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Desk Officer for
Department of the Treasury, and
the Board of Governors of the Federal Reserve System
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
725 17th Street, NW
Washington, DC 20503

Re: Paperwork Reduction Act Comments on Information Collection Request for: Docket Treas–DO–2007–0015; Docket Number R–1298

The Center for Regulatory Effectiveness ("CRE") respectfully submits the following comments under the Paperwork Reduction Act ("PRA") on the above-captioned proceedings.

The Information Collection Request ("ICR") submitted for review by the Office of Management and Budget ("OMB") is deficient in three key respects and needs to be revised and provided for public comment in order to comply with the statutory requirements of the PRA. In their ICR, the Treasury Department ("Department") has:

1. Failed to provide "a specific, objectively supported estimate of burden" as required by 44. U.S.C. §3506(c)(1)(A)(iv).

2. Provided incorrect and unsupported statements regarding the burden on small businesses; and

3. Not provided burden estimates for many information collection tasks described in the proposed rule.

Failure To Provide An Objectively Supported Burden Estimate

The Departments has not provided the required objectively supported estimate of burden on depository institutions, card systems, money transmitting businesses and other financial organizations as evidenced by:

1. The significant internal contradiction in the estimate of the number of affected entities between the Department's estimate developed for the ICR and the estimate developed for their Initial Regulatory Flexibility Analysis; and

2. The ICR's failure to relate the burden estimates to the specific information collection tasks contained in the proposed rule.

Internal Contradictions

The ICR provides a burden estimate for only half the number of entities that the Department and the Board of Governors of the Federal Reserve System estimated in their Initial Regulatory Flexibility Analysis would be subject to recordkeeping requirements. Moreover, the agencies' estimate of just the number of small businesses that would be impacted by the proposed rule was far more than the ICR's estimate of the total number of entities that would be subject to proposed recordkeeping requirements.

Specifically, with respect to small business, the Initial Regulatory Flexibility Analysis stated that the "Agencies estimate that 4,792 small banks (out of a total of 8,192 banks), 420 small savings associations (out of a total of 838), 7,609 small credit unions (out of a total of 8,477), and 240,547 small money transmitting businesses (out of a total of 253,208) would be affected by this proposed rule."[1]

This estimate of 253,368 small business (and 270,715 total businesses) is in sharp contrast to the declaration in the ICR's supporting statement that the "total estimated number of recordkeepers is 136,270 consisting of 9,666 depository institutions and card system operators and 126,604 money transmitting businesses."[2]

The contradiction between the ICR and the Regulatory Flexibility Analysis demonstrates the need for the agencies to revise both documents and resubmit them for public comment. In no event should OMB approve the ICR until, as a very minimum, the number of affected entities is reconciled through objective data provided to the public for comment.

No Objective Support for Burden Estimate

The ICR contains no objective support for the burden estimates, as required by statute. Instead of objectively estimating the specific burdens associated with the proposed rule, the Supporting

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[1] 72 Fed. Reg. 56693 (Oct. 4, 2007).

[2] Department of the Treasury, Departmental Offices, "Supporting Statement and Request for Clearance Notice of Proposed Rulemaking – 31 C.F.R. Part 132 – Prohibition on Funding of Unlawful Internet Gambling," A. 12.

Statement simply asserts that the burden estimate for depository institutions and card system operators "is based on similar recordkeeping requirements for the establishment and maintenance of policies and procedures that have the same level of complexity."[3] Thus, instead of providing the statutorily required, "objectively supported estimate of burden" the Department provided a simple unsupported assertion that the burden is similar to the burdens associated with a different rule. An assertion of similarity of burden to another rule does not relieve the Department of their non-discretionary statutory duty to objectively determine the specific information collection burdens the proposed rule would place on all affected entities.

Therefore, the Department needs to:

- Estimate the burden associated with each task identified in the proposed rule applicable to depository institutions, card systems, and to other entities affected by the proposed rule;

- Determine the total burden on depository institutions, card systems, and other entities; and

- Provide the objectively supported estimate for public comment in a revised ICR.

With respect to money transmitting businesses, the Department admits that they did not estimate the burden on these businesses. Instead of developing the mandatory burden estimates, the Department asserted that:

1. "certain large money transmitting business operators have their own centralized policies and procedures to prevent unlawful gambling transactions" and

2. "Small money transmitters, acting as agents in these large systems, may be able to rely on the system's policies and policies, and therefore would not need to establish their own policies and procedures."[4]

There are several significant PRA deficiencies with the above quoted reasoning:

1. Even if the Department is correct that "certain large money transmitting" business have policies and procedures in place to prevent restricted transactions, that does not means that all large money transmitting business have such policies and procedures. Since the Department is not claiming, let alone demonstrating, that all such business have policies and procedures in place to identify and block unlawful gambling transactions, the Department needs to provide an estimate of

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[3] Ibid.

[4] Ibid.

the burden, based on the each of the tasks discussed in the proposed rule, of money transmitting business developing and implementing the required policies and procedures.

Simply put, the Department has failed to include *any* burden estimate for large money transmitting business to develop and implement policies and procedures to comply with the proposed rule based on the assertion that certain of those business already have such polices and procedures in place.

2. The assertion that small money transmitting business "may be able to rely" on policies and procedures that certain large operators are claimed to have, fails to account for:

   - Small money transmitting business that are not able to rely on the policies and procedures of large operators of which they are agents, either because the large operator does not have such policies and procedures adhering to the proposed rule or the large system's policies and procedures are not applicable or will not meet the small businesses' needs; and

   - Small money transmitting businesses that are not acting as agents for large businesses, as is the case for hawala-type businesses.

   In short, the Department has used an unsupported possibility, ["may"] in lieu of developing and providing for public comment the required objectively supported estimate of the burden associated with small money transmitting businesses developing the policies and procedures to identify and block restricted transactions.

Thus, in order to comply with the PRA, the Department needs to:

1. Determine the burden for large money transmitting business to develop and implement policies and procedures (including software costs, training, legal costs, management time, verification/quality checking, etc.) to identify and block restricted gambling transactions;

2. Identify the number of large money transmitting businesses that will need to develop and implement the required systems;

3. Determine the number of small money transmitting businesses that are not currently relying on large systems operators to provide the identification and blocking required by the proposed rule;

4. For small money transmitting businesses able to apply policies and procedures developed by large system operators, objectively estimate the costs of applying the policies and procedures;

5. For those small businesses which will not be readily able to rely on the policies and procedures of large systems operators, determine the costs for developing and implementing policies and procedures consistent with the proposed rule (including software, training, legal, translation functions associated with non-English speaking employees or customers, etc.); and

6. Providing all of the objectively supported burden estimates to the public for comment in a revised ICR.

Incorrect/Unsupported Statements on Small Business Recordkeeping Burden

The Department makes two incorrect and unsupported statements regarding the impact of the recordkeeping burden on small businesses, the first of which is contradicted by the Initial Regulatory Flexibility Analysis, the second of which is contradicted by the Congressional Budget Office.

No Basis for No Significant Impact Assertion

The ICR's Supporting Statement asserts that the "recordkeeping requirement in the NPRM will likely have no significant impact on a substantial number of regulated small entities."[5] The Department acknowledges in their Initial Regulatory Flexibility Analysis, however, that "the Agencies do not have sufficient information to quantify reliably the effects the Act and the proposed rule would have on small entities...."[6]

There is a contradiction between the ICR's assertion that the recordkeeping will not likely have a significant impact on a substantial number of small entities and the Regulatory Flexibility Analysis' recognition that the agencies lack sufficient information to reliably quantify the effects of the proposed rule on small businesses.

Simply put, the Department, based on their own statement made under the Regulatory Flexibility Act, do not have a reliable basis for their assertion on small business impact made to OMB in their ICR Supporting Statement.

The contradiction between the ICR and the Initial Regulatory Flexibility Analysis highlights the need for the agencies to prepare a Revised Initial Regulatory Flexibility Analysis and provide it for public comment prior to developing a revised ICR.

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[5] Ibid., A. 5.

[6] Fed. Reg., *op cit.*

The UIGEA Does Not Prevent The Agencies From Reducing The Paperwork Burden On Small Businesses

The Department's ICR states that "the economic impact of the recordkeeping requirement on regulated entities, including small entities, flows directly from the Act, and not the NPRM."[7] This assertion that the UIGEA does not provide the agencies with the discretion to reduce the burden on small businesses is contradicted by the Congressional Budget Office ("CBO") and by the statute itself.

In their estimate of the burden on the private sector developed pursuant to the Unfunded Mandates Reform Act, CBO stated, "The cost for financial transaction providers to comply with those mandates would depend on the regulations to be prescribed."[8]

CBO goes on to explain that "if the regulations also include the requirement for banks to identify and block checks or other bank instruments used in a restricted transaction, the direct cost to comply with the mandates could increase significantly...." Thus, CBO clearly believed that the agencies have sufficient statutory discretion in drafting the regulations to "significantly" affect the cost on the private sector by exercising policy options such as exempting checks and other bank instruments.

CBO's statement contradicts the Department's assertion to OMB that the costs to the private sector, including small businesses, "flows directly from the Act, and not the NPRM."

Moreover, the text of the UIGEA explicitly directs the agencies to,

> *the extent practical, permit any participant in a payment system to choose among alternative means of identifying and blocking, or otherwise preventing or prohibiting the acceptance of the products or services of the payment system or participant in connection with, restricted transactions*;[9]

The UIGEA also directs the agencies exempt those restricted transactions where enforcement is not reasonably practical. As the statute states, the agencies are to,

> *exempt certain restricted transactions or designated payment systems from any requirement imposed under such regulations, if the Secretary and the Board jointly find that it is not reasonably practical to identify and block, or otherwise prevent or prohibit the acceptance of, such transactions*;

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[7] Department of the Treasury, Departmental Offices, *op cit.*

[8] Congressional Budget Office, Cost Estimate, "H.R. 4411, Unlawful Internet Gambling Enforcement Act of 2006," May 26, 2006.

[9] Public Law 109-347, Sec. 802.

However, *since the agencies have not reliably determined the impact of the proposed rule on small businesses under the Regulatory Flexibility Act, they are not able to determine whether or not it is "reasonably practical" for small businesses (or larger businesses) to identify and block restricted transactions*.

The determination of reasonable practicality under the UIGEA has specific implications under the PRA since the PRA requires agencies "certify (and provide a record supporting such certification including public comments received by the agency) that each collection of information submitted to the Director for review..." demonstrating that it "reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities...."[10]

Furthermore, similar to the UIGEA's exemption based on reasonable practicality, the PRA calls for "an exemption from coverage of the collection of information, or any part thereof"[11] as a technique for reducing the burden "to the extent practicable and appropriate" of information collections with a particular emphasis on "small entities."

Since the Department has not yet reliably determined the small business impact of the proposed rules, they do not have the record for certifying that they have met the burden reduction requirements of the PRA and will not have such a record until they develop a Revised Initial Regulatory Flexibility Analysis. Accordingly, OMB should withhold approval until the necessary record is developed and provided to the public for comment.

Moreover,

> *in addition to the requirements of this chapter regarding the reduction of information collection burdens for small business concerns (as defined in section 3 of the Small Business Act (15 U.S.C. 632)), make efforts to further reduce the information collection burden for small business concerns with fewer than 25 employees.*[12]

There is no indication in the ICR or the NPRM that the Department has made the statutorily required further efforts to reduce the paperwork burden on small businesses with fewer than 25 employees. The Department's demonstration of adherence to this statutory requirement needs to be included in the revised ICR.

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[10] 44. U.S.C. §3506(c)(3).

[11] Ibid.

[12] 44. U.S.C. §3506(c)(4).

Failure to Provide Burden Estimates for Many Information Collection, Labeling and Recordkeeping Requirements

The ICR does not account for the various costs associated with the many paperwork requirements discussed in the NPRM. Thus, the agency has not: 1) providing the required objectively supported estimate of burden; and 2) has not reduced the burden (which has not been determined) on small businesses, particularly those with fewer than 25 employees.

Specific examples of significant paperwork burdens which are not discussed or accounted for in the ICR include:

> Contractual Agreements. The proposed rule's "safe harbor" provisions call for information disclosures to third parties by ACH banks, card operators, check processing companies, and money transmitting business. These disclosures are included in the PRA's definition of "collection of information."[13] Several of these disclosures are structured as specific inclusions in contractual relationships between financial institutions, *e.g.*, "Including as a term of the commercial customer agreement that the customer may not engage in restricted transactions;"[14]
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> All of the legal, management, staff and other time and expenses associated with development, negotiation and implementation of these national and international business transactions – by both sides – needs to be included in the PRA estimate provided by the agencies. The time (legal and management) required by the commercial customers to review, approve and implement the new/revised agreements needs to be included in the burden estimates. Since the commercial customers will need to adhere to their side of the agreements, they have burdens that need to be estimated under the PRA.
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> New Transaction Codes and Mechant/Business Category Codes. Card system operators are charged with "Establishing transaction codes and merchant/business category codes that are required to accompany the authorization request...."[15] Requiring that transactions be accompanied by new codes is a labeling requirement. *Every merchant who submits a transaction containing the new code(s) is subject to this third-party disclosure provision of the PRA*. Thus, merchants, including many small businesses, need to be included in the estimate of the number of entities affected by the proposed rule.
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> The complete burden associated with this very extensive labeling requirement (computer programming, coordination with tens of thousands of participating financial institutions and merchants, testing, training, software, hardware, etc.) need to be included in the PRA estimate. The burden associated with these third-party labeling requirements, distinct from non-exempt

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[13] See 44 U.S.C. §3502(3)(A).

[14] Fed. Reg., *op cit.*, 56698 and 56699.

[15] Ibid., 56698.

businesses drawing up policies and procedures, were not included in the discussion of the PRA burden estimate.

Because merchants, including gambling businesses, are not included in the ICR, they may be able to exercise the "public protection" provisions of the PRA and not be subject to any penalty for not complying with information collection aspects of the rule.[16]

Internet monitoring and analysis. Card systems and money transmitting businesses are expected to engage in the monitoring and analyzing "of payment patterns to detect suspicious patterns of payments to a recipient" and to engage in "monitoring of Web sites to detect unauthorized use of the relevant designated payment system...." No burden hours and expenses are estimated for the development or purchase of internet monitoring/pattern detection software let as well as the costs of training personnel in its use and engaging in the monitoring activities.

Legal research. For a non-exempt designated payment system to identify and block a restricted transaction while not interfering with permitted internet wagers, they will need to know precisely what transactions are unlawful in each state, locality and tribal area. Unless each payment system/non-exempt financial institution has a specific set of locality-based restricted transactions, it will not be possible for any payment system to identify those transactions even if they have perfect knowledge of each transaction.

The agencies have declined to state which internet gambling transactions are unlawful and have recognized the difficulty of doing so for reasons including "the fact that the legality of a particular Internet gambling transaction might change depending on the location of the gambler at the time the transaction was initiated, and the location where the bet or wager was received."

Although the agencies are not required to list a set of restricted transactions, the proposed rule *de facto* requires designated payment systems and non-exempt processors to determine what is and is not a restricted transaction in each jurisdiction in which they do business. Without such a determination, which underlies all identification/blocking tasks, the entire set of policies and procedures would be useless, lack practical utility and, thus, could not be approved by OMB. The agencies have recognized the significant burden associated with determining what is and is not a restricted when they indicated that determining which internet wagers are unlawful would require formally interpreting "the various Federal and State gambling laws in order to determine whether the activities of each business that appears to conduct some type of gambling-related function are unlawful under those statutes."

Therefore, each designated payment system and/or non-exempt transaction provider will need to retain competent counsel to draft a defensible legal opinion specifying, for each state/locality in which they transact business, exactly which internet wagers are unlawful and which are

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[16] See 44 U.S.C. §3512.

permitted. The legal and management costs associated with: 1) determining what is an unlawful transaction in a given locality; and 2) incorporating that information into commercial agreements, computer systems, and other policies and procedures is clearly a "burden" as defined in 44 U.S.C. §3502 with respect to "reviewing instructions," "adjusting the existing ways to comply with any previously applicable instructions and requirements," and "transmitting, or otherwise disclosing the information." The substantial burden associated with the task, which underlies all enforcement under the UIGEA, needs to be included in the ICR.

Conclusions

- The Department has not provided a specific, objectively supported estimate of burden as required by the PRA.
- The Department has not provided a record supporting the certification that they have reduced the burden on businesses to the extent practical, with a particular emphasis on small businesses, as required by the PRA.
- The Department has not made the further efforts to reduce the paperwork burden on small business with fewer than 25 employees as required by the PRA.

RECOMMENDATION

- Since the ICR does not substantively comply with the PRA, OMB should send it back to the Department for revision and correction. The revised ICR should be provided to the public for comment prior to approval.

Sincerely,

/s/
Jim Tozzi
Member, Board of Advisors

cc: Charles Klingman, US Department of Treasury
Jennifer J. Johnson, Board of Governors of the Federal Reserve System