



Alert

Financial Institutions Client Service Group

To: Our Clients and Friends

October 18, 2011

FINCEN ISSUES A NOTICE OF PROPOSED RULEMAKING REQUIRING CROSS-BORDER REPORTING FOR PREPAID CARDS

FinCEN has released a proposed rulemaking that would require consumers holding prepaid cards that aggregate to more than \$10,000 in value, to report such prepaid cards when crossing into or out of the U.S., in the same way they currently report cash, travelers checks and other monetary instruments. The notice of proposed rulemaking (NPRM) would add “tangible prepaid access devices” to the list of currency and monetary instruments that must be reported when transported, mailed or shipped into or out of the United States in aggregate amounts over \$10,000.

Currently persons crossing into or out of the US must report cash and monetary instruments exceeding \$10,000, using FinCEN Form 105, the Report of International Transportation of Currency or Monetary Instruments known as the “CMIR” form. The NPRM’s inclusion of tangible prepaid access devices as a type of monetary instrument applies only to the \$10,000 CMIR filing obligation; it does not extend to other requirements, such as the \$3,000 recordkeeping requirement applicable to monetary instruments.

Interestingly, however, the NPRM also acknowledges that FinCEN is only authorized to extend CMIR reporting to items similar to U.S. currency based on the legislative purpose behind BSA reporting, that is to facilitate “the traceability of currency and its equivalents and eliminating anonymous international flows of money.” To the extent prepaid cards are not the equivalent to currency, and do not provide for “anonymous international flows of money” arguably the extension of CMIR reporting should not apply.

This proposal appears to have only a limited direct impact on prepaid card issuers and program managers. However, it will impact cardholders directly, possibly with negative consequences for customer experience and satisfaction. The proposal may result in holders of prepaid cards feeling discriminated against and/or stigmatized as compared to holders of debit and credit cards, who do not need to report their associated funds nor their access to lines of credit. It may also result in increased inquiries from law enforcement to designated providers of prepaid access and/or issuing banks about

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the value of specific cards crossing the border as well as increased website traffic and calls to customer service from individuals checking card balances to determine whether reporting is required and for what amount.

What is a “tangible prepaid access device”?

The term “tangible prepaid access device” is defined as “any physical item that can be transported, mailed, or shipped into or out of the United States and the use of which is dedicated to obtaining access to prepaid funds or the value of funds by the possessor in any manner without regard to whom the prepaid access is issued.” (Emphasis added.) The value of a tangible prepaid access device for reporting purposes would be the amount of funds available to which the device provides access, at the time it is transported, mailed or shipped.

FinCEN states that tangible prepaid access devices “serve as ready cash or the value of cash, and as a means of payment, are intended to provide the same (or superior) certainty as the bearer instruments listed in the definition of monetary instrument. The funds represented by prepaid access devices are payable to or readily usable by the bearer of the device, with no record necessary to track the chain of ownership.” [Note: Given that most credit or debit cards can be used by the possessor without providing ID or using a PIN, is difficult to see why prepaid cards should be treated differently.]

The definition of “tangible prepaid access devices” is meant to include “general-use prepaid cards, gift cards, store cards, payroll cards, and government benefit cards. It also includes cell phones and other tangible devices to the extent that they themselves, or an item built into or attached to them, provide access to prepaid funds or the value of funds by being readable by a device employed for the purpose by merchants.” It does not, however, extend to “tangible items that may be incidental to obtaining access to intangible prepaid access, such as laptop computers, web-enabled cell phones, or other devices that are not dedicated to accessing specific prepaid funds.” [Note: The concept that there is a cell phone or other tangible device that might be “dedicated” to accessing prepaid funds” seems unusual; we can think of no example - other than a prepaid card - that fits this definition.]

What is excluded from the NPRM?

The NPRM excludes credit cards and debit cards from its scope. The term “debit card” is defined by cross-reference to a portion of the definition used in the Durbin Amendment; that is, “any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN, or other means.” It does not include, however, the remainder of the definition that references general-use prepaid cards.” FinCEN also acknowledges that the term monetary instrument does not include “[d]ebit cards associated with a bank account.”

The NPRM does not require reports of cross-border transportation of prepaid cards when businesses deliver prepaid card inventory to cross-border selling agents for eventual sale to the public. This mirrors the exclusion that currently exists for travelers check issuers and their agents.

Comments Requested by FinCEN on the NPRM

Perhaps the most interesting aspect of the NPRM is the list of issues on which FinCEN seeks comment. Many of these requests for comment reflect the concerns raised by the industry regarding cross-border reporting of prepaid cards. These questions are an opportunity not only for industry participants to address key issues, but will also force law enforcement agencies to grapple with some of these difficult issues. The specific items for comment in the NPRM, include:

- How should law enforcement obstacles be addressed? FinCEN identifies the following as some such obstacles:
 - Network branded open loop devices “can be indistinguishable from credit and debit cards,” thus making it difficult for law enforcement to identify covered devices.
 - The Right to Financial Privacy Act and state privacy laws may make it difficult for law enforcement to determine the available balance on a covered device.
 - Law enforcement may not be prepared with a device to read the available balance when the device takes a “novel form” (i.e., not a chip or card).
 - A declaration concerning available balances may be unintentionally inaccurate, because of possible difficulties for the holder in retrieving records concerning the device or because the holder may not be directly responsible for adding value to the device.
- Should closed loop cards continue to be subject to a border declaration obligation as proposed?
 - FinCEN notes that such cards typically bear no information identifying the cardholder, so they can be used by anyone who possess the card. Although their inability to access cash may mitigate their potential use as a money laundering device, such cards may be sold outright for cash.
- Should other types of lower-risk prepaid access devices that are not “prepaid programs” under the final prepaid rule be excluded from the definition of monetary instruments, such as government-funded cards, cards holding no more than \$1000 with restricted usage, or payroll cards with restricted usage?
- Should branded open loop reloadable prepaid cards with the name of the person to whom the card has been issued embossed on the front of the card be subject to border declaration as monetary instruments?
 - FinCEN notes that such cards are issued exclusively by depository institutions in the US, and are already subject to a full slate of AML obligations, including the customer identification program rule. Such cards may have the name of the person to whom the card was issued embossed on its face, similar to a debit or credit card.
- Should the border declaration obligation be associated with the value immediately available to a prepaid access device at the time the device enters or leaves the country or should the declaration obligation apply to the potential maximum value available via the prepaid access device? For

example, if a card that has the capacity to hold \$20,000 is carried across the border with only \$1,000 on the card, should that card still be subject to reporting?

- Should the border declaration obligation apply to codes, passwords, and other intangibles as well as to any tangible object that is dedicated to accessing prepaid funds? Should it only apply to cards, or also to cell phones, key fobs, or other tangible objects that include a device that enables them to function in a similar manner to “swiping” a magnetic stripe card?
- Are there any additional costs associated with the completion of the CMIR form as a result of the proposed rule?
- Is it appropriate to exempt (as proposed) the international transport, mail or shipment by a prepaid access business or its agents of tangible prepaid access devices prior to their delivery to a seller for sale to the public?
- Should devices that require a PIN number for POS or ATM use be excluded as intangible prepaid access?
- What will be the impact of the proposed rule on small entities?
- With respect to its Paperwork Reduction Act obligations, FinCEN specifically requests comments on: (a) whether the proposed recordkeeping requirements are necessary for the proper performance of the mission of FinCEN, and whether the information shall have practical utility; (b) the accuracy of FinCEN’s estimate of the burden of the proposed recordkeeping requirement; (c) ways to enhance the quality, utility, and clarity of the information required; and (d) how the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

Comments must be submitted within 60 days after publication of the NPRM in the Federal Register. To our knowledge, the NPRM has not yet been published.

The NPRM is available at:

http://fincen.gov/statutes_regs/frn/pdf/Prepaid_at_the_Border_NPRM.pdf

FinCEN’s press release announcing the NPRM is available at:

http://fincen.gov/news_room/nr/html/20111012.html.

Should you have questions, feel free to contact us:

Judith Rinearson
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10404
P: (212) 541-1135
F: (212) 541-1385
judith.rinearson@bryancave.com

Linda C. Odom
Bryan Cave LLP
1155 F Street NW
Washington, DC 20004
P: (202) 508-6331
F: (202) 220-7631
linda.odom@bryancave.com

Kristine M. Andreassen
Bryan Cave LLP
1155 F Street NW
Washington, DC 20004
P: (202) 508-6117
F: (202) 220-7417
kristine.andreassen@bryancave.com

John ReVeal
Bryan Cave LLP
1155 F Street NW
Washington, DC 20004
P: (202) 508-6395
F: (202) 220-7695
j.reveal@bryancave.com

Margo Hirsch Strahlberg
Bryan Cave LLP
161 North Clark Street, Suite 4300
Chicago, IL 60601
P: (312) 602-5094
F: (312) 698-7494
mhstrahlberg@bryancave.com

Jennifer L. Crowder
Bryan Cave LLP
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, MO 64105-2100
P: (816) 374-3365
F: (816) 855-3365
jennifer.crowder@bryancave.com

Barry Hester
One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, GA 30309
P: (404) 572-6711
F: (404) 420-0511
barry.hester@bryancave.com

Courtney S. Stolz
Bryan Cave LLP
1155 F Street NW
Washington, DC 20004
P: (202) 508-6076
F: (202) 220-6200
courtney.stolz@bryancave.com

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