



August 27, 2010

*Submitted Electronically*

James H. Freis, Jr., Director  
Financial Crimes Enforcement Network  
U.S. Department of the Treasury  
2070 Chain Bridge Road  
Vienna, VA 22182

**RE: Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Prepaid Access, 75 Fed. Reg. 36589 (June 28, 2010)**

**RIN 1506-AB07**

Dear Director Freis:

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the Financial Crimes Enforcement Network (FinCEN) proposed rule to revise the Bank Secrecy Act (BSA) regulations applicable to Money Services Businesses (MSBs) with regard to stored value or prepaid access. FMI recognizes the national security threat posed by money laundering, terrorist financing and other illicit activities, and is committed to working with FinCEN to develop appropriate BSA oversight policies that minimize money laundering risks without unnecessarily limiting consumer access to prepaid products.

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than

50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

FinCEN is seeking comments on all aspects of the notice of proposed rulemaking (NPRM) on prepaid access. FMI's comments will first focus on the exemptions of certain prepaid products, such as closed-loop and payroll cards. Second, these comments will address challenges of collecting buyer information at the point-of-sale (POS). Third, the comments will address the potential for increased compliance costs on businesses who, should the sale of their prepaid access products not remain exempt from the final rulemaking, would have to initiate an anti-money laundering (AML) plan and be subject to MSB reporting and recordkeeping standards.

FMI brings a unique perspective to this proposed rulemaking in that currently many of FMI's member companies are registered MSBs because they cash checks, issue money orders or provide money transmission services. When regulations issued in 2002 required covered MSBs to develop AML plans, the supermarket industry complied with those standards and developed effective procedures. FMI is concerned that new requirements for information collection at the POS contained within the proposed rule will impose significant new burdens on companies already registered as MSBs.

### **Exemptions and Challenges**

#### **Closed-loop Stored Value Cards**

FMI strongly supports FinCEN's exemption of closed-loop products in the NPRM. Given closed-loop cards can only be redeemed at specific retailers or their affiliates, and cannot generally be redeemed for cash, we believe the risk of illicit activities associated with these cards is minimal.

FMI believes international use or card transfers should not be precluded from this exemption since closed-loop cards generally cannot be redeemed for cash and do not pose a high money laundering threat. While the risk associated with international use of any card may be slightly greater than a card used only domestically we believe risks are minimized in a closed-loop environment. The same is true for Internet transactions initiated from abroad; while there are some risks involved, we believe them to be minimal because again, they involve the movement of goods or services redeemable at a single merchant or affiliate, not the movement of cash funds. As "sellers" of stored-value closed-loop cards redeemable at other stores (i.e. a Starbucks's gift cards), any international use exception to the exemption of closed-loop products could have an impact on stored-value products we carry in our stores. Additionally, we believe that further study should be conducted on the prevalence of closed-loop gift cards that can be used across borders. FinCEN should also examine the degree of risk of misuse of such cards before cards with international use capabilities are removed from the exemption for closed-loop stored value cards.

### **Flexible Spending Account Cards**

FMI is extremely supportive of the exemption of flexible spending accounts debit cards from the scope of the NPRM. FMI strongly agrees with FinCEN's interpretation that because there are maximum annual dollar limits established for these accounts, and the funds can only be accessed as reimbursement for defined, qualifying expenses, these are low risk accounts.

### **Payroll Cards**

FMI is supportive of the exemption for payroll cards as we believe there is limited risk in the transfer of funds in the employer-employee relationship where the employer or a third-party contractor (i.e. an issuer or program manager) should have adequate information about the cardholder. FMI does, however, believe that because the issuer or program manager of these cards should have appropriate AML programs in place, that the loading of funds onto payroll cards by employees should not be a reason to preclude payroll cards from the NPRM exemption. One clear benefit of these cards is they put a versatile financial product in the hands of unbanked customers, and shifting those customers away from cash to loading funds on their card ultimately makes those funds more traceable, and less likely to be used in criminal contexts. Should law enforcement need information on the use of those cards, it is highly likely that the card provider (issuer or program manager) would be able to make that information available. Additionally, FMI believes that in our industry there is a low incidence of transferability of this product, and we would support additional study of the payroll card environment before excluding any features of these cards from the exemption for payroll cards provided under the NPRM.

### **\$1,000 Threshold per Person per Day**

In the current environment, our member companies sell numerous different types of prepaid products at all check out lanes in each store. It would be extremely difficult for us to aggregate the sale of these products across a store or all stores. This would require us to obtain personal information for the sale of prepaid cards and other MSB services, even if at the time of sale our members would not otherwise be required to collect such information. This information would also have to be collected, processed, and centralized in real-time in order to track whether or not a single customer exceeded the \$1,000 threshold in a day. Retailers are not currently set-up to track or manage sales to this level, and it would require extensive technology and programming investments in order to do so. Not to mention, the collection of personal information at the POS raises additional concerns, which will be addressed in the next section of our comments.

### **Information Collection**

To the extent the NPRM covers certain supermarket retailers as "sellers" of prepaid access products, the capture of additional information at the POS would be particularly burdensome, and would increase time in lane for the customer. Currently, most, if not all, money services business

activities, such as check cashing, money order, or money transmission services are confined to separate areas of the store where employees are trained to conduct money services business activities (i.e. a customer service desk) so while many supermarkets are already registered MSBs, requiring collection of purchaser data at the POS in traditional checkout lanes would mean costly operational changes and technology investments. New information collection requirements could result in gift card purchases being relegated to other areas of the stores, which would likely have a negative impact on customer satisfaction and retailer sales.

We recognize the importance of personal interaction with the buyer of the product and the value of this interaction to law enforcement, but would encourage FinCEN to take into account the logistical challenges and increased burden new information collection standards would impose. The provider or issuer may serve as a better centralized point of contact for law enforcement because they have greater decision-making ability with regard to the product, and greater control over the product use, such as activation and authorization through the payments processes and life cycle of the card. Given the transferable nature of gift card products, often times the retailer has no direct interaction with the end user of the card.

The feasibility of collecting buyer information at the POS is an additional concern. Retailers would need to invest in new procedures and programs, as well as new equipment and significant cashier training, in order to facilitate the collection of personal identifying data at the POS. The collection of buyer information also raises privacy and data security concerns about the retention, and storage of sensitive customer data. As described in the NPRM on page 52, a “seller of prepaid access must establish procedures to verify the identity of the customer of a prepaid program and must retain such customer identifying information, including name, date of birth, address, and identification number, for five years.” While we do not disagree that the collection of this data would lead to greater financial transparency, we have serious concerns about the risk of collecting and storing personal identifying information and the social and material costs that could arise from the compromise of such data, as well as whether or not the risks associated with maintaining this level of detailed, sensitive information outweigh the benefits.

### **Compliance Burdens**

While many supermarkets are currently registered MSBs, there are also many who are not, especially many small to mid-size businesses. Currently, we believe many of our member companies are exempt from the NPRM requirements on “sellers” of prepaid access products due to the exemption for closed-loop stored value cards and open-loop prepaid cards under the \$1,000 threshold that are not reloadable. However, should the products sold by some of our member companies become non-exempt based on the definitions determined in the final rulemaking, those businesses would have to employ AML plans, complete suspicious activity reporting, and employ

additional recordkeeping procedures referenced on page 45 of the NPRM. This could lead to significant investments in time and resources by companies who are not already registered MSBs or it could lead to a reduced product mix of prepaid access products for those sellers. We would strongly encourage FinCEN to maintain, and consider possibly expanding, the current product exemptions in the NPRM to avoid creating an undue burden on these businesses.

### **Conclusion**

FMI greatly appreciates the opportunity to comment on the proposed changes to the application of BSA requirements to prepaid access products. We recognize the challenge FinCEN and other law enforcement agencies are faced with in controlling and reducing the threat of money laundering, terrorist financing, and other illicit activities, and we appreciate the opportunity to work with FinCEN to ensure that the sale and use of legitimate and beneficial prepaid products can continue to occur with limited disruptions to the retail and prepaid communities.

We would be pleased to discuss our views with you further at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with the first name "Erik" being the most prominent.

Erik R. Lieberman  
Regulatory Counsel