Client Alert.

October 19, 2011

FinCEN Proposes Requirement for Reporting Prepaid Products Crossing U.S. Border

By L. Richard Fischer, Obrea O. Poindexter and Sean Ruff

On October 17, 2011, the Financial Crimes Enforcement Network ("FinCEN") published a proposed rule that would add "tangible prepaid access devices" to the list of monetary instruments that must be reported when they are "transported, mailed, or shipped into or out of the United States."

Pursuant to the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"), which provides Treasury with the authority to issue regulations "implementing the Bank Secrecy Act, regarding the sale, issuance, redemption, or international transport of stored value, including stored value cards," FinCEN has proposed a rule intended to address "money laundering and terrorist financing vulnerabilities."

Under the Bank Secrecy Act, persons currently transporting currency or other monetary instruments in excess of $10,000 across U.S. borders are required to file a Report of International Transport of Currency or Monetary Instruments ("CMIR"). FinCEN's proposed rule would expand the definition of "monetary instrument" to include "tangible prepaid access devices." Specifically, a "tangible prepaid access device" is defined as "any physical item…dedicated to obtaining access to prepaid funds or the value of funds by the possessor in any manner without regard to whom the prepaid access is issued." The value of the accessible funds would be determined by the amount of the funds available through the access device at the "time of physical transportation, mail, or shipment into or out of the United States." Because the value accessible through a prepaid access device may change without the knowledge of the holder of the device, FinCEN requested comment as to whether the value of the access device should be determined based upon the maximum potential value, rather than the value at the time the device crosses the U.S. border.

As proposed, the term "tangible prepaid access device" would include general-use prepaid cards, gift cards, store cards, payroll cards, and government benefit cards. The supplemental information accompanying the proposed rule also states that "tangible prepaid access device" would include cell phones and other tangible devices that have the capability to access prepaid funds at a merchant location.

FinCEN requested comment on whether various devices should be excluded from the proposed reporting requirements. For example, FinCEN requested comment on whether closed-loop prepaid access devices should be excluded because they can only be used at specific locations and do not provide access to cash, and whether open-loop prepaid access cards embossed with the customer's name and issued by a depositary institution already subject to anti-money laundering requirements should be excluded.

Under the proposal, the term “tangible prepaid access device” would not encompass:

- Intangible methods of accessing prepaid funds, such as codes and PINs;
- Tangible items with only “incidental” access to prepaid access, such as laptop computers, web-enabled cell phones, or other devices that are not “dedicated to accessing specific prepaid funds”;
- Debit cards “issued or approved for use through a payment card network to debit an individual’s asset account”; or
- Credit cards used to obtain money or other items on credit.

Although the proposed rule would exempt from the reporting requirements a business or its agents offering prepaid products prior to their sale to the public, FinCEN requested comments as to whether this exemption is appropriate.

The comment period ends on December 16, 2011.

Contact:

L. Richard Fischer
(202) 887-1566
lfischer@mofo.com

Obrea O. Poindexter
(202) 887-8741
opoindexter@mofo.com

Sean Ruff
(202) 778-1665
sruff@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer*’s A-List for eight straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.