



Department of the Treasury Financial Crimes Enforcement Network

Ruling

FIN-2012-R003

Issued: May 23, 2012

Subject: Application of the Prepaid Access Rule to Bank-Controlled Programs

Dear []:

I am responding to your letter, dated November 1, 2011, to the Financial Crimes Enforcement Network ("FinCEN"), in which you seek an administrative ruling on the application of money services business ("MSB") regulations as they relate to the activities of [] ("the Company") as a distributor and seller of bank network-branded, reloadable and non-reloadable prepaid cards. Specifically, you asked whether the Company is considered a prepaid access provider and subject to MSB registration; and whether the Company is subject to the bank exemption from the definition of MSB for the purpose of prepaid product sales.

You state that the Company markets, distributes and sells to consumers in its stores certain bank-issued reloadable and non-reloadable open-loop cards, and reload packs through which cardholders can add value to reloadable cards. The cards are issued by [] ("the Bank"), a national bank that is supervised by the Office of the Comptroller of the Currency. The responsibilities of the Company and the Bank are set forth in an agreement between them. The agreement provides that the Bank is responsible for issuing the cards, establishing and maintaining account balances, and processing card transactions; and the Company is responsible for selling the cards to consumers in grocery and other retail stores owned and operated by the Company and its affiliates, and conforming to the Bank's anti-money laundering compliance program. The Company and the Bank also have executed an amendment to the agreement in which the Bank has been designated as the "provider" of prepaid access.

The term MSB refers to financial services providers, wherever located, that do business wholly or in a substantial part in the United States in each of the following distinct categories: (1) dealer in foreign exchange; (2) check casher; (3) issuer or seller of traveler's checks or money orders; (4) provider of prepaid access; (5) money transmitter;

(6) the United States Postal Service; and (7) seller of prepaid access.¹ A bank, as defined in the BSA regulations, cannot be an MSB.²

A provider of prepaid access is defined as “the participant within a prepaid program that agrees to serve as the principal conduit for access to information from its fellow program participants[.]” The participants in a prepaid program must designate one of the prepaid program participants to serve as the provider of prepaid access.³ Additionally, where no non-bank participant registers as the provider of prepaid access for a defined prepaid access program, “the provider of prepaid access is the person with principal oversight and control over the prepaid program.”⁴

A seller of prepaid access is defined as:

Any person that receives funds or the value of funds in exchange for an initial loading or subsequent loading of prepaid access if that person: (i) Sells prepaid access offered under a prepaid program that can be used before verification of customer identification under § 1022.210(d)(1)(iv); or (ii) Sells prepaid access (including closed loop prepaid access) to funds that exceed \$10,000 to any person during any one day, and has not implemented policies and procedures reasonably adapted to prevent such a sale.⁴

According to your letter, an amendment to the contract between the Company and the Bank designated the Bank as the provider of prepaid access. However, “provider of prepaid access” is a defined category of MSB, and banks are one of the types of entities excluded from being an MSB. A bank, therefore, cannot be designated as the provider of prepaid access for any defined MSB prepaid access program.⁵ Where a bank has primary oversight and control over an arrangement to provide prepaid access, no participant is required to register as the provider of prepaid access.⁶ Although a contractual designation of a bank as a “provider of prepaid access” cannot make a bank an MSB,

¹ 31 CFR § 1010.100(ff)(1)-(7).

² See 31 CFR § 1010.100(ff)(8)(i).

³ See 31 CFR § 1010.100(ff)(4).

⁴ See 31 CFR § 1010.100(ff)(7).

⁵ In your letter, you assert that you are an agent of the bank and therefore cannot be an MSB. However, please note that FinCEN does not deem it a viable argument for a company merely to assert that it is an agent of a bank, and therefore not an MSB, for providing or selling prepaid access issued by a bank. In the absence of an agreement, a prepaid access provider determination is based on the underlying activity in which a participant is involved and based on all the facts and circumstances, such as whether a participant in an arrangement may have primary oversight and control.

⁶ See Frequently Asked Questions: Final Rule – Definitions and Other Regulations Relating to Prepaid Access, Question 9 (Nov. 2, 2011), available at (http://www.fincen.gov/news_room/nr/html/20111102.html).

such language in a contract would serve as evidence of a bank's oversight and control over an arrangement to provide prepaid access.

In this case, if the Bank exercises primary oversight and control over the arrangement to provide prepaid access which the Company distributes and sells, the Company would not be required to register as the provider of prepaid access and would not be an MSB under 31 CFR § 1010.100(ff)(4), nor would any other participant in the particular prepaid access arrangement.

Please keep in mind, however, that the Company may or may not be considered a seller of prepaid access even if it is not a provider of prepaid access under our regulations. If the Company sells a prepaid product from a defined MSB prepaid program that can be used before verification of customer identification, the Company would be a seller of prepaid access.⁷ The company also would be a seller of prepaid access if it sells any type of prepaid access, regardless of whether it is from a defined MSB prepaid access program or from another prepaid access arrangement, without having implemented policies and procedures reasonably adapted to prevent the sale of such prepaid access to funds that exceed \$10,000 to any person during any one day.⁸ However, if the Company's prepaid access sales only involve products other than prepaid access products from a defined MSB prepaid program that provides access to funds prior to customer identification, and the Company has implemented policies and procedures reasonably adapted to prevent the sale of prepaid products that provide access to more than \$10,000 to any person during any one day, then the Company would not be a seller of prepaid access.⁹

This ruling is provided in accordance with the procedures set forth at 31 CFR § 1010.711. In arriving at the conclusions in this letter, we have relied upon the accuracy and completeness of the representations made in your letter. Nothing precludes us from reaching a different conclusion or taking further action if circumstances change or any of the information provided is inaccurate or incomplete. We reserve the right, after redacting your name and your company's name and address, to publish this letter as guidance to financial institutions in accordance with our regulations. You have fourteen days from the date of this letter to identify any other information you believe should be redacted and the legal basis for redaction.

⁷ See 31 CFR §§ 1010.100(ff)(7)(i) and 1022.210(d)(1)(iv). While this would not apply with respect to the sale of prepaid access solely under the arrangement that you have with the Bank as described in your letter, it could be the case if you were to sell prepaid access under another prepaid access arrangement.

⁸ See 31 CFR § 1010.100(ff)(7)(ii). This may apply with respect to the sale of prepaid access under any arrangement that you have, including the arrangement that you have with the Bank as described in your letter.

⁹ For example, if the Company is only selling prepaid access under the arrangement with the Bank as described in your letter, and the Company has implemented the policies and procedures referenced in 31 CFR § 1010.100(ff)(7)(ii), it would not be a seller of prepaid access under FinCEN's regulations.

If you have any questions regarding this letter, please contact [FinCEN's regulatory helpline at (800) 949-2732].

Sincerely,

// signed //

Jamal El-Hindi
Associate Director
Regulatory Policy and Programs Division