

# Client Alert

International Trade Practice Group

August 16, 2011

## FinCEN Amends the Bank Secrecy Act Affecting Money Services Businesses that Deal in Stored Value

On July 29, 2011, the Financial Crimes Enforcement Network (FinCEN) published in the *Federal Register* a **Final Rule** applicable to Money Services Businesses (MSBs) with regard to stored value. FinCEN issued the Final Rule to address regulatory gaps that have resulted from the proliferation of prepaid innovations and their increasing use as an accepted payment method. The **Notice of Proposed Rulemaking** initially addressing these regulatory issues was issued by FinCEN on June 28, 2010.

The effective date of the Final Rule is September 27, 2011, and the compliance date with respect to registration requirements is January 29, 2012.

### Background

Under the Bank Secrecy Act (BSA), sellers or redeemers of stored value are covered under the definition of the term MSBs. MSBs are generally required to (1) establish written anti-money laundering (AML) programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities; (2) file Currency Transaction Reports and Suspicious Activity Reports; and (3) maintain certain records, including those relating to the purchase of certain monetary instruments with currency, transactions by currency dealers or exchangers, and certain transmittals of funds. Most types of MSBs are also required to register with FinCEN, and all are subject to examination for BSA compliance by the Internal Revenue Service.

### Final Rule

The Final Rule implements section 503 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) signed by the President on May 22, 2009, that requires the issuance of “regulations in final form implementing the Bank Secrecy Act, regarding the sale, issuance, redemption, or international transport of stored value, including stored value cards.” In its implementation of section 503 of the Card Act, the Final Rule, *inter alia*, amends the current MSB regulations by replacing the term “stored value” with the term “prepaid access” that covers prepaid devices such as plastic cards, mobile phones, electronic serial numbers, key fobs and/or other mechanisms that provide a portal to funds that have been paid for in advance and are retrievable and transferable.

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More specifically, the Final Rule amends the BSA's regulations with respect to MSBs by:

- Renaming "stored value" as "prepaid access" (and deleting the term "stored value"), without narrowing or broadening the meaning of the term, but to more aptly describe the underlying activity;
- Deleting the terms "issuer" and "redeemer" of stored value;
- Clarifying that prepaid access is a financial service that provides consumers with access to the financial system, and as such, should be subject to an appropriate level of regulation to prevent misuse;
- Imposing suspicious activity reporting, customer information and transaction information recordkeeping requirements on both providers and sellers of prepaid access and, additionally, a registration requirement on providers of prepaid access only;
- Adopting 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;
- Exempting 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;
- Exempting closed loop prepaid access products sold in amounts of \$2,000 or less; and
- Excluding prepaid access used to pay government benefits as well as government funded and pre-tax flexible spending for health and dependent care funded prepaid access programs.

The Final Rule specifies that a provider of prepaid access program can be designated by agreement among the participants in the prepaid access program. Under the agreement approach, the provider will serve as the principal conduit of information for the other members of the program, thereby simplifying the production and strengthening the integrity of required reports and recordkeeping. The provider will accept and manage the flow of information generated by all of the program participants in such a way as to comply with regulatory requirements.

In addition, the Final Rule states that sellers of prepaid access are general service retailers, such as pharmacies, convenience stores, supermarkets, discount stores or other types of businesses that offer a wide spectrum of products. As such, sellers of prepaid access generally have face-to-face contact with consumers at the point of sale and, thus, are in the best position to collect customer identifying information. While sellers are not required to register with FinCEN (just as no MSB that operates solely as an agent for another MSB is required to register), they must maintain an AML program if (1) the prepaid access product offered is covered by the Final Rule and can be used without a later activation process that includes customer identification or (2) if the sold prepaid access products (regardless of whether offered under a prepaid program) provide a portal to funds that exceed \$10,000 to any person during any one day.

Importantly, in the Final Rule FinCEN explicitly states that it continues to believe that prepaid access such as general purpose reloadable products with no restrictions on international use poses heightened money laundering risks regardless of the value of the funds to which such access is being provided. To mitigate the money laundering risks, the Final Rule includes this type of prepaid access under the definition of prepaid program that triggers regulatory obligations applicable to both providers and sellers of prepaid access.

If you have any questions regarding the Final Rule, please contact Jeff Telep at +1 202 626 2390 or Jane Cohen at +1 202 661 7842.

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