

August 27, 2010

Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

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Docket number TREAS–FinCEN–2009–0007 RIN 1506–AB07

**Re: Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act
Regulations – Definitions and Other Regulations Pertaining to Prepaid Access
(31 CFR Part 103, RIN 1506-AB07)**

The New York State Society of Certified Public Accountants, representing more than 27,000 CPAs in public practice, industry, government and education, welcomes the opportunity to comment on the above captioned proposed revisions to the Bank Secrecy Act regulations.

The NYSSCPA's Anti Money Laundering and Counter Terrorist Financing Committee deliberated the proposed revisions and prepared the attached comments. If you would like additional discussion with us, please contact Robert L. Goecks, Chair of the Financial Accounting Standards Committee at rgoecks@egrillc.com, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Margaret A. Wood
President

Attachment

**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS ON FINANCIAL CRIMES ENFORCEMENT NETWORK;
AMENDMENT TO THE BANK SECRECY ACT REGULATIONS –
DEFINITIONS AND OTHER REGULATIONS PERTAINING TO
PREPAID ACCESS
(31 CFR PART 103, RIN 1506-AB07)**

August 27, 2010

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New York State Society of Certified Public Accountants
Anti Money Laundering and Counter Terrorist Financing Committee

**Comments on Financial Crimes Enforcement Network; Amendment to the Bank
Secrecy Act Regulations – Definitions and Other Regulations Pertaining to
Prepaid Access**
(31 CFR Part 103, RIN 1506-AB07)

We agree, with reservation, with the Financial Crimes Enforcement Network’s (“FinCEN”) proposal to amend and revise the relevant Bank Secrecy Act (“BSA”) regulations applicable to Money Services Businesses (“MSB”) with regard to stored value or prepaid access.

We recognize that there has been an increase of prepaid innovations over the last few years and that the increased use and acceptance of prepaid access as an accepted payment method has resulted in regulatory gaps. We also recognize that this increase in the use of prepaid access has amplified the potential of using prepaid access as a means for furthering money laundering, terrorist financing, and other illicit transactions through the financial system.

However, we do have a number of comments and concerns with the proposed amendment and revision. As we understand it, the mission of FinCEN is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems. The advances in technology and the increase in acceptance of prepaid access as an accepted means of monetary exchange provides an opportunity for criminals to take advantage of any current regulatory gaps. We recognize that too much regulation could impair this evolving prepaid access industry and hinder the legitimate U.S. consumer from having an easy, safe way to carry out legal monetary exchanges.

We have the following responses to question numbers 2, 3, 4, 5, 10, 11 and 15 that are summarized in Part XIII., Questions for Public Comment. We have no comment on question numbers 1, 6, 7, 8, 9, 12, 13 and 14:

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.*

We support FinCEN’s intentions to regulate the international transport of prepaid access. In light of the significant escalation of electronic payments and prepaid access product usage in recent years, we concur that an enhancement to the current regulations of prepaid access is essential to reduce the risks of money laundering, terrorist financing and other illicit transactions through the financial system. We believe that the activity

threshold for prepaid access should not create an administrative burden to the provider, seller or consuming public. The current \$10,000 threshold for currency and monetary instruments may be a prudent threshold for these prepaid access instruments. Maintaining a uniform threshold of \$10,000 may help to alleviate consumer confusion. The importance of effective and clear consumer education is essential to help alleviate compliance misunderstandings to the general public.

The apparent ease of concealing the transportation of prepaid access products on an international basis far exceeds the obvious difficulties of transporting currency. We endorse FinCEN's use of the Department of Homeland Security and other law enforcement organizations to provide risk assessments in this area. One area of concern includes the means to detect the carrying of prepaid access products, perhaps through the use of an electronic indicator embedded within all such products. Tampering or removal of the electronic indicator should render the prepaid access device useless.

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.*

Prepaid access products are, for all intents and purposes, currency equivalents, and provide an efficient and effective means to those who have the desire to launder money. Currently, as an economic device with little regulation, it does allow almost all of the rules and regulations regarding currency to be easily circumvented. While it should not be the intent of FinCEN to disable this growing industry, any increase in regulation might have a negative impact on the future potential development of this industry.

In reviewing the requirements for collecting data, it is apparent that the collection of information aggregating to a central provider might be necessary. It is easy to envision scenarios in which a criminal organization could use this medium to distribute assets to various operatives (moving the funds downward in the organization), and also moving upwards in the organization (from lower level operatives to the central headquarters of a money-laundering operation). In practicality, there is little difference between a prepaid access card and a U.S. \$100 bill. In reality, in international circumstances, it is probably easier to use a prepaid access card to get foreign currency, as opposed to converting a U.S. \$100 bill to a local currency in a foreign nation.

Therefore, it may be prudent to require the collection of personal information for both the purchaser and the redeemer of the prepaid access instrument. Not to be overly burdensome, FinCEN should apply the same rules and regulations to prepaid access products as it does to currency, with the same dollar limits that would be used for suspicious activity reports.

4. \$1,000 Threshold Aggregation —*In its 2009 MSB NPRM, FinCEN sought comment on whether transactions involving multiple Money Services Businesses (“MSB”) 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.*

It is not at all surprising that the industry has been generally opposed to the aggregation requirement. The loopholes and opportunities that exist with the lack of aggregation almost lay out a schematic for those involved in money laundering as to how to circumvent the regulations. However, to avoid a burdensome level of reporting, both for the reporting organizations and the receiving ones, it may be necessary to adjust the dollar threshold to achieve a balance to limit the capabilities of staying under the radar. Obviously, multiple transactions that occur to stay below the limit should also be reported (as is currently required).

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.*

In order to remain practical, FINCEN should consider a lower set of regulations regarding closed loop prepaid access. These products provide less potential for abuse. However, closed loop prepaid access products, are bearer instruments that make the products easily transferable between individuals. As a further safeguard, closed loop products over a certain dollar amount should be limited to the use by a designated individual whose personal identification information has been documented.

After further investigation of closed-loop prepaid access cards, we concluded that an individual could purchase, theoretically, an unlimited amount of gift cards with cash, and sell those cards at a discount on auction Web sites.

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?

There are several ways in which prepaid access payroll card programs can be abused. In one situation, employers may not have access to employee information because there is no direct relationship between the two, as is the case with a freelance employee. In other situations, fictitious employees may be set up and used to launder money. To combat both of these vulnerabilities, we believe that it is important for employers and prepaid access providers to maintain current information relating to each employee in order to ensure that they are legitimate. For example, employers and prepaid access providers can be mandated to obtain, at the very least, government identification numbers (*e.g.*, social security numbers), and easily verify an employee's legitimacy using systems already in place at many employers and banks throughout the country.

We understand that many existing payroll card providers already verify this sort of information using Chexsystems, that "is used to ensure that the social security number is valid and matches the name of the employee."¹ This is very similar to the accounting auditing process of searching for "ghost employees" in the records of a company. In the same report, the OCC acknowledges the "number of unsettled regulatory issues involving payroll cards," one of them being if the Customer Identification Program should apply to such programs, which in our opinion, is one way to address these issues. In summary, we believe that by requiring up-to-date, verifiable, identifiable information relating to each employee, the abuse of prepaid access payroll programs can be significantly mitigated. However, as with all proposed regulations, special attention must be paid not to go too far and thereby hamper the conveniences and efficiencies these programs provide.

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?*

¹ Office of the Comptroller of the Currency. "Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked." June 2005. <<http://www.occ.treas.gov/cdd/payrollcards.pdf>>.

Before a final determination of selecting an optimal balance between daily and annual limits, an analysis should be done by FinCEN of the effectiveness of the European annual limits. While it is probably impossible to eliminate all possibilities of money laundering, and as the volume, both in value and in amount of transactions, continues to grow, FinCEN should adopt a more intelligent solution to collecting and analyzing the data reported. Before adopting any additional regulations on this matter, FinCEN should show that it has the resources to actually use these data for effective and efficient enforcement of the BSA. The current feeling in the industry is that the currency filings for transfers outside the country are not resulting in any further analysis.

By imposing the collection of personal information on companies, the new regulations would require the distribution of additional technology and significant training of the general retail clerk. They would also make the acquisition and redemption of these prepaid access items much more cumbersome for the general public. This burden would not be minimized by the adoption of an annual limit for review because unless the transactions are captured at the lowest level, there would be no way to aggregate in order to determine if the daily/annual limits are exceeded. By making prepaid access the same as currency, for regulatory purposes, confusion as to what the requirements are by the consumer would be minimized.

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.*

Prepaid access, or as it is referred to at the moment, “stored value,” is at a critical crossroads today. There are scores of dubious providers; there has been the recent re-emergence of the “big three” telecom providers introducing new and aggressive products; and the possibility of great oversight from a host of entities which makes this a pivotal junction in the future of these products.

The ‘‘Dodd-Frank Wall Street Reform and Consumer Protection Act’’ has among its provisions, two controversial elements that deals with the long litigated interchange fee issue as well as the creation of the Consumer Financial Protection Bureau. Both of these provisions will impact the “stored value” space. Because of concern regarding how these rules are going to be applied and to prevent liability, several institutions have discussed and at least one might have actually suspended the sale of its privately labeled debit card product.

Based on recent financial reporting numbers, one can clearly see how any regulatory change may seriously impact profitability in this sector and, for some, their viability as a going concern. Regulatory changes have to take into account the impact on the marketplace. While the very largest telecoms are much stronger financially (and are not banking on prepaid to the degree of others) there are numerous other firms within the telecommunications', alternative markets' and consumer products' space that rely on "stored value" products throughout their product set that they take the form of prepaid wireless handsets and top-up (refresh/replenishment), prepaid telephony products – both domestic and international, open and closed loop reloadable/non-reloadable debit and gift cards.

While FinCEN has stated that bank issued products will continue to be managed under the existing BSA guidelines, prepaid telephony products were not specifically mentioned. Yet FinCEN has stated that it expects these products to eventually fall within the scope of these guidelines.

Clear and definitive communication with the industry is imperative. Especially on the telephony side as they do not currently operate under the much more extensive and pervasive BSA/AML apparatus that banks do. If fully applied to them, for those that provide debit products, it appears telephony might also have to register as an MSB. If so, they will likely find the record keeping, reporting and registration requirements and all of the components of BSA, to be an onerous and expensive undertaking. The somewhat vague definition of a "provider of prepaid access" is a "moving target" that many state regulators have acknowledged as an issue. Inadvertent noncompliance and the threat of substantial fines and the sheer cost of compliance might drive some providers from the marketplace, creating less competition and higher costs to the public. As prepaid telephony products are sold disproportionately to those individuals in a lower socioeconomic strata, if not carefully designed, these recommendations could inadvertently reduce competition and raise the cost to those that can least afford it.

It may be reasonable for FinCEN to consider classifying prepaid access products as electronic monetary instruments with all the regulations and thresholds that are currently applicable to monetary instruments.