RETAIL INDUSTRY LEADERS ASSOCIATION
Educate. Innovate. Advocate.

1700 NORTH MOORE STREET
SUITE 2250
ARLINGTON, VA 22209
T (703) 841-2300 F (703) 841-1184
WWW.RILA.ORG

August 24, 2010

BY FEDERAL E-RULEMAKING PORTAL

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

Re: Comments on RIN 1506-AB07

The Retail Industry Leaders Association (RILA) is pleased to respond to the Financial Crimes Enforcement Network's (FinCEN) Notice of Proposed Rulemaking and request for comments on amendments to the Bank Secrecy Act (BSA) regulations regarding definitions and other regulations relating to prepaid access (NPRM or Proposed Rule).[1]

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Most retailers currently offer prepaid-access programs – typically closed-loop or open-loop gift cards – to provide customers with another medium for the purchase of goods and services. Gift cards are sold for a broad range of purposes: to individuals and businesses for gifts to others; to companies as incentives or rewards for their employees; to customers who return merchandise purchased with cash or credit but without a receipt; as rebates for customers who have made large-dollar purchases, such as electronics or appliances; and in bulk to third-party sellers to increase the distribution of the retailer's gift cards. In each of these transactions, the retailer retains the cash, with the card holder effectively becoming a creditor and the retailer recognizing income once the gift card is used for future purchases of goods and services.

Due to legal, privacy, and public-relations considerations, retailers currently do not collect personal information from the purchaser of closed-loop gift cards, except as necessary to comply with currency transaction reporting requirements on purchases in cash exceeding $10,000. And, any information collected for sales of open-loop products is often not retained after it is provided to the sponsoring bank or its agent to limit security and privacy risks. Moreover, since the purchaser rarely buys a gift card for his or her own use, a retailer will not know its creditors under these gift-card programs prior to redemption. As a result, most retailers presently do not have the information-systems capacity to collect personal information on gift-card sales, and

[1] RIN 1506-AB07, 75 Fed. Reg. 36589 (June 28, 2010). For purposes of this letter, the term "NPRM" will generally refer to the preambulatory material and regulatory notices at pages 36589-36607, and the term "Proposed Rule" will refer to the actual BSA amendments at pages 36607-36608.

implementing such systems would be extraordinarily costly and raise a host of security and privacy concerns.

While RILA understands FinCEN's efforts to respond to concerns by law enforcement and to implement the Credit Card Accountability and Disclosure Act of 2009 (Credit CARD Act),[2] we believe that retail gift-card programs should continue to be broadly exempted from the application of the BSA, especially where such products cannot be accessed for cash.

RILA appreciates FinCEN's consideration of the detailed comments provided below. Section I of this letter explains RILA's general view that retailers should remain exempt from BSA requirements with respect to gift-card programs. Assuming that it is determined that gift cards must be subject to BSA requirements, Section II addresses concerns with the proposed exemptions to the term "prepaid program" applicable to retail; Section III raises issues relating to the definition of "seller" and "provider" of prepaid access; Section IV responds to FinCEN's request for comments on the imposition of an aggregated $1,000 limitation to apply per person, per day for all forms of prepaid access; and Section V discusses matters relating to the effective date and the critical need for transitional rules.

I. RETAILERS SHOULD REMAIN BROADLY EXEMPT FROM BSA REQUIREMENTS WITH RESPECT TO SALES OF GIFT CARDS

The Proposed Rule would require providers and sellers of prepaid access, including current closed-loop and open-loop gift-card products, to comply with the BSA and the regulations applicable to Money Services Businesses (MSB). The Proposed Rule, however, provides five exemptions for prepaid-access programs that pose lower risks of money laundering and terrorist financing, allowing sellers and providers of such exempt products to avoid the expanded application of BSA requirements. For programs that fail to meet one of the exemptions, the provider would be required to register with FinCEN, and both the seller and provider, under the Proposed Rule, would be required to:

- Establish written anti-money laundering (AML) programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering or the financing of terrorist activities with respect to the purchase of prepaid access;[3]
- Obtain and verify identifying information about the person purchasing prepaid access (e.g., name, address, date of birth, state-issued identification number) and retain such information for five years.[4]
- File Currency Transaction Reports (CTRs) and Suspicious Activity Reports (SARs);[5] and

[2] NPRM, Supplemental Information §§ I.B and II.E, 75 Fed. Reg. at 36590-36593.
[3] Proposed § 103.125, 75 Fed. Reg. at 36608; NPRM, Supplemental Information §§ XII.E.2 and XII.E.4, 75 Fed. Reg. at 36601-36602.
[4] *Id.*
[5] Proposed § 103.20, 75 Fed. Reg. at 36608; NPRM, Supplemental Information § XII.E.1, 75 Fed. Reg. at 36600-36601. We note that retailers are already subject to and comply with the CTR requirements for any purchase of general merchandise involving more than $10,000 in cash.

- Maintain certain records, including records relating to actual usage and the transaction history surrounding a prepaid-access product in the case of providers of prepaid access, for a period of five years.[6]

A. BSA Challenges and Risks for Retail Sellers of Prepaid Access

For retail businesses currently offering prepaid-access products, the implementation of the foregoing BSA requirements would pose enormous obstacles in terms of information collection, consumer impact, security and privacy risks, and redundancy, all of which could ultimately lead to a wide-spread discontinuation of prepaid-access programs and products.

1. Customer Information Collection and Verification

Some retailers today offer other types of financial services that required information collection and storage to comply with SAR reporting and are complying with those obligations. Many other retailers, however, do not offer financial services that trigger such requirements, and as a result they currently do not have systems in place to collect the information necessary to file SAR reports. Implementing the information technology to collect such customer information – name, address, date of birth, and government-issued identification – would force substantial investments in costly new information technology and storage media, especially if such information were required to be maintained in a centralized location.[7] For example, new terminals capable of capturing detailed customer information would need to be installed at every point of sale at which a prepaid-access product may be sold. Despite FinCEN's emphasis in the preamble that the records to be retained are "only those *generated in the ordinary course of business* by a business entity involved in transaction processing,"[8] the customer identification information sufficient to meet AML requirements under proposed § 103.125 is generally not collected today at the level of the retail seller of open-loop prepaid access and not at all in the case of closed-loop products.

Similarly, retailers typically do not have systems to meet the requirement under the Proposed Rule for "procedures to verify the identity of a person who obtains prepaid access . . . ."[9] Many retailers are already required to *validate* a customer's identity (i.e., compare a customer's face with his or her picture identification) for certain purchases, such as liquor, tobacco, and particular pharmaceuticals, as well as for credit applications. Nevertheless, *verification* of identity involves a whole new level of scrutiny. New technology and third-party services will be required to verify the authenticity of a customer's government-issued identification, which the Proposed Rule does not specify, but presumably would include a driver's license, passport or Social Security card. We question why this heightened level of verification is proposed for the sale of prepaid-access products when it is not applied currently for other MSB services (e.g., sales of money orders, check cashing, wire transfers, etc.).

---

[6] Proposed § 103.40, 75 Fed. Reg. at 36608; NPRM, Supplemental Information § XII.E.2, 75 Fed. Reg. at 36601.
[7] NPRM, Supplemental Information § XII.E.2, 75 Fed. Reg. at 36601.
[8] *Id.* (emphasis original).
[9] Proposed § 103.125, 75 Fed. Reg. at 36608.

For the many retailers not already engaged in offering financial services, the verification requirement will also add to the burden of training the thousands of employees –who interact with customers to complete sales of goods and services every day – in order to comply with the overall BSA procedures. These employees will have to be trained on new information collection systems and technologies, verification procedures, such as distinguishing legitimate forms of government-issued identification from forgeries (which can be especially difficult when customers come for multiple states in many retail locations), as well as procedures for identifying suspicious activities for SAR reporting. Assigning these types of responsibilities may also necessitate the need for employee background checks, an additional and costly step to ensure compliance. Moreover, because many of these employees work part time or seasonally with significant turnover, this type of training will have to be continuous, further increasing the burden and cost of these information-collection requirements on retail employers.

We also do not believe it is advisable for customer-facing retail employees to be put in the position of having to seek identification information from suspicious persons, such as individuals seeking to launder drug money, who may or may not be armed or become violent. And, to what end: Does the Proposed Rule contemplate a requirement that a retail business must refuse to complete a gift-card purchase when the customer refuses or is simply unable to supply the necessary personal information or his or her identification cannot be verified?

2. Processing Time and Impact on Consumers

Collecting customer identification information on each sale of non-exempt prepaid access would not only be enormously time consuming for the seller, but also for the retail customer.[10] While the NPRM estimates that it will take only *two minutes* per transaction,[11] such a seemingly short period of time in fact exceeds the standard purchase transaction time for some retailers. In addition, for retailers that sell multiple prepaid-access products – such as through a dedicated in-store gift-card center, kiosk or mall – time will have to be factored in for employees to distinguish between exempt and non-exempt products under the Proposed Rule, recognizing that the status of any given product could change over time. Thus, to collect the require information for each issuance of a prepaid-access product or service, RILA believes that the time expended to input and verify such information will significantly exceed that two-minute estimate, especially during the initial implementation of the new requirements when employees will have to explain the new rules to customers frustrated by the limitations on prepaid-access products.

The additional time needed to collect and process customer identification information would also increase checkout times for all customers. Clearly, the collection process would affect the individual seeking to purchase prepaid access, but it would also affect customers who are not

[10] We appreciate FinCEN's request for comment on a risk-based assessment of necessary information to be collected. NPRM, Supplemental Information § XIII.14, 75 Fed. Reg. at 36603. The result, however, would be significant variations between providers and sellers of prepaid access, among various retail sellers, and potentially even within a single retailer based on different store locations. Such variations only create uncertainty for businesses striving to comply with the rules and would undermine any benefits. Accordingly, RILA believes that a mandatory data set of customer information would be the only viable way to implement the information-collection requirements under the Proposed Rule.

[11] NPRM, Supplemental Information § XVI, 75 Fed. Reg. at 36606.

making such purchases as they will have to endure longer checkout wait times, thereby decreasing customer satisfaction.

Customer dissatisfaction will also be exacerbated if self-checkout options do not permit the purchase of prepaid-access products. A customers who would otherwise use self-checkout for the entire basket of products, will be forced to complete their purchases at an employee-staffed register where the required information can be collected and verified. The result may be that the customer simply abandons the gift-card purchase to take advantage of self-checkout and avoid the longer wait at a staffed register.

Even if the sale of prepaid access were centralized at a customer service desk, for example, the process of collecting customer information on sales of non-exempt prepaid-access products would dramatically slow the checkout process for those products and assuredly breed customer ill will, with many customers simply being unwilling to go to a separate location to make a gift-card purchase. RILA member companies stress that their customers increasingly seek out prepaid access such as gift cards because they are easy and convenient to purchase and meet a host of consumer needs. Making it harder and more time consuming to purchase prepaid access would produce long lines and frustrated customers, and would ultimately discourage consumer spending and adversely affect retail sales.

3. Risks of Collecting Personally Identifiable Information

Aside from the practical and consumer implications, a requirement to collect identification information would lead to the creation of thousands of sizeable new databases (or worse, paper records) of sensitive personally identifiable information, which retailers currently take great pains to avoid. These databases would be prime targets for identify theft and other types of financial fraud. Retailers would be required to make additional costly investments in security measures to protect the information in the location where it is collected, during transmission within the retail business or to the provider in the case of third-party products, and finally for the mandated five-year retention period. Apart from those retailers that offer broader MSB services and are subject to information collection and retention requirements, many retailers do collect customer information in connection with applications for credit products, but that sensitive personal identifying information in many cases is not retained once it is transmitted to the issuing bank in order to protect customer privacy and reduce the potential for theft.

Security and privacy risks would also arise during the actual collection of the identification information under the Proposed Rule. Other consumers waiting in a checkout line would easily be able to hear or see a customer providing his or her personal information verbally or in writing, which would create new opportunities for identity thieves without having to go to the trouble of infiltrating the retailer's computer systems.

At a broader level, the creation of the foregoing security and privacy risks would be completely contrary to pressures on the retail industry by consumer privacy advocates to minimize the personally identifiable information that retailers collect and retain with respect to customers.

4. Redundancy and Relevance of the Required Information

Lastly, subject to the discussion of RILA's recommendations below, the collection of identification information on non-exempt prepaid-access products under the Proposed Rule would be redundant. To the extent that the purchaser and user of a prepaid-access product are one and the same, sellers would be required to amass the same information that in many instances is already collected or available to the issuing bank or its agents overseeing the prepaid-access program (i.e., the provider of prepaid access under the Proposed Rule).[12] In the extreme, this would result in three sets of the same record and raises the question of why this triplicate burden is necessary to achieve the overall goals of the Proposed Rule, especially when the preamble to the NPRM notes that "[t]he provider is the entity that FinCEN believes is in the *best* position to file CTRs and SARs, maintain or have access to transaction records, and establish and maintain AML programs . . . ."[13]

The Proposed Rule also raises the question of whose information the seller or provider of prepaid access is required to collect. Prepaid access such as gift cards are typically intended to be transferred to another person as a gift. Similarly, businesses frequently purchase large quantities of open-loop or closed-loop gift cards for employee gifts, incentives or rewards and for use in customer promotions (e.g., buy $500 worth of appliances and receive a $50 X company gift card). Schools and other tax-exempt organization also make bulk purchases for use in fundraising (so-called "script programs"). In these cases, the identity of the ultimate user will not even be known at the time of sale.

B. Anticipated Retail Reaction to BSA Compliance

Faced with the foregoing burdens, costs, and risks, RILA believes that if the Proposed Rule is implemented without substantial changes, including those outlined below, retail sellers and providers of prepaid access will respond by modifying their prepaid-access programs to fit squarely into one or more of the exemptions under the Proposed Rule. At a minimum this risks stifling innovation in the market place and limiting existing consumer options.

However, to the extent that a retailer cannot make such modifications – or the issuing bank or provider of such program particularly in the case of open-loop products does not adapt the product to an exemption – RILA further believes that the retailer will have no choice but to terminate all non-exempt prepaid-access programs. For retailers that currently do not offer prepaid access, implementation of the Proposed Rule would create a serious barrier to entry, discouraging new retailers from offering gift cards. Such results would have a significant adverse effect on American consumers and particularly on the unbanked and underbanked, whose need for access to the financial system has motivated, in part, the growth in prepaid-access products.[14]

---

[12] *See* Section III, *infra*, with respect to RILA's concerns regarding the Proposed Rule's definition of "provider of prepaid access."
[13] NPRM, Supplemental Information § VI, 75 Fed. Reg. at 36594 (emphasis added).
[14] NPRM, Supplemental Information § I.A, 75 Fed. Reg. at 36590.

For retailers with closed-loop gift card programs, any inability to conform their program to one of the exemptions may also result in having to register as an MSB. Particularly for smaller retailers, becoming an MSB could have the unintended consequence of complicating current and future banking relationships, as FinCEN has noted previously that banks have been reluctant to establish or maintain banking relationships with MSBs.[15]

On average, between 2007 and 2009 more than 140 million U.S. adults used prepaid and/or gift cards annually.[16] In 2008 alone, according to recent reports, 5 billion prepaid-card transactions occurred, totaling $152 billion in the United States.[17] And, for open-loop and closed-loop prepaid cards combined, the total amount loaded in 2008 was $247.7 billion.[18] Moreover, FinCEN estimates that there are 70,000 sellers of prepaid access, heavily concentrated within the retail industry.[19]

In this context, a wide-spread discontinuation of prepaid-access programs and products would clearly not be in the best interest of consumers, banked or unbanked. Moreover, the economic loss to retailers would not be limited simply to the lost gift-card sale, but also to consumer purchases that often exceed the balance on a gift card. At a time when the economy is struggling to recover from a lengthy and deep recession, the retail industry, and the millions of jobs it supports, can hardly afford the magnified losses that any decrease or discontinuation of prepaid-access programs and products would produce. Given the costly burdens that the Proposed Rule would pose, RILA urges FinCEN to retain the current broad exemption from BSA compliance for retail sellers of prepaid access.

II. DEFINITION OF "PREPAID PROGRAM"

The Proposed Rule is designed to exclude certain products, services or prepaid programs of a provider of prepaid access that "are organized in such a way, or are of such minimal risk, that those products, services or provider need not fall within the regulatory strictures of the BSA."[20] Of the five exemptions proposed, three are primarily applicable to the retail industry and RILA's members, namely the exemptions for: (1) closed-loop prepaid access, (2) providing prepaid access to funds subject to limits, and (3) payments through payroll cards.[21] RILA's concerns and recommendations for each of these exemptions are set out below followed by a discussion of the NPRM's suggestion that an exemption may not apply under particular facts and circumstances.

---

[15] *See generally*, RIN 1506-AA85, Financial Crimes Enforcement Network; Provision of Banking Services to Money Services Businesses, 71 Fed. Reg. 12308-12310 (Mar. 10, 2006).

[16] Javelin Strategy & Research, 2010 Prepaid and Gift Card Market: Challenging Year Calls for New Growth Strategies, at 7, Fig. 1 (March 2010).

[17] Mintel International Group Ltd., Prepaid and Gift Cards, June 2010, at 14 (June 2010) (citing Nilson Report, December 2009).

[18] *Id.* (citing Mercator Advisory Group, "6th Annual Network Branded Prepaid Market Assessment," September 2009).

[19] NPRM, Supplemental Information § XV, 75 Fed. Reg. at 36604.

[20] NPRM, Supplemental Information § XII.C, 75 Fed. Reg. at 36598.

[21] The exemption applicable to flexible-spending accounts for health care and dependent-care expenses may also be relevant to certain retailers, although the plan administrators for such plans are in the best position to offer views on that exemption. Proposed § 103.11(uu)(4)(ii)(A)(3), 75 Fed. Reg. at 36607. In general, RILA supports the exclusion of prepaid access used to administer flexible-spending and dependent-care accounts.

A. Closed-Loop Prepaid Access

1. FinCEN's Current Approach to Closed-Loop Prepaid Access

While proposing an exemption for closed-loop prepaid access, the NPRM indicates that FinCEN is questioning the current overall approach to excluding closed-loop prepaid-access products from regulation.[22] RILA strongly supports FinCEN's current approach, and we do not believe that changes, including the proposed limits on international use or transfers between or among users, are necessary or advisable.

At the outset, it is important to recognize that the structure of closed-loop prepaid access offered by major retailers – typically gift cards and merchandise-return vouchers in today's marketplace – precludes their effective use for the types of illicit transactions and activity, such as money laundering, which are the stated motivation for the Proposed Rule. The fundamental rationale for closed-loop prepaid access in the retail environment is for retailers to pre-sell goods and services, not serve as a medium through which the funds paid can later be recovered in the form of cash. A closed-loop gift card, for example, that is redeemed for cash rather than merchandise is of little economic benefit to the retailer and could easily result in a loss if the costs of the gift-card program are taken into account. As a result, gift cards generally cannot be redeemed for cash, except for de minimis residual balances as required under certain state laws.[23] In addition, major retailers commonly track the method of payment for merchandise so that a customer returning an item purchased with a gift card will receive a new gift card. Similarly, a customer who returns an item without a receipt will typically receive a merchandise voucher, which functions similarly to a gift card. In neither case will the returned item be converted to cash.

Based on the foregoing, we do not believe retail closed-loop prepaid access actually constitutes a form of money transmission. Although the NPRM states that "[p]repaid access involves the transmission from one point to another of funds that have been paid in advance,"[24] closed-loop products, as noted above, generally do not make "funds" available after the card is purchased. In fact, the sale of a closed-loop gift card creates a liability for the retail issuer to provide future merchandise and/or services, which is reduced and ultimately eliminated only when the card is redeemed.

While we understand the concerns about money laundering and terrorist financing, we do not believe that closed-loop prepaid-access products that do not allow cash redemptions facilitate such activities. Moreover, we agree with the assessment in the NPRM that "[t]he effort required to use closed-loop products for the placement, layering or integration of funds makes them unattractive and unlikely vehicles for moving large sums of money efficiently,"[25] if such money transmission is even possible given the typical structure of a closed-loop product. Accordingly,

---

[22] NPRM, Supplemental Information § XIII.5, 75 Fed. Reg. at 36602.
[23] For example, California requires retailers to cash out a gift card with a value of less than $10 at the customer's request. Cal. Civ. Code § 1749.5. Cash redemptions in such small amounts would seem unlikely to facilitate illicit transactions or activities such as money laundering or terrorist financing.
[24] NPRM, Supplemental Information § IV, 75 Fed. Reg. at 36593.
[25] NPRM, Supplemental Information § XII.C.5, 75 Fed. Reg. at 36599.

RILA believes that FinCEN should maintain its current broad-based exemption for closed-loop prepaid-access products that cannot be redeemed for cash (other than as required by applicable law) without any of the additional limitations proposed in the NPRM.

2. Proposed Exemption for Closed-Loop Prepaid Access

a. Limitation on International Use

RILA believes that the general exemption for closed-loop prepaid access as set out in the Proposed Rule would exempt most closed-loop products commonly offered by many retailers.[26] However, the Proposed Rule goes on to require that a program not permit "funds or value to be transmitted internationally."[27] As discussed above, RILA does not believe such a limitation is necessary where a prepaid-access product cannot be redeemed for cash. In addition, the restrictions outlined above that retailers generally apply to returned merchandise provide an additional back stop against gift cards being used to transfer funds abroad. Accordingly, RILA urges FinCEN to eliminate this limitation from the exemption for closed-loop prepaid access.

If the international limitation is retained, however, it raises a number of concerns. Many RILA members currently operate closed-loop prepaid-access programs in which the gift card can be redeemed for goods or services at the company's locations outside the United States – typically in Canada and/or Mexico, although some RILA member also have locations in Europe and other parts of the world. New systems and technology to limit such prepaid-access products solely to use in the United States would be both costly and burdensome to implement.

Moreover, the Internet implications of this international-use limitation are even more daunting. With only limited explanation in the preamble – "The phrase 'international prepaid transaction' is intended to capture a domestic-issued prepaid product used outside of the United States"[28] – the broad limitation in the Proposed Rule raises serious questions regarding its intended scope. Does FinCEN intend it to cover any Internet purchase or use of a closed-loop prepaid product? If so, a retailer's closed-loop gift-card program would not be exempt if a U.S. resident were able to use a U.S. purchased closed-loop gift card while outside the United States to purchase merchandise through the issuing retailer's website with the merchandise shipped to a U.S. address. At the other extreme, it would seem that the limitation would bar a closed-loop program that allowed a Canadian resident who bought a prepaid-access card while in the United States to purchase merchandise via the Internet upon his return to Canada, regardless of whether the merchandise is shipped to a Canadian or U.S. address. These are just two of the myriad fact patterns involving Internet use of closed-loop gift cards that could reasonable occur with no clear indication of how the international-use limitation is to be applied to them.

In any case, existing closed-loop prepaid-access programs, company websites, and tracking systems generally are not set up to ensure that closed-loop prepaid access is purchased or used solely within the U.S. borders. It is unclear whether systems could even be developed to distinguish domestic from international use of prepaid access through the Internet.

---

[26] Proposed § 103.11(uu)(4)(ii)(A)(5), 75 Fed. Reg. at 36608.
[27] Proposed § 103.11(uu)(4)(ii)(B)(1), 75 Fed. Reg. at 36608.
[28] NPRM, Supplemental Information § XII.C, 75 Fed. Reg. at 36599.

Consequently, the proposed limitation would likely lead retailers to bar customers from purchasing closed-loop prepaid-access products or using them for purchases over the Internet – a result that RILA believes unnecessarily penalizes U.S. resident customers of prepaid-access products as well as stifles innovation in the Internet environment.[29]

Online purchases through prepaid-access amounted to $14 billion in 2009 and are expected to exceed $40 billion by 2014 according to a recent study.[30] Barring Internet use of prepaid access will assuredly dampen customer satisfaction with such products, adversely affect retail sales of closed-loop prepaid access, and hinder e-commerce. RILA does not believe these outcomes are consistent with the intent of the proposal to be "mindful of the many legitimate, beneficial uses of these payment products,"[31] and not "stifle growth or innovation within the payment industry."[32] For these reasons, RILA recommends that if the international limitation on closed-loop prepaid access must be retained, it not apply to the U.S. purchase or use of such products over the Internet.

b. Proposed Limitation on Transfers Between or Among Users

The Proposed Rule would also limit the exemption for closed-loop prepaid access where the program permits "[t]ransfers between or among users of prepaid access within a prepaid program such as a person-to-person transfer."[33] Again, where a closed-loop prepaid-access program precludes redemptions for cash, RILA does not believe that this limitation is necessary to discourage the use of such programs for illicit transactions or activities such as money laundering. Accordingly, RILA urges FinCEN to eliminate this restriction for closed-loop prepaid access.

If closed-loop prepaid access must limit transfers between or among users, we urge FinCEN to narrow the scope of the limitation to take into account certain factors that we again do not believe create a risk for illicit activities. First, given the limitation's broad drafting, "transfers between or among users of prepaid access within a prepaid program" could apply to the mere gifting of a gift card from the purchaser to the recipient. While we do not believe that such a reading is the intent of the limitation, clarifying that it does not apply to gifts would remove uncertainty, especially since a substantial segment of the prepaid-access market relates to purchases for gifting purposes.[34]

Second, the Proposed Rule should clarify that transfers between or among users may be permitted for lost, damaged or stolen prepaid-access products. Many retailers currently permit customers who claim a lost, damaged or stolen gift card and can produce a receipt, for example, to have the old card cancelled and a new card issued with the remaining balance. These types of

---

[29] The Department of Commerce's Internet Policy Task Force recently initiated a comprehensive review of the nexus between privacy policy and innovation in the Internet economy and requested public comment on this issue. *See* RIN 0660–XA12, 75 Fed. Reg. 21226-21231 (Apr. 23, 2010). We urge FinCEN to coordinate its efforts on the Proposed Rule with the Task Force's initiative in an effort to minimize any adverse effects on Internet innovation.
[30] Javelin Strategies, *supra*, at 8, Fig. 2.
[31] NPRM, Supplemental Information § XI, 75 Fed. Reg. at 36595.
[32] NPRM, Supplemental Information § I, 75 Fed. Reg. at 36591.
[33] Proposed § 103.11(uu)(4)(ii)(B)(2), 75 Fed. Reg. at 36608.
[34] Mintel, *supra*, at 49, Fig. 28.

replacement processes have been developed not only as an important customer service, but also in response to various state requirements that retail providers institute and maintain replacement practices. It is unclear whether the proposed limitation would apply to such programs. However, if retailers are precluded from offering these types of services, which do not permit the prepaid-access card to be converted to cash, it will adversely affect customers' interest in purchasing closed-loop prepaid access for fear of loss or theft.

Similarly, some retailers permit customers to use closed-loop prepaid-access products to contribute to group gifts (e.g., wedding registries) or to purchase gift cards on line (e.g., social network group gifting). In these instances where the retailer accepts an existing gift card, for example, with the value going to the group giving program, it is unclear whether the limitation would apply. While RILA urges FinCEN to eliminate the limitation on transfers between or among users, which again does not facilitate the conversion of closed-loop prepaid access into cash, if it must be retained, we recommend that provisions be added to permit the foregoing transfers under the closed-loop exemption.

B. Prepaid Access Subject To Limits

1. $1,000 Limit on Initial Load, Reloads, and Withdrawals

The Proposed Rule provides an exemption for prepaid-access products that are limited to a $1,000 maximum applicable to the initial load, reloads, and withdrawals, which maximum must be clearly stated on the product.[35] In the retail setting, this exemption would generally apply to open-loop prepaid-access products, such as open-loop gift cards co-branded by a retailer and an issuing bank, as well as general purpose reloadable cards.

With respect to the dollar amount, RILA recommends that the threshold be increased to at least $3,000 to be consistent with the recordkeeping obligations of current MSBs.[36] Because prepaid access poses less risk than other money services, such as wire transfers and money orders, we do not believe it makes sense to have more stringent requirements for prepaid access than exist for other basic money services. RILA members report that the purchase of a gift card in excess of $1,000 is not rare, especially when it is intended as a gift in anticipation of its use for higher-priced products such as electronics (e.g., televisions, computers) or appliances. Also, customers returning merchandise without a receipt or above certain ticket-price limits typically receive a merchandise voucher or gift card, as discussed above. Occasionally, these returned-merchandise transactions can exceed $1,000.

We also recommend that FinCEN clarify the disclosure requirement for the maximum value to be stated on the prepaid-access product. Specifically, we recommend that the requirement be satisfied if the product reflects any maximum value that does not exceed the dollar threshold set in the final rule.

---

[35] Proposed § 103.11(uu)(4)(ii)(A)(4)(i) - (iii), 75 Fed. Reg. at 36607-36608.
[36] *See*.31 CFR § 103.29.

With respect to the limitation itself, as it relates to the amount initially loaded, it could be enforced at the retail level by a seller of prepaid access. Application of such a limit to reloads, however, would not be within the control of a seller of prepaid access beyond a basic per-transaction limit on any reload.[37] Additionally, a seller would not be able to determine whether a particular prepaid-access product permits withdrawals of more than the threshold amount on any given day. The reload and withdrawals limits could only be enforced effectively by the issuing bank and/or the company administering the prepaid-access program – the provider of prepaid access under the Proposed Rule.[38]

In a typical transaction, a customer tenders payment for an open-loop prepaid-access product – for example, a general purpose reloadable card – and receives the card from the retail seller. In many cases, the product is not activated until the customer contacts the program provider by telephone or Internet and supplies the personal information required by the provider and/or bank issuing the open-loop gift card. Thus, the retail seller's interaction with the customer is limited to the exchange of cash or other form of payment for the prepaid product, while the provider and/or issuing bank collect the identification information on the user and monitor the product with respect to reloads and withdrawals.

Accordingly, RILA recommends that the exemption be modified to apply separately to the seller of prepaid access.[39] Under this approach, a seller of open-loop prepaid access would satisfy the exemption if it limits the initial sale and any reload of a prepaid-access product to a $3,000 per card threshold (reflecting RILA's recommended increase in the threshold amount). The exemption as proposed would apply to the provider of prepaid access, which is in a position to limit the initial purchase and reloads to a maximum dollar amount and prohibit withdrawals exceeding a maximum daily threshold amount once the product is activated.

We believe that the result ultimately will be the development of prepaid-access products that limit the initial load, reloads and withdrawals to the specified dollar threshold. Until that time, however, sellers of prepaid access should not be subject to BSA compliance for aspects of a prepaid-access product that they cannot control nor monitor on a real-time basis. The issuing banks and providers of the prepaid-access program already collect customer information on these products and have the ability to monitor reloads and withdrawals.

For sellers of multiple prepaid-access products, for example through a gift-card kiosk or mall, the rule as proposed could lead to some cards being exempt while others are not. Unless the seller's BSA compliance is predicated on an initial-sale threshold and per-transaction reload limit, checkout personnel would have to be trained to distinguish between exempt and non-exempt products (the status of which would continually be subject to change) and collect information on

---

[37] At the retail level, the only way a seller of prepaid access could effectively limit reloads would be on a transaction-by-transaction basis, for example, a $1,000 limit on any reload. Such a limit, however, could not assure that the value placed on a particular product did not exceed the maximum envisioned under the Proposed Rule.

[38] Proposed § 103.11(uu)(4)(i), 75 Fed. Reg. at 36607. Section III, *infra*, discusses a number of concerns regarding the clarity of this definition and the distinction between "sellers" and "providers" of prepaid access.

[39] We believe this bifurcated approach is consistent with the statement in the preamble of the NPRM that "[s]eparate requirements would be imposed with respect to sellers of prepaid access." NPRM, Supplemental Information § IV, 75 Fed. Reg. at 36593.

the non-exempt ones. Even if such a system could be implemented, the customer reaction would likely be to abandon the non-exempt product and seek out only prepaid-access products that do not require the disclosure of personal information, thereby creating competitive advantages and disadvantages as a result of the Proposed Rule.

As discussed in Section I.B, RILA believes that forcing retail sellers of prepaid access to meet requirements for the exemption over which they have no control will result in sellers abandoning such products to avoid the excessive burdens and risk associated with BSA compliance.

2. Limitation on International Use

The exemption for prepaid access subject to limits also requires that such prepaid-access products not permit funds or value to be transmitted internationally.[40] As with reloads and withdrawals under the general limit, a retailer generally has no control over where a prepaid-access product is used, short of prohibiting its non-U.S. stores from accepting any such products, which may run afoul of the honor-all-cards rules imposed by the major credit card companies. However, as written, the Proposed Rule would deny the exemption if the product permits any international use, thereby forcing the retail seller of such non-exempt prepaid access to comply with BSA requirements. Accordingly, RILA recommends that this limitation apply solely to the provider of prepaid access and/or the issuing bank, since the only effective means of enforcing this limitation is for the prepaid-access product to be programmed for use exclusively in the United States.

As noted above with respect to the closed-loop exemption, imposing Internet limitations on the use of prepaid access that a retailer may sell raises substantial concerns. Retailers' e-commerce systems are generally not set up to determine whether a prepaid-access product sold by the retailer is purchased or used by a non-U.S. resident or where the transaction is made via the Internet. Consistent with our recommendation for closed-loop prepaid access, RILA urges FinCEN to exclude Internet transactions if the international-use limitation must remain part of the exemption.

Absent such an exclusion, retailers will have little choice but to prohibit the prepaid access they offer from being purchased or used on their websites. Such a prohibition would not only affect international Internet sales, but also have negative consequences for purely domestic purchases as Internet sales continue to grow rapidly. Unbanked and underbanked individuals who represent an estimated 23 million households and who rely increasingly on prepaid access would also be penalized if they were only able to use their prepaid access in physical store locations.[41]

3. Limitation on Transfers Between or Among Users

As with the limitation on international use, restricting transfers between or among users[42] presents challenges for retail sellers of prepaid access, especially in terms of distinguishing at the point of sale between credit and debit cards, which would continue to be permitted under the

[40] Proposed § 103.11(uu)(4)(ii)(B)(1), 75 Fed. Reg. at 36608.
[41] Mintel, *supra*, at 5.
[42] Proposed § 103.11(uu)(4)(ii)(B)(2), 75 Fed. Reg. at 36608.

Proposed Rule to purchase prepaid access, from other prepaid-access products, such as a general purpose card, which would not. Accordingly, RILA recommends that this limitation be eliminated.

Should it apply, however, RILA urges FinCEN to clarify that it does not apply to basic gifting or replacement programs for lost, damaged or stolen cards.[43] While retail sellers typically are not involved in replacing lost, damaged or stolen open-loop products, the option can be an important factor for customers considering the purchase of a prepaid-access product. Similarly, we urge FinCEN to clarify that the limitation would not apply to group gift programs as discussed above with respect to the closed-loop exemption.[44]

4. Restriction on Funds from Non-Depository Sources

An additional requirement of the exemption for prepaid access subject to limits is that such products may not be purchased with funds from non-depository sources.[45] While we appreciate that this limitation does not apply to the closed-loop exemption, we question whether FinCEN intends to limit all cash purchases of prepaid products, which represent not an insubstantial amount of retail sales of prepaid-access products. Such a limit would significantly alter current transactions for prepaid access and customer expectations in many cases, and the resulting ill will would have negative consequences for retail sales of these products.

Limiting purchases and reloads of prepaid access to depository funds would also adversely affect the unbanked and underbanked. For these individuals, prepaid-access products – chiefly general purpose reloadable cards – operate effectively as a debit card in the absence of a checking account, giving them the security of not having to carry cash. The Proposed Rule's limitation would create a significant barrier to the on-going effort to bring these individuals into the financial mainstream.

Moreover, some retailers specifically limit the sales of prepaid-access products to cash in order to avoid the growing risk associated with forged checks and stolen credit cards. We question whether the intended benefits that such a non-depository-source limit might have in reducing money laundering would outweigh the added costs of checking and credit-card fraud.

Finally, limiting purchases of prepaid access to depository funds appears to be inconsonant with the cash threshold for SAR reporting. If one factor in assessing suspicious activities is a cash payment of $2,000 or more, it would stand to reason that a lesser amount of cash can legitimately be used to purchase prepaid access.[46] If cash purchases of prepaid access must be limited, the overall dollar threshold for the proposed exemption would arguably be sufficient and minimize the adverse consequences outlined above.

---

[43] *See* Section II.A.2.b, *supra.*
[44] *Id.*
[45] Proposed § 103.11(uu)(4)(ii)(B)(3), 75 Fed. Reg. at 36608.
[46] *See* NPRM, Supplemental Information § XV, 75 Fed. Reg. at 36604

C. Exemption for Payroll Cards

RILA appreciates and supports the exemption under the Proposed Rule for prepaid access used for payment of wages, salaries, benefits and incentives.[47] While we understand law enforcement's concern that criminals are establishing fictitious companies and using payroll-card programs to pay non-existent employees for money-laundering purposes,[48] we do not believe this exemption should focus on the employers offering such payroll-card programs. Retailers, like all employers, are already required to collect and verify substantial amounts of employee information in order to ensure that the individual has a valid right to work. Subjecting employers to BSA requirements with respect to their payroll-card programs will do little more than increase already costly compliance burdens, when the real issue is the need to identify the sham companies reported by law enforcement.

To address that concern, RILA submits that the bank sponsors and providers of payroll-card programs are in the best position to undertake the "know your customer" due diligence necessary to identify shell companies without undermining the benefits of payroll-card programs currently offered by legitimate employers. Moreover, as with open-loop prepaid products, the issuing bank and provider of the prepaid access are the only parties that can effectively monitor the use of the payroll cards and identify any suspicious activities on an on-going basis.

We are also concerned that the exemption will be inapplicable to many payroll programs because of the requirement that only an employer may load value on the payroll card.[49] A significant motivation for payroll-card programs is to help employees, typically low-income and part-time individuals, who do not have access to traditional banking services. Such programs allow these employees to avoid excessive fees associated with payday lenders and check-cashing facilities as noted in the NPRM.[50] At the same time, the payroll card effectively serves as a debit account to which the employee can add funds from other sources (e.g., a second job or a spouse's earnings). Accordingly, RILA recommends that the exemption be modified to permit employees to add value to the payroll card.[51]

D. Inapplicability of Exemptions under Particular Facts and Circumstances

While not reflected in the Proposed Rule, the preamble to the NPRM indicates that certain facts and circumstances may override the application of an exemption for a prepaid-access program. Specifically, the NPRM provides:

> The explanation provided in the preceding sections for allowing certain prepaid access programs to fall outside of the requirements of proposed 31 CFR part

[47] Proposed § 103.11(uu)(4)(ii)(A)(1), 75 Fed. Reg. at 36607.
[48] NPRM, Supplemental Information § XIII.10, 75 Fed. Reg. at 36603.
[49] Proposed § 103.11(uu)(4)(ii)(B)(3), 75 Fed. Reg. at 36608; NPRM, Supplemental Information § XII.C.1, 75 Fed. Reg. at 36598.
[50] NPRM, Supplemental Information § I, 75 Fed. Reg. at 36590.
[51] A limitation on cash loads to a payroll card could be added to the exemption. However, since an employer could not monitor or enforce such a limit, RILA would recommend that any cash-load limit apply only to the bank sponsor and/or provider of the program, which would be in a position to program such a limitation into the payroll card.

> 103.11(uu)(4)(iii) [52] [the proposed definition of "prepaid program"] can also serve to bring otherwise excluded programs under the BSA rules if the risk factors change. Specifically, in situations where the provider administers a prepaid program with features that introduce an increased level of risk and serve to diminish financial transparency, that program may be subject to the full extent of obligations [of a prepaid program], even if the other program characteristics fall squarely within [one of the 5 exemptions]. The determination of whether the provider must comply with all BSA requirements must be analyzed for all of the program's attendant facts and circumstances.[53]

From the retailer's perspective, the overriding value of the exemptions set forth in the Proposed Rule is to provide a clear delineation of the parameters that specific prepaid-access programs must satisfy to be exempt from BSA compliance. The introduction of a subjective facts-and-circumstances standard would substantially undercut the exemptions' value and would introduce unnecessary uncertainty into retailers' compliance efforts under the Proposed Rule, especially where there is no clear discussion or examples of the types of features that would "introduce an increased level of risk and serve to diminish financial transparency."

While the preambulatory statement quoted above refers to the "provider" and is silent on its application to the "seller" of prepaid access, we are concerned that it could be so expanded. If so, a retailer relying on the Proposed Rule's exemption for closed-loop prepaid access to design and operate its closed-loop gift-card program, for example, would always be at risk that FinCEN could find one or more of the program's features introduced an increased level of risk and/or served to diminish financial transparency. And, from the quoted language, such a determination appears to be possible at anytime during the life of a particular prepaid-access program.

Similarly, a facts-and-circumstances standard would also put retailers selling a third party's prepaid-access products at an on-going risk of non-compliance with BSA requirements. For example, a retailer that sells prepaid access through a gift-card kiosk or mall could initially determine that each product satisfies one of the Proposed Rule's exemptions based on representations of the providers and other objective evidence. Later, after sales of the products are well under way, FinCEN could determine that facts and circumstances at the provider level have increased the level of risk and/or diminished financial transparency sufficiently to disqualify one or more of the gift-card-mall products. As a result, the retailer would be out of BSA compliance despite good faith reliance on one or more of the Proposed Rule's exemptions.

For these reasons, RILA urges FinCEN not to incorporate this subjective facts-and-circumstances standard into the Proposed Rule so that providers and sellers of prepaid access have greater certainty as to whether a prepaid-access program or product falls squarely within the parameters of one of the five exemptions and can implement and maintain their compliance programs accordingly.

---

[52] The preamble's reference to "proposed 31 CFR 103.11(uu)(4)(iii)" appears to cite inaccurately to the proposed definition of "prepaid program" under proposed 31 CFR 103.11(uu)(4)(ii).
[53] NPRM, Supplemental Information § XII.C, 75 Fed. Reg. at 36599.

III. DEFINITION OF "SELLER" AND "PROVIDER" OF PREPAID ACCESS

As noted above, RILA believes that if retailers must be subject to the BSA, it should only be applied to retail sellers of prepaid access in a manner that is commensurate with their control over the prepaid-access product. From that perspective, we believe that the Proposed Rule's definition of "seller of prepaid access" reasonably captures the role that retailers typically play in exchanging a prepaid-access product for funds or the value of funds.[54] While the NPRM indicates that FinCEN's intent is to identify the party with "the most face-to-face purchaser contact" and the party that is in the best position to capture information required for BSA compliance,[55] RILA anticipates that sellers of prepaid access will respond to the Proposed Rule by taking steps to ensure that the prepaid-access products they sell satisfy one of the enumerated exemptions and by eliminating non-exempt products. As stressed in this letter, we believe that the collection of customer identification information on prepaid-access products at the point of sales is not practical for the 70,000 estimated sellers under the Proposed Rule[56] and will adversely affect access to and sales of such products as well as create increased privacy and security risks for those customers about whom such information is collected.

RILA is concerned, however, that the Proposed Rule's definition of "provider of prepaid access" is vague and creates substantial uncertainty with respect to BSA compliance.[57] We appreciate FinCEN's effort to craft a definition that applies to the broad range of current and future prepaid-access programs. Nevertheless, defining the term as the person with "principal oversight and control" over a prepaid-access program based on a non-exclusive list of five broad activities[58] will lead to substantial uncertainty and disparate results. For example, if Company Z is in the business of administering open-loop gift-card products for multiple retailers and Retailer Q works closely with Company Z to develop a new gift card for use in Retailer Q's stores, who is actually "organizing" the prepaid program? At what point will Retailer Q's involvement in setting the terms and conditions it wants to see with respect to its business and customer base (e.g., initial value limits, whether it is reloadable) or agreeing to allow the new gift cards to be sold at another retailer's gift-card malls constitute sufficient oversight and control?

And, the fact that the Proposed Rule states that this determination is a matter of facts and circumstances only compounds the uncertainty as different parties will undoubtedly reach different conclusions on similar fact patterns. The "facts and circumstances" language also suggests that FinCEN or the Internal Revenue Service (IRS) could reach a different conclusion on audit, opening the door to potential penalties for resulting non-compliance, despite the party's reasonable effort to determine its status.

As noted above, we believe that the vast majority of the information FinCEN is seeking to identify with respect to purchasers of open-loop prepaid access is already collected by companies

[54] Proposed § 103.11(uu)(8), 75 Fed. Reg. at 36608.
[55] NPRM, Supplemental Information § XII.D, 75 Fed. Reg. at 36600, and § VII, 75 Fed. Reg. at 36594.
[56] NPRM, Supplemental Information § XV, 75 Fed. Reg. at 36604.
[57] Proposed § 103.11(uu)(4)(i), 75 Fed. Reg. at 36607.
[58] *Id.*

administering current prepaid-access programs.[59] Moreover, a number of RILA's recommendations to improve the exemptions to the definition of "prepaid program" rely on a clear distinction between the seller and provider of prepaid access. Accordingly, we urge FinCEN to narrow the definition of provider of prepaid access to specific factors and specify an objective approach for determining the extent to which the factors are sufficient to meet the definition.

As an alternative, FinCEN could provide an elective certification mechanism through which persons seeking to be classified as providers would apply for FinCEN designation, which the agency and the IRS would recognize as binding with respect to a specific prepaid-access program. A seller of prepaid access could then look to whether a company managing an open-loop gift-card product, for example, had a FinCEN provider designation in assessing overall BSA compliance.[60]

IV. REQUEST FOR COMMENT ON EXPANSION OF THE $1,000 LIMITATION TO APPLY ON A "PER PERSON, PER DAY" BASIS AND AGGREGATED FOR ALL FORMS OF PREPAID ACCESS

The NPRM requests comments on an expansion of BSA coverage that would effectively moot the exemptions set out in the Proposed Rule and discussed above. Specifically, the NPRM states:

> FinCEN is considering whether to include in the definition of sellers of prepaid access those entities that sell *any form* of prepaid access, regardless of its inclusion in a BSA covered prepaid program, in an amount over $1,000 to *any person on any day* in one or more transactions.[61]

In effect, this proposal would require providers and sellers to aggregate the sales of every type of prepaid access – closed-loop, open-loop, other MSB products and services such as traveler's checks, money orders or wire transfers – and ensure that no person purchases more than $1,000 of such aggregated prepaid access on any given day. For the reasons set out below, RILA believes that this aggregated "per person, per day" concept is not administrable and will threaten the continued viability of prepaid-access products if adopted.

A. $1,000 Threshold Effectively Meaningless

While the concept includes a $1,000 threshold, the added requirement that purchases and reloads of a prepaid-access product be limited to that amount for any person on any day renders the

[59] For closed-loop products, the retailer sponsoring the program will likely be both a seller and the provider of prepaid access. As discussed above, however, we believe a broad exemption should be maintained for closed-loop prepaid access, as these products do not facilitate the types of illicit transactions or activities that the Proposed Rule seeks to address when the products cannot be redeemed for cash, making the collection of customer information unnecessary. Thus, the distinction between seller and provider is primarily an issue in the open-loop context.

[60] In the closed-loop context, since the same entity would typically be a seller and the provider, such an elective FinCEN provider designation would not be necessary.

[61] NPRM, Supplemental Information § XII.D, 75 Fed. Reg. at 36600 (emphasis added).

exemption effectively meaningless.[62] Today, many RILA members offer prepaid-access products directly at all points of sale in every store. A number of RILA members also use in-store gift-card kiosks or malls to offer prepaid-access products of other retailers. As a result, a customer can buy multiple prepaid-access products of the same or different brands, each under the $1,000 limit – at separate checkout counters in a single retail location, going store to store of the same retailer, or at the issuing retailer as well as at gift-card malls at other retailers – all in the same day.

Unless a seller of prepaid access collects identification information on each prepaid-access product sold, regardless of the dollar amount or type, it will be impossible for a seller to enforce the "per person, per day" limitation. Moreover, even with such first-dollar customer information, a system of real-time access would be necessary for the limit to be enforced across all locations of the same retailer or even all points of sale within a single store, not to mention between a retailer and gift-card malls where multiple, unrelated products are sold. Such technology is currently not in place, and we are doubtful that it could be implemented in a cost effective or timely fashion, if at all.

For prepaid-access products that are reloadable, the proposal becomes even more daunting. Not only would customer information be needed on the initial purchase, but reloads of each specific product – closed-loop, open-loop and other forms – would also have to be tracked to ensure that no one individual exceeded the $1,000 limit on any given day.

Additionally, with the proposed aggregation of all types of products – prepaid access as well as other MSB products[63] – the system for tracking all such products would have to integrate countless proprietary information systems. In many cases, a retailer does not use the same system for all products – closed-loop gift cards may be handled under the retailer's in-house system, open-loop products handled under the provider's network, and other MSB services, such as Western Union wire transfers processed under Western Union's proprietary system. Integrating all of these systems, if even possible, would raise serious technological and cost concerns. It would also require whole-scale changes to contractual agreements just to provide access to the other company's customer information, and it would pose substantial security issues as well as privacy concerns with respect to sharing personally identifiable information between businesses and across systems.

An aggregate $1,000 threshold would also create substantial complications for business-to-business bulk sales of prepaid access, which typically exceed such a level with any given transaction. As noted in Section I.A, businesses frequently purchase large quantities of open-loop or closed-loop gift cards for employees and for use in customer promotions as do schools and other tax-exempt organization for fundraising activities. While we do not believe the aggregate $1,000 threshold is practicable overall, we believe that business-to-business sales of

[62] In terms of the actual dollar amount of the threshold, as noted in Section II.B.1, *supra*, RILA believes a higher limit of at least $3,000 should be applied, in particular for open-loop prepaid access. The proposed $1,000 limit could also adversely affect payroll programs if it represented a maximum value for the card at any one time. Depending on the frequency of payroll deposits, even a low-wage worker with little or no required tax withholding could breach a $1,000-maximum-value limit.

[63] NPRM, Supplemental Information § XIII.4, 75 Fed. Reg. at 36602.

prepaid access would have to be excluded or handled separately from sales of prepaid access to individual consumers.

B. Information Collection Challenges and Risks

Implementing a system that would require the collection of customer information with the first dollar of prepaid access purchased would represent seismic movement in customers' minds. All of the sudden a retailer would have to start asking for the customer's name, address, date of birth, and government-issued identification – all for a $20 gift card for a grandchild's birthday. With concerns about identity theft and data security, as well as targeted marketing, such a demand will likely dissuade the customer from purchasing a prepaid-access product in most cases.

As discussed in Section I.A above, the process for collecting such customer information also presents overwhelming challenges. Retailers currently do not have systems in place to collect and verify detailed customer information in most instances, and the process of training checkout personnel to capture and verify such information will be extremely burdensome and time consuming. The likely result would be centralization of the sale of all prepaid-access products at a customer service desk, for example. However, we believe few customers will be willing to go to a separate location to make a gift-card purchase, especially when required to provide personal information. Ultimately, limited access, long lines and frustrated customers will adversely affect sales of these important products.

We also question how the proposed "per person, per day" limitation would apply when the purchaser of the prepaid-access product differs from the actual user. Who is the "person" to which the limitation applies? This issue is further complicated in the case of business-to-business sales of prepaid access noted above. In these transactions, we do not believe it would be reasonable or feasible for the seller to require a list of the ultimate individual recipients of the prepaid-access products in order to comply with the information-collection requirements. And, in the case of gift cards used for promotions or fundraising, the ultimate recipient of the gift card will not be known at the time that the prepaid access is sold.

Lastly, an unintended consequence of a "per person, per day" limitation would be the creation of even more and larger new databases containing personally identifiable information than discussed in Section I.A with respect to the Proposed Rule. The cost of these information systems and the security and privacy measures necessary to protect them could easily be prohibitive for many retail businesses.

In light of the foregoing concerns, RILA believes that a "per person, per day" threshold – regardless of the dollar level or whether it applies to individual product lines or the aggregation of all types of prepaid access – would create an insurmountable obstacle for retailers, in particular those not engaged in broader MSB services, to continue offering prepaid-access products to individual and business customers. Several RILA members have suggested that if a "per person, per day" limitation were adopted, they would simply exit the market and cease to offer prepaid-access products, a result that is not in the best interests of the consumer, the retail industry or the economy overall. Accordingly, RILA strongly urges FinCEN not to pursue a

"per person, per day" limitation on prepaid access as part of the Proposed Rule or anytime in the future.

V. EFFECTIVE DATE AND TRANSITION RELIEF

While we understand that the NPRM reflects only proposed amendments to the BSA, we are concerned by the absence of a proposed effective date for a final rule as well as provisions to address the myriad transitional issues that such a rule will create. If the Proposed Rule were implemented without changes and a retailer did not respond by simply abandoning the sale of prepaid access, we estimate that it would take at least 24 to 36 months for an affected business to institute the AML procedures and controls, restructure the process for selling prepaid access, and put in place the required information-collection technology and systems.[64] Accordingly, RILA recommends that the final rule be effective no earlier than 36 months after it is published in the *Federal Register*.

More importantly, we recommend that the final rule apply only to new prepaid-access products sold after the aforementioned effective date. Today, there are millions of open-loop and closed-loop gift cards already in consumers' hands as well as in inventory awaiting sale – the NPRM estimates 7.5 million network-branded prepaid cards alone at any given moment.[65] While some open-loop products are registered, others are not, nor are closed-loops products in general. The replacement of existing registered prepaid-access products with new ones that comply with the Proposed Rule (e.g., reflecting the proposed $1,000 limit on reloads and withdraws) would involve substantial time and costs, and the replacement of unregistered product would simply not be possible. Moreover, whole-scale replacement of non-compliant cards would result in unnecessary waste of existing merchandise and require costly measures to collect and destroy non-compliant products in order to avoid new opportunities for theft. Therefore, RILA recommends that FinCEN exempt prepaid-access products sold before the effective date recommended above.

If FinCEN determines not to exempt existing cards, RILA strongly recommends that providers of prepaid access have until the effective date, as recommended above, to reprogram systems so existing prepaid-access products can meet one of the exemptions set out in the Proposed Rule. This will, again, help minimize the waste of existing products and the costs of collecting and destroying them. Moreover, the final rule should permit sellers and providers of prepaid access to use alternative methods for communicating any new requirements to consumers holding existing cards (e.g., dollar threshold, limit on international use). For example, under the recently enacted amendment to the Credit CARD Act,[66] Congress permitted issuers to satisfy the new disclosure requirements regarding expiration date and certain fees through notice to consumers – via in-store signage, messages during customer service calls, websites, and general advertising – where existing cards could not be brought into compliance. Similar alternatives would be essential under the Proposed Rule for prepaid-access products already in the marketplace.

---

[64] Implementation of the Proposed Rule may also necessitate system modification to reflect changes in the manner in which the provider must handle escheatment of unused balances under applicable state laws.
[65] NPRM, Supplemental Information § XVI, 75 Fed. Reg. at 36606.
[66] Pub. L. No. 111-209 (Jul. 27, 2010).

Concluding Remarks

RILA appreciates the opportunity to comment on the proposed changes to the application of BSA requirement to prepaid-access products. RILA recognizes the challenges the FinCEN and other law enforcement agencies face in controlling illicit transactions and activity, especially that involving the country's financial system and/or financial products and services. However, RILA urges FinCEN to consider the issues outlined in this letter before imposing any new requirements to ensure that they can be implement effectively without creating undue compliance burdens and costs on sellers of prepaid access and without jeopardizing the continued viability of these important products to American consumers or otherwise stifling innovation and growth of electronic commerce.

We would be pleased to discuss RILA's views with you further at your convenience.

Respectfully submitted,

Mark E. Warren
Vice President, Tax & Finance