

DEPARTMENT OF THE TREASURY

31 CFR Part 1010

RIN 1506-AB13

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Definition of “Monetary Instrument”

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is proposing to amend the definition of “monetary instrument” in the Bank Secrecy Act (“BSA”) regulations for purposes of the international transport of currency and monetary instrument reporting requirement at 31 CFR 1010.340 to include tangible prepaid access devices.

DATES: Written comments on this notice of proposed rulemaking must be submitted on or before (INSERT DATE 60 DAYS FOLLOWING PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER).

ADDRESSES: You may submit comments, identified by RIN 1506-AB13, by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB13 in the submission. Refer to Docket Number FINCEN–2011-0003.

- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506-AB13 in the body of the text. Please submit comments by one method only. Comments submitted in response to this notice of proposed rulemaking will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Public comments received electronically or through the U.S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on <http://www.regulations.gov>.

Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m. and 3 p.m., by calling the Disclosure Officer at (703) 905-5034 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT:

FinCEN, Regulatory Policy and Programs Division at (800) 949-2732 and select Option 1.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory background

The BSA, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b and 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (the “Secretary”) to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis to protect against international terrorism.”¹ The Secretary’s authority to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.² FinCEN has

¹ 31 U.S.C. 5311.

² See Treasury Order 180-01 (Sept. 26, 2002).

interpreted the BSA through implementing regulations (“BSA regulations” or “BSA rules”) that appear at 31 CFR Chapter X.³

Reports on the international transportation and receipt of monetary instruments are among those authorized by the BSA.⁴ Pursuant to this authority, FinCEN has issued regulations requiring that a form be filed reporting the international transportation, mail, or shipment of currency or other monetary instruments in an aggregate amount that exceeds \$10,000.⁵ The regulations, initially issued in 1972, are currently found at 31 CFR 1010.340, and the definition of “monetary instrument” is at 31 CFR 1010.100(dd).

The term “monetary instrument” is defined in the BSA to include currency and a variety of bearer negotiable instruments, securities, and similar items, but does not specifically include any types of prepaid access devices.⁶ Nevertheless, FinCEN has regulatory authority to expand the definition of monetary instruments to include items deemed to be “similar materials” to coins and currency of a foreign country, travelers’ checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock on which title is passed on delivery.⁷ Pursuant to this authority, FinCEN is proposing to amend the definition of “monetary instrument” for purposes of the

³ On October 26, 2010, FinCEN issued a final rule creating a new Chapter X in Title 31 of the Code of Federal Regulations for the BSA regulations. *See* 75 FR 65806 (October 26, 2010) (Transfer and Reorganization of Bank Secrecy Act Regulations Final Rule) (referred to herein as the “Chapter X Final Rule”). The Chapter X Final Rule became effective on March 1, 2011.

⁴ 31 U.S.C. 5316.

⁵ The report is filed on Form 105, “Report of International Transport of Currency or Monetary Instruments” (“CMIR”).

⁶ Specifically, 31 U.S.C. 5312(a)(3) defines “monetary instruments” to mean:

(A) United States coins and currency;

(B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers’ checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and *similar material*; and

(C) as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form. (Emphasis added.)

⁷ *Id.*

international transport of currency and monetary instrument reporting (“CMIR”) requirement at 31 CFR 1010.340 to include *tangible* prepaid access devices.

On May 22, 2009, when FinCEN regulations still referred to stored value rather than prepaid access, the President signed the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 (“CARD Act”).⁸ Section 503 of the CARD Act required the issuance of “regulations in final form implementing the Bank Secrecy Act, regarding the sale, issuance, redemption, or international transport of stored value, including stored value cards.”⁹ The CARD Act authorizes “regulations regarding international transport” of prepaid access devices, including “reporting requirements pursuant to Section 5316 of title 31, United States Code.”

Pursuant to the BSA and CARD Act, FinCEN published the Notice of Proposed Rulemaking— Definitions and Other Regulations Relating to Prepaid Access on June 28, 2010 (“Prepaid Access NPRM”),¹⁰ and, on July 29, 2011, issued a Final Rule entitled “Definitions and Other Regulations Relating to Prepaid Access” (the “Prepaid Access Final Rule”).¹¹ The Final Rule contains definitions of “prepaid access”¹² and related terms and imposes registration, reporting, record-keeping, and anti-money laundering program requirements on providers and sellers of prepaid access. While the Final Rule does not address reporting requirements for prepaid access with respect to the

⁸ P.L. 111-24 (May 22, 2009), 123 Stat. 1734.

⁹ *Id.*, Sec. 503(a), (c).

¹⁰ 75 FR 36589. The Prepaid Access NPRM discussed FinCEN’s engagement with the Department of Homeland Security and other members of the law enforcement community in an attempt to identify appropriate solutions regarding reporting of the international transport of prepaid access, *see* 75 FR 36593.

¹¹ 76 F.R. 45403.

¹² The Final Rule defines “prepaid access” as access to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number. 31 CFR 1010.100(ww). The Final Rule replaces the term “stored value” with “prepaid access.”

international transport of monetary instruments pursuant to 31 CFR 1010.340 because it's provisions provide definitions and requirements for money services businesses, it does provide the necessary first step before this rule could be proposed by creating a regulatory framework and definition of prepaid access.

Congress enacted the requirements of the CARD Act because of the potential to substitute prepaid access for cash and other monetary instruments as a means to smuggle the proceeds of illegal activity into and out of the United States, as various reports and cases have suggested.¹³ In a May 13, 2009 statement, Senator Collins, introducing the amendment that added Section 503 to the CARD Act, stated:

“[S]tored value cards have been used and are being used by Mexican drug cartels to smuggle their drug revenues back to Mexico. The Department of Justice estimates that up to \$24 billion in cash is smuggled into Mexico each year from the United States and these stored value cards are one of the means by which the cash is smuggled back into Mexico. Stored value cards can be loaded anonymously by individuals who are involved in criminal enterprises, such as drug trafficking. The cards are then physically smuggled across the border and can be used to withdraw large quantities of cash from ATMs.”¹⁴

The 2007 National Money Laundering Strategy stated that prepaid access is “. . . an emerging cash alternative for both legitimate consumers and money launderers alike.”¹⁵

A U.S. Immigration and Customs Enforcement official cited a case example where

“hundreds of [prepaid cards] were found concealed in a compartment similar to those used to conceal cash, drugs and other contraband. The cards are also being used by criminal organizations to cover ‘expenses’ incurred by their couriers as they transport cash, drugs and other contraband across the country. . . .”¹⁶

¹³ See Money Laundering Using New Payment Methods, Financial Action Task Force, October 2010 (<http://www.fatf-gafi.org/dataoecd/4/56/46705859.pdf>).

¹⁴ See 155 Cong. Rec. S5426-5427

¹⁵ See <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/nmls.pdf>.

¹⁶ Statement of Kumar C. Kibble, Deputy Director, U.S. Immigration and Customs Enforcement, Department of Homeland Security, before the U.S. Senate Caucus on International Narcotics Control, March 9, 2011.

This proposal addresses the money laundering and terrorist financing vulnerabilities illustrated by these examples.

B. Legislative History of 31 U.S.C. 5316

The proposal is consistent with the legislative history of the definition of monetary instrument and the border reporting requirement. When Congress enacted the BSA, it defined “monetary instrument” for purposes of the international transport reporting requirement to mean:

“...coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, *or the equivalent thereof*, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.”¹⁷ (Emphasis added.)

The Treasury Department was a key proponent of the BSA, as part of which it advocated for a border reporting requirement for monetary instruments to include “U.S. currency or *its equivalent*, such as foreign currency, travelers checks, *and other items which can pass freely by delivery*,” (emphasis added) in order to remove a potential loophole in the reporting regime.¹⁸

The definition was amended when Congress revised and restated Title 31 of the United States Code by deleting the phrase “or the equivalent thereof” and substituting the

¹⁷ Section 203(l), Pub. L. 91-508, H.R. 15073 (Oct. 26, 1970).

¹⁸ Hearings before the Committee on Banking and Currency (House) regarding H.R. 15073, Statement of Eugene T. Rossides, Assistant Secretary of the Treasury for Enforcement and Operations (March 2, 1970), p. 151. In subsequent testimony, Assistant Secretary Rossides testified further with regard to the importance of including in the definition, in addition to U.S. currency and particular instruments, the phrase “or their equivalent”: “The term ‘or their equivalent’ is necessary to permit the Secretary of the Treasury the necessary discretion to include other types of instruments which are easily transferrable which may not be in bearer form.” Hearings before the Subcommittee on Financial Institutions of the Committee on Banking and Currency (Senate) regarding S. 3678 and H.R. 15073 (June 8, 9, 10, and 11, 1970), Statement of Eugene T. Rossides, Assistant Secretary of the Treasury for Enforcement and Operations (June 9, 1970), p. 183 (internal citations omitted). (Emphasis in original.)

phrase “or similar material.”¹⁹ Congress expressly stated that this change was not intended to make a substantive change to the meaning and was done only for clarity.²⁰ With this change, Congress articulated a preference for the phrase “similar material,” signaling that it more clearly explained the intent of the provision than the phrase “the equivalent thereof” in the original text.

II. Meaning of “Similar Material”

Based on this legislative history, it is clear that Congress was concerned with persons transferring monetary value anonymously across international borders, particularly in connection with criminal activity. Clearly, such activity at the time of enactment was primarily accomplished through the use of currency and other substitutes for currency, such as bearer negotiable instruments or securities. Accordingly, the definition contains a list of such substitutes for currency identified for this purpose. However, the definition is not limited to the listed items, but is expressly expanded to include other “similar material.”

The authority to extend these reports to *items similar to U.S. currency* is consistent with the legislative purpose behind BSA reporting -- facilitating the traceability of currency and its equivalents and eliminating anonymous international flows of money. FinCEN believes it is reasonable to conclude that items that can be used to accomplish the same anonymous transfer of monetary value Congress sought to reach are items properly within the scope of the term “monetary instrument.” Moreover, FinCEN finds that this interpretation is consistent with the purpose of the BSA to address gaps in the ability to

¹⁹ 31 U.S.C. 5312(a)(3).

²⁰ P.L. 97-258 (Sept. 13, 1982), enacting H.R. 6128 to revise, codify and enact without substantive change certain general and permanent laws related to money and finance as Title 31, United States Code. “This bill makes no substantive change in the law.” Committee Report No. 97-651 to H.R. 6128, p.28 (July 21, 1982) (In subsection (a)(3)(B), the words “in addition”, and “and such types of” are omitted as surplus. The words “similar material” are substituted for “the equivalent thereof” for clarity).

trace the flow of currency and its equivalents through reporting requirements that are highly useful in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis to protect against international terrorism.²¹

Prepaid access devices are “similar material” to the items listed in the definition of a monetary instrument in 31 U.S.C. § 5312(b)(3), “travelers checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery,” in that they can be used as a substitute for currency, the funds they provide access to are accessible by the bearer of the device, and they can be transferred from person to person without a record of the chain of title. In particular they are similar to traveler’s checks and bearer negotiable instruments such as cashier’s and certified checks.

Although a traveler’s check has the formal characteristics of a negotiable instrument,²² it is used and accepted as ready cash because payment is guaranteed by the issuer, who has already received the value of the funds represented on the face of the check. Those funds are held in an account specifically for that purpose, although the account is not one established by the purchaser.²³ Traveler’s checks are purchased from the issuer in advance of use and in amounts corresponding to specific denominations of United States or foreign currency.

Under the Uniform Commercial Code (the “UCC”), a negotiable instrument is an unconditional order or promise to pay a fixed or determinable amount of money to bearer

²¹ 31 U.S.C. 5311.

²² See UCC § 3-104(i) and 12 C.F.R. § 229.2(hh) (Availability of Funds and Collection of Checks (Regulation CC)).

²³ Generally, traveler's checks are thought of as being "safer than cash" because issuers promise to replace them if they are lost or stolen. Further, they have no expiration date and hold their face value until used.

or to order that is payable on demand or at a definite time.²⁴ Rights and obligations contained in a negotiable instrument can be altered by endorsement. The ordinary manner in which the payee of a check endorses that check is by placing his or her signature on the back of it. An endorsement may be made after a specific direction ("pay to Dolly Madison" or "for deposit only"), called a qualified or restricted endorsement, or with no qualifying or restricting language, thereby making it payable to the holder, called a blank endorsement. A blank endorsement creates a bearer negotiable instrument, which is payable to whomever possesses it, just like most tangible prepaid access devices. Once endorsed in blank, a negotiable instrument can be transferred without any record of transfer.

Common negotiable instruments include cashier's and certified checks. A cashier's check represents funds paid by the purchaser to a bank, as represented by the face value. The check is issued and certified by the bank on the bank's own account (not that of the purchaser).²⁵ The check will state the name of both purchaser and payee but because it is a negotiable instrument, it can be transformed into a bearer negotiable instrument by a blank endorsement. A cashier's check does not depend on a private account and, therefore, is received as cash. Certified checks are similar in that the face value of the check represents funds paid by the purchaser to a bank, which is guaranteed for payment and can be converted into a bearer negotiable instrument.²⁶

²⁴ See UCC § 3-104 (1990, unchanged in 2002 revisions). Technically, there is an additional requirement: that the order or promise not state any other undertaking or instruction by the person promising or ordering payment.

²⁵ See UCC § 3-104(g) and 12 C.F.R. § 229.2(i) (Availability of Funds and Collection of Checks (Regulation CC)).

²⁶ 12 C.F.R. § 229.2(j) (Availability of Funds and Collection of Checks (Regulation CC)).

These instruments are similar to tangible prepaid access devices in that they are issued based on funds already received by the issuer, which is intended to facilitate immediate payment. The promises or orders underlying them are guaranteed for payment, giving them enhanced liquidity—the quintessential purpose of these instruments—enabling them to be treated as a substitute for cash. As bearer instruments, they are payable to whomever has possession, allowing transfers to be made with no record of the chain of ownership. Tangible prepaid access devices serve the identical purpose. In this context 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. Consequently, FinCEN believes that prepaid access devices are “similar material” to those bearer instruments that are included in the definition of monetary instruments.

III. Section-by-Section Analysis

Under the Prepaid Access Final Rule, FinCEN regulations define the term “prepaid access” very broadly to mean “[a]ccess to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number.”²⁷ While the devices or vehicles that can provide access to prepaid funds are potentially limitless, this proposal is narrowly focused on tangible prepaid access devices transported, mailed, or shipped across the border of the United States.

²⁷ 31 CFR 1010.100(ww).

A. Proposed 31 CFR 1010.100(dd)

Pursuant to FinCEN’s authority under 31 U.S.C. 5312, FinCEN proposes to amend 31 CFR Part 1010.100 by revising the definition of “monetary instrument” as that term is used for purposes of complying with the CMIR requirement at § 1010.340. In particular, the proposed revisions would add prepaid access devices to the BSA definition of monetary instrument by revising 31 CFR 1010.100(dd)(2) and add a new 31 CFR 1010.100(dd)(3) that would incorporate the exclusions for warehouse receipts and bills of lading, currently found at 31 CFR 1010.100(dd)(2), as well as adding exclusions for credit and debit cards. The proposed revisions to 31 CFR 1010.100(dd) would: (a) expand the definition to include *tangible* prepaid access devices; (b) limit the application of the expanded definition to tangible prepaid access only for purposes of the CMIR reporting requirement at § 1010.340; (c) establish that the value of any such prepaid access device would be determined by the amount of the funds available through the device at the time of physical transportation, mail or shipment into or out of the United States; and (d) clarify that credit cards and debit cards are not a form of monetary instrument for BSA purposes.

1. Proposed 31 CFR 1010.100(dd)(2)

The proposed revision to 31 CFR 1010.100(dd)(2) would provide that, for purposes of the CMIR regulations issued pursuant to 31 USC 5316, the definition of monetary instrument includes tangible prepaid access devices.

The proposed inclusion of “tangible prepaid access devices” within “monetary instrument” is limited in scope to CMIR filing obligations found at 31 CFR 1010.340 and related BSA rules involving the definitions, penalty, seizure, and enforcement provisions

that refer to those obligations. This proposed regulation is not intended to extend to tangible prepaid access devices the record keeping and other reporting requirements applicable to monetary instruments under other provisions of the BSA regulations.

The term “tangible prepaid access device” is defined at 31 CFR 1010.100(dd)(2) to mean “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.” This definition includes the predominant forms of prepaid devices such as 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. The proposed definition does not reach intangible vehicles for accessing prepaid funds or the value of funds, such as codes and PINs. It also does not reach 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.

The proposed revision to 31 CFR 1010.100(dd)(2) would also provide that the point in time at which the value of a tangible prepaid access device is measured is the time at which it crosses into or out of the United States. For purposes of complying with the CMIR reporting requirement at § 1010.340, the proposed definition would establish that the balance available through any such access device as a monetary instrument “at the time of the physical transportation, mail, or shipment into or out of the United States”

would be the reportable value. In cases of mail or shipment, there is a presumption that the value available through the device remains the same throughout the period of shipment.

2. Proposed 31 CFR 1010.100(dd)(3)

The proposed revisions clarify that credit and debit cards are not a form of monetary instrument for BSA purposes. For this purpose the proposed definition adopts the definition of credit card used in the consumer credit protection law²⁸ and Truth-In-Lending Act regulations (Regulation Z)²⁹, which define the term to mean any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit. With respect to debit cards, the proposed definition adopts the portion of the definition of debit card used in the consumer credit protection law,³⁰ which defines the term to mean any card, or other payment code or device, issued or approved for use through a payment card network to debit an individual's asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN, or other means. The proposed definition would not adopt the rest of the debit card definition in the consumer credit protection law that goes on to include general-use prepaid cards and exclude paper checks.³¹ Debit cards associated with a bank account are not included within the meaning of the term monetary instrument.

²⁸ 15 U.S.C. 1602(k).

²⁹ 12 CFR 226.2(15).

³⁰ 15 U.S.C. 1693o-2(c)(2)(A).

³¹ 15 U.S.C. 1693o-2(c)(2)(B) and (C).

B. Proposed 31 CFR 1010.340(c)(10)

The proposed regulation would add new 31 CFR 1010.340(c)(10) to exclude from the reporting requirement the international transportation, mail, or shipment of tangible prepaid access devices by a business or its agent offering such products prior to their delivery to a seller for sale to the public. This provision mirrors the exclusion for a traveler's check issuer or its agent found at 31 CFR 1010.340(c)(7). The phrase "[a] business participating in the offering of tangible prepaid access devices or its agent" is intended to include all of the participants in a prepaid access program and their agents, if any. The proposed rule is only intended to capture tangible prepaid access devices that have been purchased for use, loaded with funds, and "activated" by whatever process a particular prepaid program requires for loaded funds to be made available for use.

IV. Questions for Public Comment

A. There may be obstacles to law enforcement identifying prepaid access devices and verifying the available balance. Branded open loop prepaid access devices can be indistinguishable from credit and debit cards, making it difficult for border agents and other law enforcement authorities to identify prepaid access devices. Various impediments, such as the Right to Financial Privacy Act³² or state privacy laws involving individuals' bank records, may make it difficult to determine the available balance of an underlying prepaid access device, since the value is not generally indicated on its face.³³ Further, where the prepaid access device takes a novel form (not a card or chip), law enforcement may not be prepared with a device to read the available balance. Moreover, since a holder of certain prepaid access devices may experience difficulties in retrieving

³² 12 U.S.C. 3401, *et seq.*

³³ *The Credit CARD Act of 2009 and Prepaid Cards*, Payment Cards Center Note, Federal Reserve Bank of Philadelphia, August 2009.

records concerning the prepaid access device, a declaration concerning available balance may be unintentionally inaccurate. The holder may also not be directly responsible for adding value to the prepaid program, which could also result in a declaration concerning the available balance being unintentionally inaccurate. FinCEN requests comment on these and any other potential obstacles to law enforcement identifying prepaid access devices and verifying the accessible value, including suggestions as to how they may be addressed.

B. Prepaid access devices vary in form and function, including closed loop cards that can be used only at a specific store or merchant, or for a specific service, and cannot be used at ATMs to access cash. These cards typically bear no information identifying the cardholder, so they can be used by anyone who possesses the card. Although their limited functionality may mitigate their potential use as a money laundering device as they cannot be used as a cash access device, they might be sold outright for cash. Should these closed loop cards continue to be subject to a border declaration obligation as proposed? Should other types of lower-risk prepaid access devices that are not considered prepaid programs under the final prepaid rule be excluded from the definition of monetary instruments, such as government-funded, limited-value, or payroll cards?

C. Branded open loop reloadable cards are the prepaid access device most similar to debit cards, some allowing both cash access via ATMs and the ability to conduct transactions at a physical point of sale or online. Currently, in the United States, debit cards and open loop prepaid access cards that bear a global network brand (e.g., MasterCard and Visa), are exclusively issued by depository institutions. Depository

institutions are already subject to a full slate of anti-money laundering (“AML”) obligations, including a customer identification program rule.³⁴ Consequently, these cards may bear the name, embossed on the front of the card, of the person to whom the card has been issued in the same manner as a debit or credit card. 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?

D. Certain prepaid access programs, whether open or closed loop, allow value to be added remotely to the funds accessible via the card or other device. The effect is that someone other than the holder can add value to the funds available to the holder. This is a typical arrangement, for example, when parents give a prepaid access card to a child away at school or when migrant laborers use a prepaid access device to provide financial support to family members who remain in the home country. In these circumstances, a prepaid access card or device may cross the border out of or into the United States without an available balance, but may later, when funds are added to the prepaid access device, be able to access value. 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?

E. Payment technology is a fast moving industry, with new programs and access devices and methods constantly in development. There may soon be the potential for a code or password, or object not typically associated with payment system access (e.g., cell phone or key fob), to be brought into or taken out of the United States and used

³⁴ 31 CFR 1020.220.

to access cash drawn from a prepaid access program either via an ATM or otherwise. Should the border declaration 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?

F. FinCEN also specifically requests comments identifying any additional costs associated with the completion of the CMIR form as a result of this proposed rule.

G. FinCEN requests comment regarding whether it is appropriate to exempt, in proposed 31 CFR 1010.340(c)(10), 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. This provision would parallel the exemption for traveler’s checks found at 31 CFR 1010.340(c)(7).

H. FinCEN requests comment on whether devices that require a PIN number for a point of sale or for ATM use should be excluded as intangible prepaid access.

V. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.” (5 U.S.C. § 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The proposed rule will apply to all persons, a term that includes individuals and entities of all sizes, if they conduct a reportable action under the rule. The proposed rule

is targeted at obtaining reports from individuals transporting over \$10,000 in currency, tangible prepaid access devices, or other monetary instruments into or out of the United States. FinCEN estimates that the number of reports filed by small entities will be few and not impact a substantial number of those entities.³⁵

FinCEN estimates that the proposed rule will result in a total of 8,000 annual reports.³⁶ The majority of these reports will be filed by individuals. FinCEN estimates that each report will take 11 minutes to complete. FinCEN does not believe that this proposed rule will have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 605) and the reasons stated above, it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. FinCEN invites comments on the impact of this proposed rule on small entities.

VI. Paperwork Reduction Act

The collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. Comments on

³⁵ FinCEN has exempted the presale transportation of prepaid devices, thus limiting the majority of instances when an entity, as opposed to an individual, would have been required to report.

³⁶ In 2010, 200,000 CMIRs were filed. Of those CMIRs filed, 32,000 indicated monetary instruments crossed the border. By comparing the transaction volumes of prepaid devices with other monetary instruments, FinCEN determined that the proposed rule will increase the number of CMIRs indicating monetary instruments by 25% or 8,000 reports. Because the average burden per report is 11 minutes, the proposed rule will increase the collection by 1,467 hours.

the information collection should be sent to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503, or by the Internet to oir_submission@omb.eop.gov with a copy to the Financial Crimes Enforcement Network by mail or as part of the comments through the Internet. Comments are welcome and must be received by [INSERT DATE 60-DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Report of International Transportation of Currency or Monetary Instruments (31 CFR 1010.340). Office of Management and Budget Control Number: 1506-0014. (FinCEN Form 105)

This information is required to be provided pursuant to 31 U.S.C. 5316(a). Information collected on the CMIR is made available, in accordance with strict safeguards, to appropriate criminal law enforcement and regulatory personnel in the official performance of their duties. The information collected is of use in investigations involving international and domestic money laundering, tax evasion, fraud, and other financial crimes. The collection of information is mandatory. Records required to be retained under the Bank Secrecy Act must be retained for five years. In 2009, OMB approved FinCEN for 51,333 hours under OMB control number 1506-0014. The collection of reports on the international transportation of prepaid devices will add to the estimated burden by 1,467 hours.³⁷ However, the actual annual reporting activity since 2009 (36,667 hours) has been notably less than the amount approved by OMB in 2009 (51,333 hours). To accommodate for this difference and provide a more accurate estimate going forward, FinCEN is reducing the overall burden for this collection by

³⁷ *Id.*

7,333 hours. Therefore, as proposed, the net reduction to the overall approved burden under OMB Control Number 1506-0014 is 5,866 hours.

Description of Respondents: Individuals, business or other for-profit institutions, and not-for-profit institutions involved in the international transport of monetary instruments.

Estimated Number of Respondents: The rule decreases the number of reports by 32,000.

Estimated Average Annual Burden Hours per Respondent: The estimated average annual burden associated with the reporting requirement in 31 CFR 1020.340 is 11 minutes.

Estimated Total Annual Recordkeeping Burden: 45,467 hours

Request for Comments: FinCEN specifically invite comments on: (a) whether the proposed recordkeeping requirements are necessary for the proper performance of the mission of the 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.

VII. Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental,

public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is not a significant regulatory action.

Accordingly, a formal review by the Office of Management and Budget is not required.

VIII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202.

List of Subjects in 31 CFR Parts 1010

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Proposed Amendments to the Regulations

For the reasons stated in the preamble, FinCEN proposes to amend 31 CFR Part 1010 as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. §§ 1829b and 1951-1959; 31 U.S.C. §§ 5311-5314, 5316-5332; Title V, § 503, Pub. L. 111-24.

2. Amend Section 1010.100 as follows:
 - a. Revising paragraph (dd)(2); and
 - b. Adding paragraph (dd)(3).

§ 1010.100 General Definitions.

* * * * *

(dd) * * *

(2) For the purposes of complying with the currency and monetary instrument reporting requirements issued pursuant to 31 USC 5316, the term monetary instruments also includes any tangible prepaid access device. The term “tangible prepaid access device” means 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. The value of any such prepaid access device is the amount of the funds available to which the device provides access at the time of physical transportation, mail, or shipment into or out of the United States.

(3) Monetary instruments do not include warehouse receipts, bills of lading, credit cards (as defined in as in 15 U.S.C. 1602(k), including cards defined in 12 CFR 226.2(15)), or debit cards (as defined in 15 U.S.C. 1693o-2(c)(2)(A)).

* * * * *

3. Amend Section 1010.340 by adding new (c)(10)

§ 1010.340 Reports of transportation of currency or monetary instruments.

