerns raised by commenters, the final rule changes how sellers will be regulated as MSBs to focus on those that sell cards that present the greatest risk of money-laundering. As a result:
  - Retailers that sell low-dollar closed loop prepaid access are not covered
  - Sellers are covered if they sell products which exceed:
    - $2,000 and that can be used before verification of customer ID or
    - $10,000 in value to any person in one day (unless the seller has policies and procedures designed to prevent such sales)
Exclusions

Taking a risk-based approach, FinCEN revised the final rule to eliminate from coverage products that present little or no risk of money laundering. After carefully considering all the comments received, the final rule excludes three specific products:

- **Closed loop products** that do not exceed $2,000 in value on any one day. Closed loop products are those which can only be used for goods or services involving a defined merchant or location (or set of locations) such as a specific retailer or retail chain, a college campus or subway system. A defined location could include the stores in a single mall. To be excluded, a closed-loop product also must not permit value transfers to third parties or cash withdrawals.

- **Government funded prepaid access products**, including federal, state, local, territory, insular possession and tribal government agency products.

- **Flexible spending and dependent card funded prepaid access products**. The final rule declined to adopt ABA’s recommendation to extend this exclusion to Health Savings Accounts (HSAs) since FinCEN determined that HSAs do not provide the same controls as other accounts with restricted use. To qualify, funds can only be used to reimburse defined, qualifying expenses.

In addition, the final rule has two limited exclusions that impose qualifications for the products to be excludible:

- **Payroll products**, defined as products used for the payment of employment benefits, wages or salaries. Due to concerns raised by law enforcement, the final rule did not accept ABA recommendations to add flexibility to encourage the use of payroll programs. As a result, the exclusion is restricted to products which cannot be used internationally, that do not allow funding from other sources (i.e., are limited to employer funding) and do not allow funds to be transferred to others.

- **Small value products**, defined as products where funds cannot exceed $1,000 at purchase or that do not permit more than $1,000 to be loaded, used or withdrawn on any one day. As with payroll cards, these products may not allow international use, person-to-person transfers of funds or funding from non-depository sources. The final rule does not require the value restriction to be printed on the card.

- **NOTE**: for Internet transactions, the relevant location to determine whether the transaction is an international transaction is the foreign location of a merchant and not the location of the person using the card or the location where products or services are to be delivered.

Anti-Money Laundering Requirements

Covered sellers or providers must establish an **anti-money laundering program** commensurate with the risks presented by their business model, including geography and customer base.

The program must include **policies and procedures** for access to and retention of customer identifying information (in the case of sellers) or retaining the information (in the case of providers). While both sellers and providers are responsible for collecting customer identification information, they may agree with one another which will collect the information.

**Records** must be retained for five years (for sellers, five years after date of the last sale; for providers, five years after the last use). The records may be kept in any format, but the provider bears ultimate responsibility for compliance with the recordkeeping requirements.

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Both providers and sellers must report suspicious transactions and large currency transactions. Since a provider is defined as a money services business (MSB), it must register with FinCEN and the registration must provide a complete list of the prepaid programs for which it serves as provider; the current MSB registration form (Form 107) is being revised to be ready by the final compliance date.

Questions? Contact ABA’s Rob Rowe for more information.