

# RESCINDED

Office of Thrift Supervision  
Department of the Treasury

July 13, 2009

**Transmittal**

**TR-433**

This rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, refer to the original issuer of the document.



Federal Register, Vol. 74, No. 90, pp. 22129-22142

**Number TR-433**

On May 12, 2009 the Financial Crimes Enforcement Network (“FinCEN”) issued a proposal to revise the regulations implementing the Bank Secrecy Act (BSA) regarding money services businesses (“MSB”) to clarify which entities are covered by the definitions.

inspecting the fuselage front posts, repairing any corrosion found and replacing pads made of foam rubber by pads made of Neoprene to prevent water ingress.

#### Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within 12 years from date of manufacture or within the next 2 months after May 18, 2009 (the effective date of AD 2009–09–04), whichever occurs later, inspect the fuselage front posts for signs of corrosion following paragraph 6.A. of EADS PZL “Warszawa-Okecie” S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009.

(2) If corrosion or any corrosion damage is found during the inspection required in paragraph (f)(1) of this AD, before further flight, repair or replace any parts where corrosion or corrosion damage was found in accordance with an FAA-approved repair solution obtained from EADS–PZL “Warszawa-Okecie” S.A., Aleja Krakowska 110/114, 00–971 Warszawa, Poland; telephone: +48 22 577 22 11; fax: +48 22 577 22 03; e-mail: eadsplz@plz.eads.net.

(3) Within 12 years from date of manufacture or within the next 2 months after May 18, 2009 (the effective date of AD 2009–09–04), whichever occurs later, replace the rear glass padding following paragraph 6.C. of EADS PZL “Warszawa-Okecie” S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009.

(4) Within 2 months after the effective date of this AD, amend the approved operator’s airplane maintenance program to incorporate the applicable tasks as described in PZL–104 Wilga 80 Maintenance Manual, pages 5–4 and 25–10, dated April 7, 2009.

#### FAA AD Differences

**Note:** This AD differs from the MCAI and/or service information as follows: No differences.

#### Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested, using the procedures found in 14 CFR 39.19. Send information to *Attn:* Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the

provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

#### Related Information

(h) MCAI European Aviation Safety Agency (EASA) AD No.: 2009–0072, dated March 31, 2009, EADS PZL “Warszawa-Okecie” S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009; and PZL–104 Wilga 80 Maintenance Manual, pages 5–4 and 25–10, dated April 7, 2009, for related information.

Issued in Kansas City, Missouri, on May 6, 2009.

**Scott A. Horn,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

**RIN 1506–AA97**

#### Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Department of the Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Financial Crimes Enforcement Network (“FinCEN”), a bureau of the Department of the Treasury (“Treasury”), is proposing to revise the regulations implementing the Bank Secrecy Act (“BSA”) regarding money services businesses (“MSBs”) to clarify which entities are covered by the definitions. Specifically, we are reviewing the MSB regulatory framework with a focus on providing efficient and effective regulation for the industry, as well as improving the ability of regulators, law enforcement, and FinCEN to safeguard the U.S. financial system from the abuses of terrorist financing, money laundering, and other financial crime.

The proposed changes are intended to more clearly delineate the scope of entities regulated as MSBs, so that determining which entities are obligated to comply will be more straightforward and predictable. This rulemaking proposes to amend the current MSB regulations in the following ways: By ensuring that certain foreign-located MSBs with a U.S. presence are subject to the BSA rules; by updating the MSB

definitions to reflect past guidance and rulings, current business operations, evolving technologies, and merging lines of business; and by combining all of stored value into one category, without substantively changing the existing definition, so that issuers of stored value and sellers or redeemers of stored value are in the same category. In addition, this rulemaking solicits comments on stored value to assist FinCEN with a future rulemaking proposing a revised definition of stored value and revising related regulations.

**DATES:** Written comments on the notice of proposed rulemaking must be submitted on or before September 9, 2009.

**ADDRESSES:** You may submit comments, identified by RIN 1506–AA97, by any of the following methods:

- *Federal e-rulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Refer to Docket number TREAS–FinCen–2009–0002.

- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA97 in the body of the text.

*Inspection of comments:* Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (Not a toll free call).

**FOR FURTHER INFORMATION CONTACT:** Regulatory Policy and Programs Division, FinCEN (800) 949–2732 and select option 1.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The term MSB, as currently defined in the BSA regulations, refers to each of the following distinct categories of financial service providers: (1) Currency dealer or exchanger, (2) check casher, (3) issuer of traveler’s checks, money orders, or stored value, (4) seller or redeemer of traveler’s checks, money orders, or stored value, (5) money transmitter, and (6) the United States Postal Service.<sup>1</sup>

MSBs play a critical role in providing financial services to, among others, a segment of the population that generally does not maintain bank accounts. Law enforcement, FinCEN, and other federal regulators have repeatedly stressed the need to prevent transactions that typically flow through these businesses from going underground, which would diminish transparency with respect to these transactions. Because MSBs

<sup>1</sup> 31 CFR 103.11(uu)(1)–(6).

provide needed financial services to numerous communities throughout the country and often facilitate the transmission of money to those in foreign countries, they are vital to both domestic and foreign economies.

In drafting this rulemaking, FinCEN reviewed past industry survey studies that were conducted to gain perspective on the size, revenue, geographic distribution, and other characteristics of the various service sectors of MSBs. The industry has grown in size and operational complexity since FinCEN first proposed MSB regulations in 1997.

A 1997 study estimated that the MSB industry population (both principals and agents) was around 158,000, and provided approximately \$200 billion annually in financial services.<sup>2</sup> The study estimated that fewer than ten large businesses accounted for the bulk of MSB activity (involving money transmissions, money orders, traveler's checks, and check cashing and currency exchange) conducted within the United States. The financial services were provided primarily through systems of agents.

In 2005, FinCEN again studied the MSB population and services provided and determined that the industry had grown to approximately \$284 to \$305 billion annually in financial services.<sup>3</sup> The increase reflected a growth rate for the MSB industry of about 50% over the previous decade. The study found that approximately 50% of all MSBs offered both check cashing and money order services.

This rulemaking proposes to amend 31 CFR 103.11(uu) by revising the MSB definitions. In addition to discussing our rationale for such revisions, we have asked questions of the general public to assist us with understanding the impact that the proposed changes may have on the affected businesses, as well as on law enforcement and regulatory efforts. These questions are asked both throughout the document and again in section IV with additional specific requests for comments.

In drafting this rulemaking, we have proposed folding all of stored value into one category so that *issuers* of stored value and *sellers or redeemers* of stored value are in the same category, without making any substantive changes to the definition of this category. We have determined that a separate, comprehensive proposal is warranted for stored value and will make such a

proposal at a later date. To facilitate this process, we urge interested parties to respond to the requests for comments about stored value that we have included within this rulemaking.<sup>4</sup>

## II. Background

### A. Statutory and Regulatory Background

The BSA, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 18 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (the "Secretary") to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis, to protect against international terrorism."<sup>5</sup> The Secretary's authority to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.<sup>6</sup> FinCEN has interpreted the BSA through implementing regulations ("BSA regulations" or "BSA rules") that appear at 31 CFR Part 103.

The BSA defines the term "financial institution" to include, in part: A currency exchange; an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; the United States Postal Service; a person involved in the transmission of funds; and any business or agency which engages in any activity which is determined by regulation to be an activity which is similar to, related to, or a substitute for these activities.<sup>7</sup>

The Director of FinCEN, through delegated authority, has implemented regulations under the BSA interpreting the recordkeeping, reporting, and other requirements of the BSA. Like other financial institutions under the BSA, MSBs must implement anti-money laundering (AML) programs, make certain reports to FinCEN, and maintain certain records to facilitate financial transparency. MSBs are required to: (1) Establish written AML programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities;<sup>8</sup> (2) file Currency Transaction Reports (CTRs)<sup>9</sup> and Suspicious Activity Reports (SARs)<sup>10</sup> and (3)

maintain certain records, including those relating to the purchase of certain monetary instruments with currency;<sup>11</sup> relating to transactions by currency dealers or exchangers;<sup>12</sup> and relating to certain transmittals of funds.<sup>13</sup> Most types of MSBs are required to register with FinCEN<sup>14</sup> and all are subject to examination for BSA compliance by the Internal Revenue Service (IRS).<sup>15</sup>

### B. Past Public MSB Meetings

In 1997, FinCEN held public meetings to give members of the financial services industry an opportunity to discuss the proposed MSB regulations and any impact they might have on operations.<sup>16</sup> In drafting the final rules defining the MSB categories,<sup>17</sup> FinCEN relied on the contributions from these public forums.

On March 8, 2005, FinCEN held a fact-finding meeting in Washington, DC on the provision of banking services to MSBs.<sup>18</sup> MSBs recounted their challenges in obtaining and maintaining banking services due to the perception that their businesses posed a high risk of money laundering and terrorist financing. In 2006, FinCEN issued an advance notice of proposed rulemaking seeking input on how to address these challenges,<sup>19</sup> and received 142 comments in response, which have informed this rulemaking.<sup>20</sup>

redemption of stored value are not covered by the SAR requirement. See 31 CFR § 103.20(a)(1), (5).

<sup>11</sup> See 31 CFR 103.29.

<sup>12</sup> See 31 CFR 103.37.

<sup>13</sup> See 31 CFR 103.33(f)-(g).

<sup>14</sup> See 31 CFR 103.41.

<sup>15</sup> 31 CFR 103.56(b)(8).

<sup>16</sup> These public meetings were held in Vienna, Virginia, on July 22, 1997; New York, New York, on July 28, 1997; San Jose, California, on August 1, 1997; Chicago, Illinois, on August 15, 1997; and Vienna, Virginia, on September 3, 1997. The discussions focused on how businesses operate and how best to regulate them. Discussion regarding whether a definitional threshold was warranted and if so, how to arrive at one, provided invaluable information to FinCEN.

<sup>17</sup> Definitions Relating to, and Registration of, Money Services Businesses, 64 FR 45438 (Aug. 20, 1999) ("1999 Rulemaking").

<sup>18</sup> FinCEN conducted the meeting through the Non-bank Financial Institutions and the Examination Subcommittees of the Bank Secrecy Act Advisory Group ("BSAAG"). BSAAG is an advisory group created by Congress consisting of industry, regulatory, and law enforcement participants for the purpose of engaging in open dialogue related to the protection of the U.S. financial system from money laundering, terrorist financing, and other abuses. BSAAG uses a variety of permanent and ad hoc subcommittees to identify and analyze relevant issues.

<sup>19</sup> Provision of Banking Services to Money Services Businesses, 71 FR 12308 (March 10, 2006).

<sup>20</sup> These comments are available in files dated March 10 and May 15, 2006 at [http://www.fincen.gov/statutes\\_regs/frn/reg\\_proposal\\_comments.html](http://www.fincen.gov/statutes_regs/frn/reg_proposal_comments.html).

<sup>4</sup> See Section IV, below.

<sup>5</sup> 31 U.S.C. 5311.

<sup>6</sup> See Treasury Order 180-01 (Sept. 26, 2002).

<sup>7</sup> 31 U.S.C. 5312(a)(2)(J), (K), (R), (V), and (Y).

<sup>8</sup> See 31 CFR 103.125.

<sup>9</sup> See 31 CFR 103.22.

<sup>10</sup> See 31 CFR 103.20. Check cashers and transactions solely involving the issuance, sale or

<sup>2</sup> Coopers and Lybrand LLP, "Non-Bank Financial Institutions: A Study of Five Sectors" (Feb. 28, 1997).

<sup>3</sup> KPMG 2005 Money Services Business Industry Survey Study (Sept. 26, 2005), available on FinCEN's Web site, <http://www.fincen.gov>.

### C. The Term “Money Services Businesses”

In 1999, FinCEN added “money services business” to the definition of “financial institution” in the BSA regulation.<sup>21</sup> The term MSB was created to: (1) clarify statutory language in a way that effectively captured industry operations and (2) refine a subset of non-bank financial institutions that are not subject to federal functional regulation at the federal level. We substituted the term “money services business” for the statutory term “money transmitting business” to avoid using a general term that could too easily be confused with “money transmitter,” which was being proposed as a specific category of MSB.<sup>22</sup>

Over the years, MSBs have asserted that using a single term to identify actors engaging in particular diverse activities is inadequate for assessing money laundering and terrorist financing risks. Furthermore, industry has argued that the use of the term MSB has adversely affected their access to banking services. For these reasons, industry has asked us to eliminate the term “money services business” to describe this particular group of non-bank financial institutions and describe the businesses as “non-bank financial institutions.”

It would be ineffective and confusing to use the broader term “non-bank financial institution” to describe the subset of “MSBs.” Even in the late 1990s, the term “non-bank financial institutions” encompassed broker-dealers in securities and casinos, as well as those businesses currently incorporated within the term MSB. The term is even less helpful now, as there are more types of non-bank financial institutions subject to BSA regulations, such as mutual funds, insurance companies, credit card system operators, dealers in precious metals, stones, and jewels, and futures commission merchants.

Despite the diverse risks posed across and even within MSB industries,<sup>23</sup>

MSBs share certain qualities. In particular, these businesses offer financial services that Congress grouped together in the BSA.<sup>24</sup> MSBs provide a range of financial services to many people without bank accounts similar to those services offered by banks to their customers. FinCEN therefore sees the continuing utility in the general term “MSB” as a concise way to refer to certain non-bank financial institutions that are without a federal functional regulator;<sup>25</sup> that offer specific services (often in combination), and that have similar BSA requirements.

### D. Genesis of the Proposed Revisions

In June 2007, FinCEN adopted its BSA efficiency and effectiveness initiative, which includes as one of its initial provisions, clarifying the scope of the MSB definitions. The initiative makes it a priority for FinCEN to review, and revise if appropriate, the MSB definitions in light of the money laundering risks posed.

We believe the current MSB regulatory definitions should be revised to describe with greater particularity the types of activity that would subject a business to the BSA rules.<sup>26</sup> For example, under the current regulations, to be deemed a check casher, a business only has to cash checks in amounts greater than the definitional threshold. The regulatory language does not provide insight, for instance, into the types of instruments a check casher may accept and does not detail what may be redeemed and whether it could be a combination of items (e.g., currency, another instrument, or a combination of instruments). The intent in clarifying the definitions is to resolve such ambiguities in the regulations so that the rules can be applied with more certainty by potential MSBs, the banks who maintain accounts for them, law enforcement, and regulators. The rationale for our proposed changes is

business, the types of businesses are quite distinct”). We also have communicated this message at compliance schools for banking examiners, on public panels, and at other speaking engagements.

<sup>24</sup> See 31 U.S.C. 5330(d)(1).

<sup>25</sup> The Internal Revenue Service examines these businesses only for compliance with the BSA. It is not a “functional” regulator of MSBs.

<sup>26</sup> The 1997 open forums on MSBs included discussions on whether to create definitions based on the type of institution involved or instead based on the activity or function performed by an entity regardless of the type of institution. Ultimately, FinCEN determined that changes in the industry over time may make relying on the type of institution problematic while creating definitions based on the underlying activity would enable the regulations to account for new technologies, services, and products.

provided in the section-by-section analysis below.

### E. Need for Review and Updates

Nearly ten years have passed since FinCEN issued the BSA regulations defining the categories of MSBs.<sup>27</sup> Since that time, FinCEN has received numerous requests to clarify the application of the MSB regulations to particular businesses. Over one-third of these requests came from persons inquiring whether or not they were an MSB.<sup>28</sup> Some of these requests for guidance reflect significant technological advances such as the online provision of financial services, as well as new financial products developed after the publication of our current rules such as stored value products and electronic currency. All of these developments have changed the nature of the MSB industry. Where possible, we have provided guidance to the industry on how to interpret and apply the regulations.

With respect to check cashers and money transmitters in particular, we have developed a large body of guidance in the years since the issuance of the final MSB regulations. For check cashers, FinCEN’s guidance and rulings provide several examples of activities that do not meet the regulatory definition of a check casher, though they may involve check activity in amounts exceeding the regulatory threshold. Examples of businesses that are *not* check cashers include: (1) A payday lender that holds checks as collateral for repayment of the loan by the customer and does not deposit or negotiate the checks;<sup>29</sup> (2) a business cashing its employees’ payroll checks;<sup>30</sup> (3) a business cashing its own checks issued as payment for goods or services provided by non-employees;<sup>31</sup> (4) a tax preparer cashing its own refund anticipation loan checks for taxpayers for whom it has prepared tax returns;<sup>32</sup> and (5) a consumer finance company cashing its own loan checks to borrowers.<sup>33</sup>

Similarly, over the years, FinCEN has issued guidance and administrative rulings that provide examples of

<sup>27</sup> 1999 Rulemaking, 64 FR 45438 (Aug. 20, 1999).

<sup>28</sup> This statistic comes from a review of requests for guidance from our Regulatory Helpline.

<sup>29</sup> FinCEN Ruling 2002–2 (Definition of Check Casher (Payday Lenders)), (Feb. 5, 2002).

<sup>30</sup> FinCEN Guidance 2006–G005 (Frequently Asked Questions—Businesses Cashing Their Own Checks) (March 31, 2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FinCEN Ruling 2007–R001 (Whether a Publicly Traded Company that Cashes its own Checks Issued to Loan Customers is a Money Services Business) (Jan. 8, 2008).

<sup>21</sup> 1999 Rulemaking, *supra* note 17, at 45438.

<sup>22</sup> See *Definition and Registration of Money Services Businesses*, 62 FR 27890, 27890 (May 21, 1997) (“1997 Proposal”).

<sup>23</sup> FinCEN has expressed its view that not all MSBs pose the same level of risk and will not require the same level of due diligence. See, e.g., FFIEC Manual (2007) at 277 (Non-bank Financial Institutions—Overview—Providing Banking Services to Money Services Businesses) and “Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the United States” (April 26, 2005) (“[t]he range of products and services offered, and the customer bases served by money services businesses, are equally diverse \* \* \* while they all fall under the definition of a money services

activities that do not meet the regulatory definition of a money transmitter, even though entities engaged in such activities may be involved in accepting and transmitting funds, such as: (1) Payment processing businesses that only provide merchants with a portal to financial institutions with access to the ACH system for the receipt of payments for goods and services already provided;<sup>34</sup> (2) debt management companies, with respect to their submission of payments to creditors on behalf of debtors in conjunction with a debt management plan;<sup>35</sup> (3) merchants and ATMs associated with a network of banks that accept and transmit funds that will become stored value used through the network, but that do so only as a conduit between individual banks and their customers;<sup>36</sup> and (4) businesses that only accept payments on behalf of the utilities with which they have contracted, and that decline to accept and transmit funds for any other purpose.<sup>37</sup>

Given the nature and scope of these important interpretative rulings, we think it is appropriate to update, streamline, and clarify the MSB regulations by incorporating these interpretations into the proposed regulatory revisions and extending them where appropriate. The proposed regulations also reflect proposed policy changes, on which we also seek comment.

### III. Section-by-Section Analysis

Pursuant to FinCEN's authority to interpret the provisions of 31 U.S.C. 5312, this document proposes to amend 31 CFR Part 103, primarily by revising the definitions of "money services business." These proposed changes would affect multiple categories of MSBs by: (1) Removing the "doing business" language in the definition of MSB merely for purposes of removing unclear language without broadening the application of the regulation beyond its present scope and (2) revising the general language to ensure that activity within the United States that does not involve the physical presence in the United States of an MSB's agent, agency,

branch or office is directly regulated. The proposed changes are more fully discussed below.

#### A. Meaning of the Term "Money Services Business"

In issuing the current MSB regulations in 1999, FinCEN was responding to a growing need to apply effective BSA regulation to a relatively little known or little understood part of the financial sector in the United States.<sup>38</sup> FinCEN's regulations established broad definitions for each enumerated MSB activity. This had the effect of capturing national and multinational MSB operations as well as the small enterprises that competed with them. It also captured businesses that exclusively provided MSB services as well as businesses that provided both financial services and unrelated products or services.<sup>39</sup>

Since the issuance of these regulations, FinCEN has continued to seek input on defining the categories of MSBs appropriately and establishing appropriate dollar thresholds for activity with the goal of covering those businesses that are significantly engaged in providing products and services that are legitimate subjects of regulatory interest. FinCEN is now in a position to tailor the 1999 definition in a number of ways.

#### Doing Business

The current regulatory definition of MSB includes "[e]ach agent, agency, branch, or office within the United States of any person *doing business*, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section."<sup>40</sup> Banks and persons registered with, and regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission have been excluded from the MSB definitions.<sup>41</sup>

Whether a person is *doing business* as an MSB depends on all of the facts and circumstances. We use the term "doing business" to mean the activity in which the person is engaged, rather than any status that the entity has either taken on itself or been assigned, such as a business licensed by a state. In this proposed rulemaking, FinCEN continues to regulate an MSB by its *activity* and the context in which the activity occurs and not simply its *status*.

Whether a person is a business in any formal sense should not be determinative of whether it is subject to the MSB definitions, absent statutory requirements to the contrary.

To avoid confusion that might result from the focus on the status of an entity and not its activity and the context in which the activity occurs, we have revised the language in the MSB definition in section 103.11(uu) by deleting the "doing business" language and replacing it with "engaged in activities \* \* \*" "Doing business" had caused uncertainty which we expect will be alleviated with this change. By removing the phrase "doing business," however, we do not intend to broaden the application of the regulation beyond its present scope. To the extent that a person engages in one or more of the enumerated activities listed in the definition, it is an MSB; to the extent that a person does not engage in such activities, it is not.

#### Dollar Threshold

The regulation currently includes an activity threshold of \$1,000 for any person in any one day. This threshold applies to all MSB categories, except money transmitters which do not have any activity threshold, and was established to exclude certain activities under that dollar amount from the BSA requirements.<sup>42</sup>

The issue of a dollar threshold was discussed at FinCEN's publicly-held meetings in 1997 with the industry to vet issues arising from the originally proposed rules. During the meetings, various methods of arriving at a dollar threshold were discussed. Certain members of the industry proposed a threshold based on total gross fee income. FinCEN did not favor that approach because it allowed for potential manipulation on the part of a business seeking to avoid the registration requirement by not collecting a fee and obtaining payment for the service in some other way. Some participants also recommended tying the threshold to an economic indicator, like the minimum for social security payments or the federal minimum wage, which was ultimately rejected. In the final rule, FinCEN doubled the originally proposed threshold of \$500 in part based on input received from the industry.<sup>43</sup>

<sup>42</sup> See 1999 Rulemaking, 64 FR at 45446 (the threshold attempts to eliminate treating certain businesses as MSBs, like grocery stores and hotels, which cash checks and exchange currency as an accommodation to customers otherwise buying goods and services).

<sup>43</sup> The final rule also indicated that many MSB transactions regularly occur in amounts greater than

<sup>34</sup> FinCEN Ruling 2003-8 (Definition of Money Transmitter (Merchant Payment Processor)) (Nov. 19, 2003).

<sup>35</sup> FinCEN Ruling 2004-4 (Definition of Money Services Businesses (Debt Management Company)) (Nov. 24, 2004).

<sup>36</sup> FinCEN Ruling 2008-R005 (Whether Certain Reloadable Card Operations are Money Services Businesses) (March 10, 2008) (Merchants and ATMs associated with a network of banks were not deemed money transmitters).

<sup>37</sup> FinCEN Ruling 2008-R006 (Whether an Authorized Agent for the Receipt of Utility Payments is a Money Transmitter) (May 21, 2008).

<sup>38</sup> See 1999 Rulemaking, 64 FR 45439.

<sup>39</sup> *Id.*

<sup>40</sup> 31 CFR 103.11(uu) (emphasis added).

<sup>41</sup> *Id.*

Although FinCEN does not propose amending the current threshold in this rulemaking, we are considering the need for a separate rulemaking to make possible adjustments to the threshold. A lower threshold may increase the amount of information available to law enforcement by expanding the scope of entities subject to BSA requirements, but would also add additional entities that conduct incidental and low-value MSB activities in which the benefits of regulation many not outweigh the costs. Moreover, the effect on the clients whom these MSBs serve would need to be carefully studied. Conversely, a higher threshold may remove from the scope of the BSA entities that conduct incidental and low-value MSB activities in which the benefits of regulation many not outweigh the costs.

#### Questions for Comment

- We seek information on the average daily transaction amount for the different MSB services offered: check cashing; money orders; money transmission; foreign exchange; stored value; and traveler's checks.
- We specifically seek comment from law enforcement on how adjusting the threshold higher or lower would impact their investigations and prosecutions.
- We specifically seek comment from community groups on how adjusting the threshold higher or lower would impact the clients who utilize MSB firms.

#### Foreign-Located MSBs

The BSA authorizes us to define a domestic financial institution without reference to its physical presence in the United States. 31 U.S.C. 5312(b)(1) states that the term "domestic financial institution" applies to *an action in the United States*, not to the physical location of the financial agency or institution taking the action. Thus, it is within FinCEN's authority to write regulations establishing that a foreign-located business that meets the definition of a "financial institution" and is conducting business in the United States in such a capacity is a "domestic financial institution."

We propose to use this authority to amend the regulatory language implementing 31 U.S.C. 5312(a)(2)(J), (K), and (R)—the provisions on which our regulatory definition of MSBs is based—to ensure that certain foreign-located entities engaging in MSB activities in the United States are subject to the requirements of the BSA. We propose to do this by revising our MSB definition to state that an entity is

defined as an MSB by the activity it conducts within the United States, and not exclusively by the physical presence of one or more of the entity's agents, agencies, branches or offices within the United States. Accordingly, we propose the following text: "The term "money services business" shall include a person wherever located engaged in the activities that take place wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section, whether or not on a regular basis or as an organized business concern. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States."

Technological advances make it increasingly possible for MSBs to offer financial services through mechanisms other than "brick and mortar" locations. Foreign entities can and do offer services in the U.S. through other instrumentalities, such as the Internet or a U.S.-based bank account. Under this rulemaking, we seek to ensure that a foreign-located entity engaging in activities in the United States in one of the capacities listed in 31 CFR 103.11(uu)(1)–(5) is regulated as an MSB. We intend to include an entity that has 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. Establishing the degree to which the activities of a foreign-located MSB occurs within the United States depends on all the facts and circumstances and whether U.S. customers or recipients are involved in the activities.<sup>44</sup> If a foreign-located business is an MSB according to our regulations, then it will have the same reporting and recordkeeping and other requirements as an MSB with a physical presence in the United States, with respect to its U.S. activities.<sup>45</sup>

FinCEN seeks to ensure that our AML regulations apply equally to all persons engaging in activities in the United States as MSBs. The U.S. system is not fully protected when some MSB

transactions are covered and others are not. We are concerned that mechanisms such as the Internet increasingly can be used to conduct business within the United States from a foreign jurisdiction. Use of such mechanisms may avoid both our regulations and the regulations of the foreign jurisdiction. This undermines the legitimate interest of the United States in protecting its own financial system from abuse.

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. These efforts in turn help support the efforts of individual countries to prevent their financial systems from being used as conduits for financial crimes.

We seek comment on the effectiveness of the proposed text changes regarding the application of the MSB definition to certain foreign-located MSBs. In addition, we request input on the effectiveness of examining and enforcing such entities' compliance with BSA requirements, such as the requirement that a foreign-located MSB maintain registration records in the United States that are readily available at the request of FinCEN or any appropriate law enforcement agency.<sup>46</sup> Moreover, we seek comment on the implications of requiring a foreign-located MSB to file SARs with respect to transactions taking place within the United States and the ability to enforce the confidentiality and safe harbor provisions of the SAR,<sup>47</sup> or to penalize the issuance of a civil money penalty<sup>48</sup> on such an MSB.<sup>49</sup> We seek comment

<sup>46</sup> See 1999 Rulemaking, 64 FR at 45441 ("A money services business is not required to keep records required by section § 103.41 in a centralized location so long as the records are maintained in the United States").

<sup>47</sup> 31 CFR 103.20(d). See also FinCEN Form 107 (Registration of Money Services Business) (Jan. 2005), which allows for the registration of a foreign located MSB in Part III.

<sup>48</sup> 31 CFR 103.56–103.57.

<sup>49</sup> The practical issues that may arise in enforcing these requirements are distinct from the legal issues as to whether FinCEN has the authority to impose these requirements on foreign-located MSBs, and whether federal courts have the authority to impose sanctions for the failure of a foreign-located MSB to comply with these requirements. MSB activity wholly or substantially within the United States is an economic activity substantially affecting interstate commerce, and it is therefore clearly amenable to federal regulation. See *United States v. Morrison*, 529 U.S. 598, 609–610, 120 S.Ct. 1740, 1749–1750 (2000). As noted, the BSA authorizes FinCEN to regulate action within the United States without reference to the actor's physical presence in the United States. See 31 U.S.C. § 5312(b)(1). Finally, the nature of MSB activity is such that a

the originally proposed definitional threshold of \$500. See 1999 Rulemaking, 64 FR at 45446.

<sup>44</sup> See FinCEN Ruling 2004–1 (March 29, 2004). Guidance (Definition of Money Services Business) (Foreign-Located Currency Exchanger With U.S. Bank Account) (A foreign-located currency exchanger whose only presence in the U.S. was a bank account was not deemed an MSB when the currency exchange transactions occurred solely in a foreign country for foreign-located customers and the use of the U.S. bank account was limited to issuing and clearing dollar-denominated monetary instruments.)

<sup>45</sup> See Section II.A of this rulemaking above for MSB compliance obligations.

from law enforcement on how such changes may impact their work if certain foreign businesses were regulated as MSBs. Alternatively, we solicit comment on whether we should expand the definition of “foreign financial institution”<sup>50</sup> in the foreign correspondent account rule to include check cashers and issuers and/or sellers of traveler’s checks and/or money orders.

#### *B. Meaning of the Term “Dealer in Foreign Exchange”*

Pursuant to FinCEN’s authority to interpret the provisions of 31 U.S.C. 5312, this section proposes to amend 31 CFR Part 103 by amending the regulation implementing 31 U.S.C. 5312(a)(2)(J), which defines “a currency exchange” as a financial institution and 31 U.S.C. 5312(a)(2)(Y) and (Z), which permit the Secretary to designate as a financial institution “any business \* \* \* which engages in any activity \* \* \* which is similar to, related to, or a substitute for any activity in which any business [defined to be a financial institution] is authorized to engage [or] any other business whose cash transactions have a high degree of

foreign-located MSB engaging in such activity wholly or substantially within the United States is making a conscious decision to do so and is aware of where the activity is taking place. It should therefore be possible to identify a federal judicial district with which the foreign-located MSB has sufficient minimum contacts that the maintenance of a suit against the foreign-located MSB does not offend due process or traditional notions of fair play and substantial justice, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945), either because the suit arises out of the MSB’s specific contacts with the district and the MSB has purposefully directed its efforts towards residents of the district, see *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985), or because the MSB has maintained continuous and systematic general business contacts with the district, see *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873 (1984). It should therefore be possible for a federal court to assert personal jurisdiction over the MSB on either a general jurisdiction or specific jurisdiction theory, notwithstanding the MSB’s lack of physical presence in the United States. See *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079 (9th Cir. 2003) (federal district court has personal jurisdiction over defendant lacking physical presence in district because defendant’s “highly interactive” website operates as “virtual store” in district), *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512–513 (D.C.Cir. 2002) (federal district court may have personal jurisdiction over defendant lacking physical presence in district because residents of district “use its website to engage in electronic transactions with the firm”); see also *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123–1126 (9th Cir. 2002) (federal district court may have personal jurisdiction over defendant notwithstanding defendant’s lack of physical presence in the United States), *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 619–625 (1st Cir. 2001) (same).

<sup>50</sup> 31 CFR 103.175(h).

usefulness in criminal, tax, or regulatory matters.”

Currently, 31 CFR 103.11(uu)(1) defines a “currency dealer or exchanger,” as “[a] currency dealer or exchanger (other than a person who does not exchange currency in an amount greater than \$1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).” The proposed changes would revise 31 CFR 103.11(uu)(1) to state: “*Dealer in Foreign Exchange*. A person who accepts the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more countries in exchange for the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more other countries in an amount greater than \$1,000 for any other person on any day in one or more transactions, whether or not for same-day delivery.”

The term “dealer in foreign exchange” can be found in the first BSA regulations published in 1972.<sup>51</sup> Although the term later was deleted from the regulations, the deletion and subsequent changes were not intended to change the meaning of the category.<sup>52</sup> The use of the word “dealer” in the proposed definition is intended to include both dealers (persons taking one side of a position and seeking to earn a spread) and brokers (persons bringing the buyers and sellers together for a commission and who, like a dealer, will conduct the transaction on its books and through its accounts). “Dealer” is intended to include all persons who are in the business of engaging in transactions involving the current or future acquisition or disposition of funds denominated in a particular currency by exchanging them for funds denominated in another currency.

We have removed the word “currency” from the name of the category to make clear that businesses that meet this definition may be exchanging not only currency, but also other monetary instruments, funds, or other instruments that are denominated in currency. Although the statute uses

<sup>51</sup> See 37 FR 6912 (April 5, 1972) (defining “financial institution” to include “a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks”).

<sup>52</sup> See 51 FR 30233, 30234 (Aug. 25, 1986) (proposing to define “financial institution” to include “a currency dealer or exchanger, including a check casher,” with no notice that this change in language would constitute a change in the scope of the definition); 52 FR 11436, 11439–11440 (Apr. 8, 1987) (adopting the proposed language changes).

the language “*currency exchange*,”<sup>53</sup> we believe the language was intended to capture the underlying activity involved in foreign exchange services and that our interpretation is consistent with the original intent and current industry practices. We seek comment on the name change of this category of MSB and whether the revision is consistent with current practices.

The insertion of the word “foreign” clarifies our consistent position that any exchange that occurs in the United States could be covered by this definition, even if it does not involve U.S. dollars. Therefore, if all other requirements are fulfilled, and a business exchanges currency, other monetary instruments, funds or other instruments denominated in a currency other than U.S. dollars for currency, other monetary instruments, funds or other instruments denominated either in dollars or in another non-U.S. currency, we would consider the business a dealer in foreign exchange for purposes of our rules. Though such a transaction may not involve U.S. dollars, the potential use of a dealer in foreign exchange to launder money, finance terrorism, or carry out other illicit activity nevertheless would impact the U.S. financial system and should be subject to regulation.

This proposed clarification also reflects the reality of the international nature of money laundering and terrorist financing as well as the jurisdictional responsibility of the U.S. Government to safeguard the financial system against those risks. Although U.S. dollars are considered an attractive medium for money laundering and terrorist financing because of the worldwide acceptance of the dollar as a means of payment, failing to capture exchanges within the United States of two foreign (non-U.S. dollar) currencies or of payment instruments denominated in two foreign currencies would leave a significant class of potentially vulnerable transactions that occur within the United States unregulated.

The proposed definition also clarifies that dealing in foreign exchange is not limited to the physical exchange of the currency of one country for the currency of another country. The phrase “currency, or other monetary instruments, funds, or other instruments” clarifies which mediums of exchange are included under the current rule’s phrasing “currency or monetary or other instruments.” Our current rules and existing body of administrative rulings make clear our determination that a person that

<sup>53</sup> 31 U.S.C. 5312(a)(2).

converts funds denominated in the currency of one country to funds denominated in the currency of another country is a currency dealer or exchanger.<sup>54</sup> “Other instruments” is intended to capture those types of payment instruments that do not fall precisely into one of the other categories, but nevertheless are readily recognizable as payment instruments.

The addition of the phrase “of one or more other countries”<sup>55</sup> to the text of the definition signals a proposed policy clarification, which we believe better comports with a more common understanding of the business of exchanging currency. This phrase indicates that a person would no longer be considered a dealer in foreign exchange when converting currency, other monetary instruments, funds or other instruments denominated in U.S. currency for currency, other monetary instruments, funds or other instruments also denominated in U.S. currency. Similarly, if a person were to accept currency, other monetary instruments, funds or other instruments denominated in a particular foreign currency in exchange for currency, other monetary instruments, funds or other instruments denominated in that same foreign currency, that person would not be considered an MSB. By way of example, a person accepting a traveler’s check denominated in Mexican pesos in exchange for Mexican pesos in currency form would not be considered a dealer in foreign exchange.

The proposed language “for any other person” was inserted into the definition to explicitly reflect the interpretation that a person is not a dealer in foreign exchange “[t]o the extent that [he is] exchanging \* \* \* and transporting [his] own money on behalf of [him]self.”<sup>56</sup>

We added the phrase “whether or not for same-day delivery” to account for the potential time difference between the date on which the exchange rate is

agreed and the date of the exchange. Common settlement terms in foreign exchange markets include: (1) Same-day or cash—where the parties both agree to an exchange of currency and conclude the exchange on the same working day; (2) spot—where the parties agree to an exchange of currency on one date, with the exchange taking place two working days thereafter; (3) cash forward—where the parties agree to an exchange of currency on one date, with the exchange of currency deferred until an agreed-upon date in the future; and (4) future—where the parties agree to an exchange of currency on one date, with settlement to occur in an agreed upon delivery period in the future typically by payment of an amount reflecting the change in the foreign currency rate between the time of the agreement and delivery. A contract for future delivery of currency may also be settled with the delivery of currency, resulting in the exchange of the currencies underlying the futures contract.

The subject definition would apply only to exchanges of currency in the over-the-counter markets.<sup>57</sup> Exchange-traded contracts and the persons who intermediate them are regulated by the Commodity Futures Trading Commission, and therefore are excluded from the definition of dealer in foreign exchange.<sup>58</sup> However, currency is an “excluded commodity” under the Commodity Exchange Act,<sup>59</sup> and foreign exchange futures may be traded over-the-counter in limited circumstances. Consequently, this discrete category of futures contracts would fall within this definition.

#### Requests for Comment

- Does limiting this definition to only dealers in *foreign* exchange increase the risk for money laundering? How? We especially seek input from law enforcement.
- Does the definition appropriately include the mediums of exchange that are used to effect these transactions?
- Should all categories of MSB be required to maintain and retain additional records on customers similar to those of currency dealers and exchangers in 31 CFR § 103.37?

#### C. Meaning of the Term “Check Casher”

Currently, under 31 CFR § 103.11(uu)(2), a check casher is

defined as “a person engaged in the business of a check casher (other than a person who does not cash checks in an amount greater than \$1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).” FinCEN is proposing to amend 31 CFR 103.11(uu)(2) to clarify the meaning of the term “check cashing” by splitting the existing regulatory definition into two subsections—one defining check cashing activity and one excluding certain activity from that definition.

The proposed revision would change the definition of check cashier to state (in part): “A person who accepts checks (as defined in the Uniform Commercial Code [U.C.C. Article 3—Negotiable Instruments § 3–104]) or monetary instruments (as defined in § 103.11(u)(1)(ii), (iii), (iv) and (v)) in return for currency or a combination of currency and other monetary instruments or other instruments in an amount greater than \$1,000.”

“In return” has been added to the definition to more accurately describe the activity that occurs when cashing a check or redeeming a monetary instrument. The Uniform Commercial Code reference has been added in order to provide a clear definition of “check.” A reference to the definition of “monetary instruments” has also been provided. “Other instruments” is intended to capture those types of payment instruments that do not fall precisely into one of the other categories. The term is meant to capture those instruments that are readily recognizable as payment instruments—an instrument such as a stored value card that is treated in commerce as a cash equivalent—without capturing goods or services that may be purchased with a check or monetary instrument.

For the sake of efficiency, this proposed definition would also incorporate the redeeming of monetary instruments into the definition of check casher. Given its similarity to check cashing, we believe it is unnecessary to treat this activity separately from check cashing.<sup>60</sup> Accordingly, under this proposal, a person engaged in redeeming monetary instruments (including traveler’s checks and money orders) would be a check casher if it redeemed checks for currency or a combination of currency and monetary or other instruments. Our intent in this revision is not to capture activity that is tantamount to merely exchanging one

<sup>54</sup> See FinCEN Ruling 2008–R003 (Whether a Person That is Engaged in the Business of Foreign Exchange Risk Management is a Currency Dealer or Exchanger or Money Transmitter) (May 9, 2008); FinCEN Ruling 2008–R002 (Whether a Foreign Exchange Dealer is a Currency Dealer or Exchanger or Money Transmitter) (May 9, 2008); and 31 CFR 103.37(b)(6).

<sup>55</sup> The addition of “one or more other countries” is intended to capture the fact that some foreign currencies are used by multiple countries. For instance, the Euro is used by the member states of the European Union. Accordingly, a dealer in foreign exchange may accept funds of one or more other *countries* in exchange for funds of one or more other countries.

<sup>56</sup> See, e.g., FinCEN Ruling 2003–9, (Definition of Money Services Business (Money Transmitter/Currency Dealer or Exchanger)) (October 20, 2003). See also, FinCEN Ruling 2004–3, (Definition of Money Services Business (Money Transmitter/Currency Dealer or Exchanger)) (Aug. 17, 2004).

<sup>57</sup> The terms of a spot, forward, or futures contract typically will permit either delivery of the underlying foreign currency or settlement of the contract in the local currency. As the option of delivering the foreign currency always exists, these contracts cause the contracting parties to fall under the dealer in foreign exchange definition.

<sup>58</sup> 31 CFR 103.11(uu).

<sup>59</sup> 7 U.S.C. 1a(13).

<sup>60</sup> FinCEN does not interpret “redeem” to include payment instruments or mechanisms taken in exchange for goods or services. See 1999 Rulemaking, 64 FR at 45441–45443.



monetary instrument for another monetary or other instrument and accordingly, the proposed rule would require currency to be included in the redeeming.

The proposed revision also would clarify what activities would *not* be subject to the check casher definition. The proposed definition also would include the following: “Whether a person is a check casher as described in this section is a matter of facts and circumstances. The term ‘check casher’ shall not include: a person that sells closed loop stored value<sup>61</sup> purchased with a check, monetary instrument or other instruments as referenced above in this definition; a person that redeems its own checks;<sup>62</sup> or a person that only holds a customer’s check as collateral for repayment by the customer of a loan.<sup>63</sup> These businesses are being excluded from the definition of check casher because of their limited purpose and low risk.”

Finally, under the current regulations, redeemers of traveler’s checks and money orders currently have SAR obligations while check cashers do not. As we are proposing to combine these two current categories of MSB, we seek comment on whether FinCEN should amend its regulations in a future rulemaking to require check cashers to report suspicious activity to FinCEN under the BSA. Would such a requirement be necessary, considering, for example, that issuers of traveler’s checks and money orders will continue to have SAR reporting requirements with respect to the instruments that they issue?

#### Requests for Comment

- Should there be an exemption or other relief for certain types of lower risk checks (e.g., federal, state, or local government entitlement checks)?
- Should check cashers be subject to a SAR requirement?
- Should there be any other exceptions or limitations on the check casher definition?
- FinCEN invites comment on the impact of the proposed changes, if any, on current business practices.

<sup>61</sup> We are proposing to define closed-loop stored value as stored value that is limited to a defined merchant or location (or set of locations), such as a specific retailer or retail chain, a college campus, or a subway system. *Cf.*, Federal Reserve Board, *A Summary of the Roundtable Discussion on Stored-Value Cards and Other Prepaid Products* (Nov. 12, 2004) available at <http://www.federalreserve.gov/paymentsystems/storedvalue/>.

<sup>62</sup> See FinCEN Guidance FIN–2006–G005 (Frequently Asked Questions—Businesses Cashing Their Own Checks) (March 31, 2006).

<sup>63</sup> FinCEN Ruling 2002–2 (Definition of Check Cashier (Payday Lenders)), (Feb. 5, 2002).

- We specifically seek comment from law enforcement on how the proposed changes may affect their investigations and prosecutions.

#### *D. Meaning of the Term “Issuer or Seller of Traveler’s Checks or Money Orders”*

FinCEN proposes to replace existing sections 103.11(uu)(3), “issuer of traveler’s checks, money orders, or stored value” and 103.11(uu)(4), “seller or redeemer of travelers checks, money orders, or stored value” with new section 103.11(uu)(3), “issuer or seller of traveler’s checks or money orders.” This proposed new section defines an issuer or seller of traveler’s checks or money orders as “[a] person that (i) issues traveler’s checks or money orders that are sold in an amount greater than \$1,000 for any person on any day in one or more transactions or (ii) sells traveler’s checks or money orders in an amount greater than \$1,000 for any person on any day in one or more transactions.”

The proposed rule eliminates the “redeemer” language that is contained in our current definitions. Although the current rules include those who “redeem” traveler’s checks and money orders, traveler’s checks typically are redeemed by their issuers, making a separate redemption category redundant in such circumstances. Moreover, redeeming a traveler’s check or money order by a non-issuer is close enough to the activity of a check casher that we think it can be incorporated into that definition with little difficulty.<sup>64</sup> Accordingly, we are removing the “redeemer” provision from the proposed rule.

The proposed rule defines an issuer by virtue of the amount at which its monetary instruments or travelers checks are sold, as opposed to the amounts at which they are issued. For example, we contemplate the amount of the sale including the face value of the monetary instruments plus any fees. Because money orders are not issued in round dollar increments like traveler’s checks, but are rather sold either directly by the issuer or by its agent to a customer who specifies the exact amount, a business must look at this activity to determine whether its transactions exceed the definitional threshold per person per day. Similarly,

<sup>64</sup> FinCEN has never held that a business that provides goods or services in exchange for payment in the form of money orders or traveler’s checks is an MSB. See 1999 Rulemaking, 64 FR at 45447. Accordingly, only a business that redeems these instruments for currency, or exchanges them for a combination of currency and monetary or other instruments would be considered an MSB, specifically a check casher, under the proposed rule.

although traveler’s checks are usually issued in large round amounts (e.g., \$20, \$50, or \$100), the definition is linked to the aggregate amount at which those checks are sold, either directly by the issuer or at the agent level, to a customer in a single day.

#### Requests for Comment

- Is it appropriate to link the definitional threshold for an issuer to the value at which the money orders and traveler’s checks are sold?
- In light of the proposed definition of a check casher, is the “redeemer” provision no longer necessary for traveler’s checks and money orders?

#### *E. Meaning of the Term “Stored Value”*

Under the current rules, FinCEN addresses traveler’s checks, money orders, and stored value under two separate definitions: issuers and sellers or redeemers of those products. FinCEN proposes to group issuers, sellers, and redeemers of stored value together. Our intent in the proposed new section is not to change the regulatory definitions regarding issuers, sellers, or redeemers of stored value in this rulemaking but simply to group such providers of stored value together in one category. Accordingly, the new section would be revised as follows: “A person who (1) issues stored value (other than a person who does not issue such stored value in an amount greater than \$1,000 to any person on any day in one or more transactions) or (2) sells or redeems stored value (other than a person who does not sell or redeem such stored value for an amount greater than \$1,000 from any person on any day in one or more transactions).”

Although FinCEN does not intend to substantively amend the category of issuers, sellers, or redeemers of stored value in this rulemaking, we are reviewing the current status of the stored value regulatory regime, and we are considering possible future revisions. In 1999, FinCEN issued a final rulemaking deferring certain requirements for the stored value industry based on the complexity of the industry and the desire to avoid unintended consequences with respect to an industry then in its infancy. Mindful of these continuing issues, FinCEN is deferring the proposal of a new rulemaking regarding issuers, sellers, and redeemers of stored value at the present time. FinCEN will continue to study the nature and the risks of this emerging industry before proposing a separate future rulemaking. At this point, FinCEN is not proposing to revise the definition of stored value found at 31 CFR 103.11(vv).

### F. Meaning of the Term "Money Transmitter"

We propose to revise the regulation interpreting 31 U.S.C. 5312(a)(2)(R), which defines funds transmission under the BSA as "a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business 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."

The implementing regulation, 31 CFR 103.11(uu)(5), currently defines a money transmitter as "Any person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or any other person engaged as a business in the transfer of funds."

The proposed definition of money transmitter would read in part, "a person who provides money transmission services. The term "money transmission services" means 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. "Any means" includes through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network."

The current regulation additionally contains a facts and circumstances limitation that excludes from the money transmitter definition persons that are engaged in the business of money transmission as an integral part of the execution and settlement of the transaction. Integral includes entities that could not engage in their businesses without engaging in the transmission of funds. In retrospect, it has been difficult for potential money transmitters to apply this exemption. We are proposing to clarify the limitations to the definition by using concise exceptions and by removing phrases that have been difficult to interpret.

The proposed definition of money transmitter is "a person who provides money transmission services." This language is consistent with existing language in the BSA.<sup>65</sup> The proposed definition removes the phrase "engages as a business" as FinCEN continues to regulate an MSB by its activity and the context in which the activity occurs and not by its status. The removal of "engages as a business" is not intended to broaden the regulation beyond its present scope.

The proposed definition also removes the phrase "whether or not licensed or required to be licensed." While this phrase reflects language in 31 U.S.C. 5312, we find the phrase to be unnecessary because it does not add substantive value to the meaning of money transmitter.

Consistent with the current definition of money transmitter, the proposed language defines "money transmission services [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 proposed regulatory definition of money transmission services includes the phrase "or other value that substitutes for currency" to state that businesses that accept stored value or other currency equivalents as a funding source and transmit that value are providing money transmission services.<sup>66</sup>

By including the transmission of value, the current and proposed regulatory definitions of money transmitter are worded to include informal value transfer systems, including hawalas.<sup>67</sup> Such activity is money transmission, and the providers are money transmitters subject to the requirements of the BSA.<sup>68</sup>

The proposed regulatory definition of money transmission services also adds the phrase "to another location or person." Although this phrase is not in the statutory definition of money

transmitting service, it is implicit in the statutory definition's use of the word "transmitting." Transactions involving the acceptance of currency from one person at one location and the return of that currency to that same person at the same location would not be considered a money transmission service. The addition of the phrase "to another location or person," will explicitly convey our interpretation.

The phrase "any means" is defined in the old rule to include transmission "through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network." We moved the phrase "any means" to a different part of the definition only to increase reader comprehension, and the change in placement of the phrase has no substantive effect on the meaning of the definition.

The current regulations also include in the definition, "Any other person engaged as a business in the transfer of funds."<sup>69</sup> This phrase has led to confusion making it difficult for a person to assure themselves that they do not fall under the definition. Therefore, we have removed the phrase from the proposed definition to minimize confusion. As noted above, our intention is that hawalas be covered by other language in this definition. The deletion of this language is not intended in any way to lessen the applicability of our definition of "money transmitter" to hawalas.

As mentioned above, the current regulation provides for facts and circumstances, or limitations regarding the definition of a money transmitter, and states "whether a person 'engages as a business' in the activities described in paragraph (uu)(5)(i) of this section is a matter of facts and circumstances. Generally, the acceptance and transmission of funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself (for example, in connection with a bona fide sale of securities or other property), will not cause a person to be a money transmitter within the meaning of paragraph (uu)(5)(i) of this section."<sup>70</sup>

The proposed regulation also has a facts and circumstances limitation that incorporates existing interpretations of the current limitation by adding explicit language reflecting policy developed through administrative ruling letters

<sup>65</sup> 31 U.S.C. 5330 uses the language "any business that provides \* \* \* money transmitting or remittance services."

<sup>66</sup> This proposed rulemaking largely reserves the discussion of stored value for a future date. As previously stated, FinCEN intends to issue a separate rulemaking proposing a revised definition of stored value and revising related regulations.

<sup>67</sup> "An 'informal value transfer system' refers to any system, mechanism, or network of people that receives money for the purpose of making the funds or an equivalent value payable to a third party in another geographic location, whether or not in the same form." FinCEN Advisory Issue 33 (Informal Value Transfer Systems) (March 2003). Hawala is an alternative remittance system that operates outside of, or parallel to, "traditional" banking or financial channels.

<sup>68</sup> Id.

<sup>69</sup> 31 CFR 103.11(uu)(i)(b).

<sup>70</sup> 31 CFR 103.11(uu)(5)(ii).

and guidance. The proposed limitation language reads, “whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term ‘money transmitter’ shall not include a person that only \* \* \* engages in the following activity:

“Provides the delivery, communication, or network access services used by a money transmitter to support money transmission services. \* \* \*” We find that institutions that are used by money transmitters solely for the purpose of providing a medium of communication or transportation of information between money services businesses and their agents, financial institutions, or service providers should not fall under the definition of money transmitter.

“Acts as a payment processor to facilitate the purchase or payment of a bill for a good or service through a clearance and settlement system by agreement with the creditor or seller \* \* \*.” Although payment processors may provide a money transmission service, the service is ancillary to their primary business of coordinating payments either from a debtor to a creditor or, if operating at the point-of-sale, from a purchaser to a merchant.<sup>71</sup> A payment processor could not provide the primary service of coordination without providing ancillary money transmission services, but because the money transmission services are ancillary, and because they are generally low risk, we think it appropriate for entities engaged in this activity to be excluded from the definition. Note, however, that this limitation only applies to transmission services by payment processors on behalf of the creditor or seller and not the debtor or buyer. We believe that a contractual agreement for transmission services between the creditor or seller and the money transmitter is a relatively controlled flow of money that poses little money laundering risk, provided that the funds are transmitted only to the creditor or seller with whom the payment processor has contracted and not to another location or person.

“Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. This includes but would not be limited to the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the SEC, and derivatives clearing organizations, or other clearinghouse arrangements

<sup>71</sup> FinCEN Ruling 2003–R008 (Definition of Money Transmitter) (Nov. 19, 2003).

established by a financial agency or institution. \* \* \*” We view persons who solely provide a clearance and settlement system or act as intermediaries between BSA regulated institutions and do not provide other types of money transmission services as mere instrumentalities that the financial institutions use to process their transfers. Therefore, these instrumentalities should not be included in the definition of money transmitter.

“Provides closed loop stored value.” We also are proposing to exclude a person who provides closed loop stored value from the definition of money transmitter. Generally, a closed loop system refers to stored value that is limited to a defined merchant or location or set of locations.<sup>72</sup>

We do not want the language of the proposed money transmitter definition to be so broad as to include a person that issues a closed loop stored value card, such as most gift cards. For example, we do not want a department store that sells gift cards that only may be used at that department store, or a mall operator who sells gift cards that may only be used within the confines of the mall operator’s locations, to be subject to the MSB rules as a money transmitter.

In addition to not being a money transmitter under this proposed rule, FinCEN previously determined that a person solely issuing, selling, or redeeming closed loop stored value is not an “issuer, seller or redeemer of stored value” and is therefore not subject to BSA regulation as an MSB under that MSB category either.<sup>73</sup> The fact of this exclusion, however, should not be read to imply that all persons who provide open loop stored value are money transmitters. In part, this is because a significant amount of the open loop stored value issued within the U.S. is issued by or through a depository institution, a category of financial institution that expressly is excluded from the definition of MSB by statute and regulation.<sup>74</sup> Further discussion of open loop stored value will be included in a forthcoming rulemaking.

“Physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person

<sup>72</sup> See *supra* note 63.

<sup>73</sup> See FinCEN Ruling 2003–R004 (Definition of Money Transmitter/Stored Value (Gift Certificates/Gift Cards)) (Aug. 15, 2003) (FinCEN does not currently interpret the definition of stored value to include closed system products such as a mall-wide gift card program).

<sup>74</sup> See 31 U.S.C. 5330(d)(1)(C), 31 CFR 103.11(uu).

engaged in such business from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial papers, or other value at any point during the transportation;”

This limitation encompasses past armored car rulings. We previously ruled that although armored car services may fall within the definition of a money transmitter, to the extent that they deliver currency on behalf of BSA regulated institutions, they should not be treated as money transmitters when they cannot be viewed as participating, or having a stake in the financial transaction that they are conducting on behalf of the BSA regulated institution.<sup>75</sup> We additionally determined that an armored car is not a money transmitter when it moves currency on behalf of a private party to an account or another location of the same party without taking a financial stake in the transaction.<sup>76</sup>

In this proposed exclusion, the person engaged in physical transportation cannot have more than a custodial interest in what is being moved at any point during the transportation.<sup>77</sup> Thus, the limitation would not apply to such a person if it deposited currency or monetary instruments that it was transporting into its own operating account at a bank, regardless of the identity of the ultimate recipient of the funds represented by the currency or monetary instruments. The limitation would also not apply to such a person if it actually purchased a monetary instrument, and then transported the monetary instrument. We solicit comment on whether our use of the phrase “no more than a custodial interest” adequately encapsulates a meaningful distinction between a person that merely transports items of monetary value on behalf of another and a person that takes title or ownership.

This proposed exclusion would apply to transport initiated by any person, not only to transport initiated by a BSA-regulated institution. Additionally, when transport is initiated by a bank, a broker-dealer or other SEC-regulated

<sup>75</sup> FinCEN Ruling 2004–R003 (Definition of Money Services Business) (Aug. 17, 2004). See also FinCEN 2003–R007 (Definition of Money Transmitter) (Oct. 28, 2003).

<sup>76</sup> *Id.* In such instance, the armored car is merely a conduit or vehicle and has no control over the financial transaction.

<sup>77</sup> The “custodial” language is intended to replace the language from past rulings “stake in the transaction” for purposes of clarifying the armored car limitation.

financial institution, or a futures commission merchant or other CFTC-regulated institution, a transport business such as an armored car would not be a money transmitter, regardless of whether the transport is to another location or person. In such circumstances, when the transport business does not take title or ownership or the items do not in any manner convert, the transport business merely is acting as an extension of the bank or the SEC- or CFTC-regulated financial institution, all of which are exempt from the proposed definition of money services business at paragraph (uu)(7). We solicit comment on the use of “custodial” language to convey that title or ownership or items do not convert during physical transport like armored car services.

“Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.”

Similar to circumstance (B), we view persons that sell goods or provide services other than money transmission services, and only transmit funds as an integral part of that sale of goods or provision of services, not to be money transmitters. For example, brokering the sale of securities, commodity contracts, or similar instruments is not money transmission notwithstanding the fact that the person brokering the sale may move funds back and forth between the buyer and seller to effect the transaction. The person who is accepting and transmitting the funds simply offers a service other than money transmission services. Also, this limitation would include a debt management company that, unlike in circumstance (B), contracted with a debtor as a medium to provide payment to its creditors.<sup>78</sup> This circumstance is similar to circumstance (B), but uses broader language to encompass those persons who operate under facts and circumstances similar to those stated herein.

#### Requests for Comments

- Should intermediaries of money transmission services acting between two BSA regulated entities be removed from the definition of money transmitter?

#### Related Regulations—

##### G. Service of Legal Process

There currently is no provision within 31 CFR part 103 that requires foreign-

located MSBs to designate an agent to accept service of legal process in the United States. In order to enhance the ability of U.S. law enforcement and regulatory agencies to reach these MSB registrants, we are proposing the following additional language to 31 CFR § 103.41: “Each foreign-located person engaged in activities in the United States as a money services business shall designate the name and address of a person who resides in the United States and is authorized, and has agreed to be an agent, to accept service of legal process with respect to compliance with this part, and shall identify the address of the location within the United States for records pertaining to (b)(1)(iii) of this section.”

#### IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to revise the MSB definitions and related regulations. If you are currently an MSB, please indicate in your response which MSB service(s) you offer and whether you offer the services in an agent capacity. We specifically invite comment on the above-referenced Request for Comments, as well as the following:

*Funds*—Is there a need to define the term “funds” for purposes of the BSA? We use “funds” to refer to money held in bank accounts and “value of funds” to denote something different from money actually held in a bank account, such as the value reflected on a stored value card in a chip-based product.

#### MSB Regulations—

- *Aggregating MSB Services.* Should transactions involving multiple MSB services be aggregated for purposes of determining whether definitional thresholds have been met?

- *Stored Value.* FinCEN intends to issue a separate rulemaking proposing a revised definition of stored value and revising related regulations. However, we seek your input on stored value generally, and specifically on the following:

- *Definition of stored value:* We seek input on refining the current definition of “stored value” in 31 CFR 103.11(v). In doing so, we would like your comment on the appropriateness of a definition that would be based upon the following principles:

- Definition should be technologically neutral and consistent with actual use of stored value within the economy.

- Definition should be neutral in regards to the type of entity that provides/issues the stored value.

For purposes of this request for comment, please provide your comments and suggestions on how to

better define the term “stored value” given the following two existing legal definitions:

- Current definition in 31 CFR 103.11 (vv). “Funds or monetary value represented in digital electronics format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically.”

- Uniform Money Services Act definition of 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” and “monetary value” is “a medium of exchange, whether or not redeemable in money” and “money” is “a medium of exchange that is authorized or adopted by the United States or a foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more governments.”

- Alternatively, we seek comment on this potential definition: “electronic monetary value that is generally accepted as a medium of exchange, whether or not redeemable for currency or funds.”

- *Treatment of stored value as money transmission.* Some states already have started to include stored value within their money transmission laws. We have recognized, moreover, that some stored value is a subset of our definition of money transmitter.<sup>79</sup> For purposes of this request for comment, we would request input on the following:

- How would treating all forms of stored value as a form of money transmission impact the needs of industry, law enforcement, or regulators?

- Should open loop stored value be regulated differently from closed loop? If so, how?

- Should only certain uses or types of value transfers involving stored value be considered money transmission? If so, please describe or explain.

- If stored value were excluded completely from being considered a

<sup>79</sup> See 1997 Proposed Rule, 62 FR at 27893. (The Department of the Treasury stated that businesses that operate systems that permit the transmission of stored value are within the statutory definition of money transmitting services and specifically within the regulatory definition of money transmitter.) See also, 1999 Rulemaking, 64 FR at 45446. (FinCEN determined not to exclude “stored value” from the definition of “money transmitter” but rather treated it as a subclass so that it could be excluded from the operation of certain substantive rules, in particular MSB registration and suspicious activity reporting requirements).

<sup>78</sup> FinCEN Ruling 2004–R004 (Definition of Money Services Business) (Nov. 24, 2004).

form of money transmission, how would that affect the industry, law enforcement, or regulators?

○ *Treatment of stored value players and products*

• Should we regulate only issuers of stored value or also sellers and redeemers as well? Why? How should we define them? Should there be a threshold for determining whether an entity is an issuer, seller, or redeemer of stored value? What should the threshold be? Should the definitional threshold be consistent with the other categories of MSBs that are subject to thresholds?

• Should regulatory requirements vary depending on whether the stored value product is in bearer form or not? Should regulatory requirements vary depending on whether the stored value product is anonymous versus tied to an identifiable account holder?

• Should memory chip products be regulated differently from magnetic stripe products?

• Are the distinctions between open and closed loop stored value systems still meaningful? FinCEN recognizes that modern closed loop stored value systems operate internationally. As a result, these international closed-loop systems may pose additional money laundering risks when compared with the shopping mall-wide stored value systems that we have previously determined are not stored value for purposes of the BSA rules.

• What other issues or questions should be considered in developing the appropriate regulatory framework for stored value in light of the actual risks of money laundering and terrorist financing associated with these systems?

• *Foreign-located MSBs*

○ Should foreign MSB principals engaged in MSB activities with U.S. persons or residents through U.S. agents or through a U.S. bank account, be subject to the BSA rules?

○ Would adding check-cashers and issuers, sellers or redeemers of money orders and/or traveler's checks to 31 CFR 103.175(h), making them each *foreign financial institutions* that are subject to special due diligence by banks, broker-dealers, and other financial institutions that are obligated to comply with our rule implementing the correspondent account provisions of the USA PATRIOT Act, be a sufficient alternative? What would the consequences be?

○ Would U.S.-based MSBs move offshore if foreign MSBs are excluded?

○ How should domestic agents of foreign-located principals be treated if foreign-located principals are excluded from registration?

• *Thresholds*

○ For ease of compliance, should the regulatory threshold remain uniform for the categories of MSBs that have a threshold or should the threshold differ among the types of businesses to distinguish between the risks of certain types of activities? How would this affect the operations of businesses providing multiple MSB services?

**V. Proposed Location in Chapter X**

As per the **Federal Register** Notice of November 7, 2008, FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Chapter 1000 to 1099 (Chapter X). As such and if finalized, the proposed changes herein would be reorganized according to the changes proposed in the Notice of Proposed Rulemaking (NPRM) for Chapter X. The planned reorganization will have no substantive effect on the proposed regulatory changes herein. The proposed regulatory changes of this specific NPRM would be renumbered according to the proposed Chapter X as follows:

(a) 103.11(h) would be moved to 1010.100(m).

(b) 103.11(uu) and its parts would be moved to 1010.100(gg)

(c) 103.41(a)(2) would be moved to 1022.380(a)(2). Current sections 103.41(a)(2) and (a)(3), proposed to be redesignated, would be renumbered therein as 1022.380(a)(3) and (a)(4) respectively.

(d) 103.175(h)(3) would be moved to 1010.605(f)(3).

**VI. Regulatory Flexibility Act**

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that these proposed regulation revisions will not have a significant economic impact on a substantial number of small entities. This rulemaking imposes no new recordkeeping or reporting requirements on the MSB. In large part, the proposed rule updates the MSB definitions to integrate past guidance and rulings into the regulatory text. Incorporating existing interpretations into the regulatory text would have no impact on small entities that have been aware of these interpretations for years. In addition, the proposal combines all of stored value into one category, without substantively changing the existing definition, so that *issuers* of stored value and *sellers or redeemers* of stored value are in the same category. This structural proposal would not impact small entities. Accordingly, a regulatory flexibility analysis is not required.

**VII. Paperwork Reduction Act Notices**

The reduction of the recordkeeping requirement contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Since we are making requirements clearer for foreign entities, there is a potential that certain foreign-located MSBs conducting business in the United States may see an increase in the collection and reporting of information. However, any such potential may likely be offset by the corresponding exceptions we have made explicit regarding the type of business activity that would make a business an MSB. Comments on the issue of possible foreign reporting and other questions should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 with a copy to the Financial Crimes Enforcement Network by mail or comments may also be submitted by e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) with a copy to [regcomments@fincen.gov](mailto:regcomments@fincen.gov). Please submit comments by one method only. Comments are welcome and must be received by September 9, 2009.

This proposed rulemaking does not impose any new reporting or recordkeeping requirements. Instead, it seeks to clarify the scope of the existing MSB definitions and related rules. To the extent that we have eliminated any uncertainty or ambiguities with this proposal and to the extent that we narrow the scope of businesses subject to reporting or recordkeeping requirements, we will have reduced regulatory obligations.<sup>80</sup>

*Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses*

In accordance with requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3506(c)(2)(A), and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information of the *Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses* is presented to assist those persons wishing to comment on the information collection.

<sup>80</sup>This amendment to 31 CFR 103.11 and 103.41 makes explicit that certain foreign MSBs that conduct operations in the U.S. must register with FinCEN as an MSB and will be subject to certain BSA recordkeeping and reporting requirements.

FinCEN anticipates that this proposed rule, if enacted as proposed, would result in no additional forms to be filed annually.<sup>81</sup> This is an estimate, based on a projection of the size and volume of the industry.

*Description of Affected Financial Institutions:* Money Services Businesses as defined in 31 CFR 103.11(uu).

*Estimate Number of Affected Financial Institutions:* 42,000.

*Estimate Average Annual Burden Hours per Affected Financial Institution:* The estimated average decrease in burden associated with the recordkeeping requirements in this proposed rule is one hour per affected financial institution.

*Estimated Total Annual Burden:* minus 42,000 hours. FinCEN specifically invites comment on the accuracy of FinCEN's estimate of the reduction in burden on respondents and any other aspects of our PRA estimates.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of FinCEN, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced; and

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

#### VIII. Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866.

#### IX. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before

promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance the proposals in the Notice of Proposed Rulemaking provide the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

#### List of Subjects in 31 CFR Part 103

Authority delegations (government agencies), Banks and banking, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 31 CFR part 103 is proposed to be amended as follows:

#### PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS

1. The authority citation for part 103 is revised to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Public Law 107–56, 115 Stat. 307.

2. Section 103.11 is amended as follows:

- a. Adding paragraph (i);
- b. Revising paragraph (uu) introductory text;
- c. Revising paragraph (uu)(1);
- d. Revising paragraph (uu)(2);
- e. Revising paragraph (uu)(3);
- f. Revising paragraph (uu)(4);
- g. Revising paragraph (uu)(5);
- h. Adding paragraph (uu)(7).

#### § 103.11 Meaning of terms.

\* \* \* \* \*

(i) *Closed loop stored value.* Stored value that is limited to a defined merchant or location (or set of locations), such as a specific retailer or retail chain, a college campus, or a subway system.

\* \* \* \* \*

(uu) *Money services business.* The term "money services business" shall include a person wherever located engaged in activities that take place wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section, whether or not on a regular basis or as an organized business concern. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.

(1) *Dealer in foreign exchange.* A person who accepts the currency, or

other monetary instruments, funds, or other instruments denominated in the currency, of one or more countries in exchange for the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more other countries in an amount greater than \$1,000 for any other person on any day in one or more transactions, whether or not for same-day delivery.

(2) *Check casher—(i) In general.* A person that accepts checks (as defined in the Uniform Commercial Code [U.C.C. Article 3—Negotiable Instruments § 3–104]), or monetary instruments (as defined at § 103.11(u)(1)(ii), (iii), (iv), and (v)) in return for currency or a combination of currency and other monetary instruments or other instruments, in an amount greater than \$1,000.

(ii) *Facts and circumstances; Limitations.* Whether a person is a check casher as described in this section is a matter of facts and circumstances. The term "check casher" shall not include:

(A) A person that sells closed loop stored value purchased with a check, monetary instrument or other instruments as referenced above in this definition;

(B) A person that solely accepts monetary instruments as payment for goods or services other than check cashing services;

(C) A person that engages in check cashing for the verified maker of the check who is a customer otherwise buying goods and services;

(D) A person that redeems its own checks; or

(E) A person that only holds a customer's check as collateral for repayment by the customer of a loan.

(3) *Issuers and sellers of traveler's checks or money orders.* A person that:

(i) Issues traveler's checks or money orders that are sold in an amount greater than \$1,000 for any person on any day in one or more transactions; or

(ii) Sells traveler's checks or money orders in an amount greater than \$1,000 for any person on any day in one or more transactions.

(4) *Issuer, seller, or redeemer of stored value.* A person that:

(i) Issues stored value (other than a person that does not issue such stored value in an amount greater than \$1,000 to any person on any day in one or more transactions); or

(ii) Sells or redeems stored value (other than a person that does not sell or redeem such stored value for an amount greater than \$1,000 from any person on any day in one or more transactions).

<sup>81</sup> *Id.*

(5) *Money transmitter*—(i) *In general.* A person that provides money transmission services. The term “money transmission services” means 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. “Any means” includes through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network.

(ii) *Facts and circumstances; Limitations.* Whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term “money transmitter” shall not include a person that only:

(A) Provides the delivery, communication, or network access services used by a money transmitter to support money transmission services;

(B) Acts as a payment processor to facilitate the purchase or payment of a bill for a good or service through a clearance and settlement system by agreement with the creditor or seller;

(C) Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. This includes but would not be limited to the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the SEC, and derivatives clearing organizations, or other clearinghouse arrangements established by a financial agency or institution;

(D) Provides closed loop stored value;

(E) Physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person engaged in such business from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial papers, or other value at any point during the transportation; or

(F) Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.

\* \* \* \* \*

(7) *Limitation.* For the purposes of this section, the term “money services business” shall not include:

(i) A bank;

(ii) A person registered with, and functionally regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission.

\* \* \* \* \*

3. Section 103.41 is amended by redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4) respectively, and adding new paragraph (a)(2) to read as follows:

**§ 103.41 Registration of money services businesses.**

(a) \* \* \*

(2) *Foreign-located money services business.* Each foreign-located person engaged in activities in the United States as a money services business shall designate the name and address of a person who resides in the United States and is authorized, and has agreed to be an agent to accept service of legal process with respect to compliance with this part and shall identify the address of the location within the United States for records pertaining to paragraph (b)(1)(iii) of this section.

\* \* \* \* \*

Dated: May 5, 2009.

**James H. Freis, Jr.,**

*Director, Financial Crimes Enforcement Network.*

[FR Doc. E9-10864 Filed 5-11-09; 8:45 am]

**BILLING CODE 4810-02-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 100**

[Docket No. USCG-2009-0252]

RIN 1625-AA08

**Special Local Regulation for Marine Event; Temporary Change of Dates for Recurring Marine Event in the Fifth Coast Guard District**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to temporarily change the enforcement period of special local regulations for a recurring marine event in the Fifth Coast Guard District. These regulations apply to only one recurring marine event that conducts “workboat races”. Special local regulations are necessary to provide for the safety of life on

navigable waters during the event. This action is intended to restrict vessel traffic in a portion of the York River, VA, during the event.

**DATES:** Comments and related material must be received by the Coast Guard on or before June 11, 2009.

**ADDRESSES:** You may submit comments identified by docket number USCG-2009-0252 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call Dennis Sens, Project Manager, Fifth Coast Guard District, Prevention Division, at 757-398-6204 or e-mail at [Dennis.M.Sens@uscg.mil](mailto:Dennis.M.Sens@uscg.mil). If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:**

**Public Participation and Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.

**Submitting Comments**

If you submit a comment, please include the docket number for this rulemaking (USCG-2009-0252), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via <http://www.regulations.gov>) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a