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FinCEN
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**Amendment to the Bank Secrecy Act Regulations, RIN 1506-AA97
Definitions and Other Regulations Relating to Money Services
Businesses**

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on FinCEN's proposed changes to the Bank Secrecy Act (BSA) rules that apply to money services businesses (MSBs). The proposal is designed to update existing rules to help clarify which entities are covered by the definition of a money services business (MSB), more clearly delineate the scope of businesses covered, ensure certain foreign-based MSBs with a presence in the United States are subject to BSA rules and requirements, incorporate past guidance on MSBs into the text of the regulations, and reflect developments in technology, business operations and new products and services. In addition, the proposal would combine the elements that apply to stored value into one category as well as raise a number of questions on stored value to help FinCEN develop new rules on stored value.²

Subject to the clarifications and adjustments outlined below, ABA supports the steps FinCEN proposes to clarify the MSB rules. ABA generally appreciates FinCEN's ongoing effort to update and streamline the BSA

¹ ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$14 trillion in assets and employ over 2 million men and women.

² Since this proposal was published, President Barack Obama signed the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act"), on May 22, 2009. Section 503 of the statute requires FinCEN, in consultation with the Department of Homeland Security, to issue final rules on the sale, issuance, redemption or international transport of stored value, including stored value products. The final rules must be issued by February 2010.

requirements to facilitate compliance and ease regulatory burden while ensuring that the fundamental goals of the BSA are met. However, ABA recommends FinCEN make a number of changes to the proposal to accomplish its goal in the most efficient and effective way.

Overview of ABA Comments. Generally, ABA believes that many of the changes that FinCEN proposes are both appropriate and logical. However, ABA has serious concerns that deleting the provisions that apply to “doing business” or “engaged in the business of” could have unintended consequences and cast such a wide net that it would inadvertently draw in many transactions that are completely irrelevant to possible risks of money laundering or terrorist financing and that FinCEN would be incapable of monitoring for compliance. Second, to that same end, ABA strongly encourages FinCEN to work with the industry through the Bank Secrecy Act Advisory Group (BSAAG) and other appropriate forums to adjust the existing \$1,000 per person per day threshold that triggers an MSB designation to a more meaningful and practical level. ABA also urges FinCEN to proceed with caution before expanding the definition to capture foreign entities, since such extra-territorial reaching is fraught with difficulty. And finally, ABA strongly recommends that FinCEN work closely with industry, regulators and law enforcement through the BSAAG to ensure that any rules on stored value do not conflict with other rules being developed by the regulators under Congressional mandate, that do not unnecessarily hamper the development of beneficial products and services and that are not so overly rigid that they quickly become obsolete and irrelevant.

Background. As FinCEN correctly notes in the preamble to the proposal, MSBs provide vital services for the economy, especially those who may not maintain or regularly use traditional banking services. As a result, MSBs can serve as an avenue to integrate that population into mainstream banking. Because MSBs serve as an entry into mainstream banking, it is critically important to strike the proper balance to avoid discouraging MSBs from operating, make it unduly risky for banks to serve MSBs or drive transactions currently offered by MSBs underground. Overly restrictive rules could easily produce such results.

Most MSBs are required to register with FinCEN. In addition, even though the Internal Revenue Service (IRS) is not the functional regulator for MSBs, all MSBs are subject to examination by the IRS for BSA

compliance³. FinCEN added MSBs to the definition of financial institution in 1999, and while some have recommended changing the definition of MSBs to ‘non-bank financial institutions’ as a more accurate descriptor, FinCEN believes – and ABA agrees – that the existing term is less confusing and a “concise way to refer to certain non-bank financial institutions that are without a federal functional regulator.”⁴

The fundamental aim of this proposal is to revise the existing MSB definitions to describe with greater particularity the types of activities that would subject a business to BSA requirements, resolve ambiguities on how MSB rules apply, and incorporate guidance developed over the years, especially guidance for check cashers and money transmitters.

ABA Comments on the Proposal

Doing Business. If adopted as proposed, FinCEN will continue to regulate MSBs based on the activity and the context in which the activity occurs, not on the entity’s status. To help accomplish this, the phrase “doing business” would be changed by the proposal to “engaged in activities” to clarify that a person engaging in covered activities comes within the definition of an MSB.

ABA is seriously concerned about FinCEN’s proposal to eliminate the phrase “doing business.” First, eliminating the phrase may contradict statutory intent. For example, 31 U. S. Code section 5312 defines “financial institution” to include a number of entities such as “a currency exchange” or “an issuer, redeemer, or cashier of travelers’ checks, checks, money orders or similar instruments.” In other words, the statute applies to the entity, not a person engaged in the activity. More important, the same definition under the Bank Secrecy Act at 31 U. S. Code section 5312(a)(2)(R) includes under the definition of “financial institution” the following: “a licensed sender of money or any other person who engages *as a business* (emphasis added) in the transmission of funds.” In other words, the statutory construct relies on the concept of doing business as. To depart from that in the regulatory scheme goes against the statutory language.

³ 74 *Federal Register*, May 12, 2009, footnote 25, p. 22131

⁴ 74 *Federal Register*, May 12, 2009, p. 22131.

Another statutory provision also calls into question FinCEN's proposal. For registration purposes, 31 U. S. Code 5330 (d) defines a "money transmitting business" as any *business...which* : (A) provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person *who engages as a business* in the transmission of funds..."(emphasis added). Again, Congress clearly focused on persons or entities "doing business as." This same statutory provision goes on to incorporate informal money transfer systems such as hawalas. ABA firmly believes that this clear manifestation of Congressional intent in the statutory language calls into question FinCEN's proposal to eliminate the language "doing business as" from the regulation.

More important from a practical standpoint is that changing this approach will cast a much broader net in defining which entities are subject to the MSB definition. While FinCEN states that removing the phrase is not intended to broaden the application of the regulation beyond its present scope,⁵ ABA believes that it is more likely that the change will capture many additional entities. ABA does not believe that Congress intended the definition and registration requirement to apply to persons who make occasional accommodations for customers, clients or acquaintances. By adopting the changes as proposed, FinCEN will create two burdensome requirements. For FinCEN, it will expand the scope of those subject to the MSB registration and review. FinCEN is already facing challenges in identifying and registering the many businesses subject to MSB requirements and expanding this universe will only expand the demand on FinCEN's resources. Second, it will place a new burden on the banking industry to identify and monitor customers to determine whether or not they have engaged in any activity that could possibly cause them to cross the line and become an MSB. Therefore, instead of simplifying the application of the MSB rule, this approach is actually likely to inadvertently expand the rule's scope without improving the quality of compliance or the information obtained.

ABA believes the far preferable approach would be to stay consistent with the Congressional intent and focus on entities doing business as an MSB and not any persons engaged in any level of activity. After all, the purpose of identifying MSBs is to include them in a functioning reporting

⁵ 74 *Federal Register* 22132, May 12, 2009.

regime that will produce highly useful information for law enforcement. This goal is best achieved by covering businesses, since the expectation for reporting is then better aligned with the capacity to perform – not by attempting to apply the obligation to every person and possible activity without regard to the value or quality of compliance. The purpose of BSA is not to create “gotcha” compliance traps for unsuspecting persons who failed to understand reporting duties for some ancillary aspect of their operations. The focus should be to have the primary sectors of the financial system each perform their respective and appropriate role in monitoring their sector’s primary functions. In other words, the obligation should be placed on businesses that engage in qualifying activities as an integral part of their business.

Because the proposal to eliminate the “doing business” qualifier ultimately undermines quality compliance and reporting utility, ABA recommends FinCEN not adopt this revision.

Dollar Threshold. Currently, for all transactions except those by money transmitters, the aggregate amount must exceed \$1,000 per person per day to trigger the MSB designation. Under the proposal, this regulatory threshold would not change. However, FinCEN is considering a separate rulemaking to revise this threshold, including the potential impact any change would have for law enforcement.

ABA strongly encourages FinCEN to undertake a separate rulemaking to focus on this regulatory threshold as expeditiously as possible. ABA finds the current threshold of \$1,000 is too low and needs to be increased. While FinCEN has been helpful with guidance on which entities qualify as an MSB under the existing threshold, ABA is concerned that the present threshold captures many smaller businesses which only cash checks as a convenience for their customers but which are not a money laundering threat. For example, if a small convenience store cashes one check on one day for one customer, even though that may be an unusual occurrence for that business, it still would trigger the definition. Instead, ABA believes that a *de minimis* approach used for other regulations might be considered.⁶ The key is to identify an approach that does not increase

⁶ Initially, ABA considered recommending excluding from the definition those which had a small number of transactions over a specific period of time. The problem with such an approach, say no more than one per month, is it would complicate monitoring purposes and actually add to regulatory burden. However, since this is an issue that would still remain open, ABA strongly encourages FinCEN to continue working with industry representatives through the Bank Secrecy Act Advisory Group to identify some way to adjust this threshold appropriately without compromising the information needed by law enforcement.

burden but excludes routine transactions that have no value for law enforcement purposes.

An added problem that confronts banks in certain jurisdictions is that state thresholds can vary from the federal threshold. For example, some jurisdictions use a \$2,000 per person per day threshold. This forces banks to track transactions at two different levels to determine whether the state or the federal tripwire has been triggered. Again, ABA strongly encourages FinCEN to use this opportunity to coordinate with state requirements to simplify compliance.

Foreign-Located MSBs. According to FinCEN, the BSA authorizes it to define a domestic financial institution without reference to physical presence. FinCEN proposes to use this authority to include certain foreign-located MSBs. Under the proposal, an entity would be defined as an MSB based on the activity it conducts within the U. S. and not by physical presence (“a person wherever located engaged in activities that take place wholly or in substantial part within the United States”). As a result, the definition would be designed to include entities “with a presence in the U. S. by means of the Internet or similar mechanism, *or by means of an account with a U. S. financial institution and who, for instance, is transmitting money through the account with U. S. customers or recipients* (emphasis added).”⁷ FinCEN believes that “effectively regulating the use of the U. S. financial system by all actors, both domestic and foreign, is consistent with the efforts to establish an international community designed to help countries and other jurisdictions work in concert to protect the inextricably intertwined global financial system.”⁸

First and foremost, ABA opposes the use of maintaining a bank account in the United States as the sole determinative factor. By looking to the bank account, in contradiction to its initial premise, FinCEN relies on an entity’s status and not its activities. As with the test to determine court jurisdiction for a legal dispute, ABA urges a greater nexus be required before any foreign MSB is subject to FinCEN rules and regulation.

ABA also believes that this overly broad definition of an MSB that attempts to capture foreign entities will be problematic for FinCEN. To begin with, the ability to supervise and have access to necessary documents and records not located within the United States will be a challenge for

⁷ 74 *Federal Register* 22133, May 12, 2009.

⁸ 74 *Federal Register* 22133, May 12, 2009.

FinCEN. Second, FinCEN has repeatedly stressed the importance of international cooperation in AML/CFT efforts. Instead of relying on compliance with U. S. rules and regulations, ABA suggests it would be more efficient and more in keeping with the spirit of international cooperation to rely on other countries and their Financial Intelligence Units (FIUs). This will enhance FinCEN's stated intent to promote international cooperation without putting it into the impossible situation of trying to govern non-domestic companies, setting FinCEN up for conflict with foreign authorities and undermining international cooperation.

Perhaps the most important deterrent to this approach, though, is that it will make it difficult for these entities to maintain bank accounts in the United States. ABA is seriously concerned that the proposal sets the stage for potential risks, including liability risk, for domestic financial institutions that open or manage accounts for any company deemed to be a foreign MSB. As a result, instead of encouraging banking for these MSBs, the proposal will discourage United States banks from offering banking accounts to entities that could fall under the definition of foreign MSBs. In other words, while FinCEN has been taking steps over the past five years to ensure domestic MSBs have access to banking services in the United States, this broad-brush definition would discourage banks from offering services to any entity that might come within the ambit of this definition – the risk for the bank would be simply too great.

Another factor that FinCEN must consider is the impact this might have on foreign banks, broker-dealers and other financial institutions. Currently, the BSA rules are structured with a focus on domestic financial institutions or those authorized to do business domestically. By altering this definition of MSB to capture foreign-based MSBs, FinCEN also opens the door to capturing many other foreign financial institutions. This raises the potential for conflict and overlapping regulatory requirements for foreign financial institutions.⁹ If FinCEN proceeds with this element of the proposal, then the focus must be clarified and tailored to avoid casting a net that captures virtually all non-domestic financial institutions.

⁹ For example, FinCEN is currently addressing the issue of how domestic institutions might share SAR information with foreign affiliates, something ABA supports. However, if foreign entities are captured by the scope of this definitional revision, that complicates the issue of SAR filing and sharing. Perhaps even more vexing from a compliance standpoint is the entire problem of conflict of laws and the ability to determine which laws apply to a transaction.

Dealer in Foreign Exchange. FinCEN also proposes revising the current term “dealer or exchanger” to “dealer.” The revision is intended to clarify which entities are covered and to include all persons, both brokers and dealers, engaged in transactions involving the current or future acquisition or disposition of funds denominated in one currency by exchanging them for funds denominated in a different currency. The term “currency” would be deleted to indicate non-cash monetary instruments are covered while the term “foreign” would be added to exclude transactions in United States currency or monetary instruments (transactions in foreign currency that take place in the United States would be covered).

The intent of these changes is to clarify that dealing in foreign exchange is not limited to physical exchange, especially since these transactions can be conducted through electronic means. The proposal would clearly exclude individuals exchanging and transporting currency on their own behalf. Finally, the proposal would add a new phrase to the definition. It would add “whether or not for same-day delivery” to clarify that same-day as well as future deliveries are included.

ABA does not object to these changes and believes that they will, in fact, simplify and facilitate compliance.

Check Cashier. Under the proposal, the existing definition of a check cashier would be split into two subsections. The first new subsection would define what constitutes check cashing activity while the second new subsection would clearly exclude certain activities.

As proposed, the definition of what constitutes a check cashier would rely on the Uniform Commercial Code (UCC). It would clearly provide that a check cashier is one who accepts a check or similar monetary instrument “in return for currency or a combination of currency and other monetary instruments.” The term “in return” has been suggested as a more accurate description of the activity while the use of the phrase monetary instruments and reference to the UCC is intended to capture payment instruments that do not neatly fit into existing categories but that are readily recognizable as payment instruments (i.e., checks). Finally, the revision would incorporate the act of redeeming monetary instruments in the definition.¹⁰

¹⁰ The proposal would also clarify in a footnote that redeeming does not include payment for goods or services. 74 *Federal Register* 22135, May 12, 2009, footnote 60. ABA suggests that FinCEN incorporate this provision in the text of the final rule to avoid confusion.

ABA believes that the updated definition is appropriate. Incorporating provisions built on existing concepts of the UCC should streamline the application of the rules, eliminate potential conflicts or confusion, and provide a solid reference for further guidance for regulators and industry.

Exclusions. The second part of the revision would exclude certain activities from the definition and classification as a check casher. As proposed, the second subsection would clearly exclude sellers of closed loop stored value purchased with a check; persons who redeem their own checks; and persons who only hold a customer's check as collateral (payday lenders). These activities would be excluded as low risk.

ABA concurs with the exclusions as proposed. However, additional clarification to one element is needed. As proposed, the definition would exclude an entity "that solely accepts monetary instruments as payment for goods or services other than check cashing services." The problem that confronts financial institutions attempting to apply this definition is how to draw the line between a purchase transaction that involves some portion of cash-back and a check cashing transaction. For example, if a customer comes in with a check for \$900 and purchases a pack of cigarettes for \$7.00 and receives \$893.00 in change, is that a purchase for goods or services? While ABA appreciates the flexibility, additional guidance is needed in the final rule to help financial institutions make the appropriate distinction. This should not be a hard and fast rule but should provide sufficient factors that financial institutions can use to make the distinction. ABA suggests a workable approach would be to use the overall context of the transaction: exclude any transaction where the primary purpose is payment for goods or services, without regard to dollar amounts or percentages.

Reporting Suspicious Activities. FinCEN has asked whether a future rulemaking should require check cashers to report suspicious activities. ABA believes it would be appropriate to add such a requirement. Since the Bank Secrecy Act was initially adopted in 1970, the approach to detection and investigation of financial crimes has increasingly relied on the reporting of suspicious activities by the different sectors of the financial community. ABA believes that it would be useful and appropriate for check cashers to follow a requirement that already applies to most other sectors of the financial industry. First, it would make the application of AML/CFT requirements more uniform. Second, since analyzing reported

suspicious activities has improved through steps such as SAR review task forces, suspicious activity reporting becomes even more important. Since suspicious activity reporting is the keystone for contemporary BSA compliance, it is entirely appropriate to apply suspicious activity reporting requirements to all sectors of the financial industry. ABA concurs with doing this through a separate rulemaking that can focus on the unique elements of the check cashing business that will allow FinCEN to develop a reporting mechanism appropriate for check cashers.¹¹

Issuer of Seller of Traveler's Checks or Money Orders. Under this proposed revision, FinCEN would separate the existing definition that applies to issuers of traveler's checks or money orders into two separate provisions, one that would continue to apply to traveler's checks and money orders and a new subsection that applies solely to stored value. As proposed, the existing term "redeemer" would be eliminated as unnecessary. Instead, the redemption of traveler's checks and money orders would be covered under the revised provision that applies to check cashers. FinCEN believes this construct is more logical and ABA agrees.

FinCEN also proposes to add new guidance for calculating the amount of traveler's checks or money orders sold to one person in one day (the amount that triggers the definitional threshold). Under the proposed clarification, the amount would be calculated by considering the aggregate amount sold to one person per day and not by face amount of individual traveler's checks or money orders. In other words, when determining the amount, the calculation would include fees involved in the transaction. Again, ABA agrees with this revision.

Stored Value. As noted in the preceding section, the proposal would combine issuers, sellers and redeemers of stored value in one place. This regrouping is not designed as a substantive change to existing requirements, but rather to consolidate like provisions. Under the change, the definition would apply to a person who issues, sells or redeems stored value in an amount greater than \$1,000 to any person on any day in one or more transactions.

¹¹ In a recent comment letter, ABA supported extending suspicious activity reporting requirements to non-bank mortgage lenders. Fundamentally, the goal of the suspicious activity reporting regime, which is the mainstay of BSA compliance, is to draw the attention of law enforcement to possible instances or transactions that merit further investigation. It is the ability to be informed of suspect activities, not requirements that collect data about routine, non-risky transactions, that should be the focus of any BSA rule.

ABA supports this approach. On the following pages, we have provided more detailed response to the questions FinCEN has raised on stored value. However, while ABA in general believes that the \$1,000 per person per day threshold needs to be increased for other MSB definitions, for the purpose of stored value, maintaining a threshold not lower than \$1,000 is very important. Industry statistics suggest most stored value transactions fall below this threshold. For the most part, these small-dollar transactions are low-risk and highly unlikely to be used to launder money. Excluding them will not lose important data for law enforcement but will minimize compliance difficulties and ensure these products remain viable.

Money Transmitter. Another element of the proposed revisions would alter the definition of a money transmitter. As proposed, a money transmitter would be “a person who provides money transmission services.” Money transmission services would be defined as “the acceptance of currency, funds, or other value that substitutes for currency from one person AND the transmission of such currency, funds, or the value to another location or person by any means.” The term “engages as a business” in the current definition would be deleted to reaffirm that it is the activity and not an entity’s status that is determinative. At the same time, the term “whether or not licensed or required to be licensed” would also be removed as unnecessary “because it does not add substantive value.”

As noted previously, it is important to recognize that the provision “engages as a business” in the current regulation is taken directly from the Bank Secrecy Act definition of a financial institution at 31 U. S. Code section 5312 (a)(2)(R). The statutory language that applies to entities which must register as a money transmitting business, as set forth at 31 U. S. Code 5330(d) defines a “money transmitting business” as *any business* which provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers’ checks, and other similar instruments or any other person *who engages as a business* (emphasis added) in an informal money transfer system or any network of people *who engage as a business* in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system. Therefore, since the provision is statutory, ABA disagrees with removing this provision since FinCEN does not have the authority to disregard it.

FinCEN notes that including the concept of “transmission of value” is designed to capture informal mechanisms such as hawalas. While this may be appropriate, it is also somewhat unnecessary since as noted in the preceding paragraph, the U. S. Code already includes language to capture informal systems. Rather than using a different approach to capture the same transmittal systems, ABA encourages FinCEN to adhere to the existing statutory provisions.

FinCEN also points out in the preamble to the proposal that a change to the location of the phrase “by any means” includes through a financial institution and was relocated to facilitate comprehension and not designed to signal a substantive change. In addition, the proposal would continue to ascertain whether an activity is covered by an analysis of all the facts and circumstances surrounding the transaction. ABA agrees with these steps.

Payment Processors. To help clarify which activities are covered, certain activities and transactions would be specifically excluded, steps that ABA finds helpful. For example, the proposal would clearly exclude activities that support money transmission services, primarily what are considered backroom operations. This incorporates elements of guidance previously issued by FinCEN that should simplify compliance by incorporating the guidance into the text of the rule.

The definition would exclude instances when a business serves as a payment processor by transmitting funds to facilitate payment for goods or services. However, FinCEN interjects a qualifier to this exclusion that ABA believes may actually confuse and not clarify the application of the exclusion. As proposed, the exclusion would be limited to payments made on behalf of the creditor or seller but not payments made on behalf of the debtor or buyer. ABA is concerned that this distinction may be difficult to apply, since it may not always be simple or even possible to clearly determine on whose behalf a transaction is conducted. Rather than imposing this qualifier, ABA suggests that a cleaner and less confusing approach would be to exclude any payments for goods or services from the definition of money transmitter. Such an approach would be consistent with the proposal for check cashers. However, if FinCEN declines to eliminate this qualification from the exclusion, ABA strongly urges FinCEN to provide examples and guidance to help determine how the proposed distinction will operate, subject to public comment. Without further clarification or simplification, though, ABA believes the rule as

proposed will generate more questions on which transactions are excluded, especially questions about how to identify whether a payment is being made on behalf of the debtor/buyer or creditor/seller.

Additional Exclusions. The proposal would exclude several other activities, such as activities that operate as a clearance and settlement system or that otherwise operate as an intermediary between BSA regulated institutions, such as Fedwire. Also excluded would be closed-loop stored value such as low-risk department store gift cards.¹²

ABA concurs with these exclusions. Perhaps more important, though, since FinCEN is contemplating special provisions for stored value products, ABA recommends that the final revisions to the definition clearly exclude all stored value products from the definition of money transmission services as a cleaner, less confusing and simpler approach.

Physical transportation of currency would be excluded as long as the entity transporting the currency has only a custodial interest in the currency transported (e.g., an armored car service). This exclusion would not apply to a person transporting currency on its own behalf to deposit into its own operating account or a person who purchases a monetary instrument and then transports it. ABA agrees that custodial transport of currency should be outside the scope of the rules. However, to a question raised by FinCEN, ABA does not believe it necessary to add language regarding title in the final rule.

Finally, the proposal would exclude the acceptance and transmittal of funds where that activity is integral to the sale or provision of services. In other words, the proposal would clearly exclude a debt management company or brokering the sale of securities. ABA supports this step as appropriate.

Additional revisions. Each foreign-located person engaging in a covered MSB activity would be required to appoint a U. S. resident agent to accept service of legal process. ABA agrees this is logical and consistent with other requirements.

¹² FinCEN notes that this exclusion is not meant to suggest that all providers of open-loop cards are deemed to be money transmitters, a comment that is extremely important to articulate in the final rule. ABA also agrees that it is appropriate to continue discussing this issue in other rulemakings.

Finally, ABA notes that the definition of an MSB continues to clearly exclude banks and persons registered with and functionally regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission. ABA fully supports continuing these exclusions in the final rule.

Multiple MSB services. There are times when a business will provide more than one type of money service. For example, a check casher might also offer customers money transmission services. FinCEN has asked whether transactions involving multiple MSB services should be aggregated. In raising the question, FinCEN has not offered any indication that the existing approach has undermined law enforcement or detracted from the information available to track possible instances of money laundering or terrorist financing. Absent the evidence of such problems, ABA believes that an aggregation requirement will only complicate compliance, cause confusion among financial institutions, regulators and MSBs and is an unnecessary step. Therefore, ABA opposes adding this requirement.

Stored Value

FinCEN has raised a number of questions on stored value that will guide the agency as it develops rules. When this proposal was issued, the intent was to use this feedback to move forward with a new proposal. Since that time, though, Congress enacted the *Credit Card Accountability Responsibility and Disclosure Act of 2009* (the CARD Act). Section 503 of the statute requires FinCEN, working with the Department of Homeland Security, to develop final rules on stored value by next February. The mandate from Congress is broad, covering the “sale, issuance, redemption, or international transport of stored value, including stored value cards.” In developing these rules, the statute also directs FinCEN to factor into the equation possible reporting requirements for international transport of stored value as well as emerging and developing technologies.

For a number of years, FinCEN and law enforcement agencies have raised concerns about stored value and the potential for criminals to

abuse these products.¹³ While ABA agrees that additional guidance is necessary, ABA also very strongly recommends that FinCEN carefully tailor any new rules to avoid the very real potential that new rules could drive transactions completely underground. Such a development would only hamper the ability of law enforcement agencies to track the movement of funds.

FinCEN has been actively reviewing the elements of stored value systems and the risks presented by stored value programs, especially those related to prepaid cards, for quite some time. The agency has consulted and discussed these programs, especially the risks and the controls that the industry applies to control the identified risks. ABA strongly encourages FinCEN to continue to work with this group of experts as it moves forward. And, it cannot be emphasized strongly enough that – while it is foolhardy to believe risks can or should be eliminated completely – identifying the risks and ensuring that the controls are in place that address those risks is what is most important. As it moves forward, FinCEN must be mindful of the rapid development of technologies in this area that require any rule to have sufficient flexibility to adapt over time. Otherwise, any rules can quickly become obsolete and irrelevant. In addition, the need for flexibility is equally important since overly rigid restrictions can hamper technologies and the development of beneficial products and services. Since stored value products can serve as a mechanism to bring the unbanked and under-banked into mainstream banking, it is important to ensure that restrictions also not discourage programs that can be used to this end. And finally, any rules that apply to stored value must build on and enhance the existing partnerships with industry, regulators and law enforcements if the program is to be viable.

FinCEN has indicated that it plans to issue a proposed rule for public comment, but because Congress has imposed a very short time-frame, the turnaround time will be brief. ABA looks forward to continuing to work with FinCEN on this project, but to that end, we offer the following comments based on the questions raised by FinCEN in the MSB proposal.

¹³ See, e.g., the 2006 interagency *U. S. Money Laundering Threat Assessment*, December 2005, <http://www.treas.gov/offices/enforcement/pdf/mlta.pdf> and the 2007 Money Laundering Strategy, <http://www.treas.gov/press/releases/docs/nmls.pdf> .

Specific Questions Raised by FinCEN

Is there a need to define the term “funds”? It is not clear why FinCEN has raised the question or what problems a new definition is intended to address that current definitions lack. As a result, ABA does not believe there is a need to develop a special definition for the term in the context of stored value.

Should the definition of stored value be revised based on principles of technological neutrality as well as neutral regarding the entity providing the service? The existing rule defines stored value as “funds or monetary value represented in digital electronics format (whether or not specifically encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically” while the Uniform Money Services Act defines stored value as “monetary value that is evidenced by an electronic record” where record is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” As one possible alternative, FinCEN has suggested defining stored value as “electronic monetary value that is generally accepted as a medium of exchange, whether or not redeemable for currency or funds.”

ABA does not have a preference for any one definition. However, that said, ABA also believes it is critically important that FinCEN coordinate with other agencies to ensure that whatever definition is selected is totally compatible with definitions used for other purposes. For example, under Title IV of the CARD Act, the Federal Reserve is currently developing rules and regulations for prepaid gift cards. While these cards are one subset of stored value, it is important that whatever approach FinCEN takes is consistent with other contexts. Barring consistency and coordination, there will be confusion that will only work to the benefit of criminal elements.

Some states have started treating stored value under money transmission provisions for state law purposes: (1) what impact might occur if FinCEN took this approach? (2) should open loop and closed loop stored value be regulated separately?; and (3) should only certain stored value transactions be considered “money transmission”? In order for FinCEN to develop appropriate rules, it must first clearly identify what risks the rules are designed to address. Separate steps taken by various states may be focused on different problems and

risks that may not be consistent with the concerns that FinCEN is attempting to address. To develop final rules that work as intended, the first step for FinCEN must be to identify what risks are presented and then determine whether incorporating stored value under the definition of money transmission works for federal purposes. Only then should FinCEN consider what states have done and what is needed to reconcile the two. However, ABA believes FinCEN needs to articulate the goals it wants to achieve and not take a step merely because another governmental authority has already acted.

Should regulation be limited to issuers or should it include sellers and redeemers? At the outset, ABA believes that any rules that apply to stored value should be as comprehensive as possible. Therefore, it appears appropriate to apply any requirements to issuers and to sellers and redeemers. However, ABA also recommends that FinCEN distinguish between the two in developing a proposal, since their business models, practices and operations are different. Therefore, it is likely that it will be necessary to develop parallel and coordinated requirements that work in tandem – one for issuers and a separate one for sellers and redeemers.

Should requirements vary if the stored value is in bearer form? ABA believes this question may be somewhat misleading, based on the current state of technology and business models. The distinction being increasingly used by industry is one-time non-reloadable prepaid cards where the purchaser and user are likely to be different and reloadable cards where the holder is often using the card as a substitute for a bank account. These latter cards, which may include payroll cards or government benefit cards, are often designed as a means to reach those without banking accounts. As a result, they can serve as a valuable stepping stone to bring these individuals into mainstream banking. Such a step is not only beneficial to those using the cards but also provides bank records of account transactions. Therefore, ABA recommends that FinCEN make the distinction between reloadable and registered cards and non-reloadable prepaid gift cards.

Most non-reloadable prepaid gift cards are, due to their nature, issued in bearer form. Therefore, in order to properly develop a final rule, FinCEN needs to more clearly articulate what risks it intends to address with this distinction.

Should memory chip products be regulated differently from chip products? ABA does not believe such a distinction serves any useful purpose. From an industry perspective, the two operate the same.

Are open-loop /closed-loop distinctions still valid? In 2003, FinCEN issued a ruling that excluded closed-loop cards. While the distinction between open-loop and closed-loop is fading over time, ABA believes that the distinction still has sufficient validity for FinCEN's purposes in this proposal.

Finally, as an aside, ABA notes that the use of the term "stored value" is falling into disuse by the industry. The currently accepted approach is to use the term "prepaid" as a more accurate descriptor.

Conclusion. ABA commends FinCEN for taking steps to ensure the rules and regulations on MSBs are kept current and designed to simplify and streamline compliance requirements for all entities affected. As it finalizes these rules, though, ABA encourages FinCEN to make adjustments to focus on the key risks presented and ensure that the final rules are clearly designed to meet the agency's and the industry's ultimate goal: detecting and deterring potential instances of money laundering and terrorist financing.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact the undersigned by telephone at 202-663-5029 or by e-mail at rrowe@aba.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Rowe, III". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

Robert G. Rowe, III
Vice President & Senior Counsel