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November 15, 2007

Charles Klingman,
Deputy Director,
Office of Critical Infrastructure Protection and Compliance Policy
US Department of the Treasury
Room 1327, Main Treasury Building
1500 Pennsylvania Avenue, NW.
Washington, DC 20220

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Request for Comment Extension: Docket Treas–DO–2007–0015; Docket Number R–1298

Dear Mr. Klingman and Ms. Johnson:

The Center for Regulatory Effectiveness ("CRE") respectfully requests an extension of the comment period of at least 90 days in the above-captioned proceedings for reasons stated below:

1. **Paperwork Reduction Act Deficiencies**. As CRE explained in our comments to the Office of Management and Budget ("OMB"),[1] the agencies' Information Collection Request ("ICR") contains significant deficiencies in their submission to OMB, deficiencies which harm the ability of affected parties to effectively participate in the rulemaking process. Among the deficiencies detailed in CRE's comments to OMB, the agencies did not estimate the burden associated the responsibilities assigned to financial organizations, money transmitting businesses and other firms for paperwork burdens including:

   - *Third-Party Disclosure/Labeling Requirements*. Specific examples of significant disclosure burdens which are not discussed or accounted for in the ICR include:

[1] http://www.federalreserve.gov/SECRS/2007/November/20071106/R-1298/R-1298_25_1.pdf.

- 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" and require substantial time by management and also by legal counsel since several of these disclosures are structured as 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."[2]

- New Transaction Codes and Merchant/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...."[3] Requiring that transactions be accompanied by new codes is a labeling requirement and a "collection of information" as defined in 44 U.S.C. § 3502. 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.

  The NPRM specifically sought "comment on the practicality, effectiveness, and cost of developing such additional merchant codes"[4] without including any burden estimates in the ICR. This omission highlights: 1) the need for a revised ICR to be submitted for public comment; and 2) as discussed below, additional time for merchants, technology vendors, card system operators, and other affected parties to provide the detailed information that the agencies require for both the rulemaking and the ICR.

  Because the ICR is incomplete, the government has not yet taken the appropriate steps to allow merchants and other affected parties to: 1) become aware that they would be impacted by the proposed rule; and 2) the ways in which they would be impacted. Thus, an extended comment period, along with a revised ICR, is needed to allow these affected firms to effectively participate in the rulemaking. The extended comment period would also allow valuable input from companies such as software firms and other service providers to the retailing and card system industries. In

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

[3] Ibid., 56698.

[4] Fed Reg., *op cit.*, 56689.

additional to information on the costs associated with the proposed new codes, these firms may be able to provide businesses and the agencies with information on the lead times necessary to implement the new codes – information which is essential for determining the earliest practical effective date of the rule.

Card systems and other stakeholders need to obtain informed responses from vendors and other parties in order to respond to the agencies' question of whether having "the final regulations take effect six months after the joint final rules are published...is reasonable."[5] The agencies go on to state that "commenters requesting a longer period should explain why the longer period would be necessary to comply with the regulations, particularly if the need for additional time is based on any system or software changes required to comply with the regulations." An extended comment period is needed for commentors to obtain relevant information from vendors in order to answer this agency question.

- *Internet monitoring and analysis*. The paperwork burden on card systems and money transmitting businesses include their engaging 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 in the ICR for the development or purchase of internet monitoring/ pattern detection software or the costs of training personnel in its use and engaging in the monitoring activities.

  With respect to monitoring, the agencies have requested "comment on whether ongoing monitoring and testing should be included within the examples for the ACH, check collection, and wire transfer systems, and, if so, how such functionality could reasonably be incorporated into those systems" without even establishing in the ICR, a baseline burden for these issues with respect to card systems and money transmitting businesses, again highlighting both the ICR deficiencies and the need for an extended comment period.

  An extended comment period is necessary to allow all affected parties, including vendors, to weigh in on the cost, effectiveness, potential unforseen problems, and lead times that would be necessary to implement this provision of the proposed rule.

- *Legal research*. The proposed rule *de facto* requires non-exempt designated payment systems to know precisely what transactions are unlawful in each state,

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[5] Fed Reg., *op cit.*, 56682.

locality and tribal area in which they do business in order to be potentially able to identify and block a restricted transaction while not interfering with permitted internet wagers. 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. Similarly, it will not be possible for these financial institutions to include the information in their commercial agreements with other institutions.

As an illustration of the centrality of this legal research task to the proposed rule, consider that the proposal calls for "including as a term in its agreement with the foreign sender requiring the foreign sender to have reasonably designed policies and procedures in place to ensure that the relationship will not be used to process restricted transactions...."[6]

Unless the domestic institution specifies to the foreign sender what does and does not constitute a restricted transaction, it is the foreign sender who would be responsible for interpreting US federal, state and tribal gambling laws. Even if responsibility for the legal determination is "kicked down the road" to the foreign sender, the ICR still needs to determine the burden on these entities of performing the legal research. Moreover, all of the foreign senders have burdens under the PRA with respect to negotiating and carrying out their responsibilities specified in the commercial agreements.

Financial institutions are not able to conduct "reasonable due diligence" without knowing specifically what constitutes a restricted transaction. In short, the determination of what constitutes restricted transactions (and non-restricted internet wagers) in each state and tribal area underlies all identification and blocking tasks and without this research, the entire set of policies and procedures would be useless, lack practical utility and not fulfil the goal of the statute.

Since the agencies have declined to state which internet gambling transactions are unlawful, and have recognized the significant difficulty of doing so, 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 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

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[6] Fed Reg., *op cit.*, 56698.

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.

In addition to the critical ICR deficiencies associated with the agencies effectively requiring payment systems to research which transactions are and are not restricted in each locality, the agencies' decision means that private sector organizations will need to conduct at least preliminary legal research in order to respond to the agencies' specific "request [for] comment on whether it is reasonably practical for an originator's bank and an intermediary bank in a wire transfer system to implement policies and procedures (including, but not limited to, those discussed above) that would likely be effective in identifying and blocking or otherwise prevent or prohibit restricted transactions...." and "whether he burden imposed by such policies and procedures on an intermediary bank, an originator, and an originator's bank would outweigh any value provided in preventing restricted transactions and a description of such burdens and benefits; and whether any policies and procedures could reasonably be limited only to consumer initiated wire transfers and, if so, a description of any costs or benefits of so limiting the requirement."[7]

Thus, in that the Paperwork Reduction Act requires agencies provide "a specific, objectively supported estimate of burden"[8] the agencies will need to revise their ICR and resubmit it for public comment. Furthermore, the ICR deficiencies highlight questions that will take stakeholders additional time in order to provide meaningful responses.

2. **Regulatory Flexibility Act Deficiencies**. The Initial Regulatory Flexibility Analysis does not contain sufficient information to determine the impact of the proposed rule on the more than 250,000 small businesses that would be affected by the proposed rule. Specifically, the agencies state that they "do not have sufficient information to quantify reliably the effects the Act and the proposed rule would have on small entities...."[9]

Given the agencies' lack of reliable data, potential commenters, such as CRE, will likely have to fill in this gap by developing or gathering the data and then analyzing those data to determine the impact of the proposed rule on small entities, as that term is defined in the Regulatory Flexibility Act. Correspondingly, a minimum 90-day extension would allow stakeholders and the agencies to: 1) gather additional information on the small business

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[7] Fed Reg., *op cit.*, 56686.

[8] 44 U.S.C. 3506 (c)(1)(A)(iv).

[9] 72 Fed. Reg. 56693 (Oct. 4, 2007).

impact, including through the procedures discussed in 5 U.S.C. §609; and 2) publish this enhanced small business impact information for comment.

Moreover, the approximately quarter-million small money transmitting businesses are likely in need of significant additional comment time since many of these companies may:

1) Not be part of a trade association or other organization plugged into federal regulatory processes and thus are in particular need of the outreach activities as discussed in § 609 of the Regulatory Flexibility Act; and

2) Not use English as their primary language, thus creating the need for significant additional time in order to allow them a meaningful opportunity to participate in the rulemaking process.

Denying the extension of comment period would not only harm these small, often minority-owned, businesses but also would essentially disenfranchise their minority and/or non-English speaking clientele from the process.

3. **Regulatory Complexity**. The proposed rule includes complex domestic and international requirements. Diverse financial organizations, including quasi-governmental entities, will require additional time to effectively participate in the rulemaking process. Many of these entities may be required to seek prior approval from their quasi-governmental governing boards before participating through the submission of comments in a United States rulemaking. We do not believe that the current the comment period is adequate to accommodate the constraints of these foreign effected entities.

Sincerely,

/s/
Jim Tozzi
Member, Board of Advisors