

December 16, 2011

Financial Crimes Enforcement Network
P. O. Box 39
Vienna, VA 22183

Re: Definition of Monetary Instrument, RIN 1506-AB13

Dear Sirs:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the recent proposal by the Financial Crimes Enforcement Network (FinCEN) to revise the definition of “monetary instrument” to include tangible prepaid access devices when reporting international transportation of currency and monetary instruments.

Information about cash and monetary instruments being brought into or out of the United States is currently reported on FinCEN Form 105, *Report of International Transportation of Currency or Monetary Instruments* (CMIR). While the current report covers currency and a variety of bearer and negotiable instruments, it does not include prepaid access devices. Congress asked FinCEN to address the international transportation of these devices in the CARD Act of 2009.² The proposal would carry out this mandate by revising the definition of monetary instruments and minimally change the reporting requirements for those crossing into or out of the United States. The primary difference would be to expand the definition to also include certain prepaid access devices.

While there are clear differences between traditional monetary instruments and prepaid access devices, ABA accepts the proposal as a feasible response to the Congressional mandate. Nevertheless, we recommend that FinCEN monitor the utility of this reporting obligation and hold law enforcement accountable for demonstrating that the value of this new reporting requirement exceeds its costs.

Similar Function, Different Operation. In its analysis, FinCEN underscores the focus on currency and similar instruments that has been in place since Congress originally adopted the Bank Secrecy Act over 40 years ago. While prepaid access devices have a portability that makes them an attractive cash substitute, they have other characteristics that distinguish them from the other ‘monetary instruments’ which are currently reported on the CMIR. For example, unlike

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees. ABA’s extensive resources enhance the success of the nation’s banks and strengthen America’s economy and communities.

² Section 503 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) required Treasury to develop rules within 270 days that address, among other elements, the international transportation of stored value devices.

other monetary instruments, prepaid cards or devices access funds held in accounts. As FinCEN recognized in its prior rulemaking, the statutory term “stored value” leaves the mistaken impression that the card itself contains a certain value. This is not the case. No value transits with the prepaid access product at the border. Rather, it is not until a transaction is executed at a point of sale, during an on-line transaction, or at a cash dispensing outlet (ATM, bank branch or money transmitting office) that an account is drawn on to fund the transaction and money crosses a border. Consequently, treating them as completely interchangeable with currency overlooks the practical realities of how these devices operate. ABA concurs in the points made by the Network Prepaid Branded Card Association that illustrate several of the important distinctions between prepaid access and existing monetary instruments. Therefore, ABA urges FinCEN and law enforcement going forward to recognize the important distinctions between currency and paper instruments and prepaid access devices, in weighing whether to proceed with the proposal.

Devices Covered. While tangible prepaid devices would be defined as monetary instruments subject to reporting at the border, credit cards and debit cards would be excluded, a step that ABA supports since it recognizes the practical difficulties and problems inherent in requiring reporting of cross-border movement of those cards.³

As defined, the prepaid access devices which are covered and therefore reportable at the time the border is crossed would be based on the value of “funds available through the device at the time of physical transportation.”⁴ ABA believes this is appropriate and matches the standard applied to other instruments within the scope of the reporting requirement.

FinCEN raises the question whether a reloadable device should be reported based on the amount actually loaded at the time of border crossing or whether the maximum amount that could be loaded should be reported. ABA believes that relying on the amount at the time the card or access device is transported across the border is consistent with existing reporting requirements. For example, checks transported across the border, are only reported when they have a sufficient payment amount and are endorsed without restriction such that title to the funds passes on delivery.

Cell Phones. Using the same premise that is used to exclude credit cards and debit cards that access funds in established accounts,⁵ FinCEN proposes to exclude “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.”⁶ Again, this is a logical step that ABA supports.

³ For example, many international travelers carry credit cards with access to more than \$10,000 in credit when traveling abroad. To report each and every one of those cards at border crossing would delay processing through immigration exponentially, would provide reams of meaningless information, and would consume resources for no good reason.

⁴ 76 *Federal Register* p. 64052, October 17, 2011.

⁵ These are typically simple access devices for funds in established accounts where information about transactions is readily available to law enforcement.

⁶ *Ibid.*

Exclusion of Retail Products Shipped for Sale. The proposal would exclude products shipped internationally by a business or its agent for delivery to a seller for sale to the public.⁷ ABA believes this is appropriate, especially since there are other mechanisms that far better detect possible inappropriate activities.

Validation of the Utility of the Data. Consistent with existing federal mandates and recommendations made by ABA in 2008 in *A New Framework for Partnership, Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform*,⁸ ABA believes it is critically important for law enforcement to validate the usefulness of the information collected. ABA suspects this reporting requirement may lead to considerable expenditures by law enforcement and border crossing agents in both time and money, and so we urge FinCEN to ensure that law enforcement clearly report and demonstrate how the information collected under this requirement is useful and used. Only then can resources be efficiently and effectively applied.

Conclusion

ABA believes FinCEN has drafted a proposal that satisfies the statutory mandate in a minimally intrusive way. However, it is not entirely clear that this new reporting will produce useful data that actually helps detect and deter financial criminal activity and so it is incumbent on law enforcement under FinCEN's oversight to demonstrate how this information actually does support efforts against international financial crime.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Rowe, III". The signature is fluid and cursive, with a horizontal line extending from the end.

Robert G. Rowe, III
Vice President & Senior Counsel

⁷ 76 *Federal Register* p. 64053, October 17, 2011.

⁸ <http://www.aba.com/Compliance/CCBSA.htm>