

Guidance

FIN-2016-G002

Issued: March 24, 2016

Subject: Frequently Asked Questions regarding Prepaid Access

Frequently Asked Questions (FAQs)

These FAQs are in addition to, and supplement, the FAQs entitled “Final Rule – Definitions and Other Regulations Relating to Prepaid Access,” which were issued on November 2, 2011. The 2011 FAQs are found at http://www.fincen.gov/news_room/nr/pdf/20111102.pdf.

Question 1: De minimis cash refund requirements under state law

A particular retailer does business in several different states. In several of those states, there are state laws that require the refunding of *de minimis* amounts in cash to an individual holding a closed-loop card. The states vary, however, on the dollar level assigned the *de minimis* classification. For example, in California the dollar level is set at \$10, while in other states it is set at \$5 or \$2.

Q: Can a retailer operating in a variety of states set and maintain a single *de minimis* dollar amount of cash to return and still maintain the benefit of the closed loop exclusion from FinCEN’s regulations, so long as other exclusion requirements are met? For example, could the retailer, for ease of administration as well as to provide uniformity and predictability for its patrons and employees, set as its standard the highest level as required among the various states in which it does business?

A: Yes. If the retailer maintains a standard dollar level for *de minimis* refunds that is set at the highest required fixed amount from among the states in which the retailer does business, FinCEN will regard all such refunds as *de minimis* and consistent with the definition of closed loop prepaid access.

Closed loop prepaid access is a type of prepaid access that can be used for goods or services. *See* 31 CFR 1010.100(kkk). The regulations exclude from the definition of a prepaid program an arrangement that provides closed loop prepaid access to funds limited to \$2,000 or less that can be associated with a prepaid access device or vehicle on any day. *See* 31 CFR 1010.100(ff)(4)(iii)(A). As FinCEN has explained, refunds of *de minimis* amounts required by applicable state law are consistent with the definition of “closed loop prepaid access” and do not negate the exclusion of closed loop prepaid access from the definition of a prepaid program.¹

¹ Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Prepaid Access, 76 FR 45403, 45413 n.36 (July 29, 2011).

It would be much more efficient for a retailer to provide refunds at a single dollar amount that is set at the highest required among the different states in which the retailer does business for ease of administration as well as to provide uniformity and predictability for its patrons and employees. FinCEN previously determined that a fixed amount established by state law is *de minimis*.² This applies to each state's determination that a fixed amount is *de minimis* regardless of whether one state varies from another. Given the benefits to be gained from a uniform approach to the definition of *de minimis* amounts, and the lack of compelling reasons to keep to a state-by-state approach, FinCEN concludes that providing refunds at the highest required fixed amount from among the states in which the retailer does business will not result in the loss of a retailer's closed loop prepaid access exclusion.³

Question 2: Use of Quick Response Codes and other technology in connection with Prepaid Access

Many state governments participate in a type of program that allows their residents to purchase and affix a transponder to their vehicles for use on toll roads and bridges. Through this mechanism, the appropriate fee is deducted from the balance of funds maintained on account for each individual driver. The account is replenished from time to time, as needed, when the balance falls to a predetermined value. Additions to the account are typically made by an automated clearinghouse transaction, or through an advance from an associated credit or debit card. We interpret this type of program as falling within the definition of closed loop prepaid access as defined in 31 CFR 1010.100(kkk).

Q: If a company or individual sought to establish a similar arrangement for the provision of other services around the country, such as commercial parking lots, where the redemption is not by means of a transponder, but instead by a smartphone quick response (QR) code or other technology, would the closed loop definition apply? Would the \$2,000 closed loop threshold, which allows for exclusion from the regulation's coverage, also apply?

A: If an arrangement for the payment of fees, such as parking lot fees, were to be established that operated similarly to the toll road pass system described above, it could meet the regulation's definition of closed loop prepaid access. To do so, the arrangement would need to meet all of the characteristics of the definition, including, but not limited to, the identification of a "defined merchant or location (or set of locations)." A participating "defined merchant," might

² See *supra* note 1.

³ We understand that Massachusetts law concerning non-reloadable closed loop prepaid access is structured differently than the laws of other states requiring refunds on closed loop prepaid access. Massachusetts law requires that for such products a consumer be provided cash redemption when 90% or more of the initial prepaid access value has been depleted. Depending on the original value, this may significantly exceed the fixed amount currently required by any other state law. When Massachusetts law applies to closed loop prepaid access, but only when Massachusetts law applies, FinCEN deems a refund required by Massachusetts law to be *de minimis* for purposes of determining whether closed loop prepaid access exception applies. This means a retailer that does business in Massachusetts, as well as in other states, may apply a standard dollar level for *de minimis* refunds that is set at the highest required *fixed* amount from among the other states in which the retailer does business. At present, Massachusetts is the only state that applies a percentage refund, should other states adopt this approach, FinCEN would consider application of this FAQ to those states' policies.

be made known to the general public by the use of distinctive signage, logos, symbols or mobile communication(s) to a prospective patron. This list is by no means exhaustive of the ways to convey program participation.

The QR code or other technology would need to be limited, as is the transponder in the roadway example, to only the service being advertised. If the parking lot arrangement meets all of the closed loop characteristics, it is also eligible to be excluded from the regulation provided it does not exceed the \$2,000 maximum value that can be associated with a prepaid access device or vehicle on any day.

Question 3: Defined Merchant in the context of closed loop prepaid access

Q: Is the term “defined merchant” in the definition of closed loop prepaid access limited to a single merchant and its affiliates? Does it exclude prepaid access arrangements comprised of one or more unaffiliated partner merchants?

A: No, the term “defined merchant” in the definition of closed loop prepaid access is not limited to a single merchant and its affiliates and may include additional unaffiliated partner merchants joined for the limited purpose of providing a closed loop prepaid access program. 31 CFR 1010.100(kkk) defines “closed loop prepaid access” as “[p]repaid access to funds or the value of funds that can be used only for goods or services in transactions involving *a defined merchant or location (or set of locations)*, such as a specific retailer or retail chain, a college campus, or a subway system.” (Emphasis added.)

In circumstances where the “defined merchant” in a closed loop prepaid program extends to a number of merchants, affiliated for purposes of jointly offering closed loop prepaid access, there are a variety of measures commonly employed to identify the participants to the prospective purchasing public. For example, a family entertainment company might choose to offer a “get-away weekend.” To maximize its appeal, the company offers the vacationing family a closed loop product that encompasses theme park admission, lodging, dining, and travel arrangements. As a function of this closed loop program, the entertainment company informs the buyer of its get-away weekend partners, in media promotions, websites, and via marketing materials. The parameters of the closed loop program are distinctly drawn and made known explicitly to the purchaser. As long as the program adhered to the \$2,000 maximum value established by FinCEN’s prepaid access regulation for exclusion, the standard of a “defined merchant” has been met.

The preamble to the final rule states that “in all of these instances, the prepaid access is ‘closed’ to any other retailers which are not part of the specifically identified group of retailers.”⁴ Some closed loop programs may choose to enumerate the retailers by name (or logo, or trademark) on the prepaid access device or its accompanying materials. Others, we understand, may refer a purchaser to a public website for participating merchants and locations. As long as the universe of merchants is identifiable and articulated to the purchasing public, and the partner merchants

⁴ Bank Secrecy Act Regulations: Definitions and Other Regulations Relating to Prepaid Access, 76 FR 45403, 45407 (July 29, 2011).

are joined for the limited purpose of providing a closed loop prepaid access program, such an arrangement falls within the term “defined merchant.”

Question 4: Policies and procedures reasonably adapted to avoid the threshold for seller of prepaid access

Q: Can FinCEN offer more specificity and clarity regarding what measures are necessary on the part of retailers to institute controls, policies and procedures sufficient to meet the “reasonably adapted” criteria, and thereby avoid being designated as “sellers” under the rule? Must a retailer collect identification information from every customer to be able to track how much the person buys in a single day as part of “policies and procedures reasonably adapted to prevent” the sale of more than \$10,000 in prepaid access to an individual in a day?

A: A person is a “Seller of prepaid access” if the person “[s]ells 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.” See 31 CFR 1010.100(ff)(7)(ii). In FinCEN’s November 2011 Frequently Asked Questions related to Prepaid Access (November 2011 FAQs), Question [#4] asks “[h]ow do I know whether my policies and procedures are ‘reasonably adapted’ to prevent a sale of more than \$10,000 to any person during any one day?” The response to this question states that the policies and procedures must be risk-based and appropriate for the retailer in question.⁵

We understand that some persons and businesses in the marketplace are interpreting this section of the regulation to impose the equivalent of a strict liability standard regarding the sale of prepaid access. In effecting compliance, some retailers are requesting purchaser information at the point of sale for each and every sale of prepaid access; this information has, on occasion, included social security numbers and driver’s license numbers. Purchasers may be confused and reluctant to provide such personal information, particularly in situations where the purchases are of low dollar value and/or exclusively closed loop products.

Although a business entity may choose to collect this information for its own reasons, FinCEN did not intend to institute such a sweeping requirement. Instead, FinCEN’s expectation regarding the “policies and procedures reasonably adapted to prevent” sales of \$10,000 of collective prepaid access is that retailers will: (1) develop an internal policy regarding sales of prepaid access in excess of \$10,000 to a single individual in a day; (2) articulate this policy to the appropriate personnel within the organization; and (3) monitor activity, through mechanisms appropriate to the retailer’s size and type of operating structure, to avoid sales in excess of \$10,000 to a single individual in a day. As we stated in the closing sentence of the response to Question 4 in the November 2011 FAQs, “[t]he 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.’”

As we noted in FinCEN’s public webinar in November 2011:

⁵ See http://www.fincen.gov/news_room/nr/html/20111102.html.

[W]e believe it is quite appropriate to regulate sellers who *routinely* engage in high volume sales of prepaid access by requiring an AML program, SAR reporting and customer identification collection for those that sell more than \$10,000 of prepaid access to a person in a day. However, we don't believe that all (or even most) retailers sell at this dollar volume and we don't want to impose inappropriate burdens on them. (Emphasis added).⁶

“Reasonably adapted” policies, as referenced in 31 CFR 1010.100(7)(ii), may simply involve modifications to existing internal operating procedures. If a retailer that already has a policy to avoid large cash transactions expands that policy to avoid the sale of large amounts of prepaid access, it would be a good indication that such a retailer is mindful and compliant with its BSA obligations. A good policy will be risk-based and take into account the lines of business in which it engages, its customer base and target market, sales volume and other factors unique to its operation. The policy should set an operating standard for the business that is well understood and followed by all members of the organization.

Question 5: Listing sellers of prepaid access on the provider's MSB agent list

Q: When is a provider of prepaid access required to list on its MSB agent list an entity that sells the provider's prepaid product?

A: A seller of prepaid access is defined in the regulation 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:

- (1) Sells prepaid access offered under a prepaid program that can be used before verification of customer identification; or
- (2) 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.⁷

If an entity that sells a provider's prepaid product meets the definition of "seller of prepaid access," the provider of prepaid access is required to list that entity on its MSB agent list. If an entity does not meet the definition of "seller of prepaid access," the provider of prepaid access is not required to list that entity on its agent list.

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Financial institutions with questions about this guidance or other matters related to compliance with the implementing regulations of the BSA may contact FinCEN's Resource Center at 703-905-3591.

⁶ http://www.fincen.gov/financial_institutions/msb/. [Webinar: Prepaid Access Final Rule]

⁷ 31 CFR 1010.100(ff)(7).