

May 24, 2002

VIA E-MAIL AND OVERNIGHT COURIER

Attn: Section 352 MSB Regulations
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

**Re: Comments of Costco Wholesale Corporation and Starbucks Coffee
Company on FinCEN's Adoption of Interim Final Regulations
Concerning Anti-Money Laundering Programs for Money Services
Businesses**

To Whom It May Concern:

On behalf of and counsel for Costco Wholesale Corporation ("Costco") and Starbucks Coffee Company ("Starbucks"), we are writing to formally submit comments regarding the adoption of the interim final regulations implementing Section 352 of the Patriot Act and requiring the creation of a written anti-money laundering program for money services businesses.¹ For the reasons outlined below, Costco and Starbucks believe that the Financial Crimes Enforcement Network ("FinCEN") should exercise its authority under Section 352(a)(2) of the Act to expressly exempt stored value cards from the regulations.

A. Background

Costco is a pioneer and leader in the membership warehouse industry with 389 warehouses worldwide and over 33 million members. Starbucks is the leading retailer, roaster and brand of specialty coffee in the world selling coffee drinks and related products through retail outlets worldwide.

Both companies have developed stored value card programs to create a convenient and efficient method for their customers to pre-pay for their merchandise and services. Each company's program is a "closed" system -- the stored value cards may only be redeemed for the goods or services of that particular company. Like most merchandise cards, the cards generally are non-refundable and may not be redeemed for cash.

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (The Patriot Act) Act of 2000, P.L. 107-56 (Oct. 2001).

B. Scope of Interim Final Rule

On April 24, 2002, the FinCEN published interim final regulations implementing anti-money laundering provisions of the Patriot Act (the "Interim Rule"). The Patriot Act made significant changes to the Bank Secrecy Act ("BSA") to provide additional tools to prevent, detect, and prosecute international money laundering. A key requirement of the Interim Rule is the creation of a written anti-money laundering program. Institutions subject to the rule are required to implement such a program by July 24, 2002.

The Interim Rule applies specifically to "money services businesses" ("MSBs").² The regulations prescribe standards for anti-money laundering programs for MSBs as required by Section 5318(h)(1) of the Patriot Act. Specifically, each MSB is required to create an anti-money laundering program that includes, at a minimum:

- the development of internal policies, procedures, and controls;
- the designation of a compliance officer;
- an ongoing employee training program; and
- an independent audit function to test programs.

The program is to be tailored to the particular circumstances of the MSB's industry. The exact nature of the program must be commensurate with the risks posed by the size and location of the particular MSB and the nature and volume of the financial services it offers.

C. Significant Departure from Historic Treatment of Stored Value

Under the Interim Rule, MSBs include sellers, issuers and redeemers of stored value products.³ The rule's requirement that stored value MSBs create an anti-money laundering program is a significant, inconsistent departure from the historic hands-off approach taken by FinCEN under the BSA.

To date, FinCEN has consistently exempted issuers, sellers, and redeemers of stored value from regulation under the BSA. First, in August 1999, FinCEN promulgated final rules

² MSBs include most types of non-bank financial institutions: currency dealers or exchangers, money transmitters, check cashers, and issuers, sellers or redeemers of traveler's checks, money orders or stored value. 31 C.F.R. § 103.11(uu).

³ "Stored value" means "funds or monetary value represented in digital electronic format (whether or not specifically encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically." 31 C.F.R. § 103.11(vv). However, if a company does not reach two financial activity thresholds, it is not considered a MSB by FinCEN and the regulations do not apply:

- the company does not sell stored value in an amount greater than \$1,000 in currency or in monetary or other instrument; or
- the company does not redeem stored value or other instruments for an amount greater than \$1,000 in currency or monetary or other instruments from any person on any day in one or more transactions. 31 C.F.R. 103.11(uu)(4).

requiring MSB's to register with the Department of the Treasury.⁴ The purpose of registration is to assist supervisory and law enforcement agencies in the enforcement of criminal, tax and regulatory laws and to prevent MSBs from engaging in illegal activities. Although the final rule continued to treat stored value as a financial instrument and its issuers and sellers as financial institutions under the BSA, the rule expressly exempted stored value from registration.⁵ FinCEN noted:

This limited treatment of stored value -- which frees the industry from registration requirements to which issuers and sellers of money orders and traveler's checks will be subject -- eliminates the "chilling effect" on the technology industry to which commerce objected. The limited step that is being taken should create certainty as to the outlines of the Bank Secrecy Act's application to electronic funds equivalents, while allowing further developments prior to any rulemaking that deals with more specific issues such as, for example, exemptions for "closed systems" or small denomination stored value devices or terms for possible tailored application of the registration or other Bank Secrecy Act requirements to aspects of these emerging payment products.⁶

FinCEN went on to note in the rulemaking that it did not believe it was necessary to exclude particular "closed systems" or apply threshold exclusions based on value because such a step was more appropriate in a separate rulemaking to specifically address such issues and the application of the BSA generally.⁷

Similarly, in March 2000, FinCEN issued a final rule to implement various aspects of the BSA related to "suspicious activity reporting" ("SAR") by MSBs.⁸ Under the SAR Rule, a MSB subject to the rules must report a transaction if the MSB knows, suspects, or has reason to suspect that the transaction requires reporting.⁹ Although the SAR Rule applied to most MSB

⁴ *Amendment to Bank Secrecy Act Regulations -- Definitions Relating to, and Registration of, Money Services Businesses*, U.S. Department of the Treasury, Financial Crimes Enforcement Network, 64 Fed. Reg. 45438 (Aug. 20, 1999) [hereinafter "Registration Rule"].

⁵ 31 C.F.R. 103.41(a) (stored value cards issuers, sellers and redeemers exempt from FinCEN registration rule).

⁶ Registration Rule, 64 Fed. Reg. at 45442.

⁷ *Id.* at 45447.

⁸ 65 Fed. Reg. 13683 (Mar. 2000); 31 C.F.R. § 103.20.

⁹ Reporting is required within thirty (30) days after becoming aware of suspicious activity. Whether a particular transaction requires reporting must be decided by the MSB based on all of the facts and circumstances relating to the transaction or pattern of transactions in question.

activities, FinCEN expressly exempted stored value products.¹⁰ Reiterating its concerns from the registration rule, FinCEN noted:

As noted in the preamble to the final rule on registration of money services businesses, Treasury believes that a business that issues or facilitates the digital transfer of electronically-stored value is a money services business covered by the Bank Secrecy Act. However, it is not appropriate, given the infancy of the use of stored value products in the United States, to finalize a rule specifically dealing with suspicious transaction reporting by non-banks with respect to stored value products at this time.¹¹

FinCEN's forbearance from applying the BSA to stored value has been and continues to be appropriate. The stored value card industry is still nascent though maturing. The imposition of an anti-money launder program would pose a substantial, if not impractical, burden on these types of stored value cards. BSA requirements for stored value would create yet another and currently unnecessary entry barrier to deployment of this new industry and technology.

First, the most prevalent type of cards on the market are "closed," pre-paid merchandise cards such as those offered by retailers like Costco, Starbucks, Blockbuster, Home Depot, and the Bon Marche to name a few. Many telephone companies and civic transportation systems also utilize pre-paid cards for their services. With the exception cards administered by universities and colleges, few stored value cards are redeemable by any party other than the issuer. As exemplified by the pilot program conducted at the 2000 summer Olympics in Atlanta, the lack of an "open" system derives, in part, from a lack of customer acceptance and familiarity with stored value products. In addition, the relative dearth of stored value products also is due from the current burdens and uncertainties retailers face in administering a stored value card system, i.e., state banking laws and money transmitter statutes. An additional layer of federal regulations would almost certainly impede the growth of the industry.

Additionally, the type of cards issued by Costco and Starbucks do not pose a significant risk of being used for money laundering. The cards are used for recurring, small dollar-value transactions -- compared to the type of threshold activity of which FinCEN has historically been concerned and applied to banks. It is difficult to imagine a scenario in which a party could use either Costco's or Starbucks' stored value cards to launder or transmit money to a third party.

Finally, as a practical matter, retailers and their vendors are not currently equipped to implement the type of programs contemplated by the Interim Rule. Retailers like Costco and Starbucks would struggle to assess how to implement a program that would be appropriately

¹⁰ 31 C.F.R. 103.20(a)(5) ("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 reporting under this paragraph (a), until the promulgation of rules specifically relating to such reporting.")

¹¹ 65 Fed. Reg. at 13690.

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tailored to their business activity, namely the sale of their own goods and services. Additional guidance from FinCEN would be essential to ensure compliance.

D. Conclusion

Based on the foregoing, the Costco and Starbucks urge FinCEN to consider the disproportionate and anomalous impact that the Interim Rules would have on issuers, sellers and redeemers of stored value products and exempt stored value from the rules pursuant to FinCEN's authority under Section 352(a)(2) of the Patriot Act. Consistent with its prior position, FinCEN should undertake a separate rulemaking when the time is appropriate to consider the full application of the BSA to stored value products.

Sincerely,

/S/

John P. Morgan
Attorney for
Costco Wholesale Corporation
Starbucks Coffee Company

Perkins Coie LLP
505 Fifth Avenue South, Suite 620
Seattle, WA 98004
(206) 583-8679