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DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AB07

**Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act
Regulations – Definitions and Other Regulations Relating to Prepaid Access**

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is proposing to revise the Bank Secrecy Act (“BSA”) regulations applicable to Money Services Businesses with regard to stored value or prepaid access.

More specifically, the proposed changes include the following: (1) renaming “stored value” as “prepaid access” and defining that term; (2) deleting the terms “issuer and redeemer” of stored value; (3) imposing suspicious activity reporting, customer information and transaction information recordkeeping requirements on both providers and sellers of prepaid access and, additionally, imposing a registration requirement on providers only; and (4) exempting certain categories of prepaid access products and services posing lower risks of money laundering and terrorist financing from certain requirements.

The proposed changes are intended to address regulatory gaps that have resulted from the proliferation of prepaid innovations over the last ten years and their increasing use as an accepted payment method. If these gaps are not addressed, there is increased potential for the use of prepaid access as a means for furthering money laundering, terrorist financing, and other illicit transactions through the financial system. This would

significantly undermine many of the efforts previously taken by government and industry to safeguard the financial system through the application of BSA requirements to other areas of the financial sector. In this proposed rulemaking, we are reviewing the stored value/prepaid access regulatory framework with a focus on developing appropriate BSA regulatory oversight without impeding continued development of the industry, as well as improving the ability of FinCEN, other regulators and law enforcement to safeguard the U.S. financial system from the abuses of terrorist financing, money laundering, and other financial crime. In the course of our regulatory research into the operation of the prepaid industry, we have encountered a number of distinct issues, such as the appropriate obligations of payment networks and financial transparency at the borders, and we anticipate future rulemakings in these areas. We will seek to phase in any additional requirements, however, as the most prudent course of action for an evolving segment of the money services business (“MSB”) community.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before (INSERT DATE 30 DAYS FOLLOWING PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER).

ADDRESSES: You may submit comments, identified by RIN 1506-AB07, by any of the following methods:

- Federal e-rulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Refer to Docket number TREAS–FinCEN–2009–0007.
- Mail: FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506-AB07 in the body of the text.

Inspection of comments: Public comments received electronically or through the U.S. Postal Service sent in response to a “Notice and Request for Comment” will be made available for public review as soon as possible on www.regulations.gov. Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10:00 a.m. and 3:00 p.m., by calling the Disclosure Officer at (703) 905-5034 (not a toll free call).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN (800) 949-2732 and select option 1.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Development of the Prepaid Industry

Prepaid products, also variously known as stored value, stored value cards, or prepaid cards, have emerged in recent years into the mainstream of the U.S. financial system. As consumers have embraced the convenience and security of being able to transact many daily commercial activities electronically, more and more areas of American commerce explore ways to reap the advantages of electronic payment delivery.

This migration to electronic delivery has escalated greatly in recent years, most especially over the last 3 – 5 years.¹ As consumer comfort levels rise and technology costs fall, continued growth in all types of electronic payment options appears likely. As

¹ “Study findings suggest...the market for open-loop gift/prepaid cards is increasing...more than twice as many gift card purchasers/receivers bought or were given a general purpose gift card in 2008 as were in 2005.” Hitachi Consulting “Payments Study Highlights Continued Growth in Credit, Debit Cards,” February 2009.

the Federal Reserve Board noted in its 2007 Payments Study, electronic payments comprised over two-thirds of all non-cash payments.²

By certain accounts,³ the launch of the first stored value/prepaid product traces to the magnetic stripe-bearing gift cards introduced by Blockbuster Video in 1995 to replace the company's former paper gift certificates. The change allowed the merchant to offer the purchaser a more attractive product that, unlike its paper-based predecessor, could be issued in any denomination. The gift cards also allowed the balance to be monitored and offered security features against alteration or fraud. The Blockbuster Gift Card began the rapid migration by most gift card sellers to plastic from paper.

Beginning in the year 2000, VISA, Inc. moved into the prepaid space by introducing its Buxx card, targeted at the teen/young adult market as a money management tool and a more secure way for parents to provide college students with funds for living expenses. MasterCard launched a competitor card (iGen) in 2001, and American Express began marketing its prepaid card in October 2002 as a general purpose gift card that was good anywhere that American Express was accepted. The convergence of the initial retailer-exclusive gift cards⁴ such as Blockbuster, Sears or Amazon.com with these "branded" cards, bearing a Visa, MasterCard, American Express or Discover logo, meant that consumers could easily find a gift card for any purpose and in virtually any amount.

² Of electronic payments, "[c]ard payments alone comprised over half of non-cash payments." The 2007 Federal Reserve Payments Study – Non-cash Payment Trends in the United States: 2003-2006, pg. 5.

³ CardTrak News, Blockbuster Giftcard press release, January 15, 1996.

⁴ Retailer-specific prepaid products are generally characterized as "closed loop," meaning that there are a finite number of locations at which the devices can be used. Closed loop programs involve a known provider of goods or service at the time of sale. Conversely, "open loop" refers to a type of prepaid access device that can be used at any accepting retail location. Generally, open loop cards are branded network cards, such as: VISA, MasterCard, American Express and Discover. See also Footnote 34 in this NPRM for a discussion of FinCEN's previous proposal of a regulatory definition relating to closed loop stored value.

A simultaneous market development involved in-store gift card kiosks, such as Gift Card Mall, launched in 2001 by Blackhawk Network, a subsidiary of Safeway Stores, Inc. Blackhawk Network pioneered the establishment of in-store gift card retail centers, located in supermarkets and convenience stores, which meant that the purchaser no longer had to visit a particular retailer, restaurant, or entertainment center to buy gift cards for department and discount stores, movie theaters, theme parks, and on-line vendors such as iTunes. Although initial marketing strategies for these “malls” targeted a specific consumer niche, the varied vendors represented and the convenience appealed to a broader-than-expected audience. A 2006 study⁵ undertaken by the American Bankers Association (“ABA”) and Dove Consulting revealed strong consumer preference for both giving and receiving retailer-specific gift cards, deemed both more personal than cash and more valued by the recipient.

Within the context of the above-referenced developments, there are a myriad of factors that have spurred the growth of the prepaid industry including: (1) the effort to market cost-effective financial products to individuals who are either unbanked or underbanked;⁶ (2) the effort by governmental entities, at federal and state and local levels, to deliver an increasing number of benefits through prepaid cards, which can be used at ATMs as withdrawal devices or used at points of sale (“POS”) to purchase goods and services; and (3) the move by many employers to pay some workers, such as construction workers, day laborers, and others, through cards, which they regularly

⁵ 2005/2006 Study of Consumer Payment Preferences, published October 2005.

⁶ “A Tool for Getting By or Getting Ahead? Consumers’ Views on Prepaid Cards,” by Center for Financial Services Innovation; authors Gordon, Romich and Waithaka (2009), pg. 7. See also, FDIC Survey of Unbanked and Underbanked Households (December 2009), available at http://www.fdic.gov/householdsurvey/full_report.pdf.

reload⁷ with scheduled earnings for as long as the individual remains an employee. Generally, these cards can also be used at ATMs and at retail POS.

With respect to the first factor, concerning the needs of the unbanked and underbanked, the use of prepaid cards has been promoted by various advocacy groups⁸ as an effective, lower-cost method to deliver necessary financial services. For a variety of cultural or educational reasons, or due to language barriers, some individuals have found the traditional banking environment overly intimidating or unsuited to their financial services needs. Many have never established banking relationships, or have found them cost-prohibitive for their limited needs, and have turned to the “alternative financial service provider” marketplace,⁹ accessing businesses such as payday lenders, pawnshops, and check cashing facilities. Often, the fees associated with these alternatives may be high in relation to the dollar value of the transaction.¹⁰ The development and promotion of prepaid cards introduced a new non-traditional banking alternative for these individuals. Many of the major industry members engaged in prepaid access are aggressively courting this unbanked market segment by increasing marketing efforts and by also lowering fees.¹¹

With respect to the latter two factors, concerning government and employer payments, the use of a prepaid card replaces the issuance of paper checks, offering benefits to the government entity or employer such as lower transaction costs, accounting efficiencies, safeguards against alteration or loss, and others. For the recipient, many of

⁷ “Load” and “reload,” as used in the prepaid access context, refer to the initial provision of value and all subsequent provisions of value to a prepaid access program.

⁸ See “A Tool for Getting By or Ahead...,” referenced in footnote 6.

⁹ “Alternative Financial Services: A Primer,” FDIC Quarterly, 2009, Vol.3, No. 1.

¹⁰ See materials referenced in footnote 6.

¹¹ American Banker, June 4, 2009, p. 1.

the same security concerns are addressed, as well as the immediacy and reliability of the payment, which no longer has to be sent by mail and can be used without the need for negotiation at a bank or check cashing facility.

As the general public has become more attuned to seeing plastic where paper formerly dominated, it has been willing, and sometimes eager, to accept transition to a card or similar convenient device, such as a key fob.¹² The advantages to the consumer include eliminating the need to carry cash, security against loss/theft and the ability to track and limit spending, among others. For the financial services industry, it offers a profitable retail payment product whose acceptance by the general public and the vast majority of the American and global marketplace is attractive.

B. The Need for Rulemaking

Notwithstanding the benefits of prepaid access, based on discussions with the law enforcement community, FinCEN believes that it may be vulnerable to money laundering. Many of the same factors that make prepaid access attractive to consumers make it vulnerable to illicit activity. For example, the ease with which prepaid access can be obtained combined with the potential for relatively high velocity of money through accounts involving prepaid access and anonymous use, may make it particularly attractive to illicit actors. These individuals value the ability to receive and distribute a significant amount of funds without being subject to many of the reporting requirements that would apply to comparable transactions using cash or involving an ordinary demand deposit account at a bank. FinCEN solicits comment on the money laundering and

¹² As used in this discussion, “key fob” refers to a type of contactless payment device, typically attached to a key chain, which might resemble a disc-shaped ornament or token. It contains an electronic chip from which a compatible mechanism is able to communicate payment instructions to the holder of the corresponding account.

terrorist financing vulnerabilities that prepaid access products or services may pose.

Depending on the sensitivity of such information, this information may be maintained in a confidential docket.

The purpose of this rulemaking is to establish clear requirements under the BSA with respect to certain non-bank actors involved in the provision of prepaid access. In doing so, FinCEN intends to bring an appropriate degree of transparency to the sector; facilitate the provision of valuable information to regulatory and law enforcement agencies; and enhance the resilience of the prepaid industry against illicit activity. While a limited degree of regulatory oversight over the prepaid industry exists at present, we believe that it is now time to bring this industry within the full ambit of the BSA. We believe that our endeavors in this regard will be assisted by the fact that many in industry already use automated fraud monitoring systems that evaluate data points similar to those relevant to detect suspicious transactions and other information relevant to the BSA.

In proposing this rule, FinCEN is also reiterating a clear distinction that already exists in our regulations between money services businesses and depository institutions, both of which play roles in prepaid access transaction chains. Depository institutions are already held responsible for a full slate of anti-money laundering (“AML”) obligations, and those responsibilities will not change as a result of this rulemaking. Further, these depository institutions are subject to regular examinations by their federal regulators where they are assessed for compliance. Consequently, with this rulemaking, we intend to bring non-bank entities in the prepaid sector under regulatory treatment that is more consistent with other financial institutions, such as depository institutions, subject to the BSA.

In this proposed rulemaking, we will attempt to address vulnerabilities in the types of prepaid programs that present potential for abuse, and to impose requirements on those within the transaction chain that possess the greatest ability to control the program's operations, either directly or through an oversight role, and those who may have relevant consumer information. At the same time, we do not want to stifle growth or innovation within the payments industry. Finally, we recognize that, while we will frequently refer to the "card" in describing this payment method, it is becoming increasingly apparent that the plastic card entails only one possible method of enabling prepaid access. Accordingly, we intend for this rulemaking to be as forward-looking and as technologically neutral as possible; today prepaid access can be provided through a card, a mobile phone, a key fob or any other object to which relevant electronic information can be affixed. In some contexts, there may even be no physical object, as access to prepaid value can be enabled through the provision of information over the telephone or the Internet. We intend for our rule to be applicable to whatever tomorrow's payment environment offers as well. However, we seek comment on whether the rulemaking is sufficiently technologically neutral, and if not, in what areas it can be improved for these considerations.

FinCEN does not intend for this rule to have an impact on two other payment methods that bear some outward similarities to prepaid access, namely the use of credit cards or debit cards. The proposed terminology in this rulemaking is meant to establish a clear difference between those systems and prepaid access. FinCEN anticipates obtaining further insight from the rulemaking and public comment process to ensure that we employ the most accurate and precise terminology possible.

II. Background of this Rulemaking

A. *Statutory and Regulatory Background*

The BSA, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b and 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (the “Secretary”) to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis to protect against international terrorism.”¹³ The Secretary’s authority to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.¹⁴ FinCEN has interpreted the BSA through implementing regulations (“BSA regulations” or “BSA rules”) that appear at 31 CFR Part 103.

FinCEN has defined the BSA term “financial institution” to include “money services businesses,”¹⁵ a category that includes: a currency dealer or exchanger; a check casher; an issuer, seller, or redeemer of traveler’s checks, money orders, or stored value; and money transmitter.¹⁶ FinCEN is authorized to deem any business engaged in an activity determined by regulation to be an activity similar to, related to, or a substitute for these activities a “financial institution.”¹⁷

The Director of FinCEN, through delegated authority, has issued regulations under the BSA implementing the recordkeeping, reporting, and other requirements of the

¹³ 31 U.S.C. 5311.

¹⁴ See Treasury Order 180-01 (Sept. 26, 2002).

¹⁵ “MSB” is a term FinCEN created that refers to certain non-bank financial institutions that offer specific services (often in combination) and are without a federal functional regulator.

¹⁶ 31 CFR 103.11(uu) implementing 31 U.S.C. 5312(a)(2)(J), (K), (R) and (V).

¹⁷ 31 U.S.C. 5312(a)(2)(Y).

BSA. Like other financial institutions under the BSA, MSBs must implement AML programs, make certain reports to FinCEN, and maintain certain records to facilitate financial transparency. MSBs are required with some exceptions to: (1) establish written AML programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities;¹⁸ (2) file Currency Transaction Reports (“CTRs”)¹⁹ and Suspicious Activity Reports (“SARs”);²⁰ and (3) maintain certain records, including records relating to the purchase of certain monetary instruments with currency,²¹ relating to transactions by currency dealers or exchangers, and relating to certain transmittals of funds.²² Most types of MSBs are required to register with FinCEN²³ and all are subject to examination for BSA compliance by the Internal Revenue Service (“IRS”).²⁴

B. Past Public Meetings with the MSB Industry

In 1997, FinCEN held public meetings at various locations throughout the country to give members of the financial services industry an opportunity to discuss the proposed MSB regulations and any impact they might have on operations. In drafting the final rules defining the MSB categories, FinCEN relied on the contributions from these public forums.

The proceedings of those meetings, with respect to stored value and money transmission, reveal a shared acknowledgement by FinCEN and industry that the prepaid business existed only in an early developmental stage at that time, and that it was

¹⁸ See 31 CFR 103.125.

¹⁹ See 31 CFR 103.22.

²⁰ See 31 CFR 103.20. Check cashers and transactions solely involving the issuance, sale or redemption of stored value are not covered by the SAR requirement. See 31 CFR 103.20(a)(1) and (a)(5).

²¹ See 31 CFR 103.29.

²² See 31 CFR 103.33(f)-(g).

²³ See 31 CFR 103.41.

²⁴ See 31 CFR 103.56(b)(8).

important not to stifle innovation. Although the industry was in its infancy, many issues surrounding prepaid products today were discussed and debated then, such as establishing appropriate audit trails and the need for information gathering on certain customers.

Among other conclusions, these meetings resulted in the following pronouncements:

- The money transmission definition should be sufficiently flexible to encompass the traditional concept of wiring funds, while also capturing alternative types of payments, both electronic and manual.²⁵
- FinCEN officials acknowledged that the use of the term “stored value” might be somewhat imprecise, and lead to the conclusion that only “value or representation of value that is stored either on a chip or on a hard drive somewhere” was correctly labeled stored value. Despite these misgivings, the term stored value was chosen as the best available at the time.²⁶

We find the proceedings of these meetings informative and persuasive in guiding the current rulemaking. Not only did these forums occur at various locations around the country, but they also involved a number of different perspectives from throughout the financial services industry. Early entrants into the stored value marketplace, seasoned banking professionals, federal and state regulators and service providers such as data processing representatives were all either in attendance or represented. There was

²⁵ Transcript of FinCEN meeting, held in New York City, NY. A FinCEN official in attendance stated, “Just as a point of clarification, again, under our definitions, as proposed in our rules, and also our intent, is not to restrict money transmitters to those businesses that only provide currency, cash, to customers, and the notion of a money transmittal will take place regardless of whether the form is in checks or in money orders or in travelers checks, or the more traditional notion of wire transfer credits to an existing bank account.”

²⁶ Transcript of FinCEN meeting, held in San Jose, CA. A FinCEN official in attendance stated, “...the concept is that there is a new something which we called fundamental monetary value represented in digital format and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically. We called that stored value, because frankly we couldn’t think of anything else to call it....We were kind of aware that when we used the term, people were going to think we were only talking about stored value cards. And we decided to take that risk.”

considerable discussion among the participants that illustrated the struggle to define the shifting payments environment as it was only beginning to take full advantage of new technologies.²⁷

C. The Terms “Stored Value” and “Prepaid Access”

A FinCEN official in attendance at the 1997 meetings observed that the term “stored value” was imprecise for the meaning being ascribed to it. The concept at issue, as he described it, involved monetary value represented in digital format that was stored or capable of being stored on electronic media in such a way as to be retrievable and transferable electronically.²⁸

The key distinction to be drawn from his observation is that the “value” to which he refers is not “stored” on the card; rather, the value is stored in a location or a medium that can be accessed electronically through the card or an alternative device. Given the nascent nature of the stored value industry approximately ten years ago, the limitations of descriptive terms are easily understood. The term “stored value” gained a foothold following FinCEN’s publication of the 1999 MSB regulation, which included issuers, sellers and redeemers of stored value in the definition of MSB.²⁹

In this Notice of Proposed Rulemaking (“NPRM”), we intend to replace the terms “issuer” and “redeemer” of stored value. These terms are not useful as the primary focal point for our regulatory efforts with respect to this industry for the following reasons:

²⁷ Transcript of FinCEN meeting, held in San Jose, CA. An industry member in attendance stated, “...these products are all ...evolving....The ACH system is old...batch processing, it’s clunky....We are working very hard to develop new systems that work better, that are more efficient, that are faster...”

²⁸ See supra note 26.

²⁹ 31 CFR 103.11(uu)(3), (4).

- “Issuers” are generally banks, which mean that, by definition, they cannot be deemed MSBs under our rules.³⁰ Additionally, the activities of banks are covered under other BSA regulations.
- “Redeemers” is a term formerly used in the context of several MSB definitions that FinCEN is seeking to eliminate.

Instead, we propose to introduce the terms “prepaid access” and “provider of prepaid access,” with the latter used to characterize a distinct category of MSB and a primary focus of our regulatory efforts.³¹ We believe that these terms offer a more accurate characterization of the role and the payment product which we seek to bring more fully within the scope of the BSA.

Although considerable discussion occurred in 1997 regarding divergent strategies for chip-enabled cards vs. magnetic stripe-bearing cards, developments over the last twelve years reveal a far more harmonized evolution. The magnetic-stripe card continues to be the technology used most in the United States.³² Even in situations where a card or other device is characterized as “chip-based,” this chip principally transfers the magnetic stripe functionality to a smaller unit of information. The miniaturized size allows for installation in any number of various devices such as cell phone screens and key chain tokens. Whether magnetic stripe or chip-based, the value to which the payment device gives access remains in an account; not in any way “stored” on the card.

³⁰ 31 CFR 103.11(uu).

³¹For the remainder of this document, and in the accompanying rule text, we will use the terms “prepaid access” and “provider of prepaid access.” However, as noted in the final paragraph of this section, we solicit public comment for the best term for the payment mechanism at issue.

³² A repeated question raised with respect to chip-based cards concerns those in use in Europe and Asia, and whether that variety will migrate to use in the United States. At present, there appears to be little appetite for installing the necessary payments infrastructure to enable such use at the point of transaction. In the event that such developments occur in the future, we believe that our rule text employs the necessary flexibility to encompass any such new payment devices.

Therefore, we find the purported dichotomy forecast in 1997 to be unpersuasive for purposes of this rulemaking. We consider this proposed rule to encompass cards and all other emerging payment devices, such as mobile phones, currently in the marketplace and on the horizon.

We seek public comment regarding the terms “prepaid access” and “provider of prepaid access,” and whether they offer the best, most meaningful description of the product(s).

D. May 12, 2009 Money Services Business NPRM

On May 12, 2009, FinCEN published an NPRM entitled “Amendment to the Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses” in the Federal Register.³³ Comments concerning the 2009 MSB NPRM from the industry and public were accepted through the close of the comment period on September 9, 2009.

In the 2009 MSB NPRM, FinCEN proposed to revise the MSB definition by describing with more clarity the types of financial activity that will subject a business to the BSA implementing rules. The proposal incorporated past FinCEN rulings and policy determinations into the regulatory text and sought to make it easier for MSBs to determine their responsibilities.

FinCEN also solicited comments on a number of stored value/prepaid questions in an effort to garner information regarding the accurate definition(s) or terminology for this payment device, to determine the appropriate treatment as an MSB component, and to identify the various participants comprising the numerous prepaid business models. Those comments have assisted FinCEN in drafting the current proposed rulemaking.

³³ 74 FR 22129 (May 12, 2009) (hereinafter 2009 MSB NPRM).

The comments covered a significant range of opinions. A consumer rights organization and an association of state regulatory agencies urged a more rigorous regulatory scheme, encompassing any and all types of prepaid business models. The comments received from business entities in the prepaid industry generally suggested that closed loop products³⁴ should not be encompassed within the proposed rulemaking because they posed very minimal money laundering risk. They asserted that stored value/prepaid products are often wrongly categorized as monetary instruments and, while more closely allied with money transmission, they most accurately deserve a separate category as a form of money transmission.

E. Credit CARD Act of 2009

On May 22, 2009, the President signed Public Law 111-24, the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 (CARD Act).

Section 503 of the CARD Act requires the following:

1. No later than 270 days from the date of enactment, the Treasury Secretary, in consultation with the Secretary of the Department of Homeland Security (“DHS”), must issue final regulations regarding the sale, issuance, redemption, or international transport of stored value, including stored value cards.
2. The regulations regarding international transport may include reporting requirements pursuant to §5316 of title 31, United States Code.

³⁴ In its 2009 MSB NPRM, FinCEN proposed a definition for closed loop stored value as “Stored value that is limited to a defined merchant or location (or a set of locations) such as a specific retailer or retail chain, a college campus, or a subway system.” 74 FR 22129, 22141 (May 12, 2009). In the present rulemaking, FinCEN is proposing a similar definition for closed loop prepaid access.

3. The regulations shall take into consideration current and future needs and methodologies for transmitting and storing value in electronic form.

III. Current Regulatory Scheme

Under the current rules, FinCEN addresses traveler's checks, money orders, and stored value under two separate definitions: "issuers" under 31 CFR 103.11(uu)(3) and "sellers or redeemers" of those products under 31 CFR 103.11(uu)(4). The regulations currently include an activity threshold of \$1,000 for any person in any one day, which applies to all MSB categories except money transmitters.³⁵ Money transmitters are not subject to any dollar level threshold at all. Accordingly, an issuer, seller or redeemer of stored value, as defined by our regulations, is required to file CTRs³⁶ and to establish a written AML program, including policies, procedures, and internal controls commensurate with its activities and reasonably designed to prevent it from being used to facilitate money laundering and the financing of terrorist activities.

In 1999, when FinCEN issued its final MSB rule,³⁷ it deferred certain requirements for the prepaid or stored value arena based on its complexity and the desire to avoid unintended consequences with respect to an industry then in its infancy. Therefore, unlike most other categories of MSB, an issuer, seller, or redeemer of stored value is not required to register as an MSB with FinCEN or to file SARs. Consistent with a regulatory delegation of examination authority³⁸ the IRS currently examines money services businesses, including those falling within the scope of FinCEN's regulations

³⁵ 31 CFR 103.11(uu). ; This activity based threshold of \$1,000 has remained the same since 1999. See, Definitions Relating to and Registration of, Money Services Businesses, 64 FR 45438 (Aug. 20, 1999).

³⁶ See 31 CFR 103.22; reporting of cash transactions exceeding \$10,000.

³⁷ Definitions Relating to, and Registration of, Money Services Businesses, 64 FR 45438 (Aug. 20, 1999).

³⁸ 31 CFR 103.56(b)(8).

with respect to stored value, for compliance with the BSA, as these entities are not otherwise subject to more general supervision by a federal functional regulator.

In the 2009 MSB NPRM, we proposed folding all of stored value into one category so that *issuers* of stored value and *sellers or redeemers* of stored value would be in the same category. In the 2009 MSB NPRM, FinCEN did not propose making any substantive changes to the definition of this category. After further consideration of the issue, however, we now offer a substantive change to the definition of the category, and thus to the overall regulatory scheme, by shifting our focus from issuers and redeemers to “providers” of prepaid access, while retaining regulatory focus on retail “sellers” in this arena.³⁹

IV. Prepaid Access as a Distinct Form of Money Transmission

Prepaid access involves the transmission from one point to another of funds that have been paid in advance. It is empirically similar to activity engaged in by persons defined as “money transmitters,” but the mechanisms for directing that the money be transmitted are different. Based on this understanding, as well as on some of the concepts brought forward in the responses to our 2009 MSB NPRM, FinCEN is proposing to treat providers of prepaid access as a distinct category of MSB, keeping it separate from the category established for money transmitters, while at the same time acknowledging prepaid access should be regulated in a similar fashion.⁴⁰ While distinct,

³⁹ Please refer to regulatory text for 103.11(uu)(4), wherein we propose further amendments to the revisions proposed in the May 2009 MSB NPRM.

⁴⁰ Though the regulatory requirements may be similar, or even identical, the effects of those requirements on the two types of MSBs may differ, depending on their different prevailing business models. For example, the business models of most providers of prepaid access currently appear to involve the use of electronic funds transfers subject to the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. 1693 et seq. So long as that is the case, the Funds Transfer Rule, 31 CFR 103.33(f), and the Travel Rule, 31 CFR 103.11(jj), should not impose specific recordkeeping requirements on providers of prepaid access, because

many responsibilities imposed on money transmitters and other MSB categories generally would be imposed on prepaid access providers: there would be a requirement to file SARs and to register with FinCEN as an MSB. Separate requirements would be imposed with respect to sellers of prepaid access.

V. Reporting on International Transportation of Prepaid Access

As noted previously, Section 503 of the CARD Act authorizes Treasury to establish reporting requirements with respect to stored value pursuant to 31 U.S.C. 5316⁴¹ and requires the consideration of current and future needs and methodologies for transmitting and storing value in electronic form. 31 U.S.C. 5316 and corresponding FinCEN regulations require persons transporting or shipping currency and monetary instruments across the U.S. border in an aggregate amount over \$10,000 to provide a report of such transportation or shipment.⁴² We have consulted extensively with our law enforcement colleagues and are seeking information, including but not limited to, risk assessments evaluating the likelihood of illegal action. Depending on the sensitivity of such information, this information may be provided in a confidential docket.

Presently, there is no similar requirement to report the transportation of prepaid access products across the border. FinCEN recognizes the value of collecting information on international transactions and payment flows, and is engaging with the Department of Homeland Security and other members of the law enforcement community in an attempt to identify appropriate solutions. We invite comment on any

electronic funds transfers subject to the EFTA are exempt from the Funds Transfer Rule and the Travel Rule.

⁴¹ Section 503 of the CARD Act requires Treasury to issue regulations “regarding the sale, issuance, redemption, or international transport of stored value,” which FinCEN in this NPRM interprets to be essentially synonymous with “prepaid access.” Section 503 also provides that regulations regarding international transportation “may include reporting requirements pursuant to [31 U.S.C. 5316].” The implementing regulation for 31 U.S.C. 5316 is 31 CFR 103.23.

⁴² 31 CFR 103.23.

aspect of the international transport issue as part of this effort. We seek comment from the law enforcement officials and the greater public on the risks prepaid access transactions pose and the types of transactions that are particularly vulnerable to money laundering, terrorist financing, and other illicit transactions through the financial system. We also seek comment on the activity threshold for prepaid access transactions.

VI. A Shift in Regulatory Obligations

A difficulty in regulating prepaid access is determining which entity or entities involved should be responsible for compliance with BSA requirements. The prepaid landscape includes a number of different types of actors with different roles. These actors and roles are not consistent throughout the industry and some entities perform multiple roles. Given the difficulty in identifying the provider and the changing nature of the industry, it is vital that a provider of prepaid access be defined on the basis of its activities.

FinCEN is proposing removing “issuers” and “redeemers” from the definition of money services business and imposing AML program, reporting, and recordkeeping obligations on the business entity that engages in activity that demonstrates the most control and oversight of transactions – what FinCEN proposes to define as the “provider of prepaid access.”

The provider is the entity that FinCEN believes is in the best position to file CTRs and SARs, maintain or have access to transaction records, and establish and maintain AML programs because it is likely to have business relationships with most or all of the other participants in the transaction chain. Accordingly, it has the relevant information or access to the information to make and file relevant and meaningful BSA reports and

records. Centralizing primary BSA obligations in the prepaid provider will unify an otherwise fragmented transaction chain where it is likely that no single player has the necessary financial transparency to comply adequately with BSA requirements. Shifting the requirements to one player may enrich the information available, provide greater financial transparency for appropriate regulators and administrators, and allow law enforcement to obtain relevant information with respect to various aspects of a prepaid access transaction chain without having to seek it from multiple sources.

Providers of prepaid access should anticipate developing AML programs that relate to their role as the centralized point in the chain for relevant information. These programs should include elements such as (a) internal policies and procedures that contemplate the collection and processing of information to be used for the evaluation, completion, and submission of SARs and CTRs; and (b) training programs for other industry members with whom it contracts for prepaid support services to be able to identify suspicious activity to inform the program provider. FinCEN seeks comment on the costs that may be associated with developing these policies, procedures, and training programs. FinCEN also seeks comment on the costs that may be associated with developing information technology systems and anti-money laundering programs.

VII. Participants in the Prepaid Environment

As discussed previously in this NPRM, the historical background surrounding the early regulation of the MSB industry involved the effort to identify the many participants who collectively comprised the non-bank financial services universe. A shift that occurred with the issuance of the 1999 regulation was to focus more intensively on the activity being performed in the movement of funds, or the execution of a transaction.

Where previous statutory and regulatory anti-money laundering efforts generally targeted the entity, commonly banks, thrifts, credit unions, et al., the new policy direction required an understanding that, in many cases, the delivery of a financial service was only a single component of many different lines of business for a particular business entity.

For example, a convenience store might offer retail grocery products, gasoline, an on-premises fast food establishment, a car wash, and the sale of money orders. Similarly, a travel agency might offer extensive consumer and business booking services, guided tours, trip planning and, for customer convenience, also deal in foreign exchange and the sale of traveler's checks. In these and similar situations, it is the particular financial services activity that is intended to be captured by regulation, not the universe of convenience stores or travel agencies.

As we seek to more precisely define the duties and the responsible party among the parties in the prepaid operating environment, we are again focused specifically on the activities executed. We appreciate that executing a prepaid transaction almost necessarily involves greater technological complexity and the involvement of more participants in a transaction chain than would check cashing or the sale of money orders. Despite the multiple parties involved, however, we consider it imperative to center our primary regulatory responsibilities on the party exercising the principal degree of oversight and control that we believe exists in any prepaid program. We are also mindful that, among all the typical parties, a very important role is that of the seller. The seller alone has face-to-face dealings with the purchaser and is privy to information unavailable elsewhere in the transaction chain. For that reason, we believe the seller to be secondarily important among all the entities involved in the program.

The prepaid marketplace has evolved over time without developing a universally-accepted set of labels or categories to describe its participants. In some cases, this may be attributable to individuals or companies operating in multiple capacities, thus blurring conceptually what parameters may or may not exist for a particular role. For other reasons, such as multiple points of entry to this line of business or widely disparate purposes for initiating a prepaid program, the participants may choose no actual titles or labels for the functions they perform. The roles are defined and executed strictly according to the contractual terms established.

While our proposed rule text will confer responsibilities on the “provider of prepaid access,” using no current industry term of art, we believe it is important to provide context to understand how we came to choose this term, and to describe how we see the comprehensive prepaid industry landscape. In the Section-by-Section analysis, following the discussion of the role of the “provider of prepaid access,” we also describe the various industry members that we understand to be standard participants in a prepaid program.

VIII. Alternative Regulatory Approaches to Consider

We believe that our approach for imposing regulatory obligations on the central player in the prepaid program offers the advantages of simplicity and efficiency for regulatory and law enforcement purposes. Centralizing BSA duties and recordkeeping in a particular party would enable law enforcement officials acting in time-critical situations to direct requests to a single party.

We also look to the seller as an important link in the transaction chain. The seller is uniquely situated to see the first step in the establishment of a prepaid relationship, and

to interact directly with the purchaser who may, or may not, be the ultimate end-user of the card. The requirements of this party to maintain records over a five-year time period and to report suspicious activity, also serve law enforcement's needs.

We have reviewed the viability of requiring each participant along the prepaid access chain to be subject to the BSA recordkeeping and reporting requirements. In balancing the burdens versus the benefits of this approach, we believe that providing central points along the transaction chain, i.e., the provider and seller of prepaid access, offers the most utility to law enforcement and the least burden to the industry.

We appreciate, however, that such an approach is not the only approach and we request comments on alternative methods to achieve the same ends. The many participants in the transaction chain likely bring specialized knowledge to the program. By imposing a separate, stand-alone obligation on each party along the transaction chain, we may facilitate the collection of more detailed information, not filtered through any secondary perspective. As FinCEN may consider such an alternate approach, we seek comment on which prepaid program participants offer the most meaningful information, such as transaction information, purchaser information, or card holder information.

In determining whether an entity offering money services is an MSB for purposes of the BSA implementing regulations, entities are not required to aggregate transactions across distinct money service categories to any person on any day (in one or more transactions) in determining whether thresholds apply. In its 2009 MSB NPRM, FinCEN sought comment on whether it should reconsider its previous position with respect to transactions involving multiple MSB services, and require that such multiple services be aggregated for purposes of determining whether definitional thresholds have been met.

We received industry comments on this issue generally opposed to such a development. FinCEN is still considering the matter and welcomes any further comments on this issue, particularly with respect to the inclusion of the sale of prepaid access in connection with other money service business products.

IX. Parameters of this Rulemaking

This NPRM pertains only to non-banks. As noted earlier, this rulemaking does not establish new requirements and does not change existing requirements for banks. Banks may participate in the provision of prepaid access in a variety of ways and may enlist the services of a variety of agents acting on their behalf. As also stated earlier, banks are subject to the full panoply of BSA/AML program, recordkeeping and reporting requirements. Similarly, as discussed in more detail herein, this rulemaking neither establishes new requirements nor changes existing requirements for persons registered with, and regulated or examined by, the Securities and Exchange Commission (“SEC”) or the Commodity Futures Trading Commission (“CFTC”).

This rulemaking establishes the categories of MSBs that will be regulated in the prepaid arena. It also identifies which actors will not be regulated where their activities are confined to those that present less opportunity for misuse by illicit actors seeking to launder money or finance illicit activities. As discussed further herein, such categories of actors may include those dealing solely in the provision of payroll or job and health benefits through prepaid access.

This rulemaking departs from FinCEN’s previous stance on closed-loop prepaid access in one respect. Historically, FinCEN’s regulatory interpretations⁴³ have held that

⁴³ FinCEN Ruling 2003-4 (Definition of Money Transmitter/Stored Value – Gift Certificates/Gift Cards) (Aug. 15, 2003).

the traditional “gift cards” that are redeemable only by a single retailer pose limited risk for money laundering or evading financial transparency. In this rulemaking, FinCEN proposes subjecting providers and sellers of closed loop prepaid access to BSA requirements in such circumstances that involve international use or person to person payments. Because financial transparency can be obscured, if the prepaid access product can be used internationally and other persons or non-depository sources can add or deplete the funds associated with it, FinCEN is proposing a regulatory construct under which certain providers and sellers of closed loop prepaid access would be subject to the BSA implementing rules.⁴⁴

We believe that this treatment is warranted given information provided by our law enforcement colleagues, maintained in a confidential docket, that closed loop gift cards have a strong appeal for criminal enterprises to launder cash proceeds in trade (merchandise). The criminals focus particularly on merchants who maintain retail locations both within and outside of the United States. The ability to redeem the value placed on the card on either side of the border is a convenient, anonymous method to move and masquerade illicit funds freely. The proposed rule would clarify that providers of prepaid closed loop access that can be used within and outside our borders are within the scope of BSA regulatory requirements.

⁴⁴ In several contexts, FinCEN has articulated the heightened money laundering and terrorist financing vulnerabilities associated with international transactions. The concern about international use is consistent with FinCEN’s frequently repeated position that the specific geographic locations at which a financial product or service is offered must be taken into account in assessing the risks associated with that product or service. *See, e.g.*, Bank Secrecy Act / Anti-Money Laundering Act Examination Manual for Money Services Businesses (December 2008), p. 21. The concern about person-to-person transfers is consistent with guidance that FinCEN has issued with respect to intra-institutional transfers of value from one subaccount to another by other types of financial institutions. *See, e.g.*, FIN-2008-G008 (September 10, 2008), Application of the Definition of Money Transmitter to Brokers and Dealers in Currency and Other Commodities.

We question whether it might now be appropriate to revisit the rationale that we have previously applied to closed loop prepaid access even when such prepaid access is limited solely to domestic use. Are there inherent vulnerabilities in closed loop prepaid access that require our consideration? Is closed loop prepaid access that allows use at more than a single retail facility (for example, to a shopping mall) more vulnerable to abuse than a traditional closed loop product? FinCEN solicits comment on whether and how it should reconsider its existing interpretation with respect to closed loop gift cards.

X. Consideration of Examination Authority

As noted earlier, the IRS has been delegated the authority to examine money services businesses for compliance with the BSA, given that there is not a federal functional regulator with broad supervision over money services businesses. With respect to providers of prepaid access, FinCEN seeks comment on any particular aspects of the prepaid access sector that should be considered when making a decision about whether and how to delegate examination authority.

XI. Future Rulemakings Contemplated

We acknowledge that the proposed revisions to the regulatory text do not address the full array of regulatory considerations raised by the marketing and use of prepaid access. FinCEN recognizes that despite its many positive aspects, as with any innovation in the delivery of monetary value, prepaid access can be misused. Our goal is to recognize these vulnerabilities and to assist law enforcement in promoting transparency throughout the financial system. Our further goal is to undertake this effort while mindful of the many legitimate, beneficial uses of these payment products.

The prepaid environment is no longer limited to simply commercial business uses; increasingly, the federal government is making widespread use of prepaid access in delivering benefits to individuals such as certain Social Security payments and disaster relief assistance. By no means do we intend to curtail the growth or migration to prepaid access where there are regulatory controls in place. Where all of the parties and transactions can reveal a legitimate audit trail, FinCEN and its law enforcement colleagues raise no objection.

We believe that there may be other areas and aspects concerning the prepaid business environment that warrant future regulatory scrutiny. As noted earlier, we intend to engage in a rulemaking on instituting reporting requirements on the international transport of prepaid access. If there are other areas in need of consideration for future rulemaking, we ask for the public to offer comment.

XII. Section-by-Section Analysis

Pursuant to FinCEN's authority to interpret the provisions of 31 U.S.C. 5312, this document proposes to amend 31 CFR Part 103, primarily by revising the definition of "stored value" as stated below. These proposed changes include the following: (1) renaming "stored value" as "prepaid access" and defining that term; (2) deleting the terms "issuer and redeemer" of stored value; (3) imposing suspicious activity reporting, customer information and transaction information recordkeeping requirements on both providers and sellers of prepaid access and, additionally, imposing a registration requirement on providers only; and (4) exempting certain categories of prepaid access products and services posing lower risks of money laundering and terrorist financing from certain requirements.

A. *Meaning of the Term “Closed Loop Prepaid Access”*

The proposed term “closed loop prepaid access” is defined as prepaid access to funds or the value of funds that is limited to a defined merchant or location (or a set of locations) such as a specific retailer or retail chain, a college campus, or a subway system. This proposed definition supersedes the definition proposed in FinCEN’s 2009 MSB NPRM.⁴⁵ It is similar to the previous proposed definition, but it replaces the term “stored value” with “prepaid access” and uses more precise language.

B. *Meaning of the Term “Provider of Prepaid Access”*

1. In General

In general, this term will apply to any person that serves in the capacity of oversight and control for a prepaid program. The determination of the applicability of this term to any given player in the program’s transaction chain will be a matter of facts and circumstances; we do not “assign” this term to any particular role. We recognize that there may be situations in which no single party alone exercises exclusive control. However, we do believe that there will always be a party in the transaction chain with the predominant degree of decision-making ability; that person plays the lead role among all the others, and is in the best position to serve as a conduit for information for regulatory and law enforcement purposes.

We wish to state clearly and emphatically that identifying the provider of prepaid access is not simply an arbitrary decision by the program participants. As with other MSBs, the role of the provider of prepaid access is determined through the facts and circumstances surrounding the activity; no single act or duty alone will be determinative.

⁴⁵ 74 FR 22129, 22141 (May 12, 2009).

While not exhaustive, we consider the following activities to be strong indicators of what entity acts in a principal role:

- The party in whose name the prepaid program is marketed to the purchasing public. For example, whose press release trumpets the launch of a new product? Whose name is used in print, on-line advertisements, and on the face of the card/device itself? In legal parlance, the individual or entity who “holds himself out” as the lead player will be a very important determining characteristic.
- The party who a “reasonable person” would identify as the principal entity in a transaction chain - - the principal decision-maker.
- The party to whom the issuing bank looks as its principal representative in protecting its network relationship and its brand integrity.
- The party who determines distribution methods and sales strategies.
- The party whose expertise in the prepaid environment is recognized by the others, particularly by the issuing bank, as instrumental in bringing together the most appropriate parties for the delivery of a successful program.

We intend for these enumerated characteristics to illustrate that there is no one single determinant; the provider of prepaid access need not do, or refrain from doing, any single activity. The totality of the facts and circumstances will identify the provider of prepaid access.

(a) *Organizing the prepaid program*

A logical first step in the determination of the party to be deemed the provider of prepaid access is to look to the initiation and establishment of the program itself. This may involve actions or activities as diverse as identifying the need for a prepaid program, developing a business plan, or obtaining financing and contracting with other principals. This step alone, however, is not dispositive in determining that a party is appropriately deemed a provider of prepaid access.

We can easily foresee situations where the initiator of a prepaid program recognizes early in the process that unique skills and industry expertise are necessary to carry the program through to fulfillment; for example, when a corporation's human resources department decides to transfer its payroll distribution from paper checks to reloadable prepaid cards. In that case, although the human resources department may well have identified the need for a prepaid program, and may have established some threshold parameters, it may choose to cede the program to an expert in the industry by contracting with an outside third party. Most likely, under these circumstances, the party assuming these duties from the corporation's human resources officials will step into the role of the provider of prepaid access. The totality of the circumstances remains the basis for this determination.

(b) *Setting the terms and conditions and determining that the terms have not been exceeded*

Principally, this element in the determination of the status of a provider will concern the technical specifications involved in establishing and operating the prepaid program. For example, the terms and conditions may encompass a range of decisions

ranging from sales locations for prepaid access, fees assessed for activation and reloading, and avenues to access customer service assistance and myriad others.

While there may be many considerations that factor into establishing the terms and conditions, such as cost considerations, marketing partnerships and demographic targets, the provider of prepaid access will be the party best situated to understand the entire prepaid landscape. The provider of prepaid access brings its industry understanding to the program, and should be in a position to convey the pros and cons of varying business decisions to the other parties in the program.

(c) *Determining the other businesses that will participate in the transaction chain, which may include the issuing bank, the payment processor, or the distributor*

As discussed in (b) above, the provider of prepaid access possesses the inside industry understanding, and presumably the industry contacts and relationships as well, to identify the other parties necessary for a prepaid program. Our understanding of the industry is that some issuing banks and processors are particularly well-known as market leaders in the prepaid environment. Given this specialization, it may be that a provider of prepaid access will be more likely to seek out and to strike agreements with such specialty organizations. Or, a provider of prepaid access may choose its operating partners with an eye toward geographic proximity, or specialized expertise in a particular line of prepaid access, such as payroll programs. As with the four other factors enumerated herein, this element should not be considered in isolation but as one determinant when identifying a provider.

(d) *Controlling or directing the appropriate party to initiate, freeze, or terminate prepaid access*

As one of the five criteria enumerated in determining the provider of prepaid access in a prepaid operating environment, the ability to affect the movement of funds between parties and/or entities is very important. We understand that the provider of prepaid access may exercise this authority alone, in tandem with other principals or at the direction of law enforcement or judicial authority. It is a key ability that demonstrates an element of oversight and decision-making power that is less apparent, and much less discretionary, among the other program participants.

We believe that there will be situations, in the operation of any prepaid program, that require a central decision-maker to determine whether a particular transaction should be disallowed or, in the alternative, to approve an otherwise irregular transaction due to mitigating circumstances. The provider of prepaid access will be the logical decision-maker in these situations, given its primacy in the prepaid program. The contractual agreements among the parties may even require the sharing of information with a central point of contact for this specific purpose. While the processor may flag the transaction and/or deactivate the card, and the issuing bank and the network may confer about authorization, it is generally at the direction of the provider of prepaid access that these decisions are made and these actions are taken, absent some other compelling reason for the processor, issuing bank or network to act unilaterally.

Additionally, if a SAR filing is warranted, it is the provider of prepaid access who possesses the most comprehensive “big picture” perspective and is in the best position to provide the most meaningful information. It is precisely the provider’s relationship to all of the parties in the transaction chain which is of great value to law enforcement.

We acknowledge that the above may be a very basic illustration of a far more complex series of communications and actions. But, we believe that, ultimately, there is a party who must be in the dominant position to harmonize the duties and responsibilities of the other participants. The determination of the identity of the provider of prepaid access will be influenced considerably by the element of oversight and control it can freely exercise.

(e) *Engaging in activity that demonstrates control and oversight of transactions*

This criterion among the five is intended to capture situations where the party exercising control and oversight may be evidenced by activities that do not fit squarely within items a through d, preceding. To the extent that both the prepaid industry and our understanding of it continue to evolve, this criterion provides the flexibility needed to ensure reasonable longevity for the rule.

2. Distinguishing the role of banks and certain non-MSB financial institutions under this rulemaking

By definition under FinCEN's regulations, MSBs exclude banks and entities registered with, and regulated or examined by the SEC or the CFTC.⁴⁶ Accordingly, while banks in particular often play a critical role with respect to prepaid access, banks (and persons registered with and regulated or examined by the SEC or the CFTC) cannot be providers of prepaid access under the rule proposed in this NPRM.

The record collection processes proposed in this MSB rulemaking do not apply to banks. In situations where a bank functions like a provider of prepaid access as defined under this proposed rulemaking, FinCEN expects that the bank's compliance with its pre-

⁴⁶ 31 CFR 103.11(uu).

existing regulatory obligations⁴⁷ under the BSA, including responsibility for understanding thoroughly the nature and activities of, and the information collected by, the various other actors in the bank's program, satisfies the policy goals that underlie this NPRM. FinCEN also expects that, in such situations, the bank is responsible for providing timely, comprehensive information to requests posed by law enforcement.

Generally, FinCEN believes that such bank-driven prepaid programs are not prevalent within the payments industry. Most often, the bank's role appears limited to providing the link to the network brand as the issuing bank, holding funds that will be accessed through a prepaid program, and supporting the decisions made by its partners for the establishment and operation of the prepaid program. Moreover, FinCEN is not aware of any entities registered with and regulated or examined by the SEC or CFTC that are actively engaged in the prepaid access industry in such a way as to approach the equivalent of a provider or seller of prepaid access, and solicits comment on the extent to which such entities are engaged in the prepaid access industry. We reiterate, however, that even if situations existed in which any such entity functioned like a provider or seller of prepaid access, this entity would not be a provider or seller of prepaid access under the rule proposed in this NPRM, because of the general exclusion of such entities from the definition of MSB under FinCEN's regulations.⁴⁸

As described earlier in this NPRM, in beginning this rulemaking process we sought to understand the prepaid industry comprehensively, including its many

⁴⁷ The federal banking agencies have addressed banks' responsibilities when involved in prepaid programs in a number of different circulars and guidance pieces, e.g. OTS Memo to CEOs #254 "Guidance on Gift Card Programs" (February 28, 2007); OCC Advisory Letter AL 2004-5, Payroll Card Systems (May 6, 2004), and the FFIEC Examination Manual, "Expanded Examination Overview and Procedures for Products and Services; Electronic Cash, Overview; subsection *Prepaid Cards/Stored Value Cards*" (April 2010 update).

⁴⁸ Id.

participants along the transaction chain. To provide the reader with context, in the following, we attempt to identify the component parties and to briefly describe their role. To the degree that our sketch of the landscape is inaccurate or incomplete, we seek guidance and clarification from the commenting public:

Program Sponsor: The entity that establishes the program relationship(s), identifies and procures the necessary parties and sets contractual terms and conditions. FinCEN expects that in many instances the program sponsor will be the provider of prepaid access, but given that this term is currently not employed in a uniform fashion across industry, there are also situations in which a program sponsor may not meet the description of the provider of prepaid access.

Program Manager: A common term of art used in the prepaid industry. We characterize the Program Manager as the entity that functions as an operations “control center” for the program. This function ensures that the program’s day-to-day operations flow smoothly, and will troubleshoot problems as they arise (e.g., computer outages, card functionality problems, network authorization issues), either firsthand or by delegating to the appropriate party within the prepaid program.

Network: Any of the payment networks, including MasterCard, VISA, Discover and American Express.

Distributor: The entity, as distinct from the network, that “brands” the card with its business identity. It may also play a central role in marketing the card through its regular communications with customers.

Processor: The entity that conducts the transaction processing and facilitates funds management and tracking. As defined by an industry trade group,⁴⁹ the “core processing functions” consist of:

- i. card account set-up and card activation;
- ii. provision of authorizations for card transactions;
- iii. value load and reload processing; and
- iv. security/fraud control and reporting.

The processor’s role in loading and reloading value is largely ministerial, executed pursuant to instructions from the card network, the ACH or the reload facility handling a cash transaction. For the other enumerated duties, the processor

⁴⁹ The Network Branded Prepaid Card Association (NBPCA) “Recommended Practices for Anti-Money Laundering Compliance for U.S.-Based Prepaid Card Programs,” (2008) pg. 7.

receives operating instructions from the program manager or other program authority.

Issuer, Issuing Bank: The depository institution whose contractual involvement is required in order to invoke the network brand (Visa, MasterCard, Discover, American Express) and which also may serve as the holder of funds that have been prepaid and are awaiting instructions to be disbursed.

Retailer and/or Reload Facility: The various retail locations, including, among many others, convenience stores, drugstores, and supermarkets where an individual consumer can purchase a prepaid card. Typically, the cards are maintained on a retail “j-hook” display fixture, from which the consumer can select the product of his choice and purchase onsite. The card’s value may be inaccessible until the purchaser subsequently activates the card through a prescribed verification system, often a toll-free phone call; or, a very low dollar amount may be accessible to the card purchaser prior to verification.

The Reload function varies, but the evolving model appears to be a self-operated kiosk at locations such as Western Union offices and Wal-Mart MoneyCenters.

C. Meaning of the Term “Prepaid Program”

There may be circumstances where prepaid access products or services, or even the entire prepaid program(s) of a specific provider of prepaid access, are organized in such a way, or are of such minimal risk, that those products, services or provider need not fall within the regulatory strictures of the BSA. A prepaid access program whose operations fall squarely within one or more of the limitations described below in (1) – (5) will not bear characteristics conducive to money laundering or illicit behavior under the BSA. A provider of a range of products and services, only *some* of which fall within the exemptions, will be subject to regulation as a provider of prepaid access and as an MSB, but the exempt products and services will not be subject to certain BSA requirements.

The types of prepaid programs considered outside the parameters of this rulemaking are:

1. The payment of benefits, incentives, wages, or salaries through payroll cards or other such electronic devices for similar purposes

We believe that in most employer–employee relationships, the necessary personal details regarding the employee (such as full name, address, date of birth and a government identification number) are known to the employer. In those situations, where the individual employees paid under the program are identified by the employer, and where this information is shared with (or made available to) the provider of prepaid access, there are sufficient checks on possible money laundering abuse to warrant exclusion for this type of program. These payroll programs, in addition to regularly scheduled wage and benefits payments, may also include bonus or incentive payments paid at intervals outside the norm. This limitation applies only when the employer (or appropriately designated third parties), and not the employee, can add to the funds to which the payroll card or other such electronic device provides access. The payment of employees generally does not represent an opportunity for the placement of ill-gotten funds into the financial system. This exemption does not contemplate scenarios in which an employer does not have a direct relationship with an employee and works through a third party to pay the employee, such as in certain instances with a freelance employee.

We understand that some members of law enforcement would prefer to subject all prepaid payroll programs to the full range of BSA obligations. They assert that criminals often establish shell companies and use these fictitious entities and non-existent employees as conduits to launder illicit funds. They believe that the potential for abuse of prepaid payroll cards is considerable and have voiced their concerns to us.

We therefore seek public comment regarding the need to institute additional safeguards and/or conditions prior to excluding prepaid access to payroll funds from the

full extent of BSA responsibilities. What qualifications must a payroll program establish to ensure that the employer obtains all the necessary information regarding each employee participant, and that the information is kept current? Are there methods to ensure that the company and employees are legitimate, and that the program is valid?

2. Payment of government benefits such as unemployment, child support, and disaster assistance through electronic devices.

These types of benefits, payable at the state and federal level, currently range across a great many areas including unemployment, child support, disability, Social Security, veterans' benefits and disaster relief assistance. Additionally, this category of prepaid program may include provision of public transit benefits. Given governmental oversight over these programs and the source of the funds, we see minimal opportunity for the placement or layering of illicit funds into the financial system.

Our research into federal benefit payments reveal that there are some unique programs currently employing branded prepaid access as the delivery mechanism for the payment of benefits. Upon verification of the individual's eligibility for a benefit payment, the federal agency refers the individual to an issuing bank for account establishment and program enrollment. To date, the programs have operated very successfully, and the members of the public receiving such benefits report a high degree of satisfaction based on the superior physical security of prepaid access as compared to paper checks, the reliability of periodic payment delivery and the broad commercial acceptance of prepaid access. FinCEN solicits comment on whether such federal government prepaid programs are of such a low risk for money laundering abuses that even if the prepaid product or service can be used internationally, or meets other criterion which invalidates an exemption, the programs should continue to be exempt.

3. Disbursement of reimbursement funds from pre-tax flexible spending accounts for health care and dependent care expenses.

Generally administered by a central payor, these programs are pre-funded by employee and/or employer contributions to an account maintained by the payor. Any monies not reimbursed to the employee by the end of the calendar year (or allowed grace period) are forfeited to the Internal Revenue Service.⁵⁰ There are maximum annual dollar limits established for these accounts, and the funds can only be accessed as reimbursement for defined, qualifying expenses. We believe that these types of highly-controlled, low risk accounts are of minimal value to potential money launderers as a means of placing or layering funds. For this reason, we do not include these prepaid programs within the scope of the current rulemaking.

4. Providing prepaid access to funds subject to limits that include a maximum value as indicated below, where such maximum value is clearly visible on the prepaid access product: (a) at the point of initial load, the load limit cannot exceed \$1,000; (b) at any point in the lifecycle of the prepaid access, no more than \$1,000 in total maximum value may be accessed; and (c) on any given day, no more than \$1,000 can be withdrawn with the use of the prepaid access.

The foregoing dollar maximums associated with this particular limitation are intended to distinguish the many situations where prepaid products are purchased solely as a one-time gift or convenience choice. In these situations, the purchaser wants simply to substitute prepaid access for currency, generally in modest amounts. As long as the dollar maximum accessible by the prepaid access is clearly visible, and no subsequent loading or reloading can increase the funds beyond the stated maximum, we believe that

⁵⁰ Any flexible spending programs, or other similar health expense-related programs, must receive the same tax treatment by the IRS, or they will not be considered to fall within this limitation.

the potential for misuse is slight. Under these circumstances, the prepaid program would not fall within the scope of this regulation. FinCEN wishes to emphasize that tying the threshold to the requirement of having the maximum amount clearly indicated on the product is a departure from the current regulations, and that it is meant to encourage industry to take steps towards greater transparency in this arena.

We have chosen a \$1,000 maximum for this provision for a number of reasons: (1) industry research findings for average and maximum initial loads; (2) consistency with thresholds established for other MSB categories; and (3) dollar level yielding greatest utility of information for law enforcement, while posing minimal burden to consumers and the prepaid access industry.

We request public comment on the following considerations regarding this section of the proposed rule:

- We seek comments from the public on whether the \$1,000 activity-based threshold is appropriate. Please provide us with comments regarding alternative dollar limits, higher or lower than this proposal, daily or otherwise, and tied to a clearly delineated dollar amount or not. What merits are derived and what vulnerabilities are created by increasing or decreasing the threshold? Would an additional activity limit threshold, such as annual multi-thousand thresholds that exist in some European countries, have benefits over our use of a daily dollar level?
- What is the technological feasibility of these requirements? What cost implications and practical burdens are raised by these requirements for the

provider of prepaid access, the processor, or any other parties in the transaction chain to enable the application of the exemption?

- What practical implications and what technological challenges arise if different limits are established for transfers, aggregate value, withdrawals, and velocity?

5. Providing closed-loop prepaid access

We believe that closed-loop prepaid access, whose use is limited to a small range of acceptance, for a very specific type of good or service, also appropriately falls outside the parameters of this rulemaking. Closed-loop providers, who are explicitly known to the purchaser at the point of sale, generally operate with considerable oversight of the full extent of the transaction chain, with the generation of a substantial audit trail to validate such. The effort required to use closed-loop products for the placement, layering or integration of funds makes them unattractive and unlikely vehicles for moving large sums of money efficiently.

However, a closed-loop provider could be subject to the BSA implementing rules under this proposal if the prepaid access is no longer limited in range. A departure from current regulatory policy, this NPRM would subject a closed-loop provider to the BSA rules if the prepaid access product could be used internationally or if other persons and non-depository sources had access and could transfer the value of the funds. The exceptions to the limitations are more fully discussed below.

The explanations provided in the preceding sections for allowing certain prepaid access programs to fall outside of the requirements of proposed 31 CFR Part 103.11(uu)(4)(iii) can also serve to bring otherwise excluded programs under the BSA

rules if the risk factors change. Specifically, in situations where the provider administers a prepaid program with features that introduce an increased level of risk and serve to diminish financial transparency, that program may be subject to the full extent of obligations under proposed 31 CFR 103.11(uu)(4)(iii), even if the other program characteristics fall squarely within 1 through 5, above. The determination of whether the provider must comply with all BSA requirements must be analyzed for all of the program's attendant facts and circumstances.

We believe that the characteristics cited under proposed 31 CFR 103.11(uu)(4)(ii)(B)(1)-(3),

- Funds or value transmitted internationally;
- Internal transfers within a program between individual cardholders; or
- For anything that does not qualify as closed-loop prepaid access, the ability to load funds or the value of funds from non-depository sources

allows for an element of anonymity that obscures the financial transparency necessary to ameliorate regulatory and law enforcement concerns. While not inherently suspect, the risks associated with these types of transactions diminish the clarity and audit trail that is generally found in payroll, flexible spending accounts, government benefits and closed loop systems.

Additionally, inherent risk is associated with any international prepaid transaction simply because it invokes governmental authority outside our domestic boundaries. The phrase "international prepaid transaction" is intended to capture a domestic-issued prepaid product used outside of the United States. "International prepaid transaction" could also include a foreign-issued prepaid product that is marketed or used in the United

States. In such an instance, the provider of prepaid access could be a foreign-located MSB subject to the BSA implementing rules.⁵¹

Our law enforcement stakeholders have warned of the potential use in an under-regulated environment of prepaid access products transported across our borders to effect high volume, high velocity movement of funds in a manner that may be extremely attractive to those engaged in criminal activity. Although not all international transactions involve criminal behavior, we believe that these transactions impose a level of risk that requires full BSA compliance, regardless of the type of prepaid program in which the provider is engaged.

We have identified the above five types of prepaid programs as being of less risk based on our current understanding of comparative vulnerabilities. FinCEN seeks comment from law enforcement, industry, and the general public concerning their own assessment for money laundering and terrorist financing risks posed by these prepaid programs or prepaid programs in general.

D. Meaning of the Term “Seller of Prepaid Access”

The seller of prepaid access is the party with the most face-to-face purchaser contact and thus becomes a valuable resource for capturing information at the point of sale, unlike any other party in the transaction chain. Typically, the seller is a general purpose retailer, engaged in a full spectrum product line through a business entity such as a pharmacy, convenience store, supermarket, discount store or any of a number of others. Precisely because this party deals face-to-face with the purchaser, and has the ability to capture unique information in the course of completing the transaction, we believe the seller should fall within the regulation’s direct reach.

⁵¹ 2009 MSB NPRM, 74 FR 22129, 22133 (May 12, 2009).

Because the seller's role is complementary with, but not equal to, the authority and primacy of the provider of prepaid access, we choose not to require registration with FinCEN.⁵² The seller, we believe, is generally acting as an agent on behalf of the provider and this treatment is consistent with other agents under the MSB rules. However, the seller's agency does not excuse compliance with the other responsibilities assigned under this proposed rule: (1) the maintenance of an effective AML program, (2) SAR reporting, and (3) recordkeeping of customer identifying information and transactional data.

Coverage of sellers under this definition does not include situations where applicable exemptions to the scope of covered prepaid programs apply. Thus, a retailer who sells only those prepaid access products that fall within the scope of the exemptions to the definition of prepaid programs will have no BSA responsibilities under this rulemaking. Such retailers will, however, still have responsibilities under the BSA with respect to filing reports on the receipt of currency in excess of \$10,000 in the course of engaging in a trade or business.⁵³ While this reporting requirement will ensure some transparency within the context of the sale of prepaid access that otherwise falls outside the scope of BSA regulations, FinCEN is actively considering whether this level of reporting is enough to detect and deter abuse of prepaid access by illicit actors that might seek to launder funds through the bulk purchase of such prepaid access products.

⁵² With respect to certain business models, FinCEN expects that a provider of prepaid access may also be a seller of prepaid access. In such contexts, as in other areas where regulatory overlap exists, the more expansive of the two competing applicable regulations will apply. For example, a provider of prepaid access will not be absolved from a registration requirement simply because it is also a seller of prepaid access. In noting that a provider of prepaid access may also be a seller, FinCEN is not implying that all providers of prepaid access will also be sellers. FinCEN notes that with respect to some prepaid programs, such as those pertaining to government benefits, and payroll, there may be no seller or retail outlet associated with the program.

⁵³ These reports, filed on FinCEN Form 8300, are required under 31 CFR 103.30.

FinCEN is considering whether to include as an addition to the proposed definition of seller of prepaid access, an activity-based threshold, similar to such thresholds that we have used in other contexts. Consistent with these other approaches, FinCEN is considering whether to include within the definition of sellers of prepaid access those entities that sell any form of prepaid access, regardless of its inclusion in a BSA covered prepaid program, in an amount over \$1,000 to any person on any day in one or more transactions. FinCEN believes there may be merit in having greater transparency for all high-value prepaid access above \$1,000. Such a threshold would trigger suspicious activity reporting and other obligations on covered sellers to enhance transparency and deter illicit use. Imposing reporting requirements on such sellers would also lead to the ability of the law enforcement community to pursue persons deemed to have structured transactions to avoid a report required of a financial institution.

E. Meaning of the Term “Prepaid Access”

The current regulations use the term “stored value.” 31 CFR 103.11(vv) defines the term as funds or the value of funds represented in digital electronic format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically. The use of the term “stored value,” as discussed previously in section II-B of the Preamble, was known from its inception to be a less-than-perfect label for this payment mechanism, given that no value is actually “stored” on the card. Very shortly after the publication of the MSB final rule in 1999, the term “prepaid” emerged as the more common industry term. We now revise our term to correspond to the more accurate and the more prevalent term in the marketplace.

This proposal is an opportunity to employ more precise terminology while still striving for regulatory flexibility so that the rule will not become obsolete with the next innovative product. We believe the proposed language has the necessary regulatory elasticity to survive future technological advancements. Specifically, we propose defining “prepaid access” as an “electronic device or vehicle, such as a card, plate, code, number, electronic serial number, mobile identification number, personal identification number, or other instrument that provides a portal to funds or the value of funds that have been paid in advance and can be retrievable and transferable at some point in the future.”

1. Removal of Exemption of Stored Value Transactions from Suspicious Activity Reporting.

FinCEN proposes to revise the regulation implementing 31 U.S.C. 5318(g) which requires MSBs to report certain suspicious activity. In particular, FinCEN proposes to remove the exemption that previously accorded issuers, sellers and redeemers of stored value a lighter BSA regime by not requiring them to report suspicious activity under 31 CFR 103.20. The implementing regulation currently states:

[e]very money services business described in §103.11(uu) (1), (3), (4), (5), or (6), shall file with the Treasury Department ... a report of any suspicious transaction relevant to a possible violation of law or regulation.... Notwithstanding the provisions of this section, a transaction that involves solely the issuance, or facilitation of the transfer of stored value, or the issuance, sale, or redemption of stored value, shall not be subject to a reporting under this paragraph (a), until the promulgation of rules specifically relating to such reporting.

The proposed definition will remove the stored value exemption from paragraph (a)(5) of 31 CFR 103.20. When the current regulation was implemented, it contemplated that issuers, sellers, and redeemers of stored value were among the institutions that could provide valuable information concerning suspicious transactions.⁵⁴ However, FinCEN

⁵⁴ 62 FR 27900, 27904 (May 21, 1997).

determined that it was not appropriate to specifically require issuers, sellers, and redeemers of stored value to file SARs because of the infancy of the use of stored value products in the United States.⁵⁵

The reasons for exempting transactions solely involving stored value from SAR reporting are no longer applicable. Moreover, the reasons for requiring the reporting of these transactions have increased. Since the implementation of the SAR rule for MSBs, the growth of the industry has made it an attractive medium through which money launderers can conduct illicit transactions. Prepaid access is easily transportable and, in some cases, can be loaded from a number of different locations.

In developing their programs, providers of prepaid access have often implemented technological solutions to combat fraud and to increase transaction efficiencies. These same technology solutions can logically provide additional information that may prove useful in identifying suspicious activity that will have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. Therefore, the proposed regulation will remove the exemption for providers from filing SARs.

We believe that prepaid access sellers also serve a potentially valuable role in reporting suspicious activity through SAR filings. Although they may not employ the same sophisticated technology solutions as many providers, their position as the uniquely-situated customer contact point offers information at least as important. These sellers represent the first step in the transaction chain. Such a direct, hands-on role is unique and potentially highly valuable to the law enforcement community.

⁵⁵ Id.

2. Requirement that prepaid access providers retain transaction information.

Our discussions with the law enforcement community have revealed the utility of detailed records and recordkeeping on the part of regulated financial institutions, over a substantial period of time, generally five years. This facilitates investigations in which law enforcement is attempting to reconstruct a pattern, or a history of transaction activity, that substantiates criminal behavior involving prepaid products or services. In §103.125, we discuss recordkeeping related to the customer involved in the initial purchase of the prepaid access product. Under § 103.40, we seek recordkeeping related to the actual usage, the transaction history, surrounding a prepaid product over a five year time period.

We emphasize, however, that records to be retained under this section are only those *generated in the ordinary course of business* by a business entity involved in transaction processing. We believe that these records would routinely reflect (1) type of transaction (ATM withdrawals, POS purchase, etc.), (2) amount and location of transaction, (3) date and time of transaction, and (4) any other unique identifiers related to transactions. These records need not be kept in any particular format, or by any particular entity in the transaction chain. The provider of prepaid access bears the responsibility, however, to establish these recordkeeping requirements either internally or on the part of a third party entity. Additionally, the records must be easily accessible and retrievable upon the appropriate request of law enforcement or judicial order. Although we are currently proposing that records of relevant transactions may be kept in various locations at the direction of the provider of prepaid access, FinCEN is also considering whether there should be a requirement that the provider of prepaid access maintain all

such records in a central location. FinCEN seeks comment on the costs and benefits of such a requirement to maintain transaction records more centrally.

3. Removal of Registration Exemption for Issuers, Sellers and Redeemers of Stored Value.

FinCEN proposes to revise the regulation implementing 31 U.S.C. 5330 that requires MSBs to register with FinCEN. Specifically, FinCEN proposes to amend 31 CFR 103.41 by removing the exemption from registration accorded to issuers, sellers, and redeemers of stored value. The implementing regulation currently states, "... each money services business ... must register with the Department of the Treasury..." It states further, "[t]his section does not apply to ... a person to the extent that the person is an issuer, seller, or redeemer of stored value."

FinCEN is proposing to revoke the exemption from registration previously accorded to issuers, sellers, and redeemers of stored value. Since the initial exemption, the stored value industry has experienced rapid growth and market maturity; FinCEN no longer feels that regulation will inhibit the successful development of the industry. Additionally, the lack of a registration requirement may result in a market imbalance between providers of prepaid access and other MSBs that offer competing services. By removing the exemption, providers of prepaid access will now be required to register as MSBs with FinCEN. The rule makes it clear that for every prepaid program there must be a non-bank provider of prepaid access registered with FinCEN.⁵⁶ We wish to

⁵⁶ By virtue of the regulatory definition of a money services business, neither a bank nor any other participants in the bank-centered prepaid program would be required to register with FinCEN. In addition, if applicable, entities registered with, and regulated by or examined by the SEC or the CFTC would not be required to register with FinCEN.

emphasize, however, that like all other MSB agents, sellers of prepaid access are not required to register.

FinCEN anticipates that identifying information about the component entities involved in a prepaid program will be fundamentally important to the law enforcement community. We believe that the most efficient way to obtain this information and make it available for law enforcement use is via the registration process, and FinCEN will be considering ways in which the MSB Registration form, FinCEN Form 107, can be updated to accommodate such information. We solicit comments on the use of the form to collect this information.

4. Requirement that providers and sellers of prepaid access retain customer information.

FinCEN proposes to revise the regulation implementing 31 U.S.C. 5318(h) that requires MSBs to maintain an adequate anti-money laundering program. Specifically, FinCEN proposes to amend 31 CFR Part 103.125(d)(1) by prescribing that, as a minimum standard of their anti-money laundering program, providers of prepaid access and sellers of prepaid access must have policies and procedures for the retention of customer identifying information.

In implementing 31 CFR 103.125, FinCEN stated that the uniqueness of each financial institution required the adaptation of policies, procedures, and internal controls to a level commensurate to the risks in its business model, including geography and customer base. Therefore, it was not intended that the standards established in 31 CFR 103.125 would create specific identical requirements for all MSBs. Based on inherent risks, some businesses would be required to implement more policies, procedures, and internal controls than others.

The proposed regulation will add paragraph (d)(1)(iv) stating “[a] money services business that is a provider or seller of prepaid access must establish procedures to verify the identity of a customer of a prepaid program and must retain such customer identifying information, including name, date of birth, address, and identification number, for five years.” FinCEN believes that such customer information capture and retention is necessary for greater financial transparency of the purchasers of the prepaid products or services. We anticipate that retaining such records will not only assist the providers and sellers, but may be of great value to law enforcement. FinCEN seeks comment on the value of retaining such records.

For providers and sellers of prepaid access, this proposed customer identification requirement is linked to and narrowed by the proposed definition of “prepaid program.” Accordingly, providers and sellers of prepaid access involved in the delivery and sale of a form of prepaid arrangement not deemed a prepaid program under 31 CFR 103.11(uu)(4)(ii), would not be required to obtain customer information under this part.

As we have discussed this matter with our law enforcement colleagues throughout the rulemaking process, we have often heard that a standard “data set” of information, typically including name, address, date of birth and a form of government-issued identification containing a unique identifying number should be required at a minimum. FinCEN also believes that the information proposed to be retained will be highly useful in the investigation and prosecution of criminal, tax, and regulatory investigations and proceedings. Without the requirement that this information be retained, law enforcement may likely be missing valuable information.

FinCEN recognizes, however, that verifying and retaining information on every applicable transaction could be time consuming and expensive. Such costs might be alleviated if the precise type of information that an institution had to collect was left to the determination of the provider or seller of prepaid access based on an assessment of their risks, in a manner consistent with other FinCEN regulations. We seek public comment as to the merits of incorporating a risk-based standard into the rule, instead of the proposed combination of a risk-based approach with a mandatory set of minimum information collection standards.

The provider and seller are reminded that the AML program developed for their prepaid program or prepaid services should accurately reflect their business operations. The program must be sufficiently detailed with standards and criteria specified for how the information is to be collected, verified, and retained. There should also be provisions addressing its communication throughout the employee ranks and for the training of any individuals/entities acting on its behalf.

XIII. Questions for Public Comment

FinCEN invites comments on all aspects of the proposal to regulate prepaid access. The following represents a compilation of all of the questions presented earlier in the preamble text. They have been aggregated here for the convenience of the commenting public.

1. Proposed terminology for this rulemaking

We seek public comment regarding the terms “prepaid access” and “provider of prepaid access,” and whether they offer the best, most meaningful description of the product(s).

2. International transport to be addressed in a subsequent rulemaking

FinCEN intends to undertake a subsequent rulemaking proposal on the international transport of prepaid access. In the interim, we invite comment on any aspect of the international transport issue that we should consider in the context of a future reporting requirement directed at this type of payment mechanism.

3. Alternate approach to designation of a single, central “provider”

The many parties in the transaction chain each bring specialized knowledge to the program. By imposing a separate, stand-alone obligation on each party along the transaction chain, we may facilitate the collection of more detailed information not filtered through any secondary perspective. As FinCEN considers such an alternate approach, we seek comment on which prepaid program participants offer the most meaningful information, such as transaction information, purchaser information, or card holder information.

4. \$1,000 threshold aggregation

In its 2009 MSB NPRM, FinCEN sought comment on whether transactions involving multiple MSB services should require aggregation for purposes of determining whether definitional thresholds had been met. We received industry comments on this issue generally opposed to such a development.

FinCEN is still considering the matter and welcomes any further comments on this issue, particularly with respect to the inclusion of the sale of prepaid access in connection with other money services business products.

5. Closed loop prepaid access, generally

We question whether it might now be appropriate to revisit the rationale that we have previously applied to closed loop prepaid access even if such prepaid access is limited solely to domestic use. Are there inherent vulnerabilities in closed loop prepaid access that require our consideration? Is closed loop prepaid access that allows use at more than a single retail facility (for example, at a shopping mall) more vulnerable to abuse than a traditional closed loop product? FinCEN solicits comment on whether and how it should reconsider its existing interpretation with respect to closed loop gift cards.

6. Consideration of examination authority

With respect to providers of prepaid access, FinCEN seeks comment on any particular aspects of the prepaid access sector that should be considered when making a decision about whether and how to delegate examination authority.

7. Future rulemakings contemplated

As noted earlier, we intend to engage in a rulemaking on instituting reporting requirements on the international transport of prepaid access. If there are other areas in need of consideration for future rulemaking, we ask for the public to offer comment.

8. SEC and CFTC-regulated entities; involvement in prepaid access sector

FinCEN is not aware of entities registered with, and regulated or examined by the SEC or CFTC that are actively engaged in the prepaid access industry in such a way as to approach the equivalent of a provider or seller of prepaid access, and solicits comment on the extent to which such entities are engaged in the prepaid access industry.

9. Description of participants in the prepaid access transaction chain

To the degree that our sketch of the landscape is inaccurate or incomplete, we seek guidance and clarification from the commenting public.

10. Employer use of prepaid access program for payroll purposes

We understand that some members of the law enforcement community would prefer to subject all prepaid payroll programs to the full range of BSA obligations. They assert that criminals often establish shell companies and use these fictitious entities and non-existent employees as conduits to launder illicit funds. They believe that the potential for abuse of prepaid payroll cards is considerable and have voiced their concerns to us. We therefore seek public comment regarding the need to institute additional safeguards and/or conditions prior to excluding prepaid access to payroll funds from the full extent of BSA responsibilities. Are there methods to ensure that the company and employees are legitimate, and that the program is valid?

11. Requirements placed on limited value prepaid access to enable exclusion from regulation

We request public comment on the following considerations regarding this section of the proposed rule:

- Please provide us with comments regarding alternative dollar limits, higher or lower than this proposal, daily or otherwise, and tied to a clearly delineated dollar amount or not. What merits are derived and what vulnerabilities are created by increasing or decreasing the threshold? Would an additional activity limit threshold, such as annual multi-thousand thresholds that exist in

some European countries, have benefits over our use of a daily dollar level?

- What is the technological feasibility of these requirements? What cost implications and practical burdens are raised by these requirements for the provider of prepaid access, the processor, or any other parties in the transaction chain to enable the application of the exemption?
- What practical implications and what technological challenges arise if different limits are established for transfers, aggregate value, withdrawals, and velocity?

12. Information regarding the prepaid access program to be derived through registration process

FinCEN anticipates that identifying information about the component entities involved in a prepaid program will be fundamentally important to the law enforcement community. We believe that the most efficient way to obtain this information and make it available for law enforcement use is via the registration process, and FinCEN will be considering ways in which the MSB Registration form, FinCEN Form 107, can be updated to accommodate such information. We solicit comments on the use of the form to collect this information.

13. Capture and retention of customer information

FinCEN believes that such customer information capture and retention is necessary for greater financial transparency of the purchasers of the prepaid products or services. We anticipate that retaining such records will assist not only the providers and sellers but may be of great value to law enforcement. FinCEN seeks comment on the value of retaining such records.

14. Mandatory data set of customer information vs. Risk-based assessment of necessary information variables

FinCEN recognizes that verifying and retaining information on every applicable transaction could be time consuming and expensive. Such costs might be alleviated if the precise type of information that an institution had to collect was left to the determination of the provider or seller of prepaid access based on an assessment of their risks, in a manner consistent with other FinCEN regulations. We seek public comment as to the merits of incorporating a risk-based standard into the rule instead of the proposed combination of a risk-based approach with a mandatory set of minimum standards.

15. Certification of regulatory burden

- FinCEN's research has revealed that AML and customer identification requirements are currently imposed on providers of prepaid access (and through them, to sellers of prepaid access) by the partner bank that is authorized to issue the prepaid access by the payment network. FinCEN solicits confirmation of this fact, and any substantial divergence between the current contractual obligations of a provider or seller, and the requirements specified by the proposed rule.
- Please provide comment on any or all of the provisions in the proposed rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, in carrying out responsibilities under the proposed rule and (b) what alternatives, if any, FinCEN should consider.

XIV. Proposed Location in Chapter X

As discussed in a previous Federal Register Notice, 73 FR 66414, Nov. 7, 2008, FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Parts 1000 to 1099 ("Chapter X"). If the notice of proposed rulemaking for Chapter X is finalized, the changes in the present proposed rule would be reorganized according to the proposed Chapter X. The planned reorganization will have no substantive effect on the regulatory changes herein. The regulatory changes of this specific rulemaking would be renumbered according to the proposed Chapter X as follows:

- (a) 103.11 would be moved to 1010.100;
- (b) 103.20 would be moved to 1022.320;
- (c) 103.33 would be moved to 1010.410;
- (d) 103.40 would be moved to 1020.420;
- (e) 103.41 would be moved to 1022.380; and
- (f) 103.125 would be moved to 1022.210.

XV. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” (5 U.S.C. §603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Estimate of the number of small entities to which the proposed rule will apply:

For the purpose of arriving at an estimated number of providers of prepaid access, FinCEN is relying on information regarding the industries as identified by their North American Industry Classification System (“NAICS”)⁵⁷ codes. In particular, FinCEN finds that prepaid providers will be listed as NAICS code 522320 (Financial transaction processing, reserve and clearinghouse activities). The United States Census Bureau estimates there are about 3000 entities in this classification. However, this classification includes services that are outside of those provided by prepaid providers (i.e. check validation services, bank clearinghouse associations, and credit card processing services). Because prepaid providers utilize electronic funds transfers systems to conduct business, FinCEN narrowed the estimated industry to those entities that are within NAICS code 522320 and perform either electronic funds transfers or electronic financial payment services. FinCEN was unable to obtain a number for these entities from the United States Census Bureau and therefore relies on commercial database information. Based on this

⁵⁷ NAICS was developed as the standard for use by federal statistical agencies in classifying business establishments for the collection, analysis, and publication of statistical data related to the business economy of the U.S. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997.

information, FinCEN estimates that there are 700 entities that share this classification.⁵⁸

Within this classification those entities that have less than 7 million dollars in gross revenue are considered small. FinCEN estimates that 93% of the affected industry is considered a small business, and that the proposed regulation will affect all of them.

For the purpose of identifying sellers, FinCEN is unable to rely on NAICS codes because sellers, including grocery stores, convenience stores, and department stores, will be classified under the primary services that they provide. Therefore, to arrive at an estimated number of sellers of prepaid access, FinCEN is relying on information about distribution channels obtained through informal consultations with members of the prepaid industry. In addition, FinCEN is relying on prepaid access selling patterns identified through the 2005 Money Services Business Industry Survey Study conducted by KPMG.

FinCEN estimates that there are 70,000 sellers of prepaid access operating within prepaid card programs, as defined under our proposed rule. The inclusion of these sellers as small businesses for regulatory purposes would depend, in great part, on the corporate organization of each sales outlet.⁵⁹ In consideration of the discussions above, for the purposes of the Regulatory Flexibility Act, FinCEN stipulates that it is affecting a substantial number of small businesses.

⁵⁸ Dun and Bradstreet, D&B Duns Market Identifiers Plus (US) (Accessed on Nov 19, 2009) (Search of Codes NAICS 522320 with removal of outlying institutions).

⁵⁹ Nearly 70% of the individual sales outlets of prepaid access covered within the scope of this proposed regulation belong to a national or regional chain (such as a convenience store, drugstore, or supermarket chain). If the corporation bases its distribution strategy on a branch network, the single, unified nation- or region-wide corporation is considered the seller of prepaid access, the gross annual revenue would probably exceed the threshold for consideration as a small business, and the number of sellers of prepaid access decreases significantly. On the other hand, if the corporation bases its distribution strategy on franchises, then each individual franchisee becomes a seller of prepaid access, and its individual gross annual revenue might qualify it as a small business.

Description of the projected reporting and recordkeeping requirements of the proposed rule:

The proposed rule will require prepaid providers and sellers to implement the same BSA requirements with which other MSBs are already complying. By requiring this, FinCEN is addressing vulnerabilities in the United States financial system and is leveling the playing field among MSBs. Currently, all MSBs are required to maintain AML programs, report certain currency transactions, and maintain certain records. Also, MSBs, except check cashers and issuers, sellers, and redeemers of stored value, are currently required to file reports on suspicious transactions. The proposed rule will require prepaid providers and sellers to comply with these same requirements. The proposed rule will require only prepaid providers, not sellers, to register with FinCEN. Additionally, prepaid providers and sellers will be required to maintain records about customer identification and transaction information. As discussed below, FinCEN does not foresee a significant impact on the regulated industry from these requirements.

AML Program Requirement in General

The proposed rule will require prepaid providers and sellers to maintain AML programs. Sellers that transact in amounts greater than \$1000 per person per day are already required to maintain AML programs.

The majority of providers have not been previously required by regulation to maintain AML programs. However, through discussions with industry and representations from a prepaid card association, FinCEN has determined that prepaid providers are already maintaining AML programs, typically as part of their contractual obligations to their partner banks or credit card networks. When an issuing bank partners with a prepaid provider to reduce reputational and operational risk the bank will require

that the provider maintain an AML program commensurate with the bank's risk tolerance. To assist these prepaid providers, prepaid card associations publish reports on AML best practices. Similarly, for those sellers that transact in ways that would subject them to the proposal, the proposed rule would require the maintenance of an AML program. Because these sellers are agents of either the provider or issuing bank or both, they have been contractually obligated to maintain AML programs to assure their principal that AML risks are mitigated. Therefore, since providers and sellers are already contractually obligated to fulfill the requirement of maintaining an AML program as proposed in this rule, FinCEN estimates that the impact of this requirement will be minimal.

Currency Transaction Reporting

The proposed rule will require prepaid providers and sellers to report transactions in currency in amounts greater than \$10,000. As stated in FinCEN's 1999 MSB rulemaking, sellers that transact in amounts greater than \$1,000 per person per day are already required to report these transactions.

Providers and sellers that transact in amounts of \$1,000 or less per person per day have not been required to report transactions in currency in amounts greater than \$10,000. However, because the average load amounts for prepaid cards are well below the \$10,000 threshold and the majority of prepaid loads above \$1,000 are deposited through direct deposit, FinCEN does not foresee a significant burden in this requirement. In support of this assertion, several prepaid providers have stated to FinCEN that they have rarely if ever encountered a transaction of over \$10,000 in currency per person per day associated with their prepaid programs.

Suspicious Activity Reporting

The proposed rule will require prepaid providers and sellers to report on transactions of \$2,000 or more which they determine to be suspicious. Prepaid providers and sellers have not been previously required to comply with such a requirement under regulation. It is important to highlight that these reports are not required to be filed unless a transaction is suspicious and is for an amount of \$2,000 or more. The average transaction amount for a point-of-sale debit is about \$40.⁶⁰ This is substantially less than the \$2,000 threshold. Additionally, through an overview of currently operating programs, FinCEN has determined that few prepaid programs allow a customer to withdraw more than \$1,000 from an automated teller machine in a day. Lastly, in discussions with the industry, prepaid providers indicated that they rarely encountered transactions for which they would file a SAR if required by regulation. Therefore, FinCEN estimates that the number of SARs that will be filed by prepaid providers and sellers will be low.

FinCEN understands that the costs in SAR reporting go beyond the actual cost in filing the report. These costs also include developing systems to monitor transactions for suspicious activity. Because of the inherent risk of fraud that exists in the prepaid industry or any payment industry for that matter, prepaid providers already utilize fraud monitoring systems. These systems monitor transactions of individual cards to detect patterns that would indicate suspicious behavior that could be fraud. To detect fraud these systems rely on various data points including transaction velocity, transaction

⁶⁰ Cheney, Julia "An Update on trends in the Debit Card Market," Payment Cards Center, June 2007, pg. 3 (citing The Nilson Report Issue 865); available at <http://www.phil.frb.org/payment-cards-center/publications/discussion-papers/2007/D2007JuneUpdateDebitCardMarketTrends.pdf>.

volume, and transaction location which are compared to a customer profile. These same data points can be used to detect suspicious behavior beyond fraud.

Customer Identification Information

The proposed rule will require prepaid providers and sellers to implement procedures to collect and retain customer information relating to prepaid access within the proposed definition of a “prepaid program.” As part of their current AML programs, sellers that transact in amounts greater than \$1000 per person per day are already required to have policies and procedures to maintain customer information for certain transactions. Other prepaid sellers and providers have not been required to retain this information by regulation.

Similar to the discussion of AML programs above, prepaid providers are currently required to obtain and retain customer identification information through contractual obligations with the bank partners. Since the implementation of §326 of the USA PATRIOT Act, banks have been required to obtain customer identification for each account they open. Through discussions with prepaid industry members and associations, FinCEN has determined that, to mitigate risks, banks have extended this requirement to their prepaid provider partners through contractual obligations. Therefore, prepaid providers are already obtaining and maintaining information on their customers to comply with contractual obligations. Beyond these obligations, prepaid providers are maintaining this information to assist in their fraud monitoring and targeted marketing programs. Sellers of prepaid access also obtain and maintain this information as agents of their principal banks and providers. Because it is the sellers that have direct

communication with the customer, the obligation to collect customer identification information has been extended to them by their principals.

Transaction Records Generated in the Ordinary Course of Business

The proposed rule will require prepaid providers and sellers to retain transaction specific records generated in the ordinary course of business. Currently, providers and sellers are not required to maintain these records by regulation. However, because these records are necessary for data processing and transaction look-backs, these institutions already retain such records in the ordinary course of business.

Registration of Providers

The proposed rule will require prepaid providers to register with FinCEN. Sellers will not be required to register as they are agents of the providers. The FinCEN registration form is two pages and must be filed once every two years. Under OMB control number 1506-0013, FinCEN estimates that the annual burden from reporting and recordkeeping associated with this registration is 2.5 hours.⁶¹

Certification

Most of the requirements in the proposed rule reflect contractual obligations already imposed on both prepaid providers and sellers or the codification of a requirement to maintain records that are already maintained in the ordinary course of business. The additional burden proposed by the rule is a registration requirement and a SAR filing requirement. As discussed above, FinCEN estimates that the impact from

⁶¹ The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.41 is 30 minutes per recordkeeper for the completion, filing, and recordkeeping of registration forms, and an additional 120 minutes for the completion, filing, and recordkeeping of the list of prepaid programs subject to the regulation.

these requirements will not be significant. Accordingly, FinCEN certifies that the proposed rule will not have a significant impact on a substantial number of small entities.

Questions for Comment:

1. FinCEN's research has revealed that AML and customer identification requirements are currently imposed on providers of prepaid access (and through them, to sellers of prepaid access) by the partner bank that is authorized to issue the prepaid access by the payment network. FinCEN solicits confirmation of this fact, and any substantial divergence between the current contractual obligations of a provider or seller, and the requirements specified by the proposed rule.

2. Please provide comment on any or all of the provisions in the proposed rule with regard to (a) the impact of the provision(s) (including any benefits and costs), if any, in carrying out responsibilities under the proposed rule and (b) what alternatives if any, FinCEN should consider.

XVI. Paperwork Reduction Act Notices

The collections of information contained in this proposed rule are being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503, fax (202/395-6974), or by the Internet to oir_submission@omb.eop.gov, with a copy to the Financial Crimes Enforcement Network by mail. Comments on the collection of information should be received by

[INSERT DATE 60-DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]

In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR Part 1320, the following information concerning the collection of information is presented to assist those persons wishing to comment on the information collection. The information collections in this proposal are contained in 31 CFR 103.20, 31 Part 103.40, 31 CFR 103.41, and 31 CFR 103.125.

AML program for providers and sellers of prepaid access

Anti-money laundering programs for money services businesses (31 CFR 103.125). Office of Management and Budget Control Number: 1506–0020.

This information is required to be retained pursuant to 31 U.S.C. 5318(h) and 31 CFR 103.125. The collection of information is mandatory.

The information collected pursuant to 31 CFR 103.125(c) will be used by examiners to determine whether providers of prepaid access comply with the BSA. By defining providers and sellers of prepaid access as MSBs, the proposal will increase the estimated number of entities by 70,700. However, by removing issuers, sellers, and redeemers of stored value from the definition of MSB, the proposal will reduce the estimated number of entities by 10,000. Overall, the proposal will increase the number of entities that collect information under 31 CFR 103.125(c) by 60,700.

Description of Recordkeepers: MSBs as defined in 31 CFR 103.11(uu)(4).

Estimated Number of Recordkeepers: The proposal increases the number of recordkeepers to 60,700.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.125(c) is one hour.

Estimated Total Annual Recordkeeping Burden: The current burden will be reduced by 10,000 hours and increased by 70,700 hours, for a net increase to the current burden of 60,700 hours.

Customer identification requirement for providers and sellers of prepaid access

The information collected pursuant to 31 CFR 103.125(d) will be used by law enforcement agencies in the enforcement of criminal and regulatory laws. The proposal affects an estimated 70,700 providers and sellers of prepaid access. The proposal requires two minutes of collection burden per issuance of prepaid access product or service.

Description of Recordkeepers: MSBs as defined in 31 CFR 103.11(uu)(4).

Estimated Number of Recordkeepers: The proposal increases the number of recordkeepers to 70,700.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.125(d) is two minutes per issuance of a prepaid access device. At any given moment, there are an estimated 7.5 million network branded prepaid cards in the marketplace. FinCEN estimates that the average lifespan of a prepaid card is three years. Therefore, FinCEN estimates that there are 2.5 million new prepaid cards or products issued each year. However, we seek comment from the public on whether the three-year average lifespan of a prepaid card is a reasonable assumption.

Estimated Total Annual Recordkeeping Burden: The burden will be 83,300 hours.

SAR filing for providers and sellers of prepaid access

Suspicious activity reports for money services businesses (31 CFR 103.20).

Office of Management and Budget Control Number: 1506-0015.

This information is required to be provided pursuant to 31 U.S.C. 5318(g) and 31 CFR 103.20. This information will be used by law enforcement agencies in the enforcement of criminal and regulatory laws and to prevent money services businesses from engaging in illegal activities. The collection of information is mandatory. The proposal will increase the number of recordkeepers by 70,700.

Description of Recordkeepers: MSBs as defined in 31 CFR 103.11(uu)(4).

Estimated Number of Recordkeepers: On an annual basis there are approximately 700 Providers of prepaid access and 70,000 sellers of prepaid access. Therefore, the number of recordkeepers would be increased by 70,700.

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.20 is 90 minutes per report.

Estimated Total Annual Recordkeeping Burden: The proposal should increase the estimated annual burden by 144,900 hours.

Registration of providers of prepaid access

Registration for money services businesses (31 CFR 103.41). Office of Management and Budget Control Number: 1506-0013.

This information is required to be provided pursuant to 31 U.S.C. 5330 and 31 CFR 103.41. The information will be used by law enforcement and regulatory agencies in the enforcement of criminal, tax, and regulatory laws and to prevent money services businesses from engaging in illegal activities. The collection of information is mandatory. As only providers of prepaid access need register and list the prepaid programs subject to the proposed regulation, the number of recordkeepers will be increased by 700.

Description of Recordkeepers: Providers of prepaid access as defined in 31 CFR 103.11(uu)(4).

Estimated Number of Recordkeepers: The number of recordkeepers would be increased by 700 MSBs

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.41 is 60 minutes per recordkeeper for the completion, filing, and recordkeeping of registration forms, and an additional 90 minutes for the completion, filing, and recordkeeping of the list of prepaid programs subject to the regulation.

Estimated Total Annual Recordkeeping Burden: We will increase the number of burden hours under this collection by 1,750 hours.

Recordkeeping and retrieval requirement

Customer and Transactional Data Recordkeeping Requirements (31 CFR 103.33, 103.38, 103.40, and 103.125). Office of Management and Budget Control Number: 1506-0009.

This information is required to be provided pursuant to Section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829) and 31 CFR 103.33, 103.38, 103.40, and

103.125.. This information will be used by law enforcement agencies in the enforcement of criminal, tax, and regulatory laws and to prevent money services businesses from engaging in illegal activities. Prepaid providers would be required to retain information in a format that allows for its retrieval upon request. Both providers and sellers of prepaid access are responsible for the recordkeeping of customer and transactional data that would routinely be captured and maintained in the ordinary course of business under the proposed regulation, the number of recordkeepers will be increased by 70,700.

Description of Recordkeepers: MSBs as defined in 31 CFR 103.11(uu)(4).

Estimated Number of Recordkeepers: The number of recordkeepers would be increased by 70,700 MSBs

Estimated Average Annual Burden Hours per Recordkeeper: The estimated average annual burden associated with the recordkeeping requirement in 31 CFR 103.33, 103.38, 103.40, and 103.125. is 16 hours per recordkeeper for the maintenance of customer and transactional data that would routinely be captured and maintained in the ordinary course of business under prepaid programs subject to the proposed regulation.

Estimated Total Annual Recordkeeping Burden: We will increase the number of burden hours under this collection by 1,131,200 hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the Bank Secrecy Act must be retained for five years.

Request for Comments: We specifically invite comments on: (a) whether the proposed recordkeeping requirements are necessary for the proper performance of the

mission of the Financial Crimes Enforcement Network, and whether the information shall have practical utility; (b) the accuracy of our estimate of the burden of the proposed recordkeeping requirement; (c) ways to enhance the quality, utility, and clarity of the information required.

XVII. Executive Order 12866

This proposed rule is a significant regulatory action, and has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866 (“Regulatory Planning and Review”). Most of the entities that would be affected by this rulemaking are already contractually obliged to maintain AML programs, verify customer identification, and keep records of transaction information in order to fulfill their contractual obligations to banks and transaction processors. Additionally, FinCEN understands that many of these entities already use automated fraud monitoring systems that evaluate data points similar to those relevant to detect suspicious transactions. The imposition of apparently new compliance obligations under this proposed rule would therefore likely not impose significant new costs on regulated entities in this regard.

As discussed in the RFA certification, FinCEN estimates that because of the low transaction limits for prepaid access products and services neither SARs nor CTRs will be required to be filed often. Lastly, FinCEN estimates the registration requirement proposed by the rule will require 2.5 hours of employee time annually. FinCEN expects that the new reporting requirements imposed by this proposed rule would therefore likely have a modest overall operational and economic impact.

FinCEN solicits comment on the economic impact of this proposed rule. FinCEN will use this feedback to conduct additional analysis. Given the difficulty in quantifying

or monetizing the important incremental benefits of a Regulation, FinCEN is considering OMB guidance and Circular A-4 with respect to conducting a threshold or “break-even” analysis. According to OMB Circular A-4 this analysis would answer, “How small the value of the non-quantified benefits could be (or how large would the value of the non-quantified costs need to be) before the rule will yield zero net benefits.”⁶²

XVIII. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the proposed regulation, FinCEN has determined that it is not required to prepare a written statement under section 202.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Banks, banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Proposed Amendments to the Regulations

Accordingly, 31 CFR Part 103 is proposed to be amended as follows:

⁶² See OMB Circular A-4 (September 17, 2003), p. 2.

**PART 103 – FINANCIAL RECORDKEEPING AND REPORTING OF
CURRENCY AND FINANCIAL TRANSACTIONS**

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. §§ 1829b and 1951-1959; 31 U.S.C. §§ 5311-5314, 5316-5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107-56, 115 Stat. 307.

2. Section 103.11, as proposed to be amended on May 12, 2009 (74 FR 22129), is proposed to be further amended as follows:

- a. Revising paragraph (i);
- b. Revising paragraph (uu)(4);
- c. Adding paragraph (uu)(7); and
- d. Revising paragraph (vv).

The revisions and addition read as follows:

§ 103.11 Meaning of terms.

* * * * *

(i) Closed loop prepaid access. Prepaid access to funds or the value of funds that can be used only in transactions involving a defined merchant or location (or a set of locations) such as a specific retailer or retail chain, a college campus, or a subway system.

* * * * *

(uu) * * *

(4) Provider of prepaid access—(i) In general. The term “provider of prepaid access” means the person with principal oversight and control over one or more prepaid

programs. Which person exercises “principal oversight and control” is a matter of facts and circumstances. Activities that indicate “principal oversight and control” include:

(A) Organizing the prepaid program;

(B) Setting the terms and conditions and determining that the terms have not been exceeded;

(C) Determining the other businesses that will participate in the transaction chain underlying the prepaid access which may include the issuing bank, the payment processor, or the distributor;

(D) Controlling or directing the appropriate party to initiate, freeze, or terminate prepaid access; and

(E) Engaging in activity that demonstrates oversight and control of transactions.

(ii) Prepaid program. For the purposes of this section and subject to the limitations set forth in this paragraph (u)(4)(ii), a prepaid program is an arrangement under which one or more persons acting together provide(s) a particular form of prepaid access.

However, an arrangement is not a prepaid program if:

(A) The prepaid access provided is limited to one of the following:

(1) Payment of benefits, incentives, wage or salaries through payroll cards or other such electronic devices for similar purposes;

(2) Payment of government benefits such as unemployment, child support, and disaster assistance through electronic devices;

(3) Disbursement of reimbursement funds from pre-tax flexible spending accounts for health care and dependent care expenses;

(4) Providing prepaid access to funds subject to limits that include a maximum value as indicated in paragraphs (u)(4)(i) through (iii) of this section, where such maximum value is clearly visible on the prepaid access product:

(i) Not to exceed \$1,000 maximum value that can be initially loaded at the time of purchase of the prepaid access;

(ii) Not to exceed \$1,000 maximum aggregate value (such as through multiple transfers of value to a single prepaid access product) that can be associated with the prepaid access at any given time; and

(iii) Not to exceed \$1,000 maximum value that can be withdrawn from the prepaid access device on a single day; or

(5) Providing closed-loop prepaid access; and

(B) It does not permit:

(1) Funds or value to be transmitted internationally;

(2) Transfers between or among users of prepaid access within a prepaid program such as person-to-person transfers; or

(3) Unless it qualifies as closed loop prepaid access, the ability to load monetary value from other non-depository sources onto prepaid access.

* * * * *

(7) Seller of prepaid access. The term “seller of prepaid access” means any person that receives funds or the value of funds in exchange for providing prepaid access as part of a prepaid program directly to the person that provided the funds or value, or to a third party as directed by that person.

* * * * *

(vv) Prepaid access. Electronic device or vehicle, such as a card, plate, code, number, electronic serial number, mobile identification number, personal identification number, or other instrument that provides a portal to funds or the value of funds that have been paid in advance and can be retrievable and transferable at some point in the future.

* * * * *

3. Amend §103.20 by:

- a. Revising the first sentence of paragraph (a)(1)(i); and
- b. Removing paragraph (a)(5).

The revision reads as follows:

§103.20 Reports by money services businesses of suspicious transactions.

(a) *General.* (1) Every money services business, described in §103.11(uu), (1), (3), (4), (5), (6), or (7), shall file with the Treasury Department, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. * * *

* * * * *

4. Add new §103.40 to subpart C to read as follows:

§103.40 Additional records to be maintained by providers of prepaid access

With respect to transactions relating to providers and sellers of prepaid access described in §103.11(uu)(4) and (7) that are subject to the requirements of part 103, each provider of prepaid access shall maintain transactional records for a period of five years. The provider, as defined in §103.11(uu)(4), shall maintain transactional records generated in the ordinary course of business by the payment processor or other party that facilitates

prepaid access activation, loads, reloads, purchases, withdrawals, transfers, or other prepaid-related transactions.

5. Amend §103.41 by revising paragraph (a)(1) to read as follows:

§103.41 Registration of money services businesses.

(a) Registration requirement – (1) In general. Except as provided in paragraph (a)(2) of this section, relating to agents, and except for sellers as defined in §103.11(uu), to the extent that they are not already agents, each money services business (whether or not licensed as a money services business by any State) must register with FinCEN and, in the case of a provider of prepaid access, identify each prepaid program for which it is the provider of prepaid access. Each money services business must, as part of its registration, maintain a list of its agents as required by 31 U.S.C. 5330 and this section. This section does not apply to the United States Postal Service, to agencies of the United States, of any State, or of any political subdivision of a State. With respect to prepaid programs, each prepaid program must have a provider of prepaid access registered with FinCEN.

* * * * *

6. Amend §103.125 by:

- a. Revising paragraph (d)(1)(i); and
- b. Adding new paragraph (d)(1)(iv).

The revision and addition read as follows:

§103.125 Anti-money laundering programs for money services businesses.

* * * * *

(d) * * *

(1) * * *

(i) Policies, procedures, and internal controls developed and implemented under this section shall include provisions for complying with the requirements of this part including, to the extent applicable to the money services business, requirements for:

(A) Verifying customer identification, including as set forth in paragraph

(d)(1)(iv) of this section.

(B) Filing Reports;

(C) Creating and retaining records;

(D) Responding to law enforcement requests.

* * * * *

(iv) A money services business that is a provider or seller of prepaid access must establish procedures to verify the identity of a person who obtains prepaid access under a prepaid program, obtain identifying information concerning such a person, including name, date of birth, address, and identification number, and retain such identifying information for five years after the termination of the relationship.

* * * * *

Date: _____

James H. Freis, Jr.
Director,
Financial Crimes Enforcement Network