American Payroll Association

Government Relations • Washington, DC

August 25, 2010

James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
Regulatory Policy and Programs Division
PO Box 39
Vienna, VA 22183

Re: Docket number TREAS–FinCEN–2009–0007; RIN 1506-AB07
Amendment to the Bank Secrecy Act Regulations – Regulations Relating to Prepaid Access

Dear Mr. Freis:

The American Payroll Association is writing to provide comments on the Notice of Proposed Rulemaking (NPRM) as it may affect important aspects of employer payroll administration and employee benefit programs.

The APA is a nonprofit professional association representing more than 21,000 individuals and their companies in the United States and Canada. The APA's primary mission is to educate its members and the payroll industry regarding best practices associated with paying America's workers while complying with applicable federal, state, and local laws. In addition, the APA's Government Affairs Task Force works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

Many APA member companies offer prepaid payroll debit cards as an alternative to paper checks and direct deposit, and many offer similar health benefit cards such as Flexible Spending Accounts (FSAs), Health Spending Accounts (HSAs), etc. Electronic payroll methods such as direct deposit and payroll debit cards offer many benefits to both employees and employers. From the employee's perspective, direct deposit and payroll cards eliminate check cashing fees and remove delivery problems that often result when, for example, an employee is ill or traveling.

Employees without bank accounts, who are likely to be the principal users of payroll cards, generally incur high fees when cashing their payroll checks and then incur additional costs when paying bills using money orders or traveling to a payment location to pay in cash. These fees are eliminated when employees are given the option of receiving their wages by direct deposit or on a payroll card. Electronic payment methods also reduce the risks associated with lost or stolen paychecks and facilitate the delivery of wages during severe weather conditions and natural disasters. Employers benefit from reduced check processing and distribution costs and expenses associated with lost or stolen paychecks. The APA agrees that it is critical to strike the right balance in these regulations so as not to unduly burden employers and employees who have come to rely on the convenience, safety and cost-efficiency of payroll cards.

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The APA would like clarification on certain issues raised within the NPRM which may affect employers. We believe that under the proposed NPRM, employers who offer payroll cards would generally not be responsible for compliance with the provisions of the Bank Secrecy Act (BSA), such as registration with FinCEN, transaction monitoring, suspicious activity reporting and anti-money laundering programs. Most employers would have extreme difficulty in fully complying with BSA requirements, and we do not believe that it is the intent of FinCEN to create broad new obligations for employers. However, we would ask that FinCEN clarify its expectations of employers in the following areas.

1. The Exclusion for Payroll Cards Should be Broadened

The NPRM nominally provides a payroll card exemption from the BSA requirements; however, **the exemption is so narrow that it would likely cover few, if any, current payroll card programs**:

> *However, an arrangement is not a prepaid program if:*
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> *(A) The prepaid access provided is limited to one of the following:*
> *(1) Payment of benefits, incentives, wage or salaries through payroll cards or other such electronic devices for similar purposes;...and*
>
> *(B) It does not permit:*
> *(1) Funds or value to be transmitted internationally;*
> *(2) Transfers between or among users of prepaid access within a prepaid program such as person-to-person transfers; or*
> *(3) Unless it qualifies as closed loop prepaid access, the ability to load monetary value from other non-depository sources onto prepaid access.*

One goal of current payroll cards is to provide unbanked and underbanked workers with access to the banking system. These products are made to function similarly to bank debit cards. To exclude from the exemption payroll cards that permit other loading sources, person-to-person transfers and international transactions would be a significant step back for payroll cards, as payroll card providers will almost certainly feel compelled to restrict the functionality of their current payroll card programs to fit within the exemption. Cardholders without a traditional banking relationship would be forced to carry cash, incur fees to either purchase other card products, traveler's checks or money orders, and would not have the benefit of being able to travel abroad and use a payroll card to book hotels or make purchases while on vacation.

FinCEN has acknowledged that payroll cards are low risk. As such, the payroll card exemption should not be subject to the proposed exceptions for third-party loads, person-to-person transfers and international transactions. We would suggest, instead, added requirements for a card program to fall within the payroll card exemption. For example, that the prepaid access device must initially be issued for payroll and/or be issued through an employer (rather than a J hook type card marketed to the public) and be loaded initially by an employer. Also, if the concern for MSB registration is to make certain one entity is responsible for BSA compliance and to provide one point of contact for law enforcement, the issuing bank could be the designated entity for payroll cards. There could be a further requirement that a payroll card contain the name of the program provider so that law enforcement can quickly identify who to contact to get information on the cardholder and transactions.

FinCEN has valid reasons for acknowledging payroll cards as being low risk. Employers already collect and document identification information from newly hired employees via DHS Form I-9 (as discussed in more detail below). Employers also obtain Forms W-4 from each employee with additional personal and taxpayer information, and periodically report identification information for their employees to a number of government agencies.

In sum, the APA is concerned that if FinCEN adopts the proposed regulations as currently drafted, program providers will feel compelled to offer restricted-use payroll cards in order to avoid the costs and complications of the FinCEN regulatory scheme. The more than ten million unbanked and underbanked U.S. citizens who are most in need of appropriate, inexpensive banking services would be severely disadvantaged if the functionality of payroll cards was limited because of overly narrow restrictions proposed by FinCEN.

2. Registration

In Section VI, FinCEN acknowledges that there are often many organizations involved in providing prepaid access, and discusses the best approach for determining which among them should be subject to the provisions of the NPRM.

> *VI. A Shift in Regulatory Obligations*
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> *A difficulty in regulating prepaid access is determining which entity or entities involved should be responsible for compliance with BSA requirements. The prepaid landscape includes a number of different types of actors with different roles. These actors and roles are not consistent throughout the industry and some entities perform multiple roles. Given the difficulty in identifying the provider and the changing nature of the industry, it is vital that a provider of prepaid access be defined on the basis of its activities.*
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> *FinCEN is proposing removing "issuers" and "redeemers" from the definition of money services business and imposing AML program, reporting, and recordkeeping obligations on the business entity that engages in activity that demonstrates the most control and oversight of transactions – what FinCEN proposes to define as the "provider of prepaid access."*
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> *The 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 because it is likely to have business relationships with most or all of the other participants in the transaction chain. Accordingly, it has the relevant information or access to the information to make and file relevant and meaningful BSA reports and records. Centralizing primary BSA obligations in the prepaid provider will unify an otherwise fragmented transaction chain where it is likely that no single player has the necessary financial transparency to comply adequately with BSA requirements. Shifting the requirements to one player may enrich the information available, provide greater financial transparency for appropriate regulators and administrators, and allow law enforcement to obtain relevant information with respect to various aspects of a prepaid access transaction chain without having to seek it from multiple sources.*

The American Payroll Association agrees that FinCEN should focus on the organization that demonstrates the most control and oversight of transactions as the "provider of prepaid access," to be responsible for registration, AML programs, reporting, recordkeeping and other BSA obligations. It seems unlikely that employers or their payroll software or service providers would be able to fully comply with BSA requirements. Employers do not have access to transaction details subsequent to the payment of wages, so they would not be in position to monitor subsequent spending or funds transfers.

Those involved in offering prepaid access (payroll debit cards) should be able to contractually designate a party to be responsible for all BSA compliance requirements. This party is likely to be the financial institution that issues the card and already is subject to strict BSA requirements. It would seem much clearer and more effective to have one organization designated for overall compliance than to obligate each participant directly to address any provisions that might arguably fall within their capabilities. This approach would avoid any confusion that may arise due to redundancies; e.g., where each party might believe that another party was primarily responsible for registration, reporting, CID programs, *etc*.

3. Responsibility for Customer Identification Requirements Should Be Clarified

The NPRM could be read to impose new customer identification provisions on employers and/or their service providers, such as payroll services or payroll card vendors. APA members are concerned about the potential for redundancies and confusion.

As background, employers already collect and document identification information from their workers. All employees must complete Form I-9 when they are hired, and present identification documents, such as a driver's license, military ID card or Employment Authorization Card. Employers are required to view original documents and assess whether the identification information (i.e., photograph) resembles the employee.

Employers must also obtain a Form W-4 from each employee. This Form calls for the employee's full name, Social Security Number, address, marital status, and number of withholding allowances. Employers are also required to periodically report employment information to a number of government agencies, including the IRS, state tax authorities (if applicable), state workforce agencies and state child support enforcement agencies. (The 1996 Welfare Reform law requires all employers to collect and report the name, address and Social Security Number of each newly hired employee to a federal and/or state agency for child support enforcement purposes.)

In addition, while some payment networks, issuing banks and/or program managers rely on employers to verify the identity of their employees, others require comprehensive customer identification measures with respect to prepaid payroll debit cards, duplicating employer identification verification measures. The NPRM raises the possibility that other organizations that are involved in providing prepaid access might also be required to conduct their own CID verification. For example, one interpretation could be that an employer's payroll service provider would have to verify the identification of each employee who receives a payroll card. Payroll services offer such cards within a comprehensive array of payroll alternatives, but they generally contract with banks or payroll card operators to offer them. As FinCEN noted, one party should be clearly responsible for CID measures.

Again, we would recommend that participants be able to designate one organization for overall compliance with the NPRM to reduce any confusion that may arise due to redundancies. With respect to CID measures, the responsible party may conduct their own CID verification, or they could assess the employer's existing compliance and determine whether it was sufficient.

4. The Exclusion for FSA Accounts Should be Broadened

Within the Section-by-Section Analysis, and subsection (C) Meaning of the Term "Prepaid Program," FinCEN recognizes that certain prepaid access programs present such a minimal risk that they should be excluded from the NPRM. This includes "Disbursement of reimbursement funds from pre-tax flexible spending accounts for health care and dependent care expenses". The APA appreciates and agrees with the proposed exemption for FSA accounts for health care and dependent care expenses. These prepaid card programs are generally only available for limited amounts, and can only be used for qualifying expenses.

The APA requests clarification, however, as to whether this exclusion is limited to FSA accounts, or whether it is intended to refer to the broader array of similar employee benefit prepaid card programs, such as health reimbursement arrangements, health savings accounts, transportation benefit cards, etc. These programs have virtually the same characteristics and should be viewed as low risks.

We appreciate the opportunity to provide our views on the NPRM. Please contact Cathy Beyda at (650) 320-1824, Bill Dunn at (202) 232-6889 or Pete Isberg at (610) 827-1591 if you have questions.

Sincerely,

Cathy S. Beyda

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