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FinCEN Issues Guidance on the Prepaid Access Final Rule

By **L. Richard Fischer, Obrea O. Poindexter and Sean Ruff**

Last week, the Financial Crimes Enforcement Network (“FinCEN”) issued guidance in the form of frequently asked questions (“FAQs”) to clarify various aspects of its final rule regarding “prepaid access” (“Final Rule”).

Following the issuance of the Final Rule, which amended the Bank Secrecy Act (“BSA”) regulations applicable to Money Services Businesses (“MSB”) with respect to “prepaid access,” financial institutions, retailers and others have had questions regarding their compliance obligations under the Final Rule.

The mandatory compliance date for the majority of the Final Rule is March 31, 2012. The FAQs can be accessed at http://www.fincen.gov/news_room/nr/html/20111102.html. In addition, FinCEN will hold a webinar **today, November 9, 2011 at 3:00 PM EST**, to discuss the Final Rule, the FAQs and FinCEN’s regulatory expectations. More information about the webinar can be found at <http://www.fincen.gov/whatsnew/html/20111102.html>.

In part, the FinCEN FAQs clarify that:

- With respect to closed loop prepaid access, the \$2,000 threshold is per device or vehicle and does not require aggregation of all purchases of separate closed-loop prepaid access devices or vehicles bought by an individual in a single day.
- The closed loop prepaid access exception permits each closed loop prepaid access device or vehicle to be loaded up to the \$2000 daily limit on any given day.
- A business that may be a “seller of prepaid access” under the Final Rule as a result of its reload activity, does not have to obtain customer identification information from customers “that have already provided customer identification information with respect to the prepaid access that they are reloading.”
- A business is not a “seller of prepaid access” even if the business allows a consumer to reload prepaid access at a non-depository location if the business:
 - Reloads less than \$10,000 of prepaid access that is not part of a prepaid access program for any person on any given day;
 - Reloads less than \$10,000 of prepaid access that is part of a prepaid access program, but the prepaid access is subject to verification procedures following the prepaid card’s initial sale, for any person on any given day; and
 - Maintains policies and procedures reasonably adapted to prevent the reloading of \$10,000 or more for any person on any given day.
 - For example, a retailer would not be a “seller of prepaid access,” nor would the retailer have to engage in the collection of identification information, if the retailer reloads a bank-issued prepaid card in amounts that do not exceed \$1,000 in open loop (or \$2,000 in closed loop) prepaid access per day.

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- Similarly, a retailer would not be a “seller of prepaid access” where (i) the initial load is under \$1,000 in open loop (or \$2,000 in closed loop) prepaid access and is not otherwise prepaid access under a prepaid card program, or (ii) a subsequent reload of the prepaid access exceeds the \$1,000-per-day maximum load requirement for open loop (or \$2,000-per-day maximum load requirement for closed loop), provided the cardholder has already undergone identification collection and verification procedures.
- A business is not considered a “seller of prepaid access” when distributing prepaid access to another business for further distribution, or for sale to consumers, by the other business. FinCEN explains that the Final Rule is intended to address sales to consumers or “end users,” rather than distributions to businesses.
- A bank is not a “provider of prepaid access” under the Final Rule.
 - That is, as referenced in a footnote in the supplemental information accompanying the Final Rule, FinCEN clarifies that because a bank cannot be an MSB under the BSA regulations, a bank that issues prepaid cards cannot be a provider of prepaid access subject to the requirements of the Final Rule.
 - FinCEN also makes clear that if a bank “exercises ‘principal oversight and control’” over a prepaid access program, “no participant,” including a program manager, “is required to register as the provider of prepaid access.” However, FinCEN reminds banks that the Final Rule does not relieve banks of their traditional BSA obligations arising outside the Final Rule.
 - FinCEN further explains that if a prepaid card program participant, other than a bank, registers as a “provider of prepaid access,” that participant is a “provider” under the Final Rule and, therefore, must comply with the provider obligations under the Final Rule, even if the participant is part of a bank program.
- Policies and procedures “reasonably adapted” to prevent a sale of more than \$10,000 in prepaid access to any person during any one day should be “risk-based and appropriate to the particular retailer in question.”
 - FinCEN does not provide guidance on whether specific policies and procedures would be deemed to be reasonable, other than stating that they should take into account factors such as its typical customers, its location(s), and the volume of prepaid access.
 - However, FinCEN makes clear the mere fact that if a business sells more than \$10,000 of prepaid access to any one person on any one day, this would not “in and of itself” disqualify the procedures from being considered “reasonably adapted” to prevent such sales.

Contact:

L. Richard Fischer
(202) 887-1566
lfischer@mofo.com

Obrea O. Poindexter
(202) 887-8741
opoindexter@mofo.com

Sean Ruff
(202) 778-1665
sruff@mofo.com

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